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# Federal Register

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

## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### 1 CFR Part 301

### Organization and Purpose

**AGENCY:** Administrative Conference of the United States.

**ACTION:** Final rule.

**SUMMARY:** The Administrative Conference of the United States (ACUS or the Conference) is repromulgating updated rules identifying its purposes, organization and activities, as required by the Freedom of Information Act.

**DATES:** *Effective Date:* November 10, 2010.

**FOR FURTHER INFORMATION CONTACT:** David Pritzker, Deputy General Counsel, at 202–480–2093.

**SUPPLEMENTARY INFORMATION:**

*Background Information.* ACUS was established by the Administrative Conference Act, 5 U.S.C. 591–96. Following the loss of its funding in 1995, ACUS ceased operations. In 1996, its prior regulations (including Part 301) were eliminated. 61 FR 3539 (1996). Congress has now reauthorized and refunded ACUS, which has now reinitiated operations. This regulation describes the agency's purposes, organization and activities in accordance with its current statutory authority and is promulgated pursuant to the requirements of 5 U.S.C. 552(a)(1).

**Statutory Reviews**

*(a) No Notice Required Under 5 U.S.C. 553*

5 U.S.C. 553 exempts "rules of agency organization, procedure, or practice" from rulemaking notice requirements.

*(b) Paperwork Reduction Act*

ACUS has determined that the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* does not apply because these regulations do not contain any information collection requirements.

*(c) Regulatory Flexibility Act*

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* requires agencies to perform regulatory flexibility analyses when promulgating rules through notice and comment procedures. Since notice and comment procedures are not required here, the Regulatory Flexibility Act does not apply.

**List of Subjects in 1 CFR Part 301**

Organization and Functions.

■ For the reasons set forth in the preamble, under the authority at 5 U.S.C. 552 and 591–96, the Administrative Conference of the United States is establishing 1 CFR Chapter III, consisting of Parts 300 through 399, to read as follows:

**CHAPTER III—ADMINISTRATIVE CONFERENCE OF THE UNITED STATES**

**PART 300—[RESERVED]**

**PART 301—ORGANIZATION AND PURPOSE**

Sec.
301.1 Establishment and location.
301.2 Purposes.
301.3 Organization.
301.4 Activities.
301.5 Office of the Chairman.

**Authority:** 5 U.S.C. 552, 591–96.

## PART 301—ORGANIZATION AND PURPOSE

### § 301.1 Establishment and location.

The Administrative Conference of the United States was established as a permanent independent agency of the Federal Government by the Administrative Conference Act (5 U.S.C. 591–96), as amended. The Conference offices are located at 1120 20th Street, NW., South Lobby, Suite 706, Washington, DC 20036. The offices are open from 8:30 a.m. to 5 p.m., Monday through Friday, excluding legal holidays, unless otherwise stated. General correspondence and filings should be delivered to the foregoing address. Electronic filings should be transmitted as specified by the Conference. The public may obtain information about the Conference either by accessing its Web site at *http://www.acus.gov,* by calling the Conference offices at (202) 480–2080, or by contacting *info@acus.gov.* The Conference's recommendations may be obtained by accessing its Web site or by visiting the reading room at its offices.

### § 301.2 Purposes.

The purposes of the Administrative Conference are—

(a) To provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest;

(b) To promote more effective public participation and efficiency in the rulemaking process;

(c) To reduce unnecessary litigation in the regulatory process;

(d) To improve the use of science in the regulatory process; and

(e) To improve the effectiveness of laws applicable to the regulatory process.

### § 301.3 Organization.

(a) The Chairman of the Administrative Conference of the United States is appointed by the President, with the advice and consent of the Senate, for a five-year term.

(b) The Council consists of the Chairman and 10 other members who are appointed by the President for three-year terms, of whom not more than one-half may be employees of Federal regulatory agencies or Executive departments.

(c) The total membership of the Conference may not, by statute, be lower than 75 or higher than 101. It comprises, in addition to the Council, approximately 50 Government members (from Executive departments and agencies designated by the President and independent regulatory boards or commissions) and approximately 40 non-Government or public members appointed by the Chairman with the approval of the Council (lawyers in private practice, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to Federal administrative procedure). Public members are selected so as to provide broad representation of the views of

private citizens and utilize diverse experience.

(d) Members of the Conference, except the Chairman, are not entitled to pay for service; although public members are entitled to travel reimbursement.

(e) The membership is divided into six standing committees, each assigned a broad area of interest as follows: Adjudication, Administration, Public Processes, Judicial Review, Regulation, and Rulemaking.

(f) The membership meeting in plenary session is called the Assembly of the Administrative Conference. The Council must call at least one plenary session each year. The Assembly has authority to adopt bylaws for carrying out the functions of the Conference.

**§ 301.4 Activities.**

(a) The Conference may study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs. Subjects for inquiry by the Conference are developed by the Chairman, the Council, the committees, and the Assembly. The committees, with the assistance of staff and consultants, conduct thorough studies of these subjects and develop proposed recommendations and supporting reports. Reports and recommendations are considered by the Council and distributed to the membership, with the views and recommendations of the Council, to be placed on the agenda of a plenary session. The Assembly has complete authority to approve, amend, remand, or reject recommendations presented by the committees. The deliberations of the Assembly are public. Recommendations may be made to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States, as the Conference considers appropriate.

(b) The Conference may arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure, collect information and statistics from administrative agencies and publish such reports as it considers useful for evaluating and improving administrative procedure, and enter into arrangements with any administrative agency or major organizational unit within an administrative agency pursuant to which the Conference performs any of the functions described in this section.

(c) The Conference may provide assistance in response to requests relating to the improvement of administrative procedure in foreign countries, subject to the concurrence of the Secretary of State or the Administrator of the Agency for International Development, as appropriate, except that:

(1) Such assistance shall be limited to the analysis of issues relating to administrative procedure, the provision of training of foreign officials in administrative procedure, and the design or improvement of administrative procedure, where the expertise of members of the Conference is indicated; and

(2) Such assistance may only be undertaken on a fully reimbursable basis, including all direct and indirect administrative costs.

(d) For purposes of this section:

(1) "Administrative program" includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rulemaking, adjudication, licensing, or investigation, except that it does not include a military or foreign affairs function of the United States; and

(2) "Administrative procedure" means procedure used in carrying out an administrative program and is to be broadly construed to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action, and the relationship of operating methods to later judicial review, but does not include the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion.

**§ 301.5 Office of the Chairman.**

The Chairman is the chief executive of the Conference. The Chairman presides at meetings of the Council and at each plenary session of the Conference. Among his powers is the authority to encourage Federal agencies to adopt the recommendations of the Conference. The Chairman is also authorized to make inquiries into matters he considers important for Conference consideration, including matters proposed by individuals inside or outside the Federal Government. The purpose of such inquiries is not to review the results in particular cases, but rather to determine whether the problems should be made the subject of Conference study in the interests of developing fair and effective procedures for such cases. Upon request of the head of an agency, the Chairman is authorized to furnish assistance and advice on matters of administrative procedure. The Chairman may request agency heads to provide information needed by the Conference, which information shall be supplied to the extent permitted by law.

## PARTS 302 THROUGH 399—[RESERVED]

Dated: November 3, 2010.

**Paul R. Verkuil,**

*Chairman.*

[FR Doc. 2010–28207 Filed 11–9–10; 8:45 am]

**BILLING CODE 6110–01–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

### 7 CFR Part 301

**[Docket No. APHIS–2009–0079]**

### Karnal Bunt; Regulated Areas in Arizona, California, and Texas

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Interim rule and request for comments.

**SUMMARY:** We are amending the Karnal bunt regulations to make changes to the list of areas or fields regulated because of Karnal bunt, a fungal disease of wheat. We are adding the Buckeye/Pretoria area of Maricopa County, AZ, to the list of regulated areas. We are also removing Throckmorton and Young Counties, TX, portions of Riverside County, CA, and certain areas in La Paz, Maricopa, and Pinal Counties, AZ, from the list of regulated areas based on our determination that those fields or areas meet our criteria for release from regulation. These actions are necessary to prevent the spread of Karnal bunt to noninfected areas of the United States and to relieve restrictions on certain areas that are no longer necessary.

**DATES:** This interim rule is effective November 10, 2010. We will consider all comments that we receive on or before January 10, 2011.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2009-0079* to submit or view comments and to view supporting and related materials available electronically.
- *Postal Mail/Commercial Delivery:* Please send one copy of your comment to Docket No. APHIS–2009–0079, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD

20737–1238. Please state that your comment refers to Docket No. APHIS–2009–0079.

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

*Other Information:* Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

**FOR FURTHER INFORMATION CONTACT:** Ms. Lynn Evans-Goldner, Karnal Bunt Program Manager, Plant Pathogen and Weed Programs, EDP, PPQ, APHIS, 4700 River Road Unit 26, Riverdale, MD 20737–1236; (301) 734–7228.

**SUPPLEMENTARY INFORMATION:**

**Background**

Karnal bunt is a fungal disease of wheat (*Triticum aestivum*), durum wheat (*Triticum durum*), and triticale (*Triticum aestivum* X *Secale cereale*), a hybrid of wheat and rye. Karnal bunt is caused by the fungus *Tilletia indica* (Mitra) Mundkur and is spread primarily through the planting of infected seed followed by very specific environmental conditions matched during specific stages of wheat growth. Some countries in the international wheat market regulate Karnal bunt as a fungal disease requiring quarantine; therefore, without measures taken by the United States Department of Agriculture (USDA), Animal and Plant Health Inspection Service (APHIS), to prevent its spread, the presence of Karnal bunt in the United States could have significant consequences with regard to the export of wheat to international markets.

Upon detection of Karnal bunt in Arizona in March of 1996, Federal quarantine and emergency actions were imposed to prevent the interstate spread of the disease to other wheat-producing areas in the United States. The quarantine continues in effect, although it has since been modified, both in terms of its physical boundaries and in terms of its restrictions on the production and movement of regulated articles from regulated areas. The regulations regarding Karnal bunt are set forth in 7 CFR 301.89–1 through 301.89–16 (referred to below as the regulations). Articles regulated for Karnal bunt are listed in § 301.89–2. Conditions for determining whether an area is regulated for Karnal bunt are set forth in § 301.89–3.

The regulations in § 301.89–3(e)(2) provide that we will classify a field or area as a regulated area when it is:

- A field planted with seed from a lot found to contain a bunted wheat kernel;
- A distinct definable area that contains at least one field that was found during survey to contain a bunted wheat kernel. The distinct definable area may include an area where Karnal bunt is not known to exist but where intensive surveys are required because of the area's proximity to a field found during survey to contain a bunted kernel; or
- A distinct definable area that contains at least one field that has been determined to be associated with grain at a handling facility containing a bunted kernel of a host crop. The distinct definable area may include an area where Karnal bunt is not known to exist but where intensive surveys are required because of the area's proximity to the field associated with the bunted kernel at the handling facility.

We are adding a portion of Maricopa County, AZ, to the list of quarantined areas in § 301.89–3(g) based on our determination that fields within that area meet the criteria of § 301.89–3(e)(2). The area includes 8 fields comprising 4,553 acres in the Buckeye/Pretoria area of Maricopa County, AZ.

Under the regulations in § 301.89–3(f), a field known to have been infected with Karnal bunt, as well as any noninfected acreage surrounding the field, will be released from regulation if:

- The field has been permanently removed from crop production; or
- The field is tilled at least once per year for a total of 5 years (the years need not be consecutive). After tilling, the field may be planted with a crop or left fallow. If the field is planted with a host crop, the harvested grain must test negative, through the absence of bunted kernels, for Karnal bunt.

In this interim rule, we are amending the list of quarantined areas in § 301.89–3(g) by removing certain areas in La Paz County, AZ; two fields in Pinal County, AZ; the Chandler/Gilbert area of Maricopa County, AZ; Riverside County, CA; and Throckmorton and Young Counties, TX, from the list of regulated areas, based on our determination that these fields or areas are eligible for release from regulation under the criteria in § 301.89–3(f).

Specifically, we are removing:

*Arizona*

- 123 fields (5,094 acres) from La Paz County.
- 2 fields (67 acres) from Pinal County.
- 50 fields (13,237 acres) from Chandler/Gilbert area of Maricopa County.

*California*

- 464 fields (14,287 acres) from Riverside County.

*Texas*

- 79 fields (5,919 acres) from Throckmorton County.
- 221 fields (11,836 acres) from Young County.

This action relieves restrictions on fields within those areas that are no longer warranted. We note that with the removal of those fields in Throckmorton and Young Counties, there are no longer any areas within the State of Texas that are quarantined because of Karnal bunt.

*Miscellaneous*

In § 301.89–5, "Movement of regulated articles from regulated areas," paragraph (a)(3) provides for the movement of soil samples. In a final rule published February 23, 2004 (69 FR 8091–8097, Docket No. 02–056–2), we removed soil from the list of regulated articles. In that rule, we should also have removed provisions for moving soil samples, but did not. We are correcting that oversight in this rule by removing paragraph (a)(3) and the associated footnote.

**Immediate Action**

Immediate action is necessary to help prevent Karnal bunt from spreading to noninfected areas of the United States. This rule will also relieve restrictions on certain fields or areas that are no longer warranted. Under these circumstances, the Administrator has determined that prior notice and opportunity for public comment are contrary to the public interest and that there is good cause under 5 U.S.C. 553 for making this action effective less than 30 days after publication in the **Federal Register**.

We will consider comments we receive during the comment period for this interim rule (*see* **DATES** above). After the comment period closes, we will publish another document in the **Federal Register**. The document will include a discussion of any comments we receive and any amendments we are making to the rule.

**Executive Order 12866 and Regulatory Flexibility Act**

This rule has been reviewed under Executive Order 12866. For this action, the Office of Management and Budget has waived its review under Executive Order 12866.

This rule amends the Karnal bunt regulations by removing certain areas in

Arizona, California, and Texas from quarantine based on surveys that indicate these areas have met the criteria for release from regulation. This rule also adds 4,553 acres in the Buckeye/Pretoria area of Maricopa County, AZ, to the list of areas quarantined because of Karnal bunt.

We have prepared an economic analysis for this interim rule. The analysis, which considers the number and types of entities that are likely to be affected by this action and the potential economic effects on those entities, provides the basis for the Administrator's determination that the rule will not have a significant economic impact on a substantial number of small entities. The economic analysis may be viewed on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov). Copies of the economic analysis are also available from the person listed under **FOR FURTHER INFORMATION CONTACT**.

**Executive Order 12372**

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (*See* 7 CFR part 3015, subpart V.)

**Executive Order 12988**

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are in conflict with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

**Paperwork Reduction Act**

This interim rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

**List of Subjects in 7 CFR Part 301**

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

■ Accordingly, we are amending 7 CFR part 301 as follows:

## PART 301—DOMESTIC QUARANTINE NOTICES

■ 1. The authority citation for part 301 continues to read as follows:

**Authority:** 7 U.S.C. 7701–7772 and 7781–7786; 7 CFR 2.22, 2.80, and 371.3.

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

■ 2. In § 301.89–3, paragraph (g) is amended as follows:

■ a. Under the heading "Arizona", by revising the entries for La Paz County and Maricopa County to read as set forth below.

■ b. Under the heading "Arizona", in the entry for Pinal County, by removing paragraph (3).

■ c. Under the heading "California", by revising the entry for Riverside County to read as set forth below.

■ d. By removing the entry for Texas.

**§ 301.89–3 Regulated areas.**

* * * * *

(g) * * *

**Arizona**

*La Paz County.* Beginning at the northeast corner of sec. 24, T. 8 N., R. 21 W.; then south to the southeast corner of sec. 1, T. 7 N., R. 21 W.; then east to the northeast corner of sec. 7, T. 7 N., R. 20 W.; then south to the southeast corner of sec. 19, T. 7 N., R. 20 W.; then west to the southwest corner of sec. 19, T. 7 N., R. 20 W.; then south to the southeast corner of sec. 36, T. 7 N., R. 21 W.; then west to the southwest corner of sec. 36, T. 7 N., R. 21 W.; then south to the southeast corner of sec. 2, T. 6 N., R. 21 W.; then west to the southwest corner of sec. 2, T. 6 N., R. 21 W.; then south to the southeast corner of sec. 10, T. 6 N., R. 21 W.; then west to the southwest corner of sec. 8, T. 6 N., R. 21 W.; then north to the southwest corner of sec. 5, T. 6 N., R. 21 W.; then west to the southwest corner of sec. 6, T. 6 N., R. 21 W.; then north to the northwest corner of sec. 6, T. 6 N., R. 21 W.; then west to the southwest corner of sec. 36, T. 7 N., R. 22 W., then north to the northwest corner of sec. 24, T. 7 N., R. 22 W.; then east to the northeast corner of sec. 24, T. 7 N., R. 22 W.; then north from that point to the Colorado River; then northeast along the Colorado River to the northern boundary of sec. 16, T. 8 N., R. 21 W.; then east to the northeast corner of sec. 14, T. 8 N., R. 21 W.; then south to the southeast corner of sec. 14, T. 8 N., R. 21 W.; then east to the point of beginning.

*Maricopa County.* (1) Beginning at the southeast corner of sec. 8, T. 1 S., R. 2 E.; then west to the southwest corner of sec. 8, T. 1 S., R. 2 E.; then south to the southeast corner of sec. 18, T. 1 S., R. 2 E.; then west to the southwest corner of sec. 14, T. 1 S., R. 1 E.; then north to the northwest corner of sec. 14, T. 1 S., R. 1 E.; then west to the southwest corner of sec. 9, T. 1 S., R. 1 E.; then north to the northwest corner of sec. 9, T. 1 S., R. 1 E.; then west to the southwest corner of sec. 5, T. 1 S., R. 1 E.; then north to the northwest corner of sec. 5, T. 1 S., R. 1 E.; then west to the northeast corner of sec. 6, T. 1 S., R. 1 W.; then south to the southeast corner of sec. 7, T. 1 S., R. 1 W.; then west to the northeast corner of sec. 14, T. 1 S., R. 2 W.; then south to the southeast corner of sec. 14, T. 1 S., R. 2 W.; then west to the northeast corner of sec. 20, T. 1 S., R. 2 W.; then south to the southeast corner of sec. 20, T. 1 S., R. 2 W.; then west to the northeast corner of sec. 29, T. 1 S., R. 3 W.; then south to the southeast corner of sec. 29, T. 1 S., R. 3 W.; then west to the southwest corner of sec. 26, T. 1 S., R. 5 W.; then north to the northwest corner of sec. 14, T. 1 N., R. 5 W.; then east to the southwest corner of sec. 7, T. 1 N., R. 2 W.; then north to the northwest corner of sec. 7, T. 1 N., R. 2 W.; then east to the northeast corner of sec. 7, T. 1 N., R. 2 W.; then north to the northwest corner of sec. 5, T. 1 N., R. 2 W.; then east to the northeast corner of sec. 5, T. 1 N., R. 2 W.; then north to the northwest corner of sec. 33, T. 2 N., R. 2 W.; then east to the northeast corner of sec. 33, T. 2 N., R. 2 W.; then north to the northwest corner of sec. 3, T. 3 N., R. 2 W.; then east to the northeast corner of sec. 1, T. 3 N., R. 1 W.; then south to the northwest corner of sec. 19, T. 3 N., R. 1 E.; then east to the northeast corner of sec. 20, T. 3 N., R. 1 E.; then south to the northeast corner of sec. 29, T. 3 N., R. 1 E.; then east to the northeast corner of sec. 27, T. 3 N., R. 1 E.; then south to the southeast corner of sec. 27, T. 3 N., R. 1 E.; then east to the northeast corner of sec. 35, T. 3 N., R. 1 E.; then south to the southeast corner of sec. 35, T. 3 N., R. 1 E.; then east to the northeast corner of sec. 1, T. 2 N., R. 1 E.; then south to the northeast corner of sec. 1, T. 1 N., R. 1 E.; then east to the northeast corner of sec. 4, T. 1 N., R. 2 E.; then south to the northwest corner of sec. 15, T. 1 N., R. 2 E.; then east to the northeast corner of sec. 14, T. 1 N., R. 2 E.; then south to the southeast corner of sec. 35, T. 1 N., R. 2 E.; then west to the northeast corner of sec. 3, T. 1 S., R. 2 E.; then south to the southeast corner of sec. 3, T. 1 S., R. 2 E.; then west to the southwest corner of sec. 4, T. 1 S., R. 2 E.; then south to the point of beginning.

(2) Beginning at the intersection of the Maricopa/Pinal County line and the southeast corner of sec. 36, T. 2 S., R. 7 E.; then west along the Maricopa/Pinal

County line to the southwest corner of sec. 33, T. 2 S., R. 5 E.; then north to the northwest corner of sec. 33; then west to the southwest corner of sec. 30, T. 2 S., R. 5 E.; then north to the southeast corner of sec. 25, T. 2 S., R. 4 E.; then west to the southwest corner of sec. 25, T. 2 S., R. 4 E.; then north to the southwest corner of sec. 13, T. 2 S., R. 4 E.; then west to the southwest corner of sec. 15, T. 2 S., R. 4 E.; then north to the northwest corner of sec. 3, T. 2 S., R. 4 E.; then east to the southwest corner of sec. 35, T. 1 S., R. 4 E.; then north to the northwest corner of sec. 35, T. 1 S., R. 4 E.; then east to the northeast corner of sec. 33, T. 1 S., R. 5 E.; then north to the northwest corner of sec. 27, T. 1 S., R. 5 E.; then east to the northeast corner of sec. 27, T. 1 S., R. 5 E.; then north to the northwest corner of sec. 23, T. 1 S., R. 5 E.; then east to the northeast corner of sec. 21,T. 1 S., R. 6 E.; then south to the southeast corner of sec. 21, T. 1 S., R. 6 E.; then east to the northeast corner of sec. 27, T. 1 S., R. 6 E.; then south to the southeast corner of sec. 27, T. 1 S., R. 6 E.; then east to the northeast corner of sec. 31, T. 1 S., R. 7 E.; then south to the northwest corner of sec. 5, T. 2 S., R. 7 E.; then east to the northeast corner of sec. 3, T. 2 S., R. 7 E.; then north to the northwest corner of sec. 35, T. 1 S., R. 7 E.; then east to the northeast corner of sec. 36, T. 1 S., R. 7 E. and the Maricopa/Pinal County line; then south along the Maricopa/Pinal County line to the point of beginning.

* * * * *

**California**

*Riverside County.* That portion of Riverside County known as the Palo Verde Valley (in part) bounded by a line drawn as follows: Beginning at the intersection of 22nd Avenue and State Highway 78; then north on State Highway 78 to an unnamed road at 33.548088 latitude and −114.656718 longitude; then east on the unnamed road to an unnamed canal at 33.548066 latitude and −114.647868 longitude; then north on the unnamed canal to 33.548360 latitude and 114.647877 longitude; then east from that point to 33.548360 latitude and −114.643696 longitude; then north from that point to 33.550088 latitude and −114.643692 longitude; then east from that point to 33.550044 latitude and −114.639367 longitude; then north from that point to 33.551705 latitude and −114.639367 longitude; then east from that point to the Atchison, Topeka, and Santa Fe Railroad tracks at 33.551740 latitude and −114.634545 longitude; then southwest along the Atchison, Topeka, and Santa Fe Railroad tracks to 33.548300 latitude and −114.637487 longitude; then east from that point to the C Canal at 33.548277 latitude and −114.626363 longitude; then north along the C Canal to 33.549084 latitude and −114.626372 longitude; then east from that point to South Defrain Boulevard at 33.549145 latitude and −114.621792 longitude; then south on South Defrain Boulevard to 33.548217 latitude and −114.621774 longitude; then east from that point to Lovekin Drain at 33.548338 latitude and −114.612488 longitude; then south along Lovekin Drain to 22nd Avenue; then east on 22nd Avenue to South Lovekin Boulevard; then south on South Lovekin Boulevard to 33.541141 latitude and 114.603889 longitude; then east from that point to 33.541274 latitude and −114.595394 longitude; then southeast from that point to 33.540357 latitude and −114.59219 longitude; then south from that point to 33.536702 latitude and −114.595261 longitude; then northeast from that point to 33.537766 latitude and −114.593187 longitude; then east from that point to an unnamed canal beginning at 33.537887 latitude and −114.586582 longitude; then south along the unnamed canal to 33.534809 latitude and −114.586554 longitude; then southeast from that point to S C and D Boulevard at 33.534561 latitude and −114.586228 longitude; then south on S C and D Boulevard to 33.523400 latitude and −114.585948 longitude; then east from that point to the D10–11 Canal at 33.523596 latitude and −114.577832 longitude; then southwest along the D1011 Canal to the boundary line of Riverside County at 33.540900 latitude and −114.544620 longitude; then southeast along the Riverside County boundary line to 33.455829 latitude and 114.623143 longitude; then west from that point to 33.455783 latitude and −114.669038 longitude; then north from that point to South End Drain at 33.456190 latitude and −114.669076 longitude; then north along South End Drain to 34th Avenue; then west on 34th Avenue to 33.463226 latitude and −114.682378 longitude; then north from that point to the C–18–1 Canal; then west along the C–18–1 Canal to 33.470427 latitude and −114.691076 longitude; then north from that point to an unnamed canal at latitude 33.474836 and −114.691197 longitude; then southwest along the unnamed canal to Palo Verde Lagoon; then northeast along Palo Verde Lagoon to Rannells Drain; then north along Rannells Drain to 33.499639 latitude and 114.961526 longitude; then north from that point to the C–03 Canal; then north along the C–03 Canal to 33.522835 latitude and −114.687051 longitude; then north from that point to 24th Avenue; then east on 24th Avenue to the C–03 Canal; then north along the C–03 Canal to 33.537501 latitude and −114.682892 longitude; then east from that point to Stephenson Boulevard; then north on Stephenson Boulevard to 22nd Avenue; then east on 22nd Avenue to the point of beginning.

**§ 301.89–5 [Amended]**

■ 3. Section 301.89–5, is amended by removing paragraph (a)(3) and footnote 1.

**§ 301.89–6 [Amended]**

■ 4. In § 301.89–6, in paragraph (a) introductory text and paragraph (a)(2), footnotes 2 and 3 are redesignated as footnotes 1 and 2, respectively.

**§ 301.89–7 [Amended]**

■ 5. In § 301.89–7, footnote 4 is redesignated as footnote 3.

■ 6. In § 301.89–9, paragraph (a) is amended as follows:

■ a. By redesignating footnote 5 as footnote 4.

■ b. By revising newly redesignated footnote 4 to read as set forth below.

**§ 301.89–7 Assembly and inspection of regulated articles.**

(a) * * *[4]

[4] See footnote 1.

* * * * *

Done in Washington, DC, this 4th day of November 2010.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2010–28347 Filed 11–9–10; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

### 7 CFR Parts 319, 352, 360, and 361

**[Docket No. APHIS–2007–0146]**

**RIN 0579–AC97**

### Update of Noxious Weed Regulations

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** We are amending the regulations governing the importation and interstate movement of noxious

weeds by adding definitions of terms used in the regulations, adding details regarding the process of applying for the permits used to import or move noxious weeds, adding a requirement for the treatment of niger seed, and adding provisions for petitioning to add a taxon to or remove a taxon from the noxious weed lists. These changes will update the regulations to reflect current statutory authority and program operations and improve the effectiveness of the regulations. We are also adding seven taxa to the list of terrestrial noxious weeds and to the list of seeds with no tolerances applicable to their introduction. This action will prevent the introduction or dissemination of these noxious weeds into or within the United States.

**DATES:** *Effective Date:* December 10, 2010.

**FOR FURTHER INFORMATION CONTACT:** Dr. Alan V. Tasker, Noxious Weeds Program Coordinator, Emergency and Domestic Programs, PPQ, APHIS, 4700 River Road Unit 26, Riverdale, MD 20737–1236; (301) 734–5225; or Dr. Arnold Tschanz, Senior Plant Pathologist, Risk Management and Plants for Planting Policy, RPM, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1231; (301) 734–0627.

**SUPPLEMENTARY INFORMATION:**

## Background

The Plant Protection Act (PPA), as amended (7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of any plant, plant product, biological control organism, noxious weed, article, or means of conveyance if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction of a plant pest or noxious weed into the United States or the dissemination of a plant pest or noxious weed within the United States.

The PPA defines "noxious weed" as "any plant or plant product that can directly or indirectly injure or cause damage to crops (including nursery stock or plant products), livestock, poultry, or other interests of agriculture, irrigation, navigation, the natural resources of the United States, the public health, or the environment." The PPA also provides that the Secretary may publish, by regulation, a list of noxious weeds that are prohibited or restricted from entering the United States or that are subject to restrictions on interstate movement within the United States. Under this authority, the Animal and Plant Health Inspection Service (APHIS) administers the noxious weeds regulations in 7 CFR part 360 (referred to below as the regulations), which prohibit or restrict the importation and interstate movement of those plants that are designated as noxious weeds in § 360.200.

Under the authority of the Federal Seed Act (FSA) of 1939, as amended (7 U.S.C. 1551 *et seq.*), the U.S. Department of Agriculture (USDA) regulates the importation and interstate movement of certain agricultural and vegetable seeds and screenings. Title III of the FSA, "Foreign Commerce," requires shipments of imported agricultural and vegetable seeds to be labeled correctly and to be tested for the presence of the seeds of certain noxious weeds as a condition of entry into the United States. APHIS' regulations implementing the provisions of title III of the FSA are found in 7 CFR part 361. A list of noxious weed seeds is contained in § 361.6. Paragraph (a)(1) of § 361.6 lists species of noxious weed seeds with no tolerances applicable to their introduction into the United States.

On June 10, 2009, we published in the **Federal Register** (74 FR 27456–27467, Docket No. APHIS–2007–0146) a proposal [1] to make several changes to the regulations. Briefly, we proposed to:

- Add definitions for terms used in the regulations and replace references to the Federal Noxious Weed Act with references to the PPA;
- Add explanatory text to clarify the listing of noxious weeds in § 360.200;
- Provide additional detail about the requirements for permits to move noxious weeds in § 360.300;
- Amend the regulations to require heat treatment for *Guizotia abyssinica* (niger) seed, as currently required in § 319.37–6;
- Add a section to provide information about the process for petitioning to add or remove a taxon from the noxious weed list;
- Add seven new noxious weeds to the list of noxious weeds in § 360.200 and the list of noxious weed seeds in § 361.6; and
- Update or correct the taxonomic designations for several currently listed noxious weeds.

We solicited comments concerning our proposal for 60 days ending August 10, 2009. We received six comments by that date. They were from a private citizen, a seed organization, a biotechnology industry organization, researchers, and a representative of a State government. The issues they raised that are germane to the proposed rule are discussed below by topic.

[1] To view the proposed rule and the comments we received, go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2007-0146.*

*Concurrence From States in Approving Noxious Weed Permits*

We proposed to add to the regulations new §§ 360.301 through 360.305 to provide additional information about the requirements for permits to import or move noxious weeds. Proposed § 360.304 contained information about denial and cancellation of permits.

In paragraph (a) of proposed § 360.304, we proposed to provide that the Administrator could deny an application for a permit to move a noxious weed when the Administrator has determined that, among other things, a State plant regulatory official objects to the issuance of the permit on the grounds that granting the permit will pose a risk of dissemination of the noxious weed into the State. However, we went on to note that, under the proposed regulations, the Administrator would have the option to approve a permit for movement of a noxious weed even if a State plant regulatory official objected to the issuance of a permit—for example, if the Administrator determined that the safeguards specified in the permit were adequate to address the risk of dissemination.

One commenter stated that the approval of a permit when a State plant regulatory official objected to the approval could potentially put an importer in an unfortunate position between APHIS and a State authority. The commenter stated that APHIS needs to reach positive resolution with the States when deciding to approve permits to avoid putting the importer in a bind.

APHIS' decisions on whether to grant a permit take into account the views of the State, but ultimately APHIS has the final authority to grant or deny an application for a permit. However, in all cases, APHIS attempts to come to a positive resolution of any difference of opinion with a State plant health official, as the commenter recommends. Our State plant health cooperators are key to the successful enforcement and functioning of the Federal noxious weed regulations. In practice, we would rarely act contrary to States' concerns regarding issuing a permit for the importation or interstate movement of taxa listed as Federal noxious weeds, and we would provide information to specifically support issuing the permit if we were to do so.

*New Section With Treatment for Niger Seed*

We proposed to add a new § 360.400 indicating that *Guizota abysinnica* (niger) seed is required to be treated. This requirement is found in our regulations governing the importation of nursery stock in § 319.37–6; we proposed to duplicate the conditions that are specified in that section in proposed § 360.400, as most niger seed is not imported for use as nursery stock but as birdseed.

(NOTE: In an interim rule published and effective on October 19, 2009 (74 FR 53397–53400, Docket No. APHIS–2008–0097), we added a new § 360.400 to codify the preemptive effects of the regulations in part 360. This final rule redesignates § 360.400 as § 360.600 to accommodate the new provisions we proposed to add in June 2009.)

One commenter stated that it is not entirely clear why proposed § 360.400 was included with the noxious weed regulations, given that *G. abysinnica* is not listed as a noxious weed.

Although *G. abysinnica* itself is not a noxious weed, imported lots of *G. abysinnica* are commonly contaminated with various noxious weed seeds, including *Cuscuta* spp. We have determined that heat treatment effectively mitigates the risk associated with noxious weed seeds in lots of *G. abysinnica.* Because *G. abysinnica* is not typically imported for use as nursery stock, importers may not know to look in the nursery stock regulations in § 319.37–6 to find the requirements for its importation. Importers of seed more commonly look at the requirements in parts 360 and 361. Indicating that *G. abysinnica* must be heat treated for noxious weed seeds in part 360 will make this requirement more prominent to its intended audience and thus improve the clarity and effectiveness of the regulations.

*Petitions To Add a Taxon to or Remove a Taxon From the Noxious Weed Lists*

APHIS accepts petitions to add a taxon to or remove a taxon from the noxious weed lists in § 360.200. Although we provide some information about the petition process on APHIS' noxious weeds Web site,[2] the regulations have not contained any information about this process. We proposed to add new §§ 360.500 and 360.501 to provide such information.

In both sections, we proposed to encourage petitioners to provide several pieces of information along with their petitions. Providing such information can help speed up the review process and help APHIS determine whether the specified plant taxon should be listed as a noxious weed. However, we did not propose to require that such information be provided.

One commenter characterized our proposal to request information as a list of criteria for adding or removing a taxon from the list of noxious weeds, and stated that it is not clear whether or not all criteria need to be met in order to add or remove taxa. The commenter expressed concern that justifying additions solely on the basis of one criterion (such as potential economic impacts) could result in a noxious weed list populated with plant species that are not noxious from a biological or ecological perspective. The commenter asked us to add language to these sections stating that all criteria must be addressed and considered in any petition to add (or remove) taxa to the noxious weed list.

This commenter also stated that the proposed regulations do not include any discussion regarding how APHIS will evaluate petitions to add a taxon to or remove a taxon from the noxious weed lists, or communicate their decisions to the public. The commenter recommended that APHIS establish a transparent process or procedures by which APHIS will conduct these evaluations and communicate decisions to the public. The commenter also recommended that these procedures include a sufficient comment period (up to 180 days) to give stakeholders who may be impacted an opportunity to respond to petitions and provide input.

The various types of information we proposed to request are not a comprehensive set of criteria for listing a taxon as a noxious weed or removing a taxon from the list of noxious weeds; rather, we proposed to request information we would find useful in investigating whether or not a plant should be listed as a noxious weed. We did not propose to require petitioners to include all the different types of information we requested because that information may not be available to the petitioner. Accordingly, we are not taking the commenter's suggestion to require petitioners to provide all this information.

If we receive a petition to list a taxon as a noxious weed or to remove a taxon from the list of noxious weeds, we will communicate with the petitioner regarding whether we are proceeding with a weed risk assessment (WRA), and, if not, why not.

We conduct our WRAs in accordance with our Weed-Initiated Pest Risk Assessment Guidelines for Qualitative Assessments, regardless of whether the assessment is triggered by a petition, through research and identification of a potential noxious weed, or discovery of an outbreak or introduction of a potential noxious weed. These guidelines are available on the Web at *http://www.aphis.usda.gov/plant_health/plant_pest_info/weeds/downloads/wra.pdf.* These guidelines are consistent with the International Plant Protection Convention's (IPPC) International Standard for Phytosanitary Measures (ISPM) No. 2, "Framework for pest risk analysis."[3] If we perform a WRA in response to a petition, we will review all the information supplied by the petitioner as part of this process; we will also review other data sources to ensure that our conclusions regarding the taxon in question are based on the broadest possible base of information.

If our WRA and any other analysis we may conduct indicate that a taxon should be listed as a noxious weed, we will publish an interim rule or proposed rule in the **Federal Register** to amend the list of noxious weeds in § 360.200 and, if appropriate, the list of noxious weed seeds in part 361. Such publication provides both public notice and a period during which stakeholders who may be impacted can provide input. We will make the WRA and any other analysis we may conduct available along with the interim rule or proposed rule. We typically provide for a comment period of 60 days on interim rules and proposed rules; however, we have the option to allow for a longer comment period should circumstances warrant it.

We proposed to add a new § 360.500 to provide information about the process of adding a taxon to the noxious weed list. Among other things, we proposed to encourage petitioners to provide the following information about the potential consequences of the taxon's introduction or spread:

- The taxon's habitat suitability in the United States (predicted ecological range);
- Dispersal potential (biological characteristics associated with invasiveness);
- Potential economic impacts (*e.g.,* potential to reduce crop yields, lower commodity values, or cause loss of markets for U.S. goods); and
- Potential environmental impacts (*e.g.,* impacts on ecosystem processes, natural community composition or structure, human health, recreation

[2] At *http://www.aphis.usda.gov/plant_health/plant_pest_info/weeds/index.shtml.*

[3] To view this ISPM on the Internet, go to *http://www.ippc.int/IPP/En/default.jsp* and click on the "Adopted ISPMs" link under the "Standards (ISPMs)" heading.

patterns, property values, or use of chemicals to control the taxon).

Referring to the request for information about potential economic impacts of a taxon petitioned to be listed as a noxious weed, one commenter stated that the use of such information could result in petitions for classifying certain genetically engineered (GE) crop species as noxious weeds. APHIS' Biotechnology Regulatory Services (BRS) program regulates GE organisms, and the commenter assumed that BRS will use the noxious weed authority of the PPA when such issues arise with GE crops. To ensure consistency, the commenter recommended that PPQ and BRS coordinate to ensure that these regulations will be uniformly interpreted when such issues arise. If there is not consistency, the commenter stated, it is conceivable that a petitioner could apply to both PPQ and BRS to list (or delist) the same taxon and end up with different results.

We agree with the commenter's recommendation that PPQ and BRS coordinate when we receive petitions to list GE crops as noxious weeds. PPQ and BRS regularly discuss such issues and will continue to do so. It should be noted that, currently, BRS regulates GE organisms only under the plant pest authority of the PPA.

One commenter stated that, while the information requested will be necessary to determining whether to list a taxon as a noxious weed, certain baseline information will also be required and should also be specifically referenced in the regulations. As an initial matter, the commenter stated, information must be provided to show that the plant in question causes injury recognized under the PPA and the IPPC. The commenter quoted the Background section of a proposed rule regarding the importation and interstate movement of GE organisms published in the **Federal Register** on October 9, 2008 (73 FR 60008–60048, Docket No. APHIS–2008–0023), which stated that the first consideration in determining whether a plant is a noxious weed is identifying what direct injury or damage (physical harm) the plant causes.

While we proposed in § 360.500 to request that petitioners provide information regarding the potential economic and environmental impacts of spread of the plant in question, we did not propose to request or require information regarding the injury the offending plant may inflict. The commenter stated that, while in many instances this information will be obvious, it is nevertheless essential to a noxious weed determination and must not be overlooked. In all cases, the commenter stated, APHIS must first make an initial finding of physical harm caused by the plant at issue; only then may APHIS continue the risk assessment and risk mitigation process to determine whether further regulation is appropriate.

We have determined that it is not necessary to require that petitioners provide information about the direct harm caused by a taxon in a petition to list a taxon as a noxious weed. Such information may not be available to the petitioner; for example, a petitioner might notice unchecked growth of a weed in an area without knowing the precise means by which the weed was displacing native vegetation.

As discussed earlier, after receiving a petition, we consider all available information relating to that taxon, not just the information provided in the petition, and we conduct our weed risk assessments in accordance with our Weed-Initiated Pest Risk Assessment Guidelines for Qualitative Assessments. These guidelines provide specific examples of what we mean by potential economic impacts and potential environmental impacts. Potential economic impacts include, but are not limited to:

- Reduced crop yield (*e.g.,* by parasitism, competition, or by harboring other pests).
- Lower commodity value (*e.g.,* by increasing costs of production, lowering market price, or a combination); or if not an agricultural weed, by increasing costs of weed control.
- Loss of markets (foreign or domestic) due to presence of a new quarantine pest.

Potential environmental impacts include, but are not limited to, considerations of whether the weed, if introduced, could:

- Cause impacts on ecosystem processes (alteration of hydrology, sedimentation rates, a fire regime, nutrient regimes, changes in productivity, growth, yield, vigor, etc.).
- Cause impacts on natural community composition (*e.g.,* reduce biodiversity, affect native populations, affect endangered or threatened species, impact keystone species, impact native fauna, pollinators, or microorganisms, etc.).
- Cause impacts on community structure (*e.g.,* change density of a layer, cover the canopy, eliminate or create a layer, impact wildlife habitats, etc.).
- Have impacts on human health such as allergies or changes in air or water quality.
- Have sociological impacts on recreation patterns and aesthetic or property values.
- Stimulate control programs including toxic chemical pesticides or introduction of a nonindigenous biological control agent.

Risk ratings are then determined based on how many of the impacts are posed by the taxon (except for taxa that affect endangered or threatened species, which are always rated high risk for environmental impacts). The WRA process thus considers in detail the direct injury or damage the plant may cause. We believe this satisfies the commenter's overall concern that the direct injury or damage caused by a plant should be considered in determining whether to list it as a noxious weed.

*Additions to the Lists of Terrestrial Noxious Weeds and Noxious Weed Seeds*

We proposed add seven new taxa to the list of terrestrial noxious weeds in § 360.200(c) and to the list of noxious weed seeds with no tolerances applicable to their introduction in § 361.6(a)(1). Commenters who addressed these additions supported them.

One commenter stated that the addition of the seven new taxa could have indirect adverse consequences on seed production. The commenter stated that many companies have overseas operations in which seed is produced in a foreign country and shipped back to the United States for sale in the United States or for value-adding and repackaging for re-export. Some producers' offshore production sites likely could be in areas where these taxa are endemic, the commenter stated, and several of the new taxa, such as *Arctotheca calendula, Ageratina riperia, Euphorbia terracina, Onopordum acaulon,* and *O. illyricum,* could impact grass seed production as well as row crop and vegetable crop seed production. If these new taxa, or whenever any new taxa, are added to the noxious weed list, the commenter requested that we provide detailed information on the occurrence and distribution of these taxa, as well as specific information on their seed morphology and biology, so that seed production companies can implement measures to minimize contamination of seed in those production areas where these taxa pose a threat.

We list taxa as noxious weeds based on the risk they pose, not on their geographical distribution. We provided the information we have on the international distribution, seed

morphology, and biology of these weeds in the WRAs that were provided along with the proposed rule on Regulations.gov (*see* footnote 1 for instructions on accessing Regulations.gov). Because these weeds have significant effects on agricultural production and the environment, as discussed in the WRAs, seed producers will likely know whether these noxious weeds are present in or near their production facilities; for economic reasons, we presume that they would take appropriate steps to prevent contamination of their seed with seeds of these weeds.

We proposed to list *A. calendula* (capeweed) as a noxious weed. In the proposed rule, we stated that *A. calendula* is currently present in California and that a purple-flowered, seed-producing type of *A. calendula* is regulated by the State. A sterile, vegetatively reproducing yellow-flowered type is not currently regulated by the State of California, but is noted by some to spread from cultivation into wild or managed environments. In addition, absent inflorescence, identifying a plant as a member of one type or another of *A. calendula* can be difficult. We invited public comment on whether it is appropriate to regulate the entire species *A. calendula,* as we proposed to do, or whether we should only regulate the purple-flowered, seed-producing type.

Two commenters addressed this issue. One stated that the less noxious form (we described it as yellow-flowered, while the commenter described it as orange-flowered) is indistinguishable from the purple-flowered form when not in flower. The commenter pointed out that enforcement would be difficult if only one form is regulated, and recommended that we add the entire species to the list.

Another commenter agreed with this comment and added other points to consider when determining whether to regulate the entire species:

- The commenter stated that the infertile type is also invasive. According to one report from the California Invasive Plant Inventory (*http://www.cal-ipc.org*), it is more competitive than the fertile form. It can escape cultivation by creeping stolons and spread aggressively.
- The commenter asked whether purple flower color is always linked to fertile seed production and whether this is always a reliable characteristic for determining the type of capeweed.
- The commenter asked whether the genetic basis of seed infertility in the sterile type is understood. If yes, the commenter asked, is the sterility stable? Or is it capable of reverting to fertility under certain circumstances or can it cross with the fertile type?
- The commenter stated that the sterile type is just as potentially toxic to sheep, cattle, pigs and horses as the fertile type, due to presence of nitrates.

Since the publication of the proposed rule, we have found more information about the botanical classification of what we characterized as the fertile and sterile types of *A. calendula.* These are actually two different species; *A. calendula* is the fertile type, while the sterile type has been designated *A. prostrata* (creeping capeweed).[4] There are morphological differences between the two species that make it practical to distinguish them for enforcement purposes, as well.

As we had proposed to regulate *A. calendula* as a noxious weed on the basis of the damage caused by what we had characterized as the fertile type, we are adding *A. calendula* to the list of terrestrial noxious weeds and to the list of noxious weed seeds with no tolerances applicable to their introduction, as we proposed. We will evaluate *A. prostrata* separately to determine whether it, too, needs to be added to those lists, with the information and questions provided by the second commenter in mind.

One commenter, citing the "no tolerances applicable to their introduction" language, stated that this terminology strongly indicates that there is a zero tolerance for noxious weed seed contaminants in seed consignments. The commenter understood the basis for zero tolerance, but also recognizes that achieving this level of risk reduction will at times be very difficult. The commenter asked that APHIS seek input from the seed industry on the development of a rational tolerance for noxious weed seed contaminants that is achievable by the industry. The commenter also asked that APHIS add language to this section stating that whenever noxious weed seed contaminants are detected in seed consignments, companies will be given the option of recleaning and re-inspection according to established APHIS procedures and protocols, and that destruction or re-export will be considered a last option.

The commenter refers to existing text from § 361.6(a)(1) regarding seeds with no tolerances applicable to their introduction that we were discussing in the Background section of the proposal. Within § 361.6, paragraph (c) discusses how certain seed may not be counted toward the tolerance (for example, damaged seed). However, it is important to prevent even one individual, viable seed of taxa listed in § 361.6(a)(1) from entering the United States, as these taxa have been determined to be capable of causing agricultural and environmental damage should they be introduced into the United States. Thus, the zero-tolerance standard is appropriate for these taxa. We are making no changes in response to this comment.

*Common Names*

One commenter addressed the common names of noxious weeds. With regard to the seven taxa we proposed to add to the list of terrestrial noxious weeds and to the list of noxious weed seeds with no tolerances applicable to their introduction, the commenter noted that the common names we included with the scientific names in the proposed regulatory text often differed from those in the USDA's PLANTS Web site (*http://plants.usda.gov*). The commenter stated that it would be less confusing if the proposed regulatory text and the PLANTS Web site agreed on common names, and that using the most common usage would better serve the general public and others.

Common names, including those on the PLANTS Web site, are unofficial. It is often difficult to determine the most common usage, which varies worldwide. For these reasons, we rely on the scientific name of a taxon, which is the internationally recognized scientific standard, as the official name for regulatory purposes. We list a common name for the convenience of nonspecialists.

APHIS normally lists the most recent common name found in one or more of three sources. The Weed Science Society of America (WSSA) publishes a Composite List of Weeds with their officially recognized common names, which APHIS would normally use. WSSA lists few of the weeds we proposed to add because of their lack of distribution in the United States. Since the preparation of the WRAs, WSSA has added several of the species we proposed to add to the list of noxious weeds to its Composite List of Weeds. Other sources of common names are the Germplasm Resources Information Network (GRIN) and the Integrated Taxonomic Information System (ITIS) database. PLANTS tends to favor names in ITIS.

In this final rule, we are changing common names to match WSSA where names have been recognized since the

[4] *See* the Draft of the Second Edition of the Jepson Manual: Vascular Plants of California; and Tropicos, the database of the Missouri Botanical Garden. *http://mobot.mobot.org/cgi-bin/search_vast* (accessed August 24, 2010).

original draft. In cases where WSSA does not list a common name, we have compared GRIN and ITIS and changed to names listed in both databases, where available. The following table summarizes the proposed common names, the common names provided in the references listed above, and the changes in the final rule.

TABLE 1—COMMON NAMES OF SEVEN NEW NOXIOUS WEED TAXA

| Scientific name | Proposed rule | WSSA | GRIN | ITIS | PLANTS | Final rule |
|---|---|---|---|---|---|---|
| *Acacia nilotica* | prickly acacia | (no common name listed). | acacia à gomme, acacia gomifera, arabische Gummiakazie, babul acacia, Egyptian acacia, gommier rouge, Indian gum-arabic-tree, lekkeruikpeul, scented-thorn, thorn-mimosa, thorny acacia. | gum arabic tree .. | gum arabic tree. | gum arabic tree, thorny acacia. |
| *Ageratina riparia* | mistflower | creeping croftonweed. | creeping croftonweed, hamakua pamakani, mistblom, mistflower, river eupatorium. | creeping croftonweed, mist flower, spreading snakeroot. | spreading snakeroot. | creeping croftonweed, mistflower. |
| *Arctotheca calendula* | capeweed | capeweed | Capeweed, venidium | Cape weed, capeweed. | Capeweed | capeweed (no changes). |
| *Euphorbia terracina* | false caper | Geraldton carnationweed. | false caper, Geraldton carnation-spurge, Geraldton carnationweed, leiteira. | Geraldton carnation weed. | Geraldton carnation weed. | false caper, Geraldton carnation weed. |
| *Inula britannica* | British elecampane. | British elecampane. | British elecampane, ou ya xuan fu hua, xuan fu hua, British yellowhead. | British yellowhead | British yellowhead. | British elecampane, British yellowhead. |
| *Onopordum acaulon* | stemless thistle. | (no common name listed). | cardo, horse thistle, stemless onopordon, stemless thistle. | (no common name listed). | (no common name listed). | stemless thistle (no changes). |
| *Onopordum illyricum* | Illyrian thistle .. | Illyrian thistle .. | cardo-ilírico, Illyrian thistle. | Illyrian cottonthistle. | Illyrian cottonthistle. | Illyrian thistle (no changes). |

We also proposed to make several nomenclature changes for taxa currently listed as terrestrial noxious weeds and as noxious weed seeds with no tolerances applicable to their introduction. Among these changes, we proposed to update the regulations by removing the entry for *Homeria* spp. from both §§ 360.200(c) and 361.6(a)(1) and adding entries for *Moraea collina, M. flaccida, M. miniata, M. ochroleuca,* and *M. pallida* in its place.

The commenter stated that the common names we proposed to use for the *Moraea* species are contrived and confusing. In the proposed rule, *M. flaccida* is called the one-leaf Cape tulip, but most of the others also have one leaf. *M. collina* is called the apricot tulp, but other species are similarly colored, and likewise *M. ochroleuca* is called the red tulp even though it has yellow flowers. The commenter stated that it appears that "tulp" is a typographical error, and will appear to be an error to many others. To reduce confusion, the commenter recommended that all of the species be called "Cape tulip," similar to how *Salvinia* spp. are all called "giant salvinia" on the present list, or that they be listed without common name as with *Cuscuta* and *Prosopis* species on the current list.

As noted earlier, we rely on the scientific name of a taxon as the official name for regulatory purposes. We list a common name for the convenience of non-specialists. "Tulp" is the Dutch and Afrikaans word for "tulip" and is thus in common use internationally.

We conducted a review of the common names of the new *Moraea* spp. similar to the one conducted for the common names of the seven new taxa. The results of this review are shown in table 2.

TABLE 2—COMMON NAMES OF FIVE MORAEA SPECIES

| Scientific name | Proposed rule | Wiersema & Leon[1] | WSSA | GRIN | ITIS | PLANTS | Final rule |
|---|---|---|---|---|---|---|---|
| *Moraea collina* (=*Homeria collina*). | apricot tulp | (no common name listed). | (no common name listed). | (no common name listed). | (no common name listed). | Cape tulip | apricot Cape-tulip. |
| *Moraea flaccida* (=*Homeria flaccida*). | one-leaf Cape-tulip. | one-leaf Cape-tulip. | (no common name listed). | one-leaf Cape-tulip. | (no common name listed). | (no common name listed). | one-leaf Cape-tulip (no changes). |
| *Moraea miniata* (=*Homeria miniata*). | two-leaf Cape-tulip. | two-leaf Cape-tulip. | (no common name listed). | two-leaf Cape-tulip. | (no common name listed). | (no common name listed). | two-leaf Cape-tulip (no changes). |

TABLE 2—COMMON NAMES OF FIVE MORAEA SPECIES—Continued

| Scientific name | Proposed rule | Wiersema & Leon[1] | WSSA | GRIN | ITIS | PLANTS | Final rule |
|---|---|---|---|---|---|---|---|
| *Moraea ochroleuca* (=*Homeria ochroleuca*). | red tulp ..... | red tulp ..... | (no common name listed). | red tulp ..... | (no common name listed). | (no common name listed). | red Cape-tulip. |
| *Moraea pallida* (=*Homeria pallida*). | yellow tulp ..... | yellow tulp ..... | (no common name listed). | yellow tulp ..... | (no common name listed). | (no common name listed). | yellow Cape-tulip. |

Wiersema, J.H. and Leon, Blanca. 1999. World economic plants: A standard reference. p. 261.

Based on this review, we are changing the common name for *M. collina* to "apricot Capetulip," to be more consistent with the PLANTS database while ensuring that *M. collina* can be differentiated from the other regulated Cape-tulip. We also recognize that U.S. regulated entities may not be familiar with the term "tulp," and that listing all the new *Moraea* spp. as some variety of "Cape-tulip" would help to ensure consistency in naming the genus. For that reason, we have changed the proposed common name of *M. ochroleuca,* "red tulp," to read "red Cape-tulip," in this final rule and we have changed the proposed common name of *M. pallida,* "yellow tulp," to read "yellow Cape-tulip" in this final rule.

*Miscellaneous Change*

We proposed to revise current § 360.300. Proposed paragraph (a) in § 360.300 stated that no person may move a Federal noxious weed into or through the United States, or interstate, unless he or she applies for a permit to move a noxious weed in accordance with § 360.301, the permit application is approved, and the movement is consistent with the specific conditions contained in the permit. Proposed paragraph (b) of § 360.300 stated that persons who move noxious weeds into or through the United States, or interstate, without complying with those conditions will be subject to such criminal and civil penalties as are provided by the Plant Protection Act (7 U.S.C. 7701 *et seq.*).

We are not including proposed paragraph (b) in this final rule, as it is not necessary to state explicitly in the regulations that violations of the regulations are subject to the penalties prescribed in the act under whose authority they are promulgated. The requirements in proposed paragraph (a) and its subparagraphs (a)(1) through (a)(3) appear in this final rule as undesignated introductory text for § 360.300 and as paragraphs (a) through (c), respectively.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, with the changes discussed in this document.

*Federal Preemption*

On May 20, 2009, the President issued a memorandum to the heads of executive departments and agencies on the subject of preemption. The memorandum states that it is the general policy of the Administration that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption. The memorandum further states:

To ensure that executive departments and agencies include statements of preemption in regulations only when such statements have a sufficient legal basis:

- Heads of departments and agencies should not include in regulatory preambles statements that the department or agency intends to preempt State law through the regulation except where preemption provisions are also included in the codified regulation.
- Heads of departments and agencies should not include preemption provisions in codified regulations except where such provisions would be justified under legal principles governing preemption, including the principles outlined in Executive Order 13132.

Since 1996, Executive Order 12988, "Civil Justice Reform," has required agencies to include in each regulation a statement regarding its preemptive effects. APHIS has included a statement of preemptive effects in regulatory preambles under the heading "Executive Order 12988."

In compliance with the May 2009 memorandum from the White House, we are adding preemption provisions to part 352 that apply to this rule, as well as to the existing regulations in part 352. Preemption provisions have already been added to parts 319, 360, and 361.

Part 352 contains safeguarding regulations for the movement through the United States of plants, plant products, plant pests, soil, and other products and articles that may be infested or infected by or contain plant pests or noxious weeds.

Under section 436 of the Plant Protection Act (7 U.S.C. 7756), no State or political subdivision of a State may regulate in foreign commerce any article, means of conveyance, plant, biological control organism, plant pest, noxious weed, or plant product in order to control a plant pest or noxious weed, to eradicate a plant pest or noxious weed, or to prevent the introduction or dissemination of a biological control organism, plant pest, or noxious weed. Therefore, in accordance with section 436 of the Plant Protection Act, the regulations in part 352 preempt all State and local laws and regulations that are inconsistent with or exceed the regulations in part 352.

Accordingly, in this final rule, we are adding a new paragraph (d) in § 352.2 to codify the preemptive effects of the regulations in part 352. To reflect this change, we have renamed § 352.2 "Purpose; relation to other regulations; applicability; preemption of State and local laws."

**Executive Order 12866 and Regulatory Flexibility Act**

This final rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities. As described in the economic analysis, the majority of producers, importers, and merchants that may be affected by the final rule are small entities. However, there is no evidence of any significant trade in the seven taxa that are being added to the list of noxious weeds, and the other changes in the final rule serve to clarify

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

The full economic analysis may be viewed on the Regulations.gov Web site. (*See* footnote 1 in this document for a link to the analysis on Regulations.gov.) In addition, copies may be obtained by calling or writing to the individual listed under **FOR FURTHER INFORMATION CONTACT.**

**Executive Order 12372**

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (*See* 7 CFR part 3015, subpart V.)

**Executive Order 12988**

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

**Paperwork Reduction Act**

This final rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

**List of Subjects**

*7 CFR Part 319*

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

*7 CFR Part 352*

Customs duties and inspection, Imports, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

*7 CFR Part 360*

Imports, Plants (Agriculture), Quarantine, Reporting and recordkeeping requirements, Transportation, Weeds.

*7 CFR Part 361*

Agricultural commodities, Imports, Labeling, Quarantine, Reporting and recordkeeping requirements, Seeds, Vegetables, Weeds.

■ Accordingly, we are amending 7 CFR parts 319, 352, 360, and 361 as follows:

## PART 319—FOREIGN QUARANTINE NOTICES

■ 1. The authority citation for part 319 continues to read as follows:

**Authority:** 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

**§ 319.37–6 [Amended]**

■ 2. In § 319.37–6, paragraph (c) is amended by adding the words "must be treated" after the word "States".

## PART 352—PLANT QUARANTINE SAFEGUARD REGULATIONS

■ 3. The authority citation for part 352 continues to read as follows:

**Authority:** 7 U.S.C. 7701–7772 and 7781–7786; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.3.

■ 4. Section 352.2 is amended as follows:
■ a. By revising the section heading to read as set forth below.
■ b. In paragraph (a) introductory text, in the first sentence, by adding the words "noxious weeds," after the words "plant pests,"; and by removing the words "319 and 330" and adding the words "319, 330, and 360" in their place.
■ c. In paragraph (b), by removing the words "319 or 330" and adding the words "319, 330, or 360" in their place.
■ d. By adding a new paragraph (d) to read as set forth below.

**§ 352.2 Purpose; relation to other regulations; applicability; preemption of State and local laws.**

* * * * *

(d) Under section 436 of the Plant Protection Act (7 U.S.C. 7756), a State or political subdivision of a State may not regulate in foreign commerce any article, means of conveyance, plant, biological control organism, plant pest, noxious weed, or plant product in order to control a plant pest or noxious weed, to eradicate a plant pest or noxious weed, or to prevent the introduction or dissemination of a biological control organism, plant pest, or noxious weed.

**§ 352.3 [Amended]**

■ 5. Section 352.3 is amended as follows:
■ a. In paragraphs (a) and (b), by adding the words "noxious weeds," after the words "plant pests," each time they occur.
■ b. In paragraph (d), by adding the words "or noxious weed" before the word "dissemination."

**§ 352.5 [Amended]**

■ 6. Section 352.5 is amended as follows:
■ a. By adding the words "noxious weeds," after the words "plant pests," each time they occur.
■ b. In paragraph (d), by adding the words ", 330, and 360" after the words "parts 319" each time they occur.

**§ 352.6 [Amended]**

■ 7. Section 352.6 is amended as follows:
■ a. In paragraph (a), by adding the words "*(including noxious weeds)*" before the period at the end of the paragraph heading.
■ b. In paragraph (e), by adding the words "or noxious weed" before the word "dissemination" each time it occurs.

**§ 352.7 [Amended]**

■ 8. Section 352.7 is amended by adding the words "(including noxious weeds)" after the word "products" the first time it occurs.

**§ 352.9 [Amended]**

■ 9. Section 352.9 is amended by adding the words "noxious weeds," after the words "plant pests,".

**§ 352.10 [Amended]**

■ 10. Section 352.10 is amended as follows:
■ a. In paragraphs (a) and (b)(1), by removing the words "part 319 or 330" each time they occur and adding the words "parts 319, 330, or 360" in their place.
■ b. In paragraphs (b)(1), (b)(2), and (c), by adding the words "or noxious weed" before the word "dissemination" each time it occurs.
■ c. In paragraph (b)(2), by removing the words "319 or 330" and adding the words "319, 330, or 360" in their place.

**§ 352.11 [Amended]**

■ 11. In § 352.11, paragraph (a)(1) is amended by adding the words "noxious weeds," after the words "plant pests,".

**§ 352.13 [Amended]**

■ 12. Section 352.13 is amended as follows:
■ a. By adding the words "noxious weeds," after the words "plant pests,".
■ b. By removing the words "part 319 or 330" and adding the words "parts 319, 330, or 360" in their place.

**§ 352.15 [Amended]**

■ 13. Section 352.15 is amended by adding the words "or noxious weed" before the word "dissemination".

## PART 360—NOXIOUS WEED REGULATIONS

■ 14. The authority citation for part 360 continues to read as follows:

**Authority:** 7 U.S.C. 7701–7772 and 7781–7786; 7 CFR 2.22, 2.80, and 371.3.

■ 15. Section 360.100 is amended as follows:

■ a. By removing the paragraph (b) designation and the introductory text of paragraph (b).

■ b. By redesignating paragraph (a) as undesignated introductory text.

■ c. By adding, in alphabetical order, new definitions of *Administrator, APHIS, interstate, move, noxious weed, permit, person, responsible person, State, taxon (taxa), through the United States,* and *United States* to read as set forth below.

■ d. By removing the definition of *Deputy Administrator.*

### § 360.100 Definitions.

* * * * *

*Administrator.* The Administrator, Animal and Plant Health Inspection Service, or any individual authorized to act for the Administrator.

*APHIS.* The Animal and Plant Health Inspection Service, United States Department of Agriculture.

* * * * *

*Interstate.* From one State into or through any other State; or within the District of Columbia, Guam, the Virgin Islands of the United States, or any other territory or possession of the United States.

*Move.* To carry, enter, import, mail, ship, or transport; to aid, abet, cause, or induce the carrying, entering, importing, mailing, shipping, or transporting; to offer to carry, enter, import, mail, ship, or transport; to receive to carry, enter, import, mail, ship, or transport; to release into the environment; or to allow any of the activities described in this definition.

*Noxious weed.* Any plant or plant product that can directly or indirectly injure or cause damage to crops (including nursery stock or plant products), livestock, poultry, or other interests of agriculture, irrigation, navigation, the natural resources of the United States, the public health, or the environment.

*Permit.* A written authorization, including by electronic methods, by the Administrator to move plants, plant products, biological control organisms, plant pests, noxious weeds, or articles under conditions prescribed by the Administrator.

*Person.* Any individual, partnership, corporation, association, joint venture, or other legal entity.

* * * * *

*Responsible person.* The person who has control over and will maintain control over the movement of the noxious weed and assure that all conditions contained in the permit and requirements in this part are complied with. A responsible person must be at least 18 years of age and must be a legal resident of the United States or designate an agent who is at least 18 years of age and a legal resident of the United States.

*State.* Any of the several States of the United States, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the Virgin Islands of the United States, or any other territory or possession of the United States.

*Taxon (taxa).* Any grouping within botanical nomenclature, such as family, genus, species, or cultivar.

*Through the United States.* From and to places outside the United States.

*United States.* All of the States.

■ 16. Section 360.200 is amended as follows:

■ a. By revising the introductory text, including footnote 1, to read as set forth below.

■ b. In paragraph (a), by revising the entries for "*Caulerpa taxifolia* (Mediterranean clone)", "*Eichornia azurea* (Swarth) Kunth", and "*Melaleuca quenquinervia* (Cav.) Blake" to read as set forth below.

■ c. In paragraph (b), by removing the entries for "*Cuscuta jepsonii* Yuncker", "*Cuscuta nevadensis* I.M. Johnston", and "*Cuscuta occidentalis* Millspaugh ex Mill & Nuttall".

■ d. In paragraph (b), by revising the entries for "*Cuscuta ceanothii* Behr," "*Cuscuta cephalanthii* Engelmann", "*Cuscuta corylii* Engelmann", "*Cuscuta exalta* Engelmann", "*Cuscuta obtusiflora* Humboldt, Bonpland, & Kunth", "*Cuscuta rostrata* Shuttleworth ex Engelmann", "*Cuscuta umbrellata* Humboldt, Bonpland, & Kunth", and "*Cuscuta vetchii* Brandegee" to read as set forth below.

■ e. In paragraph (c), by removing the entries for "*Digitaria scalarum* (Schweinfurth) Chlovenda (African couchgrass, fingergrass)", "*Homeria* spp.", and "*Mimosa invisa* Martius (giant sensitive plant)".

■ f. In paragraph (c), by revising the entries for "*Digitaria velutina* (Forsskal) Palisot de Beauvois (velvet fingergrass, annual conchgrass)", "*Drymaria arenariodes* Humboldt & Bonpland ex Roemer & Schultes (lightning weed)", "*Imperata cylindrica* (Linnaeus) Raeuschel (cogongrass)", "*Mikania micrantha* Humboldt, Bonpland, & Kunth", "*Prosopis farcta* (Solander ex Russell) Macbride", "*Prosopis pallida* (Humboldt & Bonpland ex Willdenow) Humboldt, Bonpland, & Kunth", "*Setaria pallide-fusca* (Schumacher) Stapf & Hubbard (cattail grass)", and "*Spermacoce alata* (Aublet) de Candolle" to read as set forth below.

■ g. In paragraph (c), by adding, in alphabetical order, entries for "*Acacia nilotica* (Linnaeus) Wildenow ex Delile (gum arabic tree, thorny acacia)", "*Ageratina riparia* (Regel) R.M. King and H. Robinson (creeping croftonweed, mistflower)", "*Arctotheca calendula* (Linnaeus) Levyns (capeweed)", "*Digitaria abyssinica* (Hochstetter ex A. Richard) Stapf (African couchgrass, fingergrass)," "*Euphorbia terracina* Linnaeus (false caper, Geraldton carnation weed)", "*Inula britannica* Linnaeus (British elecampane, British yellowhead)", "*Mimosa diplotricha* C. Wright (giant sensitive-plant)", "*Moraea collina* Thunberg (apricot Cape-tulip)", "*Moraea flaccida* (Sweet) Steudel (one-leaf Cape-tulip)", "*Moraea miniata* Andrews (two-leaf Cape-tulip)", "*Moraea ochroleuca* (Salisbury) Drapiez (red Cape-tulip)", "*Moraea pallida* (Baker) Goldblatt (yellow Cape-tulip)", "*Onopordum acaulon* Linnaeus (stemless thistle)", and "*Onopordum illyricum* Linnaeus (Illyrian thistle)".

### § 360.200 Designation of noxious weeds.

The Administrator has determined that it is necessary to designate the following plants [1] as noxious weeds to prevent their introduction into the United States or their dissemination within the United States:

(a) * * *

*Caulerpa taxifolia* (Vahl) C. Agardh, Mediterranean strain (killer algae)

* * * * *

*Eichhornia azurea* (Swartz) Kunth

* * * * *

*Melaleuca quinquenervia* (Cavanilles) S.T. Blake

* * * * *

(b) * * *

*Cuscuta ceanothi* Behr

*Cuscuta cephalanthi* Engelmann

* * * * *

[1] One or more of the common names of weeds are given in parentheses after most scientific names to help identify the weeds represented by such scientific names; however, a scientific name is intended to include all subordinate taxa within the taxon. For example, taxa listed at the genus level include all species, subspecies, varieties, and forms within the genus; taxa listed at the species level include all subspecies, varieties, and forms within the species.

*Cuscuta coryli* Engelmann
* * * * *
*Cuscuta exaltata* Engelmann
* * * * *
*Cuscuta obtusiflora* Kunth
* * * * *
*Cuscuta rostrata* Shuttleworth ex Engelmann & Gray
* * * * *
*Cuscuta umbellata* Kunth
* * * * *
*Cuscuta veatchii* Brandegee
* * * * *
(c) * * *
*Digitaria velutina* (Forsskal) Palisot de Beauvois (velvet fingergrass, annual couchgrass)
*Drymaria arenariodes* Humboldt & Bonpland ex J.A. Schultes (lightning weed)
* * * * *
*Imperata cylindrica* (Linnaeus) Palisot de Beauvois (cogongrass)
* * * * *
*Mikania micrantha* Kunth
* * * * *
*Prosopis farcta* (Banks & Solander) J.F. Macbride
* * * * *
*Prosopis pallida* (Humboldt & Bonpland ex Willdenow) Kunth
* * * * *
*Setaria pumila* (Poir.) Roem. & Schult. subsp. *pallidefusca* (Schumach.) B.K. Simon (cattail grass)
* * * * *
*Spermacoce alata* Aublet
* * * * *

■ 17. Section 360.300 is revised to read as follows:

**§ 360.300 Notice of restrictions on movement of noxious weeds.**

No person may move a Federal noxious weed into or through the United States, or interstate, unless:

(a) He or she applies for a permit to move a noxious weed in accordance with § 360.301;

(b) The permit application is approved; and

(c) The movement is consistent with the specific conditions contained in the permit.

(Approved by the Office of Management and Budget under control number 0579–0054)

■ 18. New §§ 360.301 through 360.305 are added to read as follows.

**§ 360.301 Information required for applications for permits to move noxious weeds.**

(a) *Permit to import a noxious weed into the United States.* A responsible person must apply for a permit to import a noxious weed into the United States.[2] The application must include the following information:

(1) The responsible person's name, address, telephone number, and (if available) e-mail address;

(2) The taxon of the noxious weed;

(3) Plant parts to be moved;

(4) Quantity of noxious weeds to be moved per shipment;

(5) Proposed number of shipments per year;

(6) Origin of the noxious weeds;

(7) Destination of the noxious weeds;

(8) Whether the noxious weed is established in the State of destination;

(9) Proposed method of shipment;

(10) Proposed port of first arrival in the United States;

(11) Approximate date of arrival;

(12) Intended use of the noxious weeds;

(13) Measures to be employed to prevent danger of noxious weed dissemination; and

(14) Proposed method of final disposition of the noxious weeds.

(b) *Permit to move noxious weeds interstate.* A responsible person must apply for a permit to move a noxious weed interstate.[3] The application must include the following information:

(1) The responsible person's name, address, telephone number, and (if available) e-mail address;

(2) The taxon of the noxious weed;

(3) Plant parts to be moved;

(4) Quantity of noxious weeds to be moved per shipment;

(5) Proposed number of shipments per year,

(6) Origin of the noxious weeds;

(7) Destination of the noxious weeds;

(8) Whether the noxious weed is established in the State of destination;

(9) Proposed method of shipment,

(10) Approximate date of movement;

(11) Intended use of the noxious weeds;

(12) Measures to be employed to prevent danger of noxious weed dissemination; and

(13) Proposed method of final disposition of the noxious weeds.

(c) *Permits to move noxious weeds through the United States.* Permits to move noxious weeds through the United States must be obtained in accordance with part 352 of this chapter.

[2] Information on applying for a permit to import a noxious weed into the United States is available at *http://www.aphis.usda.gov/plant_health/permits/plantproducts.shtml.*

[3] Information on applying for a permit to move a noxious weed interstate is available at *http://www.aphis.usda.gov/plant_health/permits/plantproducts.shtml.*

**§ 360.302 Consideration of applications for permits to move noxious weeds.**

Upon the receipt of an application made in accordance with § 360.301 for a permit for movement of a noxious weed into the United States or interstate, the Administrator will consider the application on its merits.

(a) *Consultation.* The Administrator may consult with other Federal agencies or entities, States or political subdivisions of States, national governments, local governments in other nations, domestic or international organizations, domestic or international associations, and other persons for views on the danger of noxious weed dissemination into the United States, or interstate, in connection with the proposed movement.

(b) *Inspection of premises.* The Administrator may inspect the site where noxious weeds are proposed to be handled in connection with or after their movement under permit to determine whether existing or proposed facilities will be adequate to prevent noxious weed dissemination if a permit is issued.

**§ 360.303 Approval of an application for a permit to move a noxious weed; conditions specified in permit.**

The Administrator will approve or deny an application for a permit to move a noxious weed. If the application is approved, the Administrator will issue the permit including any conditions that the Administrator has determined are necessary to prevent dissemination of noxious weeds into the United States or interstate. Such conditions may include requirements for inspection of the premises where the noxious weed is to be handled after its movement under the permit, to determine whether the facilities there are adequate to prevent noxious weed dissemination and whether the conditions of the permit are otherwise being observed. Before the permit is issued, the Administrator will require the responsible person to agree in writing to the conditions under which the noxious weed will be safeguarded.

**§ 360.304 Denial of an application for a permit to move a noxious weed; cancelation of a permit to move a noxious weed.**

(a) The Administrator may deny an application for a permit to move a noxious weed when the Administrator determines that:

(1) No safeguards adequate or appropriate to prevent dissemination of the noxious weed can be implemented; or

(2) The destructive potential of the noxious weed, should it escape despite

proposed safeguards, outweighs the probable benefits to be derived from the proposed movement and use of the noxious weed; or

(3) The responsible person, or the responsible person's agent, as a previous permittee, failed to maintain the safeguards or otherwise observe the conditions prescribed in a previous permit and failed to demonstrate the ability or intent to observe them in the future; or

(4) The movement could impede an APHIS eradication, suppression, control, or regulatory program; or

(5) A State plant regulatory official objects to the issuance of the permit on the grounds that granting the permit will pose a risk of dissemination of the noxious weed into the State.

(b) The Administrator may cancel any outstanding permit when:

(1) After the issuance of the permit, information is received that constitutes cause for the denial of an application for permit under paragraph (a) of this section; or

(2) The responsible person has not maintained the safeguards or otherwise observed the conditions specified in the permit.

(c) If a permit is orally canceled, APHIS will provide the reasons for the withdrawal of the permit in writing within 10 days. Any person whose permit has been canceled or any person who has been denied a permit may appeal the decision in writing to the Administrator within 10 days after receiving the written notification of the cancellation or denial. The appeal must state all of the facts and reasons upon which the person relies to show that the permit was wrongfully canceled or denied. The Administrator will grant or deny the appeal, in writing, stating the reasons for the decision as promptly as circumstances allow. If there is a conflict as to any material fact, a hearing will be held to resolve the conflict. Rules of practice concerning such a hearing will be adopted by the Administrator.

**§ 360.305 Disposal of noxious weeds when permits are canceled.**

When a permit for the movement of a noxious weed is canceled by the Administrator and not reinstated under § 360.304(c), further movement of the noxious weed covered by the permit into or through the United States, or interstate, is prohibited unless authorized by another permit. The responsible person must arrange for disposal of the noxious weed in question in a manner that the Administrator determines is adequate to prevent noxious weed dissemination. The Administrator may seize, quarantine, treat, apply other remedial measures to, destroy, or otherwise dispose of, in such manner as the Administrator deems appropriate, any noxious weed that is moved without compliance with any conditions in the permit or after the permit has been canceled whenever the Administrator deems it necessary in order to prevent the dissemination of any noxious weed into or within the United States.

**§ 360.400 [Redesignated as § 360.600]**

■ 19. Section 360.400 is redesignated as § 360.600.

■ 20. New §§ 360.400, 360.500, and 360.501 are added to read as follows:

**§ 360.400 Treatments.**

(a) Seeds of *Guizotia abyssinica* (niger seed) are commonly contaminated with noxious weed seeds listed in § 360.200, including (but not limited to) *Cuscuta* spp. Therefore, *Guizotia abyssinica* seeds may be imported into the United States only if:

(1) They are treated in accordance with part 305 of this chapter at the time of arrival at the port of first arrival in the United States; or

(2) They are treated prior to shipment to the United States at a facility that is approved by APHIS [4] and that operates in compliance with a written agreement between the treatment facility owner and the plant protection service of the exporting country, in which the treatment facility owner agrees to comply with the provisions of § 319.37–6 and allow inspectors and representatives of the plant protection service of the exporting country access to the treatment facility as necessary to monitor compliance with the regulations. Treatments must be certified in accordance with the conditions described in § 319.37–13(c) of this chapter.

(b) [Reserved]

**§ 360.500 Petitions to add a taxon to the noxious weed list.**

A person may petition the Administrator to have a taxon added to the noxious weeds lists in § 360.200. Details of the petitioning process for adding a taxon to the lists are available on the Internet at *http://www.aphis.usda.gov/plant_health/plant_pest_info/weeds/downloads/listingguide.pdf.* Persons who submit a petition to add a taxon to the noxious weed lists must provide their name, address, telephone number, and (if available) e-mail address. Persons who submit a petition to add a taxon to the noxious weed lists are encouraged to provide the following information, which can help speed up the review process and help APHIS determine whether the specified plant taxon should be listed as a noxious weed:

(a) *Identification of the taxon.* (1) The taxon's scientific name and author;

(2) Common synonyms;

(3) Botanical classification;

(4) Common names;

(5) Summary of life history;

(6) Native and world distribution;

(7) Distribution in the United States, if any (specific States, localities, or Global Positioning System coordinates);

(8) Description of control efforts, if established in the United States; and

(9) Whether the taxon is regulated at the State or local level.

(b) *Potential consequences of the taxon's introduction or spread.* (1) The taxon's habitat suitability in the United States (predicted ecological range);

(2) Dispersal potential (biological characteristics associated with invasiveness);

(3) Potential economic impacts (*e.g.,* potential to reduce crop yields, lower commodity values, or cause loss of markets for U.S. goods); and

(4) Potential environmental impacts (e.g., impacts on ecosystem processes, natural community composition or structure, human health, recreation patterns, property values, or use of chemicals to control the taxon).

(c) *Likelihood of the taxon's introduction or spread.* (1) Potential pathways for the taxon's movement into and within the United States; and

(2) The likelihood of survival and spread of the taxon within each pathway.

(d) List of references.

**§ 360.501 Petitions to remove a taxon from the noxious weed lists.**

A person may petition the Administrator to remove a taxon from the noxious weeds lists in § 360.200. Details of the petitioning process for removing a taxon from the lists are available at *http://www.aphis.usda.gov/plant_health/plant_pest_info/weeds/downloads/delistingguide.pdf.* Persons who submit a petition to remove a taxon from the noxious weed lists would be required to provide their name, address, telephone number, and (if available) e-mail address. Persons who submit a petition to remove a taxon from the noxious weed lists are encouraged to provide the following information, which can help speed up the review process and help APHIS determine whether the specified plant taxon should not be listed as a noxious weed:

[4] Criteria for the approval of heat treatment facilities are contained in part 305 of this chapter.

(a) Evidence that the species is distributed throughout its potential range or has spread too far to implement effective control.

(b) Evidence that control efforts have been unsuccessful and further efforts are unlikely to succeed.

(c) For cultivars of a listed noxious weed, scientific evidence that the cultivar has a combination of risk elements that result in a low pest risk. For example, the cultivar may have a narrow habitat suitability, low dispersal potential, evidence of sterility, inability to cross-pollinate with introduced wild types, or few if any potential negative impacts on the economy or environment of the United States.

(d) List of references.

## PART 361—IMPORTATION OF SEED AND SCREENINGS UNDER THE FEDERAL SEED ACT

■ 21. The authority citation for part 361 continues to read as follows:

**Authority:** 7 U.S.C. 1581–1610; 7 CFR 2.22, 2.80, and 371.3.

■ 22. In § 361.6, paragraph (a)(1) is amended as follows:

■ a. By removing the entries for "*Caulerpa taxifolia* (Mediterranean clone)", "*Homeria* spp.", and "*Mimosa invisa* Martius".

■ b. By revising the entries for "*Digitaria abyssinica* (=*D. scalarum*)", "*Drymaria arenariodes* Humboldt & Bonpland ex Roemer & Schultes", "*Imperata cylindrica* (L.) Raeuschel", "*Mikania micrantha* Humboldt, Bonpland, & Kunth", "*Prosopis farcta* (Solander ex Russell) Macbride", "*Prosopis pallida* (Humboldt & Bonpland ex Willdenow) Humboldt, Bonpland, & Kunth", "*Setaria pallide-fusca* (Schumacher) Stapf & Hubbard", and "*Spermacoce alata* (Aublet) de Candolle" to read as set forth below.

■ c. By adding, in alphabetical order, entries for "*Acacia nilotica* (Linnaeus) Wildenow ex Delile", "*Ageratina riparia* (Regel) R.M. King and H. Robinson", "*Arctotheca calendula* (Linnaeus) Levyns", "*Euphorbia terracina* Linnaeus", "*Inula britannica* Linnaeus", "*Mimosa diplotricha* C. Wright", "*Moraea collina* Thunberg", "*Moraea flaccida* (Sweet) Steudel", "*Moraea miniata* Andrews ", "*Moraea ochroleuca* (Salisbury) Drapiez", "*Moraea pallida* (Baker) Goldblatt", "*Onopordum acaulon* Linnaeus", and "*Onopordum illyricum* Linnaeus".

### § 361.6 Noxious weed seeds.

(a) * * *

(1) * * *

*Digitaria abyssinica* (Hochstetter ex A. Richard) Stapf

* * * * *

*Drymaria arenariodes* Humboldt & Bonpland ex J.A. Schultes

* * * * *

*Imperata cylindrica* (Linnaeus) Palisot de Beauvois

* * * * *

*Mikania micrantha* Kunth

* * * * *

*Prosopis farcta* (Banks & Solander) J.F. Macbride

* * * * *

*Prosopis pallida* (Humboldt & Bonpland ex Willdenow) Kunth

* * * * *

*Setaria pumila* (Poir.) Roem. & Schult. subsp. *pallidefusca* (Schumach.) B.K. Simon

* * * * *

*Spermacoce alata* Aublet

* * * * *

Done in Washington, DC, this 4th day of November 2010.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

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## FEDERAL HOUSING FINANCE AGENCY

## 12 CFR Part 1208

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

## Office of Federal Housing Enterprise Oversight

## 12 CFR Part 1704

**RIN 2590–AA15**

## Debt Collection

**AGENCY:** Federal Housing Finance Agency; Office of Federal Housing Enterprise Oversight, HUD.

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** The Federal Housing Finance Agency (FHFA) is issuing an interim final rule with request for comments on Debt Collection. The interim final rule sets forth procedures for use by FHFA in collecting debts owed to the Federal Government. Agencies are required by law to issue a regulation on their debt collection procedures. The interim final rule includes procedures for collection of debts through salary offset, administrative offset, tax refund offset, and administrative wage garnishment. FHFA requests comments on the interim final rule.

**DATES:** The interim final rule is effective on November 10, 2010. FHFA will accept written comments on the interim final rule on or before January 10, 2011. For additional information, *see* **SUPPLEMENTARY INFORMATION.**

**ADDRESSES:** You may submit your comments on the interim final rule, identified by regulatory information number (RIN) 2590–AA15, by any one of the following methods:

- *E-mail:* Comments to Alfred M. Pollard, General Counsel may be sent by e-mail at *RegComments@fhfa.gov.* Please include "RIN 2590–AA15" in the subject line of the message.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by e-mail to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by FHFA. Include the following information in the subject line of your submission: Comments/RIN 2590–AA15.
- *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA15, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552.
- *Hand Delivered/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA15, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The package should be logged at the Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.

**FOR FURTHER INFORMATION CONTACT:** Andra Grossman, Senior Counsel, telephone (202) 343–1313 or Gail F. Baum, Associate General Counsel, telephone (202) 343–1508 (not toll-free numbers); Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The telephone number for the Telecommunications Device for the Deaf is (800) 877–8339.

**SUPPLEMENTARY INFORMATION:**

### I. Comments

The Federal Housing Finance Agency (FHFA) invites comments on all aspects of the interim final rule, and will take all comments into consideration before issuing the final regulation. Copies of all comments will be posted without change, including any personal information you provide, such as your

name and address, on the FHFA Internet Web site at *http://www.fhfa.gov.* In addition, copies of all comments received will be available for examination by the public on business days between the hours of 10 a.m. and 3 p.m., at the Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. To make an appointment to inspect comments, please call the Office of General Counsel at (202) 414–6924.

## II. Background

### *A. Establishment of the Federal Housing Finance Agency*

The Housing and Economic Recovery Act of 2008 (HERA), Public Law 110–289, 122 Stat. 2654, amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501 *et seq.*) (Safety and Soundness Act) and the Federal Home Loan Bank Act (12 U.S.C. 1421 *et seq.*) to establish FHFA as an independent agency of the Federal Government.[1] HERA transferred the supervisory and oversight responsibilities over the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, Enterprises), and the Federal Home Loan Banks (collectively, regulated entities), from the Office of Federal Housing Enterprise Oversight (OFHEO) and the Federal Housing Finance Board (FHFB), respectively, to FHFA. FHFA was established to oversee the prudential operations of the regulated entities to ensure that they operate in a safe and sound manner, including being adequately capitalized; and carry out their public policy missions, including fostering liquid, efficient, competitive and resilient national housing finance markets. The regulated entities continue to operate under regulations promulgated by OFHEO and FHFB and such regulations are enforceable by the Director of FHFA until such regulations are modified, terminated, set aside, or superseded by regulations issued by FHFA.[2]

The interim final rule, when published in its final form, would supersede OFHEO's Debt Collection regulation at 12 CFR part 1704.

### *B. Debt Collection*

The interim final rule implements the requirements of the Federal Claims Collection Act[3] and the Debt Collection Improvement Act of 1996 (DCIA).[4] The DCIA requires agencies to either (1) adopt without change regulations on collecting debts by administrative offset promulgated by the Department of Justice or Department of the Treasury; or (2) prescribe agency regulations for collecting such debts by administrative offset, which are consistent with the Federal Claims Collection Standards (FCCS).[5] The agency regulations are to protect the minimum due process rights that must be afforded to a debtor when an agency seeks to collect a debt, including the ability to verify, challenge, and compromise claims, and provide access to administrative appeals procedures which are both reasonable and protect the interests of the United States. FHFA has determined to issue its own agency regulations for debt collection, to account for FHFA's status as an independent regulatory agency, and for ease of use. The interim final rule is consistent with the FCCS, as required by the DCIA. In addition, the tax refund offset provisions of the regulations satisfy the requirement of the Internal Revenue Service that FHFA adopt agency regulations authorizing its collection of debts by administrative offset in general and tax refund offset in particular.[6] The administrative wage garnishment provisions of the regulations satisfy the requirement in 31 CFR 285.11(f) that FHFA adopt regulations for the conduct of administrative wage garnishment hearings.

#### 1. Subpart A, General

Subpart A addresses the collection of debts in general, and incorporates the debt collection procedures of the FCCS.[7] Subpart A also provides, in accordance with applicable law and regulations, that FHFA will transfer debts that are delinquent for over 180 days to the Secretary of the Department of the Treasury for collection or other appropriate action. It further provides that debts that are delinquent for less than 180 days may be referred to debt collection centers for collection.

#### 2. Subpart B, Salary Offset

Subpart B provides the procedures to collect debts owed to the Federal Government by FHFA employees and former FHFA employees who are employed by other agencies by salary offset, that is, by deductions from the current pay account of the employee.[8] Agencies are required to promulgate their own salary offset regulations[9] that must conform with OPM regulation and be approved by OPM before becoming effective.[10] The salary offset provisions of subpart B of the interim final rule, as well as corresponding definitions in subpart A, have been reviewed and approved by OPM.

#### 3. Subpart C, Administrative Offset

Subpart C provides procedures that FHFA will use to collect debts by administrative offset, if salary offset is not applicable or appropriate. Under this method of collection, FHFA may collect a debt from a debtor by withholding money that is either payable to the debtor or held by the Federal Government for the debtor.[11] Subpart C is consistent with the procedures of administrative offset set forth in 31 U.S.C. 3716 and the FCCS.

#### 4. Subpart D, Tax Refund Offset

Subpart D sets forth the procedures used for collection by tax refund offset. If collection by salary offset or administrative offset is not feasible, FHFA may seek to recover monies owed it by requesting that the Internal Revenue Service reduce a tax refund to a debtor by the amount of the debt and pay such monies to the agency.[12] In order to use the tax refund offset method of collection, the Internal Revenue Service requires an agency to promulgate temporary or permanent regulations covering all three collection methods: salary offset, administrative offset, and tax refund offset.[13] The publication of FHFA's debt collection regulation would satisfy that requirement.

#### 5. Subpart E, Administrative Wage Garnishment

Subpart E sets forth administrative wage garnishment procedures, authorized by the DCIA.[14] DCIA permits agencies to collect debts by ordering a non-Federal employer to deduct amounts up to 15 percent of an employee's disposable pay (or a greater amount to which the employee consents). Treasury regulations require agencies to adopt regulations for the conduct of administrative wage

[1] *See* Division A, titled the "Federal Housing Finance Regulatory Reform Act of 2008," Title I, Section 1101 of HERA.

[2] *See* sections 1302 and 1312 of HERA.

[3] Public Law 89–508, 80 Stat. 308 (1966), as amended by the Debt Collection Act of 1982, Public Law 97–365, 96 Stat. 1749 (1982).

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

[5] 31 U.S.C. 3716.

[6] 31 U.S.C. 3720A(b)(4); 26 CFR 301.6402–6(b); 31 CFR 285.2(c).

[7] 31 CFR chapter IX.

[8] 5 U.S.C. 5514(a)(1). The procedures for salary offset are governed by 5 U.S.C. 5514 and by Office of Personnel Management (OPM) regulation at 5 CFR part 550, subpart K.

[9] 5 U.S.C. 5514(b)(1).

[10] 5 CFR 550.1105(a)(1).

[11] 31 U.S.C. 3716.

[12] 31 U.S.C. 3720A, 26 CFR 301.6402–6.

[13] 31 U.S.C. 3720A(b)(4); 26 CFR 301.6402–6(b).

[14] 31 U.S.C. 3720D.

garnishment hearings.[15] The provisions of FHFA's interim final rule are consistent with DCIA and Treasury regulations, essentially tracking Treasury's regulation.

*C. Effective Date and Request for Comments*

FHFA has determined that this interim final rule pertains to agency practice and procedure and is interpretative in nature. The procedures contained in the interim final rule for salary offset, administrative offset, tax refund offset, and administrative wage garnishment are mandated by law and by regulations promulgated by OPM, jointly by the Department of the Treasury and the Department of Justice, and by the IRS. Therefore, the interim final rule is not subject to the Administrative Procedure Act (APA) and the requirements of the APA for a notice and comment period and for a delayed effective date.[16] Nevertheless, FHFA requests comments from the public and will take all comments into consideration before promulgating the final rule. Copies of all comments received will be posted on the agency Web site and made available for examination by the public as indicated in the **COMMENTS** section above.

**Regulatory Impact**

*Paperwork Reduction Act*

The interim final rule does not contain any information collection requirement that requires the approval of OMB under the Paperwork Reduction Act.[17]

*Regulatory Flexibility Act*

The Regulatory Flexibility Act[18] requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities.[19] FHFA has considered the impact of the interim final rule under the Regulatory Flexibility Act. FHFA certifies that the interim final rule is not likely to have a significant economic impact on a substantial number of small business entities because the regulation applies primarily to Federal employees and a limited number of Federal and business entities.[20]

**List of Subjects**

*12 CFR Part 1208*

Administrative practice and procedure, Claims, Debt collection, Government employees, Wages.

*12 CFR Part 1704*

Administrative practice and procedure, Debt collection.

**Authority and Issuance**

■ Accordingly, for the reasons stated in the preamble, under the authority of 12 U.S.C. 4526, FHFA is amending Chapters XII and XVII of Title 12 of the Code of Federal Regulations as follows:

**CHAPTER XII—FEDERAL HOUSING FINANCE AGENCY**

**SUBCHAPTER A—ORGANIZATION AND OPERATIONS**

■ 1. Add part 1208 to Subchapter A to read as follows:

## PART 1208—DEBT COLLECTION

**Subpart A—General**

Sec.
1208.1 Authority and scope.
1208.2 Definitions.
1208.3 Referrals to the Department of the Treasury, collection services, and use of credit bureaus.
1208.4 Reporting delinquent debts to credit bureaus.
1208.5 to 1208.19 [Reserved]

**Subpart B—Salary Offset**

1208.20 Authority and scope.
1208.21 Notice requirements before salary offset where FHFA is the creditor agency.
1208.22 Review of FHFA records related to the debt.
1208.23 Opportunity for a hearing where FHFA is the creditor agency.
1208.24 Certification where FHFA is the creditor agency.
1208.25 Voluntary repayment agreements as alternative to salary offset where FHFA is the creditor agency.
1208.26 Special review where FHFA is the creditor agency.
1208.27 Notice of salary offset where FHFA is the paying agency.
1208.28 Procedures for salary offset where FHFA is the paying agency.
1208.29 Coordinating salary offset with other agencies.
1208.30 Interest, penalties, and administrative costs.
1208.31 Refunds.
1208.32 Request from a creditor agency for the services of a hearing official.
1208.33 Non-waiver of rights by payments.

**Subpart C—Administrative Offset**

1208.40 Authority and scope.
1208.41 Collection.
1208.42 Administrative offset prior to completion of procedures.
1208.43 Procedures.
1208.44 Interest, penalties, and administrative costs.
1208.45 Refunds.
1208.46 No requirement for duplicate notice.
1208.47 Requests for administrative offset to other Federal agencies.
1208.48 Requests for administrative offset from other Federal agencies.
1208.49 Administrative offset against amounts payable from Civil Service Retirement and Disability Fund.

**Subpart D—Tax Refund Offset**

1208.50 Authority and scope.
1208.51 Definitions.
1208.52 Procedures.
1208.53 No requirement for duplicate notice.
1208.54 to 1208.59 [Reserved]

**Subpart E—Administrative Wage Garnishment**

1208.60 Scope and purpose.
1208.61 Notice.
1208.62 Debtor's rights.
1208.63 Form of hearing.
1208.64 Effect of timely request.
1208.65 Failure to timely request a hearing.
1208.66 Hearing official.
1208.67 Procedure.
1208.68 Format of hearing.
1208.69 Date of decision.
1208.70 Content of decision.
1208.71 Finality of agency action.
1208.72 Failure to appear.
1208.73 Wage garnishment order.
1208.74 Certification by employer.
1208.75 Amounts withheld.
1208.76 Exclusions from garnishment.
1208.77 Financial hardship.
1208.78 Ending garnishment.
1208.79 Prohibited actions by employer.
1208.80 Refunds.
1208.81 Right of action.

**Authority:** 5 U.S.C. 5514; 12 U.S.C. 4526; 26 U.S.C. 6402(d); 31 U.S.C. 3701–3720D; 31 CFR 285.2; 31 CFR Chapter IX.

### Subpart A—General

#### § 1208.1 Authority and scope.

(a) *Authority.* FHFA issues this part 1208 under the authority of 5 U.S.C. 5514 and 31 U.S.C. 3701–3720D, and in conformity with the Federal Claims Collection Standards (FCCS) at 31 CFR chapter IX; the regulations on salary offset issued by the Office of Personnel Management (OPM) at 5 CFR part 550, subpart K; the regulations on tax refund offset issued by the United States Department of the Treasury (Treasury) at 31 CFR 285.2; and the regulations on administrative wage garnishment issued by Treasury at 31 CFR 285.11.

(b) *Scope.*—(1) This part applies to debts that are owed to the Federal Government by Federal employees; other persons, organizations, or entities

[15] 31 CFR 285.11.

[16] 5 U.S.C. 553(b) and (c).

[17] 44 U.S.C. 3501 *et seq.*

[18] 5 U.S.C. 601 *et seq.*

[19] 5 U.S.C. 605(b).

[20] Id.

that are indebted to FHFA; and by Federal employees of FHFA who are indebted to other agencies, except for those debts listed in paragraph (b)(2) of this section.

(2) Subparts B and C of this part 1208 do not apply to—

(i) Debts or claims arising under the Internal Revenue Code (26 U.S.C. 1 *et seq.*), the Social Security Act (42 U.S.C. 301 *et seq.*) or the tariff laws of the United States;

(ii) Any case to which the Contract Disputes Act (41 U.S.C. 601 *et seq.*) applies;

(iii) Any case where collection of a debt is explicitly provided for or provided by another statute, *e.g.* travel advances under 5 U.S.C. 5705 and employee training expenses under 5 U.S.C. 4108, or, as provided for by title 11 of the United States Code, when the claims involve bankruptcy;

(iv) Any debt based in whole or in part on conduct in violation of the antitrust laws or involving fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any party having an interest in the claim, unless the Department of Justice authorizes FHFA to handle the collection; or

(v) Claims between agencies.

(3) Nothing in this part precludes the compromise, suspension, or termination of collection actions, where appropriate, under standards implementing the Debt Collection Improvement Act (DCIA) (31 U.S.C. 3701 *et seq.*), the FCCS (31 CFR chapter IX) or the use of alternative dispute resolution methods if they are not inconsistent with applicable law and regulations.

(4) Nothing in this part precludes an employee from requesting waiver of an erroneous payment under 5 U.S.C. 5584, 10 U.S.C. 2774, or 32 U.S.C. 716, or from questioning the amount or validity of a debt, in the manner set forth in this part.

**§ 1208.2 Definitions.**

The following terms apply to this part, unless defined otherwise elsewhere–

*Administrative offset* means an action, pursuant to 31 U.S.C. 3716, in which the Federal Government withholds funds payable to, or held by the Federal Government for a person, organization, or other entity in order to collect a debt from that person, organization, or other entity. Such funds include funds payable by the Federal Government on behalf of a State Government.

*Agency* means an executive department or agency; a military department; the United States Postal Service; the Postal Regulatory Commission; any nonappropriated fund instrumentality described in 5 U.S.C. 2105(c); the United States Senate; the United States House of Representatives; any court, court administrative office, or instrumentality in the judicial or legislative branches of the Government; or a Government corporation. If an agency under this definition is a component of an agency, the broader definition of agency may be used in applying the provisions of 5 U.S.C. 5514(b) (concerning the authority to prescribe regulations).

*Centralized administrative offset* means the mandatory referral to the Secretary of the Treasury by a creditor agency of a past due debt which is more than 180 days delinquent, for the purpose of collection under the Treasury's centralized offset program.

*Certification* means a written statement received by a paying agency from a creditor agency that requests the paying agency to institute salary offset of an employee, to the Financial Management Service (FMS) for offset or to the Secretary of the Treasury for centralized administrative offset, and specifies that required procedural protections have been afforded the debtor. Where the debtor requests a hearing on a claimed debt, the decision by a hearing official or administrative law judge constitutes a certification.

*Claim or debt* (used interchangeably in this part) means any amount of funds or property that has been determined by an agency official to be due the Federal Government by a person, organization, or entity, except another agency. It also means any amount of money, funds, or property owed by a person to a State, the District of Columbia, American Samoa, Guam, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, or the Commonwealth of Puerto Rico. For purposes of this part, a debt owed to FHFA constitutes a debt owed to the Federal Government. A claim or debt includes:

(1) Funds owed on account of loans made, insured, or guaranteed by the Federal Government, including any deficiency or any difference between the price obtained by the Federal Government in the sale of a property and the amount owed to the Federal Government on a mortgage on the property;

(2) Unauthorized expenditures of agency funds;

(3) Overpayments, including payments disallowed by audits performed by the Inspector General of the agency administering the program;

(4) Any amount the Federal Government is authorized by statute to collect for the benefit of any person;

(5) The unpaid share of any non-Federal partner in a program involving a Federal payment, and a matching or cost-sharing payment by the non-Federal partner;

(6) Any fine or penalty assessed by an agency; and

(7) Other amounts of money or property owed to the Federal Government.

*Compromise* means the settlement or forgiveness of a debt under 31 U.S.C. 3711, in accordance with standards set forth in the FCCS and applicable Federal law.

*Creditor agency* means the agency to which the debt is owed, including a debt collection center when acting on behalf of a creditor agency in matters pertaining to the collection of a debt.

*Debt* See the definition of the terms "Claim or debt" of this section.

*Debt collection center* means the Department of the Treasury or any other agency or division designated by the Secretary of the Treasury with authority to collect debts on behalf of creditor agencies in accordance with 31 U.S.C. 3711(g).

*Debtor* means the person, organization, or entity owing money to the Federal Government.

*Delinquent debt* means a debt that has not been paid by the date specified in the agency's initial written demand for payment or applicable agreement or instrument (including a post-delinquency payment agreement) unless other satisfactory payment arrangements have been made.

*Director* means the Director of FHFA or Director's designee.

*Disposable pay* means that part of current basic pay, special pay, incentive pay, retired pay, or retainer pay (or in the case of an employee not entitled to basic pay, other authorized pay) remaining after the deduction of any amount required by law to be withheld (other than deductions to execute garnishment orders in accordance with 5 CFR parts 581 and 582). FHFA will apply the order of precedence contained in OPM guidance (PPM–2008–01; Order Of Precedence When Gross Pay Is Not Sufficient To Permit All Deductions), as follows—

(1) Retirement deductions for defined benefit plan (including Civil Service Retirement System, Federal Employees Retirement System, or other similar defined benefit plan);

(2) Social security (OASDI) tax;

(3) Medicare tax;

(4) Federal income tax;

(5) Basic health insurance premium (including Federal Employees Health

Benefits premium, pre-tax or post-tax, or premium for similar benefit under another authority but not including amounts deducted for supplementary coverage);

(6) Basic life insurance premium (including Federal Employees' Group Life Insurance—FEGLI—Basic premium or premium for similar benefit under another authority);

(7) State income tax;

(8) Local income tax;

(9) Collection of debts owed to the U.S. Government (e.g., tax debt, salary overpayment, failure to withhold proper amount of deductions, advance of salary or travel expenses, etc.; debts which may or may not be delinquent; debts which may be collected through the Treasury's Financial Management Services Treasury Offset Program, an automated centralized debt collection program for collecting Federal debt from Federal payments):

(i) Continuous levy under the Federal Payment Levy Program (tax debt); and

(ii) Salary offsets (whether involuntary under 5 U.S.C. 5514 or similar authority or required by a voluntarily signed written agreement; if multiple debts are subject to salary offset, the order is based on when each offset commenced—with earliest commencing offset at the top of the order—unless there are special circumstances, as determined by the paying agency).

(10) Court-Ordered collection/debt:

(i) Child support (may include attorney and other fees as provided for in 5 CFR 581.102(d)). If there are multiple child support orders, the priority of orders is governed by 42 U.S.C. 666(b) and implementing regulations, as required by 42 U.S.C. 659(d)(2);

(ii) Alimony (may include attorney and other fees as provided for in 5 CFR 581.102(d)). If there are multiple alimony orders, they are prioritized on a first-come, first-served basis, as required by 42 U.S.C. 659(d)(3);

(iii) Bankruptcy; and

(iv) Commercial garnishments.

(11) Optional benefits:

(i) Health care/limited-expense health care flexible spending accounts (pre-tax benefit under FedFlex or equivalent cafeteria plan);

(ii) Dental (pre-tax benefit under FedFlex or equivalent cafeteria plan);

(iii) Vision (pre-tax benefit under FedFlex or equivalent cafeteria plan);

(iv) Health Savings Account (pre-tax benefit under FedFlex or equivalent cafeteria plan);

(v) Optional life insurance premiums (FEGLI optional benefits or similar benefits under other authority);

(vi) Long-term care insurance premiums;

(vii) Dependent-care flexible spending accounts (pre-tax benefit under FedFlex or equivalent cafeteria plan);

(viii) Thrift Savings Plan (TSP):

(A) Loan payments;

(B) Basic contributions; and

(C) Catch-up contributions; and

(ix) Other optional benefits.

(12) Other voluntary deductions/allotments:

(i) Military service deposits;

(ii) Professional associations;

(iii) Union dues;

(iv) Charities;

(v) Bonds;

(vi) Personal account allotments (*e.g.,* to savings or checking account); and

(vii) Additional voluntary deductions (on first-come, first-served basis); and

(13) IRS paper levies.

*Employee* means a current employee of FHFA or other agency, including a current member of the Armed Forces or a Reserve of the Armed Forces of the United States.

*Federal Claims Collection Standards (FCCS)* means standards published at 31 CFR chapter IX.

*FHFA* means the Federal Housing Finance Agency.

*Garnishment* means the process of withholding amounts from the disposable pay of a person employed outside the Federal Government, and the paying of those amounts to a creditor in satisfaction of a withholding order.

*Hearing official* means an individual who is responsible for conducting any hearing with respect to the existence or amount of a debt claimed and for rendering a final decision on the basis of such hearing. A hearing official may not be under the supervision or control of the Director of FHFA when FHFA is the creditor agency but may be an administrative law judge.

*Notice of intent* means a written notice of a creditor agency to a debtor that states that the debtor owes a debt to the creditor agency and apprises the debtor of the applicable procedural rights.

*Notice of salary offset* means a written notice from the paying agency to an employee after a certification has been issued by a creditor agency that informs the employee that salary offset will begin at the next officially established pay interval.

*Paying agency* means an agency of the Federal Government that employs the individual who owes a debt to an agency of the Federal Government and transmits payment requests in the form of certified payment vouchers, or other similar forms, to a disbursing official for disbursement. The same agency may be both the creditor agency and the paying agency.

*Salary offset* means an administrative offset to collect a debt under 5 U.S.C. 5514 by deductions at one or more officially established pay intervals from the current pay account of an employee without his or her consent.

*Waiver* means the cancellation, remission, forgiveness, or non-recovery of a debt allegedly owed by an employee to FHFA or another agency as permitted or required by 5 U.S.C. 5584 or 8346(b), 10 U.S.C. 2774, 32 U.S.C. 716, or any other law.

*Withholding order* means any order for withholding or garnishment of pay issued by an agency, or judicial, or administrative body. For purposes of administrative wage garnishment, the terms "wage garnishment order" and "garnishment order" have the same meaning as "withholding order."

**§ 1208.3 Referrals to the Department of the Treasury, collection services, and use of credit bureaus.**

(a) *Referral of delinquent debts.*—(1) FHFA shall transfer to the Secretary of the Department of the Treasury any past due, legally enforceable nontax debt that has been delinquent for a period of 180 days or more so that the Secretary may take appropriate action to collect the debt or terminate collection action in accordance with 31 U.S.C. 3716, 5 U.S.C. 5514, 5 CFR 550.1108, 31 CFR part 285, and the FCCS.

(2) FHFA may transfer any past due, legally enforceable nontax debt that has been delinquent for less than a period of 180 days to a debt collection center for collection in accordance with 31 U.S.C. 3716, 5 U.S.C. 5514, 5 CFR 550.1108, 31 CFR part 285, and the FCCS.

(b) *Collection Services.* Section 13 of the Debt Collection Act (31 U.S.C. 3718) authorizes agencies to enter into contracts for collection services to recover debts owed the Federal Government. The Debt Collection Act requires that certain provisions be contained in such contracts, including:

(1) The agency retains the authority to resolve a dispute, including the authority to terminate a collection action or refer the matter to the Attorney General for civil remedies; and

(2) The contractor is subject to the Privacy Act of 1974, as it applies to private contractors, as well as subject to State and Federal laws governing debt collection practices.

(c) *Referrals to collection agencies.*—(1) FHFA has authority to contract for collection services to recover delinquent

debts in accordance with 31 U.S.C. 3718(a) and the FCCS (31 CFR 901.5).

(2) FHFA may use private collection agencies where it determines that their use is in the best interest of the Federal Government. Where FHFA determines that there is a need to contract for collection services, the contract will provide that:

(i) The authority to resolve disputes, compromise claims, suspend or terminate collection action, or refer the matter to the Department of Justice for litigation or to take any other action under this part will be retained by FHFA;

(ii) Contractors are subject to the Privacy Act of 1974, as amended, to the extent specified in 5 U.S.C. 552a(m) and to applicable Federal and State laws and regulations pertaining to debt collection practices, such as the Fair Debt Collection Practices Act, 15 U.S.C. 1692;

(iii) The contractor is required to strictly account for all amounts collected;

(iv) The contractor must agree that uncollectible accounts shall be returned with appropriate documentation to enable FHFA to determine whether to pursue collection through litigation or to terminate collection; and

(v) The contractor must agree to provide any data in its files requested by FHFA upon returning the account to FHFA for subsequent referral to the Department of Justice for litigation.

**§ 1208.4 Reporting delinquent debts to credit bureaus.**

(a) FHFA may report delinquent debts to consumer reporting agencies (31 U.S.C. 3701(a)(3), 3711). Sixty calendar days prior to release of information to a consumer reporting agency, the debtor shall be notified, in writing, of the intent to disclose the existence of the debt to a consumer reporting agency. Such notice of intent may be a separate correspondence or included in correspondence demanding direct payment. The notice shall be in conformance with 31 U.S.C. 3711(e) and the FCCS. In the notice, FHFA shall provide the debtor with:

(1) An opportunity to inspect and copy agency records pertaining to the debt;

(2) An opportunity for an administrative review of the legal enforceability or past due status of the debt;

(3) An opportunity to enter into a repayment agreement on terms satisfactory to FHFA to prevent FHFA from reporting the debt as overdue to consumer reporting agencies, and provide deadlines and method for requesting this relief;

(4) An explanation of the rate of interest that will accrue on the debt, that all costs incurred to collect the debt will be charged to the debtor, the authority for assessing these costs, and the manner in which FHFA will calculate the amount of these costs;

(5) An explanation that FHFA will report the debt to the consumer reporting agencies to the detriment of the debtor's credit rating; and

(6) A description of the collection actions that the agency may take in the future if those presently proposed actions do not result in repayment of the debt, including the filing of a lawsuit against the borrower by the agency and assignment of the debt for collection by offset against Federal income tax refunds or the filing of a lawsuit against the debtor by the Federal Government.

(b) The information that may be disclosed to the consumer reporting agency is limited to:

(1) The debtor's name, address, social security number or taxpayer identification number, and any other information necessary to establish the identity of the individual;

(2) The amount, status, and history of the claim; and

(3) FHFA program or activity under which the claim arose.

(c) *Subsequent reports.* FHFA may update its report to the credit bureau whenever it has knowledge of events that substantially change the status of the amount of liability.

(d) *Subsequent reports of delinquent debts.* Pursuant to 31 CFR 901.4, FHFA will report delinquent debt to the Department of Housing and Urban Development's Credit Alert Interactive Voice Response System (CAIVRS).

(e) *Privacy Act considerations.* A delinquent debt may not be reported under this section unless a notice issued pursuant to the Privacy Act, 5 U.S.C. 552a(e)(4), authorizes the disclosure of information about the debtor to a credit bureau or CAIVRS.

**§§ 1208.5 to 1208.19 [Reserved]**

## Subpart B—Salary Offset

**§ 1208.20 Authority and scope.**

(a) *Authority.* FHFA may collect debts owed by employees to the Federal Government by means of salary offset under the authority of 5 U.S.C. 5514; 5 CFR part 550, subpart K; and this subpart B.

(b) *Scope.*—(1) The procedures set forth in this subpart B apply to situations where FHFA is attempting to collect a debt by salary offset that is owed to it by an individual employed by FHFA or by another agency; or where FHFA employs an individual who owes a debt to another agency.

(2) The procedures set forth in this subpart B do not apply to:

(i) Any routine intra-agency adjustment of pay that is attributable to clerical or administrative error or delay in processing pay documents that have occurred within the four pay periods preceding the adjustment, or any adjustment to collect a debt amounting to $50 or less. However, at the time of any such adjustment, or as soon thereafter as possible, FHFA or its designated payroll agent shall provide the employee with a written notice of the nature and the amount of the adjustment and a point of contact for contesting such adjustment.

(ii) Any negative adjustment to pay that arises from an employee's election of coverage or a change in coverage under a Federal benefits program that requires periodic deductions from pay, if the amount to be recovered was accumulated over four pay periods or less. However, at the time such adjustment is made, FHFA or its payroll agent shall provide in the employee's earnings statement a clear and concise statement that informs the employee of the previous overpayment.

**§ 1208.21 Notice requirements before salary offset where FHFA is the creditor agency.**

(a) *Notice of Intent.* Deductions from an employee's salary may not be made unless FHFA provides the employee with a Notice of Intent at least 30 calendar days before the salary offset is initiated.

(b) *Contents of Notice of Intent.* The Notice of Intent shall advise the employee of the following:

(1) That FHFA has reviewed the records relating to the claim and has determined that the employee owes the debt;

(2) That FHFA intends to collect the debt by deductions from the employee's current disposable pay account;

(3) The amount of the debt and the facts giving rise to the debt;

(4) The frequency and amount of the intended deduction (stated as a fixed dollar amount or as a percentage of pay not to exceed 15 percent of disposable pay), and the intention to continue the deductions until the debt and all accumulated interest are paid in full or otherwise resolved;

(5) The name, address, and telephone number of the person to whom the employee may propose a written alternative schedule for voluntary repayment, in lieu of salary offset. The employee shall include a justification for the alternative schedule in his or her

proposal. If the terms of the alternative schedule are agreed upon by the employee and FHFA, the alternative written schedule shall be signed by both the employee and FHFA;

(6) An explanation of FHFA's policy concerning interest, penalties, and administrative costs, the date by which payment should be made to avoid such costs, and a statement that such assessments must be made unless excused in accordance with the FCCS;

(7) The employee's right to inspect and copy all records of FHFA pertaining to his or her debt that are not exempt from disclosure or to receive copies of such records if he or she is unable personally to inspect the records as the result of geographical or other constraints;

(8) The name, address, and telephone number of the FHFA employee to whom requests for access to records relating to the debt must be sent;

(9) The employee's right to a hearing conducted by an impartial hearing official with respect to the existence and amount of the debt claimed or the repayment schedule *i.e.,* the percentage of disposable pay to be deducted each pay period, so long as a request is filed by the employee as prescribed in § 1208.23; the name and address of the office to which the request for a hearing should be sent; and the name, address, and telephone number of a person whom the employee may contact concerning procedures for requesting a hearing;

(10) The filing of a request for a hearing on or before the 30th calendar day following receipt of the Notice of Intent will stay the commencement of collection proceedings and a final decision on whether a hearing will be held (if a hearing is requested) or will be issued at the earliest practical date, but not later than 60 calendar days after the request for the hearing;

(11) FHFA shall initiate certification procedures to implement a salary offset unless the employee files a request for a hearing on or before the 30th calendar day following receipt of the Notice of Intent;

(12) Any knowingly false or frivolous statement, representations, or evidence may subject the employee to:

(i) Disciplinary procedures appropriate under 5 U.S.C. chapter 75, 5 CFR part 752, or any other applicable statutes or regulations;

(ii) Penalties under the False Claims Act, 31 U.S.C. 3729 through 3731, or under any other applicable statutory authority; or

(iii) Criminal penalties under 18 U.S.C. 286, 287, 1001, and 1002, or under any other applicable statutory authority;

(13) That the employee also has the right to request waiver of overpayment pursuant to 5 U.S.C. 5584 and may exercise any other rights and remedies available to the employee under statutes or regulations governing the program for which the collection is being made;

(14) Unless there are applicable contractual or statutory provisions to the contrary, amounts paid on or deducted from debts that are later waived or found not to be owed to the Federal Government shall be promptly refunded to the employee; and

(15) Proceedings with respect to the debt are governed by 5 U.S.C. 5514.

**§ 1208.22 Review of FHFA records related to the debt.**

(a) *Request for review.* An employee who desires to inspect or copy FHFA records related to a debt owed by the employee to FHFA must send a letter to the individual designated in the Notice of Intent requesting access to the relevant records. The letter must be received in the office of that individual within 15 calendar days after the employee's receipt of the Notice of Intent.

(b) *Review location and time.* In response to a timely request submitted by the employee, the employee shall be notified of the location and time when the employee may inspect and copy records related to his or her debt that are not exempt from disclosure. If the employee is unable personally to inspect such records as the result of geographical or other constraints, FHFA shall arrange to send copies of such records to the employee. The debtor shall pay copying costs unless they are waived by FHFA. Copying costs shall be assessed pursuant to FHFA's Freedom of Information Act Regulation, 12 CFR part 1202.

**§ 1208.23 Opportunity for a hearing where FHFA is the creditor agency.**

(a) *Request for a hearing.*—(1) *Time-period for submission.* An employee who requests a hearing on the existence or amount of the debt held by FHFA or on the salary-offset schedule proposed by FHFA, must send a written request to FHFA. The request for a hearing must be received by FHFA on or before the 30th calendar day following receipt by the employee of the Notice of Intent.

(2) *Failure to submit timely.* If the employee files a request for a hearing after the expiration of the 30th calendar day, the employee shall not be entitled to a hearing. However, FHFA may accept the request if the employee can show that the delay was the result of circumstances beyond his or her control or that he or she failed to receive actual notice of the filing deadline.

(3) *Contents of request.* The request for a hearing must be signed by the employee and must fully identify and explain with reasonable specificity all the facts, evidence, and witnesses, if any, that the employee believes support his or her position. The employee must also specify whether he or she requests an oral hearing. If an oral hearing is requested, the employee should explain why a hearing by examination of the documents without an oral hearing would not resolve the matter.

(4) *Failure to request a hearing.* The failure of an employee to request a hearing will be considered an admission by the employee that the debt exists in the amount specified in the Notice of Intent that was provided to the employee under § 1208.21(b).

(b) *Obtaining the services of a hearing official.*—(1) *Debtor is not an FHFA employee.* When the debtor is not an FHFA employee and FHFA cannot provide a prompt and appropriate hearing before an administrative law judge or other hearing official, FHFA may request a hearing official from an agent of the paying agency, as designated in 5 CFR part 581, appendix A, or as otherwise designated by the paying agency. The paying agency must cooperate with FHFA to provide a hearing official, as required by the FCCS.

(2) *Debtor is an FHFA employee.* When the debtor is an FHFA employee, FHFA may contact any agent of another agency, as designated in 5 CFR part 581, appendix A, or as otherwise designated by the agency, to request a hearing official.

(c) *Procedure.*—(1) *Notice of hearing.* After the employee requests a hearing, the hearing official shall notify the employee of the form of the hearing to be provided. If the hearing will be oral, the notice shall set forth the date, time, and location of the hearing, which must occur no more than 30 calendar days after the request is received, unless the employee requests that the hearing be delayed. If the hearing will be conducted by an examination of documents, the employee shall be notified within 30 calendar days that he or she should submit evidence and arguments in writing to the hearing official within 30 calendar days.

(2) *Oral hearing.*—(i) An employee who requests an oral hearing shall be provided an oral hearing if the hearing official determines that the matter cannot be resolved by an examination of the documents alone, as for example, when an issue of credibility or veracity

is involved. The oral hearing need not be an adversarial adjudication; and rules of evidence need not apply. Witnesses who testify in an oral hearing shall do so under oath or affirmation.

(ii) Oral hearings may take the form of, but are not limited to:

(A) Informal conferences with the hearing official in which the employee and agency representative are given full opportunity to present evidence, witnesses, and argument;

(B) Informal meetings in which the hearing examiner interviews the employee; or

(C) Formal written submissions followed by an opportunity for oral presentation.

(3) *Hearing by examination of documents.* If the hearing official determines that an oral hearing is not necessary, he or she shall make the determination based upon an examination of the documents.

(d) *Record.* The hearing official shall maintain a summary record of any hearing conducted under this section.

(e) *Decision.*—(1) The hearing official shall issue a written opinion stating his or her decision, based upon all evidence and information developed during the hearing, as soon as practicable after the hearing, but not later than 60 calendar days after the date on which the request was received by FHFA, unless the hearing was delayed at the request of the employee, in which case the 60-day decision period shall be extended by the number of days by which the hearing was postponed.

(2) The decision of the hearing official shall be final and is considered to be an official certification regarding the existence and the amount of the debt for purposes of executing salary offset under 5 U.S.C. 5514. If the hearing official determines that a debt may not be collected by salary offset, but FHFA finds that the debt is still valid, FHFA may seek collection of the debt through other means in accordance with applicable law and regulations.

(f) *Content of decision.* The written decision shall include:

(1) A summary of the facts concerning the origin, nature, and amount of the debt;

(2) The hearing official's findings, analysis, and conclusions; and

(3) The terms of any repayment schedules, if applicable.

(g) *Failure to appear.* If, in the absence of good cause shown, such as illness, the employee or the representative of FHFA fails to appear, the hearing official shall proceed with the hearing as scheduled, and make his or her decision based upon the oral testimony presented and the documentation submitted by both parties. At the request of both parties, the hearing official may schedule a new hearing date. Both parties shall be given reasonable notice of the time and place of the new hearing.

**§ 1208.24 Certification where FHFA is the creditor agency.**

(a) *Issuance.* FHFA shall issue a certification in all cases where the hearing official determines that a debt exists or the employee admits the existence and amount of the debt, as for example, by failing to request a hearing.

(b) *Contents.* The certification must be in writing and state:

(1) That the employee owes the debt;

(2) The amount and basis of the debt;

(3) The date the Federal Government's right to collect the debt first accrued;

(4) The date the employee was notified of the debt, the action(s) taken pursuant to FHFA's regulations, and the dates such actions were taken;

(5) If the collection is to be made by lump-sum payment, the amount and date such payment will be collected;

(6) If the collection is to be made in installments through salary offset, the amount or percentage of disposable pay to be collected in each installment and, if FHFA wishes, the desired commencing date of the first installment, if a date other than the next officially established pay period; and

(7) A statement that FHFA's regulation on salary offset has been approved by OPM pursuant to 5 CFR part 550, subpart K.

**§ 1208.25 Voluntary repayment agreements as alternative to salary offset where FHFA is the creditor agency.**

(a) *Proposed repayment schedule.* In response to a Notice of Intent, an employee may propose to repay the debt voluntarily in lieu of salary offset by submitting a written proposed repayment schedule to FHFA. Any proposal under this section must be received by FHFA within 30 calendar days after receipt of the Notice of Intent.

(b) *Notification of decision.* In response to a timely proposal by the employee, FHFA shall notify the employee whether the employee's proposed repayment schedule is acceptable. FHFA has the discretion to accept, reject, or propose to the employee a modification of the proposed repayment schedule.

(1) If FHFA decides that the proposed repayment schedule is unacceptable, the employee shall have 30 calendar days from the date he or she received notice of the decision in which to file a request for a hearing.

(2) If FHFA decides that the proposed repayment schedule is acceptable or the employee agrees to a modification proposed by FHFA, an agreement shall be put in writing and signed by both the employee and FHFA.

**§ 1208.26 Special review where FHFA is the creditor agency.**

(a) *Request for review.*—(1) An employee subject to salary offset or a voluntary repayment agreement may, at any time, request a special review by FHFA of the amount of the salary offset or voluntary repayment, based on materially changed circumstances, including, but not limited to, catastrophic illness, divorce, death, or disability.

(2) The request for special review must include an alternative proposed offset or payment schedule and a detailed statement, with supporting documents, that shows why the current salary offset or payments result in extreme financial hardship to the employee and his or her spouse and dependents. The detailed statement must indicate:

(i) Income from all sources;

(ii) Assets;

(iii) Liabilities;

(iv) Number of dependents;

(v) Expenses for food, housing, clothing, and transportation;

(vi) Medical expenses; and

(vii) Exceptional expenses, if any.

(b) *Evaluation of request.* FHFA shall evaluate the statement and supporting documents and determine whether the original offset or repayment schedule imposes extreme financial hardship on the employee, for example, by preventing the employee from meeting essential subsistence expenses such as food, housing, clothing, transportation, and medical care. FHFA shall notify the employee in writing within 30 calendar days of such determination, including, if appropriate, a revised offset or payment schedule. If the special review results in a revised offset or repayment schedule, FHFA shall provide a new certification to the paying agency.

**§ 1208.27 Notice of salary offset where FHFA is the paying agency.**

(a) *Notice.* Upon issuance of a proper certification by FHFA (for debts owed to FHFA) or upon receipt of a proper certification from another creditor agency, FHFA shall send the employee a written notice of salary offset.

(b) *Content of notice.* Such written notice of salary offset shall advise the employee of the:

(1) Certification that has been issued by FHFA or received from another creditor agency;

(2) Amount of the debt and of the deductions to be made; and

(3) Date and pay period when the salary offset will begin.

(c) If FHFA is not the creditor agency, FHFA shall provide a copy of the notice of salary offset to the creditor agency and advise the creditor agency of the dollar amount to be offset and the pay period when the offset will begin.

**§ 1208.28 Procedures for salary offset where FHFA is the paying agency.**

(a) *Generally.* FHFA shall coordinate salary deductions under this section and shall determine the amount of an employee's disposable pay and the amount of the salary offset subject to the requirements in this section. Deductions shall begin the pay period following the issuance of the certification by FHFA or the receipt by FHFA of the certification from another agency, or as soon thereafter as possible.

(b) Upon issuance of a proper certification by FHFA for debts owed to FHFA, or upon receipt of a proper certification from a creditor agency, FHFA shall send the employee a written notice of salary offset. Such notice shall advise the employee:

(1) That certification has been issued by FHFA or received from another creditor agency;

(2) Of the amount of the debt and of the deductions to be made; and provided for in the certification, and

(3) Of the initiation of salary offset at the next officially established pay interval or as otherwise provided for in the certification.

(c) Where appropriate, FHFA shall provide a copy of the notice to the creditor agency and advise such agency of the dollar amount to be offset and the pay period when the offset will begin.

(d) *Types of collection.*—(1) *Lump-sum payment.* If the amount of the debt is equal to or less than 15 percent of the employee's disposable pay, such debt ordinarily will be collected in one lump-sum payment.

(2) *Installment deductions.* Installment deductions will be made over a period not greater than the anticipated period of employment. The size and frequency of installment deductions will bear a reasonable relation to the size of the debt and the employee's ability to pay. However, the amount deducted for any pay period will not exceed 15 percent of the disposable pay from which the deduction is made unless the employee has agreed in writing to the deduction of a greater amount. The installment payment should normally be sufficient in size and frequency to liquidate the debt in no more than three years. Installment payments of less than $50 should be accepted only in the most unusual circumstances.

(3) *Lump-sum deductions from final check.* In order to liquidate a debt, a lump-sum deduction exceeding 15 percent of disposable pay may be made pursuant to 31 U.S.C. 3716 from any final salary payment due a former employee, whether the former employee was separated voluntarily or involuntarily.

(4) *Lump-sum deductions from other sources.* Whenever an employee subject to salary offset is separated from FHFA, and the balance of the debt cannot be liquidated by offset of the final salary check, FHFA may offset any later payments of any kind to the former employee to collect the balance of the debt pursuant to 31 U.S.C. 3716.

(e) *Multiple debts.*—(1) Where two or more creditor agencies are seeking salary offset, or where two or more debts are owed to a single creditor agency, FHFA may, at its discretion, determine whether one or more debts should be offset simultaneously within the 15 percent limitation.

(2) In the event that a debt owed FHFA is certified while an employee is subject to salary offset to repay another agency, FHFA may, at its discretion, determine whether the debt to FHFA should be repaid before the debt to the other agency is repaid, repaid simultaneously with the other debt, or repaid after the debt to the other agency.

(3) A levy pursuant to the Internal Revenue Code of 1986 shall take precedence over other deductions under this section, as provided in 5 U.S.C. 5514(d).

**§ 1208.29 Coordinating salary offset with other agencies.**

(a) *Responsibility of FHFA as the creditor agency.*—(1) FHFA shall be responsible for:

(i) Arranging for a hearing upon proper request by a Federal employee;

(ii) Preparing the Notice of Intent consistent with the requirements of § 1208.21;

(iii) Obtaining hearing officials from other agencies pursuant to § 1208.23(b); and

(iv) Ensuring that each certification of debt pursuant to § 1208.24(b) is sent to a paying agency.

(2) Upon completion of the procedures set forth in §§ 1208.24 through 1208.26, FHFA shall submit to the employee's paying agency, if applicable, a certified debt claim and an installment agreement or other instruction on the payment schedule.

(i) If the employee is in the process of separating from the Federal Government, FHFA shall submit its debt claim to the employee's paying agency for collection by lump-sum deduction from the employee's final check. The paying agency shall certify the total amount of its collection and furnish a copy of the certification to FHFA and to the employee.

(ii) If the employee is already separated and all payments due from his or her former paying agency have been paid, FHFA may, unless otherwise prohibited, request that money due and payable to the employee from the Federal Government, including payments from the Civil Service Retirement and Disability Fund (5 CFR 831.1801) or other similar funds, be administratively offset to collect the debt.

(iii) When an employee transfers to another paying agency, FHFA shall not repeat the procedures described in §§ 1208.24 through 1208.26. Upon receiving notice of the employee's transfer, FHFA shall review the debt to ensure that collection is resumed by the new paying agency.

(b) *Responsibility of FHFA as the paying agency.*—(1) *Complete claim.* When FHFA receives a certified claim from a creditor agency, the employee shall be given written notice of the certification, the date salary offset will begin, and the amount of the periodic deductions. Deductions shall be scheduled to begin at the next officially established pay interval or as otherwise provided for in the certification.

(2) *Incomplete claim.* When FHFA receives an incomplete certification of debt from a creditor agency, FHFA shall return the claim with notice that procedures under 5 U.S.C. 5514 and 5 CFR 550.1104 must be followed, and that a properly certified claim must be received before FHFA will take action to collect the debt from the employee's current pay account.

(3) *Review.* FHFA is not authorized to review the merits of the creditor agency's determination with respect to the amount or validity of the debt certified by the creditor agency.

(4) *Employees who transfer from one paying agency to another agency.* If, after the creditor agency has submitted the debt claim to FHFA, the employee transfers to another agency before the debt is collected in full, FHFA must certify the total amount collected on the debt as required by 5 CFR 550.1109. One copy of the certification shall be furnished to the employee and one copy shall be sent to the creditor agency along with notice of the employee's transfer. If FHFA is aware that the employee is entitled to payments from the Civil Service Retirement and Disability Fund or other similar

payments, it must provide written notification to the agency responsible for making such payments that the debtor owes a debt (including the amount) and that the requirements set forth herein and in 5 CFR part 550, subpart K, have been met. FHFA must submit a properly certified claim to the new payment agency before a collection can be made.

**§ 1208.30 Interest, penalties, and administrative costs.**

Where FHFA is the creditor agency, FHFA shall assess interest, penalties, and administrative costs pursuant to 31 U.S.C. 3717 and the FCCS, 31 CFR chapter IX.

**§ 1208.31 Refunds.**

(a) Where FHFA is the creditor agency, FHFA shall promptly refund any amount deducted under the authority of 5 U.S.C. 5514 when:

(1) FHFA receives notice that the debt has been waived or otherwise found not to be owing to the Federal Government; or

(2) An administrative or judicial order directs FHFA to make a refund.

(b) Unless required by law or contract, refunds under this section shall not bear interest.

**§ 1208.32 Request from a creditor agency for the services of a hearing official.**

(a) FHFA may provide qualified personnel to serve as hearing officials upon request of a creditor agency when:

(1) The debtor is employed by FHFA and the creditor agency cannot provide a prompt and appropriate hearing before a hearing official furnished pursuant to another lawful arrangement; or

(2) The debtor is employed by the creditor agency and that agency cannot arrange for a hearing official.

(b) Services provided by FHFA to creditor agencies under this section shall be provided on a fully reimbursable basis pursuant to 31 U.S.C. 1535, or other applicable authority.

**§ 1208.33 Non-waiver of rights by payments.**

A debtor's payment, whether voluntary or involuntary, of all or any portion of a debt being collected pursuant to this subpart B shall not be construed as a waiver of any rights that the debtor may have under any statute, regulation, or contract, except as otherwise provided by law or contract.

## Subpart C—Administrative Offset

**§ 1208.40 Authority and scope.**

(a) The provisions of this subpart C apply to the collection of debts owed to the Federal Government arising from transactions with FHFA. Administrative offset is authorized under the Debt Collection Improvement Act of 1996 (DCIA). This subpart C is consistent with the Federal Claims Collection Standards (FCCS) on administrative offset issued by the Department of Justice.

(b) FHFA may collect a debt owed to the Federal Government from a person, organization, or other entity by administrative offset, pursuant to 31 U.S.C. 3716, where:

(1) The debt is certain in amount;

(2) Administrative offset is feasible, desirable, and not otherwise prohibited;

(3) The applicable statute of limitations has not expired; and

(4) Administrative offset is in the best interest of the Federal Government.

**§ 1208.41 Collection.**

(a) FHFA may collect a claim from a person, organization, or other entity by administrative offset of monies payable by the Federal Government only after:

(1) Providing the debtor with due process required under this part; and

(2) Providing the paying agency with written certification that the debtor owes the debt in the amount stated and that FHFA, as creditor agency, has complied with this part.

(b) Prior to initiating collection by administrative offset, FHFA should determine that the proposed offset is within the scope of this remedy, as set forth in 31 CFR 901.3(a). Administrative offset under 31 U.S.C. 3716 may not be used to collect debts more than 10 years after the Federal Government's right to collect the debt first accrued, except as otherwise provided by law. In addition, administrative offset may not be used when a statute explicitly prohibits its use to collect the claim or type of claim involved.

(c) Unless otherwise provided, debts or payments not subject to administrative offset under 31 U.S.C. 3716 may be collected by administrative offset under common law, or any other applicable statutory authority.

**§ 1208.42 Administrative offset prior to completion of procedures.**

FHFA shall not be required to follow the procedures described in § 1208.43 where:

(a) Prior to the completion of the procedures described in § 1208.43, FHFA may effect administrative offset if failure to offset would substantially prejudice its ability to collect the debt, and if the time before the payment is to be made does not reasonably permit completion of the procedures described in § 1208.43. Such prior administrative offset shall be followed promptly by the completion of the procedures described in § 1208.43. Amounts recovered by administrative offset but later found not to be owed to FHFA shall be promptly refunded. This section applies only to administrative offset pursuant to 31 CFR 901.3(c), and does not apply when debts are referred to the Department of the Treasury for mandatory centralized administrative offset under 31 CFR 901.3(b)(1).

(b) The administrative offset is in the nature of a recoupment (*i.e.,* FHFA may offset a payment due to the debtor when both the payment due to the debtor and the debt owed to FHFA arose from the same transaction); or

(c) In the case of non-centralized administrative offsets, FHFA first learns of the existence of a debt due when there would be insufficient time to afford the debtor due process under these procedures before the paying agency makes payment to the debtor; in such cases, the Director shall give the debtor notice and an opportunity for review as soon as practical and shall refund any money ultimately found not to be due to the Federal Government.

**§ 1208.43 Procedures.**

Unless the procedures described in § 1208.42 are used, prior to collecting any debt by administrative offset or referring such claim to another agency for collection through administrative offset, FHFA shall provide the debtor with the following:

(a) Written notification of the nature and amount of the debt, the intention of FHFA to collect the debt through administrative offset, and a statement of the rights of the debtor under this section;

(b) An opportunity to inspect and copy the records of FHFA related to the debt that are not exempt from disclosure;

(c) An opportunity for review within FHFA of the determination of indebtedness. Any request for review by the debtor shall be in writing and shall be submitted to FHFA within 30 calendar days of the date of the notice of the offset. FHFA may waive the time limits for requesting review for good cause shown by the debtor. FHFA shall provide the debtor with a reasonable opportunity for an oral hearing when:

(1) An applicable statute authorizes or requires FHFA to consider waiver of the indebtedness involved, the debtor requests waiver of the indebtedness, and the waiver determination turns on an issue of credibility or veracity; or

(2) The debtor requests reconsideration of the debt and FHFA determines that the question of the indebtedness cannot be resolved by

review of the documentary evidence, as for example, when the validity of the debt turns on an issue of credibility or veracity. Unless otherwise required by law, an oral hearing under this subpart C is not required to be a formal evidentiary hearing, although FHFA shall document all significant matters discussed at the hearing. In those cases where an oral hearing is not required by this subpart C, FHFA shall make its determination on the request for waiver or reconsideration based upon a review of the written record; and

(d) An opportunity to enter into a written agreement for the voluntary repayment of the amount of the claim at the discretion of FHFA.

**§ 1208.44 Interest, penalties, and administrative costs.**

FHFA shall assess interest, penalties, and administrative costs on debts owed to the Federal Government, in accordance with 31 U.S.C. 3717 and the FCCS. FHFA may also assess interest and related charges on debts that are not subject to 31 U.S.C. 3717 and the FCCS to the extent authorized under the common law or other applicable statutory authority.

**§ 1208.45 Refunds.**

FHFA shall refund promptly those amounts recovered by administrative offset but later found not to be owed to the Federal Government. Unless required by law or contract, such refunds shall not bear interest.

**§ 1208.46 No requirement for duplicate notice.**

Where FHFA has previously given a debtor any of the required notice and review opportunities with respect to a particular debt, FHFA is not required to duplicate such notice and review opportunities prior to initiating administrative offset.

**§ 1208.47 Requests for administrative offset to other Federal agencies.**

(a) FHFA may request that a debt owed to FHFA be collected by administrative offset against funds due and payable to a debtor by another agency.

(b) In requesting administrative offset, FHFA, as creditor, shall certify in writing to the agency holding funds of the debtor:

(1) That the debtor owes the debt;

(2) The amount and basis of the debt; and

(3) That FHFA has complied with the requirements of its own administrative offset regulations and the applicable provisions of the FCCS with respect to providing the debtor with due process, unless otherwise provided.

**§ 1208.48 Requests for administrative offset from other Federal agencies.**

(a) Any agency may request that funds due and payable to a debtor by FHFA be administratively offset in order to collect a debt owed to such agency by the debtor.

(b) FHFA shall initiate the requested administrative offset only upon:

(1) Receipt of written certification from the creditor agency that:

(i) The debtor owes the debt, including the amount and basis of the debt;

(ii) The agency has prescribed regulations for the exercise of administrative offset; and

(iii) The agency has complied with its own administrative offset regulations and with the applicable provisions of the FCCS, including providing any required hearing or review.

(2) A determination by FHFA that collection by administrative offset against funds payable by FHFA would be in the best interest of the Federal Government as determined by the facts and circumstances of the particular case and that such administrative offset would not otherwise be contrary to law.

**§ 1208.49 Administrative offset against amounts payable from Civil Service Retirement and Disability Fund.**

(a) *Request for administrative offset.* Unless otherwise prohibited by law, FHFA may request that monies that are due and payable to a debtor from the Civil Service Retirement and Disability Fund (Fund) be offset administratively in reasonable amounts in order to collect in one full payment or in a minimal number of payments debt owed to FHFA by the debtor. Such requests shall be made to the appropriate officials of OPM in accordance with such regulations as may be prescribed by FHFA or OPM.

(b) *Contents of certification.* When making a request for administrative offset under paragraph (a) of this section, FHFA shall provide OPM with a written certification that:

(1) The debtor owes FHFA a debt, including the amount of the debt;

(2) FHFA has complied with the applicable statutes, regulations, and procedures of OPM; and

(3) FHFA has complied with the requirements of the FCCS, including any required hearing or review.

(c) If FHFA decides to request administrative offset under paragraph (a) of this section, it shall make the request as soon as practicable after completion of the applicable procedures. This will satisfy any requirement that administrative offset be initiated prior to the expiration of the applicable statute of limitations. At such time as the debtor makes a claim for payments from the Fund, if at least one year has elapsed since the administrative offset request was originally made, the debtor shall be permitted to offer a satisfactory repayment plan in lieu of administrative offset if he or she establishes that changed financial circumstances would render the administrative offset unjust.

(d) If FHFA collects part or all of the debt by other means before deductions are made or completed pursuant to paragraph (a) of this section, FHFA shall act promptly to modify or terminate its request for administrative offset under paragraph (a) of this section.

## Subpart D—Tax Refund Offset

**§ 1208.50 Authority and scope.**

The provisions of 26 U.S.C. 6402(d) and 31 U.S.C. 3720A authorize the Secretary of the Treasury to offset a delinquent debt owed the Federal Government from the tax refund due a taxpayer when other collection efforts have failed to recover the amount due. In addition, FHFA is authorized to collect debts by means of administrative offset under 31 U.S.C. 3716 and, as part of the debt collection process, to notify the United States Department of Treasury's Financial Management Service of the amount of such debt for collection by tax refund offset.

**§ 1208.51 Definitions.**

The following terms apply to this subpart D—

*Debt or claim* means an amount of money, funds or property which has been determined by FHFA to be due to the Federal Government from any person, organization, or entity, except another Federal agency.

(1) A debt becomes eligible for tax refund offset procedures if:

(i) It cannot currently be collected pursuant to the salary offset procedures of 5 U.S.C. 5514(a)(1);

(ii) The debt is ineligible for administrative offset or cannot be collected currently by administrative offset; and

(iii) The requirements of this section are otherwise satisfied.

(2) All judgment debts are past due for purposes of this subpart D. Judgment debts remain past due until paid in full.

*Debtor* means a person who owes a debt or a claim. The term "person" includes any individual, organization or entity, except another Federal agency.

*Dispute* means a written statement supported by documentation or other evidence that all or part of an alleged debt is not past due or legally

enforceable, that the amount is not the amount currently owed, that the outstanding debt has been satisfied, or in the case of a debt reduced to judgment, that the judgment has been satisfied or stayed.

*Notice* means the information sent to the debtor pursuant to § 1208.53. The date of the notice is that date shown on the notice letter as its date of issuance.

*Tax refund offset* means withholding or reducing a tax refund payment by an amount necessary to satisfy a debt owed by the payee(s) of a tax refund payment.

*Tax refund payment* means any overpayment of Federal taxes to be refunded to the person making the overpayment after the Internal Revenue Service (IRS) makes the appropriate credits.

**§ 1208.52 Procedures.**

(a) *Referral to the Department of the Treasury.*—(1) FHFA may refer any past due, legally enforceable nonjudgment debt of an individual, organization, or entity to the Department of the Treasury for tax refund offset if FHFA's or the referring agency's rights of action accrued more than three months but less than 10 years before the offset is made.

(2) Debts reduced to judgment may be referred at any time.

(3) Debts in amounts lower than $25 are not subject to referral.

(4) In the event that more than one debt is owed, the tax refund offset procedures shall be applied in the order in which the debts became past due.

(5) FHFA shall notify the Department of the Treasury of any change in the amount due promptly after receipt of payment or notice of other reductions.

(b) *Notice.* FHFA shall provide the debtor with written notice of its intent to offset before initiating the offset. Notice shall be mailed to the debtor at the current address of the debtor, as determined from information obtained from the Internal Revenue Service pursuant to 26 U.S.C. 6103(m)(2), (4), (5) or maintained by FHFA. The notice sent to the debtor shall state the amount of the debt and inform the debtor that:

(1) The debt is past due;

(2) FHFA intends to refer the debt to the Department of the Treasury for offset from tax refunds that may be due to the taxpayer;

(3) FHFA intends to provide information concerning the delinquent debt exceeding $100 to a consumer reporting bureau unless such debt has already been disclosed; and

(4) Before the debt is reported to a consumer reporting agency, if applicable, and referred to the Department of the Treasury for offset from tax refunds, the debtor has 65 calendar days from the date of notice to request a review under paragraph (d) of this section.

(c) *Report to consumer reporting agency.* If the debtor neither pays the amount due nor presents evidence that the amount is not past due or is satisfied or stayed, FHFA will report the debt to a consumer reporting agency at the end of the notice period, if applicable, and refer the debt to the Department of the Treasury for offset from the taxpayer's Federal tax refund. FHFA shall certify to the Department of the Treasury that reasonable efforts have been made by FHFA to obtain payment of such debt.

(d) *Request for review.* A debtor may request a review by FHFA if he or she believes that all or part of the debt is not past due or is not legally enforceable, or in the case of a judgment debt, that the debt has been stayed or the amount satisfied, as follows:

(1) The debtor must send a written request for review to FHFA at the address provided in the notice.

(2) The request must state the amount disputed and reasons why the debtor believes that the debt is not past due, is not legally enforceable, has been satisfied, or if a judgment debt, has been satisfied or stayed.

(3) The request must include any documents that the debtor wishes to be considered or state that additional information will be submitted within the time permitted.

(4) If the debtor wishes to inspect records establishing the nature and amount of the debt, the debtor must make a written request to FHFA for an opportunity for such an inspection. The office holding the relevant records not exempt from disclosure shall make them available for inspection during normal business hours within one week from the date of receipt of the request.

(5) The request for review and any additional information submitted pursuant to the request must be received by FHFA at the address stated in the notice within 65 calendar days of the date of issuance of the notice.

(6) In reaching its decision, FHFA shall review the dispute and shall consider its records and any documentation and arguments submitted by the debtor. FHFA shall send a written notice of its decision to the debtor. There is no administrative appeal of this decision.

(7) If the evidence presented by the debtor is considered by a non-FHFA agent or other entities or persons acting on behalf of FHFA, the debtor shall be accorded at least 30 calendar days from the date the agent or other entity or person determines that all or part of the debt is past due and legally enforceable to request review by FHFA of any unresolved dispute.

(8) Any debt that previously has been reviewed pursuant to this section or any other section of this part, or that has been reduced to a judgment, may not be disputed except on the grounds of payments made or events occurring subsequent to the previous review or judgment.

(9) To the extent that a debt owed has not been established by judicial or administrative order, a debtor may dispute the existence or amount of the debt or the terms of repayment. With respect to debts established by a judicial or administrative order, FHFA review will be limited to issues concerning the payment or other discharge of the debt.

**§ 1208.53 No requirement for duplicate notice.**

Where FHFA has previously given a debtor any of the required notice and review opportunities with respect to a particular debt, FHFA is not required to duplicate such notice and review opportunities prior to initiating tax refund offset.

**§ 1208.54 to 1208.59 [Reserved]**

## Subpart E—Administrative Wage Garnishment

**§ 1208.60 Scope and purpose.**

These administrative wage garnishment procedures are issued in compliance with 31 U.S.C. 3720D and 31 CFR 285.11(f). This subpart E provides procedures for FHFA to collect money from a debtor's disposable pay by means of administrative wage garnishment. The receipt of payments pursuant to this subpart E does not preclude FHFA from pursuing other debt collection remedies, including the offset of Federal payments. FHFA may pursue such debt collection remedies separately or in conjunction with administrative wage garnishment. This subpart E does not apply to the collection of delinquent debts from the wages of Federal employees from their Federal employment. Federal pay is subject to the Federal salary offset procedures set forth in 5 U.S.C. 5514 and other applicable laws.

**§ 1208.61 Notice.**

At least 30 days before the initiation of garnishment proceedings, FHFA will send, by first class mail to the debtor's last known address, a written notice informing the debtor of:

(a) The nature and amount of the debt;

(b) FHFA's intention to initiate proceedings to collect the debt through deductions from the debtor's pay until the debt and all accumulated interest

penalties and administrative costs are paid in full;

(c) An explanation of the debtor's rights as set forth in § 1208.62(c); and

(d) The time frame within which the debtor may exercise these rights. FHFA shall retain a stamped copy of the notice indicating the date the notice was mailed.

**§ 1208.62 Debtor's rights.**

FHFA shall afford the debtor the opportunity:

(a) To inspect and copy records related to the debt;

(b) To enter into a written repayment agreement with FHFA, under terms agreeable to FHFA; and

(c) To the extent that a debt owed has not been established by judicial or administrative order, to request a hearing concerning the existence or amount of the debt or the terms of the repayment schedule. With respect to debts established by a judicial or administrative order, a debtor may request a hearing concerning the payment or other discharge of the debt. The debtor is not entitled to a hearing concerning the terms of the proposed repayment schedule if these terms have been established by written agreement.

**§ 1208.63 Form of hearing.**

(a) If the debtor submits a timely written request for a hearing as provided in § 1208.62(c), FHFA will afford the debtor a hearing, which at FHFA's option may be oral or written. FHFA will provide the debtor with a reasonable opportunity for an oral hearing when FHFA determines that the issues in dispute cannot be resolved by review of the documentary evidence, for example, when the validity of the claim turns on the issue of credibility or veracity.

(b) If FHFA determines that an oral hearing is appropriate, the time and location of the hearing shall be established by FHFA. An oral hearing may, at the debtor's option, be conducted either in person or by telephone conference. All travel expenses incurred by the debtor in connection with an in-person hearing will be borne by the debtor. All telephonic charges incurred during the hearing will be the responsibility of the agency.

(c) In cases when it is determined that an oral hearing is not required by this section, FHFA will accord the debtor a "paper hearing," that is, FHFA will decide the issues in dispute based upon a review of the written record.

**§ 1208.64 Effect of timely request.**

If FHFA receives a debtor's written request for a hearing within 15 business days of the date FHFA mailed its notice of intent to seek garnishment, FHFA shall not issue a withholding order until the debtor has been provided the requested hearing, and a decision in accordance with § 1208.68 and § 1208.69 has been rendered.

**§ 1208.65 Failure to timely request a hearing.**

If FHFA receives a debtor's written request for a hearing after 15 business days of the date FHFA mailed its notice of intent to seek garnishment, FHFA shall provide a hearing to the debtor. However, FHFA will not delay issuance of a withholding order unless it determines that the untimely filing of the request was caused by factors over which the debtor had no control, or FHFA receives information that FHFA believes justifies a delay or cancellation of the withholding order.

**§ 1208.66 Hearing official.**

A hearing official may be any qualified individual, as determined by FHFA, including an administrative law judge.

**§ 1208.67 Procedure.**

After the debtor requests a hearing, the hearing official shall notify the debtor of:

(a) The date and time of a telephonic hearing;

(b) The date, time, and location of an in-person oral hearing; or

(c) The deadline for the submission of evidence for a written hearing.

**§ 1208.68 Format of hearing.**

FHFA will have the burden of proof to establish the existence or amount of the debt. Thereafter, if the debtor disputes the existence or amount of the debt, the debtor must prove by a preponderance of the evidence that no debt exists, or that the amount of the debt is incorrect. In addition, the debtor may present evidence that the terms of the repayment schedule are unlawful, would cause a financial hardship to the debtor, or that collection of the debt may not be pursued due to operation of law. The hearing official shall maintain a record of any hearing held under this section. Hearings are not required to be formal, and evidence may be offered without regard to formal rules of evidence. Witnesses who testify in oral hearings shall do so under oath or affirmation.

**§ 1208.69 Date of decision.**

The hearing official shall issue a written opinion stating his or her decision as soon as practicable, but not later than 60 days after the date on which the request for such hearing was received by FHFA. If FHFA is unable to provide the debtor with a hearing and decision within 60 days after the receipt of the request for such hearing:

(a) FHFA may not issue a withholding order until the hearing is held and a decision rendered; or

(b) If FHFA had previously issued a withholding order to the debtor's employer, the withholding order will be suspended beginning on the 61st day after the date FHFA received the hearing request and continuing until a hearing is held and a decision is rendered.

**§ 1208.70 Content of decision.**

The written decision shall include:

(a) A summary of the facts presented;

(b) The hearing official's findings, analysis and conclusions; and

(c) The terms of any repayment schedule, if applicable.

**§ 1208.71 Finality of agency action.**

A decision by a hearing official shall become the final decision of FHFA for the purpose of judicial review under the Administrative Procedure Act.

**§ 1208.72 Failure to appear.**

In the absence of good cause shown, a debtor who fails to appear at a scheduled hearing will be deemed as not having timely filed a request for a hearing.

**§ 1208.73 Wage garnishment order.**

(a) Unless FHFA receives information that it believes justifies a delay or cancellation of the withholding order, FHFA will send by first class mail a withholding order to the debtor's employer within 30 calendar days after the debtor fails to make a timely request for a hearing (*i.e.,* within 15 business days after the mailing of the notice of FHFA's intent to seek garnishment) or, if a timely request for a hearing is made by the debtor, within 30 calendar days after a decision to issue a withholding order becomes final.

(b) The withholding order sent to the employer will be in the form prescribed by the Secretary of the Treasury, on FHFA's letterhead, and signed by the head of the agency or delegate. The order will contain all information necessary for the employer to comply with the withholding order, including the debtor's name, address, and social security number, as well as instructions for withholding and information as to where payments should be sent.

(c) FHFA will keep a stamped copy of the order indicating the date it was mailed.

**§ 1208.74 Certification by employer.**

Along with the withholding order, FHFA will send to the employer a

certification in a form prescribed by the Secretary of the Treasury. The employer shall complete and return the certification to FHFA within the time frame prescribed in the instructions to the form. The certification will address matters such as information about the debtor's employment status and disposable pay available for withholding.

**§ 1208.75 Amounts withheld.**

(a) Upon receipt of the garnishment order issued under this section, the employer shall deduct from all disposable pay paid to the debtor during each pay period the amount of garnishment described in paragraphs (b) through (d) of this section.

(b) Subject to the provisions of paragraphs (c) and (d) of this section, the amount of garnishment shall be the lesser of:

(1) The amount indicated on the garnishment order up to 15 percent of the debtor's disposable pay; or

(2) The amount set forth in 15 U.S.C. 1673(a)(2). The amount set forth at 15 U.S.C. 1673(a)(2) is the amount by which the debtor's disposable pay exceeds an amount equivalent to thirty times the minimum wage.

(c) When a debtor's pay is subject to withholding orders with priority, the following shall apply:

(1) Unless otherwise provided by Federal law, withholding orders issued under this section shall be paid in the amounts set forth under paragraph (b) of this section and shall have priority over other withholding orders which are served later in time. However, withholding orders for family support shall have priority over withholding orders issued under this section.

(2) If amounts are being withheld from a debtor's pay pursuant to a withholding order served on an employer before a withholding order issued pursuant to this section, or if a withholding order for family support is served on an employer at any time, the amounts withheld pursuant to the withholding order issued under this section shall be the lesser of:

(i) The amount calculated under paragraph (b) of this section; or

(ii) An amount equal to 25 percent of the debtor's disposable pay less the amount(s) withheld under the withholding order(s) with priority.

(3) If a debtor owes more than one debt to FHFA, FHFA may issue multiple withholding orders. The total amount garnished from the debtor's pay for such orders will not exceed the amount set forth in paragraph (b) of this section.

(d) An amount greater than that set forth in paragraphs (b) and (c) of this section may be withheld upon the written consent of the debtor.

(e) The employer shall promptly pay to FHFA all amounts withheld in accordance with the withholding order issued pursuant to this section.

(f) An employer shall not be required to vary its normal pay and disbursement cycles in order to comply with the withholding order.

(g) Any assignment or allotment by the employee of the employee's earnings shall be void to the extent it interferes with or prohibits execution of the withholding order under this section, except for any assignment or allotment made pursuant to a family support judgment or order.

(h) The employer shall withhold the appropriate amount from the debtor's wages for each pay period until the employer receives notification from FHFA to discontinue wage withholding. The garnishment order shall indicate a reasonable period of time within which the employer is required to commence wage withholding.

**§ 1208.76 Exclusions from garnishment.**

FHFA will not garnish the wages of a debtor it knows has been involuntarily separated from employment until the debtor has been re-employed continuously for at least 12 months. The debtor has the burden of informing FHFA of the circumstances surrounding an involuntary separation from employment.

**§ 1208.77 Financial hardship.**

(a) A debtor whose wages are subject to a wage withholding order under this section, may, at any time, request a review by FHFA of the amount garnished, based on materially changed circumstances such as disability, divorce, or catastrophic illness which result in financial hardship.

(b) A debtor requesting a review under this section shall submit the basis for claiming that the current amount of garnishment results in a financial hardship to the debtor, along with supporting documentation.

(c) If a financial hardship is found, FHFA will downwardly adjust, by an amount and for a period of time agreeable to FHFA, the amount garnished to reflect the debtor's financial condition. FHFA will notify the employer of any adjustments to the amounts to be withheld.

**§ 1208.78 Ending garnishment.**

(a) Once FHFA has fully recovered the amounts owed by the debtor, including interest, penalties, and administrative costs consistent with the Federal Claims Collection Standards, FHFA will send the debtor's employer notification to discontinue wage withholding.

(b) At least annually, FHFA will review its debtors' accounts to ensure that garnishment has been terminated for accounts that have been paid in full.

**§ 1208.79 Prohibited actions by employer.**

The Debt Collection Improvement Act of 1996 prohibits an employer from discharging, refusing to employ, or taking disciplinary action against the debtor due to the issuance of a withholding order under this subpart E.

**§ 1208.80 Refunds.**

(a) If a hearing official determines that a debt is not legally due and owing to the United States, FHFA shall promptly refund any amount collected by means of administrative wage garnishment.

(b) Unless required by Federal law or contract, refunds under this section shall not bear interest.

**§ 1208.81 Right of action.**

FHFA may sue any employer for any amount that the employer fails to withhold from wages owed and payable to its employee in accordance with this subpart E. However, a suit will not be filed before the termination of the collection action involving a particular debtor, unless earlier filing is necessary to avoid expiration of any applicable statute of limitations. For purposes of this subpart E, "termination of the collection action" occurs when the agency has terminated collection action in accordance with the FCCS or other applicable standards. In any event, termination of the collection action will have been deemed to occur if FHFA has not received any payments to satisfy the debt from the particular debtor whose wages were subject to garnishment, in whole or in part, for a period of one (1) year.

## CHAPTER XVII—OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

## PART 1704—[REMOVED]

■ 2. Remove part 1704.

Dated: November 3, 2010.

**Edward J. DeMarco,**

*Acting Director, Federal Housing Finance Agency.*

[FR Doc. 2010–28261 Filed 11–9–10; 8:45 am]

**BILLING CODE 8070–01–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 73

**[Docket No. FAA–2010–1070; Airspace Docket No. 10–AEA–18]**

**RIN 2120–AA66**

## Amendment of Using Agency for Restricted Areas R–4002, R–4005, R–4006 and R–4007; MD

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

**ACTION:** Final rule.

**SUMMARY:** This action makes a minor change to the name of the using agency for restricted areas R–4002, Bloodsworth Island, MD; and R–4005, R–4006 and R–4007, Patuxent River, MD to "U.S. Navy, Commanding Officer, NAS Patuxent River, MD." This is an administrative change only and there are no changes to the dimensions, time of designation or activities conducted within the affected restricted areas.

**DATES:** Effective date 0901 UTC, January 13, 2011.

**FOR FURTHER INFORMATION CONTACT:** Paul Gallant, Airspace, Regulations and ATC Procedures Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

**SUPPLEMENTARY INFORMATION:**

### Background

The U.S. Navy requested a minor change to the name of the using agency for restricted areas R–4002, R–4005, R–4006 and R–4007 in Maryland, in order to reflect the correct organization responsible for operation of the areas and to standardize the using agency listing in the area legal descriptions.

### The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 73 by changing the using agency name from "Commanding Officer, Naval Amphibious School Little Creek, Norfolk, VA," To "U.S. Navy, Commanding Officer, NAS Patuxent River, MD" for restricted area R–4002, Bloodsworth Island, MD; and restricted areas R–4005, R–4006 and R–4007, Naval Air Station Patuxent River, MD, from "Commanding Officer, NAS Patuxent River, MD," to "U.S. Navy, Commanding Officer, NAS Patuxent River, MD." This is an administrative change and does not affect the boundaries, designated altitudes, or activities conducted within the restricted area; therefore, notice and public procedures under 5 U.S.C. 553(b) are unnecessary.

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

### Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with 311d., FAA Order 1050.1E, Environmental Impacts: Policies and Procedures. This airspace action is an administrative change to the descriptions of the affected restricted areas to update the using agency name. It does not alter the dimensions, altitudes, or times of designation of the airspace; therefore, it is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exists that warrant preparation of an environmental assessment.

### List of Subjects in 14 CFR Part 73

Airspace, Prohibited areas, Restricted areas.

### Adoption of the Amendment

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

## PART 73—SPECIAL USE AIRSPACE

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

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

**§ 73.40 [Amended]**

■ 2. § 73.40 is amended as follows:

* * * * *

**1. R–4002 Bloodsworth Island, MD [Amended]**

By removing the words "Using agency. Commanding Officer, Naval Amphibious School Little Creek, Norfolk, VA" and inserting the words "Using agency. U.S. Navy, Commanding Officer, NAS Patuxent River, MD."

**2. R–4005 Patuxent River, MD [Amended]**

By removing the words "Using agency. Commanding Officer, NAS Patuxent River, MD" and inserting the words "Using agency. U.S. Navy, Commanding Officer, NAS Patuxent River, MD."

**3. R–4006 Patuxent River, MD [Amended]**

By removing the words "Using agency. Commanding Officer, NAS Patuxent River, MD" and inserting the words "Using agency. U.S. Navy, Commanding Officer, NAS Patuxent River, MD."

**4. R–4007 Patuxent River, MD [Amended]**

By removing the words "Using agency. Commanding Officer, NAS Patuxent River, MD" and inserting the words "Using agency. U.S. Navy, Commanding Officer, NAS Patuxent River, MD."

Issued in Washington, DC, on November 4, 2010.

**Edith V. Parish,**

*Manager, Airspace, Regulations and ATC Procedures Group.*

[FR Doc. 2010–28387 Filed 11–9–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 73

**[Docket No. FAA–2010–1071; Airspace Docket No. 10–ASO–28]**

**RIN 2120–AA66**

## Amendment of Using Agency for Restricted Areas R–5301; R–5302A, B, and C; and R–5313A, B, C and D; NC

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

**ACTION:** Final rule.

**SUMMARY:** This action makes a minor change to the name of the using agency for restricted areas R–5301 Albemarle Sound, NC; R–5302A, B and C, Harvey Point, NC; and R–5313A, B, C and D, Long Shoal Point, NC to read "U.S. Navy, Fleet Area Control and Surveillance Facility, Virginia Capes (FACSFAC VACAPES), Virginia Beach, VA." This is an administrative change only and there are no changes to the

dimensions, time of designation or activities conducted within the affected restricted areas.

**DATES:** Effective date 0901 UTC, January 13, 2011.

**FOR FURTHER INFORMATION CONTACT:** Paul Gallant, Airspace, Regulations and ATC Procedures Group, Office of Airspace Systems, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

**SUPPLEMENTARY INFORMATION:**

**Background**

The U.S. Navy requested a minor change to the name of the using agency for restricted areas R–5301; R–5302A, B and C; and R–5313A, B, C and D, in North Carolina by removing the words "NAS Oceana" from the description in order to reflect the organization's current designation.

**The Rule**

This action amends Title 14 Code of Federal Regulations (14 CFR) part 73 by changing the using agency names for restricted area R–5301 Albemarle Sound, NC; restricted areas R–5302A, B and C, Harvey Point, NC; and restricted areas R–5313A, B, C and D, Long Shoal Point, NC from "U.S. Navy, Fleet Area Control and Surveillance Facility, Virginia Capes (FACSFAC VACAPES), NAS Oceana, Virginia Beach, VA," to "U.S. Navy, Fleet Area Control and Surveillance Facility, Virginia Capes (FACSFAC VACAPES), Virginia Beach, VA.". This is an administrative change and does not affect the boundaries, designated altitudes, or activities conducted within the restricted area; therefore, notice and public procedures under 5 U.S.C. 553(b) are unnecessary.

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

**Environmental Review**

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with 311d., FAA Order 1050.1E, Environmental Impacts: Policies and Procedures. This airspace action is an administrative change to the descriptions of the affected restricted areas to update the using agency name. It does not alter the dimensions, altitudes, or times of designation of the airspace; therefore, it is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

**List of Subjects in 14 CFR Part 73**

Airspace, Prohibited areas, Restricted areas.

**Adoption of the Amendment**

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

## PART 73—SPECIAL USE AIRSPACE

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

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

**§ 73.53 [Amended]**

■ 2. § 73.53 is amended as follows:

* * * * *

**1. R–5301 Albemarle Sound, NC [Amended]**

By removing the words "Using agency. U.S. Navy, Fleet Area Control and Surveillance Facility, Virginia Capes (FACSFAC VACAPES), NAS Oceana, Virginia Beach, VA" and inserting the words "Using agency. U.S. Navy, Fleet Area Control and Surveillance Facility, Virginia Capes (FACSFAC VACAPES), Virginia Beach, VA."

**2. R–5302A Harvey Point, NC [Amended]**

By removing the words "Using agency. U.S. Navy, Fleet Area Control and Surveillance Facility, Virginia Capes (FACSFAC VACAPES), NAS Oceana, Virginia Beach, VA" and inserting the words "Using agency. U.S. Navy, Fleet Area Control and Surveillance Facility, Virginia Capes (FACSFAC VACAPES), Virginia Beach, VA."

**3. R–5302B Harvey Point, NC [Amended]**

By removing the words "Using agency. U.S. Navy, Fleet Area Control and Surveillance Facility, Virginia Capes (FACSFAC VACAPES), NAS Oceana, Virginia Beach, VA" and inserting the words "Using agency. U.S. Navy, Fleet Area Control and Surveillance Facility, Virginia Capes (FACSFAC VACAPES), Virginia Beach, VA."

**4. R–5302C Harvey Point, NC [Amended]**

By removing the words "Using agency. U.S. Navy, Fleet Area Control and Surveillance Facility, Virginia Capes (FACSFAC VACAPES), NAS Oceana, Virginia Beach, VA" and inserting the words "Using agency. U.S. Navy, Fleet Area Control and Surveillance Facility, Virginia Capes (FACSFAC VACAPES), Virginia Beach, VA."

**5. R–5313A Long Shoal Point, NC [Amended]**

By removing the words "Using agency. U.S. Navy, Fleet Area Control and Surveillance Facility, Virginia Capes (FACSFAC VACAPES), NAS Oceana, Virginia Beach, VA" and inserting the words "Using agency. U.S. Navy, Fleet Area Control and Surveillance Facility, Virginia Capes (FACSFAC VACAPES), Virginia Beach, VA."

**6. R–5313B Long Shoal Point, NC [Amended]**

By removing the words "Using agency. U.S. Navy, Fleet Area Control and Surveillance Facility, Virginia Capes (FACSFAC VACAPES), NAS Oceana, Virginia Beach, VA" and inserting the words "Using agency. U.S. Navy, Fleet Area Control and Surveillance Facility, Virginia Capes (FACSFAC VACAPES), Virginia Beach, VA."

**7. R–5313C Long Shoal Point, NC [Amended]**

By removing the words "Using agency. U.S. Navy, Fleet Area Control and Surveillance Facility, Virginia Capes (FACSFAC VACAPES), NAS Oceana, Virginia Beach, VA" and inserting the words "Using agency. U.S. Navy, Fleet Area Control and Surveillance Facility, Virginia Capes (FACSFAC VACAPES), Virginia Beach, VA."

**8. R–5313D Long Shoal Point, NC [Amended]**

By removing the words "Using agency. U.S. Navy, Fleet Area Control

and Surveillance Facility, Virginia Capes (FACSFAC VACAPES), NAS Oceana, Virginia Beach, VA" and inserting the words "Using agency. U.S. Navy, Fleet Area Control and Surveillance Facility, Virginia Capes (FACSFAC VACAPES), Virginia Beach, VA."

* * * * *

Issued in Washington, DC, on November 4, 2010.

**Edith V. Parish,**

*Manager, Airspace, Regulations and ATC Procedures Group.*

[FR Doc. 2010–28388 Filed 11–9–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 510

**[Docket No. FDA–2010–N–0002]**

### New Animal Drugs; Change of Sponsor's Name

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor's name from North American Nutrition Companies, Inc., to Provimi North America, Inc.

**DATES:** This rule is effective November 10, 2010.

**FOR FURTHER INFORMATION CONTACT:** Steven D. Vaughn, Center for Veterinary Medicine (HFV–100), Food and Drug Administration, 7520 Standish Pl., Rockville, MD 20855, 240–276–8300, E-mail: *steven.vaughn@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** North American Nutrition Companies, Inc., 6531 State Rte. 503, Lewisburg, OH 45338, has informed FDA that it has changed its name to Provimi North America, Inc. Accordingly, the Agency is amending the regulations in 21 CFR 510.600 to reflect this change.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

**List of Subjects in 21 CFR Part 510**

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 510 is amended as follows:

## PART 510—NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 510 continues to read as follows:

**Authority:** 21 U.S.C. 321, 331, 351, 352, 353, 360b, 371, 379e.

■ 2. In § 510.600, in the table in paragraph (c)(1), remove the entry for "North American Nutrition Companies, Inc."; and alphabetically add a new entry for "Provimi North America, Inc."; and in the table in paragraph (c)(2), revise the entry for "017790" to read as follows:

**§ 510.600 Names, addresses, and drug labeler codes of sponsors of approved applications.**

* * * * *

(c) * * *

(1) * * *

| Firm name and address | Drug labeler code |
|---|---|
| * * * * * | |
| Provimi North America, Inc., 6531 State Rte. 503, Lewisburg, OH 45338 ..... | 017790 |
| * * * * * | |

(2) * * *

| Drug labeler code | Firm name and address |
|---|---|
| * * * * * | |
| 017790 ..... | Provimi North America, Inc., 6531 State Rte. 503, Lewisburg, OH 45338. |
| * * * * * | |

Dated: October 28, 2010.

**Steven D. Vaughn,**

*Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.*

[FR Doc. 2010–28307 Filed 11–9–10; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 878

**[Docket No. FDA–2010–N–0512]**

### Medical Devices; General and Plastic Surgery Devices; Classification of Tissue Adhesive With Adjunct Wound Closure Device Intended for Topical Approximation of Skin

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is classifying the tissue adhesive with adjunct wound closure device intended for topical approximation into class II (special controls). The special control that will apply to the device is the guidance document entitled "Guidance for Industry and FDA Staff; Class II Special Controls Guidance Document: Tissue Adhesive With Adjunct Wound Closure Device Intended for the Topical Approximation of Skin." The agency is classifying the device into class II (special controls) in order to provide reasonable assurance of safety and effectiveness of the device. Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of a guidance document that will serve as the special control for this device type.

**DATES:** This final rule is effective December 10, 2010. The classification was effective April 30, 2010.

**FOR FURTHER INFORMATION CONTACT:** George J. Mattamal, Center for Devices and Radiological Health, Food and Drug Administration, Bldg. 66, Rm. 4617, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 301–796–6396.

**SUPPLEMENTARY INFORMATION:**

**I. What is the background of this rulemaking?**

The Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 301 *et seq.*) as amended by the Medical Device Amendments of 1976 (the 1976 amendments) (Pub. L. 94–295), the Safe Medical Devices Act of 1990 (Pub. L. 101–629), and the Food and Drug Administration Modernization Act (Pub. L. 107–250) established a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the FD&C Act (21 U.S.C. 306c) established three categories (classes) of devices, depending on the regulatory controls needed to provide reasonable assurance of their safety and

effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

FDA refers to devices that were not in commercial distribution before May 28, 1976 (the date of enactment of the 1976 amendments), as postamendments devices. Postamendments devices are classified automatically by statute (section 513(f) of the FD&C Act) into class III without any FDA rulemaking process. These devices remain in class III and require premarket approval, unless: (1) FDA reclassifies the device into class I or II; (2) FDA issues an order classifying the device into class I or class II in accordance with section 513(f)(2) of the FD&C Act; or FDA issues an order finding the device to be substantially equivalent, under section 513(i), to a predicate device that does not require premarket approval. The agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and 21 CFR part 807 of the regulations.

Section 513(f)(2) of the FD&C Act provides that any person who submits a premarket notification under section 510(k) of the FD&C Act for a device that has not previously been classified may, within 30 days after receiving an order classifying the device into class III under section 513(f)(1) of the FD&C Act, request FDA to classify the device under the criteria set forth in section 513(a)(1). FDA will, within 60 days of receiving this request, classify the device by written order. This classification shall be the initial classification of the device. Within 30 days after the issuance of an order classifying the device, FDA must publish a notice in the **Federal Register** announcing this classification.

In accordance with section 513(f)(1) of the FD&C Act, FDA issued an order on February 25, 2009, classifying the PRINEO Skin Closure System into class III, because it was not substantially equivalent to a device that was introduced or delivered for introduction into interstate commerce for commercial distribution before May 28, 1976, or a device which was subsequently reclassified into class I or class II. On March 23, 2009, Closure Medical Corp. submitted a petition requesting classification of the tissue adhesive with adjunct wound closure device for topical approximation of skin under section 513(f)(2) of the FD&C Act. The manufacturer recommended that the device be classified into class II (Ref. 1).

In accordance with section 513(f)(2) of the FD&C Act, FDA reviewed the petition in order to classify the device under the criteria for classification set forth in section 513(a)(1) of the FD&C Act. FDA classifies devices into class II if general controls by themselves are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls to provide reasonable assurance of the safety and effectiveness of the device for its intended use. After review of the information submitted in the petition, FDA determined that tissue adhesive with adjunct wound closure device intended for topical approximation of skin can be classified into class II with the establishment of special controls. FDA believes these special controls will provide reasonable assurance of the safety and effectiveness of the device.

The device is assigned the generic name "Tissue Adhesive with Adjunct Wound Closure Device Intended for Topical Approximation of Skin" and it is identified as tissue adhesive with adjunct wound closure device intended for topical approximation of skin. FDA has identified the following risks to health associated specifically with this type of device and the recommended measures to mitigate these risks.

A. Unintentional bonding of device due to misapplication of device, device leaking or running to unintended areas, etc.

B. Wound dehiscence

C. Adverse tissue reaction and chemical burns

D. Infection

E. Applicator malfunction

F. Weak bonding leading to loss of approximation

G. Delayed polymerization

TABLE 1—RISKS TO HEALTH AND MITIGATION MEASURES

| Identified risk | Recommended mitigation measures |
|---|---|
| Unintentional bonding of device due to misapplication of device, device leaking or running to unintended areas, etc. | Bench Testing, Labeling. |
| Wound dehiscence | Bench Testing, Shelf Life Testing, Animal Testing, Clinical Studies, Labeling. |
| Adverse tissue reaction and chemical burns | Biocompatibility Animal Testing, Clinical Studies. |
| Infection | Bench Testing, Biocompatibility Animal Testing, Clinical Studies, Sterility. |
| Applicator malfunction | Bench Testing. |
| Weak bonding leading to loss of approximation | Bench Testing, Animal Testing, Clinical Studies. |
| Delayed polymerization | Bench Testing, Animal Testing. |

FDA believes that the special controls guidance document, in addition to general controls, addresses the risks to health identified in table 1 of this document and provides reasonable assurance of the safety and effectiveness of the device. Therefore, on April 30, 2010, FDA issued an order to the petitioner classifying the device into class II. FDA is codifying this device by adding § 878.4011 to 21 CFR part 878.

Following the effective date of this final classification rule, any firm submitting a 510(k) premarket notification for tissue adhesive with adjunct wound closure device intended for topical approximation of skin will need to address the issues covered in the special controls guidance. However, the firm need only show that its device meets the recommendations of the guidance or in some other way provides equivalent assurance of safety and effectiveness.

Section 510(m) of the FD&C Act provides that FDA may exempt a class II device from the premarket notification requirement under section 510(k) of the FD&C Act, if FDA determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. For this type of device, FDA has determined that premarket notification is necessary to provide reasonable assurance of the safety and effectiveness of the device and, therefore, the type of device is not exempt from premarket notification requirements. Persons who intend to market this type of device must submit to FDA a premarket notification prior to marketing the

device, which contains information about the tissue adhesive with adjunct wound closure intended for topical approximation of skin that they intend to market.

**II. What is the environmental impact of this rule?**

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

**III. What is the analysis impact of this rule?**

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

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because reclassification of this device from class III to class II will relieve manufacturers of the device of cost of complying with the premarket approval requirements of section 515 of the FD&C Act (21 U.S.C. 360e), and may permit small potential competitors to enter the marketplace by lowering their costs, the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing "any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year."

The current threshold after adjustment for inflation is $135 million, using the most current (2009) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

**IV. Does this final rule have Federalism Implications?**

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. Section 4(a) of the Executive order requires agencies to "construe * * * a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute." Federal law includes an express preemption provision that preempt certain State requirements "different from or in addition to" certain Federal requirements applicable to devices. 21 U.S.C. 360k; *See Medtronic* v. *Lohr,* 518 U.S. 470 (1996); *Riegel* v. *Medtronic,* 552 U.S. 312 (2008). The special controls established by this final rule create "requirements" to address each identified risk to health presented by these specific medical devices under 21 U.S.C. 360k, even though product sponsors have some flexibility in how they meet those requirements. Cf. *Papike* v. *Tambrands, Inc.,* 107 F.3d 737, 740–42 (9th Cir. 1997).

**V. How does this rule comply with the Paperwork Reduction Act of 1995?**

This final rule contains no new collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 is not required. Elsewhere in this issue of the **Federal Register**, FDA is issuing a notice announcing the availability of a guidance for the final rule. The guidance, "Class II Special Controls Guidance Document: Tissue Adhesive with Adjunct Wound Closure Device Intended for the Topical Approximation of Skin," references previously approved collections of information found in FDA's regulations.

**VI. What references are on display?**

The following reference has been placed on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Petition from Closure Medical Corp., March 23, 2009.

**List of Subjects in 21 CFR Part 878**

Medical devices.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 878 is amended as follows:

## PART 878—GENERAL AND PLASTIC SURGERY DEVICES

■ 1. The authority citation for 21 CFR part 878 continues to read as follows:

**Authority:** 21 U.S.C. 351, 360, 360c, 360e, 360j, 3601, 371.

■ 2. Section 878.4011 is added to subpart E to read as follows:

**§ 878.4011 Tissue adhesive with adjunct wound closure device for topical approximation of skin.**

(a) *Identification.* A tissue adhesive with adjunct wound closure device intended for the topical approximation of skin is a device indicated for topical application only to hold closed easily approximated skin edges of wounds from surgical incisions, including punctures from minimally invasive surgery, and simple, thoroughly cleansed, trauma-induced lacerations. It may be used in conjunction with, but not in place of, deep dermal stitches. Additionally, the adjunct wound closure device component maintains temporary skin edge alignment along the length of wound during application of the liquid adhesive.

(b) *Classification.* Class II (special controls). The special control for this device is FDA's "Guidance for Industry and FDA Staff; Class II Special Controls Guidance Document: Tissue Adhesive with Adjunct Wound Closure Device Intended for the Topical Approximation of Skin." See § 878.1(e) for the availability of this guidance document.

Dated: November 4, 2010.

**Nancy K. Stade,**

*Deputy Director for Policy, Center for Devices and Radiological Health.*

[FR Doc. 2010–28356 Filed 11–9–10; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 117

**[Docket No. USCG–2010–0998]**

### Drawbridge Operation Regulation; Upper Mississippi River, Rock Island, IL

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of temporary deviation from regulations.

**SUMMARY:** The Commander, Eighth Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Rock Island Railroad and Highway Drawbridge across the Upper Mississippi River, mile 482.9, at Rock Island, Illinois. The deviation is necessary to allow the bridge owner time to perform preventive maintenance and critical repairs that are essential to the continued safe operation of the drawbridge. This deviation allows the bridge to be maintained in the closed to navigation position for fifty-six days.

**DATES:** This deviation is effective from 7:30 a.m., January 4, 2011 to 7:30 a.m. February 28, 2011.

**ADDRESSES:** Documents mentioned in this preamble as being available in the docket are part of docket USCG–2010–0998 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–0998 in the "Keyword" box and then clicking "Search". They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or e-mail Eric A. Washburn, Bridge Administrator, Coast Guard; telephone 314–269–2378, e-mail *Eric.Washburn@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:** The U.S. Army Rock Island Arsenal requested a temporary deviation for the Rock Island Railroad and Highway Drawbridge, across the Upper Mississippi River, mile 482.9, at Rock Island, Illinois to remain in the closed to navigation position for 56 days from 7:30 a.m., January 4, 2011 to 7:30 a.m., February 28, 2011 to allow the bridge owner time for critical repairs and preventive maintenance. In order to perform extensive repairs and required annual maintenance, the bridge must be kept inoperative and in the closed to navigation position. The Rock Island Railroad and Highway Drawbridge currently operates in accordance with 33 CFR 117.5, which states the general requirement that drawbridges shall open promptly and fully for the passage of vessels when a request to open is given in accordance with the subpart.

There are no alternate routes for vessels transiting this section of the Upper Mississippi River.

The Rock Island Railroad and Highway Drawbridge, in the closed-to-navigation position, provides a vertical clearance of 23.8 feet above normal pool. Navigation on the waterway consists primarily of commercial tows and recreational watercraft. The drawbridge will not be able to open for emergencies during the repair period. This temporary deviation has been coordinated with waterway users. No objections were received.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: October 28, 2010.

**Eric A. Washburn,**

*Bridge Administrator.*

[FR Doc. 2010–28326 Filed 11–9–10; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 62

**RIN 2900–AN53**

## Supportive Services for Veteran Families Program

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** The Department of Veterans Affairs (VA) is amending its regulations to establish the Supportive Services for Veteran Families Program (SSVF Program). These amendments implement the provisions of section 604 of the Veterans' Mental Health and Other Care Improvements Act of 2008 (Act). The purpose of the SSVF Program is to provide supportive services grants to private non-profit organizations and consumer cooperatives who will coordinate or provide supportive services to very low-income veteran families who are residing in permanent housing, are homeless and scheduled to become residents of permanent housing within a specified time period, or after exiting permanent housing, are seeking other housing that is responsive to such very low-income veteran family's needs and preferences. The new SSVF Program is within the continuum of VA's homeless services programs.

**DATES:** This final rule is effective December 10, 2010.

**FOR FURTHER INFORMATION CONTACT:** John Kuhn, National Center for Homelessness Among Veterans, Supportive Services for Veteran Families Program Office, 4100 Chester Avenue, Suite 200, Philadelphia, PA 19104, (877) 737–0111 (this is a toll-free number).

**SUPPLEMENTARY INFORMATION:** In a document published in the **Federal Register** (75 FR 24514) on May 5, 2010, VA proposed to establish a new 38 CFR part 62 consisting of regulations captioned "SUPPORTIVE SERVICES FOR VETERAN FAMILIES PROGRAM" (referred to below as the proposed rule). This document adopts as a final rule, with changes discussed below, the proposed rule. This final rule establishes regulations concerning the SSVF Program and is necessary to implement section 604 of the Act, which is codified at 38 U.S.C. 2044.

VA provided a 30-day comment period that ended on June 4, 2010. VA received four submissions during this comment period on the proposed rule. One submission consisted of an inquiry about the timing for the award of supportive services grants, but did not contain any substantive comments on the proposed rule. The subject matter of the other submissions can be grouped into several categories, and we have organized our discussion of the comments accordingly.

### Selecting Applicants To Receive Supportive Services Grants

Two commenters provided recommendations regarding the scoring criteria used to rate applicants fulfilling the threshold requirements. Proposed § 62.22 described the scoring criteria VA would use to score applicants fulfilling the threshold requirements.

One commenter recommended that proposed § 62.22(b)(2), the scoring criterion regarding the applicant's outreach and screening plan, include an examination of the thoroughness of coverage by using available data to estimate the total number of veterans who could be eligible for participation over the course of a year, and then to determine the percentage of veterans in the applicant's area or community that will be contacted through outreach and screening.

We agree that the estimated number of participants and percentage of very low-income veterans served in an area or community should be considered when scoring the supportive services grant application; however, we think this can be better addressed through the scoring criterion relating to the need for program (§ 62.22(b)(1)) rather than the scoring criterion relating to the outreach and screening plan (§ 62.22(b)(2)). Section 62.20(a)(3) of the proposed rule stated that a complete supportive services grant application would include "an estimate with supporting documentation of the number of very

low-income veteran families occupying permanent housing who will be provided supportive services by the applicant and a description of the area or community where such very low-income veteran families are located." We added in § 62.20(a)(3) that the description of the area or community must include "an estimate of the total number of very low-income veteran families occupying permanent housing in such area or community." In accordance with § 62.22(b)(1)(i), points will be awarded to an applicant who has shown "a need amongst very low-income veteran families occupying permanent housing in the area or community where the program will be based." To determine need, the applicant's response to the information requested in § 62.20(a)(3) will be evaluated.

One commenter stated that the proposed rule did not include a scoring criterion that would award points to proposals that work with harder to serve populations of chronically homeless veterans. The commenter recommended awarding additional points to applicants serving chronically homeless veterans.

We agree that applicants should be rewarded for targeting those very low-income veteran families most in need of supportive services. Therefore, we have amended the scoring criterion in § 62.22(b)(2)(i) to include a reference to the identification and assistance of those "most in need of supportive services." We decline to make further changes based on this comment because § 62.22(b)(6) allows points to be awarded to applicants that meet VA's requirements, goals and objectives of the SSVF Program as identified in the regulations and the Notice of Fund Availability. In the event that VA wishes to target certain populations, such as chronically homeless veterans, VA can highlight this in the Notice of Fund Availability and award points to applicants meeting the stated goal. In accordance with § 62.40(d) of the rule, VA may also include priorities for funding to meet the statutory mandates of the Act and VA goals for the SSVF Program in the Notice of Fund Availability.

One commenter recommended that specific goals should be included in the scoring criterion regarding an applicant's "clear, realistic, and measurable goals" set forth in proposed § 62.22(c)(1). To more clearly specify the types of goals the applicant will receive points for describing, we have changed the criterion in § 62.22(c)(1) to describe "clear, realistic, and measurable goals that reflect the Supportive Services for Veteran Families Program's aim of reducing and preventing homelessness among very low-income veteran families."

**Selecting Applicants To Receive Supportive Services Grants**

Consistent with the Act (38 U.S.C. 2044(a)(4)), proposed § 62.23(d)(1) provided that VA would prefer applicants that provide, or coordinate the provision of, supportive services for very low-income veteran families transitioning from homelessness to permanent housing. One commenter stated that this preference is "extremely important" in order to "promote the efficiency of this program at reducing homelessness." Because this preference is already included in § 62.23(d)(1) of the rule, no change is necessary based upon this comment.

**Scoring Criteria for Grantees Applying for Renewal of Supportive Services Grants**

Proposed § 62.24 described the scoring criteria VA would use to score grantees applying for renewal of a supportive services grant. Proposed § 62.24(a) provided that up to 55 points would be awarded "based on the success of the grantee's program" and listed certain criteria that would be used to determine the success of the grantee's program. One commenter recommended that "[s]coring criteria should include success at reaching and serving veterans who are at greatest risk of homelessness or already homeless; and at reducing the number of homeless veterans in the service area." We agree with the comment, and add as § 62.24(a)(iv) and § 62.24(a)(v) of the rule the following scoring criteria: "The grantee prevented homelessness among very low-income veteran families occupying permanent housing that were most at risk of homelessness;" and, "The grantee's program reduced homelessness among very low-income veteran families occupying permanent housing in the area or community served by the grantee."

**Cost Sharing Requirement**

Pursuant to proposed § 62.26, grantees would be required to match a minimum of 10 percent of the amount of VA-provided supportive services grant funds with cash resources or third party in-kind contributions from non-VA sources. Under proposed § 62.22(d)(3), an applicant would be awarded points if the applicant exceeded the minimum cost sharing requirement up to a certain percentage as set forth in the Notice of Fund Availability. The cost sharing requirement was included in the proposed rule to demonstrate the applicant's commitment to the SSVF Program and ensure continuity of program operations and assistance to participants.

One commenter recommended removing the higher point threshold for the match in proposed § 62.22(d)(3) and including a waiver process that could allow communities suffering budgetary hardship to avoid the match requirement. Another commenter supported the matching requirement, however, this commenter indicated that it was an entity that received no government funding for its existing veteran homelessness programs.

We agree that some eligible entities may find the match requirement to be so burdensome that the eligible entity will decide not to apply for the supportive services grant or will incur a large administrative burden to justify in-kind consideration valuing 10 percent of the supportive services grant request. Because VA's goals for the cost sharing requirement can be met through other means during the supportive services grant application scoring process, imposing a formal percentage requirement is unnecessary. For example, it is likely that applicants that would have provided a match would also score well in the categories of financial capability and plan (see § 62.22(d)) and community linkages (see § 62.22(e)). Therefore, we have eliminated all references to the cost sharing requirement.

**Supportive Service: Direct Provision of Case Management and Other Services**

Proposed § 62.31 described a listing of baseline tasks that would fall within the supportive service of "case management." One commenter recommended that case management should be defined to include the services listed under "housing counseling" in proposed § 62.33(i). The commenter was under the impression that under the proposed rule, grantees could only provide referrals for housing counseling, but could not directly provide housing counseling services to participants.

We agree that housing counseling will be a critical part of a grantee's supportive services program and recognize that a grantee may wish to provide this service directly to participants, rather than through a referral. We have changed the introduction to § 62.33 to clarify that grantees may elect to directly provide to participants the public benefits listed in § 62.33(c) through § 62.33(i), which include housing counseling. Alternatively, grantees may elect to provide a referral for participants to

obtain these public benefits through another entity. Section 62.33 of the rule gives the grantee the flexibility to determine which of certain listed public benefits, including housing counseling, the grantee will provide and which will be accomplished through referrals. Housing counseling remains in § 62.33 to be consistent with our interpretation of the supportive services structure outlined in the Act (38 U.S.C. 2044(b)(1)(D)).

As discussed above, we have changed the introduction to § 62.33 to clarify that grantees may elect to directly provide to participants the public benefits listed in § 62.33(c) through § 62.33(i). As stated in the proposed rule, although grantees may be able to directly provide many necessary supportive services, in some situations it would be more efficient for grantees to provide a referral for participants to obtain services provided by another Federal, State, or local agency or an eligible entity in the area or community served by the grantee. The proposed rule specified that health care services and daily living services could be accomplished through referrals; therefore, the final rule clarifies that these supportive services listed in § 62.33(a) and § 62.33(b) cannot be provided directly to participants.

**Supportive Service: Assistance in Obtaining and Coordinating Other Public Benefits**

One commenter provided recommendations relating to the transportation and child care provisions in proposed § 62.33. Proposed § 62.33 described the supportive service of assistance in obtaining and coordinating other public benefits.

Proposed § 62.33(d) authorized the grantee to provide temporary transportation services to participants if the grantee determined that such assistance was necessary. Specifically, § 62.33(d) described the provision of tokens, vouchers, or other appropriate instruments for use on public transportation as the preferred method of providing transportation services, but also would allow the cost of vehicle leases to be included in a supportive services grant application if an applicant determines that public transportation options are not sufficient within the area or community to be served. The commenter stated that "in more rural settings[,] excluding car repair could be prohibitive for program participants."

We agree with the comment. We have added § 62.33(d)(3), which authorizes grantees to provide assistance to a participant needing car repairs or maintenance in an amount not to exceed $1,000 during a 3-year period. Any payments for car repairs or maintenance must be required to operate the vehicle, be reasonable, be paid directly to the third party repairing the car, and directly allow the participant to remain in permanent housing or obtain permanent housing. The $1,000 cap per participant is included so that payments for car repairs and maintenance do not consume a disproportionate amount of supportive services grant funds.

One commenter recommended removing the requirement in § 62.33(h) that a facility providing child care services pursuant to payments from the grantee be State-licensed because "home run daycare and other alternatives might be just as sufficient in many communities."

For safety reasons, we do not think that all licensing standards regarding child care providers should be removed; however, we agree that it would be beneficial to broaden the entities that would qualify as eligible child care providers. Accordingly, a definition of eligible child care provider is included in § 62.2 of the rule that is consistent with the broader definition used by the Department of Health and Human Services (HHS) for their Child Care and Development Block grant (42 U.S.C. 9859(2)). Recipients of supportive services grant funds for child care may also be recipients of funds under HHS grant programs, so it will be helpful to use a definition consistent with that used by HHS. The broader HHS definition includes child care providers that are "licensed, regulated, registered, or otherwise legally operating, under state and local law," which, in some jurisdictions, may include home run daycares.

The commenter also requested that VA consider removing the 2-month per calendar year limit on child care services payments by grantees under § 62.33(h) to allow grantees to determine and prioritize need within their jurisdiction. Although we agree that it is important to allow grantees to use some discretion in determining how supportive services grant funds should be expended, we also believe it is necessary to limit the duration of child care service expenditures in order to prevent child care services from consuming a disproportionate amount of supportive services grant funds. However, in response to the comment, we agree that 2 months may not be long enough to identify and obtain other assistance; hence, we have extended the time limitation in § 62.33(h)(2)(i) from 2 months during a calendar year to 4 months in any 12-month period beginning on the date that the grantee first pays for child care assistance. "Calendar year" is changed to "12-month period" to more accurately reflect VA's intention for the limitation, which is that the assistance be both short-term and temporary, not that it only be provided for a short time during a particular calendar year.

**Other Supportive Services**

Two commenters recommended that a longer time period be authorized for rental assistance. Proposed § 62.34(a) authorized the payment of rental assistance on behalf of a participant for a maximum of 4 months during a 3-year period, with no more than 2 months of assistance in any calendar year. One commenter explained that some grantees may provide more shallow subsidies to participants for a longer period of time if need be. Another commenter recommended flexibility in the area of rental subsidies and reliance on outcome measures to provide incentives to grantees to avoid overspending on rental assistance.

We agree with the suggestion to authorize a longer period of rental assistance, with the expectation that grantees will exercise discretion and only provide the amount of rental assistance that is necessary for a participant to obtain or remain in permanent housing. Hence, we have extended the amount of time a participant can receive rental assistance to 8 months during a 3-year period, with no more than 5 months of assistance during any 12-month period. "Calendar year" is changed to "12-month period" to more accurately reflect VA's intention for the limitation, which is that the assistance be both short-term and temporary, not that it only be provided for a short time during a particular calendar year. We have similarly changed the "calendar year" limitation in § 62.34(b)(1) on temporary financial assistance for utility-fee payment assistance to a "12-month period."

One commenter suggested that the duration limitation on the provision of rental assistance could be mitigated by increasing the funding flexibility of other VA programs. We do not respond to these comments in this notice as they are beyond the scope of this rulemaking.

Section 62.34(e) authorizes a grantee to purchase emergency supplies for a participant on a temporary basis. Section 62.2 defines "emergency supplies" as "items necessary for a participant's life or safety that are provided in order to address the participant's emergency situation." One commenter recommended providing a more detailed definition of emergency supplies, and specifying their allowed

use. The commenter explained, "Leaving it as broad as it is currently stated leaves room for potential abuse and waste of limited program dollars."

We have not further defined emergency supplies or prescribed their allowed use based on the comment. Instead of providing an itemized list of acceptable items in the rule, we expect this to be determined by grantees on a case-by-case basis in accordance with the parameters provided in § 62.2, which are that the items be "necessary for a participant's life or safety" and provided "on a temporary basis in order to address [an] emergency situation." However, we share the commenter's concern about potential abuse of limited program dollars; therefore, to ensure that a disproportionate amount of funds are not spent on emergency supplies, we added a cap of $500 per participant during a 3-year period in § 62.34(e)(1).

This same commenter recommended imposing a budgetary cap for all services paid for by a grantee under § 62.33. We decline to make any changes based on this comment aside from the $500 cap per participant for emergency services as discussed above. Through the programmatic oversight provisions and reporting requirements, and the enforcement provisions in § 62.80, VA expects to be able to identify and address any inappropriate activities of the grantee.

This commenter also recommended that, "There should be language instituted in the Final Rule to prevent any grantee paying monies back to themselves for activities that could not be viewed as direct services to the client." We interpret this comment as recommending that grantees be prohibited from providing rental assistance on behalf of a participant if the grantee is also the participant's landlord.

We made no changes based on this comment. Including such a change would unnecessarily penalize grantees who also serve as owners or managers of units occupied by very low-income veteran families. If the payment of supportive services grant funds to a grantee on behalf of a participant for rental assistance would be appropriate, reasonable, and meets the requirements set forth in the rule, a grantee should be able to make such a payment on behalf of a participant. Through the programmatic oversight provisions and reporting requirements, and the enforcement provisions in § 62.80, VA expects to be able to identify and address any inappropriate activities of the grantee.

The proposed rule included a condition that grantees providing temporary financial assistance would be required to help the participant develop a reasonable plan to address the participant's ability to pay for the item for which assistance is being provided (*i.e.* child care, rent, utilities, utilities or security deposits, and moving costs) and assist the participant to implement such plan. One commenter explained that "[t]he experience of effective prevention/re-housing programs indicates that this provision is important but needs to go further," stating that "[t]he rule should allow and encourage grantees to continue to work to provide social services to the veterans, to not only make a plan but also to implement it, through coordination with employment services, benefits and other help that is offered by the VA and other providers."

We agree. In §§ 62.33(h)(2)(iv) and 62.34, where a plan is required, we have added the following additional requirement: "Grantees must assist the participant to implement such plan by providing any necessary assistance or helping the participant to obtain any necessary public or private benefits or services."

Another commenter supported the idea of plans to address participants' housing stability, but stated that "the grantee cannot be held accountable for ensuring that 100% of the veterans served by their SSVF project will carry out their case management plans * * *" VA will consider the factors included in § 62.25 when determining whether to renew supportive services grants. None of these factors contains a requirement for a "100%" success rate for implementation of plans prepared to address participants' housing stability. Therefore, we make no changes based on this comment.

**General Operational Requirements**

One commenter stated that the proposed rule did not require grantees to execute an agreement with a participant or provide a summary of the grantee's supportive services grant program to a participant. The commenter recommended that, "A simple one-two page participant agreement providing an overview of the program and the benefits of program participation should be included for all program participants to ensure they are aware of the rules and restrictions of the program as well as the eligible uses of funds."

We agree. Providing potential participants with information on the grantee's supportive services grant program and any requirements necessary to receive supportive services would be beneficial to the participant. Therefore, a requirement for grantees to notify participants of basic information about the grantee's supportive services program and any conditions for the receipt of supportive services is added to § 62.36(c)(1).

**Program Changes**

One commenter recommended that the rule also require grantees to notify VA of changes to key personnel during the grant term. We agree. Proposed § 62.60 identified certain program changes about which the grantee would be required to notify VA. Section 62.60 is intended to help VA maintain oversight over the quality of the supportive services provided by grantees and prevent misuse of grant funds. Changes in key personnel may directly impact a grantee's supportive services grant program. Accordingly, we have added § 62.60(c), which requires grantees to inform VA in writing of key personnel changes within 30 days of the change. For similar reasons, § 62.60(c) also requires grantees to notify VA if the grantee changes its address.

**Financial Management and Administrative Costs**

Proposed § 62.70 required grantees to comply with certain Office of Management and Budget (OMB) requirements and certain VA standards for financial management for grants and agreements. One commenter recommended simplifying this section. We agree, and therefore a streamlined version of this section is included in the rule. In addition, to be more specific, rather than referring to the "applicable requirements of the appropriate OMB Circulars for Cost Principles," § 62.70(b) of the rule specifies that grantees must comply with the requirements set forth in OMB Circular A–110, Subpart C, Section 21, codified at 2 CFR 215.21; 38 CFR 49.21.

*Paperwork Reduction Act*

OMB assigns a control number for each collection of information it approves. Except for emergency approvals under 44 U.S.C. 3507(j), VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

In the proposed rule, we stated that proposed §§ 62.20, 62.36(c), 62.60, and 62.71 contain collection of information provisions under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521), and that we had requested public comment on those provisions in the notice published in the **Federal Register** on May 5, 2010 (75 FR 24523–24524).

We did not receive any comments on the proposed collection of information which is pending at OMB for approval.

*Executive Order 12866*

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a "significant regulatory action," requiring review by OMB unless OMB waives such a review, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action planned or taken by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this rule have been examined and it has been determined to be a significant regulatory action under Executive Order 12866 because it may result in a rule that raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

*Regulatory Flexibility Act*

The Secretary hereby certifies that this final rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* This final rule would only impact those entities that choose to participate in the SSVF Program. Small entity applicants will not be affected to a greater extent than large entity applicants. Small entities must elect to participate, and it is considered a benefit to those who choose to apply. To the extent this final rule would have any impact on small entities, it would not have an impact on a substantial number of small entities. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirement of sections 603 and 604.

*Unfunded Mandates*

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

*Catalog of Federal Domestic Assistance Program*

There is no Catalog of Federal Domestic Assistance program number and title for the program in this final rule.

*Signing Authority*

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on September 10, 2010, for publication.

**List of Subjects in 38 CFR Part 62**

Administrative practice and procedure, Day care, Disability benefits, Government contracts, Grant programs—health, Grant programs—social services, Grant programs—transportation, Grant programs—veterans, Grants—housing and community development, Health care, Homeless, Housing, Housing assistance payments, Indians—lands, Individuals with disabilities, Low and moderate income housing, Manpower training program, Medicare, Medicaid, Public assistance programs, Public housing, Relocation assistance, Rent subsidies, Reporting and recordkeeping requirements, Rural areas, Social security, Supplemental security income (SSI), Travel and transportation expenses, Unemployment compensation, Veterans.

Dated: November 5, 2010.

**William F. Russo,**

*Director, Regulations Management, Office of General Counsel, Department of Veterans Affairs.*

■ For the reasons stated in the preamble, VA amends 38 CFR chapter I by adding part 62 to read as follows:

## PART 62—SUPPORTIVE SERVICES FOR VETERAN FAMILIES PROGRAM

Sec.

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62.81 Supportive services grant closeout procedures.

(Authority: 38 U.S.C. 501, 2044, and as noted in specific sections)

### § 62.1 Purpose.

This part implements the Supportive Services for Veteran Families Program, which provides supportive services grants to eligible entities to facilitate the provision of supportive services to very low-income veteran families who are occupying permanent housing.

(Authority: 38 U.S.C. 501, 2044)

### § 62.2 Definitions.

For purposes of this part and any Notice of Fund Availability issued under this part:

*Applicant* means an eligible entity that submits an application for a supportive services grant announced in a Notice of Fund Availability.

*Area or community* means a political subdivision or contiguous political subdivisions (such as a precinct, ward, borough, city, county, State, Congressional district or tribal reservation) with an identifiable population of very low-income veteran families.

*Consumer cooperative* has the meaning given such term in section 202 of the Housing Act of 1959 (12 U.S.C. 1701q).

*Date of completion* means the earliest of the following dates:

(1) The date on which all required work is completed;

(2) The date specified in the supportive services grant agreement, or any supplement or amendment thereto; or

(3) The effective date of a supportive services grant termination under § 62.80(c).

*Disallowed costs* means costs charged by a grantee that VA determines to be unallowable based on applicable Federal cost principles, or based on this part or the supportive services grant agreement.

*Eligible child care provider* means a provider of child care services for compensation, including a provider of care for a school-age child during non-school hours, that—

(1) Is licensed, regulated, registered, or otherwise legally operating, under state and local law; and

(2) Satisfies the state and local requirements, applicable to the child care services the provider provides.

*Eligible entity* means a:

(1) Private non-profit organization, or

(2) Consumer cooperative.

*Emergency supplies* means items necessary for a participant's life or safety that are provided to the participant by a grantee on a temporary basis in order to address the participant's emergency situation.

*Grantee* means an eligible entity that is awarded a supportive services grant under this part.

*Homeless* has the meaning given that term in section 103 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11302).

*Notice of Fund Availability* means a Notice of Fund Availability published in the **Federal Register** in accordance with § 62.40.

*Occupying permanent housing* means meeting any of the conditions set forth in § 62.11(a).

*Participant* means a very low-income veteran family occupying permanent housing who is receiving supportive services from a grantee.

*Permanent housing* means community-based housing without a designated length of stay. Examples of permanent housing include, but are not limited to, a house or apartment with a month-to-month or annual lease term or home ownership.

*Private non-profit organization* means any of the following:

(1) An incorporated private institution or foundation that:

(i) Has no part of the net earnings that inure to the benefit of any member, founder, contributor, or individual;

(ii) Has a governing board that is responsible for the operation of the supportive services provided under this part; and

(iii) Is approved by VA as to financial responsibility.

(2) A for-profit limited partnership, the sole general partner of which is an organization meeting the requirements of paragraphs (1)(i), (ii) and (iii) of this definition.

(3) A corporation wholly owned and controlled by an organization meeting the requirements of paragraphs (1)(i), (ii), and (iii) of this definition.

(4) A tribally designated housing entity (as defined in section 4 of the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4103)).

*State* means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under the United States Housing Act of 1937.

*Subcontractor* means any third party contractor, of any tier, working directly for an eligible entity.

*Supportive services* means any of the following provided to address the needs of a participant:

(1) Outreach services as specified under § 62.30.

(2) Case management services as specified under § 62.31.

(3) Assisting participants in obtaining VA benefits as specified under § 62.32.

(4) Assisting participants in obtaining and coordinating other public benefits as specified under § 62.33.

(5) Other services as specified under § 62.34.

*Supportive services grant* means a grant awarded under this part.

*Supportive services grant agreement* means the agreement executed between VA and a grantee as specified under § 62.50.

*Suspension* means an action by VA that temporarily withdraws VA funding under a supportive services grant, pending corrective action by the grantee or pending a decision to terminate the supportive services grant by VA. Suspension of a supportive services grant is a separate action from suspension under VA regulations implementing Executive Orders 12549 and 12689, "Debarment and Suspension."

*VA* means the Department of Veterans Affairs.

*Very low-income veteran family* means a veteran family whose annual income, as determined in accordance with 24 CFR 5.609, does not exceed 50 percent of the median income for an area or community, as will be adjusted by VA based on family size and as may be adjusted and announced by VA in the Notice of Fund Availability based on residency within an area with unusually high or low construction costs, fair market rents (as determined under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f)), or family incomes. Unless VA announces otherwise in the Notice of Fund Availability, the median income for an area or community will be determined using the income limits most recently published by the Department of Housing and Urban Development for programs under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f).

*Veteran* means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.

*Veteran family* means a veteran who is a single person or a family in which the head of household, or the spouse of the head of household, is a veteran.

*Withholding* means that payment of a supportive services grant will not be paid until such time as VA determines that the grantee provides sufficiently adequate documentation and/or actions to correct a deficiency for the supportive services grant. Costs for supportive services provided by grantees under the supportive services grant from the date of the withholding letter would be reimbursed only if the grantee is able to submit the documentation or actions that the deficiency has been corrected to the satisfaction of VA.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.10 Supportive services grants—general.**

(a) VA provides supportive services grants to eligible entities as described in this part.

(b) Grantees must use at least 90 percent of supportive services grant

funds to provide and coordinate the provision of supportive services to very low-income veteran families who are occupying permanent housing.

(c) Grantees may use up to 10 percent of supportive services grant funds for administrative costs identified in § 62.70.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.11 Participants—occupying permanent housing.**

(a) *Occupying permanent housing.* A very low-income veteran family will be considered to be occupying permanent housing if the very low-income veteran family:

(1) Is residing in permanent housing;

(2) Is homeless and scheduled to become a resident of permanent housing within 90 days pending the location or development of housing suitable for permanent housing; or

(3) Has exited permanent housing within the previous 90 days to seek other housing that is responsive to the very low-income veteran family's needs and preferences.

**Note to paragraph (a):** For limitations on and continuations of the provision of supportive services to participants classified under paragraphs (a)(2) and (a)(3) of this section, *see* § 62.35.

(b) *Changes to a participant's classification for occupying permanent housing.* If a participant's classification for occupying permanent housing changes while the participant is receiving supportive services from a grantee, the participant may be reclassified under the categories set forth in paragraph (a) of this section.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.20 Applications for supportive services grants.**

(a) To apply for a supportive services grant, an applicant must submit to VA a complete supportive services grant application package, as described in the Notice of Fund Availability. A complete supportive services grant application package includes the following:

(1) A description of the supportive services to be provided by the applicant and the identified need for such supportive services among very low-income veteran families;

(2) A description of the characteristics of very low-income veteran families occupying permanent housing who will be provided supportive services by the applicant;

(3) An estimate with supporting documentation of the number of very low-income veteran families occupying permanent housing who will be provided supportive services by the applicant and a description of the area or community where such very low-income veteran families are located, including an estimate of the total number of very low-income veteran families occupying permanent housing in such area or community;

(4) Documentation evidencing the experience of the applicant and any identified subcontractors in providing supportive services to very low-income veteran families and very low-income families;

(5) Documentation relating to the applicant's ability to coordinate with any identified subcontractors;

(6) Documentation of the managerial capacity of the applicant to:

(i) Coordinate the provision of supportive services with the provision of permanent housing by the applicant or by other organizations;

(ii) Assess continuously the needs of participants for supportive services;

(iii) Coordinate the provision of supportive services with services provided by VA;

(iv) Customize supportive services to the needs of participants;

(v) Continuously seek new sources of assistance to ensure the long-term provision of supportive services to very low-income veteran families occupying permanent housing;

(vi) Comply with and implement the requirements of this part throughout the term of the supportive services grant; and

(7) Any additional information as deemed appropriate by VA.

(b) Grantees may submit an application for renewal of a supportive services grant if the grantee's program will remain substantially the same. To apply for renewal of a supportive services grant, a grantee must submit to VA a complete supportive services grant renewal application package, as described in the Notice of Fund Availability.

(c) VA may request in writing that an applicant or grantee, as applicable, submit other information or documentation relevant to the supportive services grant application.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.21 Threshold requirements prior to scoring supportive services grant applicants.**

VA will only score applicants that meet the following threshold requirements:

(a) The application is filed within the time period established in the Notice of Fund Availability, and any additional information or documentation requested by VA under § 62.20(c) is provided within the time frame established by VA;

(b) The application is completed in all parts;

(c) The applicant is an eligible entity;

(d) The activities for which the supportive services grant is requested are eligible for funding under this part;

(e) The applicant's proposed participants are eligible to receive supportive services under this part;

(f) The applicant agrees to comply with the requirements of this part;

(g) The applicant does not have an outstanding obligation to the Federal government that is in arrears and does not have an overdue or unsatisfactory response to an audit; and

(h) The applicant is not in default by failing to meet the requirements for any previous Federal assistance.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.22 Scoring criteria for supportive services grant applicants.**

VA will use the following criteria to score applicants who are applying for a supportive services grant:

(a) VA will award up to 35 points based on the background, qualifications, experience, and past performance, of the applicant, and any subcontractors identified by the applicant in the supportive services grant application, as demonstrated by the following:

(1) *Background and organizational history.* (i) Applicant's, and any identified subcontractors', background and organizational history are relevant to the program.

(ii) Applicant, and any identified subcontractors, maintain organizational structures with clear lines of reporting and defined responsibilities.

(iii) Applicant, and any identified subcontractors, have a history of complying with agreements and not defaulting on financial obligations.

(2) *Staff qualifications.* (i) Applicant's staff, and any identified subcontractors' staff, have experience working with very low-income families.

(ii) Applicant's staff, and any identified subcontractors' staff, have experience administering programs similar to the Supportive Services for Veteran Families Program.

(3) *Organizational qualifications and past performance.* (i) Applicant, and any identified subcontractors, have organizational experience providing supportive services to very low-income families.

(ii) Applicant, and any identified subcontractors, have organizational experience coordinating services for very low-income families among multiple organizations, Federal, State, local and tribal governmental entities.

(iii) Applicant, and any identified subcontractors, have organizational experience administering a program similar in type and scale to the Supportive Services for Veteran Families Program to very low-income families.

(4) *Experience working with veterans.* (i) Applicant's staff, and any identified subcontractors' staff, have experience working with veterans.

(ii) Applicant, and any identified subcontractors, have organizational experience providing supportive services to veterans.

(iii) Applicant, and any identified subcontractors, have organizational experience coordinating services for veterans among multiple organizations, Federal, State, local and tribal governmental entities.

(b) VA will award up to 25 points based on the applicant's program concept and supportive services plan, as demonstrated by the following:

(1) *Need for program.* (i) Applicant has shown a need amongst very low-income veteran families occupying permanent housing in the area or community where the program will be based.

(ii) Applicant understands the unique needs for supportive services of very low-income veteran families.

(2) *Outreach and screening plan.* (i) Applicant has a feasible outreach and referral plan to identify and assist very low-income veteran families occupying permanent housing that may be eligible for supportive services and are most in need of supportive services.

(ii) Applicant has a plan to process and receive participant referrals.

(iii) Applicant has a plan to assess and accommodate the needs of incoming participants.

(3) *Program concept.* (i) Applicant's program concept, size, scope, and staffing plan are feasible.

(ii) Applicant's program is designed to meet the needs of very low-income veteran families occupying permanent housing.

(4) *Program implementation timeline.* (i) Applicant's program will be implemented in a timely manner and supportive services will be delivered to participants as quickly as possible and within a specified timeline.

(ii) Applicant has a hiring plan in place to meet the applicant's program timeline or has existing staff to meet such timeline.

(5) *Collaboration and communication with VA.* Applicant has a plan to coordinate outreach and services with local VA facilities.

(6) *Ability to meet VA's requirements, goals and objectives for the Supportive Services for Veteran Families Program.* Applicant is committed to ensuring that its program meets VA's requirements, goals and objectives for the Supportive Services for Veteran Families Program as identified in this part and the Notice of Fund Availability.

(7) *Capacity to undertake program.* Applicant has sufficient capacity, including staff resources, to undertake the program.

(c) VA will award up to 15 points based on the applicant's quality assurance and evaluation plan, as demonstrated by the following:

(1) *Program evaluation.* (i) Applicant has created clear, realistic, and measurable goals that reflect the Supportive Services for Veteran Families Program's aim of reducing and preventing homelessness among very low-income veteran families against which the applicant's program performance can be evaluated.

(ii) Applicant plans to continually assess the program.

(2) *Monitoring.* (i) Applicant has adequate controls in place to regularly monitor the program, including any subcontractors, for compliance with all applicable laws, regulations, and guidelines.

(ii) Applicant has adequate financial and operational controls in place to ensure the proper use of supportive services grant funds.

(iii) Applicant has a plan for ensuring that the applicant's staff and any subcontractors are appropriately trained and stays informed of industry trends and the requirements of this part.

(3) *Remediation.* Applicant has a plan to establish a system to remediate non-compliant aspects of the program if and when they are identified.

(4) *Management and reporting.* Applicant's program management team has the capability and a system in place to provide to VA timely and accurate reports at the frequency set by VA.

(d) VA will award up to 15 points based on the applicant's financial capability and plan, as demonstrated by the following:

(1) *Organizational finances.* Applicant, and any identified subcontractors, are financially stable.

(2) *Financial feasibility of program.* (i) Applicant has a realistic plan for obtaining all funding required to operate the program for the time period of the supportive services grant.

(ii) Applicant's program is cost-effective and can be effectively implemented on-budget.

(e) VA will award up to 10 points based on the applicant's area or community linkages and relations, as demonstrated by the following:

(1) *Area or community linkages.* Applicant has a plan for developing or has existing linkages with Federal (including VA), State, local, and tribal government agencies, and private entities for the purposes of providing additional services to participants.

(2) *Past working relationships.* Applicant (or applicant's staff), and any identified subcontractors (or subcontractors' staff), have fostered successful working relationships and linkages with public and private organizations providing services to veterans or very low-income families in need of services similar to the supportive services.

(3) *Local presence and knowledge.* (i) Applicant has a presence in the area or community to be served by the applicant.

(ii) Applicant understands the dynamics of the area or community to be served by the applicant.

(4) *Integration of linkages and program concept.* Applicant's linkages to the area or community to be served by the applicant enhance the effectiveness of the applicant's program.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.23 Selecting applicants to receive supportive services grants.**

VA will use the following process to select applicants to receive supportive services grants:

(a) VA will score all applicants that meet the threshold requirements set forth in § 62.21 using the scoring criteria set forth in § 62.22.

(b) VA will group applicants within the applicable funding priorities if funding priorities are set forth in the Notice of Fund Availability.

(c) VA will rank those applicants who receive at least the minimum amount of total points and points per category set forth in the Notice of Fund Availability, within their respective funding priority group, if any. The applicants will be ranked in order from highest to lowest scores, within their respective funding priority group, if any.

(d) VA will use the applicant's ranking as the primary basis for selection for funding. However, VA will also use the following considerations to select applicants for funding:

(1) VA will give preference to applicants that provide, or coordinate the provision of, supportive services for very low-income veteran families transitioning from homelessness to permanent housing; and

(2) To the extent practicable, VA will ensure that supportive services grants are equitably distributed across geographic regions, including rural communities and tribal lands.

(e) Subject to paragraph (d) of this section, VA will fund the highest-ranked applicants for which funding is available, within the highest funding priority group, if any. If funding priorities have been established, to the extent funding is available and subject to paragraph (d) of this section, VA will select applicants in the next highest funding priority group based on their rank within that group.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.24 Scoring criteria for grantees applying for renewal of supportive services grants.**

VA will use the following criteria to score grantees applying for renewal of a supportive services grant:

(a) VA will award up to 55 points based on the success of the grantee's program, as demonstrated by the following:

(1) Participants made progress in achieving housing stability.

(2) Participants were satisfied with the supportive services provided by the grantee.

(3) The grantee implemented the program and delivered supportive services to participants in a timely manner.

(4) The grantee prevented homelessness among very low-income veteran families occupying permanent housing that were most at risk of homelessness.

(5) The grantee's program reduced homelessness among very low-income veteran families occupying permanent housing in the area or community served by the grantee.

(b) VA will award up to 30 points based on the cost-effectiveness of the grantee's program, as demonstrated by the following:

(1) The cost per participant household was reasonable.

(2) The grantee's program was effectively implemented on-budget.

(c) VA will award up to 15 points based on the extent to which the grantee's program complies with Supportive Services for Veteran Families Program goals and requirements, as demonstrated by the following:

(1) The grantee's program was administered in accordance with VA's goals for the Supportive Services for Veteran Families Program.

(2) The grantee's program was administered in accordance with all applicable laws, regulations, and guidelines.

(3) The grantee's program was administered in accordance with the grantee's supportive services grant agreement.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.25 Selecting grantees for renewal of supportive services grants.**

VA will use the following process to select grantees applying for renewal of supportive services grants:

(a) So long as the grantee continues to meet the threshold requirements set forth in § 62.21, VA will score the grantee using the scoring criteria set forth in § 62.24.

(b) VA will rank those grantees who receive at least the minimum amount of total points and points per category set forth in the Notice of Fund Availability. The grantees will be ranked in order from highest to lowest scores.

(c) VA will use the grantee's ranking as the basis for selection for funding. VA will fund the highest-ranked grantees for which funding is available.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.30 Supportive service: Outreach services.**

(a) Grantees must provide outreach services and use their best efforts to ensure that hard-to-reach very low-income veteran families occupying permanent housing are found, engaged, and provided supportive services.

(b) Outreach services must include active liaison with local VA facilities, State, local, tribal (if any), and private agencies and organizations providing supportive services to very low-income veteran families in the area or community to be served by the grantee.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.31 Supportive service: Case management services.**

Grantees must provide case management services that include, at a minimum:

(a) Performing a careful assessment of participant functions and developing and monitoring case plans in coordination with a formal assessment of supportive services needed, including necessary follow-up activities, to ensure that the participant's needs are adequately addressed;

(b) Establishing linkages with appropriate agencies and service providers in the area or community to help participants obtain needed supportive services;

(c) Providing referrals to participants and related activities (such as scheduling appointments for participants) to help participants obtain needed supportive services, such as medical, social, and educational assistance or other supportive services to address participants' identified needs and goals;

(d) Deciding how resources are allocated to participants on the basis of need; and

(e) Educating participants on issues, including, but not limited to, supportive services availability and participant rights.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.32 Supportive service: Assistance in obtaining VA benefits.**

(a) Grantees must assist participants in obtaining any benefits from VA for which the participants are eligible. Such benefits include, but are not limited to:

(1) Vocational and rehabilitation counseling;

(2) Employment and training service;

(3) Educational assistance; and

(4) Health care services.

(b) Grantees are not permitted to represent participants before VA with respect to a claim for VA benefits unless they are recognized for that purpose pursuant to 38 U.S.C. 5902. Employees and members of grantees are not permitted to provide such representation unless the individual providing representation is accredited pursuant to 38 U.S.C. chapter 59.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.33 Supportive service: Assistance in obtaining and coordinating other public benefits.**

Grantees must assist participants to obtain and coordinate the provision of other public benefits, including at a minimum those listed in paragraphs (a) through (i) below, that are being provided by Federal, State, local, or tribal agencies, or any eligible entity in the area or community served by the grantee by referring the participant to and coordinating with such entity. If a public benefit is not being provided by Federal, State, local, or tribal agencies, or any eligible entity in the area or community, the grantee is not required to obtain, coordinate, or provide such public benefit. Grantees may also elect to provide directly to participants the public benefits identified in paragraphs (c) through (i) below. When grantees directly provide such benefits, the grantees must comply with the same requirements as a third party provider of such benefits.

(a) Health care services, which include:

(1) Health insurance; and

(2) Referral to a governmental or eligible entity that provides any of the following services:

(i) Hospital care, nursing home care, out-patient care, mental health care, preventive care, habilitative and rehabilitative care, case management, respite care, and home care;

(ii) The training of any very low-income veteran family member in the care of any very low-income veteran family member; and

(iii) The provision of pharmaceuticals, supplies, equipment, devices, appliances, and assistive technology.

(b) Daily living services, which may consist of the referral of a participant, as appropriate, to an entity that provides services relating to the functions or tasks for self-care usually performed in the normal course of a day, including, but not limited to, eating, bathing, grooming, dressing, and home management activities.

(c) Personal financial planning services, which include, at a minimum, providing recommendations regarding day-to-day finances and achieving long-term budgeting and financial goals.

(d) Transportation services.

(1) The grantee may provide temporary transportation services directly to participants if the grantee determines such assistance is necessary; however, the preferred method of direct provision of transportation services is the provision of tokens, vouchers, or other appropriate instruments so that participants may use available public transportation options.

(2) If public transportation options are not sufficient within an area or community, costs related to the lease of vehicle(s) may be included in a supportive services grant application if the applicant or grantee, as applicable, agrees that:

(i) The vehicle(s) will be safe, accessible, and equipped to meet the needs of the participants;

(ii) The vehicle(s) will be maintained in accordance with the manufacturer's recommendations; and

(iii) All transportation personnel (employees and subcontractors) will be trained in managing any special needs of participants and handling emergency situations.

(3) The grantee may make payments on behalf of a participant needing car repairs or maintenance required to operate the vehicle if the payment will allow the participant to remain in permanent housing or obtain permanent housing, subject to the following:

(i) Payments for car repairs or maintenance on behalf of the participant may not exceed $1,000 during a 3-year period, such period beginning on the date the grantee first pays for any car repairs or maintenance on behalf of the participant.

(ii) Payments for car repairs or maintenance must be reasonable and must be paid by the grantee directly to the third party that repairs or maintains the car.

(iii) Grantees may require participants to share in the cost of car repairs or maintenance as a condition of receiving assistance with car repairs or maintenance.

(e) Income support services, which may consist of providing assistance in obtaining other Federal, State, tribal and local assistance, in the form of, but not limited to, mental health benefits, employment counseling, medical assistance, veterans' benefits, and income support assistance.

(f) Fiduciary and representative payee services, which may consist of acting on behalf of a participant by receiving the participant's paychecks, benefits or other income, and using those funds for the current and foreseeable needs of the participant and saving any remaining funds for the participant's future use in an interest bearing account or saving bonds.

(g) Legal services to assist a participant with issues that interfere with the participant's ability to obtain or retain permanent housing or supportive services.

(h) Child care, which includes the:

(1) Referral of a participant, as appropriate, to an eligible child care provider that provides child care with sufficient hours of operation and serves appropriate ages, as needed by the participant; and

(2) Payment by a grantee on behalf of a participant for child care by an eligible child care provider.

(i) Payments for child care services must be paid by the grantee directly to an eligible child care provider and cannot exceed a maximum of 4 months in a 12-month period beginning on the date that the grantee first pays for child care services on behalf of a participant.

(ii) Grantees may require participants to share in the cost of child care as a condition of receiving payments for child care services.

(iii) Payments for child care services cannot be provided on behalf of participants for the same period of time and for the same cost types that are being provided through another Federal, State or local subsidy program.

(iv) As a condition of providing payments for child care services, the grantee must help the participant develop a reasonable plan to address the participant's future ability to pay for child care services. Grantees must assist the participant to implement such plan by providing any necessary assistance or helping the participant to obtain any necessary public or private benefits or services.

(i) Housing counseling, which includes the provision of counseling relating to the stabilization of a participant's residence in permanent housing. At a minimum, housing counseling includes providing referrals to appropriate local, tribal, State, and Federal resources, and providing counseling, education and outreach directly to participants on the following topics, as appropriate:

(1) Housing search assistance, including the location of vacant units, the scheduling of appointments, viewing apartments, reviewing tenant leases, and negotiating with landlords on behalf of a participant;

(2) Rental and rent subsidy programs;

(3) Federal, State, tribal, or local assistance;

(4) Fair housing;

(5) Landlord tenant laws;

(6) Lease terms;

(7) Rent delinquency;

(8) Resolution or prevention of mortgage delinquency, including, but not limited to, default and foreclosure, loss mitigation, budgeting, and credit; and

(9) Home maintenance and financial management.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.34 Other supportive services.**

Grantees may provide the following services which are necessary for maintaining independent living in permanent housing and housing stability:

(a) *Rental assistance.* Payment of rent, penalties or fees to help the participant remain in permanent housing or obtain permanent housing.

(1) A participant may receive rental assistance for a maximum of 8 months during a 3-year period, such period beginning on the date that the grantee first pays rent on behalf of the participant; however, a participant cannot receive rental assistance for more than 5 months in any 12-month period beginning on the date that the grantee first pays rent on behalf of the participant. The rental assistance may be for rental payments that are currently due or are in arrears, and for the payment of penalties or fees incurred by a participant and required to be paid by the participant under an existing lease or court order. In all instances, rental assistance may only be provided if the payment of such rental assistance will directly allow the participant to remain in permanent housing or obtain permanent housing.

(2) Rental assistance must be paid by the grantee directly to the third party to whom rent is owed.

(3) As a condition of providing rental assistance, the grantee must help the participant develop a reasonable plan to address the participant's future ability

to pay rent. Grantees must assist the participant to implement such plan by providing any necessary assistance or helping the participant to obtain any necessary public or private benefits or services.

(4) The rental assistance paid by a grantee must be in compliance with the following "rent reasonableness" standard. "Rent reasonableness" means the total rent charged for a unit must be reasonable in relation to the rents being charged during the same time period for comparable units in the private unassisted market and must not be in excess of rents being charged by the property owner during the same time period for comparable non-luxury unassisted units. To make this determination, the grantee should consider:

(i) The location, quality, size, type, and age of the unit; and

(ii) Any amenities, housing services, maintenance, and utilities to be provided by the property owner. Comparable rents can be checked by using a market study, by reviewing comparable units advertised for rent, or using a note from the property owner verifying the comparability of charged rents to other units owned by the property owner. Prior to providing rental assistance in the form of payment of penalties or fees incurred by a participant, the grantee must determine that such penalties or fees are reasonable.

(5) With respect to shared housing arrangements, the rent charged for a participant must be in relation to the size of the private space for that participant in comparison to other private space in the shared unit, excluding common space. A participant may be assigned a pro rata portion based on the ratio derived by dividing the number of bedrooms in their private space by the number of bedrooms in the unit. Participation in shared housing arrangements must be voluntary.

(6) Rental assistance payments cannot be provided on behalf of participants for the same period of time and for the same cost types that are being provided through another Federal, State, or local housing subsidy program.

(7) Grantees may require participants to share in the cost of rent as a condition of receiving rental assistance.

(b) *Utility-fee payment assistance.* Payment of utility fees to help the participant to remain in permanent housing or obtain permanent housing.

(1) A participant may receive payments for utilities for a maximum of 4 months during a 3-year period, such period beginning on the date that the grantee first pays utility fees on behalf of the participant; provided, however, that a participant cannot receive payments for utilities for more than 2 months in any 12-month period beginning on the date that the grantee first pays a utility payment on behalf of the participant. The payment for utilities may be for utility payments that are currently due or are in arrears, provided that the payment of such utilities will allow the participant to remain in permanent housing or obtain permanent housing.

(2) Payments for utilities must be paid by the grantee directly to a utility company. Payments for utilities only will be available if a participant, a legal representative of the participant, or a member of his/her household, has an account in his/her name with a utility company or proof of responsibility to make utility payments, such as cancelled checks or receipts in his/her name from a utility company.

(3) As a condition of providing payments for utilities, the grantee must help the participant develop a reasonable plan to address the participant's future ability to pay utility payments. Grantees must assist the participant to implement such plan by providing any necessary assistance or helping the participant to obtain any necessary public or private benefits or services.

(4) Payments for utilities cannot be provided on behalf of participants for the same period of time and for the same cost types that are being provided through another Federal, State, or local program.

(5) Grantees may require participants to share in the cost of utility payments as a condition of receiving payments for utilities.

(c) *Deposits.* Payment of security deposits or utility deposits to help the participant remain in permanent housing or obtain permanent housing.

(1) A participant may receive assistance with the payment of a security deposit a maximum of one time in every 3-year period, such period beginning on the date the grantee pays a security deposit on behalf of a participant.

(2) A participant may receive assistance with the payment of a utility deposit a maximum of one time in every 3-year period, such period beginning on the date the grantee pays a utility deposit on behalf of a participant.

(3) Any security deposit or utility deposit must be paid by the grantee directly to the third party to whom the security deposit or utility deposit is owed. The payment of such deposit must allow the participant to remain in the participant's existing permanent housing or help the participant to obtain and remain in permanent housing selected by the participant.

(4) As a condition of providing a security deposit payment or a utility deposit payment, the grantee must help the participant develop a reasonable plan to address the participant's future housing stability. Grantees must assist the participant to implement such plan by providing any necessary assistance or helping the participant to obtain any necessary public or private benefits or services.

(5) Security deposits and utility deposits covering the same period of time in which assistance is being provided through another housing subsidy program are eligible, as long as they cover separate cost types.

(6) Grantees may require participants to share in the cost of the security deposit or utility deposit as a condition of receiving assistance with such deposit.

(d) *Moving costs.* Payment of moving costs to help the participant to obtain permanent housing.

(1) A participant may receive assistance with moving costs a maximum of one time in every 3-year period, such period beginning on the date the grantee pays moving costs on behalf of a participant.

(2) Moving costs assistance must be paid by the grantee directly to a third party. Moving costs assistance includes reasonable moving costs, such as truck rental, hiring a moving company, or short-term storage fees for a maximum of 3 months or until the participant is in permanent housing, whichever is shorter.

(3) As a condition of providing moving costs assistance, the grantee must help the participant develop a reasonable plan to address the participant's future housing stability. Grantees must assist the participant to implement such plan by providing any necessary assistance or helping the participant to obtain any necessary public or private benefits or services.

(4) Moving costs assistance payments cannot be provided on behalf of participants for the same period of time and for the same cost types that are being provided through another Federal, State, or local program.

(5) Grantees may require participants to share in the cost of moving as a condition of receiving assistance with moving costs.

(e) *Purchase of emergency supplies for a participant.* (1) A grantee may purchase emergency supplies for a participant on a temporary basis. The costs for such emergency supplies shall not exceed $500 per participant during

a 3-year period, such period beginning on the date that the grantee first pays for an emergency supply on behalf of the participant.

(2) The costs of the emergency supplies must be paid by the grantee directly to a third party.

(f) *Other.* Other services as set forth in the Notice of Fund Availability or as approved by VA that are consistent with the Supportive Services for Veteran Families Program. Applicants may propose additional services in their supportive services grant application, and grantees may propose additional services by submitting a written request to modify the supportive services grant in accordance with § 62.60.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.35 Limitations on and continuations of the provision of supportive services to certain participants.**

(a) *Continuation of the provision of supportive services to a participant classified under § 62.11(a)(2).* If a participant classified under § 62.11(a)(2) does not become a resident of permanent housing within the originally scheduled 90-day period, the grantee may continue to provide supportive services to a participant classified under § 62.11(a)(2) for such time that the participant continues to meet the requirements of § 62.11(a)(2).

(b) *Limitations on the provision of supportive services to participants classified under § 62.11(a)(3).* (1) A grantee may provide supportive services to a participant classified under § 62.11(a)(3) until the earlier of the following dates:

(i) The participant commences receipt of other housing services adequate to meet the participant's needs; or

(ii) Ninety days from the date the participant exits permanent housing.

(2) Supportive services provided to participants classified under § 62.11(a)(3) must be designed to support the participants in their choice to transition into housing that is responsive to their individual needs and preferences.

(c) *Continuation of supportive services to veteran family member(s).* If a veteran becomes absent from a household or dies while other members of the veteran family are receiving supportive services, then such supportive services must continue for a grace period following the absence or death of the veteran. The grantee must establish a reasonable grace period for continued participation by the veteran's family member(s), but that period may not exceed 1 year from the date of absence or death of the veteran, subject to the requirements of paragraphs (a) and (b) of this section. The grantee must notify the veteran's family member(s) of the duration of the grace period.

(d) *Referral for other assistance.* If a participant becomes ineligible to receive supportive services under this section, the grantee must provide the participant with information on other available programs or resources.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.36 General operation requirements.**

(a) *Eligibility documentation.* Grantees must verify and document each participant's eligibility for supportive services and classify the participant under one of the categories set forth in § 62.11(a). Grantees must certify the eligibility and classification of each participant at least once every 3 months.

(b) *Confidentiality.* Grantees must maintain the confidentiality of records kept on participants. Grantees that provide family violence prevention or treatment services must establish and implement procedures to ensure the confidentiality of:

(1) Records pertaining to any individual provided services, and

(2) The address or location where the services are provided.

(c) *Notifications to participants.* (1) Prior to initially providing supportive services to a participant, the grantee must notify each participant of the following:

(i) The supportive services are being paid for, in whole or in part, by VA;

(ii) The supportive services available to the participant through the grantee's program; and

(iii) Any conditions or restrictions on the receipt of supportive services by the participant.

(2) The grantee must provide each participant with a satisfaction survey which can be submitted by the participant directly to VA, within 45 to 60 days of the participant's entry into the grantee's program and again within 30 days of such participant's pending exit from the grantee's program.

(d) *Assessment of funds.* Grantees must regularly assess how supportive services grant funds can be used in conjunction with other available funds and services to assist participants.

(e) *Administration of supportive services grants.* Grantees must ensure that supportive services grants are administered in accordance with the requirements of this part, the supportive services grant agreement, and other applicable laws and regulations. Grantees are responsible for ensuring that any subcontractors carry out activities in compliance with this part.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.37 Fee prohibition.**

Grantees must not charge a fee to very low-income veteran families for providing supportive services that are funded with amounts from a supportive services grant.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.40 Notice of Fund Availability.**

When funds are available for supportive services grants, VA will publish a Notice of Fund Availability in the **Federal Register**. The notice will identify:

(a) The location for obtaining supportive services grant applications;

(b) The date, time, and place for submitting completed supportive services grant applications;

(c) The estimated amount and type of supportive services grant funding available;

(d) Any priorities for or exclusions from funding to meet the statutory mandates of 38 U.S.C. 2044 and VA goals for the Supportive Services for Veteran Families Program;

(e) The length of term for the supportive services grant award;

(f) The minimum number of total points and points per category that an applicant or grantee, as applicable, must receive in order for a supportive services grant to be funded;

(g) Any maximum uses of supportive services grant funds for specific supportive services;

(h) The timeframes and manner for payments under the supportive services grant; and

(i) Other information necessary for the supportive services grant application process as determined by VA.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.50 Supportive services grant agreements.**

(a) After an applicant is selected for a supportive services grant in accordance with § 62.23, VA will draft a supportive services grant agreement to be executed by VA and the applicant. Upon execution of the supportive services grant agreement, VA will obligate supportive services grant funds to cover the amount of the approved supportive services grant, subject to the availability of funding. The supportive services grant agreement will provide that the grantee agrees, and will ensure that each subcontractor agrees, to:

(1) Operate the program in accordance with the provisions of this part and the applicant's supportive services grant application;

(2) Comply with such other terms and conditions, including recordkeeping and reports for program monitoring and

evaluation purposes, as VA may establish for purposes of carrying out the Supportive Services for Veteran Families Program, in an effective and efficient manner; and

(3) Provide such additional information as deemed appropriate by VA.

(b) After a grantee is selected for renewal of a supportive services grant in accordance with § 62.25, VA will draft a supportive services grant agreement to be executed by VA and the grantee. Upon execution of the supportive services grant agreement, VA will obligate supportive services grant funds to cover the amount of the approved supportive services grant, subject to the availability of funding. The supportive services grant agreement will contain the same provisions described in paragraph (a) of this section.

(c) No funds provided under this part may be used to replace Federal, State, tribal, or local funds previously used, or designated for use, to assist very low-income veteran families.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.51 Payments under the supportive services grant.**

Grantees are to be paid in accordance with the timeframes and manner set forth in the Notice of Fund Availability.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.60 Program or budget changes and corrective action plans.**

(a) A grantee must submit to VA a written request to modify a supportive services grant for any proposed significant change that will alter the supportive services grant program. If VA approves such change, VA will issue a written amendment to the supportive services grant agreement. A grantee must receive VA's approval prior to implementing a significant change. Significant changes include, but are not limited to, a change in the grantee or any subcontractors identified in the supportive services grant agreement; a change in the area or community served by the grantee; additions or deletions of supportive services provided by the grantee; a change in category of participants to be served; and a change in budget line items that are more than 10 percent of the total supportive services grant award.

(1) VA's approval of changes is contingent upon the grantee's amended application retaining a high enough rank to have been competitively selected for funding in the year that the application was granted.

(2) Each supportive services grant modification request must contain a description of the revised proposed use of supportive services grant funds.

(b) VA may require that the grantee initiate, develop and submit to VA for approval a Corrective Action Plan (CAP) if, on a quarterly basis, actual supportive services grant expenditures vary from the amount disbursed to a grantee for that same quarter or actual supportive services grant activities vary from the grantee's program description provided in the supportive services grant agreement.

(1) The CAP must identify the expenditure or activity source that has caused the deviation, describe the reason(s) for the variance, provide specific proposed corrective action(s), and provide a timetable for accomplishment of the corrective action.

(2) After receipt of the CAP, VA will send a letter to the grantee indicating that the CAP is approved or disapproved. If disapproved, VA will make beneficial suggestions to improve the proposed CAP and request resubmission, or take other actions in accordance with this part.

(c) Grantees must inform VA in writing of any key personnel changes (e.g., new executive director, supportive services grant program director, or chief financial officer) and grantee address changes within 30 days of the change.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.61 Procedural error.**

If an applicant would have been selected but for a procedural error committed by VA, VA may select that applicant for funding when sufficient funds become available if there is no material change in the information that would have resulted in the applicant's selection. A new application will not be required for this purpose.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.62 Religious organizations.**

(a) Organizations that are religious or faith-based are eligible, on the same basis as any other organization, to participate in the Supportive Services for Veteran Families Program under this part. In the selection of applicants, the Federal government will not discriminate for or against an organization on the basis of the organization's religious character or affiliation.

(b)(1) No organization may use direct financial assistance from VA under this part to pay for any of the following:

(i) Inherently religious activities, such as religious worship, instruction, or proselytization; or

(ii) Equipment or supplies to be used for any of those activities.

(2) For purposes of this section, "indirect financial assistance" means Federal assistance in which a service provider receives program funds through a voucher, certificate, agreement, or other form of disbursement, as a result of the independent and private choices of individual beneficiaries. "Direct financial assistance" means Federal aid in the form of a grant, contract, or cooperative agreement where the independent choices of individual beneficiaries do not determine which organizations receive program funds.

(c) Organizations that engage in inherently religious activities, such as worship, religious instruction, or proselytization, must offer those services separately in time or location from any programs or services funded with direct financial assistance from VA under this part, and participation in any of the organization's inherently religious activities must be voluntary for the beneficiaries of a program or service funded by direct financial assistance from VA under this part.

(d) A religious organization that participates in the Supportive Services for Veteran Families Program under this part will retain its independence from Federal, State, or local governments and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from VA under this part to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, faith-based organizations may use space in their facilities to provide VA-funded services under this part, without removing religious art, icons, scripture, or other religious symbols. In addition, a VA-funded religious organization retains its authority over its internal government, and it may retain religious terms in its organization's name, select its board members and otherwise govern itself on a religious basis, and include religious reference in its organization's mission statement and other governing documents.

(e) An organization that participates in a VA program under this part must not, in providing direct program assistance, discriminate against a program beneficiary or a prospective program beneficiary regarding supportive services, financial assistance, or technical assistance, on the basis of religion or religious belief.

(f) If a State or local government voluntarily contributes its own funds to supplement federally funded activities, the State or local government has the

option to segregate the Federal funds or commingle them. However, if the funds are commingled, this provision applies to all of the commingled funds.

(g) To the extent otherwise permitted by Federal law, the restrictions on inherently religious activities set forth in this section do not apply where VA funds are provided to religious organizations through indirect assistance as a result of a genuine and independent private choice of a beneficiary, provided the religious organizations otherwise satisfy the requirements of this part. A religious organization may receive such funds as the result of a beneficiary's genuine and independent choice if, for example, a beneficiary redeems a voucher, coupon, or certificate, allowing the beneficiary to direct where funds are to be paid, or a similar funding mechanism provided to that beneficiary and designed to give that beneficiary a choice among providers.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.63 Visits to monitor operations and compliance.**

(a) VA has the right, at all reasonable times, to make visits to all grantee locations where a grantee is using supportive services grant funds in order to review grantee accomplishments and management control systems and to provide such technical assistance as may be required. VA may conduct inspections of all program locations and records of a grantee at such times as are deemed necessary to determine compliance with the provisions of this part. In the event that a grantee delivers services in a participant's home, or at a location away from the grantee's place of business, VA may accompany the grantee. If the grantee's visit is to the participant's home, VA will only accompany the grantee with the consent of the participant. If any visit is made by VA on the premises of the grantee or a subcontractor under the supportive services grant, the grantee must provide, and must require its subcontractors to provide, all reasonable facilities and assistance for the safety and convenience of the VA representatives in the performance of their duties. All visits and evaluations will be performed in such a manner as will not unduly delay services.

(b) The authority to inspect carries with it no authority over the management or control of any applicant or grantee under this part.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.70 Financial management and administrative costs.**

(a) Grantees must comply with applicable requirements of the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, "Audits of States, Local Governments, and Non-Profit Organizations," codified by VA at 38 CFR Part 41.

(b) Grantees must use a financial management system that provides adequate fiscal control and accounting records and meets the requirements set forth in OMB Circular A–110, Subpart C, Section 21 (codified at 2 CFR 215.21) and 38 CFR 49.21.

(c) Payment up to the amount specified in the supportive services grant must be made only for allowable, allocable, and reasonable costs in conducting the work under the supportive services grant. The determination of allowable costs must be made in accordance with the applicable Federal Cost Principles set forth in OMB Circular A–122, Cost Principles for Non-Profit Organizations, codified at 2 CFR Part 235.

(d) Grantees are subject to the Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and other Non-Profit Organizations, codified at 38 CFR Part 49.

(e) Costs for administration by a grantee must not exceed 10 percent of the total amount of the supportive services grant. Administrative costs will consist of all direct and indirect costs associated with the management of the program. These costs will include the administrative costs, both direct and indirect, of subcontractors.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.71 Grantee reporting requirements.**

(a) VA may require grantees to provide, in such form as may be prescribed, such reports or answers in writing to specific questions, surveys, or questionnaires as VA determines necessary to carry out the Supportive Services for Veteran Families Program.

(b) If, on a quarterly basis, actual supportive services grant expenditures vary from the amount disbursed to a grantee for that same quarter or actual supportive services grant activities vary from the grantee's program description provided in the supportive services grant agreement, grantees must report the deviation to VA.

**Note to paragraph (b):** For information on corrective action plans, which may be required in this circumstance, *see* § 62.60.

(c) At least once per year, or at the frequency set by VA, each grantee must submit to VA a report containing information relating to operational effectiveness, fiscal responsibility, supportive services grant agreement compliance, and legal and regulatory compliance, including a description of the use of supportive services grant funds, the number of participants assisted, the types of supportive services provided, and any other information that VA may request.

(d) Grantees must relate financial data to performance data and develop unit cost information whenever practical.

(e) All pages of the reports must cite the assigned supportive services grant number and be submitted in a timely manner.

(f) Grantees must provide VA with consent to post information from reports on the Internet and use such information in other ways deemed appropriate by VA. Grantees shall clearly mark information that is confidential to individual participants.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.72 Recordkeeping.**

Grantees must ensure that records are maintained for at least a 3-year period to document compliance with this part. Grantees must produce such records at VA's request.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.73 Technical assistance.**

VA will provide technical assistance, as necessary, to eligible entities to meet the requirements of this part. Such technical assistance will be provided either directly by VA or through grants or contracts with appropriate public or non-profit private entities.

(Authority: 38 U.S.C. 501, 2044, 2064)

**§ 62.80 Withholding, suspension, deobligation, termination, and recovery of funds by VA.**

(a) *Recovery of funds.* VA will recover from the grantee any supportive services grant funds that are not used in accordance with the requirements of this part. VA will issue to the grantee a notice of intent to recover supportive services grant funds. The grantee will then have 30 days to submit documentation demonstrating why the supportive services grant funds should not be recovered. After review of all submitted documentation, VA will determine whether action will be taken to recover the supportive services grant funds.

(b) *VA actions when grantee fails to comply.* When a grantee fails to comply with the terms, conditions, or standards of the supportive services grant, VA

may, on 7-days notice to the grantee, withhold further payment, suspend the supportive services grant, or prohibit the grantee from incurring additional obligations of supportive services grant funds, pending corrective action by the grantee or a decision to terminate in accordance with paragraph (c) of this section. VA will allow all necessary and proper costs that the grantee could not reasonably avoid during a period of suspension if such costs meet the provisions of the applicable Federal Cost Principles.

(c) *Termination.* Supportive services grants may be terminated in whole or in part only if paragraphs (c)(1), (2), or (3) of this section apply.

(1) By VA, if a grantee materially fails to comply with the terms and conditions of a supportive services grant award and this part.

(2) By VA with the consent of the grantee, in which case VA and the grantee will agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated.

(3) By the grantee upon sending to VA written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if VA determines in the case of partial termination that the reduced or modified portion of the supportive services grant will not accomplish the purposes for which the supportive services grant was made, VA may terminate the supportive services grant in its entirety under either paragraphs (c)(1) or (2) of this section.

(d) *Deobligation of funds.* (1) VA may deobligate all or a portion of the amounts approved for use by a grantee if:

(i) The activity for which funding was approved is not provided in accordance with the approved application and the requirements of this part;

(ii) Such amounts have not been expended within a 1-year period from the date of the signing of the supportive services grant agreement;

(iii) Other circumstances set forth in the supportive services grant agreement authorize or require deobligation.

(2) At its discretion, VA may re-advertise in a Notice of Fund Availability the availability of funds that have been deobligated under this section or award deobligated funds to applicants who previously submitted applications in response to the most recently published Notice of Fund Availability.

(Authority: 38 U.S.C. 501, 2044)

**§ 62.81 Supportive services grant closeout procedures.**

Supportive services grants will be closed out in accordance with the following procedures upon the date of completion:

(a) No later than 90 days after the date of completion, the grantee must refund to VA any unobligated (unencumbered) balance of supportive services grant funds that are not authorized by VA to be retained by the grantee.

(b) No later than 90 days after the date of completion, the grantee must submit all financial, performance and other reports required by VA to closeout the supportive services grant. VA may authorize extensions when requested by the grantee.

(c) If a final audit has not been completed prior to the date of completion, VA retains the right to recover an appropriate amount after considering the recommendations on disallowed costs once the final audit has been completed.

(Authority: 38 U.S.C. 501, 2044)

[FR Doc. 2010–28407 Filed 11–9–10; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA–R06–OAR–2006–0132; FRL–9223–2]

### Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities

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

**ACTION:** Final rule.

**SUMMARY:** The EPA is finalizing its proposal to partially approve and partially disapprove a revision to the Texas State Implementation Plan (SIP) submitted by the Texas Commission on Environmental Quality (TCEQ) in a letter dated January 23, 2006 (the January 23, 2006 SIP submittal). Today's action finalizes our May 13, 2010 proposal that concerned revisions to 30 Texas Administrative Code (TAC) Chapter 101, General Air Quality Rules, Subchapter A General Rules; and Subchapter F Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities. We are finalizing our proposed approval of those portions of the rule that are consistent with the federal Clean Air Act (the Act or CAA), and finalizing our proposed disapproval of those portions of the rule that are inconsistent with the Act. More specifically, we are finalizing our proposed disapproval of provisions that provide for an affirmative defense against civil penalties for excess emissions during planned maintenance, startup, or shutdown activities and related provisions that contain nonseverable cross-references to the affirmative defense provision. A disapproval of these provisions means that an affirmative defense is not available in an enforcement action in Federal court to enforce the SIP for violations due to excess emissions during planned maintenance, startup, or shutdown activities. We are taking this action under section 110 of the Act.

**DATES:** This rule will be effective on January 10, 2011.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2006–0132. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

**FOR FURTHER INFORMATION CONTACT:** Mr. Alan Shar, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–6691, fax (214) 665–7263, e-mail address *shar.alan@epa.gov*.

**SUPPLEMENTARY INFORMATION:** Throughout this document "we," "us," and "our" refer to EPA.

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## I. What actions did we propose?

In EPA's May 13, 2010 proposal (75 FR 26892), we proposed to partially approve and partially disapprove a revision to the Texas SIP, as submitted to EPA on January 23, 2006. More specifically, the May 13, 2010 proposal reflected EPA's intent to partially approve and partially disapprove submitted revisions to 30 TAC General Air Quality Rule 101 into the Texas SIP, as outlined in the Table below.

| 30 TAC General Air Quality Rule 101 | Type of action | Type of change |
|---|---|---|
| Subchapter A, Section 101.1 (Definitions) | Proposed Approval | Revised Section. |
| Subchapter F, Section 101.201 (Emissions Event Reporting and Recordkeeping Requirements) [1]. | Proposed Approval | Revised Section. |
| Subchapter F, Section 101.211 (Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements) [2]. | Proposed Approval | Revised Section. |
| Subchapter F, Section 101.221 (Operational Requirements) | Proposed Approval | New Section. |
| Subchapter F, Section 101.222 (a)–(g) (Demonstrations) | Proposed Approval | New Section. |
| Subchapter F, Section 101.222 (h)–(j) (Demonstrations) | Proposed Disapproval | New Section. |
| Subchapter F, Section 101.223 (Actions to Reduce Excessive Emissions) | Proposed Approval | New Section. |

[1] Subsequent to the proposal, TCEQ withdrew section 101.201(h) from EPA's review. Letter from Bryan W. Shaw, TCEQ Chairman to Alfredo Armendariz, EPA Region 6 Administrator, dated August 5, 2010.

[2] Subsequent to the proposal, TCEQ withdrew section 101.211(f) from EPA's review. Letter from Bryan W. Shaw, TCEQ Chairman to Alfredo Armendariz, EPA Region 6 Administrator, dated August 5, 2010.

Section E of the May 13, 2010 proposal (75 FR at pp. 26896–26897) stated EPA's reasoning for the proposal to disapprove sections 101.222(h) (Planned Maintenance, Startup, or Shutdown Activity), 101.222(i) (concerning effective date of permit applications), and 101.222(j) (concerning processing of permit applications) into the Texas SIP. In short, we proposed to disapprove section 101.222(h) because it provides an affirmative defense for excess emissions during planned maintenance. Section 101.222(h) also provides for an affirmative defense for excess emissions during planned startup and shutdown. However, because the provisions regarding excess emissions during planned startup and shutdown are not severable from that for planned maintenance, we proposed to disapprove section 101.222(h) in its entirety. We further noted that a preferable means of dealing with excess emissions from planned startup and shutdown, in cases where sources are unable to comply with an applicable emission limit during those periods, would be to establish an alternative limit that would apply during startup and shutdown.

We proposed to disapprove sections 101.222(i) and (j), which concern the timing and processing procedures for permits that would address excess emissions during periods of maintenance, startup or shutdown, because those provisions were not severable from section 101.222(h). For more detail, see 75 FR 26896–26897 of the May 13, 2010 proposal.

We proposed to approve section 101.1 (Definitions) because it provides for consistency among Subchapters A and F, thereby facilitating implementation of the rule and other legislative changes. We proposed to approve section 101.201 (Emissions Event Reporting and Recordkeeping Requirements), because it establishes new requirements that local air pollution authorities be informed of excess emissions. We proposed to approve section 101.211 (Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements), because it provides for reporting and recordkeeping of the initial notification and final report of the scheduled maintenance, startup, and shutdown activities. We proposed to approve section 101.221 (Operational Requirements) because it provides the requirement that air pollution abatement equipment must be maintained and be in good working order. We proposed to approve section 101.222(a)–(g) (Demonstrations) because it provides an affirmative defense for certain emission events that is consistent with the interpretation of the Act as set forth in our guidance documents. We also proposed to approve section 101.223 (Actions to Reduce Excessive Emissions) because it provides for a corrective action plan and written notification for facilities determined to have excessive emission events to take necessary actions to reduce the future occurrence of such events.

## II. When did the public comment period end?

EPA's proposed action of May 13, 2010 (75 FR 26892) provided a 30-day public comment period. During this 30-day period we received 7 letters requesting EPA extend the public comment period. In response, we extended the public comment period by two weeks, such that it closed on June 28, 2010, rather than June 14, 2010. *See* 75 FR 33220 (June 11, 2010).

## III. Who submitted comments to us?

During the public comment period, we received written comments on our May 13, 2010 proposal (75 FR 26892) from the Lower Colorado River Authority; Texas Municipal Power Agency; National Environmental Development Association's Clean Air Project; Texas Industry Project; American Electric Power; Luminant; Utility Air Regulatory Group; Texas Oil and Gas Association; Texas Association of Business; Texas Commission on Environmental Quality; Texas Mining and Reclamation Association; Gulf Coast Lignite Coalition; San Miguel

Electric Cooperative; Association of Electric Companies of Texas; and Environmental Clinic—University of Texas School of Law on behalf of Citizens for Environmental Justice, Lone Star Chapter Sierra Club, Public Citizen's Texas Office, Air Alliance Houston, Environmental Integrity Project, and Environmental Defense Fund.

**IV. What is our final action?**

Except for two provisions that were withdrawn by the State by letter dated August 5, 2010, as described below, we are finalizing our proposal to approve revisions to 30 TAC Chapter 101, Subchapter A General Rules; and Subchapter F Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities of the January 23, 2006 SIP submittal as revisions to the federally-approved Texas SIP.

Subsequent to the publication of the proposed rule, in a letter dated August 5, 2010, TCEQ notified EPA of its withdrawal from EPA review of sections 101.201(h) (concerning annual emissions event reporting) and 101.211(f) (concerning annual scheduled maintenance, startup, and shutdown activity reporting), as adopted by the TCEQ on December 14, 2005. The withdrawal of these two pieces of the submission does not affect our ability to take final action approving the remaining pieces we proposed to approve. As an initial matter, the withdrawn portions are independent provisions that are severable from the remaining regulations pending before EPA. In addition, the withdrawal of these provisions does not create a defect in the remaining portions of the rule for which we proposed approval. Paragraphs (a) through (g) of section 101.201 and paragraphs (a) through (e) of section 101.211 acted upon today contain all of the necessary requirements for how and when to report excess emissions events. TCEQ only withdrew the annual reporting requirement in the two paragraphs, and an annual reporting requirement is not a criterion for an approvable excess emissions SIP revision. Furthermore, TCEQ already has the ability to collect emissions information under the Texas SIP at the Emission Inventory Requirements in 30 TAC sections 101.10 (b) and (f), which require an owner or operator to submit emission inventories and/or related data, including excess emissions occurring during maintenance activities, startup and shutdowns, and upset conditions, to the state.[3] Section 101.10 was approved into Texas SIP on January 26, 1999 at 64 FR 3847.

Because the submitted rule and the Texas SIP already contain adequate reporting requirements for excess emissions during planned and unplanned startup, shutdown, maintenance and malfunction events, TCEQ's withdrawal of the sections referenced above does not affect our partial approval of the remaining portions of the rule which were proposed for approval. Thus, as described below, we are taking final action to approve all of the provisions for which we proposed approval, with the exception of withdrawn sections 101.201(h) and 101.211(f) of the January 23, 2006 SIP submittal. We have made TCEQ's August 5, 2010 withdrawal letter available for public inspection in the docket associated with this action, identified as EPA–R06–OAR–2006–0132.

In summary, we are finalizing our May 13, 2010 proposal to approve Subchapter A, section 101.1 (Definitions); and Subchapter F, sections 101.201 (Emissions Event Reporting and Recordkeeping Requirements) (except for 101.201(h)), 101.211 (Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements) (except for 101.211(f)), 101.221 (Operational Requirements), 101.222(a) through (g) (Demonstrations), and 101.223 (Actions to Reduce Excessive Emissions) into the Texas SIP. We are approving these provisions for the reasons provided in our proposed approval: They clarify existing reporting requirements; they clarify that the rule does not allow exemptions from compliance with federal requirements, including any requirements in the federally-approved SIP; they provide for an affirmative defense[4] from unplanned startup, shutdown, or maintenance (*i.e.,* malfunctions), consistent with the CAA as interpreted by EPA; and they provide for a corrective action plan and written notification concerning excessive emission events. *See* section D of our May 13, 2010 proposal (75 FR at 26894).

We are also finalizing our May 13, 2010 proposal to disapprove sections 101.222(h) (Planned Maintenance, Startup, or Shutdown Activity), 101.222(i) (concerning effective date of permit applications), and 101.222(j) (concerning processing of permit applications) of the January 23, 2006 submittal. As we explain more fully below, we are disapproving section 101.222(h) because it provides an affirmative defense against penalties for excess emissions during planned maintenance activities. Because the portions of section 101.222(h) that provide an affirmative defense for excess emissions during planned startup and shutdown are not severable from the provision for maintenance, those provisions are also disapproved.[5] Section 101.222(i) concerns the scheduling and applicable effective dates for permit applications submitted to TCEQ for sources that request unauthorized emissions associated with the planned maintenance, startup, or shutdown activities be permitted. Since section 101.222(i) is not severable from section 101.222(h), which we are disapproving, we are disapproving section 101.222(i). Section 101.222(j) concerns the processing of permit applications referenced in 101.222(h), and provides the Executive Director with the authority to process, review, and permit unauthorized emissions from planned maintenance, startup, or shutdown activities. We explained our reasons for proposing to disapprove section 101.222(h) above. Since section 101.222(j) is not severable from section 101.222(h), which we are disapproving, we are disapproving section 101.222(j).

In light of the comments received on this action, we provide in more detail here our rationale for our final action

[3] Furthermore, although not included as part of the approved SIP, the title V deviation reporting requirements provide significant information to the State (which is also available to EPA and the public) regarding emission event violations.

[4] An affirmative defense is defined, in the context of an enforcement proceeding, as a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding. By demonstrating that the elements of an affirmative defense have been met, a source may avoid a civil penalty, but not injunctive relief.

[5] Although we interpret the Act to allow for an affirmative defense for excess emissions during startup and shutdown, we note that the current Texas rule includes a defect which could prevent our approval of this provision in the future if submitted in the same form. Specifically, instead of identifying the criteria a source must meet to assert an affirmative defense for planned activities, the Texas rule cross-references the criteria that apply for unplanned events. Thus, sources might argue that many of the criteria would not apply and would not need to be proved when asserting an affirmative defense. The criteria that a source must prove in asserting a defense are critical for ensuring that the defense will not be abused. Thus, any future rule submitted by the State must be clear about the applicable criteria that apply and those criteria must ensure that, among other things, excess emissions were not due to inadequate design, that the facility was operated consistent with good practices for minimizing emissions and the frequency and duration of operation in startup or shutdown mode was minimized. *See* the 1999 Policy at 6.

disapproving that provision. EPA's interpretation of the CAA is that it is not appropriate for SIPs to exempt periods of startup, shutdown, maintenance or malfunction from compliance with applicable emission limits. This is supported by the definition of "emission limitation" in section 302(k) of the Act, which requires emissions be limited on a "continuous" basis. In addition, we have noted that because SIPs are used to demonstrate how an area will attain and maintain health-based standards, it is not appropriate to exempt any periods of operation from compliance with the limits relied on to demonstrate that public health will be protected. We recognize that courts have disagreed whether it may be appropriate to provide for certain exceptions from compliance with emission limits when setting technology based standards. *Mossville Environmental Action Now* v. *EPA,* 370 F.3d 1232, 1242 (DC Cir. 2004) (upholding, as reasonable, standards that had factored in variability of emissions under all operating conditions). *See, Weyerhaeuser* v. *Costle,* 590 F.2d 1011, 1058 (D.C. Cir. 1978) ("In the nature of things, no general limit, individual permit, or even any upset provision can anticipate all upset situations. After a certain point, the transgression of regulatory limits caused by 'uncontrollable acts of third parties,' such as strikes, sabotage, operator intoxication or insanity, and a variety of other eventualities, must be a matter for the administrative exercise of case-by-case enforcement discretion, not for specification in advance by regulation."). Although one might argue that it is appropriate to account for such variability in technology-based standards, EPA's longstanding position has been that it is not appropriate to provide exemptions from compliance with emission limits in SIPs that are developed for the purpose of demonstrating how to attain and maintain the public health-based NAAQS. For purposes of demonstrating attainment and maintenance, States assume source compliance with emission limitations at all times. Thus, broad provisions that would exempt compliance during periods of startup, shutdown, malfunction and/or maintenance would undermine the integrity of the SIP. Recently, in the context of the CAA section 112 program regulating emissions of hazardous air pollutants, the court in *Sierra Club* v. *EPA,* 551 F.3d 1019 (DC Cir. 2008), *cert. denied, 130 S. Ct. 1735 (U.S. 2010),* held that the CAA section 302(k) definition of emission standard or emission limitation in conjunction with the provisions of section 112 require continuous compliance with section 112-compliant standards. We believe that this case supports EPA's long-standing interpretation in the SIP context that it is inappropriate to exempt periods of startup, shutdown and malfunction and/or maintenance from compliance with emission limitations.

Although EPA has long interpreted the CAA to bar States from including exemptions from compliance with applicable emission limitations during periods of startup, shutdown, maintenance and malfunction, we have also recognized that sources may, despite good practices, be unable to meet emission limitations during periods of startup and shutdown and, that despite good operating practices, sources may suffer a malfunction due to events beyond the control of the owner or operator. EPA's early policies provided that these events should be addressed through enforcement discretion. *See* the memorandum dated September 28, 1982, from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation entitled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions" (1982 Policy); and EPA's clarification to the above policy memorandum dated February 15, 1983, from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation (1983 Policy). Later, in practice, and then as reflected in a 1999 Policy memorandum, EPA adopted an interpretation of the Act that would allow sources to assert an affirmative defense to periods of excess emissions during startup, shutdown and malfunction in an enforcement action for penalties, though not in an action for injunctive relief. As explained in the 1999 Policy, in the course of an enforcement action for penalties, a source could assert the affirmative defense and the burden would be on the source to prove enumerated factors, including that the period of excess emissions was minimized to the extent practicable and that the emissions were not due to faulty operations or disrepair of equipment.[6]

The criteria a source must prove when asserting an affirmative defense, as provided in the 1999 Policy, are consistent with the criteria identified in section 113(e) of the CAA that the courts and EPA may consider in determining whether to assess a penalty (and, if so, what amount) in the context of an enforcement action. Our goal in developing the criteria recommended in the 1999 Policy was to provide an avenue for relief from penalties for actions that are outside the control of an owner or operator who is making best efforts to operate consistent with applicable requirements. In other words, we believe it is important to tailor the factors so that they encourage sources to make best efforts to comply with emission limits that are intended to bring an area into attainment with and to maintain health-based air quality standards. We believe, however, that maintenance activities can and should be scheduled during process shutdowns. To the extent they are not, the source should ensure that control equipment can be consistently effective during maintenance activities. Thus, we do not believe that an affirmative defense for excess emissions during planned maintenance is appropriate since there should not be circumstances during which a source should exceed emission limits during maintenance.[7] Although we do not believe it is appropriate to approve an affirmative defense for excess emissions during maintenance into the SIP, section 113(e) of the Act still provides that a source may raise factors in an enforcement action that the Administrator or a court may consider in determining an appropriate penalty.

We note that States are not required to provide an affirmative defense approach, but, if they choose to do so, EPA will evaluate the State's submitted rules to ensure they meet the requirements of the Act as interpreted by EPA through the policy and guidance documents listed in Section B of the May 13, 2010 proposal, including EPA's 1999 Policy. In order to be consistent with the Act, an affirmative defense must be narrowly-tailored in order not to undermine the enforceability of the SIP. An effective enforcement program must be able to collect penalties to deter avoidable violations. Thus, the SIP

[6] More recently, and consistent with an additional approach discussed in the 1999 Policy (at 4–5), with respect to planned startup and shutdown events, EPA has encouraged States to address planned startup and shutdown in their SIPs. For those sources and source categories where compliance with the applicable limit is not possible during startup and/or shutdown, the State should develop alternative, applicable emission limits for such events, which they can consider in SIPs demonstrating attainment and maintenance of the NAAQS. As part of its justification of the SIP revision and in order to address potential impacts on attainment and maintenance of the NAAQS, the State should analyze the impact of the potential worst-case emissions that could be anticipated to occur during startup and shutdown.

[7] We note that if excess emissions occur during maintenance and because of a malfunction, the affirmative defense for malfunctions might be available to the source for such maintenance activity as part of the broader malfunction event.

should only provide the defense for circumstances where it is infeasible to meet the applicable limit and the criteria that the source must prove should ensure that the source has made all reasonable efforts to comply. Otherwise, such an approach could undermine the enforceability and attainment demonstration requirements of the Act. Because, as discussed above, we do not believe that it is infeasible for sources to meet applicable limits during planned maintenance, we are disapproving section 101.222(h).[8]

We further note, as provided in more detail in our proposed rule, that severing the unapprovable provisions (Sections 101.222(h), (i), and (j)) of the rule does not affect the effectiveness or the enforceability of the remaining portions of the rule that we are approving in this final action. Section D of our May 13, 2010 (75 FR 26894) proposal stated the reasons for approving portions of the submittal, and Section E (75 FR 26896) explained why we proposed disapproval of sections 101.222(h), (i), and (j). As explained in the proposed rule at 75 FR 26893, we believe sections 101.222(h), 101.222(i), and 101.222(j) are severable from, and independent of, the remainder of the January 26, 2006 SIP submittal. Disapproving these provisions does not make the portions of the submission that we are proposing to approve more stringent than the State intended. The provisions being disapproved address completely separate activities when excess emissions occur (planned activities) from those addressed by the provisions being approved (unplanned activities). The approved provisions will provide the exact limited relief intended by the State for sources covered by those provisions: A source may assert an affirmative defense in an action seeking penalties for a violation of an applicable emission limit during unplanned startup, shutdown, malfunction or maintenance activity. In asserting the affirmative defense, the source has the burden to prove certain criteria have been met. EPA's action disapproving similar relief for excess emissions during planned activities does not affect the stringency of the defense being approved for periods of excess emissions during unplanned activities.

[8] To the extent there may be a unique situation where maintenance cannot be performed at a time and in a manner that would ensure compliance with an applicable emission limitation, the State can consider establishing alternative limits that would apply during such events. However, such a situation does not support the creation of an affirmative defense that would apply more broadly to a variety of maintenance activities.

## V. What are the public comments and EPA's responses to them?

We have evaluated the comments received on the proposed rule and, as provided above, have determined to take final action consistent with our proposal, with the exception that we are not taking final action on two provisions withdrawn by the State. A summary of the comments and our responses are provided below.

### *A. General Comments of Support*

*Comments:* Two commenters expressed support for EPA's proposed approval of those sections of the January 23, 2006 SIP submittal, identified with "proposed approval" in the above Table. Many other commenters requested that EPA approve not only those sections identified with "proposed approval" in the above Table but also the entire January 23, 2006 SIP submittal. Another commenter expressed support for EPA's proposal to disapprove certain sections of the January 23, 2006 SIP submittal, and requested EPA disapprove the entire January 23, 2010 SIP submittal as it relates to affirmative defenses.

*Response:* EPA appreciates the support of the commenters who agree with EPA's proposed action. We have also considered the concerns expressed by the commenters who disagreed with all or a portion of EPA's proposed action, as discussed below in response to the commenters' more detailed comments.

### *B. Comments Related to the SIP Stringency and CAA Section 110(l) Requirements*

*Comments:* Several commenters characterized the January 23, 2006 SIP submittal as substituting a more stringent affirmative defense for a pre-existing SIP-approved automatic exemption for excess emissions, or that the submittal eliminates an exemption or affirmative defense. Other commenters expressed concern that EPA's partial approval would unlawfully increase the stringency of the Texas SIP. One commenter asserted that partial disapproval would expose sources to civil penalties. Another set of commenters stated that EPA's proposed disapproval is contrary to section 110(l) of the Act and an unmerited expansion of a solution to the problem of historically unauthorized emissions. Two commenters stated that section 101.222(h) incorporates by reference section 101.222(c)(9) which means that excess emissions would not be eligible for an affirmative defense if such events interfere with attainment and maintenance of the NAAQS. They argue that EPA has failed to show how the affirmative defense would interfere with the attainment and maintenance of the NAAQS. One commenter noted improvements to the air quality in Texas over the last 10 years despite increases in population, and claims that the affirmative defense provisions in the January 23, 2006 SIP submittal require a demonstration that the covered emissions did not cause NAAQS exceedances.

*Response:* We disagree that our action increases the stringency of the approved SIP. The federally-approved Texas SIP does not provide either an exemption for or an affirmative defense to excess emissions occurring during periods of planned or unplanned startup, shutdown, maintenance, or malfunction activities. Previously approved provisions that addressed excess emissions expired from the SIP on their own terms as of July 1, 2006. Thus, under the federally-approved Texas SIP, excess emissions are violations of the applicable emission limits, and the SIP does not include any provision for asserting an affirmative defense in response to an enforcement proceeding for excess emissions during planned or unplanned maintenance, startup, shutdown or malfunction. Thus, the action we are finalizing in this rulemaking—approving an affirmative defense available in an enforcement action for penalties for periods of excess emissions during unplanned maintenance, startup, shutdown activities (including opacity events)—does not make the approved SIP more stringent. Rather, it provides an avenue of limited relief in an action for penalties for a source that violates an applicable emission limit and can prove certain criteria have been met. Thus, the comments asserting that the partial disapproval would expose sources to penalties are incorrect, since excess emissions are violations of the existing SIP and the existing SIP does not contain affirmative defense provisions that provide relief in an action for penalties for any period of excess emissions.

In response to the commenter's concern that our disapproval would increase the stringency of the Texas SIP, we note further that section 110(k)(3) of the CAA provides that the administrator can approve a plan in part and disapprove a plan in part. A partial approval/partial disapproval action is permissible when portions of the plan are separable. "Separable" means the approved portions of the SIP revision should not result in the approved portions of the SIP submission being more stringent than the State would

have anticipated. The State's submitted provisions for an affirmative defense for excess emissions from unplanned maintenance, startup, or shutdown activities are separable from the provisions of the rule that we are disapproving. Our action has no effect on the stringency of the approved portions of the rule. The portions of the rule we are approving today that provide for an affirmative defense for excess emissions during unplanned maintenance, startup, or shutdown, and malfunction activities (as identified with "proposed approval" in the above Table) will operate exactly the same way under the federally approved SIP as they do under state law.

With respect to EPA's application of section 110(l) of the CAA in this rulemaking action, we agree that section 110(l) provides that EPA cannot approve a proposed SIP revision that would interfere with attainment or maintenance of the NAAQS. In addition, it provides that EPA cannot approve a SIP revision that would interfere with any other applicable requirement of the Act. Section 110(l) applies to this action, since the action is one that revises the existing SIP. We note that the portions of the January 23, 2006 SIP submittal we are approving do not modify any applicable emission limitation, nor do they authorize violations of applicable emission limitations. All emissions in excess of the applicable emission limits are considered violations. The affirmative defense neither authorizes nor condones such events and it is narrowly tailored consistent with our interpretation that such a defense not undermine the enforcement or attainment provisions of the Act. Thus, we have concluded that the affirmative defense provisions we are approving into the SIP will not interfere with attainment or maintenance of the NAAQS and, as explained in more detail above, such provisions are consistent with other applicable requirements of the Act. We further note that the affirmative defense is limited to actions for penalties and may not apply to actions for injunctive relief. Thus, to the extent the State, EPA or a private citizen is concerned that excess emissions might be causing or contributing to a violation of the NAAQS, they can seek a court order to abate the activity. We disagree with those commenters who suggest that in order for EPA to disapprove a SIP revision, section 110(l) requires EPA to demonstrate that there will be a violation of the NAAQS if EPA approves the SIP revision. As an initial matter, we note that the language in section 110(l) provides that EPA must disapprove a SIP revision if it "would interfere with any applicable requirement concerning attainment." This is quite distinct from an obligation to prove that a violation will occur. We believe that provisions that provide relief from penalties should be limited to circumstances where sources are unable to comply despite best efforts and, as explained above, we believe that maintenance activities can be scheduled at times that would avoid the occurrence of excess emissions. We further note that section 110(l) also provides that EPA may not approve a SIP revision that interferes with any applicable requirement of the Act. As explained more fully above, because maintenance activities can be planned to occur during planned outages, we do not believe that an affirmative defense for penalties is appropriate for excess emissions occurring during such planned maintenance activities. Allowing such a provision would undermine the enforceability, as well as the attainment, requirements of the Act.

*Comment:* One commenter stated that the New Mexico SIP provides for an affirmative defense to maintenance-related activities.

*Response:* Our review of a SIP revision submittal is governed by section 110(l) of the Act. Assuming for the moment that the New Mexico SIP contained a provision identical to that we are disapproving today for Texas, section 110(l) would still bar our approval of the rule into the Texas SIP for the reasons provided previously. The fact that we may have erred in approving a SIP for one State does not support an argument that we should make the same error with respect to a different State. In any event, we note that the commenter does not point to a specific provision in the New Mexico SIP to support its argument, and we are unaware of any provision in the New Mexico SIP that provides an affirmative defense for excess emissions during planned maintenance.

*Comment:* Other commenters claim that EPA's disapproval would create inequities between Texas sources and sources in other states whose programs contain affirmative defenses for startup or shutdown activities.

*Response:* We disagree. The commenters are referring to perceived inequities which are attributable to TCEQ's action combining a "planned maintenance" activity in section 101.222(h) with a "startup" or "shutdown" activity, leaving EPA no recourse but to partially disapprove the January 23, 2006 SIP submittal.

*C. Comments Related to Texas' Phase Out Approach and Disapproval Effects*

*Comments:* Some commenters characterized the January 23, 2006 SIP submittal as TCEQ's phase-out of a regulatory scheme in which excess emissions during planned maintenance, startup, or shutdown (MSS) activities were exempt from compliance to one where such emissions would become authorized under a permit. Other commenters claimed that EPA's disagreement with the Texas approach was not adequately explained. These commenters stated that the point of difference between EPA and TCEQ must have originated from the procedures and timing TCEQ is providing to affect its phase-out. As a result, EPA's partial disapproval would disrupt an orderly transition resulting in negative impacts (including interstate inequities) at the expense of Texas facilities and causing companies to forgo preventative maintenance. TCEQ commented on the reasons supporting its phase-out approach (which includes the categories of sources likely to report the majority of excess emissions, the degree of complexity of processing of permit applications for planned MSS activities for these categories, and facilitating the orderly/temporary transition to appropriate permit limits and requirements) and its plan to exercise enforcement discretion when reviewing excess emissions from planned MSS activities that fail to meet the schedule set forth in 30 TAC § 101.222(h). One commenter asserted that TCEQ's provision for an affirmative defense to emissions from planned maintenance activities is a direct response to EPA's comments to TCEQ.

*Response:* As an initial matter, it is important to understand what the commenters are referring to. The January 23, 2006 SIP submittal submitted by the State relates to a broader process envisioned by the State where it would have provisions in the Texas SIP that would address excess emissions during unplanned and planned MSS and malfunctions activities and also establish a process and schedule for addressing emissions from planned MSS for sources through a New Source Review (NSR) SIP permitting process. Pursuant to the January 23, 2006 SIP submittal, as sources apply for and receive NSR SIP permits that authorize emission limitations for the emissions occurring during planned MSS activities, then under the State's submitted transition process, the affirmative defense provisions addressing excess emissions during periods of planned MSS would

no longer apply upon the issuance of the NSR SIP permit. Instead, the terms and conditions, including the newly imposed emission limitations for the planned MSS emissions, of the NSR SIP permit would apply.

EPA's role in evaluating a proposed SIP revision is to make sure that the revision would not potentially interfere with attainment and maintenance of the NAAQS or any other applicable requirement of the Act. Thus, we must determine whether the State's regulatory choices are consistent with the federal Clean Air Act, including the obligation to attain and maintain the NAAQS and the ability to adequately enforce the obligations in the approved SIP. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). We explain our reasons for proposing disapproval of sections 101.222(h), (i), and (j) in section E of the May 13, 2009 proposal (75 FR 26892) and provide more detail above.

The commenters are incorrect that our disapproval of the three provisions is based on a "difference" with Texas over their approach to address periods of excess emissions as part of a broader permitting effort. The basis for our disapproval is explained above and is separate from any concern that we may have with Texas' overall approach to addressing excess emissions through permitting. The State's choice to create a permitting process to address excess emissions during planned maintenance, startup, or shutdown activities does not justify an approval into the SIP—even for a temporary period of time—a provision that we believe is inconsistent with the Act. We agree with the State that it is appropriate to consider appropriate emission limits that would apply during periods of planned startup and shutdown and to incorporate them into NSR SIP permits. As provided in the 1999 Policy, where it is not possible for sources to comply with applicable emission limits during periods of startup and shutdown, it is appropriate for the State to develop alternative emission limits that would apply during such periods. This can include the State using its EPA-approved NSR SIP requirements. However, we note that the State cannot issue any NSR SIP permit that has a less stringent emission limit than already is contained in the approved SIP. For example, the State cannot issue a NSR SIP permit that has less stringent Volatile Organic Compounds limits than those in Chapter 115 as approved into the Texas SIP, or less stringent Oxides of Nitrogen ($NO_X$) limits in Chapter 117 as approved into the Texas SIP. The State must issue a NSR SIP permit that meets all applicable requirements of the Texas SIP. If the State wishes to issue a NSR SIP permit that does not meet the applicable requirements of the Texas SIP, then any such alternative limits would need to be submitted to EPA for approval as a source-specific revision to the SIP, before they would modify the federally applicable emission limits in the approved SIP.

We disagree with the commenters who suggest that the partial disapproval will disrupt the orderly transition contemplated by Texas in which sources will address excess emissions in permits. As we have noted before, the current SIP does not provide an affirmative defense for any period of excess emissions. Thus, our disapproval of the provisions providing an affirmative defense for excess emissions during periods of planned maintenance, startup, or shutdown activities does not affect the status quo.

The commenters also appear to be asserting that EPA's disapproval of the submitted affirmative defense provision for excess emissions during planned maintenance, startup, and shutdown activities (which would apply in the period before a specific source applies for and receives a NSR SIP permit) would unfairly disadvantage sources. To the extent that the commenters are concerned that an inequity is created by Texas' phased-out approach for addressing periods of excess emissions through the permitting process, that inequity is created by the system developed by the State, not by EPA's partial disapproval of the SIP. These commenters appear to assume that EPA's approval of the submitted affirmative defense provision for excess emissions during planned MSS activities is needed only as a "temporary" measure until the State finishes issuing all affected sources their NSR SIP permits containing emissions limitations for these types of emissions. However, the State-issued NSR SIP permits must meet all applicable requirements under the EPA-approved Texas SIP. Should the State wish to issue a NSR SIP permit addressing periods of excess emissions during planned MSS activities that will not meet all of the requirements in the Texas SIP, then that particular NSR SIP permit must be submitted by the State to EPA for approval as a source-specific SIP revision.

The comment claiming that TCEQ added an affirmative defense for planned maintenance based on a comment from EPA provides no detail. We are unaware of any statement that we made that would have encouraged the State to add such a provision and the commenter does not reference any specific comment from EPA. Regardless of whether any statements were made, an affirmative defense for planned maintenance is not appropriate under the Act. Because the affirmative defense for planned maintenance is not severable from that for planned startup or shutdown, we are disapproving in whole the provision (section 101.222(h)) that establishes the affirmative defense for planned maintenance, startup, or shutdown activities.

*D. Comments Related to NAAQS, Air Quality, and State Control Options*

*Comments:* Some commenters contend that EPA's proposed disapproval is contrary to the cooperative federalism principles in the Act, referencing *CleanCOALition* v. *TXU Power,* 536 F.3d 469, 471 (5th Cir. 2008) and *Fla. Power & Light Co.* v. *Costle,* 650 F.2d 579, 581 (5th Cir. 1981), and amounts to second guessing Texas' reasonable choices for how to achieve the NAAQS, including opacity limits in 30 TAC Chapter 111. These commenters continue by stating that EPA's disapproval would lead to interstate inequities and remove permitting incentives.

*Response:* Under the NAAQS provisions of the CAA, air pollution control at its source is the primary responsibility of States and local governments. EPA is respectful of the Act and cognizant of the cooperative federalism principle contained therein. However, while the Act does give States a fair degree of latitude in choosing the mix of controls necessary to meet and maintain the NAAQS, it also places some limits on the choices States can make. EPA's role is to ensure that the SIP submittal is consistent with the CAA. Any SIP submittal, including revisions to 30 TAC Chapter 101, must adhere to applicable requirements of the federal CAA, including the obligation to provide for attainment and maintenance of the NAAQS and to ensure that the SIP may be adequately enforced. EPA's statutory responsibilities in reviewing a SIP is to ensure it meets the requirements of the Act, including those in section 110(a)(2) and section 172(c). As explained in the May 13, 2010 proposal and above, as part of EPA's review, we determined that the provision providing for an affirmative defense for excess emissions during planned maintenance is inconsistent with the CAA.

With respect to the comments that suggest that our proposed disapproval will lead to removal of permitting incentives, we disagree. The submitted transition permitting process is the State's choice for how to handle excess

emissions during planned maintenance, startup, or shutdown activities. Under the State's chosen transition process, after a source receives a NSR SIP permit that establishes emission limitations upon the planned maintenance, startup, or shutdown emissions, then the source no longer can assert an affirmative defense for excess emissions during planned MSS activities. The source can choose between a potential enforcement action (and whether it will prevail in its assertion of affirmative defense) or obtaining a NSR SIP permit that sets limits on the excess emissions during planned maintenance, startup, or shutdown activities. Thus, we do not see how the presence or absence of an affirmative defense for excess emissions during planned maintenance, startup, or shutdown activities in the SIP will affect the choice a source might make regarding permitting. Furthermore, we disagree with the comment that our disapproval will create interstate inequities because other SIPs contain affirmative defenses for excess emissions during planned maintenance activities. The commenter references no specific SIPs that contain provisions similar to what we are disapproving in this action. As stated above, our review of a SIP revision submittal is governed by section 110(l) of the Act; to the extent we may have erred in approving an affirmative defense for excess emissions during planned maintenance into a SIP for one State does not support an argument that we should make the same error with respect to a different State. Within Texas, however, we note that based upon our disapproval, an affirmative defense for excess emissions during periods of planned MSS would be equally unavailable to any source. For discussion concerning opacity limits in 30 TAC Chapter 111, see section H of this document.

*Comment:* One commenter notes the similarities between the proposed SIP revisions and the New Source Performance Standards (NSPS) requirements for SSM events.

*Response:* As an initial matter, we note that there are several differences between the proposed SIP revision and the NSPS requirements. First, the NSPS provisions in 40 CFR 60.11 do not establish an affirmative defense, but rather exempt periods of excess emissions during startup, shutdown and malfunction from compliance with underlying emissions limits, unless otherwise specified. The provision does not establish an affirmative defense nor does it address periods of maintenance. Even assuming the NSPS provisions were similar, however, we note that the Agency has historically allowed more flexibility in addressing emissions during startup, shutdown and malfunction for technology-driven regulations, such as the NSPS. SIPs, however, are designed for the purpose of attaining and maintaining the health-protective NAAQS, and the Agency has consistently taken the position that broad exemptions from compliance with applicable emission limits during SSM are not appropriate because they cannot be adequately accounted for in plans to demonstrate attainment and maintenance of the NAAQS. In addition to the difficulties States would encounter in predicting how many sources may be exceeding underlying limits at any one time, for how long, and by how much, such provisions undermine incentives for sources to operate using sound practices. In order to address the limits of technology for standards included in plans to attain the health-based NAAQS, we have urged States to set alternative emission limits that apply during periods of startup and shutdown where compliance with the otherwise applicable emission limits is impossible; to use enforcement discretion; or to establish an affirmative defense that is limited to actions for penalties. As explained above, however, we do not believe that it is appropriate to establish an affirmative defense for excess emissions during planned maintenance activities because we believe that these activities can be anticipated and scheduled during planned outages.

*Comment:* One comment suggests that providing affirmative defenses for startup, shutdown, and malfunction (SSM) could result in emissions contributing to ozone NAAQS exceedances. The same commenter also states that flaring and upsets could contribute to ozone nonattainment.

*Response:* We agree with the comments that flaring and upset events could contribute to ozone NAAQS nonattainment. Excess emissions related to flaring events are unauthorized emissions and thus are considered a violation of the applicable emission limit. TCEQ's ozone NAAQS control strategies including controls of flares are addressed in the substantive control requirement provisions of the SIPs as part of ozone attainment demonstration plans and were not specifically addressed as part of the emission event provisions in the 30 TAC Chapter 101 rules of the Texas SIP, including the January 23, 2006 SIP submittal. The rule on which we are taking action here does not excuse or authorize flaring events due to startup, shutdown, malfunction or maintenance. To the extent a flaring event causes excess emissions during a period of unplanned startup, shutdown or maintenance, the rule would provide limited relief to the source in an action for penalties, assuming the source could prove certain factors had been met; however, it does not authorize or excuse those excess emissions. Thus, our approval of the affirmative defense in an action for penalties for excess emissions during unplanned startup, shutdown or maintenance will not interfere with attainment or maintenance of the ozone NAAQS. We note that to the extent a violation of the NAAQS is caused by a violation of an emission limit in a SIP, the most effective means to ensure limited harm to ambient air quality from the exceedance would be an action for injunctive relief. That remedy is unaffected by our approval of the affirmative defense, which is limited to actions for penalties.

*E. Comments Related to Technical Infeasibility and Disapproval Effects*

*Comment:* Several commenters expressed concern that it is not technically feasible to meet certain emission limitations (including opacity limits) at all times during planned maintenance, startup, or shutdown activities, and that the proposed partial disapproval could lead to less effective and less safe operation of environmental control equipment, including sources that use Electrostatic Precipitators (ESPs) and Selective Catalytic Reduction as emissions control devices. For example, several commenters noted that during maintenance of a boiler at a coal-fired power plant, fans must remain on and the ESPs will not be energized, leading to excess emissions. These commenters claim that EPA's partial disapproval will force facilities to forgo preventative and proactive maintenance until permits can be issued for these activities. Other commenters note that EPA's NSPS regulations at 40 CFR 60.11(c) for coal-fired power plants provide exceptions for excess opacity emissions during planned startup, shutdown, and malfunction activities and that opacity limits in the Texas SIP were based on normal operations.

*Response:* As noted earlier, since July 1, 2006, no affirmative defense for excess emissions has been available in the federally-approved Texas SIP. Thus, our disapproval of the affirmative defense provision for periods of planned maintenance, startup, or shutdown activities will not change the status quo that has applied for over four years under the Texas SIP. We can understand that there may be excess opacity emissions in certain situations from operation of power generators equipped with ESPs. Under the current SIP these

excess opacity events would be violations, and yet power plants have been able to maintain and generate reliable power to their customers during this period. The commenters did not refute this. Thus, we do not believe our action to disapprove the affirmative defense for planned maintenance, startup, or shutdown activities where such defense has not been available since 2006, should jeopardize the safe and effective operation of the generators as several commenters claim. For this same reason, we also believe that our actions will not lead to facilities being forced to forego proactive maintenance when operated by trained and knowledgeable personnel.

The NSPS regulation at 40 CFR 60.11(c) does provide exceptions from compliance with underlying opacity limits during startup, shutdown and malfunction, but does not provide similar relief for periods of maintenance, as suggested by the commenter. As provided above, we have historically provided more leeway for compliance with technology-based standards than for health-based programs such as the NAAQS. Thus, the provisions adopted for purposes of the NSPS are not relevant to our action disapproving an affirmative defense for excess emissions during planned maintenance as part of a SIP.

*F. Comments Related to EPA Guidance and Policies and Disapproval Effects*

*Comments:* Some commenters state that the affirmative defense provisions in the January 23, 2006 SIP submittal are consistent with the EPA guidance documents referenced in the May 13, 2010 proposal, and that EPA's distinction between unplanned and planned startup or shutdown activity has no factual basis and is arbitrary and capricious.

*Response:* We disagree. The January 23, 2006 SIP submittal contains affirmative defense provisions for planned maintenance activities. As discussed previously, EPA's interpretation of the Act is that it would be inappropriate to provide an affirmative defense to an action for penalties related to excess emissions occurring during planned maintenance and that EPA's approval of such a defense into a SIP would be inconsistent with the CAA and EPA guidance. With respect to the comment concerning EPA's distinction between planned and unplanned startup or shutdown activities, we note that *unplanned* startup or shutdown activity is specifically defined in the Texas rules as nonroutine, and unpredictable. As such it is functionally equivalent to a malfunction. Therefore the distinction between planned and unplanned startup and shutdown is not arbitrary. EPA would allow a State to create a limited affirmative defense for excess emissions occurring during planned and unplanned startup and shutdown activities. However, with respect to the *planned* startup or shutdown provisions of section 101.222(h), the cross-reference of several criteria in section 101.222(c) apply only to *unplanned* activities which results in the failure to include all the necessary criteria for *planned* startup or shutdown activities, as discussed more fully below.

*Comment:* One commenter asserts that the affirmative defense provided in section 101.222(h) for excess emissions during planned maintenance, startup or shutdown activities should be approved because it incorporates by reference all the criteria set forth in section 101.222(c).

*Response:* As provided above, EPA cannot approve the submitted section 101.222(h) because it provides for an affirmative defense for excess emissions during planned maintenance activities into the Texas SIP since we believe such approval would be inconsistent with the CAA and EPA guidance. Because the portions of section 101.222(h) that provide an affirmative defense for excess emissions during planned startup and shutdown are not severable from the provision for maintenance, those provisions must also be disapproved.

While the commenter is correct that the submitted section 101.222(h) incorporates by reference the affirmative defense criteria set forth in the submitted section 101.222(c), such cross-referencing is problematic. Many of the criteria listed in submitted section 101.222(c)—namely, (c)(2), (c)(3), (c)(4), (c)(6), and (c)(8)—specifically state that they apply to "emissions from an *unplanned* maintenance, startup, or shutdown activity (emphasis added)." As stated in footnote 5 above, a source claiming an affirmative defense in an action for excess emissions during a planned startup or shutdown activity could claim that the criteria listed in section 101.222(c)(2), (c)(3), (c)(4), (c)(6), and (c)(8) do not apply. In the absence of the appropriate criteria for planned startup or shutdown activities, EPA cannot approve the submitted section 101.222(h) as part of the Texas SIP.

*Comment:* As noted by another commenter the proposed disapproval of section 101.222(h) could be interpreted as EPA's belief that it cannot approve any affirmative defense for excess emissions from planned startup or shutdown activities.

*Response:* As noted above and in footnote 5, we interpret the CAA to allow EPA to approve a SIP revision submittal from a State that provides an affirmative defense for excess emissions during planned startup or shutdown activities, but the inclusion of planned maintenance activities and the failure to include appropriate criteria (due to improper cross-referencing) for planned startup and shutdown activities renders the submitted section 101.222(h) unapprovable.

*Comments:* One commenter states that EPA's May 13, 2010 notice provides no basis for the proposed disapproval of an affirmative defense for excess emissions during planned maintenance, where a source can demonstrate that such emissions could not be avoided.

*Response:* We disagree. The May 13, 2010 proposal to disapprove section 101.222(h) specifically states that the source or operator should be able to plan maintenance that might otherwise lead to excess emissions to coincide with maintenance or production equipment or other facility shutdowns. EPA has determined that it is inappropriate to provide an affirmative defense for excess emissions resulting from planned maintenance activities. With respect to other planned activities, we noted that for those sources and source categories where compliance is not possible, the State should develop alternative, applicable emission limits for such events, which they can consider in SIPs demonstrating attainment and maintenance of the NAAQS, rather than establishing an affirmative defense for such emission events. *See* 75 FR 26896–7.

*Comment:* Other commenters claim that disapproving an affirmative defense during the period of transition to permitting planned maintenance, startup, or shutdown activities would create new liabilities and encourage arbitrary enforcement.

*Response:* We disagree. For the reasons provided above, EPA is disapproving sections 101.222(h), (i) and (j) because they are not consistent with the CAA, as interpreted by EPA through policy and guidance. For the reasons provided in the other responses, we do not believe that our action disapproving these three sections creates new liabilities. The existing SIP has not included an affirmative defense for excess emissions since June 30, 2006. Under the approved SIP, all periods of excess emissions are violations and the submitted SIP revisions that we are approving do not delineate when and how the state, EPA or a citizen chooses which sources and events to enforce against. We disagree

that our disapproval of section 101.222(h) will encourage arbitrary enforcement. Enforcement actions for excess emissions violations from planned maintenance, startup or shutdown activities will be subject to enforcement discretion. Enforcement discretion does not mean arbitrary enforcement.

*Comment:* Another commenter claims that a conditional approval would be more appropriate to address EPA's concerns with the January 23, 2006 SIP submittal.

*Response:* To propose conditional approval of a provision of a SIP revision submittal, EPA would need a State's written commitment to submit a SIP revision that corrects the deficiency no later than one year after a conditional approval and that justifies the timeframe needed to address the identified deficiencies in the SIP submittal; Texas did not provide a commitment that would have supported a proposed conditional approval.

*Comment:* One commenter suggests that the requirements associated with scheduled maintenance under section 101.211 are more stringent than EPA's guidance on excess emissions because the Texas rule imposes additional requirements, such as the reporting of maintenance, startup, or shutdown activities that are expected to exceed a reportable quantity (RQ) in advance of the activities.

*Response:* Since EPA's position is that excess emissions during planned maintenance activities cannot be afforded an affirmative defense, it is not relevant whether the submitted 101.211 may or may not be more stringent in terms of reporting requirements.

*G. Comments Related to Procedural Aspects of the Rulemaking*

*Comments:* One commenter questions EPA's failure to justify its delay in responding to the January 23, 2006 SIP submittal and the limited amount of time to review the proposed disapproval in the May 13, 2010 notice. Another commenter asserts that EPA failed to comply with its policy for Regional Consistency Review for SIP revisions and also asserts that EPA's disapproval is procedurally flawed because the May 13, 2010 proposal was signed by the Deputy Regional Administrator and not the Regional Administrator.

*Response:* Questions related to EPA's delay in acting on the January 23, 2006 SIP submittal were resolved by settlement agreement filed with the court in *BCCA Appeal Group et al.* v. *EPA* (Case No. 3–08CV1491–G, N.D. Tex.). Under the settlement agreement EPA agreed to take final action on the January 23, 2006 SIP submission by October 31, 2010.

We disagree with the comments suggesting that the comment period was not sufficient. In the initial proposed rule, EPA provided a 30-day comment period on the proposed action. This is consistent with the time period that EPA typically provides for actions on SIPs. Furthermore, EPA extended the comment period for an additional 14 days.

We also disagree with the commenters that suggest that EPA did not comply with internal procedures with respect to review of the SIP. The proposed disapproval is consistent with EPA's longstanding interpretation of the Act and does not deviate from EPA's existing practices and policies. Therefore, there was no need to initiate a SIP consistency process for this action, and the commenter's assertion for a need to initiate a SIP consistency process is misplaced.

Finally, the May 13, 2010 (75 FR 26892) proposal was signed by the Acting Regional Administrator, as provided by the Region 6 Order R6–1110.11, dated April 30, 2002. We have made this particular Order available for public inspection in the docket identified as EPA–R06–OAR–2006–0132.

*H. Comments Related to Interpretation of 30 TAC 101.221(d)*

*Comments:* One commenter asserts that the exemption provision of section 101.221(d) of the January 23, 2006 SIP submittal should be interpreted to apply to the opacity requirements of 30 TAC section 111.111, while another commenter requests clarification that the exemption provision in section 101.221(d) of the January 23, 2006 SIP submittal be interpreted to exclude federally approved SIP requirements. The commenter claims that TCEQ's and EPA's interpretation of that section is incorrect.

*Response:* 30 TAC section 111.111 entitled "Requirements for Specified Sources" was adopted by TACB on June 18, 1993, and approved by EPA as a revision to the Texas SIP on May 8, 1996 (61 FR 20734). At that time, it became federally enforceable. Therefore, the requirements in the SIP rule found at 30 TAC section 111.111 are "federal requirements." Section 101.221(d) plainly states that TCEQ will not exempt sources from complying with any "federal requirements." This position is also consistent with the April 17, 2007 letter from John Steib, Deputy Director, TCEQ Office of Compliance and Enforcement to EPA Region 6, in which the State confirmed that the term "federal requirements" in 30 TAC 101.221(d) includes any requirement in the federally-approved SIP. In section D of our May 13, 2010 proposal, we stated that new section 101.221 (Operational Requirements) requires that no exemptions can be authorized by the TCEQ for any federal requirements to maintain air pollution control equipment, including requirements such as NSPS or National Emissions Standards for Hazardous Air Pollutants (NESHAP) or requirements approved into the SIP. Texas confirmed this interpretation and, therefore, the State may not exempt a source from complying with any requirement of the federally-approved SIP. Any action to modify a state-adopted requirement of the SIP would not modify the federally-enforceable obligation under the SIP unless and until it is approved by EPA as a SIP revision. Moreover, to the extent a State includes federally-promulgated requirements, such as NSPS or NESHAP into the SIP, the State does not have authority to modify such requirements. EPA's long-standing position has been that States may not include in their SIPs provisions that allow a State Director or Board to modify the federally-applicable terms of the SIP without review and approval by EPA. This is because the emission reduction requirements in the SIP are relied on to attain and maintain the NAAQS, and exemptions or modifications to those requirements could undermine this fundamental purpose of the SIP.

*I. Comments Related to Potential Enforcement Actions*

*Comments:* Several commenters express a belief that EPA's proposed disapproval of sections 101.222(h), (i), and (j) would expose sources to enforcement uncertainty and the risk of citizen suits, and also cause them to forego preventative maintenance.

*Response:* EPA does not agree that disapproval of section 101.222(h), (i), and (j) would lead to the consequences asserted by the commenters. As previously noted, since July 1, 2006, the federally-approved Texas SIP has not included an affirmative defense for excess emissions occurring during unplanned and planned maintenance, startup, shutdown, or malfunction activities. Today's action approves into the Texas SIP affirmative defense provisions for excess emissions related to unplanned maintenance, startup, and shutdown activities (which are considered malfunctions). A source asserting the affirmative defense in an action for penalties could be relieved from paying such penalties if it can

prove that certain enumerated criteria are met. Therefore, contrary to the commenters' assertions, we do not believe that our action will increase the level of regulatory uncertainty for sources; rather, our action may create more regulatory certainty. We further note that because the affirmative defense would be raised in the context of an enforcement action, its existence is unlikely to affect whether an enforcement case is brought. As provided in more detail in a previous response, we also do not believe that this action will result in sources choosing to forego maintenance of an emissions unit.

*Comment:* Several commenters assert that EPA's approval of sections 101.222(b), (c), (d), and (e) into the Texas SIP (providing an affirmative defense to upset events and opacity events) would impermissibly limit the penalty assessment criteria and citizen suit provisions in the Act. This approval could alter the meaning of the rule and make the "defense" applicable to citizens and EPA enforcement actions in district court. Citing *Weyerhaeuser* v. *Costle,* 590 F.2d 1011 (DC Cir 1978), the commenter asserts that EPA's approval would limit injunctive relief available under the Act and delay "swift and direct" enforcement of excess emission violations.

*Response:* We disagree. We believe that the affirmative defense criteria set forth in those sections are consistent with the Clean Air Act's penalty assessment provision, 42 U.S.C. 7413(e), which allows some discretion in determining a penalty. Section 7413(e) of the Act provides that, "in determining the amount of any penalty to be assessed under this section, or section 7604(a) of this title, the Administrator or the court, *as appropriate,* shall *take into consideration (in addition to such other factors as justice may require)* the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence * * *, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation." (Emphasis added.) The use of the phrases emphasized above makes clear that the Administrator or the Court has broad discretion in the factors to consider in determining whether to assess a penalty, and if so, how much that penalty should be. The existence of an affirmative defense does not automatically preclude the assessment of civil penalties. The party raising the defense must prove that it is entitled to it, and if the affirmative defense is rejected by the court, a judge is still required to determine the appropriate penalties in a given case. Furthermore, approval of the provisions in sections 101.222(b), (c), (d), and (e) into the Texas SIP does not preclude citizen suits under the Act. Rather, the affirmative defense may be raised in defense of a claim brought by EPA, the State or a private citizen. As described above, the CAA contemplates that a source may raise a variety of factors in an attempt to mitigate or completely alleviate the assessment of a penalty. While approval of sections 101.222(b), (c), (d), and (e) into the Texas SIP would allow a source to assert affirmative defense for certain excess emissions, we do not believe that approval of those sections impermissibly limit the penalty assessment criteria set forth in CAA section 113(e).

We agree with the commenter that the State rulemaking cannot affect the authorities provided by the CAA to EPA and citizens. However, on December 15, 2005 TCEQ adopted revisions to 30 TAC Chapter 101, and submitted them to EPA as a revision to the Texas SIP. EPA has evaluated the January 23, 2006 SIP submittal and has determined that sections 101.222(b), (c), (d), and (e) of the submittal are consistent with the Act as interpreted by our policy and guidance documents. Our approval of sections 101.222(b), (c), (d), and (e) into the Texas SIP provides a source the option to assert an affirmative defense for certain periods of excess emissions in an enforcement action brought against it by EPA or a citizen in federal court.

Moreover, even where an affirmative defense is successfully raised in defense to an action for penalties, it does not preclude other judicial relief that may be available, such as injunctive relief or a requirement to mitigate past harm or to correct the non-compliance at issue. The commenters are incorrect that the affirmative defense limits injunctive relief. The affirmative defense is only available in an action for penalties and would not be available to a claim requesting injunctive relief. Finally, EPA is cognizant of the *Weyerhaeuser* v. *Costle,* 590 F.2d 1011, 1057–58 (DC Cir. 1978) decision, but EPA disagrees that approval of sections 101.222(b)–(e) into the Texas SIP would interfere with the legislative goal of "swift and direct" enforcement. We agree that the availability of civil penalties serves as an incentive for companies to be more cautious, to take more preventative actions, and to seek to develop technologies and management practices to avoid excess emissions. However, we also believe that the criteria a source would need to prove in order to successfully assert an affirmative defense will encourage companies to take such caution. For example, among the required criteria that the source must prove are that the periods of unauthorized emissions could not have been prevented through planning and design; were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and all emission monitoring system were kept in operation if possible. *See* 101.222(c).

*J. Comments Related to "Administrative Necessity" and "One-Step-at-a–Time" Doctrines*

*Comments:* Several commenters assert that EPA's disapproval of sections 101.222(h), (i), and (j) will result in a rushed transition of TCEQ's scheduled phase-in approach for authorizing MSS activities and that EPA's actions are inconsistent with the "administrative necessity" and "one-step-at-a-time" doctrines used by EPA in defending its recent greenhouse gas tailoring rule.

*Responses:* We disagree. As an initial matter, and as we explain further above, the State's submitted phased-in permitting process will not serve to modify any applicable requirement under the Texas SIP. Furthermore, our action disapproving the three provisions at issue, as discussed previously, merely maintains the status quo and should have no effect on that permitting process. Furthermore, we think this situation is distinct from that addressed in the greenhouse gas tailoring rule of June 30, 2010 (75 FR 31514) (Tailoring Rule). The Tailoring Rule concerns the applicability criteria that determine which stationary sources and modification projects become subject to permitting requirements for greenhouse gas (GHG) emissions under the Prevention of Significant Deterioration (PSD) and title V programs of the Act. EPA's issuance of the Tailoring Rule, which regulates GHGs under the CAA as air pollutants, triggered a permitting obligation for GHG emissions as of January 2, 2011. In the absence of the Tailoring Rule, the permitting obligations would apply at the 100 or 250 tons per year levels provided under the Act, greatly increasing the number of required permits, imposing undue costs on small sources, overwhelming the resources of permitting authorities, and severely impairing the functioning of the programs. In that action, EPA was taking action to relieve an imminent new burden that would have been imposed on sources and permitting authorities.

In contrast, our disapproval of certain provisions of the submitted plan does not change the status quo that has applied under the Texas SIP since July 1, 2006. Our disapproval action does not establish any new, burdensome obligation for which relief is needed. Rather, sources have been obligated to comply at all times with the applicable emission limits with no enforcement discretion or affirmative defense provisions since the previous Texas rules expired from the Texas SIP on June 30, 2006 by their own terms. Thus there is no administrative necessity or "one step at a time" argument applicable in this situation.

*K. Comments Related to Weakening of the SIP*

*Comments:* One commenter asserts that EPA's approval of sections 101.222(b)–(e) would weaken the Texas SIP by: Failing to require a "program to provide for the enforcement" of emission limitations and other control measures, citing CAA section 110(a)(2); changing the Reportable Quantity (RQ) for NOx that could interfere with attainment of the NAAQS; and allowing opacity as the only applicable RQ for certain boilers and combustion turbines in section 101.201(d), by adding the definitions for "boiler" and "combustion turbine."

*Response:* As explained earlier in this notice, EPA's role in evaluating a proposed revision to a SIP is to make sure that it provides for attainment and maintenance of the NAAQS and that it otherwise complies with applicable requirements of the Act. Texas has chosen to establish an affirmative defense for certain type of excess emissions, provided certain criteria are met, as set forth in sections 101.222(b), (c), (d), and (e). For the reasons provided above, we believe that such an affirmative defense is consistent with the requirements of the Act, including the requirement under section 110 that States must have adequate enforcement programs. The affirmative defense provision only provides limited relief to sources in an action for penalties. Although sources may avoid a penalty for certain excess emissions where they can successfully prove all of the elements of the affirmative defense, the excess emissions are still considered violations and the administrative or judicial decision-maker in an enforcement action may weigh all of the factors to determine if other relief, such as injunctive relief, is appropriate.

With respect to changes in the reporting requirements, the commenter expresses concern that the RQ for $NO_X$ would be increased from 100 pounds in the current SIP to 200 pounds in ozone nonattainment, ozone maintenance, early action compact areas, Nueces County, and San Patricio County and to 5,000 pounds in all other areas. An examination of section 101.1(89) (Reportable Quantity) reveals that there are many other substances, other than NOx, with an RQ of 5,000 pounds. Furthermore, it is important to remember that approving the raising of the reportable quantity for NOx into the Texas SIP does not change the fact that excess emissions below the reportable quantity are violations. All excess emissions must be recorded by the sources. Title V sources must report both reportable and recordable excess emissions as part of their annual deviation reports. Therefore, EPA does not believe that the change weakens the SIP; by adjusting the RQ, TCEQ is able to better manage its program by focusing on significant releases, and, as noted, the information for non-reportable quantities will otherwise be available.

The commenter notes that for certain boilers and combustion turbines opacity is the only applicable RQ and asserts that this change constitutes a weakening of the SIP. However, the language in the submitted 30 TAC subsection 101.201(d) [which provides a limited reporting exemption for certain boilers or combustion turbines equipped with Continuous Emission Monitoring Systems (CEMS) capable of sampling, analyzing, and recording data for each successive 15-minute interval] was previously approved by EPA as a revision to the Texas SIP on March 30, 2005. *See* 70 FR 16129. *See* section 101.201(d). The SIP-approved rule contained the same RQ reporting provision for opacity. Section 101.201 did not have an expiration date and it has been federally enforceable since April 29, 2005. In summary, the SIP only has required a RQ reporting provision for opacity; there is no change to this reporting provision. The only change that EPA is approving into the SIP affecting the existing SIP rule 101.201(d) is two new definitions in section 101.1 for "boiler" and "combustion turbine." These definitions, however, were taken verbatim from the 30 TAC Chapter 117 rules. *See* 73 FR 73562 (December 3, 2008). Therefore, the addition of these two definitions is non-substantive for the SIP's purposes. The commenter's assertion that the Texas SIP has been weakened is incorrect. As such, there is no substantive change to the existing SIP and there is no weakening of the SIP.

*L. Comments Related to Clarification Requests*

*Comments:* One commenter requests that EPA clarify that excess emission reports must be submitted with the source's title V monitoring and deviation reports.

*Response:* The January 23, 2006 SIP submittal concerns the SIP not the title V (operating permit) program, which is not a component of the SIP. The title V program is a separate program from the SIP. However, title V permits issued by Texas are required to contain all applicable SIP requirements. Under the approved Texas SIP, all excess emissions are violations, whether or not they meet the criteria for an affirmative defense. Therefore, a source subject to the title V program requirements is required as part of the title V permit program to report all excess emissions, both reportable and nonreportable, as deviations.

*Comment:* One commenter noted that section 101.222 does not require permitting of emissions from MSS activities.

*Response:* The submitted Section 101.222(h) provides the opportunity for a source to file an application with the State for a NSR SIP permit to impose emission limitations on excess emissions (including opacity) during periods of planned maintenance, startup, or shutdown. As noted previously, the State cannot issue a NSR SIP permit that does not meet all the requirements of the Texas SIP. If the State wishes to issue a NSR permit that varies from the Texas SIP requirements, then it must submit the permit to EPA for approval as a source-specific SIP revision. The submitted provision establishes an overall 7-year time period for sources to file such applications, allotting a specified, shorter timeframe within that period for different categories of sources to submit such applications. Submitted section 101.222(i) concerns the processing of such applications. The provision in submitted section 101.222(h), which provides for an affirmative defense to excess emissions during planned maintenance, startup, or shutdown activities, no longer applies for a specific source under the State rules once the period for filing and processing such an application expires for the source category. We agree with the State's interpretation of its rule that sources are not required to submit such applications. If sources choose not to seek a permit based on the prescribed timeline, then those sources' excess emissions occurring during these planned MSS activities would be

considered violations, for which an affirmative defense would not be available under the State rules.

*Comment:* One commenter wishes to point out that the provision of the Michigan SIP that EPA disapproved contained an automatic malfunction exemption and is not pertinent to this proceeding.

*Response:* The provision of the Michigan SIP that EPA disapproved and that was at issue in *Michigan Department of Environmental Quality* v. *Browner,* 230 F.3d 181 (6th Cir. 2000) mainly concerned an automatic exemption. Our listing of that case in section B of May 13, 2010 proposal was for informational purposes.

**VI. Final Action**

Today, we are finalizing our May 13, 2010 (75 FR 26892) proposal to approve into the Texas SIP the following provisions of 30 TAC General Air Quality Rule 101 as submitted on January 23, 2006:

*Subchapter A*

Revised section 101.1 (Definitions); and

*Subchapter F*

Revised Section 101.201 (Emissions Event Reporting and Recordkeeping Requirements), but for 30 TAC 101.201(h) which is no longer before EPA for action,

Revised Section 101.211 (Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements), but for 30 TAC 101.211(f) which is no longer before EPA for action,

New Section 101.221 (Operational Requirements),

New Section 101.222 (Demonstrations), except 101.222(h), 101.222(i), and 101.222(j)),

New Section 101.223 (Actions to Reduce Excessive Emissions).

We are finalizing our May 13, 2010 (75 FR 26892) proposal to disapprove sections 101.222(h) (Planned Maintenance, Startup, or Shutdown Activity), 101.222(i) (concerning effective date of permit applications), and 101.222(j) (concerning processing of permit applications) into the Texas SIP.

**VII. Statutory and Executive Order Reviews**

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. If a portion of the plan revision meets all the applicable requirements of this chapter and Federal regulations, the Administrator may approve the plan revision in part. 42 U.S.C. 7410(k); 40 CFR 52.02(a). If a portion of the plan revision does not meet all the applicable requirements of this chapter and Federal regulations, the Administrator may then disapprove portions of the plan revision in part that does not meet the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices that meet the criteria of the Act, and to disapprove state choices that do not meet the criteria of the Act. Accordingly, this final action, in part, approves state law as meeting Federal requirements and, in part, disapproves state law as not meeting Federal requirements; and does not impose additional requirements beyond those imposed by state law. For that reason, this final action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act;
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994);
- Does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law; and
- Is not a "major rule" as defined by 5 U.S.C. 804(2) under the Congressional Review Act, 5 U.S.C. 801 *et seq.,* added by the Small Business Regulatory Enforcement Fairness Act of 1996. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule."

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 10, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2) of the Act.)

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

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

Dated: October 29, 2010.

**Al Armendariz,**

*Regional Administrator, Region 6.*

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

## PART 52—[AMENDED]

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

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

## Subpart SS—Texas

■ 2. In § 52.2270 the entry for Chapter 101 in the table in paragraph (c) is amended by:
■ a. Revising the entry for Section 101.1 under Subchapter A.
■ b. Revising the entry for Section 101.201 under Subchapter F Division 1.
■ c. Revising the entry for Section 101.211 under Subchapter F Division 2.
■ d. Revising the entries for Section 101.221, 101.222, and 101.223 under Subchapter F Division 3.

The revisions read as follows:

**§ 52.2270 Identification of plan.**

* * * * *

(c) * * *

EPA-APPROVED REGULATIONS IN THE TEXAS SIP

| State citation | Title/subject | State approval/ submittal date | EPA approval date | Explanation |
|---|---|---|---|---|
| | * * * * * * * | | | |
| | **Chapter 101—General Air Quality Rules** | | | |
| | **Subchapter A—General Rules** | | | |
| Section 101.1 .... | Definitions ..... | 01/23/06 | 11/10/10 [Insert *FR* page number where document begins]. | |
| | * * * * * * * | | | |
| | **Subchapter F—Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities** | | | |
| | Division 1—Emissions Events | | | |
| Section 101.201 | Emissions Event Reporting and Recordkeeping Requirements. | 01/23/06 | 11/10/10 [Insert *FR* page number where document begins]. | 101.201(h) is not in the SIP. |
| | **Division 2—Maintenance, Startup, and Shutdown Activities** | | | |
| Section 101.211 | Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements. | 01/23/06 | 11/10/10 [Insert *FR* page number where document begins]. | 101.211(f) is not in the SIP. |
| | **Division 3—Operational Requirements, Demonstrations, and Actions To Reduce Excessive Emissions** | | | |
| Section 101.221 | Operational Requirements ..... | 01/23/06 | 11/10/10 [Insert *FR* page number where document begins]. | |
| Section 101.222 | Demonstrations ..... | 01/23/06 | 11/10/10 [Insert *FR* page number where document begins]. | The SIP does not include 101.222(h), 101.222 (i), and 101.222 (j). See section 52.2273(e). |
| Section 101.223 | Actions to Reduce Excessive Emissions. | 01/23/06 | 11/10/10 [Insert *FR* page number where document begins]. | |
| | * * * * * * * | | | |

* * * * *

■ 3. Section 52.2273 is amended by adding a new paragraph (e) to read as follows:

**§ 52.2273 Approval status.**

* * * * *

(e) EPA is disapproving the Texas SIP revision submittals under 30 TAC Chapter 101—General Air Quality Rules as follows:

(1) Subchapter F—Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities, Division 1—Section 101.222 (Demonstrations): Sections 101.222(h), 101.222(i), and 101.222(j), adopted December 14, 2005, and submitted January 23, 2006.

[FR Doc. 2010–28135 Filed 11–9–10; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R09–OAR–2008–0740; FRL–9221–6]**

## Revisions to the California State Implementation Plan, Imperial County Air Pollution Control District

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

**ACTION:** Final rule.

**SUMMARY:** EPA is finalizing approval of revisions to the Imperial County Air Pollution Control District (ICAPCD) portion of the California State Implementation Plan (SIP). These revisions were proposed in the **Federal Register** on May 19, 2010 and concern particulate matter (PM) emissions from beef feedlots. We are approving a local rule that regulates these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

**DATES:** *Effective Date:* This rule is effective on December 10, 2010.

**ADDRESSES:** EPA has established docket number EPA–R09–OAR–2008–0740 for this action. The index to the docket is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available in either location (*e.g.,* CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

**FOR FURTHER INFORMATION CONTACT:** Andrew Steckel, EPA Region IX, (415) 947–4115, *steckel.andrew@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document, "we," "us" and "our" refer to EPA.

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I. Proposed Action
II. Public Comments and EPA Responses
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IV. Statutory and Executive Order Reviews

## I. Proposed Action

On May 19, 2010 (75 FR 27975), EPA proposed to approve the following rule into the California SIP.

| Local agency | Rule No. | Rule title | Adopted | Submitted |
|---|---|---|---|---|
| ICAPCD | 420 | Beef Feedlots | 10/10/06 | 08/24/07 |

We proposed to approve this rule because we determined that it complied with the relevant CAA requirements. Our proposed action contains more information on the rule and our evaluation.

## II. Public Comments and EPA Responses

EPA's proposed action provided a 30-day public comment period. During this period, we received one set of comments from Jose Luis Olmedo, Comite Civico Del Valle, and Jane Williams, Desert Citizens Against Pollution (collectively "commentors"); letter dated June 18, 2010 and received June 18, 2010. A copy of the video referenced in the letter was separately provided on the same day.

In addition, several letters were received after the comment period from local business owners in support of approving Rule 420; letters dated July 27, 2010 thru August 2, 2010 and received August 2, 2010. We do not address these letters below because: (1) They were submitted significantly after the comment deadline; (2) they do not request change to our proposal; and (3) they do not provide new information helpful to address the comments listed above.

The comments and our responses are summarized below.

*Comment #1:* There is a lack of documentation to substantiate the District's claim that beef feedlots are a *de minimis* source based on a purported 50% emissions reduction that is assumed in 2002. This 50% reduction assumption is not adequately explained, verified or supported with background data.

*Response #1:* Our proposed action (75 FR 27976) and the associated TSD (pages 2–3) both refer to two ICAPCD analyses as the basis for the District's claim that beef feedlots are a *de minimis* source of PM–10. The TSD specifically references page 15 of Environ's "Draft Final Technical Memorandum Regulation VIII BACM Analysis" (October 2005); and page III.A–2 [1] of Environ's "2009 Imperial County State Implementation Plan for Particulate Matter Less Than 10 Microns in Aerodynamic Diameter" (August 11, 2009). These documents in turn reference CARB's inventory analysis to support the 50% reduction assumption.

In response to this comment, ICAPCD provided additional clarification on the 50% assumption.[2] Specifically, ICAPCD reiterates that the 50% assumption was developed through CARB's normal review procedure for inventories, and clarifies that it relies on three studies: (1) USEPA, Fugitive Dust Document and Technical Information Document for Best Available Control Measures, EPA–450/2–92–004, September 1992; Sections 3.3.3 and 3.4.2; (2) Western Regional Air Partnership (WRAP), WRAP Fugitive Dust Handbook, September 2006, Table 9–4; and (3) E.H. Pechan & Associates, Inc., Documentation Report, Version 4.1, Pechan Report No. 06.05.003/9011.002, May 2006; Section III, p. 645. We generally defer to District and CARB analysis on most emission inventory details, and we have no obvious basis to question this particular assumption at this time. However, if Imperial continues to exceed the PM–10 standard in the future despite implementation of BACM on all sources identified as significant, it would be appropriate to subject inventory assumptions for *de minimis* sources such as this to more scrutiny.

*Comment #2:* How does the tons per day analysis provided by the District relate to the 5 $\mu g/m^3$ standard set forth in 59 FR 41998 (August 16, 1994).

*Response #2:* 2–3% of Imperial County's annual PM–10 inventory is calculated to result in a 5 $\mu g/m^3$ contribution, which equates to about 6–8 ton/day emissions. See 75 FR 39371 (July 8, 2010).

*Comment #3:* ICAPCD Rule 420 relies on the permitting scheme in ICAPCD Rule 217, but Rule 217 has not been approved by EPA. How do Rule 217, 420 and San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) Rule 4570 interrelate?

*Response #3:* ICAPCD Rule 420 sections A and B reference requirements in Rule 217, which have not been approved by EPA into the SIP. However, the substantive requirements of Rule 420 do not rely on Rule 217 and are enforceable independent of Rule 217. Specifically, Rule 420 section A requires all Large Confined Animal Facilities (LCAF, defined in ICAPCD Rule 101) to acquire and maintain a LCAF permit. Rule 420 section B further requires all facilities that apply for an LCAF permit to have a dust control plan (DCP) which describes compliance with the substantive requirements of Rule 420 in paragraphs B.1 and B.2.

SJVUAPCD Rule 4570 limits emissions of volatile organic compounds (VOC) from LCAFs in SJVUAPCD, and is analogous to ICAPCD Rule 217. ICAPCD Rule 420 and Rule 217 are related in that they both impose air pollution controls on LCAFs in Imperial County. Many of the controls will differ, however, because Rule 420 is designed to limit PM emissions while Rule 217 targets VOC emissions. SJVUAPCD Rule 4570 and ICAPCD Rule 420 are less directly related as they address both different geographic areas and different pollutants.

*Comment #4:* There should be an established maximum inch of manure stockpile in feedlot pens and a standardized method of dust control with an enforceable menu or list of applicable options.

*Response #4:* We agree that the rule could be improved by more specific and standardized requirements. However, we have no basis to require such improvements without determining that additional emission reductions are needed for BACM, attainment or other CAA requirements. However, particularly if Imperial continues to exceed the PM–10 standard despite implementation of BACM on all sources identified as significant, Rule 420 improvements that ICAPCD should consider include:

a. Applying control requirements to smaller sources. South Coast Air Quality Management District (SCAQMD) Rule 1127(j)(1), for example, only exempts farms with fewer than 50 cows from analogous requirements.

b. Restructuring sections A, B and C to more clearly establish control requirements independent of Rule 217

[1] Printed in error as III–2.

[2] Provided by e-mail from Reyes Romero, ICAPCD, to Christine Vineyard, EPA, October 5, 2010.

permit requirements. This is consistent with the structure of most or all other ICAPCD prohibitory rules.

c. Establishing more specific control requirements in section B regarding manure moisture and disposal such as, for example, described in SCAQMD Rule 1127.

d. Further restricting the APCO discretion provided in section D.

e. Clarifying sampling procedures in section E.2. to reflect ICAPCD's inspection procedures which we understand to be that ten (10) random samples are taken throughout each selected corral. Those ten random samples are then averaged to determine compliance.

*Comment #5:* The commentors question whether ICAPCD is adequately enforcing Rule 420, and reference the video identified in the letter. They ask if there are other enforcement mechanisms that EPA can consider as BACM such as random inspections, increased funding or verification of the District's enforcement program.

*Response #5:* According to ICAPCD, the video shows land that was formerly part of a LCAF subject to ICAPCD Rule 420, but that has not operated at this location since the winter of 2009 due to heavy rains and flooding. ICAPCD also stated that the Imperial County Environmental Health Department and the Regional Water Control Board have investigated this site as a potential health issue.

Regarding enforcement mechanisms, ICAPCD staff explained that ICAPCD permits issued to all cattle feedlots contain conditions to ensure that required Rule 420 mitigation measures are fully enforced. ICAPCD also explained that all permitted sources are routinely inspected (including unannounced inspections at least annually and in response to citizen complaints) to determine compliance with Rule 420 and other regulations.[3]

Like all air quality agencies, Imperial is required to periodically inspect all major stationary sources within its jurisdiction and reports the results of those inspections to EPA's national data system, AIRS/AFS, which is publically available. We have included a report generated from AIRS/AFS in the docket for this action which shows the inspections and enforcement actions taken by ICAPCD for the past ten years.[4]

## III. EPA Action

No comments were submitted that change our assessment that the submitted rule complies with the relevant CAA requirements. Therefore, as authorized in section 110(k) (3) of the Act, EPA is fully approving this rule into the California SIP.

## IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Will not have disproportionately high and adverse human health or environmental effects on minority, low-income or Tribal populations because it maintains or increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population as described in Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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

### List of Subjects in 40 CFR Part 52

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

Dated: October 25, 2010.

**Jared Blumenfeld,**

*Regional Administrator, Region IX.*

■ Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

## PART 52—[AMENDED]

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

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

## Subpart F—California

■ 2. Section 52.220 is amended by adding paragraph (c)(351)(i)(A)(*2*) to read as follows:

**§ 52.220 Identification of plan.**

* * * * *

(c) * * *

(351) * * *

(i) * * *

(A) * * *

[3] *Id.*

[4] EPA AIRS Facility Subsystem Quick Look Report generated October 4, 2010.

(*2*) Rule 420, "Beef Feedlots," adopted on October 10, 2006.

* * * * *

[FR Doc. 2010–28257 Filed 11–9–10; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 180

**[EPA–HQ–OPP–2008–0781; FRL–8850–3]**

### Flumioxazin; Pesticide Tolerances

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

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes tolerances for residues of flumioxazin in or on the commodity fish, freshwater. Valent U.S.A. Corporation requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

**DATES:** This regulation is effective November 10, 2010. Objections and requests for hearings must be received on or before January 10, 2011, and must be filed in accordance with the instructions provided in 40 CFR part 178 (*see* also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

**ADDRESSES:** EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0781. All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** Kathryn V. Montague, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–1243; e-mail address: *montague.kathryn@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

#### I. General Information

*A. Does this action apply to me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to those engaged in the following activities:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

*B. How can I get electronic access to other related information?*

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.gpoaccess.gov/ecfr.*

*C. How can I file an objection or hearing request?*

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2008–0781 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before January 10, 2011. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2008–0781, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

#### II. Summary of Petitioned-for Tolerance

In the **Federal Register** of December 3, 2008 (73 FR 73640) (FRL–8390–4), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 8F7438) by Valent U.S.A. Corporation, 1600 Riviera Avenue, Suite 200, Walnut Creek, CA 94596. The petition requested that 40 CFR part 180 be amended by establishing tolerances for residues of the herbicide flumioxazin, 2-[7-fluoro-3,4-dihydro-3-oxo-4-(2-propynyl)-2H-1,4-benzoxazin-6-yl]-4,5,6,7-tetrahydro-1H-isoindole-1,3(2H)-dione and its metabolites APF (3-oxo-4-prop-2-ynyl-6-amino-7-fluoro-3,4-dihydro-1,4-benzoxazin) and 482–HA (N-(7-fluoro-3,4-dihydro-3-oxo-4-prop-2-ynyl-2H-1,4-benzoxazin-6-yl)cyclohex-1-ene-1-carboxamide-2-carboxylic acid) in or on commodity fish, freshwater at 1.5 parts per million (ppm). That notice referenced a summary of the petition prepared by Valent U.S.A. Corporation, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

#### III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) of FFDCA

defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. * * *"

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for flumioxazin including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with flumioxazin follows.

*A. Toxicological Profile*

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Flumioxazin has mild or no acute toxicity when administered via the oral, dermal and inhalation routes of exposure. It has little or no toxicity with respect to eye or skin irritation and is not a dermal sensitizer. Sub-chronic and chronic toxicity studies demonstrated that the key toxic effects associated with flumioxazin include anemia and impacts on the liver and the cardiovascular system. Hematologic (hematopoietic) effects of anemia were noted in rats, including alterations in hemoglobin parameters. Increased absolute and relative liver weights and/or increased alkaline phosphatase values were observed in dogs.

There was no evidence (quantitative or qualitative) of susceptibility following *in-utero* oral exposure in rabbits. Developmental studies in the rat resulted in cardiovascular anomalies, including ventricular septal defects. In the 2-generation reproduction study, systemic effects (clinical signs and mortality as well as a decrease in body weight/gain and food consumption) were noted in males and females; more severe offspring effects (decrease in the number of live born and decreased pup body weights) were noted at lower doses than that which resulted in parental effects.

None of the acute, sub-chronic, chronic, developmental or reproduction studies indicated an effect on the nervous systems. Based on the lack of evidence of carcinogenicity in mice and rats, flumioxazin is classified as "not likely to be carcinogenic to humans." Flumioxazin did not induce significant increases in any tumor type in either rats or mice under the conditions of the studies, and it did not induce any mutagenic activity in the required battery of mutagenicity studies.

Specific information on the studies received and the nature of the adverse effects caused by flumioxazin as well as the no observed adverse effect level (NOAEL) and the lowest observed adverse effect level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document "Flumioxazin. Human Health Risk Assessment for a Proposed Aquatic Use," pp. 49 to 56 in docket ID number EPA–HQ–OPP–2008–0781.

*B. Toxicological Points of Departure/Levels of Concern*

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which the NOAEL and LOAEL of concern are identified. Uncertainty/safety factors (UFS) are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological endpoints for flumioxazin used for human risk assessment can be found at *http://www.regulations.gov* in document "Flumioxazin. Human Health Risk Assessment for a Proposed Aquatic Use," pp. 25 to 26 in docket ID number EPA–HQ–OPP–2008–0781.

*C. Exposure Assessment*

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to flumioxazin, EPA considered exposure under the petitioned-for tolerances as well as all existing flumioxazin tolerances in 40 CFR 180.568. EPA assessed dietary exposures from flumioxazin in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. No such effect was identified for the general population. However, EPA identified potential acute effects (cardiovascular effects in offspring) for the population subgroup, females 13 to 49 years old.

In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, EPA used tolerance-level residues, dietary exposure evaluation model (DEEM) default processing factors for all processed commodities (with the exception of tomato, which used the empirical processing factor of 1x), and assumed 100 percent crop treated (PCT) for all proposed commodities.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII. As to residue levels in food, EPA used tolerance-level residues, DEEM default processing factors for all processed commodities (with the exception of tomato, which used the empirical processing factor of 1x), and assumed 100 PCT for all proposed commodities.

iii. *Cancer.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, EPA has classified flumioxazin as "not likely to be carcinogenic to humans." Therefore, a quantitative exposure assessment to evaluate cancer risk is unnecessary.

iv. *Anticipated residue and PCT information.* EPA did not use

anticipated residue and/or PCT information in the dietary assessment for flumioxazin. Tolerance level residues and/or 100 PCT were assumed for all food commodities.

2. *Dietary exposure from drinking water.* The estimated drinking water concentrations (EDWCs) of flumioxazin, 482–HA, APF and THPA degradates for acute exposures are 400 parts per billion (ppb) flumioxazin, at day zero and estimated to be 10.4 ppb, 1.6 ppb, and 110.1 ppb for flumioxazin, 482–HA and APF degradates, respectively, at day 30 for surface water. For chronic exposures for non-cancer assessments, the EDWCs of 482–HA and APF are estimated to be 4.84 ppb and 12.85 ppb, respectively, for surface water. Based on the Screening Concentration in Ground Water (SCI–GROW) model, for both acute and chronic (non-cancer) exposures, the EDWCs of 482–HA and APF are estimated to be 45.27 ppb and 2.66 ppb, respectively, for ground water. EDWCs of flumioxazin are estimated to be negligible in both surface and ground water for chronic exposures.

The estimates of drinking water concentrations were directly entered into the dietary exposure model. The peak day zero of 0.40 ppm for flumioxazin was used to assess the contribution to drinking water for the acute dietary risk assessment, and the day 30 total of 0.142 ppm for flumioxazin, 482–HA and APF degradates was used to assess the contribution to drinking water for the chronic dietary risk assessment.

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (*e.g.*, for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Flumioxazin is currently registered for use in the following areas that could result in residential exposures: Walkways, parking lots and non-grassy areas around residential dwellings. EPA assessed residential exposure using the following assumptions: Short-term dermal and inhalation exposure to adult handlers resulting from the use of flumioxazin within residential settings. For the above use sites, no post-application exposure to adults or children from flumioxazin is expected.

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

EPA has not found flumioxazin to share a common mechanism of toxicity with any other substances, and flumioxazin does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that flumioxazin does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

*D. Safety Factor for Infants and Children*

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* The prenatal and postnatal toxicology database for flumioxazin includes rat and rabbit prenatal developmental toxicity studies and a 2-generation reproduction toxicity study in rats. There is no evidence of increased susceptibility following *in-utero* oral exposure in rabbits; however, there is evidence of increased quantitative susceptibility of rat fetuses to *in-utero* exposure to flumioxazin in the oral and dermal developmental studies. In both studies, there was an increased incidence in fetal cardiovascular anomalies (including ventricular septal defects) in the absence of maternal toxicity. Additionally, quantitative susceptibility was observed in the 2-generation rat reproduction study, in which offspring effects (decrease in the number of live born and decreased pup body weights) were observed at lower doses than those which caused parental/systemic toxicity (red substance in vagina and increased mortality in females as well as decreases in male and female body weights, body weight gains and food consumption).

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for flumioxazin is complete except for immunotoxicity, acute neurotoxicity, and sub-chronic neurotoxicity testing. Recent changes to 40 CFR part 158 make acute and sub-chronic neurotoxicity testing (OPPTS Test Guideline 870.6200), and immunotoxicity testing (OPPTS Test Guideline 870.7800) required for pesticide registration; however, the existing data are sufficient for endpoint selection for exposure/risk assessment scenarios, and for evaluation of the requirements under the FQPA.

The available data for flumioxazin do not show the potential for neurotoxic effects. In the sub-chronic and chronic toxicity studies, signs of anemia (a potential immunotoxic effect) were observed. In the rat, hematologic (hematopoietic) effects of anemia were noted, including alterations in hemoglobin parameters. Flumioxazin is a protoporphyrinogen oxidase (PPO) inhibitor, which inhibits the biosynthesis of chlorophyll in plants (giving flumioxazin its weed-control properties). In animals, PPO is responsible for one of the later steps in heme synthesis; therefore, the inhibition of PPO results in anemia. Although anemia can potentially be considered an immunotoxic effect, in this case it is likely the anemia is due to the inhibited heme formation (which can interfere with the porphyrin component of heme, a hematopoietic effect resulting in anemia), and the blood effects are not considered to be the result of potential immunotoxicity. Thus, EPA has concluded that flumioxazin does not directly impact the nervous system or directly target the immune system. The Agency does not believe that conducting a functional immunotoxicity study will result in a NOAEL lower than the regulatory dose for risk assessment; therefore, an additional database uncertainty factor is not needed to account for potential immunotoxicity or neurotoxicity.

ii. There is no indication that flumioxazin is a neurotoxic chemical and there is no need for a developmental neurotoxicity study or additional uncertainty factors (UFs) to account for neurotoxicity.

iii. There is evidence of increased quantitative susceptibility of the young following exposure to flumioxazin in the oral and dermal developmental toxicity studies in the rat and in the 2-generation rat reproduction study;

therefore, a degree of concern analysis was performed to determine the level of concern for the effects observed when considered in the context of all available toxicity data and to identify any residual concerns after establishing toxicity endpoints and traditional uncertainty/safety factor to be used in the flumioxazin risk assessment. In considering the overall toxicity profile and the endpoints and doses selected for the flumioxazin risk assessment, EPA characterized the degree of concern for the susceptibility observed in the rat developmental and 2-generation reproductive studies as low and determined that there are no residual uncertainties for prenatal and/or postnatal toxicity because:

a. The only missing toxicity data for flumioxazin are the newly required neurotoxicity and immunotoxicity studies; however, no additional uncertainty/safety factor is needed in the absence of these studies because there is no evidence to indicate that flumioxazin targets the nervous system or the immune system. Further, EPA has concluded a developmental neurotoxicity study is not required.

b. There are clear NOAELs and LOAELs for the developmental and offspring effects noted in the rat developmental toxicity and 2-generation reproductive toxicity studies, and the doses and endpoints have been selected from these studies for risk assessment for the relevant exposed populations, i.e., pregnant females and children (with the exception of the chronic dietary endpoint, for which a chronic study was chosen for endpoint selection).

iv. *There are no residual uncertainties identified in the exposure databases.* The dietary food exposure assessments were performed based on conservative assumptions, including 100 PCT data and tolerance-level residues. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to flumioxazin in drinking water. EPA used similarly conservative assumptions to assess post-application exposure of children as well as incidental oral exposure of toddlers. Post-application exposure to children is not expected. These assessments will not underestimate the exposure and risks posed by flumioxazin.

### *E. Aggregate Risks and Determination of Safety*

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the aPAD and cPAD. For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-term intermediate-term, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to flumioxazin will occupy 66% of the aPAD for females 13–49 years old, the population subgroup where a potential acute risk was identified.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to flumioxazin from food and water will utilize 51% of the cPAD for all infants less than 1 year old, the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of flumioxazin is not expected.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Flumioxazin is currently registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to flumioxazin.

Using the exposure assumptions described at *http://www.regulations.gov* in document "Flumioxazin. Human Health Risk Assessment for a Proposed Aquatic Use," pp. 33 to 46 in docket ID number EPA–HQ–OPP–2008–0781 for short-term exposures from adult application of flumioxazin to residential walkways, parking lots and non-grassy areas and children and adults swimming in treated water, EPA has concluded the combined short-term food, water, and residential exposures results in aggregate MOEs of 690 for adults and 470 for children. Because EPA's level of concern for flumioxazin is a MOE of 100 or below, these MOEs are not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Intermediate-term aggregate risks are identical to the short-term aggregate risks, since endpoints for short-term and intermediate-term risk assessments are the same, and since residential exposure durations are expected to be short-term in nature.

5. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, flumioxazin is not expected to pose a cancer risk to humans.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to flumioxazin residues.

## IV. Other Considerations

### *A. Analytical Enforcement Methodology*

The following adequate enforcement methodology is available to enforce the tolerance expression: A gas chromatography/nitrogen-phosphorus detection (GC/NPD) method. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov.*

### *B. International Residue Limits*

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint U.N. Food and Agriculture Organization/ World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

There are no Codex, Canadian or Mexican maximum residue limits (MRLs) established for residues of flumioxazin on commodities associated with this petition.

## V. Conclusion

Therefore, tolerances are established for residues of herbicide flumioxazin, 2-[7-fluoro-3,4-dihydro-3-oxo-4-(2-propynyl)-2H-1,4-benzoxazin-6-yl]-4,5,6,7-tetrahydro-1H-isoindole-1,3(2H)-dione and its metabolites APF (3-oxo-4-prop-2-ynyl-6-amino-7-fluoro-3,4-dihydro-1,4-benzoxazin) and 482-HA

(N-(7-fluoro-3,4-dihydro-3-oxo-4-prop-2-ynyl-2H-1,4-benzoxazin-6-yl)cyclohex-1-ene-1-carboxamide-2-carboxylic acid), in or on fish, freshwater at 1.5 ppm.

### VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

### VII. Congressional Review Act

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

### List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: October 28, 2010.

**Lois Rossi,**

*Director, Registration Division, Office of Pesticide Programs.*

■ Therefore, 40 CFR chapter I is amended as follows:

## PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.568 is amended by alphabetically adding the following commodity to the table in paragraph (a) to read as follows:

**§ 180.568 Flumioxazin; tolerances for residues.**

(a) * * *

| Commodity | Parts per million |
|---|---|
| * * * * * | |
| Fish, freshwater | 1.5 |
| * * * * * | |

* * * * *

[FR Doc. 2010–28132 Filed 11–9–10; 8:45 am]

BILLING CODE 6560–50–P

## DEPARTMENT OF ENERGY

## 48 CFR Parts 919, 922, 923, 924, 925, 926, and 952

**RIN 1991–AB87**

## Acquisition Regulation: Socioeconomic Programs

**AGENCY:** Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The Department of Energy (DOE) is amending the Department of Energy Acquisition Regulation (DEAR) Socioeconomic Programs to make changes to conform to the Federal Acquisition Regulation (FAR), remove out-of-date coverage, and update references. Today's rule does not alter substantive rights or obligations under current law.

**DATES:** *Effective Date:* December 10, 2010.

**FOR FURTHER INFORMATION CONTACT:** Barbara Binney at (202) 287–1340 or by e-mail, *barbara.binney@hq.doe.gov.*

**SUPPLEMENTARY INFORMATION:**

I. Background
II. Comments and Responses
III. Procedural Requirements
A. Review Under Executive Order 12866
B. Review Under Executive Order 12988
C. Review Under the Regulatory Flexibility Act
D. Review Under the Paperwork Reduction Act
E. Review Under the National Environmental Policy Act
F. Review Under Executive Order 13132
G. Review Under the Unfunded Mandates Reform Act of 1995
H. Review Under the Treasury and General Government Appropriations Act, 1999
I. Review Under Executive Order 13211
J. Review Under the Treasury and General Government Appropriations Act, 2001
K. Review Under the Small Business Regulatory Enforcement Fairness Act of 1996
L. Approval by the Office of the Secretary of Energy

### I. Background

This final rule amends the existing Department of Energy Acquisition Regulation (DEAR) Subchapter D—Socioeconomic Programs. The purpose of this rule is to update DEAR Subchapter D—Socioeconomic Programs to conform it to the FAR. Changes are to DEAR parts 919, 922, 923, 925, 926, and 952. A new part 924 is added to the DEAR. There are no DEAR parts 920 or 921. DEAR parts 919

and 926 will have another proposed rule to cover additional changes. None of today's changes are substantive or of a nature to cause any significant expense for DOE or its contractors.

**II. Discussion**

DOE published a notice of proposed rulemaking on June 15, 2010 (75 FR 33752), with a public comment period ending on July 15, 2010. DOE received no comments.

DOE amends the DEAR as follows:

1. Section 919.201 is amended to remove "DOE" in the first sentence of paragraph (c) and adding in its place "Department of Energy (DOE)".

2. A new section 919.502 is added and the title of section 919.502–2 is revised to "Total small business set-asides" to conform to the FAR.

3. Section 919.503 is amended to revise the heading to "Setting aside a class of acquisitions for small business" and by removing "SBA" and adding in its place "Small Business Administration (SBA)" in the first sentence.

4. Section 919.7 is amended to revise the title heading to read "The Small Business Subcontracting Program" to conform to the FAR.

5. Sections 919.7007, 919.7009, 919.7010, and 919.7011 are amended to revise the punctuation in the introductory text to remove the "." and adding in its place "—".

6. Subpart 922.6 is removed and reserved. This subpart implemented detailed instructions on protests of eligibility determinations (FAR 22.608) that were deleted from the FAR on December 20, 1996, 61 FR 67410.

7. Part 923 is amended by revising the heading to read Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug Free Workplace.

8. Subpart 923.5 is amended by adding a new section 923.500 Scope of subpart. This section clarifies that for contracts performed at DOE sites, in lieu of FAR Subpart 23.5, contracting activities shall use 923.570, Workplace Substance Abuse Programs at DOE Sites.

9. Section 923.570–1 is amended by renumbering paragraph (a) and removing paragraph (b) in its entirety. By adding the new section 923.500, paragraph (b) at 923.570–1 is not needed.

10. Section 923.570–3 is amended by correcting the clause reference in paragraph (a) to 970.5223–4, Workplace Substance Abuse Programs at DOE Sites.

11. Section 923.7003 is amended by adding a new paragraph (h) to add a prescription on when to use the existing clauses at 952.223–75, Preservation of Individual Occupational Radiation Exposure Records, in contracts containing 952.223–71, Integration of Environment, Safety, and Health into Work Planning and Execution, or 952.223–72, Radiation Protection and Nuclear Criticality.

12. Part 924 is a new part being added titled Part 924—Protection of Privacy and Freedom of Information. This new part provides the cross reference to DOE's regulations at 10 CFR part 1008, which implement the procedures prescribed at FAR 24.103.

13. Section 925.103(b)(2)(ii) is added to prescribe the DOE procedures for proposed additions to the list of nonavailable items at FAR 25.104 list.

14. Section 925.202 is renamed "Exceptions" to conform with the FAR.

15. Section 925.202(b) is redesignated "925.202(a)(2)" and "FAR 25.202(a)(3)" in the first sentence is changed to read "48 CFR 25.202(a)(2), if the cost of the materials is not expected to exceed $100,000" to conform with the FAR and make the paragraph more concise.

16. Subpart 925.9 is redesignated to read "925.10" and the title is amended to read "Additional Foreign Acquisition Regulations" to conform to the FAR.

17. Section 925.901 is redesignated to read "925.1001 Waiver of right to examination of records."

18. Section 925.901(c) is redesignated to read "925.1001(b) Determination and findings." Additionally, the first sentence is revised to read "A determination and finding required at 48 CFR 25.1001(b) shall be forwarded to either the Director, Office of Contract Management, Office of Procurement and Assistance Management, or for the National Nuclear Security Administration (NNSA), to the Director, Office of Acquisition and Supply Management, for coordination of the Secretary's approval."

19. Section 926.7001 is amended by removing "Department of Energy" and adding in its place "Department of Energy (DOE)" in the first sentence in paragraph (a), changing the punctuation in paragraph (c) and revising paragraph (e) to read "48 CFR subpart 15.6 and subpart 915.6" to conform with the FAR.

20. Sections 926.7005, 926.7006, and 926.7102 are amended by revising the punctuation.

21. Sections 952.223–76 and 952.223–77 are amended to update the clauses to references to DOE Orders and Manuals.

22. Sections 952.226–70 and 952.226–72 are amended by revising the two clause titles of the subcontracting plan to reflect the correct name, Small Business Subcontracting Plan.

23. Sections 952.226–70, 952.226–71, 952.226–72, 952.226–73 are amended to revise the clauses' punctuation.

24. Throughout, sections were amended as follows: removing "FAR" or "DEAR" and adding "48 CFR"; removing "(FAR)", "DEAR", or "48 CFR"; revising the punctuation; and capitalizing Offeror, Contractor, Contractor's and Contracting Officer.

**III. Procedural Requirements**

*A. Review Under Executive Order 12866*

Today's regulatory action has been determined not to be a "significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," (58 FR 51735, October 4, 1993). Accordingly, this rule is not subject to review under that Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

*B. Review Under Executive Order 12988*

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the United States Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or if it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this rule meets the relevant standards of Executive Order 12988.

*C. Review Under the Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that an agency prepare an initial regulatory flexibility analysis for any regulation for which a general notice or rulemaking is required, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)). This rule updates references in the DEAR that apply to public contracts and does not impose any additional requirements on small businesses. Today's rule does not alter any substantive rights or obligations and, consequently, today's rule will not have a significant cost or administrative impact on contractors, including small entities. On the basis of the foregoing, DOE certifies that this rule would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE's certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

*D. Review Under the Paperwork Reduction Act*

This final rule does not impose a collection of information requirement subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Existing burdens associated with the collection of certain contractor data under the DEAR have been cleared under OMB control number 1910–4100.

*E. Review Under the National Environmental Policy Act*

DOE has concluded that promulgation of this rule falls into a class of actions which would not individually or cumulatively have significant impact on the human environment, as determined by DOE's regulations (10 CFR part 1021, subpart D) implementing the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this rule is categorically excluded from NEPA review because the amendments to the DEAR are strictly procedural (categorical exclusion A6). Therefore, today's rule does not require an environmental impact statement or environmental assessment pursuant to NEPA.

*F. Review Under Executive Order 13132*

Executive Order 13132, 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. The Executive Order requires agencies to have an accountability process to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735). DOE has examined today's rule and has determined that it does not preempt State law and does not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

*G. Review Under the Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) generally requires a Federal agency to perform a written assessment of costs and benefits of any rule imposing a Federal mandate with costs to State, local or tribal governments, or to the private sector, of $100 million or more. This rule does not impose any federal mandate on state, local or tribal governments or on the private sector.

*H. Review Under the Treasury and General Government Appropriations Act, 1999*

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277), requires Federal agencies to issue a Family Policymaking Assessment for any rulemaking or policy that may affect family well-being. This rule will have no impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

*I. Review Under Executive Order 13211*

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, 66 FR 28355, (May 22, 2001), requires Federal agencies to prepare and submit to Office of Information and Regulatory Affairs of the Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's rule is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

*J. Review Under the Treasury and General Government Appropriations Act, 2001*

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

*K. Review Under the Small Business Regulatory Enforcement Fairness Act of 1996*

As required by 5 U.S.C. 801, the Department will report to Congress promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(3).

*L. Approval by the Office of the Secretary of Energy Issuance of today's rule has been approved by the Office of the Secretary*

**List of Subjects in 48 CFR Parts 919, 922, 923, 924, 925, 926, and 952**

Government procurement.

Issued in Washington, DC, on October 27, 2010.

**Patrick M. Ferraro,**

*Acting Director, Office of Procurement and Assistance Management, Department of Energy.*

**Joseph F. Waddell,**

*Director, Office of Acquisition and Supply Management, National Nuclear Security Administration.*

■ For the reasons set out in the preamble, the Department of Energy amends Chapter 9 of Title 48 of the Code of Federal Regulations as set forth below.

■ 1. The authority citation for parts 919 and 926 is revised to read as follows:

**Authority:** 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

## PART 919—SMALL BUSINESS PROGRAMS

### 919.201 [Amended]

■ 2. Section 919.201 is amended by removing "DOE" and adding in its place "Department of Energy (DOE)" in the first sentence in paragraph (c).

■ 3. Section 919.502 is added to part 919 to read as follows:

### 919.502 Setting aside acquisitions.

■ 4. Section 919.502–2 heading is revised to read:

### 919.502–2 Total small business set-asides.

* * * * *

■ 5. Section 919.503 is amended by revising the heading as set forth below and by removing "SBA" and adding in its place "Small Business Administration (SBA)" in the first sentence.

### 919.503 Setting aside a class of acquisitions for small business.

* * * * *

## Subpart 919.7—The Small Business Subcontracting Program

■ 6. Subpart 919.7 heading is revised to read as set forth above.

### 919.7007 [Amended]

■ 7. Section 919.7007 is amended by removing the ":" in paragraph (a) introductory text and adding in its place "—".

### 919.7009 [Amended]

■ 8. Section 919.7009 is amended by removing the "." in the introductory text and adding in its place "—".

### 919.7010 [Amended]

■ 9. Section 919.7010 is amended by removing the ":" in the introductory text and adding in its place "—".

### 919.7011 [Amended]

■ 10. Section 919.7011 is amended by removing the ":" in paragraphs (a) introductory text and (a)(1) and adding in its place "—".

### 919.501, 919.705–6, 919.805–2 [Amended]

■ 11. In the table below, for each section indicated in the left column, remove the word indicated in the middle column from wherever it appears in the section, and add the word in the right column:

| Section | Remove | Add |
|---|---|---|
| 919.501(g) | "FAR 19.501(g)," | "48 CFR 19.501,". |
| 919.705–6 | "FAR" | "48 CFR". |
| 919.805–2 | "the FAR" | "48 CFR chapter 1". |
| 919.805–2 | "13 CFR 124.311(e)(1)" | "13 CFR part 124". |

### 919.7008, 919.7010, 919.7011, 919.7012 [Amended]

■ 12. In the table below, for each section indicated in the left column, remove the word indicated in the right column from wherever it appears in the section:

| Section | Remove |
|---|---|
| 919.7008(a) | "48 CFR". |
| 919.7010(c) and (k) | "48 CFR". |
| 919.7011(b) | "48 CFR". |
| 919.7012(a) | "48 CFR". |

■ 13. The authority citation for parts 922, 923, and 925 continues to read as follows:

**Authority:** 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

## PART 922—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITION

### 922.103–5 [Amended]

■ 14. Section 922.103–5 is amended by removing "FAR" in 3 places and adding in its place "48 CFR".

## Subpart 922.6—[Removed and Reserved]

■ 15. Subpart 922.6 is removed and reserved.

### 922.800 [Amended]

■ 16. Section 922.800 is amended by removing "(FAR)".

## PART 923—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

■ 17. The heading for part 923 is revised to read as set forth above.

■ 18. Add a new section 923.500 to subpart 923.5 to read as follows:

### 923.500 Scope of subpart.

For contracts performed at DOE sites, in lieu of 48 CFR subpart 23.5, contracting activities shall use 923.570, Workplace Substance Abuse Programs at DOE Sites.

■ 19. Section 923.570–1 is revised to read as follows:

### 923.570–1 Applicability.

The policies, criteria, and procedure specified in 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites, apply to contracts for work performed at sites owned or controlled by DOE and operated under the authority of the Atomic Energy Act of 1954, as amended, where such work—

(a) Has a value of $25,000 or more; and

(b) Has been determined by DOE to involve—

(1) Access to or handling of classified information or special nuclear materials;

(2) High risk of danger to life, the environment, public health and safety or national security; or

(3) The transportation of hazardous materials to or from a DOE site.

■ 20. Section 923.570–3 is amended by removing "970.5223" in paragraph (a) and adding in its place "970.5223–4".

■ 21. Section 923.7003 is amended by adding a new paragraph (h) to read as follows:

### 923.7003 Contract clauses.

* * * * *

(h) The contracting officer shall insert the clause at 952.223–75, Preservation of Individual Occupational Radiation

Exposure Records, in contracts containing 952.223–71, Integration of Environment, Safety, and Health into Work Planning and Execution, or 952.223–72, Radiation Protection and Nuclear Criticality.

■ 22. Add a new part 924 to Subchapter D to read as follows:

## PART 924—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

### Subpart 924.1—Protection of Individual Privacy

Sec.
924.103 Procedures.

**Authority:** 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

### Subpart 924.1—Protection of Individual Privacy

#### 924.103 Procedures.

(b)(2) The Department of Energy rules and regulations on Privacy Act are implemented under 10 CFR part 1008.

## PART 925—FOREIGN ACQUISITION

■ 23. Section 925.103 is amended by:
■ a. Removing "FAR" in paragraph (a) and adding in its place "48 CFR"; and
■ b. Adding a new paragraph (b)(2)(ii) to read as follows:

#### 925.103 Exceptions.

* * * * *

(b)(2)(ii) Proposals to add an article to the list of nonavailable articles at 48 CFR 25.104, with appropriate justifications, shall be submitted for approval by the Senior Procurement Executive and submission to the appropriate council.

■ 24. Section 925.202 is revised to read as follows:

#### 925.202 Exceptions.

(a)(2) Contracting officers may make the determination required by 48 CFR 25.202(a)(2), if the cost of the materials is not expected to exceed $100,000.

### Subpart 925.9—[Removed and Reserved]

■ 25. Subpart 925.9 is removed and reserved.

■ 26. Add a new subpart 925.10 consisting of 925.1001 to part 925 to read as follows:

### Subpart 925.10—Additional Foreign Acquisition Regulations

#### 925.1001 Waiver of right to examination of records.

(b) *Determination and findings.* A determination and findings required by 48 CFR 25.1001(b) shall be forwarded to either the Director, Office of Contract Management, Office of Procurement and Assistance Management, or for the National Nuclear Security Administration (NNSA), to the Director, Office of Acquisition and Supply Management, for coordination of the Secretary's approval.

## PART 926—OTHER SOCIOECONOMIC PROGRAMS

#### 926.7001 [Amended]

■ 27. Section 926.7001 is amended by:
■ a. Removing "Department of Energy" and adding in its place "Department of Energy (DOE)" in the first sentence in paragraph (a);
■ b. Removing the ":" in paragraph (c) introductory text and adding in its place "—"; and
■ c. Removing "(FAR) 48 CFR 15.6 and (DEAR) 48 CFR 915.6" in paragraph (e) and adding in its place "48 CFR subpart 15.6 and subpart 915.6".

#### 926.7005 [Amended]

■ 28. Section 926.7005 is amended by removing the ":" in paragraph (b)(1) introductory text and adding in its place "—".

#### 926.7006 [Amended]

■ 29. Section 926.7006 is amended by:
■ a. Removing the ":" in paragraph (a) introductory text and adding in its place "—"; and
■ b. Removing "(FAR)" in paragraph (c) second sentence.

#### 926.7007 [Amended]

■ 30. Section 926.7007 is amended by:
■ a. Removing "48 CFR" in paragraph (d); and
■ b. Removing "(FAR)" in paragraph (e).

#### 926.7102 [Amended]

■ 31. Section 926.7102 is amended by removing the "," and adding in its place ";" at the end of paragraphs (1) and (2).

#### 926.7104 [Amended]

■ 32. Section 926.7104 is amended by removing "48 CFR (DEAR)".

## PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 33. The authority citation for part 952 continues to read as follows:

**Authority:** 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

■ 34. Section 952.223–76 clause is amended by revising the date of the clause and revising paragraphs (d)(1)(i), (d)(2)(i) and (d)(3)(i) to read as follows:

#### 952.223–76 Conditional payment of fee or profit—safeguarding restricted data and other classified information and protection of worker safety and health.

* * * * *

**CONDITIONAL PAYMENT OF FEE OR PROFIT—SAFEGUARDING RESTRICTED DATA AND OTHER CLASSIFIED INFORMATION AND PROTECTION OF WORKER SAFETY AND HEALTH (DEC 2010)**

(d) * * *
(1) * * *
(i) Type A accident (defined in DOE Order 225.1A, Accident Investigations, or its successor).
* * * * *
(2) * * *
(i) Type B accident (defined in DOE Order 225.1A, Accident Investigations, or its successor).
* * * * *
(3) * * *
(i) Failure to implement effective corrective actions to address deficiencies/non-compliance documented through external (*e.g.,* Federal) oversight and/or reported per DOE Manual 231.1–2, Occurrence Reporting and Processing of Operations Information, or its successor, requirements, or internal oversight of DOE Order 470.2B, Independent Oversight and Performance Assurance Program, or its successor, requirements.
* * * * *

■ 35. Section 952.223–77 is amended by revising the date of the clause and revising paragraphs (c)(1)(i), (c)(2)(i) and (c)(3)(i) to read as follows:

#### 952.223–77 Conditional payment of fee or profit—protection of worker safety and health.

* * * * *

**CONDITIONAL PAYMENT OF FEE OR PROFIT—PROTECTION OF WORKER SAFETY AND HEALTH (DEC 2010)**

* * * * *
(c) * * *
(1) * * *
(i) Type A accident (defined in DOE Order 225.1A, Accident Investigations, or its successor).
* * * * *
(2) * * *
(i) Type B accident (defined in DOE Order 225.1A, Accident Investigations, or its successor).
* * * * *
(3) * * *
(i) Failure to implement effective corrective actions to address deficiencies/non-compliance documented through external (*e.g.,* Federal) oversight and/or reported per DOE Manual 231.1–2, Occurrence Reporting and Processing of Operations Information, or its successor, requirements, or internal oversight of DOE Order 470.2B, Independent Oversight and Performance Assurance Program, or its successor, requirements.
* * * * *

**952.226–70 [Amended]**

■ 36. Section 952.226–70 is amended by:

■ a. Removing the ":" in paragraphs (a) introductory text and (a)(1) and adding in its place "—"; and

■ b. Removing "Small, Small Disadvantaged and Women-Owned Subcontracting Plan" in paragraphs (c) and (d) and adding in its place "Small Business Subcontracting Plan".

**952.226–71 [Amended]**

■ 37. Section 952.226–71 is amended by removing the ":" in paragraphs (a) introductory text and (a)(1) and adding in its place "—".

**952.226–72 [Amended]**

■ 38. Section 952.226–72 is amended by:

■ a. Removing the ":" in paragraphs (a) introductory text and (a)(1) and adding in its place "—";

■ b. Removing the ":" in paragraph (b) and adding in its place "—";

■ c. Adding "and" in paragraph (b)(2) after the ";"; and

■ d. Removing "Small, Small Disadvantaged and Women-Owned Subcontracting Plan" in paragraph (c)(2) and adding in its place "Small Business Subcontracting Plan".

**952.226–73 [Amended]**

■ 39. Section 952.226–73 is amended by:

■ a. Removing the ":" in paragraph (a)(1) and adding in its place "—"; and

■ b. Removing the "," in paragraph (a)(1)(i) and adding in its place ";".

**952.226–74 [Amended]**

■ 40. Section 952.226–74 is amended by removing "48 CFR (DEAR)" before "926.7104" in the introductory text.

**952.219–70, 952.225–70, 952.226–70, 952.226–72, 952.226–73, and 952.226–74 [Amended]**

■ 41. In the table below, for each section indicated in the left column, remove the word indicated in the middle column from wherever it appears in the section, and add the word in the right column:

| Section | Remove | Add |
|---|---|---|
| 952.219–70 in the provision second sentence | "contractor's" | "Contractor's". |
| 952.225–70(b) introductory text | "contractor" | "Contractor". |
| 952.226–70(c) | "offeror" | "Offeror". |
| 952.226–70(c) | "offeror's" | "Offeror's". |
| 952.226–72(b) introductory text | "contractor" | "Contractor". |
| 952.226–72(c)(1) | "contractor" | "Contractor". |
| 952.226–72(c)(1) | "contracting officer" | "Contracting Officer". |
| 952.226–72(c)(2) | "contractor's" | "Contractor's". |
| 952.226–73(a) introductory text, and (b) in 2 places | "offeror" | "Offeror". |
| 952.226–73(b) | "contracting officer" | "Contracting Officer". |
| 952.226–74(b) at its second occurrence | "contractor" | "Contractor". |

[FR Doc. 2010–27869 Filed 11–9–10; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 648

**[Docket No. 0907301205–0289–02]**

**RIN 0648–XZ70**

## Fisheries of the Northeastern United States; Atlantic Herring Fishery; Total Allowable Catch Harvested for Management Area 1A

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

**ACTION:** Temporary rule; notification of trip limit reduction in Area 1A of the Atlantic Herring Fishery.

**SUMMARY:** NMFS announces that, effective 1200 hours, November 8, 2010, federally permitted vessels may not fish for, catch, possess, transfer, or land more than 2,000 lb (907.2 kg) of Atlantic herring (herring), per trip or calendar day, in or from Management Area 1A (Area 1A) until January 1, 2011, except for transiting purposes described in this document.

**DATES:** Effective 1200 hours, November 8, 2010, through December 31, 2010.

**FOR FURTHER INFORMATION CONTACT:** Lindsey Feldman, Fishery Management Specialist, (978) 675–2179.

**SUPPLEMENTARY INFORMATION:** Regulations governing the herring fishery are found at 50 CFR part 648 and require annual specification of optimum yield, domestic and foreign fishing, domestic and joint venture processing, and management area TACs. Herring specifications for 2010–2012 published on August 12, 2010 (75 FR 48874). The 2010 total TAC is 91,200 mt, allocated to the herring management areas as follows: 26,546 mt to Area 1A, 4,362 mt to Area 1B; 22,146 mt to Area 2; and 38,146 mt to Area 3.

Regulations at § 648.201(a) require NMFS to monitor catch from the herring fishery in each of the herring management areas, using dealer reports, state data, and other available information, to determine when the catch of herring is projected to reach 95 percent of the TAC allocated. When such a determination is made, NMFS is required to prohibit, through publication in the **Federal Register**, herring vessel permit holders from fishing for, catching, possessing, transferring, or landing more than 2,000 lb (907.2 kg) of herring, per trip or calendar day, in or from the specified management area for the remainder of the closure period, with the exception of transiting as described below.

This action announces that NMFS has determined, based upon dealer reports and other available information, that 95 percent of the herring TAC allocated to Area 1A (25,219 mt) for the 2010 fishing year is projected to be harvested on November 8, 2010. Therefore, effective 1200 hrs local time, November 8, 2010, federally permitted vessels may not fish for, catch, possess, transfer, or land more than 2,000 lb (907.2 kg) of herring, per trip or calendar day, in or from Area 1A through December 31, 2010. Vessels transiting Area 1A with more than 2,000 lb (907.2 kg) of herring on board may do so, provided such herring was not caught in Area 1A and that all fishing gear is stowed and not available for immediate use, as required by § 648.23(b). Federally permitted dealers are also advised, effective November 8, 2010, that they may not purchase herring from federally permitted herring vessels that harvest more than 2,000 lb (907.2 kg) of herring from Area 1A through 2400 hrs local time, December 31, 2010.

Beginning on January 1, 2011, a new TAC in Area 1A will become effective.

**Classification**

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

The Assistant Administrator for Fisheries, NOAA (AA), finds good cause pursuant to 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment because it would be contrary to the public interest. This action reduces the trip limit for herring in Area 1A to 2,000 lb (907.2 kg) until January 1, 2011, under current regulations. Regulations at § 648.201(a) require such an action to ensure that herring catch does not exceed the 2010 Area 1A TAC. The herring fishery opened for the 2010 fishing year at 0001 hours on January 1, 2010. Data indicating the herring fleet will have harvested at least 95 percent of the 2010 Management Area 1A TAC have only recently become available. If implementation of this trip limit reduction is delayed to solicit prior public comment, the 2010 TAC for the management area will be exceeded, thereby undermining the conservation objectives of the herring fishery management plan. The AA further finds, pursuant to 5 U.S.C. 553(d)(3), good cause to waive the 30 day delayed effectiveness period for the reasons stated above.

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

Dated: November 4, 2010.

**Emily H. Menashes,**

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

[FR Doc. 2010–28321 Filed 11–5–10; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 665

**[Docket No. 100618274–0543–03]**

**RIN 0648–AY92**

## Fisheries in the Western Pacific; Hawaii Bottomfish and Seamount Groundfish; Measures To Rebuild Overfished Armorhead at Hancock Seamounts

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

**ACTION:** Final rule.

**SUMMARY:** This final rule prohibits fishing for bottomfish and seamount groundfish at the Hancock Seamounts until the overfished U.S. stock of pelagic armorhead (*Pseudopentaceros wheeleri*) is rebuilt, and classifies the area around the Hancock Seamounts as an ecosystem management area. This rule is intended to rebuild the armorhead stock and facilitate research on armorhead and other seamount groundfish.

**DATES:** This rule is effective December 10, 2010.

**ADDRESSES:** Amendment 2 to the Fishery Ecosystem Plan for the Hawaiian Archipelago (FEP) describes the background and details of this action. Amendment 2 also contains an environmental assessment and is available from *http://www.regulations.gov,* or the Western Pacific Fishery Management Council (Council), 1164 Bishop St., Suite 1400, Honolulu, HI 96813, tel 808–522–8220, fax 808–522–8226, or *http://www.wpcouncil.org.*

**FOR FURTHER INFORMATION CONTACT:** Jarad Makaiau, Sustainable Fisheries, NMFS Pacific Islands Region, 808–944–2108.

**SUPPLEMENTARY INFORMATION:** Armorhead are overfished because of over-exploitation by foreign vessels in international waters dating back to the 1980s, and probably earlier. Although there has never been a U.S. fishery targeting this fish, continued exploitation outside the U.S. Exclusive Economic Zone (EEZ) by foreign fleets has kept the stock in an overfished condition. The Hancock Seamounts are the only known armorhead habitat within the EEZ. These seamounts lie west of 180 °W. and north of 28 °N. in the Northwestern Hawaiian Islands.

The Council and NMFS previously responded to the overfished condition of armorhead with a series of four, 6-year domestic fishing moratoria at the Hancock Seamounts, beginning in 1986. The most recent 6-year moratorium expired on August 31, 2010. This final rule prohibits fishing for bottomfish and seamount groundfish at the seamounts until the armorhead stock is rebuilt, and classifies the EEZ around the Hancock Seamounts as an ecosystem management area. This final rule will aid in rebuilding the armorhead stock, and will facilitate research on armorhead and other seamount groundfish.

Additional background information on this final rule is found in the preamble to the proposed rule published on August 30, 2010 (75 FR 52921), and is not repeated here. The public comment period for the proposed rule ended on October 14, 2010. NMFS did not receive any comments.

**Changes From the Proposed Rule**

There no changes from the proposed rule.

**Classification**

The Regional Administrator, Pacific Islands Region, NMFS, determined that this final rule is necessary for the conservation and management of Hawaii seamount and groundfish fisheries, and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required, and none was prepared.

**List of Subjects in 50 CFR Part 665**

Armorhead, Bottomfish, Fisheries, Fishing, Hancock seamounts, Hawaii, Seamount groundfish.

Dated: November 4, 2010.

**Samuel D. Rauch III,**

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

■ For the reasons set out in the preamble, 50 CFR part 665 is amended as follows:

## PART 665—FISHERIES IN THE WESTERN PACIFIC

■ 1. The authority citation for part 665 continues to read as follows:

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

■ 2. In § 665.202, revise paragraph (a)(3) to read as follows:

**§ 665.202 Management subareas.**

(a) * * *

(3) Hancock Seamounts Ecosystem Management Area means that portion of the EEZ in the Northwestern Hawaiian Islands west of 180 °W. long. and north of 28 °N. lat.

* * * * *

■ 3. In § 665.204, add new paragraph (k) to read as follows:

**§ 665.204 Prohibitions.**

* * * * *

(k) Fish for or possess any Hawaii bottomfish or seamount groundfish MUS in the Hancock Seamounts Ecosystem Management Area, in violation of § 665.209.

■ 4. Revise § 665.209 to read as follows:

**§ 665.209 Fishing moratorium at Hancock Seamounts.**

Fishing for, and possession of, Hawaii bottomfish and seamount groundfish MUS in the Hancock Seamounts Ecosystem Management Area is prohibited until the Regional Administrator determines that the armorhead stock is rebuilt.

[FR Doc. 2010–28413 Filed 11–9–10; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 679

**[Docket No. 080228322–91377–02]**

**RIN 0648–AW24**

## Fisheries of the Exclusive Economic Zone Off Alaska; Groundfish Observer Program

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues a final rule to amend regulations implementing the North Pacific Groundfish Observer Program (Observer Program). This action is necessary to improve the operational efficiency of the Observer Program, as well as to improve the catch, bycatch, and biological data collected by observers for conservation and management of the North Pacific groundfish fisheries, including those data collected through scientific research activities. The final rule is intended to promote the goals and objectives of the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area and the Fishery Management Plan for Groundfish of the Gulf of Alaska.

**DATES:** Effective December 10, 2010, except the revision to the definition of a fishing day in § 679.2, which is effective on January 1, 2011.

**ADDRESSES:** Electronic copies of the Regulatory Impact Review/Final Regulatory Flexibility Analysis (RIR/FRFA) prepared for this action may be obtained from the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov.* Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted by mail to NMFS, Alaska Region, P.O. Box 21668, Juneau, AK 99802–1668, Attn: Ellen Sebastian, Records Officer; in person at NMFS, Alaska Region, 709 West 9th Street, Room 420A, Juneau, AK; and by e-mail to *OIRA_Submission@omb.eop.gov* or fax to 202–395–7285.

**FOR FURTHER INFORMATION CONTACT:** Brandee Gerke, 907–586–7228.

**SUPPLEMENTARY INFORMATION:**

### Background

NMFS manages the U.S. groundfish fisheries in the Exclusive Economic Zone of the Bering Sea and Aleutian Islands Management Area (BSAI) and Gulf of Alaska (GOA) under the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area and the Fishery Management Plan for Groundfish of the Gulf of Alaska (collectively, the FMPs), respectively. The North Pacific Fishery Management Council (Council) prepared the FMPs pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Regulations implementing the FMPs appear at 50 CFR part 679. General regulations that pertain to U.S. fisheries appear at subpart H of 50 CFR part 600.

The Observer Program provides the administrative framework for observers to obtain information necessary for the conservation and management of the groundfish fisheries managed under the FMPs. Regulations implementing the Groundfish Observer Program at § 679.50 require observer coverage aboard catcher vessels, catcher/processors, motherships, and shoreside and stationary floating processors that participate in the groundfish fisheries off Alaska. These regulations also establish vessel, processor, and observer provider responsibilities relating to the Observer Program.

This final rule amends regulations at § 679.2 and § 679.50 applicable to observer providers, observers, and industry participants required to obtain observer services. The regulatory amendments are organized under six issues and will remove regulations that are either unnecessary or impractical to apply; revise regulations to allow observer providers to provide observers for exempted fishing permit-based and scientific research permit-based activities; add regulations to prohibit activities that result in non-representative fishing behavior from counting toward an observer coverage day; require observer providers to report to NMFS information about the cost of providing observers; and establish a deadline when observer providers must submit copies of their contracts to NMFS, per the Council's April 2008 motion. This action is necessary to improve the operational efficiency of the existing Observer Program, as well as improve the catch, bycatch, and biological data provided by observers for conservation and management of the North Pacific groundfish fisheries, including data provided through scientific research activities.

A detailed description of and justification for this final rule was presented in the preamble to the proposed rule (74 FR 50155, September 30, 2009). A summary of the final rule is presented below.

*Issue 1: Observer Certification and Observer Provider Permitting Process*

This final rule clarifies NMFS's discretionary authority to either grant or deny an initial observer certification or observer provider permit by allowing NMFS to consider additional needs and objectives of the Observer Program and other relevant factors when considering whether to issue a new observer provider permit or observer certification. In addition, the appeal process for unsuccessful observer candidates and observer provider applicants is removed from regulations. There is no statutory entitlement to receiving observer certification or an observer provider permit; thus, the granting or denial of observer certifications and observer provider permits are discretionary agency actions. In addition, the existing appeals process has rarely been invoked and requires substantial agency resources to fulfill. These actions will increase NMFS's efficiency in granting or denying certifications and permits. NMFS reiterates that this action does not affect the ability of observers and observer providers to appeal any agency decision to revoke or sanction a certification or permit that already is issued.

*Issue 2: Observer Conduct*

This final rule removes Federal regulations that attempt to control observer behavior related to activities involving drugs, alcohol, and sexual conduct. NMFS's observer conduct policies established in existing regulations are impractical to apply and unenforceable. Therefore, NMFS is removing these regulations.

Each observer provider will be required to develop and implement an observer conduct policy that address drugs, alcohol, and sexual conduct. Observer providers will be required to provide NMFS a copy of their conduct policies by February 1 of each year and to notify NMFS of a violation within 72 hours after the provider determines that an observer violated the conduct policy.

*Issue 3: Providing Observers for Research Activities*

Regulatory revisions implemented by this final rule clarify that observer providers are allowed to provide observers or technical staff for purposes of exempted fishing permits, scientific research permits, or other NMFS-sanctioned scientific research activities. While existing regulations do not specifically prohibit observer providers from providing observers or scientific data collectors in support of these activities, they are ambiguous as to whether these activities are allowed under the Observer Program's conflict of interest regulation.

*Issue 4: Fishing Day Definition*

This final rule revises the regulatory definition of "fishing day" to clarify that an observer must be on board a vessel for all gear retrievals during the 24-hour period to count as a day of observer coverage. This revision is intended to prevent vessel operators from making fishing trips that do not reflect their normal fishing patterns as this non-representative behavior biases the observer-collected information. The definition of "fishing day" is also revised to span from "noon to noon" rather than from "midnight to midnight" as currently defined. This revision is expected to provide a disincentive for operations to conduct non-representative fishing for the sake of satisfying observer coverage requirements during daylight hours.

The revision to the definition of a fishing day affects the calculation of days that an observer is onboard vessels greater than or equal to 60 ft length overall (LOA), but less than 125 ft LOA that are subject to 30 percent observer coverage requirements under § 679.50. These regulations require vessels that participate for more than 3 fishing days in a directed fishery for groundfish in a calendar quarter to carry an observer during at least 30 percent of its fishing days in that calendar quarter and at all times during at least one fishing trip in that calendar quarter for each of groundfish fishery category in which the vessel participates. Because the calculation of the number of fishing days that must be observed is done on a calendar quarter basis, the revision to the definition of fishing day is effective on the first day of the next calendar quarter, which is January 2, 2011.

*Issue 5: Observer Cost Information*

NMFS is not a party to contracts between the industry and observer providers. Therefore, NMFS has not had access to information about the actual cost of deploying observers in the various sectors of the groundfish fisheries. The MSA authorizes the collection of fees from North Pacific fishery participants to pay for implementing a fisheries research plan, including observer coverage. More accurate information on the cost of the existing Observer Program would help the Council and NMFS determine appropriate fees and the extent of observer coverage afforded by those fees when a fee-based research plan is developed and implemented. This action requires observer providers to submit to NMFS copies of all individual invoices for observer coverage in the groundfish fisheries off Alaska to provide NMFS with information on the costs incurred by the groundfish fishing industry for the current Observer Program. Observer providers will be required to submit these invoices to NMFS on a monthly basis, and within 45 days of the date of the invoice.

*Issue 6: Miscellaneous Revisions*

This final rule establishes a deadline by which observer providers must submit an exemplary copy of each type of contract between the provider and the observer, and between the provider and the vessel or plant operator requiring observer services in the groundfish fisheries off Alaska. The final rule also removes an incorrect reference to the Observer Program's Web site from Federal regulations.

**Comments and Responses**

Detailed information on the management background and need for action is in the preamble to the proposed rule (74 FR 50155, September 30, 2009). Comments on the proposed rule were invited through October 30, 2009. NMFS received six submissions containing 25 separate public comments on the proposed rule. These comments are summarized and responded to below.

*Issue 1: Observer Certification and Observer Provider Permitting Process*

*Comment 1:* NMFS should continue to have a strong central role in the oversight of observer providers and observer procedures. NMFS's oversight is necessary to ensure consistency throughout the program and maintain overall program integrity.

*Response:* NMFS acknowledges support for its continued role in overseeing the permitting and responsibilities of observers and observer providers.

*Comment 2:* Commenter supports NMFS's efforts to expand its discretion to grant provider permits by tailoring the application time period according to the conditions encountered by each applicant.

*Response:* NMFS acknowledges support for this regulatory revision.

*Comment 3:* Commenter supports NMFS's effort to alter the appeal forum for unsuccessful observer provider permit applicants and observer candidates. The current regulations are burdensome and ineffective.

*Response:* NMFS acknowledges support for this regulatory revision.

*Comment 4:* Eliminating the regulations regarding revocation and sanction procedures for observers and observer providers should better allocate agency resources while continuing to ensure the integrity of the Observer Program, and due process for observer providers and observers.

*Response:* This rule does not eliminate regulations regarding revocation and sanction procedures for observer certifications and observer provider permits. It does remove the appeals process for unsuccessful observer candidates and observer provider applicants.

*Issue 2: Observer Conduct*

*Comment 5:* NMFS's role in overseeing observer conduct under the proposed rule may hamper the ability of observer providers to effectively deal with employee conduct issues, which should be resolved directly by the observer providers themselves. Observer providers already have incentives to develop employment practices to cope with workplace issues, including drug and alcohol use and sexual misconduct. The role envisioned for NMFS under this new regulation is vague, as is the regulation it will replace. NMFS assesses observer performance and data quality, regardless of each observer's behavior. If NMFS determines that an observer is unable to collect the quality of data demanded by the agency, then the observer should be decertified. NMFS should specify behaviors it believes are likely to impact data quality. Once these behaviors are identified, the observer providers could likely agree on how best NMFS should be involved, though as a general rule, employment practices need to be left to

the providers who actually employ observers.

*Response:* NMFS believes that observer providers bear primary responsibility for establishing and implementing observer conduct policies. This rule will require observer providers to develop and implement an observer conduct policy and to provide a copy of the policy to NMFS. Further, this rule will require observer providers to inform NMFS of a violation of the observer provider's policy within 72 hours of determining that a violation occurred.

NMFS agrees that an observer whose data do not meet the quality standards should be decertified. Although NMFS intends to continue reviewing observer performance, NMFS does not intend to intervene in any corrective process undertaken by a provider to resolve deficiencies with its employees unless these deficiencies directly affect data quality.

It is important that NMFS is notified of violations of observer provider conduct policies so that NMFS can consider whether those violations adversely affect an observer's ability to perform his or her duties, including the collection of quality data, or compromise workplace safety. NMFS will monitor each observer provider's conduct policy to determine whether it helps to maintain a professional workforce. By keeping aware of observer providers' conduct policies and the extent to which these policies are violated, NMFS may better advise observer providers of the most effective policies, and take further action as needed should a provider's policy or ineffective implementation of its policy generate numerous cases of insufficient data quality.

*Comment 6:* NMFS should inform all observer applicants during the training process: (1) That most U.S. fishing vessels have zero tolerance policies regarding the use or possession of drugs and alcohol; and (2) that violation of such policies may be grounds for removal from the vessel at the first reasonable opportunity or for refusal to grant permission to board the vessel in the first place.

*Response:* It is NMFS's practice to inform observer applicants of the zero tolerance policies for drugs and alcohol on board most U.S. fishing vessels and the consequences of violating these policies. NMFS will continue to emphasize this information in observer training.

*Comment 7:* We acknowledge the difficulty for NMFS to enforce the observer conduct policy. However, because NMFS is responsible for the quality of information used to manage fisheries under its jurisdiction, NMFS must retain some level of observer conduct oversight, even if not through regulations and the administrative review process. The elimination of NMFS's policy creates the potential for widely varying policies among providers, which could result in confusion among observers about what is permitted. NMFS should supply a standardized policy for observer providers to enforce. At the very least, the current policy provides guidance as to what is and is not acceptable behavior.

*Response:* NMFS believes that observer providers bear primary responsibility for developing and implementing observer conduct policies. However, NMFS has posted drug and alcohol policies on the Fishery Management and Analysis Division's Web site (*http://www.afsc.noaa.gov/FMA/default.htm*). NMFS intends to keep these policies posted to notify observers of NMFS's expectations about use and possession of drugs and alcohol. NMFS will add information to the policies explaining that observer providers have their respective drug and alcohol policies to which their employees are subject. NMFS's policies may also guide observer providers in development of their policies.

*Comment 8:* NMFS should clarify why it has been impractical to enforce observer conduct before further reducing the agency's responsibility for the welfare and conduct of observers. Zero tolerance policies for drugs and alcohol, similar to ones already imposed by many fishing companies on their crew, are appropriate for the work environment in Alaska's fisheries, including its professional observers. Observers who violate alcohol policies damage the reputation of the observer profession. Alcohol use has been responsible for a range of distasteful and unsafe behavior between deployments and in employer-provided housing, demonstrating that observer providers are unable to effectively ensure compliance. Enforcing observer adherence to a professional code of conduct is of secondary importance to observer providers as their primary focus is fulfilling their business relationships with fishing companies.

*Response:* NMFS must establish a link between the unsanctioned behavior and the collection of reliable fisheries data to take corrective action such as decertifying an observer. Such links are difficult to prove for observer code of conduct violations that occur outside of an observer's working hours. Adherence to observer conduct expectations, especially at observer provider housing, is an observer provider responsibility. Drug and alcohol abuse that results in unacceptable and/or dangerous living situations for other observers between deployments should be reported to the observer provider at a minimum. During observer training, NMFS will continue to emphasize the zero tolerance drug and alcohol policy enforced by most U.S. fishing companies.

*Comment 9:* NMFS should hold annual performance reviews of observer providers to ensure there is no collusion with the fishing industry and to ensure NMFS's performance standards, including observer conduct standards, are being met. Reviews should be publicly available and should include a list of complaints made by observers against contractors, claims against observers, and should include how NMFS responded to these complaints.

*Response:* NMFS does not hold contracts with observer provider companies and does not conduct performance reviews as would occur under a contract. However, NMFS regulates the responsibilities of observer providers through Federal regulations at 50 CFR 679.50(i)(2). Observer providers are also subject to conflict of interest regulations at 50 CFR 679.50(i)(3). Non-compliance with these regulations is investigated by the NOAA Office of Law Enforcement (OLE). NOAA OLE can assess civil penalties directly against the violator in the form of Summary Settlements or refer the case to NOAA's Office of General Counsel for Enforcement and Litigation (GCEL). GCEL can assess a civil penalty in the form of a Notice of Permit Sanctions or Notice of Violation and Assessment, or they can refer the case to the U.S. Attorney's Office for criminal proceedings.

*Comment 10:* NMFS should have enforceable conduct standards for observers that all observer providers are required to enforce because:

- The business relationships between observer provider companies and fishing companies may make observer providers less inclined to investigate and enforce observer conduct violations; and
- Fishing companies could make false claims against observers who, while carrying out their duties, cause inconveniences for the vessel operator or observer provider.

*Response:* Current regulations specify conduct standards for North Pacific groundfish fishery observers (50 CFR 679.50(j)(2)). As stated above, NMFS cannot enforce observer conduct standards that are unrelated to the collection of quality data for fisheries

management. Through this action, NMFS is removing observer conduct regulations pertaining to use of drugs and alcohol and the prohibition of physical sexual contact with vessel personnel. However, several observer conduct standards, including prohibition of conflict of interest, remain in Federal regulations, and NMFS will continue to enforce compliance with these standards.

Among other types of conduct, Federal regulations prohibit the impediment, intimidation, or interference with an observer (50 CFR 679.7(g)). These regulations are designed to protect observers and allow them to freely perform their duties without harassment, which would include making false accusations against an observer. NMFS enforces these regulations to the fullest extent of the law.

*Comment 11:* This proposed rule will weaken the protections of observers and an observer's ability to carry out his or her duties to NMFS's standards. Observer sampling to monitor quotas likely results in increased conflicts between vessel personnel and observers. This proposed rule will weaken the integrity of the Observer Program.

*Response:* NMFS disagrees that the protections for observers, the ability of an observer to objectively do his or her job, or the integrity of the Observer Program will be weakened through the promulgation of this rule. This rule clarifies that the observer providers are responsible for ensuring that observers adhere to a professional code of conduct pertaining to drug and alcohol use and sexual conduct. This rule does not modify Federal regulations that prohibit assaulting, resisting, opposing, intimidating, sexually harassing, or bribing an observer, or interfering with an observer's sampling or samples.

*Issue 3: Providing Observers for Research Activities*

*Comment 12:* NMFS received two comments in support of the regulatory amendment clarifying that observer providers can provide scientific data collectors in addition to observers.

*Response:* NMFS acknowledges the support for this regulatory amendment.

*Comment 13:* NMFS should consider including language for "catch monitors" in the event that the catch share policy being developed by NMFS includes this job category.

*Response:* It is not prudent to add the term "catch monitor" to regulations implementing the Observer Program at this time, because this term has not been established nor defined for North Pacific groundfish fisheries and is not relevant to this final rule.

*Comment 14:* The same standards that apply to observer deployments should apply to deployments of scientific data collectors for Experimental Fishing Permit (EFP) and Scientific Research Permit (SRP) projects, because researchers can influence who is hired by an observer provider to serve as a scientific data collector. Since much of the EFP and scientific research has implications for the fishing industry and is often partially funded by the industry, this could be perceived as a conflict of interest. These activities should be treated with the same code of conduct as in the Observer Program, including random placement of observers and public access to the data collected.

*Response:* The decision to hire scientific data collectors is based on the nature of the experimental or scientific work being conducted. Sometimes data collectors are hired through an observer provider company. Data collected during EFP and SRP projects are neither submitted to NMFS nor incorporated into official catch accounting. As such, data collected during EFP and SRP projects are not considered to be "observer information" and the scientific data collectors are not considered to be "observers" as defined in the MSA. Therefore, regulations pertaining to observers, observer providers, or observer information do not apply to EFP or SRP projects.

*Issue 4: Fishing Day Definition*

*Comment 15:* Observer data need to be collected at times that are representative of an operation's normal fishing activity. However, the proposed change to the fishing day definition will not sufficiently address the problem of vessel operators intentionally altering fishing activities while an observer is onboard. Instead, it merely shifts the start of the fishing day by 12 hours. Vessel operators will still have incentive to try to get small tows in at whatever time of day gets them the extra day of coverage.

*Response:* NMFS acknowledges that the revised fishing day definition does not eliminate the potential for operators with a 30 percent observer coverage requirement to intentionally manipulate their observer coverage by altering their fishing behavior solely for the purpose of achieving required coverage levels. As noted in the RIR/IRFA prepared for this action (*see* **ADDRESSES**), the optimum resolution to the problem of vessels conducting non-representative fishing to meet 30 percent observer coverage requirements may be to restructure the service delivery model for the Observer Program such that NMFS would control when and where observers are deployed. NMFS and the Council are working on an analysis to evaluate alternatives for restructuring the Observer Program service delivery model, which may modify how fishing trips are selected for observer coverage. In the interim, NMFS expects the revision of the fishing day definition to reduce the extent to which fishing trips are modified solely to achieve observer coverage due to the economic disincentive of using daylight hours to return to port to drop off observers. NMFS also expects the requirement that an observer be on board a vessel for all retrievals in which groundfish are retained in a 24-hour period to increase the disincentive for either spending a full day conducting non-representative fishing, or to sacrifice a full day of fishing just to make one observer tow so that it counts towards a day of observer coverage. This action is intended to reduce the occurrence of non-representative fishing behavior, though NMFS agrees that it will not eliminate the potential for manipulating the manner in which observer coverage is attained.

*Comment 16:* To yield representative data, the requirement that 30 percent of an operation's fishing activity be observed should be replaced with a requirement that 30 percent of the estimated total round weight of groundfish brought onboard be observed. It would be simple to track and estimate total round weight harvested by a vessel as current recordkeeping and reporting regulations require vessel operators to record the total estimated weight of groundfish brought onboard each day. This recommendation is similar to the approach adopted by NMFS to address non-representative fishing by vessels using pot gear. Observer coverage requirements previously based on fishing day are now based on pot counts. This proposed solution removes the opportunity for vessels to make observer tows which result in data that represents actual harvest.

*Response:* Replacing the fishing day definition with a requirement that an observer observe 30 percent of an operation's total catch or retained catch by round weight is unlikely to prevent operations from manipulating fishing behavior to meet observer coverage requirements. The alternative to base observer coverage requirements on harvest weight rather than fishing days was discussed and rejected by the Council's Observer Advisory Committee in May 2007, because catch weight is estimated by vessel operators and

cannot be independently verified on catcher vessels or small catcher processors that discard fish at sea. Basing such a standard on retained catch weighed at the end of a fishing trip could exacerbate the generation of non-representative data from operations intentionally manipulating their discard amounts, recordkeeping and reporting, or other activities to meet coverage requirements. Observer data representing the actual spatial and temporal distribution of the fisheries are needed for reliable parameter estimates to manage the fisheries.

*Comment 17:* NMFS should continue to pursue restructuring the Observer Program to randomize vessel selection and observer deployment on all vessels subject to less than 100 percent observer coverage. The revised fishing day definition in combination with a restructured Observer Program could virtually eliminate the potential for intentionally manipulating observer coverage requirements.

*Response:* NMFS agrees that the optimum solution to this problem may be Observer Program restructuring. See response to Comment 15 above.

*Comment 18:* Changing the fishing day definition from noon to noon increases the difficulty for vessel operators and observer providers to calculate observer coverage rates and does not eliminate the potential for the manipulation of observer coverage as intended. The requirement for the observer to be onboard for the full 24-hour period would solve the problem and there is no need to modify the definition of a day from 0001–2400 to 1201–1200.

*Response:* NMFS agrees that revising the fishing day definition does not prevent operations from manipulating the manner in which observer coverage requirements are met, and that modifying the fishing day definition from 0001–2400, to 1201–1200 creates the possibility for operations to merely shift the time of day in which they fish solely for observer coverage as discussed in the RIR/IRFA for this action (*see* **ADDRESSES**). However, the RIR/IRFA notes that fishery participants would be less likely to use the time period around noon to take observer tows because daylight hours correspond with better fishing. Anecdotal evidence suggests that participants would be less likely to attempt to manipulate the system during daylight hours because they would risk foregoing key fishing time. The extent of the economic disincentive for fishing solely for observer coverage during daylight hours cannot be quantified. NMFS agrees with the commenter that the component of the fishing day definition likely to have the largest impact on reducing fishing solely for observer coverage is the requirement that an observer be on board for the entire 24-hour period. NMFS expects the change in the time of the fishing day definition to reduce the practice of changing normal fishing operations to manipulate observer coverage.

*Comment 19:* The proposed revision to the fishing day definition will reduce the intentional practice of "observer tows," non-representative fishing activities that bias observer-collected data which form the basis of bycatch estimates and other scientific assessments. Because unbiased observer information is crucial to the proper management of fisheries in the North Pacific, this proposed action to reduce bias in observer data is an important step.

*Response:* NMFS acknowledges the support for this amendment.

*Comment 20:* NMFS should continue to monitor and record uncharacteristic fishing patterns following the implementation of this rule.

*Response:* NMFS agrees.

*Issue 5: Observer Cost Information*

*Comment 21:* The requirement that observer provider invoices contain the name of the observer assigned to the vessel or plant would require observer providers to modify their business practices. Invoicing occurs at the beginning of a month for services in that month. It is not possible to reliably predict the name of the observer that will provide coverage to a particular vessel or plant over the course of the month. Adding the observer's name to invoices would require duplication of billing process solely to comply with this requirement. Because existing regulations require observer providers to submit a weekly roster to NMFS containing the names and assignments of every observer, this requirement would create an additional burden to provide information already made available to NMFS by the observer provider.

*Response:* NMFS agrees. NMFS proposed to have "observer name" provided on invoices submitted by observer providers to serve as an additional data field to link observer provider invoice information to Observer Program databases containing information about specific observer fishing trips or deployments. The ability to link observer provider invoice information to Observer Program databases is necessary to increase the level of detail for NMFS to analyze costs. For example, this would allow NMFS to know which target fishery is linked to a particular invoice. NMFS recognizes the difficulty that the requirement to include "observer name" would impose on observer providers. As discussed in the RIR/IRFA (*see* **ADDRESSES**), this action was designed with the objective of not modifying the existing billing practices of the directly regulated observer providers affected by this rule. While the inclusion of the observer's name would aid in linking invoice information to the Observer Program database, it is not required to achieve this linkage. Because this provision would require observer providers to substantially modify their billing practices and therefore impose an additional burden, NMSF has modified the final rule to exclude the proposed requirement that observer provider invoices contain the name of the observer.

*Comment 22:* We support gathering observer cost information through the collection of invoices. Invoices should also be included for research activities that involve observers and the Observer Program.

*Response:* As explained in response to Comment 14, data collected during experimental or research activities are not considered "observer information," nor are the scientific data collectors considered "observers" per the definition in the MSA. Therefore, regulations applicable to observers, observer providers, and observer information are not applicable to EFP or SRP cruises.

*Comment 23:* Collection of observer provider invoices will improve analyses of Observer Program costs and benefits. This approach for collecting cost information will—

- Ground-truth industry's claims of overly burdensome economic impacts imposed by observer coverage costs;
- Inform policies to ensure that observer costs do not present an undue burden to industry; and
- Impose no additional burden on the regulated industry as this information is already collected and maintained on file with observer providers.

*Response:* NMFS acknowledges support for this amendment.

*Other Comments*

*Comment 24:* Observers are not effective because they can be threatened with violence.

*Response:* NMFS disagrees. Observers have provided valuable information for managing the groundfish fisheries off Alaska for over twenty years. See the response to Comment 10.

*Comment 25:* Cameras should be required on vessels, and vessels should not be allowed to fish without cameras.

*Response:* This rule addresses administrative changes to the existing Observer Program regulations at 50 CFR 679.50; it does not encompass alternative monitoring sources such as cameras. At its June 2010 meeting, the Council expressed its intent to pursue options for an electronic monitoring program to augment or replace observer coverage on specific vessels and to develop and implement such a program in coordination with the proposed restructured Observer Program under consideration by the Council. NMFS will be coordinating closely with the Council as options for expanded uses of electronic monitoring are developed.

**Changes From the Proposed Rule**

Four substantive changes were made in the final rule from the proposed rule. NMFS has made changes to Issue 2 Observer Conduct, and Issue 5 Observer Cost Information. The changes under Issue 2 comprise two technical clarifications identified by NMFS. Two changes are also made to Issue 5: One resulting from public comment received on the proposed rule; and one facilitating collection of observer cost information on a continual basis consistent with the purpose and need for the action and with other economic data collection programs adopted by the Council and administered by NMFS. NMFS consulted with the Council on these changes during the December 2009 meeting as required under Section 304(b)(3) of the MSA. The Council concurred with all of NMFS's proposed changes to the proposed rule. The changes are described below.

Under Issue 2, this final rule clarifies that observer providers must implement their policies addressing observer conduct and behavior for their employees that serve as observers. The wording of the proposed rule might have been interpreted to require that observer providers merely develop and maintain a written policy addressing observer conduct and behavior for their employees. The final rule clarifies NMFS's intent that observer providers are responsible for implementing their conduct policies, rather than just maintaining their written policies.

Also under Issue 2, this final rule removes the deadline in the proposed rule that would have required observer providers to provide copies of their observer conduct policies to observer candidates and observers by February 1 of each year. It is not practical for observer providers to comply with the proposed regulation, as all observer candidates and observers may not be known by February 1 of each year. This final rule retains the February 1 deadline for observer providers to submit a copy of their conduct policies to the Observer Program Office; however, it does not specify a deadline for when observer conduct policies must be provided to observer candidates and observers, though this rule requires observers and observer candidates to be provided with the observer provider's policy.

Under Issue 5, the proposed rule would have required observer providers to submit copies of their invoices for services provided in the North Pacific groundfish fisheries to NMFS so that NMFS may understand the industry's observer coverage costs. The proposed rule preserved the intent of the Council's April 2008 motion and stated that observer providers would be required to submit to NMFS invoices on a monthly basis for a full calendar year every third year. The RIR/IRFA prepared for this action (*see* **ADDRESSES**) describes the minimal burden for observer providers to provide this information to NMFS and the shortcomings of an episodic data collection program. In the preamble to the proposed rule, NMFS expressed concerns with the proposed 3-year data collection interval. The preamble highlighted that a 3-year interval would delay NMFS's ability to detect trends in observer coverage costs. Furthermore, a periodic data collection cycle would reduce the precision of any temporal variability evaluation. As noted in the preamble to the proposed rule, the Council's preferred alternative would not allow for a complete, continuous overview of the industry's observer costs due to the 3-year lapse between data collection cycles. Finally, a 3-year lapse in data collection cycles departs from NMFS's other ongoing economic data collection programs, which collect economic data annually. When compared to other annual collection programs, a three-year collection cycle would be an anomaly and less robust.

Although NMFS highlighted its concern with the Council's recommendation to collect the monthly invoices every 3 years in the proposed rule, no public comment was received on this issue. Therefore, for the reasons described above and in the remainder of this paragraph, the final rule requires that observer providers submit copies of their invoices to NMFS on a monthly basis every year rather than on a monthly basis only every 3 years as stated in the proposed rule. Invoices are already maintained by providers and monthly submissions will provide timely information to assess the nature of change in observer costs for purposes of analyses of proposed fishery management and conservation actions. These assessments will become increasingly important if observer coverage in the future is provided under private contract arrangements between NMFS and observer providers; this approach would reflect a significant change in how observers are deployed and currently is under consideration by the Council. Invoices must be submitted to NMFS within 45 days of the date on the invoice. This provides a grace period between the time invoices are prepared and when they must be received by NMFS.

Also under Issue 5, this final rule modifies the elements required to be submitted to NMFS on an observer provider's invoice. The preamble to the proposed rule listed the items required to be contained on the invoices submitted to NMFS. In the preamble, the corresponding observer's name was listed as a required invoice element; however "observer name" was inadvertently excluded from the regulatory text in the proposed rule. During the public comment period one observer provider commented that it would have to substantially modify its billing practice to include "observer name" on a monthly invoice, as it bills clients at the beginning of the month, before an observer is selected and assigned to the client (*see* Comment 21, above). Because this element would impose a substantial compliance burden on the observer provider, and because it is not imperative for NMFS to have the observer's name on the invoice to conduct economic analyses, "observer name" is not included in the list of required invoice elements in the final rule. Also see response to Comment 21.

**Classification**

The Administrator, Alaska Region, NMFS determined that this final rule is necessary for the conservation and management of the groundfish fisheries off Alaska and that it is consistent with the Magnuson-Stevens Act and other applicable law.

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

A final regulatory flexibility analysis (FRFA) was prepared, as required by section 604(a) of the Regulatory Flexibility Act (RFA). The FRFA incorporates the initial regulatory flexibility analysis (IRFA) and provides a summary of the analyses completed to support the action. A copy of this analysis is available from NMFS (*see* **ADDRESSES**).

*Need for, and Objectives of, the Rule*

The need for, and objectives of, this final rule are described in the preamble.

*Significant Issues Raised by Public Comment on the IRFA*

No public comments were received specifically on the IRFA. However, one change was made to the final rule in response to a comment from an observer provider (a small entity). See response to Comment 21.

*Description and Number of Small Entities to Which the Final Rule Would Apply*

The directly regulated entities are different under the various issues addressed in this final rule. Since the RFA is applicable to businesses, non-profit organizations, and governments, observers fall outside of the scope of the RFA. Therefore, Issue 1, which affects observers only, is not discussed in the FRFA.

Five companies hold observer provider permits and are active in the North Pacific. These entities will be directly regulated by revisions implemented under Issues 2, 3, 5, and 6 of this final rule. As explained in the FRFA, all of the current observer provider companies are considered small entities under the RFA. Small observer provider firms that in the future obtain a permit to provide observer services will be regulated by observer provider permitting and responsibility regulations revised by this final rule; however, the potential number of these firms cannot be estimated and they are not considered directly regulated under this action.

Trawl and hook-and-line catcher vessels (CV) and catcher/processors (CP) subject to 30 percent observer coverage requirements will be directly regulated by the revision to the definition of "fishing day" under Issue 4 in this final rule. In the BSAI and GOA, with several exceptions for vessels participating in specific programs, these include trawl and hook-and-line catcher vessels between 60 feet and 125 feet length overall (LOA), and hook-and-line CPs between 60 feet and 125 feet LOA. American Fisheries Act (AFA) (16 U.S.C. 1851 note) trawl CVs subject to 30 percent observer coverage requirements are categorized as large entities for the purpose of the RFA under the principles of affiliation, as they are part of the AFA pollock harvest cooperatives. The table below lists the number of directly regulated small entities, by sector, that may be affected by the revised "fishing day" definition. The FRFA likely overestimates the number of directly regulated small entities. NMFS does not have access to data on ownership and other forms of affiliation for most segments of the fishing industry operating off Alaska, nor does NMFS have information on the combined annual gross receipts for each entity by size. Absent these data, a more precise characterization of the size composition of the directly regulated entities impacted by this action cannot be offered.

ESTIMATE OF THE NUMBER OF SMALL ENTITIES POTENTIALLY DIRECTLY REGULATED BY ISSUE 4 OF THE FINAL RULE:

| Sector | Number of small entities |
|---|---|
| Trawl CV > 60′ and ≤ 125′ | 22 |
| Trawl CP > 60′ and ≤ 125′ | 1 |
| Hook and Line CV > 60′ and ≤ 125′ | 78 |
| Hook and Line CP > 60′ and ≤ 125′ | 2 |

*Projected Reporting, Recordkeeping, and Other Compliance Requirements*

Actions under Issue 2 and Issue 5 include additional recordkeeping and reporting requirements for the five observer providers currently supplying services to the Observer Program. Regulatory amendments made under Issue 6 impose a deadline for submission of information that is already required of observer providers in existing regulations.

Revised regulations under Issue 2 require observer providers to have and implement a policy related to observer alcohol, drugs, and sexual contact; provide NMFS a copy of the conduct policy by February 1, of each year; and to notify NMFS of a violation of the observer provider's policy within 72 hours after the provider determines that an observer violated a conduct policy, including the underlying facts and circumstances of the violation. Current regulations at § 679.50(i)(2)(x)(I) require an observer provider to notify NMFS of other types of conduct violations within 24 hours of becoming aware of the alleged violation; this final rule does not substantially alter that reporting requirement. It may take 20 minutes or less for an employee of the observer provider company to report this information to NMFS, as fax or email are acceptable means of communication.

Compliance costs under Issue 4 will be somewhat reduced by the delay in effectiveness to January 1, 2011. The revision to the definition of a fishing day affects the calculation of days that an observer is onboard vessels greater than or equal to 60 ft LOA, but less than 125 ft LOA that are subject to 30 percent observer coverage requirements under § 679.50. Effectiveness of this change in definition is delayed to the first day of the next calendar quarter, which is January 2, 2011. This will delay any costs associated with the need for more observer coverage days each quarter for vessels in the 30 percent observer coverage category as a result of the change in the definition of a fishing day. It also will reduce any administrative costs associated with the additional complexity that would have been caused by changing the method for calculating observer coverage days in the middle of a calendar quarter.

Under Issue 5, this final rule requires observer providers to submit copies of billing invoices to NMFS once a month on a continual basis. This recordkeeping and reporting requirement will not require observer providers to modify or interpret their billing invoices.

Under Issue 6, existing regulations are modified by imposing a February 1 deadline for observer providers to submit to NMFS each type of contract they have entered into with observers or the fishing industry. Because regulations already require observer provider companies to submit this information to NMFS, and because most observer provider companies have been submitting this information by February 1 in the past, this regulatory amendment should impose virtually no additional net burden on the observer provider companies.

*Reason for Selecting the Alternatives in the Final Rule*

The preferred alternative for each issue was selected as the least economically burdensome alternative that met the purpose and need for action based upon the analysis in the RIR/IRFA and FRFA (*See* **ADDRESSES**). The Council selected the only action alternative available under Issues 1, 2, 3, and 6. Issues 1 and 6 do not affect small entities. The preferred alternative under Issue 2, regarding observer conduct policies, is expected to have a minimal cost to observer providers, as described above. Issue 3, clarifying that observer providers may provide observers or scientific data collectors for research, does not impost costs on small entities.

Revisions to the definition of a fishing day under Issue 4 could increase costs for vessel owners in some cases because they may need to take longer fishing trips under the revised definition. Longer trips would require them to carry observers for more days than they do under current regulations and pay

more for observer coverage as a result of these additional observer days. However, the objective of the revised definition is to prevent vessel operators from making fishing trips that do not reflect their normal fishing patterns as this non-representative behavior biases the observer-collected information. Therefore, the additional costs that may be incurred by vessel owners are necessary to address a problem that potentially reduces the quality of observer data collected to manage the groundfish fisheries off Alaska.

There were three action alternatives for Issue 5, and the Council selected the least economically burdensome alternative for observer providers by rejecting alternatives that would have required providers to compile annual expense reports summarized by fishery or expense category. The alternative that would require observer providers to submit copies of invoices already prepared as part of their standard bookkeeping was determined to be less burdensome on small entities than the other alternatives.

The Council sought to further reduce the economic burden on observer providers by requiring them to submit copies of their invoices only on a monthly basis for a full calendar year every third year; however, in this final rule, observer providers are required to submit copies of their invoices to NMFS on a monthly basis every year, in line with their present accounting practices. Although this alternative is not the least economically burdensome on the observer providers, NMFS determined that it is necessary because a 3-year interval would delay NMFS's ability to detect trends in observer coverage costs and a periodic data collection cycle would reduce the precision of any temporal variability evaluation. The additional economic burden on the observer providers is expected to be small because invoices are already maintained by providers and monthly submissions will provide timely information to assess the nature of change in observer costs for purposes of analyses of proposed fishery management and conservation actions.

*Collection-of-Information*

This rule contains a collection-of-information requirement subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). This requirement has been approved under OMB Control Number 0648–0318. Public reporting burden is estimated to average 30 minutes per individual response for Copies of Invoices; 15 minutes for Observer Provider Contract Copies; two hours for Other Reports; 40 hours for Appeals for Observer Provider Permit Expiration or Denial of Permit (this item is removed with this action); and 40 hours for Observer Conduct and Behavior Policy, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The PRA analysis submitted with this rule estimates the economic impact on each observer provider to range from $148 to $622 per year for copying and submitting copies of billing invoices to NMFS depending on whether the invoices are submitted via e-mail or fax, respectively. The PRA analysis estimates a one-time expense of $1,025 for observer providers to develop observer conduct policies and submit copies of them to NMFS. This is likely an overestimate as all active groundfish observer providers in the North Pacific currently have drug policies and four of the five have alcohol policies. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (*see* **ADDRESSES**) and by e-mail to *OIRA_Submission@omb.eop.gov,* or fax to 202–395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

**List of Subjects in 50 CFR Part 679**

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: November 4, 2010.

**Samuel D. Rauch III,**

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

■ For the reasons set out in the preamble, NMFS amends 50 CFR part 679 as follows:

## PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 1. The authority citation for 50 CFR part 679 continues to read as follows:

**Authority:** 16 U.S.C. 773 *et seq.;* 1801 *et seq.;* 3631 *et seq.;* Pub. L. 108–447.

■ 2. In § 679.2, revise the definition of "Fishing day" to read as follows:

**§ 679.2 Definitions.**

* * * * *

*Fishing day* means (for purposes of subpart E of this part) a 24-hour period, from 1201 hours, A.l.t. through 1200 hours, A.l.t., in which fishing gear is retrieved and groundfish are retained. An observer must be on board for all gear retrievals during the 24-hour period in order to count as a day of observer coverage. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.

* * * * *

■ 3. In § 679.50:

■ A. Remove and reserve paragraph (i)(1)(iii)(B) and remove paragraphs (i)(1)(iv), (i)(2)(i)(C)(*1*), (j)(1)(iv)(B), and (j)(2)(ii)(D).

■ B. Redesignate paragraphs (i)(1)(v) through (viii) as paragraphs (i)(1)(iv) through (vii), respectively.

■ C. Redesignate paragraphs (i)(2)(i)(C)(*2*) through (*4*) as paragraphs (i)(2)(i)(C)(*1*) through (*3*), respectively.

■ D. Redesignate paragraphs (i)(2)(iii) through (xii) as paragraphs (i)(2)(iv) through (xiii), respectively.

■ E. Redesignate newly redesignated paragraphs (i)(2)(xi)(H) and (I) as paragraphs (i)(2)(xi)(I) and (J), respectively, and further redesignate paragraphs (i)(2)(xi)(J)(*1*) through (*5*) as paragraphs (i)(2)(xi)(J)(*1*)(*i*) through (*v*), respectively.

■ F. Redesignate paragraphs (i)(3)(i) through (iii) as paragraphs (i)(3)(ii) through (iv), respectively.

■ G. Redesignate paragraph (j)(1)(iv)(C) as paragraph (j)(i)(iv)(B).

■ H. Add paragraphs (i)(2)(iii), (i)(2)(xi)(H), (i)(2)(xi)(J)(*1*) introductory text, (i)(2)(xi)(J)(*2*), and (i)(3)(i).

■ I. Revise paragraphs (i)(1)(i)(A), (i)(1)(iii)(A) introductory text, (i)(2)(i)(B), (j)(1)(iii)(B) introductory text, (j)(1)(iv)(A), (j)(2)(ii) introductory text, and (j)(2)(ii)(A) through (C).

■ J. Revise newly redesignated paragraphs (i)(1)(iv), (i)(1)(vi)(B), (i)(2)(xi)(G) first sentence, (i)(2)(xi)(J) introductory text, (i)(2)(xi)(J)(*1*)(*v*), and (i)(3)(ii) introductory text.

The revisions and additions read as follows:

**§ 679.50 Groundfish Observer Program.**

* * * * *

(i) * * *

(1)* * *

(i) * * *

(A) The Regional Administrator may issue a permit authorizing a person's participation as an observer provider. Persons seeking to provide observer services under this section must obtain an observer provider permit from NMFS.

* * * * *

(iii) * * *

(A) The Regional Administrator will establish an observer provider permit application review board, composed of NMFS staff, to review and evaluate an application submitted under paragraph (i)(1) of this section. The review board will evaluate the completeness of the application, the application's consistency with needs and objectives of the observer program, or other relevant factors, and the following criteria for each owner, or owners, board members, and officers if a corporation:

* * * * *

(iv) *Agency determination on an application.* NMFS will send a written determination to the applicant. If an application is approved, NMFS will issue an observer provider permit to the applicant. If an application is denied, the reason for denial will be explained in the written determination.

* * * * *

(vi) * * *

(B) The Regional Administrator will provide a written initial administrative determination (IAD) to an observer provider if NMFS's deployment records indicate that the permit has expired. An observer provider who receives an IAD of permit expiration may appeal under § 679.43. A permit holder who appeals the IAD will be issued an extension of the expiration date of the permit until after the final resolution of that appeal.

* * * * *

(2) * * *

(i) * * *

(B) Prior to hiring an observer candidate, the observer provider must provide to the candidate copies of NMFS-provided pamphlets and other literature describing observer duties.

* * * * *

(iii) *Observer conduct.* (A) An observer provider must develop, maintain, and implement a policy addressing observer conduct and behavior for their employees that serve as observers. The policy shall address the following behavior and conduct regarding:

(*1*) Observer use of alcohol;

(*2*) Observer use, possession, or distribution of illegal drugs; and

(*3*) Sexual contact with personnel of the vessel or processing facility to which the observer is assigned, or with any vessel or processing plant personnel who may be substantially affected by the performance or non-performance of the observer's official duties.

(B) An observer provider shall provide a copy of its conduct and behavior policy:

(*1*) To observers, observer candidates; and

(*2*) By February 1 of each year to the Observer Program Office.

* * * * *

(xi) * * *

(G) *Observer provider contracts.* Observer providers must submit to the Observer Program Office a completed and unaltered copy of each type of signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract) between the observer provider and those entities requiring observer services under paragraphs (c) and (d) of this section, by February 1 of each year.

* * *

* * * * *

(H) *Observer provider invoices.* Certified observer providers must submit to the Observer Program Office copies of all invoices for observer coverage required or provided pursuant to paragraphs (c) and (d) of this section.

(*1*) Copies of invoices must be received by the Observer Program Office within 45 days of the date on the invoice and must include all reconciled and final charges.

(*2*) Invoices must contain the following information:

(*i*) Name of each individual catcher/processor, catcher vessel, mothership, stationary floating processor, or shoreside processing plant to which the invoice applies;

(*ii*) Dates of service for each observer on each catcher/processor, catcher vessel, mothership, stationary floating processor, or shoreside processing plant. Dates billed that are not observer coverage days shall be identified on the invoice;

(*iii*) Rate charged in dollars per day (daily rate) for observer services;

(*iv*) Total charge for observer services (number of days multiplied by daily rate);

(*v*) Amount charged for air transportation; and

(*vi*) Amount charged by the provider for any other observer expenses, including but not limited to: Ground transportation, excess baggage, and lodging. Charges for these costs must be separated and identified.

* * * * *

(J) *Other reports.* Reports of the following must be submitted in writing to the Observer Program Office by the observer provider via fax or email:

(*1*) Within 24 hours after the observer provider becomes aware of the following information:

* * * * *

(*v*) Any information, allegations or reports regarding observer conflict of interest or failure to abide by the standards of behavior described at paragraph (j)(2)(i) or (j)(2)(ii) of this section, or;

(*2*) Within 72 hours after the observer provider determines that an observer violated the observer provider's conduct and behavior policy described at paragraph (i)(2)(iii)(A) of this section; these reports shall include the underlying facts and circumstances of the violation.

* * * * *

(3) * * *

(i) Are authorized to provide observer services under an FMP for the waters off the coast of Alaska as required in this part, or scientific data collector and observer services to support NMFS-approved scientific research activities, exempted educational activities, or exempted or experimental fishing as defined in § 600.10 of this chapter.

(ii) Must not have a direct financial interest, other than the provision of observer or scientific data collector services, in a North Pacific fishery managed under an FMP for the waters off the coast of Alaska, including, but not limited to:

* * * * *

(j) * * *

(1) * * *

(iii) * * *

(B) *New observers.* NMFS may certify individuals who, in addition to any other relevant considerations:

* * * * *

(iv) * * *

(A) *Denial of a certification.* The NMFS observer certification official will issue a written determination denying observer certification if the candidate fails to successfully complete training, or does not meet the qualifications for certification for any other relevant reason.

* * * * *

(2) * * *

(ii) *Standards of Behavior.* Observers must:

(A) Perform their assigned duties as described in the Observer Manual or other written instructions from the Observer Program Office;

(B) Accurately record their sampling data, write complete reports, and report accurately any observations of suspected violations of regulations relevant to conservation of marine resources or their environment; and

(C) Not disclose collected data and observations made on board the vessel or in the processing facility to any person except the owner or operator of the observed vessel or processing facility, an authorized officer, or NMFS.

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**§ 679.50 [Amended]**

■ 4. At each of the locations shown in the Location column, remove the phrase indicated in the "Remove" column and replace it with the phrase indicated in the "Add" column for the number of times indicated in the "Frequency" column.

| Location at § 679.50 | Remove | Add | Frequency |
|---|---|---|---|
| Newly redesignated (i)(2)(i)(C)(*3*) | in paragraph (i)(2)(x)(C) of this | in paragraph (i)(2)(xi)(C) of this | 1 |
| (i)(2)(ii)(A) | under paragraph (i)(2)(x)(E) of this | under paragraph (i)(2)(xi)(E) of this | 1 |
| Newly redesignated (i)(2)(iv)(B) | in paragraph (i)(2)(x)(C) of this | in paragraph (i)(2)(xi)(C) of this | 1 |
| Newly redesignated (i)(2)(vii)(B) | in paragraphs (i)(2)(vi)(C) and (i)(2)(vi)(D) of this. | in paragraphs (i)(2)(vii)(C) and (i)(2)(vii)(D) of this. | 1 |
| Newly redesignated (i)(2)(xi)(C) | paragraph (i)(2)(i)(B)(*1*) of | paragraph (i)(2)(i)(B) of | 1 |
| (j)(1)(iii)(B)(*2*)(*i*) | at paragraphs (i)(2)(x)(A)(*1*)(*iii*) and | at paragraphs (i)(2)(xi)(A)(*1*)(*iii*) and | 1 |
| (j)(1)(iii)(B)(*2*)(*ii*) | at paragraph (i)(2)(x)(C) | at paragraph (i)(2)(xi)(C) | 1 |
| (j)(1)(iii)(B)(*3*) | and (i)(2)(x)(C) | and (i)(2)(xi)(C) | 1 |
| (j)(1)(iii)(B)(*4*)(*ii*) | the candidate failed the training; whether | the candidate failed the training and whether. | 1 |
| (j)(1)(iii)(B)(*4*)(*ii*) | in the form of an IAD denying | in the form of a written determination denying. | 1 |
| (j)(3)(iii) | will issue a written IAD to the observer | will issue a written initial administrative determination (IAD) to the observer. | 1 |

[FR Doc. 2010–28325 Filed 11–9–10; 8:45 am]

BILLING CODE 3510–22–P

# Proposed Rules

Federal Register
Vol. 75, No. 217
Wednesday, November 10, 2010

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

## FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

### 5 CFR Parts 1600, 1604, 1651, and 1690

### Employee Contribution Elections and Contribution Allocations; Uniformed Services Accounts; Death Benefits; Thrift Savings Plan

**AGENCY:** Federal Retirement Thrift Investment Board.

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** The Federal Retirement Thrift Investment Board (Agency) proposes to amend its regulations to establish procedures to maintain beneficiary participant accounts for spouse beneficiaries in accordance with the Thrift Savings Plan Enhancement Act of 2009.

**DATES:** Comments must be received on or before December 10, 2010.

**ADDRESSES:** You may submit comments using one of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Office of General Counsel, Attn: Thomas Emswiler, Federal Retirement Thrift Investment Board, 1250 H Street, NW., Washington, DC 20005.
- *Hand Delivery/Courier:* The address for sending comments by hand delivery or courier is the same as that for submitting comments by mail.
- *Facsimile:* Comments may be submitted by facsimile at (202) 942–1676.

The most helpful comments explain the reason for any recommended change and include data, information, and the authority that supports the recommended change. We will post all substantive comments (including any personal information provided) without change (with the exception of redaction of SSNs, profanities, et cetera) on *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Laurissa Stokes at 202–942–1645.

**SUPPLEMENTARY INFORMATION:** The Agency administers the Thrift Savings Plan (TSP), which was established by the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99–335, 100 Stat. 514. The TSP provisions of FERSA are codified, as amended, largely at 5 U.S.C. 8351 and 8401–79. The TSP is a tax-deferred retirement savings plan for Federal civilian employees and members of the uniformed services. The TSP is similar to cash or deferred arrangements established for private-sector employees under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)).

#### Congressional Authorization for Beneficiary Participant Accounts

Currently, a spouse beneficiary of a TSP participant must either transfer his or her TSP death benefit payment to another eligible employer plan or individual retirement account (IRA), or receive the payment immediately. On June 22, 2009, the President signed the Thrift Savings Plan Enhancement Act of 2009 ("the Act"), Public Law 111–31 (Division B, Title I), 123 Stat. 1776, 1853. The Act authorized the Agency to allow a spouse of a deceased participant to retain a lump sum death benefit payment in the TSP, subject to certain restrictions on contributions, loans, and withdrawal elections. This proposed rule would conform the Agency's regulations to the Act and would set forth the rules and limitations applicable to beneficiary participant accounts.

#### Establishing a Beneficiary Participant Account

The Agency will automatically establish a beneficiary participant account upon identifying a deceased participant's spouse as a sole or partial beneficiary eligible for a lump sum death benefit payment. Consistent with its treatment of accounts of participants who have separated from Federal service, the Agency will not maintain a beneficiary participant account if the amount of the deceased participant's vested account balance to which the spouse is entitled is less than $200. The Agency also will not transfer this de minimus amount to another eligible plan or pay it by electronic funds transfer. Instead the TSP will make an immediate distribution to the spouse.

A civilian beneficiary participant account is a beneficiary participant account that is established with a death benefit payment from a civilian TSP participant account to which contributions were made by or on behalf of a civilian employee (*i.e.* a civilian TSP participant account). A uniformed services beneficiary participant account is a beneficiary participant account that is established with a death benefit payment from a TSP participant account to which contributions were made by or on behalf of a member of the uniformed services (*i.e.* a uniformed services TSP participant account).

Consistent with its treatment of accounts of participants who have both a civilian account and a uniformed services account, the TSP will maintain civilian beneficiary participant accounts separate from uniformed services beneficiary participant accounts. Beneficiary participants who acquire both a uniformed services participant account and a civilian beneficiary participant account will receive two separate TSP account numbers; one for the civilian beneficiary participant account and one for the uniformed services beneficiary participant account.

#### Initial Account Balance Allocation

Upon notice of a participant's death, the Agency currently transfers all funds in a deceased participant's account to the Government Securities Investment (G) Fund. This practice protects the account balance from risk of incurring losses between the time the Agency receives notice of the participant's death and the time the Agency makes a distribution to a beneficiary. The Agency will continue this practice even when it appears that the beneficiary is the participant's spouse. Therefore, funds in a beneficiary participant account will initially be allocated entirely to the G Fund regardless of the allocation of the participant's account balance at the time of his or her death. Once a beneficiary participant account is established, the spouse beneficiary may redistribute the beneficiary participant account balance among the TSP investment funds by making an interfund transfer.

#### Withdrawal Options

A spouse beneficiary will be afforded the same withdrawal options with respect to his or her beneficiary participant account that the participant would have had with respect to his or her TSP account if the participant was

living and separated from service. Accordingly, a spouse beneficiary may elect to withdraw all or a portion of his or her beneficiary participant account as a partial payment or as a full withdrawal, that is in a single payment, a series of monthly payments, a life annuity, or any combination of these options. The spouse beneficiary cannot request loans, age-based withdrawals, or financial hardship withdrawals.

**Required Minimum Distributions**

The Internal Revenue Code requires spouse beneficiaries to receive a portion of their beneficiary participant account on or before the later of—(1) The end of the calendar year immediately following the calendar year in which the participant died; or (2) The end of the calendar year in which the employee would have attained age 70½. The Agency will ensure that the annual total payments satisfy any applicable minimum distribution requirement of the Internal Revenue Code by making a supplemental payment, if necessary. The Agency will calculate minimum distributions based on the beneficiary participant account balance and the beneficiary participant's age, using the IRS Single Life Table, Treas. Reg. § 1.401(a)(9)–9, Q&A 1.

**Spousal Rights After Remarriage**

Sections 8351 and 8435, Title 5 of the United States Code give certain rights to the spouses of participants. These spousal rights are not applicable to the spouse of a beneficiary participant. Thus, if a beneficiary participant remarries, his or her new spouse will not have the right to consent, notice, or any particular form of distribution (*e.g.* joint and survivor annuity) with respect to withdrawals from the beneficiary participant account.

**Contributions, Transfers, and Rollovers to Beneficiary Participant Accounts**

The Thrift Savings Plan Enhancement Act of 2009 prohibits a spouse beneficiary from making contributions or "transfers" (trustee-to-trustee transfers or rollovers) to a beneficiary participant account. Accordingly, the Agency will not accept a contribution allocation request from a spouse beneficiary and a spouse beneficiary may not transfer or roll over any distributions from an IRA or an eligible employer plan into a beneficiary participant account.

A beneficiary participant may acquire multiple civilian beneficiary participant accounts and/or multiple uniformed services beneficiary participants if he or she remarries a Federal employee who then dies having designated him or her as a beneficiary. Beneficiary participant accounts cannot be combined since combining accounts requires a transfer from one beneficiary participant account to another.

**Transfers and Rollovers From Beneficiary Participant Accounts**

A spouse beneficiary may transfer or roll over all or a portion of an eligible rollover distribution (within the meaning of Internal Revenue Code § 402(c)(4)) to a traditional IRA, Roth IRA, or eligible employer plan. A spouse beneficiary who is a current or former Federal employee may also transfer or roll over all or a portion of an eligible rollover distribution from a civilian beneficiary participant account into his or her own civilian or uniformed services TSP participant account.

A spouse beneficiary who is a current or former Federal employee may, likewise, transfer or roll over all or a portion of an eligible rollover distribution from a uniformed services beneficiary participant account into a civilian or uniformed services TSP participant account. However, a transfer of a uniformed services beneficiary participant account to a civilian TSP participant account cannot include tax-exempt money attributable to the combat zone exclusion. Any tax-exempt money must remain in the uniformed services beneficiary account unless it is transferred or rolled over to an IRA or it is transferred directly to a uniformed services TSP participant account or other eligible employer plan that accepts tax-exempt money.

Section 1600.31 of the Agency's regulations currently prohibits participants from requesting incoming transfers or rollovers if they are receiving monthly payments from their TSP accounts. For this reason, a spouse beneficiary who is a current or former Federal employee would not be permitted to transfer an eligible rollover distribution from a beneficiary participant account to his or her own TSP participant account if he or she is receiving monthly payments from that account. The Agency proposes to remove this limitation on incoming transfers and rollovers. Thus, a spouse beneficiary would be permitted to transfer or roll over all or a portion of an eligible rollover distribution from his or her beneficiary participant account to his or her own TSP participant account even if he or she is receiving monthly payments.

**Combining a Uniformed Services Beneficiary Participant Account and a Civilian Beneficiary Participant Account Not Permitted**

The Agency's regulations currently provide that a participant may combine his or her uniformed services account with a civilian account through a "transfer." *See* 5 CFR 1604.5(b). Even in the absence of this regulatory language, combining accounts would, as practical matter, require that one account be transferred to the other. Because the Thrift Savings Plan Enhancement Act prohibits contributions or transfers to a beneficiary participant account, a spouse beneficiary cannot combine his or her uniformed services beneficiary participant account with his or her civilian beneficiary participant account.

**Death of a Beneficiary Participant**

The balance of a beneficiary participant account must be disbursed upon the death of the beneficiary participant. A beneficiary participant may designate a beneficiary for his or her beneficiary participant account. If the beneficiary participant does not designate a beneficiary for his or her beneficiary participant account, the account will be disbursed in accordance with the order of precedence set forth at 5 CFR 1651(a)(2) through (6). No individual who is entitled to a death benefit from a beneficiary participant account shall be eligible to keep his or her benefit in the TSP.

A recipient of a death benefit payment from a beneficiary participant account cannot transfer the payment to an IRA or eligible retirement plan (including the TSP). The Internal Revenue Code permits death benefit distributions to be rolled over only when the distribution is "paid to the spouse of the *employee*" or the "designated beneficiary (as defined by section 401(a)(9)(E)) of the *employee*." 26 U.S.C. 402(c)(9) (emphasis added); 26 U.S.C. 402(c)(11) (emphasis added). Because a beneficiary participant is not the employee, the TSP must pay the recipient of the death benefit payment directly and the payment will be fully taxable to that individual in the year of distribution. 26 U.S.C. 402(a).

**Regulatory Flexibility Act**

I certify that this regulation will not have a significant economic impact on a substantial number of small entities. This regulation will affect Federal employees and members of the uniformed services who participate in the Thrift Savings Plan, which is a Federal defined contribution retirement savings plan created under the Federal

Employees' Retirement System Act of 1986 (FERSA), Public Law 99–335, 100 Stat. 514, and which is administered by the Agency. It will also affect their spouse beneficiaries.

**Paperwork Reduction Act**

I certify that these regulations do not require additional reporting under the criteria of the Paperwork Reduction Act.

**Unfunded Mandates Reform Act of 1995**

Pursuant to the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 602, 632, 653, 1501–1571, the effects of this regulation on state, local, and tribal governments and the private sector have been assessed. This regulation will not compel the expenditure in any one year of $100 million or more by state, local, and tribal governments, in the aggregate, or by the private sector. Therefore, a statement under § 1532 is not required.

**List of Subjects**

*5 CFR Part 1600*

Government employees, Pensions, Retirement.

*5 CFR Part 1604*

Military personnel, Pensions, Retirement.

*5 CFR Part 1651*

Claims, Government employees, Pensions, Retirement.

*5 CFR Part 1690*

Government employees, Pensions, Retirement.

**Gregory T. Long,**

*Executive Director, Federal Retirement Thrift Investment Board.*

For the reasons stated in the preamble, the Agency proposes to amend 5 CFR chapter VI as follows:

## PART 1600—EMPLOYEE CONTRIBUTION ELECTIONS AND CONTRIBUTION ALLOCATIONS

1. The authority citation for part 1600 continues to read as follows:

**Authority:** 5 U.S.C. 8351, 8432(a), 8432(b), 8432(c), 8432(j), 8474(b)(5) and (c)(1), Thrift Savings Plan Enhancement Act of 2009, section 102.

2. Amend § 1600.31, by revising paragraph (a) to read as follows:

**§ 1600.31 Accounts eligible for transfer.**

(a) A participant who has an open TSP account and is entitled to receive (or receives) an eligible rollover distribution, within the meaning of I.R.C. section 402(c)(4) (26 U.S.C. 402(c)(4)), from an eligible employer plan or a rollover contribution, within the meaning of I.R.C. section 408(d)(3) (26 U.S.C. 408(d)(3)), from a traditional IRA may cause to be transferred (or transfer) that distribution into his or her TSP account.

* * * * *

## PART 1604—UNIFORMED SERVICES ACCOUNTS

3. The authority citation for part 1604 continues to read as follows:

**Authority:** 5 U.S.C. 8440e, 8474(b)(5) and (c)(1).

4. Revise § 1604.8 to read as follows:

**§ 1604.8 Death benefits.**

The account balance of a deceased service member will be paid as described at 5 CFR part 1651. If a service member account contains combat zone contributions, the death benefit payment will be made pro rata from all sources.

## PART 1651—DEATH BENEFITS

5. Revise the authority citation for part 1651 to read as follows:

**Authority:** 5 U.S.C. 8424(d), 8432(j), 8433(e), 8435(c)(2), 8474(b)(5), 8474(c)(1), and Sec. 109, Pub. L. 111–31,123 Stat. 1176 (5 U.S.C. 8433(e)).

6. Amend § 1651.5 by revising paragraph (a) to read as follows:

**§ 1651.5 Spouse of participant.**

(a) For purposes of payment under § 1651.2(a)(2) of this chapter and establishment of beneficiary participant accounts under § 1651.19 of this chapter, the spouse of the participant is the person to whom the participant was married on the date of death. A person is considered to be married even if the parties are separated, unless a court decree of divorce or annulment has been entered. State law of the participant's domicile will be used to determine whether the participant was married at the time of death.

* * * * *

7. Amend § 1651.14 by revising paragraph (c) to read as follows:

**§ 1651.14 How payment is made.**

* * * * *

(c) *Payment to the participant's spouse.* The Agency will automatically establish a beneficiary participant account (described in § 1651.19) for any spouse beneficiary. The Agency will not maintain a beneficiary participant account if the balance is less than $200 on the date the beneficiary participant account is established. The Agency also will not transfer this amount to another eligible plan or pay it by electronic funds transfer. Instead the spouse will receive an immediate distribution in the form of a check.

* * * * *

8. Add § 1651.19 to read as follows:

*§ 1651.19 Beneficiary participant accounts.*

A beneficiary participant account may be established only for a spouse of a deceased participant who is a sole or partial beneficiary of the deceased participant's TSP account. Beneficiary participant accounts are subject to the following rules and procedures:

(a) *Initial investment allocation.* Each beneficiary participant account will be initially allocated 100 percent to the Government Securities Investment (G) Fund regardless of the allocation of the deceased participant's account balance at the time of his or her death. A beneficiary participant may redistribute his or her beneficiary participant account balance among the TSP investment funds by making an interfund transfer request described in part 1601, subpart C, of this chapter.

(b) *Contributions.* A beneficiary participant may not make contributions or transfers to his or her beneficiary participant account. The TSP will not accept a contribution allocation request described in part 1601, subpart B of this chapter for a beneficiary participant account.

(c) *Required minimum distributions.* (1) A beneficiary participant must begin receiving annual distributions from his or her beneficiary participant account balance on or before the later of—

(i) The end of the calendar year immediately following the calendar year in which the participant died; or

(ii) The end of the calendar year in which the participant would have attained age 70½.

(2) The TSP will ensure that the amount of the beneficiary participant's annual distributions that occur after the required minimum distribution date satisfy the applicable minimum distribution requirements of the Internal Revenue Code. The TSP will calculate minimum distributions based on the beneficiary participant account balance and the beneficiary participant's age, using the IRS Single Life Table, 26 CFR 1.401(a)(9)–9, Q&A–1.

(d) *Withdrawal elections.* A beneficiary participant may elect to withdraw all or a portion of his or her beneficiary participant account as a partial payment or as a full withdrawal, that is in a single payment, a series of monthly payments, a life annuity, or any combination of these options. The provisions of §§ 1650.12, 1650.13, and 1650.14 shall apply as if all references

to a participant are references to a beneficiary participant and all references to an account balance are references to a beneficiary participant account balance.

(e) *Ineligibility for certain withdrawals.* A beneficiary participant is ineligible to request the following types of withdrawals from his or her beneficiary participant account: Age-based withdrawals described in § 1650.31 of this chapter, financial hardship withdrawals described in § 1650.32 of this chapter, or loans described in part 1655 of this chapter. A beneficiary participant will not be ineligible for a partial withdrawal because the deceased participant previously elected an age-based withdrawal.

(f) *Spousal rights.* The spousal rights described in 5 U.S.C. 8351, 5 U.S.C. 8435, or § 1650.61 of this chapter do not apply to beneficiary participant accounts.

(g) *Transfers.* A beneficiary participant may request that the TSP transfer all or a portion of an eligible rollover distribution (within the meaning of I.R.C. section 402(c)(4)) from his or her beneficiary participant account to traditional IRA, Roth IRA or eligible employer plan (including a civilian or uniformed services TSP account other than a beneficiary participant account). In order to request such a transfer, the beneficiary participant must use the transfer form provided by the TSP.

(h) *Periodic statements.* The TSP will furnish beneficiary participants with periodic statements in a manner consistent with part 1640 of this chapter.

(i) *Privacy Act.* Part 1630 of this chapter shall apply with respect to a beneficiary participant as if the beneficiary participant is a TSP participant.

(j) *Error correction.* If, because of an error committed by the Board or the TSP record keeper, a beneficiary participant's account is not credited or charged with the investment gains or losses the account would have received had the error not occurred, the account will be credited subject to and in accordance with the rules and procedures set forth in § 1605.21. A beneficiary participant may submit a claim for correction of Board or TSP record keeper error pursuant to the procedures described in § 1605.22.

(k) *Court orders.* Court orders relating to a civilian beneficiary participant account or uniformed services beneficiary participant account shall be processed pursuant to the procedures set forth in part 1653 of this chapter as if all references to a TSP participant are references to a beneficiary participant and all references to a TSP account or account balance are references to a beneficiary participant account or beneficiary participant account balance. Notwithstanding any provision of part 1653, a payee of a court-ordered distribution from a beneficiary participant account cannot request a transfer of the court-ordered distribution to an eligible employer plan or IRA.

(l) *Death of beneficiary participant.* To the extent it is not inconsistent with this section, a beneficiary participant account shall be disbursed upon the death of the beneficiary participant in accordance with part 1651 as if any reference to a participant is a reference to a beneficiary participant. For example, a beneficiary participant may designate a beneficiary for his or her beneficiary participant account in accordance with §§ 1651.3 and 1651.4 of this chapter. No individual who is entitled to a death benefit from a beneficiary participant account shall be eligible to keep the death benefit in the TSP or request that the TSP transfer all or a portion of the death benefit to an IRA or eligible employer plan.

(m) *Uniformed services beneficiary participant accounts.* Uniformed services beneficiary participant accounts are subject to the following additional rules and procedures:

(1) Uniformed services beneficiary participant accounts are established and maintained separately from civilian beneficiary participant accounts. Beneficiary participants who have a uniformed services beneficiary participant account and a civilian beneficiary participant account will be issued two separate TSP account numbers. A beneficiary participant must file separate interfund transfers and/or withdrawal requests for each account and submit separate beneficiary designation forms for each account;

(2) A uniformed services beneficiary participant account and a civilian beneficiary participant account cannot be combined;

(3) If a uniformed services beneficiary participant account contains combat zone contributions, any payments or withdrawals from the account will be distributed *pro rata* from all sources;

(4) A beneficiary participant may transfer or roll over all or any portion of an eligible rollover distribution (within the meaning of I.R.C. section 402(c)(4)) from a uniformed services beneficiary participant account into a civilian or uniformed services TSP participant account. However, tax-exempt money attributable to combat zone contributions cannot be transferred from a uniformed services beneficiary participant account to a civilian TSP participant account.

(n) *Multiple beneficiary accounts.* Each beneficiary participant account is maintained separately from all other beneficiary participant accounts. If an individual has multiple beneficiary participant accounts, each of the individual's beneficiary participant accounts will have a unique account number. A beneficiary participant must file separate interfund transfers and/or withdrawal requests and submit separate beneficiary designation forms for each beneficiary participant account that the TSP maintains for him or her. A beneficiary participant account cannot be combined with another beneficiary participant account.

## PART 1690—THRIFT SAVINGS PLAN

9. The authority citation for part 1690 continues to read as follows:

**Authority:** 5 U.S.C. 8474.

10. Amend § 1690.1, by adding the definitions of "Beneficiary participant", "Beneficiary participant account", "Civilian beneficiary participant account", and "Uniformed services beneficiary participant account", and by revising the definition of "Plan participant" and "Spouse" in alphabetical order to read as follows:

**§ 1690.1 Definitions.**

* * * * *

*Beneficiary participant* means a spouse beneficiary for whom the TSP maintains a beneficiary participant account pursuant to 5 U.S.C. 8433(e) and in accordance with 5 CFR 1651.19.

*Beneficiary participant account* means an account maintained pursuant to 5 U.S.C. 8433(e) and in accordance with 5 CFR 1651.19. The term includes both civilian beneficiary participant accounts and uniformed services beneficiary participant accounts.

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*Civilian beneficiary participant account* means a beneficiary participant account that is established with a death benefit payment from a TSP account to which contributions were made by or on behalf of a civilian employee.

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*Plan participant* or *participant* means any person with an account (other than a beneficiary participant account) in the Thrift Savings Plan or who would have an account (other than a beneficiary account) but for an employing agency error.

* * * * *

*Spouse* means the person to whom a TSP participant is married on the date

he or she signs a form on which the TSP requests spousal information, including a spouse from whom the participant is legally separated, and a person with whom the participant is living in a relationship that constitutes a common law marriage in the jurisdiction in which they live. Where a participant is seeking to reclaim an account that has been forfeited pursuant to 5 CFR 1650.16, spouse also means the person to whom the participant was married on the withdrawal deadline. For purposes of 5 CFR 1651.5 and 5 CFR 1651.19, spouse also means the person to whom the participant was married on the date of the participant's death.

* * * * *

*Uniformed services beneficiary participant account* means a beneficiary participant account that is established with a death benefit payment from a TSP account to which contributions were made by or on behalf of a member of the uniformed services.

* * * * *

[FR Doc. 2010–28320 Filed 11–9–10; 8:45 am]

**BILLING CODE 6760–01–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. FAA–2010–1109; Directorate Identifier 2010–NM–155–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Bombardier, Inc. Model CL–600–2C10 (Regional Jet Series 700, 701, & 702) Airplanes, Model CL–600–2D15 (Regional Jet Series 705) Airplanes, and Model CL–600–2D24 (Regional Jet Series 900) Airplanes

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

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

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

Rudder Travel Limiter (RTL) return spring, part number (P/N) E0650–069–2750S, failed prior to completion of the required endurance test. In addition, the replacement RTL return spring, P/N 670–93465–1 * * * was found to be susceptible to chafing on the primary actuator, which could also result in eventual dormant spring failure. There are two return springs in the RTL and if both springs failed, a subsequent mechanical disconnect of the RTL components would result in an unannunciated failure of the RTL. This, in turn, would permit an increase of rudder authority beyond normal structural limits and, in the event of a strong rudder input, controllability of the aeroplane could be affected.

* * * * *

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

**DATES:** We must receive comments on this proposed AD by December 27, 2010.

**ADDRESSES:** You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; e-mail *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

### Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Cesar Gomez, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7318; fax (516) 794–5531.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–1109; Directorate Identifier 2010–NM–155–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

### Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2010–18, dated June 16, 2010 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

Rudder Travel Limiter (RTL) return spring, part number (P/N) E0650–069–2750S, failed prior to completion of the required endurance test. In addition, the replacement RTL return spring, P/N 670–93465–1 (see Note) was found to be susceptible to chafing on the primary actuator, which could also result in eventual dormant spring failure. There are two return springs in the RTL and if both springs failed, a subsequent mechanical disconnect of the RTL components would result in an unannunciated failure of the RTL. This, in turn, would permit an increase of rudder authority beyond normal structural limits and, in the event of a strong rudder input, controllability of the aeroplane could be affected.

**Note:** RTL return springs, P/N 670–93465–1, were installed in production aeroplanes serial number 10266 (CL–600–2C10) and 15182 (CL–600–2D24) respectively and were introduced in-service by [Bombardier] Service Bulletin (SB) 670BA–27–047. SB 670BA–27–047 has since been superseded by [Bombardier] SB 670BA–27–055.

This directive mandates repetitive [detailed] inspection of the RTL [for broken] return springs and [damage through the casing, or chafing of the casing of the] primary actuator, with replacement of parts as necessary.

Corrective actions include replacing any broken return springs with new return springs, repairing any chafing of the primary actuator on its casing, and replacing any primary actuator that has damage through its casing with a new actuator. You may obtain further information by examining the MCAI in the AD docket.

**Relevant Service Information**

Bombardier, Inc. has issued Service Bulletin 670BA–27–055, Revision A, dated August 6, 2010. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

**FAA's Determination and Requirements of This Proposed AD**

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

**Differences Between This AD and the MCAI or Service Information**

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a **Note** within the proposed AD.

**Costs of Compliance**

Based on the service information, we estimate that this proposed AD would affect about 477 products of U.S. registry. We also estimate that it would take about 2 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $81,090, or $170 per product.

**Authority for This Rulemaking**

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

**Regulatory Findings**

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;

2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

**The Proposed Amendment**

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

**§ 39.13 [Amended]**

2. The FAA amends § 39.13 by adding the following new AD:

**Bombardier, Inc.:** Docket No. FAA–2010–1109; Directorate Identifier 2010–NM–155–AD.

**Comments Due Date**

(a) We must receive comments by December 27, 2010.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to Bombardier, Inc. Model CL–600–2C10 (Regional Jet Series 700, 701, & 702) airplanes, serial numbers 10003 and subsequent; and Model CL–600–2D15 (Regional Jet Series 705) and Model CL–600–2D24 (Regional Jet Series 900) airplanes, serial numbers 15001 and subsequent; certificated in any category.

**Subject**

(d) Air Transport Association (ATA) of America Code 27: Flight controls.

**Reason**

(e) The mandatory continuing airworthiness information (MCAI) states:

Rudder Travel Limiter (RTL) return spring, part number (P/N) E0650–069–2750S, failed prior to completion of the required endurance test. In addition, the replacement RTL return spring, P/N 670–93465–1 * * * was found to be susceptible to chafing on the primary actuator, which could also result in eventual dormant spring failure. There are two return springs in the RTL and if both springs failed, a subsequent mechanical disconnect of the RTL components would result in an unannunciated failure of the RTL. This, in turn, would permit an increase of rudder authority beyond normal structural limits and, in the event of a strong rudder input, controllability of the aeroplane could be affected.

* * * * *

**Compliance**

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

**Initial Inspections and Replacement/Repair**

(g) For airplanes that have accumulated 4,000 or less total flight hours as of the effective date of this AD: Before the accumulation of 6,000 total flight hours, do a detailed inspection of the RTL for broken return springs and damage through the casing, or chafing of the casing of the primary actuator, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 670BA–27–055, Revision A, dated August 6, 2010. Before further

flight, replace any broken return springs with new springs, and repair or replace with a new actuator any chafed or damaged primary actuator, as applicable, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 670BA–27–055, Revision A, dated August 6, 2010. Repeat the inspection thereafter at intervals not to exceed 6,000 flight hours.

(h) For airplanes that have accumulated more than 4,000 total flight hours as of the effective date of this AD: Within 2,000 flight hours after the effective date of this AD, do a detailed inspection of the RTL for broken return springs and damage through the casing, or chafing of the casing of the primary actuator, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 670BA–27–055, Revision A, dated August 6, 2010. Before further flight, replace any broken return springs with new springs, and repair or replace any chafed or damaged primary actuator with a new actuator, as applicable, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 670BA–27–055, Revision A, dated August 6, 2010. Repeat the inspection thereafter at intervals not to exceed 6,000 flight hours.

**Credit for Actions Accomplished in Accordance With Previous Service Information**

(i) Actions accomplished before the effective date of this AD in accordance with Bombardier Service Bulletin 670BA–27–055, dated May 11, 2010, are considered acceptable for compliance with the corresponding actions specified in this AD.

**FAA AD Differences**

**Note 1:** This AD differs from the MCAI and/or service information as follows: No differences.

**Other FAA AD Provisions**

(j) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone 516–228–7300; fax 516–794–5531. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

**Related Information**

(k) Refer to MCAI Canadian Airworthiness Directive CF–2010–18, dated June 16, 2010; and Bombardier Service Bulletin 670BA–27–055, Revision A, dated August 6, 2010; for related information.

Issued in Renton, Washington, on November 2, 2010.

**Dionne Palermo,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2010–28338 Filed 11–9–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF DEFENSE

### Department of the Army, Corps of Engineers

### 33 CFR Part 334

### Naval Surface Warfare Center, Potomac River, Dahlgren, VA; Danger Zone

**AGENCY:** United States Army Corps of Engineers, Department of Defense.

**ACTION:** Notice of proposed rulemaking and request for comments.

**SUMMARY:** The Corps of Engineers is proposing to amend an existing permanent danger zone in the waters of the Upper Machodoc Creek and the Potomac River in the vicinity of Dahlgren in King George County, Virginia. The Naval Surface Warfare Center, Dahlgren conducts research, development, testing and evaluation of national defense systems on the Potomac River Test Range. Many of the tests are hazardous operations presenting a danger to persons or property in the danger zone. The proposed amendment is necessary to protect the public from hazardous operations such as firing large and small caliber guns and projectiles, aerial bombing, use of directed energy and operating manned or unmanned watercraft. The proposed amendment adds a 100-yard buffer to the Middle Danger Zone to prevent public contact with unexploded ordnance along the shoreline of Naval Surface Warfare Center, Dahlgren within this zone.

**DATES:** Written comments must be submitted on or before December 10, 2010.

**ADDRESSES:** You may submit comments, identified by docket number COE–2010–0038, by any of the following methods:

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

*E-mail: david.b.olson@usace.army.mil.* Include the docket number, COE–2010–0038, in the subject line of the message.

*Mail:* U.S. Army Corps of Engineers, Attn: CECW–CO–R (David B. Olson), 441 G Street, NW., Washington, DC 20314–1000.

*Hand Delivery/Courier:* Due to security requirements, we cannot receive comments by hand delivery or courier.

*Instructions:* Direct your comments to docket number COE–2010–0038. All comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through regulations.gov or e-mail. The regulations.gov Web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail directly to the Corps without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic

comment, we recommend that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*. All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

**FOR FURTHER INFORMATION CONTACT:** Mr. David Olson, Headquarters, Operations and Regulatory Community of Practice, Washington, DC at 202–761–4922, or Mr. Robert Berg, Corps of Engineers, Norfolk District, Regulatory Branch, at 757–201–7793.

**SUPPLEMENTARY INFORMATION:** Pursuant to its authorities in Section 7 of the Rivers and Harbors Act of 1917 (40 Stat. 266; 33 U.S.C. 1) and Chapter XIX of the Army Appropriations Act of 1919 (40 Stat. 892; 33 U.S.C. 3), the Corps of Engineers proposes to amend its regulations at 33 CFR part 334 for a permanent danger zone in the waters of Upper Machodoc Creek and the Potomac River in the vicinity of Naval Surface Warfare Center, Dahlgren in King George County, Virginia. The Naval Surface Warfare Center, Dahlgren conducts research, development, testing and evaluation of national defense systems on the Potomac River Test Range. Many of the tests are hazardous operations presenting a danger to persons or property in the danger zone. The proposed modification of the existing permanent danger zone is necessary to protect the public from hazardous operations such as firing large and small caliber guns and projectiles, aerial bombing, use of directed energy, and operating manned or unmanned watercraft. The proposed modification adds a 100-yard buffer to the Middle Danger Zone to prevent public contact with unexploded ordnance along the shoreline of Naval Surface Warfare Center, Dahlgren within this danger zone. The proposed modification will: (1) Expand the description of continuing hazardous operations in the danger zone to include firing of large or small caliber guns and projectiles, aerial bombing, use of directed energy technology, and manned or unmanned water craft operations; (2) change the latitude and longitude references to correspond to NAD83 without changing the boundaries themselves, except in the case of the point at 38°17′54″, –77°01′02″ to move the reference point from neighboring property to Naval Surface Warfare Center, Dahlgren property; (3) expand the Middle Danger Zone further into Upper Machodoc Creek where operations involving directed energy, watercraft maneuvers, and transport of explosives are conducted; (4) add a 100-yard buffer to prevent public contact with unexploded ordnance along the shoreline of Naval Surface Warfare Center, Dahlgren within the Middle Danger Zone; (5) extend normal hours of hazardous operations from 4 p.m. to 5 p.m.; and (6) provide for continued use of the naval facility shoreline for commercial fishing and waterfowl hunting blinds under existing Navy and state regulations.

The current regulation authorizes Naval Surface Warfare Center, Dahlgren to restrict watercraft from entering or leaving Upper Machodoc Creek. The amendment will allow patrol boats to engage watercraft desiring to leave Upper Machodoc Creek a few hundred yards farther west before they get to the existing danger zone boundary at the mouth of the creek. The restriction will be in place 24 hours a day, seven days a week.

**Procedural Requirements**

*a. Review Under Executive Order 12866*

This proposed rule is issued with respect to a military function of the Defense Department and the provisions of Executive Order 12866 do not apply.

*b. Review Under the Regulatory Flexibility Act*

This proposed rule has been reviewed under the Regulatory Flexibility Act (Pub. L. 96–354) which requires the preparation of a regulatory flexibility analysis for any regulation that will have a significant economic impact on a substantial number of small entities (*i.e.,* small businesses and small governments). Unless information is obtained to the contrary during the public notice comment period, the Corps expects that the economic impact of the amendment of this danger zone would have practically no impact on the public, no anticipated navigational hazard or interference with existing waterway traffic. This proposed rule, if adopted, will have no significant economic impact on small entities.

*c. Review Under the National Environmental Policy Act*

Due to the administrative nature of this action and because there is no intended change in the use of the area, the Corps expects that this regulation, if adopted, will not have a significant impact to the quality of the human environment and, therefore, preparation of an environmental impact statement will not be required. An environmental assessment will be prepared after the public notice period is closed and all comments have been received and considered. It will be available from the District office listed at the end of **FOR FURTHER INFORMATION CONTACT**, above.

*d. Unfunded Mandates Act*

This proposed rule does not impose an enforceable duty among the private sector and, therefore, it is not a Federal private sector mandate and it is not subject to the requirements of either Section 202 or Section 205 of the Unfunded Mandates Act. We have also found under Section 203 of the Act, that small governments will not be significantly and uniquely affected by this rulemaking.

**List of Subjects in 33 CFR Part 334**

Danger zones, Marine safety, Navigation (water), Restricted areas, Waterways.

For the reasons set out in the preamble, the Corps proposes to amend 33 CFR part 334 as follows:

## PART 334—DANGER ZONE AND RESTRICTED AREA REGULATIONS

1. The authority citation for 33 CFR part 334 continues to read as follows:

**Authority:** 40 Stat. 266 (33 U.S.C. 1) and 40 Stat. 892 (33 U.S.C. 3).

2. Revise paragraph (a) of § 334.230 to read as follows:

**§ 334.230 Potomac River.**

(a) *Naval Surface Warfare Center, Dahlgren, VA*—(1) *The areas.* Portions of the Upper Machodoc Creek and Potomac River near Dahlgren, VA as described below:

(i) *Lower zone.* The entire portion of the lower Potomac River between a line from Point Lookout, Maryland, to Smith Point, Virginia, and a line from Buoy 14 (abreast of St. Clements Island) to a point near the northeast shore of Hollis Marsh at latitude 38°10′00″, longitude 76°45′22.4″. Hazardous operations are conducted in this zone at infrequent intervals.

(ii) *Middle zone.* Beginning at the intersection of the Harry W. Nice Bridge with the Virginia shore; thence to Light 33; thence to latitude 38°19′06″, longitude 76°57′06″, a point that is about 3,300 yards east-southeast of Light 30; thence to Line of Fire Buoy O, about 1,150 yards southwest of Swan Point; thence to Line of Fire Buoy M, about 1,700 yards south of Potomac View; thence to Line of Fire Buoy K, about 1,400 yards southwest of the lower end of Cobb Island; thence to Buoy 14, abreast of St. Clements Island, thence southwest to a point near the northeast shore of Hollis Marsh at latitude 38°10′00″, longitude 76°45′22.4″; thence northwest to Line of Fire Buoy J, about 3,000 yards off Popes Creek, Virginia; thence to Line of Fire Buoy L, about 3,600 yards off Church Point; thence to Line of Fire Buoy N, about 900 yards off Colonial Beach; thence to Line of Fire Buoy P, about 1,000 yards off Bluff Point; thence northwest to latitude 38°17′54″, longitude 77°01′02″, a point of the Virginia shore on property of Naval Support Facility, Dahlgren, a distance of about 4,080 yards; thence north along the Potomac shore of Naval Surface Warfare Center, Dahlgren to Baber Point; and thence west along the Upper Machodoc Creek shore of Naval Surface Warfare Center, Dahlgren to Howland Point at latitude 38°19′0.5″, longitude 77°03′23″; thence northeast to latitude 38°19′18″, longitude 77°02′29″, a point on the Naval Surface Warfare Center, Dahlgren shore about 350 yards southeast of the base of the Navy recreational pier. Hazardous operations are normally conducted in this zone daily except Saturdays, Sundays, and national holidays.

(iii) *Upper zone.* Beginning at Mathias Point, Va.; thence north to Light 5; thence north-northeast to Light 6; thence east-southeast to Lighted Buoy 2, thence east-southeast to a point on the Maryland shore at approximately latitude 38°23′35.5″, longitude 76°59′15.5″; thence south along the Maryland shore to, and then along, a line passing through Light 1 to the Virginia shore, parallel to the Harry W. Nice Bridge; thence north with the Virginia shore to the point of beginning. Hazardous operations are conducted in this zone at infrequent intervals.

(2) *The regulations.* (i) Hazardous operations normally take place between the hours of 8 a.m. and 5 p.m. daily except Saturdays, Sundays and national holidays, with infrequent night firing between 5 p.m. and 10:30 p.m. During a national emergency, hazardous operations will take place between the hours of 6 a.m. and 10:30 p.m. daily, except Sundays. Hazardous operations may involve firing large or small caliber guns and projectiles, aerial bombing, use of directed energy, and operating manned or unmanned watercraft.

(ii) When hazardous operations are in progress, no person, or fishing or oystering vessels shall operate within the danger zone affected unless so authorized by Naval Surface Warfare Center, Dahlgren's patrol boats. Oystering and fishing boats or other craft may cross the river in the danger zone only after they have reported to the patrol boat and received instructions as to when and where to cross. Deep-draft vessels using dredged channels and propelled by mechanical power at a speed greater than five miles per hour may proceed directly through the danger zones without restriction except when notified to the contrary by the patrol boat. Unless instructed to the contrary by the patrol boat, small craft navigating up or down the Potomac River during hazardous operations shall proceed outside of the northeastern boundary of the Middle Danger Zone. All craft desiring to enter the Middle Danger Zone when proceeding in or out of Upper Machodoc Creek during hazardous operations will be instructed by the patrol boat; for those craft that desire to proceed in or out of Upper Machodoc Creek on a course between the western shore of the Potomac River and a line from the Main Dock of Naval Surface Warfare Center, Dahlgren to Line of Fire Buoy P, clearance will be granted to proceed upon request directed to the patrol boat.

(iii) Due to hazards of unexploded ordnance, no person or craft in the Middle Danger Zone shall approach closer than 100 yards to the shoreline of Naval Surface Warfare Center, Dahlgren.

(3) *Enforcement.* The regulations in this section shall be enforced by the Commander, Naval Surface Warfare Center, Dahlgren and such agencies as he/she may designate. Patrol boats, in the execution of their mission assigned herein, shall display a square red flag during daylight hours for purposes of identification; at night time, a 32 point red light shall be displayed at the mast head. Range Control at Naval Surface Warfare Center, Dahlgren can be contacted by Marine VHF radio (Channel 16) or by telephone at (540) 653–8791.

(4) *Exceptions.* Nothing in this regulation shall be intended to prevent commercial fishing or the lawful use of approved waterfowl hunting blinds along the shorelines of Naval Surface Warfare Center, Dahlgren, provided that all necessary licenses and permits have been obtained from the Maryland Department of Natural Resources, the Virginia Department of Game and Inland Fisheries, or the Potomac River Fisheries Commission. Waterfowl hunters shall provide a completed copy of their blind permit to the Natural Resources Manager at Naval Surface Warfare Center, Dahlgren. Commercial fishermen and waterfowl hunters must observe all warnings and range clearances, as noted herein.

* * * * *

Dated: November 3, 2010.

**Michael G. Ensch,**

*Chief, Operations and Regulatory, Directorate of Civil Works.*

[FR Doc. 2010–28385 Filed 11–9–10; 8:45 am]

**BILLING CODE 3720–58–P**

## DEPARTMENT OF DEFENSE

## Department of the Army, Corps of Engineers

## 33 CFR Part 334

## United States Navy Restricted Area, Menominee River, Marinette Marine Corporation Shipyard, Marinette, WI

**AGENCY:** United States Army Corps of Engineers, DoD.

**ACTION:** Notice of proposed rulemaking and request for comments.

**SUMMARY:** The Corps of Engineers is proposing to amend its regulations to establish a restricted area in the Menominee River, at the Marinette Marine Corporation Shipyard, Marinette, Wisconsin, to provide adequate protection during the construction and launching of Littoral Combat Ships. The regulations are necessary to provide adequate protection of U.S. Navy combatant vessels, its materials, equipment to be installed therein, and crew, while located at the property of Marinette Marine Corporation.

**DATES:** Written comments must be submitted on or before December 10, 2010.

**ADDRESSES:** You may submit comments, identified by docket number COE–2010–0041, by any of the following methods:

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

*E-mail: david.b.olson@usace.army.mil.* Include the docket number, COE–2010–0041, in the subject line of the message.

*Mail:* U.S. Army Corps of Engineers, ATTN: CECW–CO (David B. Olson), 441 G Street, NW., Washington, DC 20314–1000.

*Hand Delivery/Courier:* Due to security requirements, we cannot receive comments by hand delivery or courier.

*Instructions:* Direct your comments to docket number COE–2010–0041. All comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through regulations.gov or e-mail. The regulations.gov Web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail directly to the Corps without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, we recommend that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

**FOR FURTHER INFORMATION CONTACT:** Mr. David Olson, Headquarters, Operations and Regulatory Community of Practice, Washington, DC at (202) 761–4922, or Ms. Linda M. Kurtz, Corps of Engineers, St. Paul District, Regulatory Branch, at (920) 448–2824.

**SUPPLEMENTARY INFORMATION:** Pursuant to its authorities in Section 7 of the Rivers and Harbors Act of 1917 (40 Stat. 266; 33 U.S.C. 1) and Chapter XIX of the Army Appropriations Act of 1919 (40 Stat. 892; 33 U.S.C. 3), the Corps proposes to amend its restricted area regulations at 33 CFR part 334 by adding § 334.815 to establish a restricted area in the Menominee River, at the Marinette Marine Corporation Shipyard, Marinette, Wisconsin, to provide adequate protection for the construction and launching of Littoral Combat Ships. By correspondence dated July 27, 2006, Marinette Marine Corporation, on behalf of the Department of the Navy, has requested the Corps of Engineers to establish this restricted area.

**Procedural Requirements**

*a. Review Under Executive Order 12866*

This proposed rule is issued with respect to a military function of the Defense Department and the provisions of Executive Order 12866 do not apply.

*b. Review Under the Regulatory Flexibility Act*

The proposed rule has been reviewed under the Regulatory Flexibility Act (Pub. L. 96–354) which requires the preparation of a regulatory flexibility analysis for any regulation that will have a significant economic impact on a substantial number of small entities (i.e., small businesses and small governments). Unless information is obtained to the contrary during the public notice comment period, the Corps expects that the economic impact of this restricted area would have practically no impact on the public, no anticipated navigational hazard or interference with existing waterway traffic. This proposed rule if adopted, will have no significant economic impact on small entities.

*c. Review Under the National Environmental Policy Act*

A preliminary draft environmental assessment has been prepared for this action. Due to the administrative nature of this action and because the intended change will only impact waters a distance of 100-feet from Marinette Marine Corporation's pier (an area of approximately 2.81 acres), the Corps expects that this regulation, if adopted, will not have a significant impact to the quality of the human environment and, therefore, preparation of an environmental impact statement will not be required. The environmental assessment will be finalized after the public notice period is closed and all comments have been received and considered. It may be reviewed at the District office listed at the end of the **FOR FURTHER INFORMATION CONTACT**, above.

*d. Unfunded Mandates Act*

This proposed rule does not impose an enforceable duty among the private sector and, therefore, it is not a Federal private section mandate and it is not subject to the requirements of either section 202 or Section 205 of the Unfunded Mandates Act. We have also found under Section 203 of the Act, that small governments will not be significantly and uniquely affected by this rulemaking.

**List of Subjects in 33 CFR Part 334**

Danger zones, Marine safety, Navigation (water), Restricted areas, Waterways.

For the reasons stated in the preamble, the Corps proposes to amend 33 CFR part 334 as follows:

## PART 334—DANGER ZONE AND RESTRICTED AREA REGULATIONS

1. The authority citation for 33 CFR part 334 continues to read as follows:

**Authority:** 40 Stat. 266 (33 U.S.C. 1) and 40 Stat. 892 (33 U.S.C. 3).

2. Add § 334.815 to read as follows:

**§ 334.815 Menominee River, at the Marinette Marine Corporation Shipyard, Marinette, Wisconsin; naval restricted area.**

(a) *The area.* The waters 100-feet from Marinette Marine Corporation's pier defined by a rectangular shaped area on the south side of the river beginning on shore at the eastern property line of Marinette Marine Corporation at latitude 45°5′58.8″ N, longitude 087°36′56.0″ W; thence northerly to latitude 45°5′59.7″ N, longitude 087°36′55.6″ W; thence westerly to latitude 45°6′3.2″ N, longitude 087°37′9.6″ W; thence southerly to latitude 45°6′2.2″ N, longitude 087°37′10.0″ W; thence easterly along the Marinette Marine Corporation pier to the point of origin. The restricted area will be marked by a lighted and signed floating boat barrier.

(b) *The regulation.* All persons, swimmers, vessels and other craft, except those vessels under the supervision or contract to local military or Naval authority, vessels of the United States Coast Guard, and local or state law enforcement vessels, are prohibited from entering the restricted area when marked by signed floating boat barrier without permission from the United States Navy, Supervisor of Shipbuilding Gulf Coast or his/her authorized representative.

(c) *Enforcement.* The regulation in this section shall be enforced by the United States Navy, Supervisor of Shipbuilding Gulf Coast and/or such

agencies or persons as he/she may designate.

Dated: November 3, 2010.

**Michael G. Ensch,**

*Chief, Operations and Regulatory, Directorate of Civil Works.*

[FR Doc. 2010–28386 Filed 11–9–10; 8:45 am]

**BILLING CODE 3720–58–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 58

**[EPA–HQ–OAR–2008–0338; FRL–9223–6]**

## Notice of Data Availability Regarding Potential Changes to Required Ozone Monitoring Seasons for Colorado, Kansas, and Utah

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

**ACTION:** Notice of Data Availability (NODA).

**SUMMARY:** The EPA is providing notice that it is supplementing the record to the Proposed Rule—Ambient Ozone Monitoring Regulations: Revisions to Network Design Requirements, published July 16, 2009. The EPA has placed in the docket for the Proposed Rule—Ambient Ozone Monitoring Regulations: Revisions to Network Design Requirements (Docket ID No. EPA–HQ–OAR–2008–0338) additional ambient ozone monitoring data for the period January 1, 2007, through April 30, 2010, for the states of Colorado, Kansas, and Utah that cover time periods outside of the current required ozone monitoring seasons. The data for these states consist of daily maximum 8-hour ozone concentrations. These data have become available since original analyses were completed for the proposal, which relied on ambient data covering the period 2004–2006. EPA is specifically considering how these more recent data could impact changes to the current and proposed required ozone monitoring seasons for Colorado, Kansas, and Utah.

**DATES:** Comments must be received on or before December 10, 2010. Please refer to **SUPPLEMENTARY INFORMATION** for additional information on submitting comments.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2008–0338, by one of the following methods:

- *http://www.regulations.gov.* Follow the on-line instructions for submitting comments. Attention Docket ID No. EPA–HQ–OAR–2008–0338.
- *Fax:* (202) 566–1741.
- *Mail:* EPA Docket Center, EPA West (Air Docket), Attention Docket ID No. EPA–HQ–OAR–2008–0338, U.S. Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include 2 copies.
- *Hand Delivery:* U.S. Environmental Protection Agency, EPA West (Air Docket), 1301 Constitution Avenue, NW., Room 3334, Washington, DC 20004, Attention Docket ID No. EPA–HQ–OAR–2008–0338. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–OAR–2008–0338. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

*Docket:* All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA East Building Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

**FOR FURTHER INFORMATION CONTACT:** For questions regarding the additional ambient ozone data, contact Lewis Weinstock, Air Quality Assessment Division/Ambient Air Monitoring Group (C304–06), Research Triangle Park, NC 27711; telephone number: 919–541–3661; fax number: 919–541–1903; e-mail address: *weinstock.lewis@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### Outline

1. What is the purpose for this action?
2. What information is EPA making available for review and comment?
3. How does this information relate to the Proposed Rule—Ambient Ozone Monitoring Regulations: Revisions to Network Design Requirements?
4. Where can I get this information?
5. What issue is EPA taking comment on?
6. What should I consider as I prepare my comments for EPA?
7. Submitting Confidential Business Information (CBI)

### 1. What is the purpose for this action?

This NODA provides for public review and comment on ambient ozone monitoring data for the period January 1, 2007, through April 30, 2010, for the states of Colorado, Kansas, and Utah.

### 2. What information is EPA making available for review and comment?

EPA is making available for review and comment ozone monitoring data for the states of Colorado, Kansas, and Utah that were obtained during the months outside of the current ozone monitoring seasons required by 40 CFR part 58, Appendix D, Table D–3. The data include a listing of days when ozone concentrations reached an 8-hour average level of at least 0.060 parts per million (ppm) during the following months: Colorado (January, February, October, November, December); Kansas (January, February, March, November, December); and Utah (January, February, March, April, October, November, December). These data were obtained from EPA's Air Quality System (AQS) and represent data from monitors

utilizing approved Federal Equivalent Methods.

**3. How does this information relate to the Proposed Rule—Ambient Ozone Monitoring Regulations: Revisions to Network Design Requirements?**

On July 16, 2009, EPA published a proposed rule (74 FR 34525) to revise the ozone monitoring network design requirements. EPA proposed to modify minimum monitoring requirements in urban areas, add new minimum monitoring requirements in non-urban areas, and to extend the length of the required ozone monitoring season in some states.

In its proposal, EPA used ambient ozone monitoring data obtained from monitors operating outside (*i.e.,* before and after) the current required ozone monitoring season to assess whether ambient ozone concentrations could approach or exceed the level of the primary (8-hour) National Ambient Air Quality Standards (NAAQS) during these periods when monitoring is not currently required. EPA's analysis utilized data for the period 2004–2006, representing data from approximately 530 monitors which were operated on a year-round basis. These data were analyzed for two indicators: (1) The number of exceedences of the NAAQS (*i.e.,* daily maximum 8-hour ozone averages above 0.075 ppm) in the months falling outside the currently required ozone monitoring season for each area, and (2) occurrences of daily maximum 8-hour ozone averages of at least 0.060 ppm, representing a value of 80 percent of the 0.075 ppm NAAQS. In the proposal, we noted that the operation of ozone monitors during such periods of time when ambient levels reach at least 80 percent of the NAAQS ensures that persons unusually sensitive to ozone are alerted to the occurrence of elevated ozone concentrations in their area, and protects against the potential for undocumented NAAQS exceedances. The availability of these additional data support many objectives including more comprehensive real-time air quality reporting to the public, ozone forecasting programs, and the verification of real-time air quality forecast models.

As EPA completes revised analyses to support the upcoming ozone monitoring final rule, certain patterns of out-of-season elevated 8-hour average ozone concentrations, which were not recognizable during 2004–2006, have become apparent in newer data. These patterns include a greater frequency of occurrences of daily maximum 8-hour ozone averages of at least 0.060 ppm before and after the currently required ozone monitoring seasons for the aforementioned states than was observed in the 2004–2006 dataset. Accordingly, EPA is making these newer data available for the specific states that have such patterns.

**4. Where can I get this information?**

All of the information can be obtained through the Air Docket and at *http://www.regulations.gov* (*see* **ADDRESSES** section above for docket contact information).

**5. What issue is EPA taking comment on?**

EPA requests comment on the interpretation of the newer ambient 8-hour average ozone monitoring data for the states of Colorado, Kansas, and Utah in the context of determining the final ozone monitoring season requirements for these states. Specifically, do the patterns of elevated 8-hour average ozone concentrations that occurred both before and after the current required ozone monitoring seasons for these states support the revised seasons proposed in the July 16, 2009, rulemaking for these states? Do these patterns support alternative required monitoring seasons different from what was proposed in the July 16, 2009, rulemaking for these states? Issues for consideration with regard to Colorado, Kansas, and Utah are whether the current ozone season requirements should be maintained, whether the proposed changes to seasons should be finalized as proposed or revised, and whether changes should be made for these states that were not originally proposed in the July 2009 rule.

**6. What should I consider as I prepare my comments for EPA?**

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide any technical information or data you used that support your views.

4. Provide specific examples to illustrate your concerns.

5. Offer alternatives.

6. Make sure to submit your comments by the comment period deadline identified.

7. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

**7. Submitting Confidential Business Information (CBI)**

Do not submit information you are claiming as CBI to EPA through *http://www.regulations.gov* or e-mail. Clearly mark the part of the information that you claim to be CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket.

**List of Subjects in 40 CFR Part 58**

Air pollution control, Environmental protection, Intergovernmental relations, Reporting and recordkeeping requirements, Ambient air monitoring.

Dated: November 3, 2010.

**Mary E. Henigin,**

*Acting Director, Office of Air Quality Planning and Standards.*

[FR Doc. 2010–28259 Filed 11–9–10; 8:45 am]

**BILLING CODE 6560–50–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

### 42 CFR Part 455

**[CMS–6034–P]**

**RIN 0938–AQ19**

## Medicaid Program; Recovery Audit Contractors

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would provide guidance to States related to Federal/State funding of State start-up, operation and maintenance costs of Medicaid Recovery Audit Contractors (Medicaid RACs) and the payment methodology for State payments to Medicaid RACs in accordance with section 6411 of the Affordable Care Act. In addition, this rule proposes requirements for States to assure that adequate appeal processes are in place for providers to dispute adverse

determinations made by Medicaid RACs. Finally, the rule proposes that States and Medicaid RACs coordinate with other contractors and entities auditing Medicaid providers and with State and Federal law enforcement agencies.

**DATES:** To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on January 10, 2011.

**ADDRESSES:** In commenting, please refer to file code CMS–6034–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov*. Follow the "Submit a comment" instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–6034–P, P.O. Box 8016, Baltimore, MD 21244–8016.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–6034–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to either of the following addresses:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786–7195 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

**FOR FURTHER INFORMATION CONTACT:** Joanne Davis, (410) 786–5127.

**SUPPLEMENTARY INFORMATION:**

*Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.regulations.gov*. Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

## I. Background

### *A. Current Law*

The Medicaid program is a cooperative Federal/State program designed to allow States to receive matching funds from the Federal government to finance medical assistance to eligible low income beneficiaries. Medicaid was enacted in 1965 by the passage of Title XIX of the Social Security Act (the Act).

States may choose to participate in the Medicaid program by submitting a State plan for medical assistance that is approved by the Secretary. Although States are not required to participate in the Medicaid program, all States, the District of Columbia, and the territories do participate. Once a State elects to participate in the program, it is required to comply with its State plan, as well as the requirements imposed by the Act and applicable Federal regulations.

CMS is the primary Federal agency providing oversight of State Medicaid activities and facilitating program integrity efforts. Our administration of the Medicaid program requires that we expend billions of dollars in Federal matching payments to States for Medicaid expenditures. We also have an obligation to prevent, identify, and recover improper payments to individuals, contractors, and organizations.

In November 2009, the President signed Executive Order (E.O.) 13520 in an effort to reduce improper payments by increasing transparency in government and holding agencies accountable for reducing improper payments. On March 22, 2010, the Office of Management and Budget (OMB) issued guidance for agencies regarding the implementation of E.O. 13520 entitled Part III to OMB Circular A–123, Appendix C (Appendix C). Appendix C outlines the responsibilities of agencies, determines the programs subject to E.O. 13520, defines supplemental measures and targets for high priority programs, and establishes reporting requirements under E.O. 13520 and procedures to identify entities with outstanding payments.

Section 6411 of the Patient Protection and Affordable Care Act (Pub. L. 111–148, enacted on March 23, 2010) (the Affordable Care Act) requires States to establish programs in which they would contract with 1 or more Recovery Audit Contractors (Medicaid RACs) by December 31, 2010. The Medicaid RACs would review Medicaid claims submitted by providers of services for which payment may be made under section 1902(a) of the Act or a waiver of the State plan. Medicaid RACs would identify underpayments, and identify and collect overpayments from providers.

Section 6411(a)(1) of the Affordable Care Act amends section 1902(a)(42) of the Act to provide that "the State shall establish a program under which the State contracts (consistent with State law and in the same manner as the Secretary enters into contracts with recovery audit contractors under section 1893(h) * * *) with 1 or more recovery audit contractors for the purpose of identifying underpayments and overpayments and recouping overpayments * * *" To offer context for our proposed approach to the Medicaid RAC program, we provide background discussion on the Medicare RAC program.

### *B. Medicare RACs*

Medicare RACs are private entities with which CMS contracts to identify and collect improper payments made in Medicare's fee-for-service program. Initially authorized by the Congress as a 3-year demonstration program by the Medicare Prescription Drug, Improvement, and Modernization Act of

2003 (Pub. L. 108–173, enacted on December 8, 2003) (MMA), Medicare RACs were permanently authorized in the Tax Relief and Health Care Act of 2006 (Pub. L. 109–432, enacted on December 20, 2006) (TRHCA). The TRHCA directed CMS to expand the Medicare RAC program nationwide by January 1, 2010.

During the Medicare RAC demonstration period, we contracted with RACs to review claims from Medicare participating providers and suppliers in New York, Florida, California, Arizona, Massachusetts, and South Carolina. From 2005 through 2008, the Medicare RACs identified and collected or corrected over $1 billion in improper payments. The majority, or 96 percent, of the improper payments were overpayments, while the remaining 4 percent were underpayments. As a result of the demonstrated cost effectiveness of the Medicare RACs, the TRHCA required CMS to implement a nationwide Medicare RAC program.

In our evaluation of the Medicare RAC demonstration, providers surveyed identified to CMS a number of concerns and processes needing improvement. For example, Medicare RACs were reportedly inconsistent in documenting their "good cause" for reviewing a claim. In addition, providers complained that a lack of physician presence on Medicare RAC staffs contributed to Medicare claims incorrectly being denied. As a result, we met with stakeholders, including the provider community, and made a number of changes to improve the Medicare RAC program. In the permanent Medicare RAC program, we directed Medicare RACs to consistently document their "good cause" for reviewing a claim. We now require each Medicare RAC to hire a physician Medical Director to oversee the medical record review process; assist nurses, therapists, and certified coders upon request; manage quality assurance procedures; and maintain relationships with provider associations.

Both the MMA and the TRHCA authorized CMS to pay Medicare RACs on a contingency fee basis. Currently, we pay Medicare RACs a contingency fee rate ranging between 9 and 12.50 percent. These contingency fees are not initially fixed by CMS, but are established by the contractors through a bidding process with CMS. Providers may appeal Medicare RAC determinations through the established Medicare appeals process. During the demonstration period, Medicare RACs were required to return contingency fees if the claim determination was overturned on the first level appeal. However, Medicare RACs were entitled to retain contingency fees if the determination was overturned on subsequent levels of appeal. In the permanent Medicare RAC program, we now require Medicare RACs to return the contingency fee payment if the determination is overturned at any stage of the appeals process.

*C. Existing State Contingency Fee Contracts*

There is precedent for State Medicaid contingency fee contracts for purposes of recovering Medicaid overpayments subject to third party liability (TPL) requirements. Section 1902(a)(25) of the Act requires States to take all reasonable measures to determine the legal liability of third parties to pay for medical assistance furnished to a Medicaid recipient under the State plan. In addition, several States currently contract with contingency fee contractors to recover Medicaid overpayments unrelated to TPL. In a memorandum to CMS' Regional Administrators dated November 7, 2002, we revised our policy prohibiting Federal financial participation (FFP) for States to pay costs to contingency fee contractors, unrelated to TPL. The revised policy allows contingency fee payments if the following conditions are met: (1) The intent of the contingency fee contract must be to produce savings or recoveries in the Medicaid program; (2) the savings upon which the contingency fee payment is based must be adequately defined and the determination of fee payments documented to CMS's satisfaction.

*D. Medicaid RACs*

Section 6411(a) of the Affordable Care Act amends and expands section 1902(a)(42) of the Act to require States to establish programs by December 31, 2010, to contract with 1 or more Medicaid RACs to audit Medicaid claims and to identify underpayments and overpayments. While States are required to establish their Medicaid RAC programs by December 31, 2010, via the State plan amendment process, such programs need not be implemented by this date. Instead, absent an exception, States must fully implement their Medicaid RAC programs by April 1, 2011. We solicit comments on the proposed implementation date. States would be required to report to CMS certain elements describing the effectiveness of their Medicaid RAC programs. These elements would include, but not be limited to general program descriptors (for example, contract periods of performance, contractors' names,) and program metrics (for example, number of audits conducted, recovery amounts, number of cases referred for potential fraud). To implement this provision, we propose to add a new subpart F to 42 CFR part 455.

Medicaid RACs would review post-payment claims for improper payments, overpayments, as well as underpayments consistent with State laws and regulations. Medicaid RACs are a supplemental approach to Medicaid program integrity efforts already underway to ensure that States make proper payments to providers. Medicaid RACs do not replace any existing State program integrity or audit initiatives or programs. States must maintain their existing program integrity efforts uninterrupted with respect to levels of funding and activity. Should we detect evidence of fraud, waste, and abuse that goes unreported by the Medicaid RACs, we would work closely with States to identify focus areas for Medicaid RACs to improve their efficacy.

The Affordable Care Act requires all States to establish Medicaid RAC programs, subject to such exceptions and requirements as the Secretary may require. This provision enables CMS to vary the Medicaid RAC program requirements, or exempt a State from establishing a Medicaid RAC program if inconsistent with State law. For example, we may exempt a State from the requirement to pay Medicaid RACs on a contingent basis for collecting overpayments when State law expressly prohibits contingency fee contracting. However, some other fee structure could be required under any such exception.

Similarly, some State legislatures must enact legislation before amending their State plans. Because the establishment of a Medicaid RAC program is accomplished by State plan amendment (SPA), many State legislatures will not have the opportunity to convene and enact such an amendment to their State plans prior to December 31, 2010, those States would need to submit justifications to defer establishing Medicaid RAC programs until after those State legislatures have met. For States that require a State legislative change granting authority to establish a Medicaid RAC program, a SPA should be submitted indicating that the Medicaid RAC program cannot be established until legislative authority is granted.

Finally, there may be circumstances, unrelated to the examples above, where a State would seek to be excepted from some or all of the requirements of the Medicaid RAC program. Accordingly,

we propose at § 455.516 that States seeking exceptions from contracting with Medicaid RACs must submit to CMS a written justification for the request. We anticipate granting complete Medicaid RAC program exceptions rarely, and only under the most compelling of circumstances.

Section 6411(a) of the Affordable Care Act amends section 1902(a)(42) of the Act, which requires States to make the following assurances to CMS regarding Medicaid RAC programs:

• Under section 1902(a)(42)(B)(ii)(I) of the Act, payments shall be made to a Medicaid RAC contractor under contract with a State only from amounts recovered. As discussed more fully below, we interpret this to mean that payments to Medicaid RACs may not exceed the total amounts recovered. Additionally, we interpret this to mean that payments to contractors may not be made based upon amounts merely identified but not recovered, or amounts that may initially be recovered but that subsequently must be repaid due to determinations made in appeals proceedings.

The payment methodology determination for States, as well as when Medicaid RACs should be paid by States for their work are separate, but closely related issues. The distinction between amounts recovered and amounts identified has implications for how States would structure and administer payment agreements with Medicaid RACs, as well as the timing of Medicaid RACs' receipt of payments. The options below illustrate two ways that States could structure payments, though they are not exhaustive.

In option one, for example, State A pays RAC B its fee when RAC B identifies and recovers an overpayment. If provider C appeals and wins at any stage, RAC B would be required to return any portion of the contingency fee that corresponds to the amount of an overpayment that is overturned on appeal.

In a second option, State D determines it would pay RAC E its contingency fee at the point at which the recovery amount is fully adjudicated; that is, at the conclusion of any and all appeals available to provider F. At that point, State D would pay RAC E a contingency fee based on the amount recovered.

• Under section 1902(a)(42)(B)(ii)(II)(aa) of the Act, payments to a Medicaid RAC contractor shall be made on a contingent basis for collecting overpayments from the amounts recovered. We are aware that the proposed Medicaid RAC program, by virtue of the differences between the Medicare and Medicaid programs, would not operate identically to the Medicare RAC program. Recognizing that each State must tailor its Medicaid RAC activities to the uniqueness of its own State, we are not proposing to prescribe a set contingency fee rate for States. Instead, we are proposing certain guidelines based upon section 1902(a)(42)(B) of the Act and our experience with the Medicare RAC program, but allowing States the discretion to set their fees within those guidelines.

The Medicaid RACs would contract with States and territories to identify and collect overpayments, and would be paid on a contingency fee basis by the States. In the Medicare RAC program, CMS contracts with Medicare RACs to identify and recover overpayments from Medicare providers, and to identify and pay underpayments to Medicare providers. We recognize the differences among States and territories when it comes to the issue of coordinating with RACs the collection of overpayments. The statute requires Medicaid RACs to collect overpayments. However, some States may not be able to delegate the collection of overpayments to contractors, while other States may have other restrictions. In keeping with the statutory language that States must establish RAC programs consistent with State law, we propose to provide States with the flexibility of coordinating RAC collections of overpayments.

Currently, there are 4 Medicare RAC contractors operating. Those RACs are paid an average contingency fee rate of 10.86 percent by CMS, with the highest rate being 12.50 percent. We interpret the statutory language that States must establish a Medicaid RAC program "in the same manner as the Secretary enters into contracts with" Medicare RACs to mean that some of the provisions of the Medicare RAC program, generally, should serve as a model for the proposed Medicaid RAC program. Accordingly, in § 455.510(b)(3) and (b)(4), we are proposing that we would not provide Federal financial participation (FFP) with respect to any amount of a State's contingency fee in excess of the then highest Medicare RAC contingency fee rate unless a State requests an exception from CMS and provides an acceptable justification.

In the absence of an approved exception, a State may only pay a RAC contractor, from the overpayments collected, a contingency fee up to the highest Medicare RAC contingency rate. Any additional payment from the State to the RAC must be made using State-only funds. FFP is not available for administrative expenditure claims for the marginal difference between the highest Medicare fee and the State's contingency fee. For example, unless an exception applies, if the highest Medicare RAC contingency fee is 12.50 percent and the State pays a Medicaid RAC 14 percent, we would not pay the Federal match on the 1.50 percent difference. The State would use State-only funds to make up the difference between the State's 14 percent contingency fee and the 12.50 percent contingency fee ceiling.

Currently, the Medicare RAC contracts have an established period of performance of up to 5 years, beginning in 2009. Initially, the maximum contingency rate for which FFP would be available for States to pay Medicaid RACs would be the highest Medicare RAC contingency fee, which is 12.50 percent. That fee would be the maximum rate when States implement their RAC programs no later than April 1, 2011. Subsequently, we would make States aware of any modifications to payment methodology for contingency fees and Medicaid RAC maximum contingency rates for which FFP would be available by publishing in a **Federal Register** notice, by December 31, 2013, the maximum Medicare contingency fee rate, which would apply to FFP availability for any Medicaid RAC contracts covering the period of performance beginning on July 1, 2014. The established rate would be in place for 5 years or until we publish a new maximum rate in the **Federal Register**. We solicit public comments on this approach.

The Medicare RAC program is still a relatively new program. We will apply the lessons learned from the Medicare RAC Demonstration, as well as from the current program in providing States technical support and assistance in their efforts to implement their programs. For example, States would require Medicaid RACs to employ trained medical professionals to review Medicaid claims, as CMS now requires the Medicare RACs to do. Additionally, States may consider establishing requirements regarding the documentation of good cause to review a claim. States should also be cognizant of potential organizational conflicts of interest, and should take affirmative steps to identify and prevent any such conflicts of interest.

The Office of the Inspector General of U.S. Department of Health and Human Services (HHS–OIG) recently reported that the Medicare RACs identified over $1 billion in improper payments, but referred only two cases of potential fraud to CMS. HHS–OIG opined that Medicare RACs are disincentivized to

make referrals because the RACs receive contingency fees. As we learn from the lessons of Medicare RACs, we caution States, in their design of Medicaid RAC programs, to ensure that the Medicaid RACs report instances of fraud and/or criminal activity in addition to the pursuit of overpayments. At § 455.508(b), we propose that whenever RACs have reasonable grounds to believe that fraud or criminal activity has occurred, they must report it to the appropriate law enforcement officials. We solicit comments on these and other issues that States should consider in the design of their RAC programs. At § 455.508(c), we propose that Medicaid RACs must meet the additional requirements that States may establish.

• Under section 1902(a)(42)(B)(ii)(II)(bb) of the Act, payment to a Medicaid RAC may be made in the amounts as the State may specify for identifying underpayments from the amounts recovered. Currently, Medicare RACs are paid a contingency fee to identify underpayments, similar to the way in which they are paid to identify and recover overpayments. With respect to Medicaid RACs, a State may elect to use a similar approach, or elect to establish a set fee or some other fee structure for the identification of underpayments. Consistent with a State's obligation to ensure that it pays the right amount to the right provider for the right service at the right time for the right recipient, whatever methodology a State chooses must adequately incentivize the detection of underpayments. In § 455.510(c), we are proposing to grant States the flexibility to specify the underpayment fee for Medicaid RACs. Additionally, we would monitor the methodologies and amounts paid by States to Medicaid RACs to identify underpayments, and may consider future additional regulation depending on what data reveals over time. We solicit public comments on the proposal of allowing States this flexibility.

The Affordable Care Act requires that payments to a Medicaid RAC can only come from amounts recovered. Federal matching payments are not available for RAC fees paid in excess of the overpayment amounts collected. The total fees paid to a Medicaid RAC include both the amounts associated with (1) identifying and recovering overpayments; and (2) identifying underpayments. Due to the Affordable Care Act's requirement that contingency fees only come from amounts recovered, total fees must not exceed the amounts of overpayments collected.

Our experience with Medicare RAC contractors is that overpayment recoveries exceed underpayment identification by more than a 9:1 ratio. Therefore, it is not anticipated that States would need to maintain a reserve of recovered overpayments to fund Medicaid RAC costs associated with identifying underpayments. However, States must maintain an accounting of amounts recovered and paid. Further, States must also ensure that they do not pay in total RAC fees more than the total amount of overpayments collected.

States must report overpayments to CMS based on the net amount remaining after all fees are paid to the Medicaid RAC. Medicaid RACs may only receive payments through the contingency fee arrangement made in accordance with these requirements and the limitations discussed relating to the maximum contingency fee amount. No additional FFP is available for any other State payment made to the RACs. This treatment of the fees and expenditures is directly linked to the specific statutory language implementing Medicaid RAC requirements. It does not apply to Medicaid overpayment recoveries in other contexts.

For example, RAC X's fee for overpayment identification is 10 percent of the recovery amount. The fee for identification of underpayments is 10 percent of the amount identified. If an overpayment amount is $100, and the total amount of underpayment is $20, the total fees paid to the Medicaid RAC would be $12 ($10 for the identification of the overpayment and $2 for the identification of the underpayment). From the remaining amount of the $88 overpayment, the State would report, and the Federal share of the identified overpayment amount would be based upon, the appropriate State match rate for FFP. If the State pays a provider based on the Medicaid RAC-identified underpayment, and that expenditure is claimed in accordance with timely filing requirements, the $20 expenditure would be matched at the regular FMAP, or the appropriate FFP rate.

Currently, § 433.312 requires States to refund the Federal share of overpayments, regardless of whether the State actually recovers the overpayments from the provider. This requirement, and all other requirements relating to overpayments, would apply to Medicaid RAC identified overpayments. Therefore, if a Medicaid RAC identifies an overpayment to a provider, the State is required to refund the Federal share of the overpayment amount to the Federal government net of any contingency fee paid, as discussed above.

• Under section 1902(a)(42)(B)(ii)(III) of the Act, States must have an adequate appeals process for entities to challenge adverse Medicaid RAC determinations. Each State already has in place an administrative appeals infrastructure, whereby a provider may avail itself of its due process rights in an administrative or judicial setting, depending on State law or administrative rule, with attendant procedures for notice and an opportunity to be heard. States may utilize the existing appeals infrastructure to adjudicate Medicaid RAC appeals. States would be required to submit to CMS a proposal describing the appeals process, which must be approved prior to implementing their RAC programs.

Alternatively, a State may elect to establish a separate appeals process for RAC determinations, which must also ensure providers adequate due process in pursuing an appeal. Accordingly, at § 455.512 we propose to offer States the flexibility to determine the appeals process that would be available to providers who seek review of adverse RAC determinations.

Finally, it is important to note that the potential length of a State's administrative appeals process may have an impact on the methodology/structure of the payment agreement between a State and a Medicaid RAC. For example, in a contract between State X and RAC Y, where State X's administrative appeal process can extend for 2 years, RAC Y may not receive payment for an extended period of time. Accordingly, RAC Y's contingency fee rate will most likely reflect operating, maintenance and legal costs over that period. Alternatively, in State Z, completion of the administrative appeals process takes 9 months. A contract between State Z and RAC V may reflect a different contingency fee rate.

• Under section 1902(a)(42)(B)(ii)(IV)(aa) of the Act, for purposes of section 1903(a)(7) of the Act, expenditures made by the State to carry out the Medicaid RAC program are necessary for the proper and efficient administration of the State plan or waiver of the plan. We interpret this reference to section 1903(a)(7) of the Act to mean that amounts expended by a State to establish and operate the Medicaid RAC program (aside from fee payments, the treatment of which is discussed elsewhere in this preamble) are to be shared by the Federal government at the 50 percent administrative rate. We propose in § 455.514(b) that FFP would be available to States for administrative costs subject to reporting requirements.

• Section 1902(a)(42)(B)(ii)(IV)(bb) and section 1903(d) of the Act applies to amounts recovered (not merely identified) under the Medicaid RAC program. We propose that a State must refund the Federal share of the net amount of overpayment recoveries *after* deducting a RAC's fee payments (in conformance with the restrictions discussed above, including the maximum allowed RAC contingency fee and the exception process). In other words, a State would take a RAC's fee payment "off the top" *before* calculating the Federal share of the overpayment recovery to be returned to CMS. Such amounts recovered would be subject to a State's quarterly expenditure estimates and the funding of the State's share.

Additionally, we note that the territories operate under a separate funding authority that is statutorily-capped. Because of the limitations placed on FFP by section 1108(g) of the Act, territories must assess the feasibility of implementing and funding Medicaid RAC contractors in their jurisdictions. We would provide technical assistance to the territories on how to implement the provisions in sections 1902(a)(42)(B)(ii)(I), (II), (III) and (IV) of the Act. We solicit public comment on the impact and feasibility of such provisions on the territories.

• Under section 1902(a)(42)(B)(ii)(IV)(cc) of the Act, States and their Medicaid RACs must coordinate their efforts with other contractors or entities performing audits of entities receiving payments under the State plan or waiver in the State, including State and Federal law enforcement agencies. We emphasize that Medicaid RACs are not intended to, and do not, replace any State program integrity or audit initiatives or programs. We propose in § 455.508(b) that an entity that wishes to enter a contract with a State to perform the functions of a Medicaid RAC must agree to the coordination efforts.

Although overlapping or multiple provider audits may be necessary, we hope to minimize the likelihood of overlapping audits. The Affordable Care Act requires that States assure CMS that they will coordinate Medicaid RAC audit activity with an array of other stakeholders that also conduct audits. We anticipate working systematically, both internally and with States. We recognize that providers are currently subject to audits by the States' routine program integrity audits, CMS' Medicaid Integrity Contractors' audits, as well as audits conducted by other State and Federal entities.

In addition to the obligation to coordinate auditing efforts to reduce the overburdening of Medicaid providers, we also want to ensure coordination between Medicaid RACs and law enforcement organizations so that suspected cases of fraud and abuse are processed through the appropriate channels. Law enforcement organizations that may conduct audits or investigations include, but are not limited to, the HHS–OIG, the U.S. Department of Justice, including the Federal Bureau of Investigation, State Medicaid Fraud Control Units, other Federal and State law enforcement agencies as appropriate and CMS. One approach to ensure this coordination is for States to establish Memoranda of Understanding (MOUs) with their State Medicaid Fraud Control Units (MFCUs), program integrity units or other law enforcement agencies. Nothing would preclude a State from agreeing to pay the Medicaid RAC a contingency fee from funds ultimately recovered and returned to the State as the State share of an overpayment (or restitution) at the close of the civil or criminal proceeding.

Finally, coordination may be a challenge because of the number of other agencies or entities that may be conducting audits, but States are obligated to ensure that Medicaid RACs do not duplicate or compromise the efforts of other entities performing audits, including law enforcement that may be investigating fraud and abuse.

## II. Provisions of the Proposed Regulations

In the section that follows, we discuss the proposed changes to the regulations in part 455 governing the Program Integrity—Medicaid.

We propose to add a new "Subpart F—Medicaid Recovery Audit Contractors Program" that would implement section 1902(a)(42)(B) of the Act. Section 1902(a)(42)(B) sets forth provisions relating to States establishing recovery audit contractor programs in which States will contract with 1 or more Medicaid RACs to audit Medicaid claims and to identify underpayments and identify and recover overpayments. We propose to add the following sections:

### *A. Purpose (§ 455.500)*

Proposed § 455.500 sets forth the purpose of the new subpart F. The regulations would implement section 1902(a)(42)(B) of the Act that establishes the Medicaid RAC program.

### *B. Establishment of Program (§ 455.502)*

At proposed § 455.502, we would establish the Medicaid RAC program as a measure for States to promote the integrity of their Medicaid program, and require that States enter into contracts with one or more RACs to carry out the activities described in § 455.506, and require that States report on certain elements describing the effectiveness of their Medicaid RAC program.

### *C. Definitions (§ 455.504)*

We are proposing to define the Medicaid RAC program as a recovery audit contractor administered by a State to identify overpayments and underpayments and recoup overpayments. We are proposing to define the Medicare RAC program as a recovery audit contractor program administered by CMS to identify overpayments and underpayments and recoup overpayments.

### *D. Activities To Be Conducted by Medicaid RACs (§ 455.506)*

We propose at § 455.506(a), to require States to contract with one or more RACs to engage in reviews of Medicaid claims submitted by providers of services or other individuals furnishing items and services for which payment has been made under section 1902(a) of the Act to determine whether providers have been underpaid or overpaid, and to recover any overpayments identified. We propose at § 455.506(b), to leave to the States' discretion the manner in which they will coordinate with Medicaid RACs' recoupment of overpayments.

### *E. Eligibility Requirements for Medicaid RACs (§ 455.508)*

We propose at § 455.508 to provide that in order to be eligible to contract with a State to perform the functions of a Medicaid RAC, an entity must have technical capability to carry out the activities described in § 455.506, including employing trained medical professionals to review Medicaid claims. An entity must also agree to coordinate with State and Federal agencies, and meet any such other requirements as the State may establish.

### *F. Payments to RACs (§ 455.510)*

We propose at § 455.510(a) that fees paid to RACs shall be made only from amounts recovered. We propose at § 455.510(b)(1) to require that the contingency fee paid to Medicaid RACs be based on a percentage of the recovered overpayment amount. We propose at § 455.510(b)(2), that States shall determine at what stage of the audit process Medicaid RACs will receive their contingency fee. We propose at § 455.510(b)(3) that, except as provided in paragraph (b)(4), CMS will not provide FFP for any amount of contingency fee that exceeds the then

highest contingency fee rate paid to a Medicare RAC. We propose at § 455.514(b)(4), that, on a case-by-case basis, CMS will review and consider substantially justified requests from States to pay Medicaid RAC(s) a contingency fee higher than the highest Medicare RAC contingency fee. We propose at § 455.510(c) to require that States determine the fee paid to Medicaid RACs to identify underpayments.

*G. Medicaid RAC Provider Appeals (§ 455.512)*

We propose at § 455.512 to require States to provide a process for provider appeals of adverse Medicaid RAC determinations.

*H. Federal Share of State Expense for the Medicaid RAC Program (§ 455.514)*

We propose at § 455.514(a) that funds expended by the State to carry out the Medicaid RAC program shall be considered necessary for the proper and efficient administration of the State plan or a waiver of the plan.

We propose at § 455.514(a) that the Federal share of State expense does not include fees paid.

We propose at § 455.514(b) that FFP is available to States for administrative costs of operation and maintenance of Medicaid RACs, subject to CMS' reporting requirements.

*I. Exceptions From Medicaid RAC Programs (§ 455.516)*

We propose at § 455.516, that States that seek to be excepted from any of the requirements of the Medicaid RAC program must submit to CMS a written justification for the request and get CMS approval.

*J. Applicability to the Territories (§ 455.518)*

We propose at § 455.518 that the provisions in § 455.500 through § 455.516 are applicable to Guam, Puerto Rico, U.S. Virgin Islands, American Samoa and the Commonwealth of the Northern Mariana Islands.

## III. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are soliciting public comment on each of these issues for the following sections of this document that contain information collection requirements (ICRs):

*A. ICRs Regarding State Submission of Certain Elements Describing the Effectiveness of Their Medicaid RAC Programs (§ 455.502(c))*

Section 455.502(c) would require States to submit certain elements describing the effectiveness of their Medicaid RAC programs. These elements will include, but not be limited to general program descriptors and program metrics evaluating effectiveness. The burden associated with this requirement is the time and effort put forth by the State to aggregate existing data that will be part of the process of establishing their RAC program. We estimate it would take 1 State 2 hours to perform this task. The total annual burden for this requirement is 112 hours.

*B. ICRs Regarding State Justifications To Pay Higher Contingency Fees (§ 455.510(b)(4))*

Section 455.510(b)(4) would require States to submit justifications to CMS to pay Medicaid RACs a contingency fee higher than the highest Medicare RAC.

The burden associated with this requirement is the time and effort put forth by the State to prepare and submit a justification. We estimate it would take 1 State 60 hours to perform this task. The total annual burden for this requirement is 1680 hours.

*C. ICRs Regarding Medicaid RAC Provider Appeals (§ 455.512)*

Section 455.512 would require States to provide administrative appeal procedures for Medicaid providers that seek review of an adverse Medicaid RAC determination.

The burden associated with this requirement is the time and effort put forth by the State to prepare and provide administrative appeal procedures. We estimate it would take 1 State 60 hours to perform these tasks. The total annual burden for this requirement is 3,360 hours.

*D. ICRs Regarding Federal Share of State Expense for the Medicaid RAC Program (§ 455.514(b))*

Section 455.514(b), FFP would be available to States for the Federal share of State expense for the Medicaid RAC program subject to CMS' reporting requirements. The burden associated with a State reporting quarterly expenditure estimates is currently approved under OMB# 0938–0067 with an expiration date of August 31, 2011.

*E. ICRs Regarding Exceptions From Medicaid RAC Programs (§ 455.516)*

Section 455.516 would require a State that is seeking an exception from any of the requirements of the Medicaid RAC program to submit a written justification to CMS.

The burden associated with this requirement is the time and effort put forth by the State to prepare and submit a written justification for the request. We estimate it would take 1 State 20 hours to meet this requirement. We estimate approximately 15 States would request an exception; therefore, the total annual burden associated with this requirement is 300 hours.

If you comment on these information collection and recordkeeping requirements, please do either of the following:

1. Submit your comments electronically as specified in the **ADDRESSES** section of this proposed rule; or

2. Submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: CMS Desk Officer, [CMS–6034–P] Fax: (202) 395–6974; or E-mail: *OIRA_submission@omb.eop.gov.*

## IV. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

## V. Regulatory Impact Analysis

*A. Overall Impact*

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354),

section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). We tentatively estimate that this rulemaking may be "economically significant" as measured by the $100 million threshold, and, therefore, may be a major rule under the Congressional Review Act.

This proposed rule applies to States' requirement to contract with Medicaid RACs to perform audits of Medicaid providers on a contingency fee basis. The majority of anticipated savings, as a result of the provisions in this rule, are related to improper payments. However, as seen in the Medicare RAC Demonstration period, we expect a limited financial impact on most providers, as significant improper payments are relatively rare. The CMS Office of the Actuary (OACT) estimated the potential impact on Federal Medicaid costs and savings. OACT used the historical experience from the Medicare program to estimate potential savings to Medicaid. As such, these estimates are highly uncertain, as a result we offer estimates for FYs 2011 through 2015 to illustrate the potential effects of this program. As a result, OACTs estimates for FYs 2011 through 2015 are presented in Table A.

TABLE A—POTENTIAL NET SAVINGS TO FEDERAL MEDICAID PROGRAM FROM THE EXPANSION OF THE RECOVERY AUDIT CONTRACTOR PROGRAM

| Fiscal year | Estimated savings (in millions of dollars) |
|---|---|
| 2011 | $80 |
| 2012 | 170 |
| 2013 | 250 |
| 2014 | 310 |
| 2015 | 330 |

We plan to refine the estimated impacts in the final rule's analysis and we request comment on the potential underpayments and overpayments collected by States and the associated contingency fees.

The RFA requires agencies to analyze options for regulatory relief of small businesses, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, we estimate that most Medicaid providers are small entities as that term is used in the RFA (include small businesses, nonprofit organizations, and small governmental jurisdictions). The great majority of hospitals and most other health care providers and suppliers are small entities, either by being nonprofit organizations or by meeting the SBA definition of a small business (having revenues of less than $7.0 million to $34.5 million in any 1 year). For purposes of the RFA, approximately 75 percent of Medicaid providers are considered small businesses according to the Small Business Administration's size standards with total revenues of $35 million or less in any 1 year and 80 percent are nonprofit organizations. Individuals and States are not included in the definition of a small business entity. Medicaid providers are required, as a matter of course, to follow the guidelines and procedures as specified in State and Federal laws and regulations. As such, Medicaid providers must retain accurate billing records for the requisite period of time. Additionally, Medicaid providers must cooperate in audits conducted by the State and/or Federal governments and their agents. Therefore, the Secretary has determined that this proposed rule will not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. For the same reason as stated above, this proposed rule would not have a significant impact on the operation of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2010, that threshold is approximately $135 million. This proposed rule applies to the States' requirement to procure Medicaid RACs to perform audits of Medicaid providers on a contingency fee basis. State expenditure associated with this proposed rule would initially involve directing or allocating personnel resources to procurement activities. Per the terms of the contracts, States would not be expending funds over $135 million for RACs to perform the contracts. Associated costs that may include the operation of RAC programs, collateral State personnel costs, and maintenance of records are not expected to exceed the $135 million threshold. Therefore, this proposed rule is not anticipated to have an effect on State, local or tribal governments in the aggregate, or by the private sector of $135 million or more.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. We have reviewed this proposed rule under the threshold criteria of Executive Order 13132, Federalism, and have determined that it would not have substantial direct effects on the rights, roles, and responsibilities of States, local or tribal governments.

*B. Conclusion*

We tentatively estimate that this rule may be "economically significant" as measured by the $100 million threshold as set forth by Executive Order 12866, as well as the Congressional Review Act. The analysis above provides our initial Regulatory Impact Analysis. We have not prepared an analysis for section 1102(b) of the RFA, section 202 of the UFMA and Executive Order 13132 because the provisions are not impacted by this rule.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

**List of Subjects in 42 CFR Part 455**

Fraud, Grant programs—health, Health facilities, Health professions, Investigations, Medicaid, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV as set forth below:

## PART 455—PROGRAM INTEGRITY—MEDICAID

1. The authority citation for part 455 continues to read as follows:

**Authority:** Section 1102 of the Social Security Act (42 U.S.C. 1302), section 1902(a)(42)(B) (42 U.S.C. 1396a(a)(42(B)).

2. New subpart F is added to read as follows:

**Subpart F—Medicaid Recovery Audit Contractors Program**

Sec.
455.500 Purpose.
455.502 Establishment of program.
455.504 Definitions.
455.506 Activities to be conducted by Medicaid RACs.
455.508 Eligibility requirements for Medicaid RACs.
455.510 Payments to RACs.
455.512 Medicaid RAC provider appeals.
455.514 Federal share of State expense for the Medicaid RAC program.
455.516 Exceptions from Medicaid RAC program.
455.518 Applicability to the territories.

## Subpart F—Medicaid Recovery Audit Contractors Program

### § 455.500 Purpose.

This subpart implements section 1902(a)(42)(B) of the Social Security Act that establishes the Medicaid Recovery Audit Contractor (RAC) program.

### § 455.502 Establishment of program.

(a) The Medicaid Recovery Audit Contractor program (Medicaid RAC program) is established as a measure for States to promote the integrity of the Medicaid program.

(b) States shall enter into contracts, consistent with State law and in accordance with this section, with eligible Medicaid RACs to carry out the activities described in § 455.506 of this subpart.

(c) States will be required to report to CMS certain elements describing the effectiveness of their Medicaid RAC program.

### § 455.504 Definitions.

As used in this subpart—

*Medicaid RAC program* means a recovery audit contractor program administered by a State to identify overpayments and underpayments and recoup overpayments.

*Medicare RAC program* means a recovery audit contractor program administered by CMS to identify underpayments and overpayments and recoup overpayments, established under the authority of section 1893(h) of the Act.

### § 455.506 Activities to be conducted by Medicaid RACs.

(a) Medicaid RACs will review claims submitted by providers of items and services or other individuals furnishing items and services for which payment has been made under section 1902(a) of the Act or under any waiver of the State plan to identify underpayments and overpayments and recoup overpayments for the States.

(b) States shall have the discretion to coordinate with Medicaid RACs regarding the recoupment of overpayments.

### § 455.508 Eligibility requirements for Medicaid RACs.

An entity that wishes to perform the functions of a Medicaid RAC may enter into a contract with a State to carry out any of the activities described in § 455.506 under the following conditions:

(a) The entity shall demonstrate to a State that it has the technical capability to carry out the activities described in § 455.506 of this subpart. Evaluation of technical capability must include the employment of trained medical professionals to review Medicaid claims.

(b) In carrying out such activities, the entity agrees to coordinate its efforts with the State as well as the Office of Inspector General of the U.S. Department of Health and Human Services, the U.S. Department of Justice, including the Federal Bureau of Investigation, State Medicaid Fraud Control Units, other Federal and State law enforcement agencies as appropriate and CMS. Whenever the entity has reasonable grounds to believe that fraud or criminal activity has occurred, the entity must report it immediately to appropriate law enforcement officials.

(c) The Medicaid RAC meets such other requirements as the State may require.

### § 455.510 Payments to RACs.

(a) *General.* Fees paid to RACs shall be made only from amounts recovered.

(b) *Overpayments.* A State shall determine the contingency fee rate to be paid to a Medicaid RAC for the identification and recovery of Medicaid provider overpayments.

(1) The contingency fee paid to a Medicaid RAC shall be based on a percentage of the overpayment recovered.

(2) States shall determine at what stage in the Medicaid RAC process, post-recovery, Medicaid RACs will receive contingency fee payments.

(3) Except as provided in paragraph (4) of this section, the contingency fee may not exceed that of the highest Medicare RAC, as specified by CMS in the **Federal Register**, unless the State submits, and CMS approves, a waiver of the specified maximum rate. If a State does not obtain a waiver of the specified maximum rate, any amount exceeding the specified maximum rate is not eligible for Federal financial participation (FFP), either from the collected overpayment amounts, or in the form of any other administrative or medical assistance claimed expenditure.

(4) CMS will review and consider, on a case-by-case basis, a State's well-justified request that CMS provide FFP in paying a Medicaid RAC(s) a contingency fee in excess of the then-highest contingency fee paid to a Medicare RAC.

(c) *Underpayments.* States shall determine the fee paid to a Medicaid RAC to identify underpayments.

### § 455.512 Medicaid RAC provider appeals.

States shall provide appeal rights available under State law or administrative procedures to Medicaid providers that seek review of an adverse Medicaid RAC determination.

### § 455.514 Federal share of State expense of the Medicaid RAC program.

(a) Funds expended by the State for the operation and maintenance of a Medicaid RAC program, not including fees paid to RACs, shall be considered necessary for the proper and efficient administration of the State plan or a waiver of the plan.

(b) FFP is available to States for administrative costs of operation and maintenance of Medicaid RACs subject to CMS' reporting requirements.

### § 455.516 Exceptions from Medicaid RAC programs.

A State may seek to be excepted from some or all Medicaid RAC contracting requirements by submitting to CMS a written justification for the request and getting CMS approval.

### § 455.518 Applicability to the territories.

The aforementioned provisions in § 455.500 through § 455.516 of this subpart are applicable to Guam, Puerto Rico, U.S. Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands.

**Authority:** (Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program).

Dated: August 19, 2010.

**Donald M. Berwick,**

*Administrator, Centers for Medicare & Medicaid Services.*

Approved: October 29, 2010.

**Kathleen Sebelius,**

*Secretary, Health and Human Services.*

[FR Doc. 2010–28390 Filed 11–5–10; 4:15 pm]

BILLING CODE 4120–01–P

# Notices

Federal Register
Vol. 75, No. 217
Wednesday, November 10, 2010

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

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2009–0088]**

### Notice of Determination of the High Pathogenic Avian Influenza Subtype H5N1 Status of Czech Republic and Sweden

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Notice.

**SUMMARY:** We are advising the public of our determination regarding the highly pathogenic avian influenza (HPAI) subtype H5N1 status of the Czech Republic and Sweden, following outbreaks of HPAI in Sweden during 2006 and in the Czech Republic during 2007. Based on an evaluation of the animal health status of the Czech Republic and Sweden, which we made available to the public for review and comment through a previous notice, the Administrator has determined that the importation of live birds, poultry carcasses, parts or products of poultry carcasses, and eggs (other than hatching eggs) of poultry, game birds, and other birds from the Czech Republic and Sweden presents a low risk of introducing HPAI H5N1 into the United States.

**DATES:** *Effective Date:* This determination is effective November 10, 2010.

**FOR FURTHER INFORMATION CONTACT:** Dr. Julia Punderson, Senior Staff Veterinarian, Regionalization Evaluation Services-Import, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 38, Riverdale, MD 20737–1231; (301) 734–4356.

**SUPPLEMENTARY INFORMATION:**

#### Background

On April 6, 2010, we published in the **Federal Register** (75 FR 17368–17370, Docket No. APHIS–2009–0088) a notice [1] in which we announced the availability, for review and comment, of an evaluation of the animal health status of the Czech Republic and Sweden relative to highly pathogenic avian influenza (HPAI) subtype H5N1. In the evaluation, titled "APHIS Evaluation of the Status of High Pathogenicity Avian Influenza H5N1 (HPAI H5N1) in the Czech Republic and Sweden" (July 2009), we presented the results of our evaluation of the status of HPAI H5N1 in domestic and wild poultry in the Czech Republic and Sweden, in light of the actions taken by the Czech and Swedish animal health authorities since the outbreaks in 2006 and 2007.

Our evaluation concluded that the Czech Republic and Sweden were able to effectively control and eradicate HPAI H5N1 in their domestic poultry populations and that animal health authorities have adequate control measures in place to rapidly identify, control, and eradicate the disease should it be reintroduced into the Czech Republic's or Sweden's wild birds or domestic poultry population.

In our April 2010 notice, we stated that if after the close of the comment period we could identify no additional risk factors that would indicate that domestic poultry in the Czech Republic and Sweden continue to be affected with HPAI H5N1, we would conclude that the importation of live birds, poultry carcasses, parts of carcasses, and eggs (other than hatching eggs) of poultry, game birds, or other birds from the Czech Republic and Sweden presents a low risk of introducing HPAI H5N1 into the United States.

We solicited comments on the evaluation for 30 days ending on May 6, 2010. We received no comments by that date. Therefore we are removing our prohibition on the importation of these products from the Czech Republic and Sweden, into the United States. Specifically:

- We are no longer requiring that processed poultry products from the Czech Republic and Sweden be accompanied by a Veterinary Service import permit and government certification confirming that the products have been treated according to APHIS requirements;
- We are allowing unprocessed poultry products from Sweden to enter the United States in passenger luggage; however, because APHIS has not evaluated the virulent Newcastle disease status of the Czech Republic, unprocessed poultry products remain ineligible for entry into the United Stated in passenger luggage from that country; and
- We are removing restrictions regarding the regions of the Czech Republic and Sweden from which processed poultry products may originate in order to be allowed entry into the United States in passenger luggage.

However, live birds from the Czech Republic and Sweden are still subject to inspection at ports of entry and the post-importation quarantines set forth in 9 CFR part 93, unless granted an exemption by the Administrator or destined for diagnostic purposes and accompanied by a limited permit.

**Authority:** 7 U.S.C. 450, 7701–7772, 7781–7786, and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

Done in Washington, DC, this 4th day of November 2010.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2010–28351 Filed 11–9–10; 8:45 am]

**BILLING CODE 3410–34–P**

[1] To view the notice and the evaluation, go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2009-0088.*

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Bridger-Teton National Forest Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Bridger-Teton Resource Advisory Committee will meet in Kemmerer, Wyoming. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub.L 110–343) and in compliance with the Federal Advisory Committee Act. The purpose is to approve processes for project applications.

**DATES:** The meeting will be held on November 29, 2010, and will begin at 5 p.m.

**ADDRESSES:** The meeting will be held at the Kemmerer Ranger District Office,

308 US Highway 189 North, Kemmerer, WY. Written comments should be sent to Tracy Hollingshead, Bridger-Teton National Forest, 308 Hwy 189 North, Kemmerer, WY 83101. Comments may also be sent via e-mail to *thollingshead@fs.fed.us,* or via facsimile to 307–828–5135.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at Bridger-Teton National Forest, Hwy 189 North, Kemmerer, WY 83101. Visitors are encouraged to call ahead to 307–877–4415 to facilitate entry into the building.

**FOR FURTHER INFORMATION CONTACT:** Tracy Hollingshead, DFO, USDA, Bridger-Teton National Forest, Hwy 189 North, Kemmerer, WY 83101; (307) 877–4415; E-mail: *thollingshead@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** The meeting is open to the public. The following business will be conducted: (1) Approve minutes from October 25, 2010 meeting. (2) Approve process for requesting and selecting project applications. (3) Update on potential additional Resource Advisory Committee applicants; and (4) Public Comment. Persons who wish to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting.

Dated: November 4, 2010.

**Tracy Hollingshead,**

*Designated Federal Officer.*

[FR Doc. 2010–28336 Filed 11–9–10; 8:45 am]

**BILLING CODE 3410–11–P**

## AGENCY FOR INTERNATIONAL DEVELOPMENT

### Senior Executive Service: Membership of Performance Review Board

**ACTION:** Notice.

**SUMMARY:** This notice lists approved candidates who will comprise a standing roster for service on the Agency's 2010 and 2011 SES Performance Review Boards. The Agency will use this roster to select SES board members, and an outside member for the convening SES Performance Review Board each year. The standing roster is as follows: Brause, Jon; Carroll, Sean; Chan, Carol; Crumbly, Angelique; Eugenia, Mercedes; Foley, Jason; Gomer, Lisa; Grigsby, Carol; Haiman, Arnold; Horton, Jerry; Lowe, Roberta; Luten, Drew; McNerney, Angela; O'Neill, Maura; Ostermeyer, David; Painter, James; Pascocello, Susan; Pendarvis, Jessalyn; Peters, James; Streufert, Randy; Vera, Mauricio; Warren, Wade; Wells, Barry; Wiggins, Sandra; Robinson, John, Outside SES Member.

**FOR FURTHER INFORMATION CONTACT:** Melissa Jackson, 202–712–1781.

Dated: October 25, 2010.

**Michelle Batie,**

*Division Chief, Civil Service Personnel Division.*

[FR Doc. 2010–28344 Filed 11–9–10; 8:45 am]

**BILLING CODE 6116–01–P**

## COMMISSION ON CIVIL RIGHTS

### Sunshine Act Notice

**AGENCY:** United States Commission on Civil Rights.

**ACTION:** Notice of meeting.

**DATE AND TIME:** Friday, November 19, 2010; 9:30 a.m. EST.

**PLACE:** 624 Ninth Street, NW., Room 540, Washington, DC 20425.

**Meeting Agenda**

This meeting is open to the public.

*I. Approval of Agenda*

*II. Program Planning*

- Approval of New Black Panther Party Enforcement Report.
- Motion Regarding Healthcare Disparities Report Commissioner Statements & Rebuttals.
- Consideration of Findings and Recommendations for Briefing Report on English-Only in the Workplace.
- Update on FY 2011 Cy Pres Enforcement Report & Consideration of Project Outline and Discovery Plan.
- Consideration of Policy on Commissioner Statements and Rebuttals.
- Discussion of Possible Briefing Topics for FY 2011.
- Update on Status of Briefing on Disparate Impact in School Discipline Policies.
- Update on Sex Discrimination in Liberal Arts College Admissions—Some of the discussion of this agenda item may be held in closed session.
- Update on Clearinghouse Project.

*III. State Advisory Committee Issues*

- Kentucky SAC.
- Maryland SAC.
- Vermont SAC.
- Wisconsin SAC.
- Update on Status of Remaining SACs to Recharter.

*IV. Management & Operations*

- Expiration of Commissioner Terms.

*V. Approval of Minutes of October 8 Meeting*

*VI. Adjourn*

**CONTACT PERSON FOR FURTHER INFORMATION:** Lenore Ostrowsky, Acting Chief, Public Affairs Unit (202) 376–8591. TDD: (202) 376–8116.

Persons with a disability requiring special services, such as an interpreter for the hearing impaired, should contact Pamela Dunston at least seven days prior to the meeting at 202–376–8105. TDD: (202) 376–8116.

Dated: November 8, 2010.

**David Blackwood,**

*General Counsel.*

[FR Doc. 2010–28492 Filed 11–8–10; 4:15 pm]

**BILLING CODE 6335–01–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Proposed Information Collection; Comment Request; Questionnaire on Business-Related Visa Processes

**AGENCY:** International Trade Administration, Commerce.

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

**DATES:** Written comments must be submitted on or before January 10, 2011.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to Christopher Clement, 202–482–4750, *christopher.clement@trade.gov,* Fax: 202–482–3643.

**SUPPLEMENTARY INFORMATION:**

**I. Abstract**

The U.S. Department of Commerce (DOC) fosters, serves, and promotes the Nation's economic development. Through participation with other U.S. Government agencies, DOC creates national policies to enhance opportunities for U.S. workers and employers in the global economy. Countries that support the free flow of products, services, capital, and people create a positive business environment for their domestic firms. DOC has been informed by industry associations representing U.S. business and trade interests that their member companies have experienced problems with the visa process as it pertains to bringing foreign business travelers into the country. Although official data does not exist, anecdotal evidence suggests common difficulties for U.S. industry due to visa delays and denials, with commensurate economic loss to U.S. firms. Recognizing that national security concerns must always remain paramount in any discussion relating to business visas and in response to these industry concerns, the Secretary of Commerce has identified the need to measure how current U.S. business visa policy affects American companies active in the global economy. The facilitation of business travel is a priority of Secretary's and very important to meeting President Obama's National Export Initiative goal of doubling U.S. exports in the next five years.

The DOC will request that U.S. industry and trade associations use the questionnaire to report instances of U.S. business visa delay or denial. The information derived from completed questionnaires is critical to enabling DOC to ascertain the economic impact, if any, of current U.S. business-related visa policy.

DOC staff regularly receive unsolicited feedback from U.S industry, U.S. trade associations, state/regional/local economic development officials, and foreign investors about challenges that foreign business travelers have encountered while trying to obtain a U.S. business visa. Though this qualitative information is useful in understanding certain issues pertaining to current U.S. business visa policy, the quantitative information that the questionnaire will gather is much more important in providing a more comprehensive understanding of the potential economic impact of business visa delays and denials.

**II. Method of Collection**

Information will be collected electronically.

**III. Data**

*OMB Control Number:* 0625–XXXX.
*Form Number(s):* None.
*Type of Review:* Regular submission (new information collection).
*Affected Public:* Business or other for-profit organizations.
*Estimated Number of Respondents:* 500.
*Estimated Time Per Response:* 30 minutes.
*Estimated Total Annual Burden Hours:* 250.
*Estimated Total Annual Cost to Public:* $0.

**IV. Request for Comments**

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: November 5, 2010.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2010–28339 Filed 11–9–10; 8:45 am]

**BILLING CODE 3510–FP–P**

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[Docket 63–2010]**

### Foreign-Trade Zone 64—Jacksonville, Florida Application for Reorganization/Expansion Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by the Jacksonville Port Authority, grantee of FTZ 64, requesting authority to reorganize and expand the zone under the alternative site framework (ASF) adopted by the Board (74 FR 1170, 1/12/09; correction 74 FR 3987, 1/22/09). The ASF is an option for grantees for the establishment or reorganization of general-purpose zones and can permit significantly greater flexibility in the designation of new "usage-driven" FTZ sites for operators/users located within a grantee's "service area" in the context of the Board's standard 2,000-acre activation limit for a general-purpose zone project. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on November 4, 2010.

FTZ 64 was approved by the Board on December 29, 1980 (Board Order 170, 46 FR 1330, 1/6/1981) and expanded on October 7, 2008 (Board Order 1579, 73 FR 61781, 10/17/2008).

The current zone project includes the following "sites" in Jacksonville, Florida: *Site 1* (67 acres)—Jacksonville International Airport, Pecan Park Road and Terrell Road; *Site 2* (43 acres)—Halmark Properties, Inc., 2201 North Ellis Road; *Site 3* (942 acres)—JPA Blount Island Terminal Complex, 9620 Dave Rawls Boulevard, and JPA Talleyrand Docks and Terminal Facility, 2085 Talleyrand Avenue; *Site 4* (200 acres)—International Trade port Complex, Airport Road; *Site 5* (4 acres)—Caribbean Cold Storage, Inc., 1505 Dennis Street; *Site 7* (47 acres)—Westlake Industrial Park, 9767 Pritchard Road; and *Site 8* (75 acres)—Imeson International Industrial Park, One Imeson Park Boulevard.

The grantee's proposed service area under the ASF would be the Florida counties of Baker, Clay, Columbia, Duval and Nassau, as described in the application. If approved, the grantee would be able to serve sites throughout the service area based on companies' needs for FTZ designation. The proposed service area is within and adjacent to the Jacksonville Customs and Border Protection port of entry.

The applicant is requesting authority to reorganize and expand its existing zone project to include existing Sites 1 and 3 as "magnet" sites, to include existing Sites 4, 7, and 8 as "usage-driven" sites, to remove existing Sites 2 and 5, and to include the following new site as a magnet site: *Proposed Site 10* (4,474.0 acres)—AllianceFlorida at Cecil Commerce Center, I–10 and Cecil Commerce Center Parkway, Jacksonville. Further, existing Site 3 will have its non-contiguous parcel renumbered, with the Talleyrand Docks and Terminal Facility (2085 Talleyrand Avenue, Jacksonville) to be designated

as Site 9 (magnet site). The ASF allows for the possible exemption of one magnet site from the "sunset" time limits that generally apply to sites under the ASF, and the applicant proposes that Site 3 (JPA Blount Island Terminal Complex) be so exempted. Because the ASF only pertains to establishing or reorganizing a general-purpose zone, the application would have no impact on FTZ 64's authorized subzone.

In accordance with the Board's regulations, Maureen Hinman of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is January 10, 2011. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to January 24, 2011.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230–0002, and in the "Reading Room" section of the Board's Web site, which is accessible via *http://www.trade.gov/ftz.* For further information, contact Maureen Hinman at *maureen.hinman@trade.gov* or (202) 482–0627.

Dated: November 4, 2010.

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. 2010–28414 Filed 11–9–10; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Georgia Institute of Technology, et al.; Notice of Consolidated Decision on Applications for Duty-Free Entry of Electron Microscopes

This is a decision consolidated pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Public Law 106–36; 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in Room 3720, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

*Docket Number:* 10–061. *Applicant:* Georgia Institute of Technology, Atlanta, GA 30333–0245. *Instrument:* Electron Microscope. *Manufacturer:* FEI Company, the Netherlands. *Intended Use*: *See* notice at 75 FR 62763, October 13, 2010.

*Docket Number:* 10–062. *Applicant:* Washington State University, Pullman, WA 99164–1020. *Instrument:* Electron Microscope. *Manufacturer:* FEI Company, Czech Republic. *Intended Use*: *See* notice at 75 FR 62763, October 13, 2010.

*Docket Number:* 10–063. *Applicant:* National Institutes of Health, Bethesda, MD 20892–8025. *Instrument:* Electron Microscope. *Manufacturer:* JEOL Limited, Japan. *Intended Use*: *See* notice at 75 FR 62723, October 13, 2010.

*Comments:* None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as these instruments are intended to be used, was being manufactured in the United States at the time the instruments were ordered. *Reasons:* Each foreign instrument is an electron microscope and is intended for research or scientific educational uses requiring an electron microscope. We know of no electron microscope, or any other instrument suited to these purposes, which was being manufactured in the United States at the time of order of each instrument.

Dated: November 3, 2010.

**Richard Herring,**

*Acting Director, Subsidies Enforcement Office, Import Administration.*

[FR Doc. 2010–28416 Filed 11–9–10; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XA011**

### Endangered and Threatened Wildlife and Plants; Proposed Listings for Two Distinct Population Segments of Atlantic Sturgeon in the Southeast

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

**ACTION:** Notice of two public hearings.

**SUMMARY:** In December 2010, we (NMFS) will hold two public hearings—one in Wilmington, NC and one in Atlanta, GA. The purpose of these hearings is to accept comments on the proposed listing of the Carolina and South Atlantic distinct population segments (DPSs) of Atlantic sturgeon (*Acipenser oxyrinchus oxyrinchus*) as endangered under the Endangered Species Act (ESA) of 1973, as amended.

**DATES:** The hearings will be held on December 6, 2010, from 6 to 9 p.m. in Wilmington, NC, and on December 7, 2010, from 6 to 9 p.m. in Atlanta, GA. An informational session will be held at the beginning of each hearing.

**ADDRESSES:** The public hearings will be held at the following locations:

- December 6, 2010, Coastline Conference and Event Center, 503 Nutt Street, Wilmington, NC 28401.
- December 7, 2010, Westin Atlanta Airport, 4736 Best Road, Atlanta, GA 30337.

**FOR FURTHER INFORMATION CONTACT:** Kelly Shotts, NMFS, Southeast Regional Office (727) 824–5312 or Marta Nammack, NMFS, Office of Protected Resources (301) 713–1401.

**SUPPLEMENTARY INFORMATION:**

#### Background

On October 6, 2010, we published a proposed rule (75 FR 61904) to list the Carolina and South Atlantic DPSs of Atlantic sturgeon as endangered under the ESA. We will accept oral and written comments regarding the proposed listing decision for these two DPSs of Atlantic sturgeon at the public hearings.

#### Special Accommodations

These hearings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kelly Shotts at (727) 824–5312 no later than November 29, 2010.

**Authority:** 16 U.S.C. 1531 *et seq.*

Dated: November 4, 2010.

**Helen M. Golde,**

*Deputy Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2010–28324 Filed 11–9–10; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

**[Docket No.: PTO–P–2010–0083]**

### Expansion and Extension of the Green Technology Pilot Program

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Notice.

**SUMMARY:** On December 8, 2009, the United States Patent and Trademark Office (USPTO) implemented the Green

Technology Pilot Program, which permits patent applications pertaining to environmental quality, energy conservation, development of renewable energy resources, and greenhouse gas emission reduction to be advanced out of turn for examination and reviewed earlier (accorded special status). The program is designed to promote the development of green technologies. Initially, participation was limited to applications filed before December 8, 2009. The USPTO is hereby expanding the eligibility for the pilot program to include applications filed on or after December 8, 2009. The program is also being extended until December 31, 2011. These changes will permit more applications to qualify for the program, thereby allowing more inventions related to green technologies to be advanced out of turn for examination and reviewed earlier.

**DATES:** *Effective Date:* November 10, 2010.

*Duration:* The Green Technology Pilot Program will run until December 31, 2011, except that the USPTO will accept only the first 3,000 grantable petitions to make special under the Green Technology Pilot Program in unexamined applications irrespective of the filing date of the application.

**FOR FURTHER INFORMATION CONTACT:** Pinchus M. Laufer and Joni Y. Chang, Senior Legal Advisors, Office of Patent Legal Administration, Office of the Associate Commissioner for Patent Examination Policy, by telephone at 571–272–7726 or 571–272–7720; or by mail addressed to: Mail Stop Comments Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450.

**SUPPLEMENTARY INFORMATION:** The USPTO published a notice for the implementation of the Green Technology Pilot Program on December 8, 2009. *See Pilot Program for Green Technologies Including Greenhouse Gas Reduction,* 74 FR 64666 (December 8, 2009), 1349 *Off. Gaz. Pat. Office* 362 (December 29, 2009) (*Green Technology* Notice). The pilot program is designed to promote the development of green technologies. The *Green Technology* Notice indicated that an applicant may have an application advanced out of turn and reviewed earlier (accorded special status) for examination, if the application pertained to green technologies including greenhouse gas reduction (applications pertaining to environmental quality, energy conservation, development of renewable energy resources or greenhouse gas emission reduction) and met other requirements specified in the *Green Technology* Notice. The USPTO published a notice eliminating the classification requirement of the Green Technology Pilot Program on May 21, 2010. *See Elimination of the Classification Requirement in the Green Technology Pilot Program,* 75 FR 28554 (May 10, 2010), 1355 *Off. Gaz. Pat. Office* 188 (June 15, 2010).

The *Green Technology* Notice required *inter alia* that an application be filed before December 8, 2009, the date of the original notice, to participate in the program. The *Green Technology* Notice also established that the program would run for twelve months from December 8, 2009. The USPTO is hereby expanding the eligibility for the pilot program to include unexamined non-reissue non-provisional utility applications filed on or after December 8, 2009. The USPTO is also extending the pilot program through December 31, 2011. Specifically, the Green Technology Pilot Program will run until 3,000 petitions have been granted (as set forth in the *Green Technology* Notice) or until December 31, 2011, whichever occurs earlier. Accordingly, if fewer than 3,000 grantable petitions are received, the pilot program will end on December 31, 2011. These changes will permit more applications to qualify for the pilot program, thereby allowing more inventions related to green technologies to be advanced out of turn for examination and reviewed earlier. Information concerning the number of petitions that have been filed and granted under the Green Technology Pilot Program is available on the USPTO's Internet Web site at *http://www.uspto.gov/patents/init_events/green_tech.jsp.* The USPTO may again extend the pilot program (with or without modifications) depending on the feedback from the participants and the effectiveness of the pilot program.

Applicants whose petitions were dismissed or denied solely on the basis that their applications were not filed before December 8, 2009, may file a renewed petition. If the renewed petition is filed within one month of the publication date of this notice, it will be given priority as of the date applicant filed the initial petition.

Dated: October 15, 2010.

**David J. Kappos,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

[FR Doc. 2010–28394 Filed 11–9–10; 8:45 am]

**BILLING CODE 3510–16–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[C–570–957]**

## Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order

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

**SUMMARY:** Based on affirmative final determinations by the Department of Commerce ("the Department") and the International Trade Commission ("ITC"), the Department is issuing a countervailing duty order on certain seamless carbon and alloy steel standard, line, and pressure pipe ("seamless pipe") from the People's Republic of China ("PRC"). Also, as explained in this notice, the Department is amending its final determination to correct certain ministerial errors.

**DATES:** *Effective Date:* November 10, 2010.

**FOR FURTHER INFORMATION CONTACT:** Shane Subler, Joseph Shuler, and Matthew Jordan, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; *telephone:* (202) 482–0189, (202) 482–1293, and (202) 482–1540, respectively.

### Background

On September 21, 2010, the Department published its final determination that countervailable subsidies are being provided to producers and exporters of seamless pipe from the PRC. *See Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination,* 75 FR 57444 (September 21, 2010) ("*Final Determination*").

On November 4, 2010, the ITC notified the Department of its final determination pursuant to sections 705(b)(1)(A)(ii) and 705(d) of the Tariff Act of 1930, as amended ("the Act"), that an industry in the United States is threatened with material injury by reason of subsidized imports of subject merchandise from the PRC. The ITC also determined that critical circumstances do not exist. *See Certain Seamless Carbon and Alloy Steel Standard, Line,*

*and Pressure Pipe from China,* USITC Investigation Nos. 701–TA–469 and 731–TA–1168, USITC Publication 4190 (November 2010).

**Scope of the Order**

The scope of this order consists of certain seamless carbon and alloy steel (other than stainless steel) pipes and redraw hollows, less than or equal to 16 inches (406.4 mm) in outside diameter, regardless of wall-thickness, manufacturing process (*e.g.,* hot-finished or cold-drawn), end finish (*e.g.,* plain end, beveled end, upset end, threaded, or threaded and coupled), or surface finish (*e.g.,* bare, lacquered or coated). Redraw hollows are any unfinished carbon or alloy steel (other than stainless steel) pipe or "hollow profiles" suitable for cold finishing operations, such as cold drawing, to meet the American Society for Testing and Materials ("ASTM") or American Petroleum Institute ("API") specifications referenced below, or comparable specifications. Specifically included within the scope are seamless carbon and alloy steel (other than stainless steel) standard, line, and pressure pipes produced to the ASTM A–53, ASTM A–106, ASTM A–333, ASTM A–334, ASTM A–589, ASTM A–795, ASTM A–1024, and the API 5L specifications, or comparable specifications, and meeting the physical parameters described above, regardless of application, with the exception of the exclusion discussed below.

Specifically excluded from the scope of the order are: (1) All pipes meeting aerospace, hydraulic, and bearing tubing specifications; (2) all pipes meeting the chemical requirements of ASTM A–335, whether finished or unfinished; and (3) unattached couplings. Also excluded from the scope of the order are all mechanical, boiler, condenser and heat exchange tubing, except when such products conform to the dimensional requirements, *i.e.,* outside diameter and wall thickness of ASTM A–53, ASTM A–106 or API 5L specifications.

The merchandise covered by the order is currently classified in the Harmonized Tariff Schedule of the United States ("HTSUS") under item numbers: 7304.19.1020, 7304.19.1030, 7304.19.1045, 7304.19.1060, 7304.19.5020, 7304.19.5050, 7304.31.6050, 7304.39.0016, 7304.39.0020, 7304.39.0024, 7304.39.0028, 7304.39.0032, 7304.39.0036, 7304.39.0040, 7304.39.0044, 7304.39.0048, 7304.39.0052, 7304.39.0056, 7304.39.0062, 7304.39.0068, 7304.39.0072, 7304.51.5005, 7304.51.5060, 7304.59.6000, 7304.59.8010, 7304.59.8015, 7304.59.8020, 7304.59.8025, 7304.59.8030, 7304.59.8035, 7304.59.8040, 7304.59.8045, 7304.59.8050, 7304.59.8055, 7304.59.8060, 7304.59.8065, and 7304.59.8070.

Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the merchandise subject to this scope is dispositive.

**Amendment to the Final Determination**

On September 27, 2010, a petitioner in this case, United States Steel Corporation ("U.S. Steel"), filed timely allegations that the Department made two ministerial errors in its *Final Determination.* In summary, U.S. Steel alleged that the Department made errors in the summary rate table for respondent Hengyang [1] and made errors in the calculation of the electricity subsidy rate for Hengyang. No interested party filed a rebuttal to U.S. Steel's allegations.

After analyzing the allegations, we have determined, in accordance with 19 CFR 351.224(e), that we made the two alleged ministerial errors in our calculations. *See generally* Memorandum to Susan Kuhbach, Director, Office 1, AD/CVD Operations, from Matthew Jordan, International Trade Compliance Analyst, AD/CVD Operations, Office 1, "Countervailing Duty Investigation: Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe ("Seamless Pipe") from the People's Republic of China ("PRC"): Ministerial Errors for Final Determination" (October 14, 2010).

Our corrected calculation to the "Provision of Electricity for Less Than Adaquate Remuneration Program" found an *ad valorem* subsidy rate of 5.46 percent for Hengyang. The previously calculated rate had been 4.22 percent *ad valorem.* As a result of the corrections, Hengyang's total countervailing duty rate changed from 53.65 percent to 56.67 percent. The countervailing duty rate for the other respondent in the seamless pipe investigation, TPCO,[2] did not change. As a result of the correction to Hengyang's rate, the countervailing duty rate for all others changed from 33.66 percent to 35.17 percent. In accordance with 19 CFR 351.224(e), we are amending the *Final Determination* to reflect these changes.

**Countervailing Duty Order**

According to section 706(b)(2) of the Act, duties shall be assessed on subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's notice of final determination if that determination is based upon the threat of material injury. Section 706(b)(1) of the Act states, "{i}f the Commission, in its final determination under section 705(b), finds material injury or threat of material injury which, but for the suspension of liquidation under section 703(d)(2), would have led to a finding of material injury, then entries of the merchandise subject to the countervailing duty order, the liquidation of which has been suspended under section 703(d)(2), shall be subject to the imposition of countervailing duties under section 701(a)." In addition, section 706(b)(2) of the Act requires U.S. Customs and Border Protection ("CBP") to refund any cash deposits or bonds of estimated countervailing duties posted before the date of publication of the ITC's final affirmative determination, if the ITC's final determination is based on threat other than the threat described in section 706(b)(1) of the Act. Because the ITC's final determination in this case is based on the threat of material injury and is not accompanied by a finding that injury would have resulted but for the imposition of suspension of liquidation of entries since the Department's *Preliminary Determination* [3] was published in the **Federal Register**, section 706(b)(2) of the Act is applicable.

As a result of the ITC's determination and in accordance with section 706(a)(1) of the Act, the Department will direct CBP to assess, upon further instruction by the Department, countervailing duties equal to the amount of the net countervailable subsidy for all relevant entries of seamless pipe from the PRC. In accordance with section 706 of the Act, the Department will direct CBP to reinstitute suspension of liquidation,[4]

[1] For the complete list of companies that "Hengyang" comprises, please see the "Suspension of Liquidation" section, below.

[2] For the complete list of companies that "TPCO" comprises, please see the "Suspension of Liquidation" section, below.

[3] *See Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination,* 75 FR 9163 (March 1, 2010) ("*Preliminary Determination*").

[4] The Department instructed CBP to discontinue the suspension of liquidation on June 29, 2010, in accordance with section 703(d) of the Act. Section 703(d) states that the suspension of liquidation pursuant to a preliminary determination may not remain in effect for more than four months. Entries

Continued

effective on the date of publication of the ITC's notice of final determination in the **Federal Register**, and to require a cash deposit for each entry of subject merchandise in an amount equal to the net countervailable subsidy rates listed below. *See* section 706(a)(3) of the Act. The all others rate applies to all producers and exporters of subject merchandise not specifically listed.

| Exporter/Manufacturer | Net subsidy rate |
|---|---|
| Tianjin Pipe (Group) Corp., Tianjin Pipe Iron Manufacturing Co., Ltd., Tianguan Yuantong Pipe Product Co., Ltd., Tianjin Pipe International Economic and Trading Co., Ltd., and TPCO Charging Development Co., Ltd. | 13.66 |
| Hengyang Steel Tube Group Int'l Trading, Inc., Hengyang Valin Steel Tube Co., Ltd., Hengyang Valin MPM Tube Co., Ltd., Xigang Seamless Steel Tube Co., Ltd., Wuxi Seamless Special Pipe Co., Ltd., Wuxi Resources Steel Making Co., Ltd., Jiangsu Xigang Group Co., Ltd., Hunan Valin Xiangtan Iron & Steel Co., Ltd., Wuxi Sifang Steel Tube Co., Ltd., Hunan Valin Steel Co., Ltd., Hunan Valin Iron & Steel Group Co., Ltd. | 56.67 |
| All Others | 35.17 |

*Termination of the Suspension of Liquidation*

As a result of our affirmative critical circumstances finding on Hengyang and all companies other than TPCO, CBP suspended liquidation and collected cash deposits or bonds on all entries by these companies made 90 days prior to our affirmative *Preliminary Determination.* Entries for TPCO were suspended and cash deposits or bonds were collected as of March 1, 2010 (*i.e.,* the date of publication of our *Preliminary Determination*).

The Department will instruct CBP to terminate the suspension of liquidation for entries of seamless pipe from the PRC, entered or withdrawn from warehouse, for consumption prior to the publication of the ITC's notice of final determination. The Department will also instruct CBP to refund any cash deposits made and release any bonds with respect to entries of seamless pipe entered, or withdrawn from warehouse, for consumption on or after December 1, 2009 (*i.e.,* 90 days prior to the date of publication of the *Preliminary Determination*), but before the date of publication of the ITC's final determination in the **Federal Register**.

This notice constitutes the countervailing duty order with respect to seamless pipe from the PRC, pursuant to section 706(a) of the Act. Interested parties may contact the Department's Central Records Unit, Room 7046 of the main Commerce Building, for copies of an updated list of countervailing duty orders currently in effect.

This order is issued and published in accordance with section 706(a) of the Act, 19 CFR 351.224(e) and 19 CFR 351.211(b).

Dated: November 5, 2010

**Edward C. Yang,**

*Acting Deputy Assistant Secretary for Import Administration.*

[FR Doc. 2010–28402 Filed 11–9–10; 8:45 am]

**BILLING CODE 3510–DS–P**

of seamless pipe from the PRC made on or after June 29, 2010, and prior to the date of publication of the ITC's final determination in the **Federal Register** are not liable for the assessment of countervailing duties because of the Department's discontinuation, effective June 29, 2010, of the suspension of liquidation.

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–956]**

## Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order

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

**DATES:** *Effective Date:* November 10, 2010.

**SUMMARY:** Based on affirmative final determinations by the Department of Commerce (the "Department") and the International Trade Commission ("ITC"), the Department is issuing an antidumping duty order on certain seamless carbon and alloy steel standard, line, and pressure pipe ("seamless pipe") from the People's Republic of China ("PRC"). In addition, the Department is amending its final determination to correct certain ministerial errors.

**FOR FURTHER INFORMATION CONTACT:** Magd Zalok or Brandon Farlander, AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4162 or (202) 482–0182, respectively.

**SUPPLEMENTARY INFORMATION:**

### Background

In accordance with sections 735(d) and 777(i)(1) of the Tariff Act of 1930, as amended ("Act"), on September 21, 2010, the Department published the final determination of sales at less than fair value in the antidumping duty investigation of seamless pipe from the PRC. *See Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Critical Circumstances, in Part,* 75 FR 57449 (September 21, 2010) ("*Final Determination*"). On November 4, 2010, the ITC notified the Department of its affirmative determination of threat of material injury to a U.S. industry, and its negative determination of critical circumstances. *See Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from China,* USITC Investigation Nos. 701–TA–469 and 731–TA–1168 (Final), USITC Publication 4190, (November 2010).

*Scope of the Order*

The merchandise covered by this order is certain seamless carbon and alloy steel (other than stainless steel) pipes and redraw hollows, less than or equal to 16 inches (406.4 mm) in outside diameter, regardless of wall-thickness, manufacturing process (*e.g.,* hot-finished or cold-drawn), end finish (*e.g.,* plain end, beveled end, upset end, threaded, or threaded and coupled), or surface finish (*e.g.,* bare, lacquered or coated). Redraw hollows are any unfinished carbon or alloy steel (other than stainless steel) pipe or "hollow profiles" suitable for cold finishing operations, such as cold drawing, to meet the American Society for Testing and Materials ("ASTM") or American Petroleum Institute ("API") specifications referenced below, or comparable specifications. Specifically included within the scope are seamless carbon and alloy steel (other than stainless steel) standard, line, and pressure pipes produced to the ASTM A–53, ASTM A–106, ASTM A–333, ASTM A–334, ASTM A–589, ASTM A–795, ASTM A–1024, and the API 5L specifications, or comparable specifications, and meeting the physical parameters described above, regardless of application, with the exception of the exclusion discussed below.

Specifically excluded from the scope of the order are: (1) All pipes meeting

aerospace, hydraulic, and bearing tubing specifications; (2) all pipes meeting the chemical requirements of ASTM A–335, whether finished or unfinished; and (3) unattached couplings. Also excluded from the scope of the order are all mechanical, boiler, condenser and heat exchange tubing, except when such products conform to the dimensional requirements, *i.e.,* outside diameter and wall thickness of ASTM A–53, ASTM A–106 or API 5L specifications.

The merchandise covered by the order is currently classified in the Harmonized Tariff Schedule of the United States ("HTSUS") under item numbers: 7304.19.1020, 7304.19.1030, 7304.19.1045, 7304.19.1060, 7304.19.5020, 7304.19.5050, 7304.31.6050, 7304.39.0016, 7304.39.0020, 7304.39.0024, 7304.39.0028, 7304.39.0032, 7304.39.0036, 7304.39.0040, 7304.39.0044, 7304.39.0048, 7304.39.0052, 7304.39.0056, 7304.39.0062, 7304.39.0068, 7304.39.0072, 7304.51.5005, 7304.51.5060, 7304.59.6000, 7304.59.8010, 7304.59.8015, 7304.59.8020, 7304.59.8025, 7304.59.8030, 7304.59.8035, 7304.59.8040, 7304.59.8045, 7304.59.8050, 7304.59.8055, 7304.59.8060, 7304.59.8065, and 7304.59.8070.

Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the merchandise subject to this scope is dispositive.

*Amendment to the Final Determination*

On September 21, 2010, the Department published its affirmative final determination in this proceeding. *See Final Determination*. On September 21, 2010, United States Steel Corporation ("U.S. Steel"), a petitioner in the investigation, and Tianjin Pipe (Group) Corporation and Tianjin Pipe International Economic and Trading Corporation (collectively "TPCO"), a respondent in the investigation, submitted timely ministerial error allegations and requested, pursuant to 19 CFR 351.224, that the Department correct the alleged ministerial errors in the dumping margin calculations. On September 27, 2010, U.S. Steel, TPCO and Hengyang Steel Tube Group Int'l Trading Inc., Hengyang Valin Steel Tube Co., Ltd. and Hengyang Valin MPM Tube Co., Ltd. (collectively "Hengyang"), the other mandatory respondent in this investigation, filed rebuttal comments. No other interested party submitted ministerial error allegations or rebuttal comments.

After analyzing all interested party comments and rebuttals, we have determined, in accordance with section 735(e) of the Act and 19 CFR 351.224(e), that we made the following ministerial errors in our calculations for the *Final Determination* with respect to TPCO and Hengyang:

- For TPCO, we unintentionally adjusted the denominator used to calculate the ratio for market-economy purchases ("MEP") of steel scrap, thereby resulting in an incorrect ratio for the MEP of steel scrap.
- For TPCO, we unintentionally calculated the percentage reduction to TPCO's reported by-product offset by dividing the quantity of further processed steel scrap by the quantity of steel scrap reintroduced into production, rather than the quantity of steel scrap generated by TPCO during the period of investigation.
- For one of the three financial statements used to calculate the financial ratios for TPCO and Hengyang, we unintentionally: (1) Classified an amount for dividend income as selling, general and administrative expenses ("SG&A") and interest, instead of excluding the dividend income from our calculation; and (2) excluded a financial expense amount, rather than including it in the SG&A and interest expense category.

For a detailed discussion of the ministerial errors alleged by U.S. Steel and the respondent, as well as the Department's analysis, *see* the Memorandum to Susan H. Kuhbach, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, "Ministerial Error Memorandum, Amended Final Determination of Sales at Less Than Fair Value: Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China," dated October 15, 2010 ("Ministerial Error Memorandum").

Also, in the *Final Determination* we determined that a number of companies in addition to the mandatory respondents qualified for a separate rate. *See Final Determination* at 57452. Since the cash deposit rate for the separate rate respondents is based on the average of the margins for the mandatory respondents, and the margins for TPCO and Hengyang changed as a result of the aforementioned ministerial errors, in the amended final determination, we have revised the calculation of the dumping margin for the separate rate respondents as well. *See* Ministerial Error Memorandum. The amended weighted average dumping margins are as follows:

| Exporter | Producer | Weighted-Average margin percent |
|---|---|---|
| Tianjin Pipe International Economic and Trading Corporation | Tianjin Pipe (Group) Corporation | 50.01 |
| Hengyang Steel Tube Group Int'l Trading Inc | Hengyang Valin Steel Tube Ltd., and Hengyang Valin MPM Tube Co., Ltd. | 82.24 |
| Xigang Seamless Steel Tube Co., Ltd | Xigang Seamless Steel Tube Co., Ltd., and Wuxi Seamless Special Pipe Co., Ltd. | 66.13 |
| Jiangyin City Changjiang Steel Pipe Co., Ltd | Jiangyin City Changjiang Steel Pipe Co., Ltd | 66.13 |
| Pangang Group Chengdu Iron & Steel Co., Ltd | Pangang Group Chengdu Iron & Steel Co., Ltd | 66.13 |
| Yangzhou Lontrin Steel Tube Co., Ltd | Yangzhou Lontrin Steel Tube Co., Ltd | 66.13 |
| Yangzhou Chengde Steel Tube Co., Ltd | Yangzhou Chengde Steel Tube Co., Ltd | 66.13 |
| PRC-wide Entity | | 98.74 |

*Antidumping Duty Order*

On November 4, 2010, in accordance with section 735(d) of the Act, the ITC notified the Department of its final determination in this investigation. In its final determination in this investigation, the ITC found that a U.S. industry is threatened with material injury by reason of imports of seamless pipe from the PRC. According to section 736(b)(2) of the Act, duties shall be assessed on subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's notice of final determination if that determination is based on the threat of material injury and is not accompanied by a finding that injury would have resulted without the imposition of suspension of liquidation of entries since the

Department's preliminary determination. In addition, section 736(b)(2) of the Act requires U.S. Customs and Border Protection ("CBP") to refund any cash deposits or bonds of estimated antidumping duties posted since the preliminary antidumping determination if the ITC's final determination is threat-based. Therefore, in accordance with section 736(b)(2) of the Act and our practice, we will instruct CBP to terminate the suspension of liquidation and refund any cash deposits made and release any bonds posted for estimated antidumping duties for entries of seamless pipe from the PRC entered, or withdrawn from warehouse, for consumption on or after April 28, 2010, the date on which the Department published its *Preliminary Determination,* but before the date of publication of the ITC's final determination in the **Federal Register.** For exports from Hengyang and the PRC-wide entity, we will instruct CBP to lift suspension, release any bond or other security, and refund any cash deposit made to secure the payment of antidumping duties with respect to entries of the merchandise entered, or withdrawn from warehouse, for consumption on or after January 28, 2010 (*i.e.,* 90 days prior to the date of publication of the preliminary determination in the **Federal Register**), through April 27, 2010. Further, we will instruct CBP to continue to suspend liquidation of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's notice of final determination. The instructions suspending liquidation will remain in effect until further notice.

In accordance with section 736(a)(3) of the Act, we will instruct CBP to require cash deposits of estimated antidumping duties. In its final determination in the companion countervailing duty ("CVD") investigation, the Department found that TPCO's and Hengyang's merchandise benefited from export subsidies.[1] Additionally, because the Department found that TPCO and Hengyang, the companies that it investigated in the CVD case, benefited from export subsidies, all other exporters have benefited from export subsidies based upon the results determined for TPCO and Hengyang. Therefore, we will instruct CBP to require an antidumping duty cash deposit equal to the weighted-average amount by which the normal value exceeds the U.S. price for TPCO and Hengyang, as indicated in the table above, minus the amount determined to constitute an export subsidy for each company. For the separate-rate companies, we will instruct CBP to adjust the dumping margin by the amount of export subsidies included in the All Others rate from the *CVD Final.* Accordingly, as of the date of publication of the ITC's final affirmative injury determination, CBP will require, at the same time as importers would normally deposit estimated duties on this subject merchandise, a cash deposit equal to the estimated weighted-average antidumping duty margins discussed above, minus the amount determined to constitute an export subsidy. *See* section 735(c)(1) of the Act. The "PRC-wide" rate applies to all exporters of subject merchandise not specifically listed.

Additionally, in accordance with section 736 of the Act, the Department will also direct CBP to assess antidumping duties on all unliquidated entries of seamless pipe from the PRC entered, or withdrawn from warehouse, for consumption on or after the date on which the ITC published its notice of final determination of threat of material injury in the **Federal Register.**

This notice constitutes the antidumping duty order with respect to seamless pipe from the PRC pursuant to section 736(a) of the Act. Interested parties may contact the Department's Central Records Unit, Room 7043 of the main Commerce building, for copies of an updated list of antidumping duty orders currently in effect.

This order is published in accordance with section 736(a) of the Act and 19 CFR 351.211.

**Edward C. Yang,**

*Acting Deputy Assistant Secretary for Import Administration.*

[FR Doc. 2010–28410 Filed 11–9–10; 8:45 am]

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[1] *See Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination,* 75 FR 57444 (September 21, 2010) ("*CVD Final*").

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Initiation of Antidumping and Countervailing Duty Administrative Reviews; Correction

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

**SUMMARY:** The Department of Commerce ("the Department") published a notice in the **Federal Register** on October 28, 2010, concerning the initiation of administrative reviews of various antidumping and countervailing duty orders and findings with September anniversary dates. The document contained incorrect information in both the Antidumping and Countervailing Duty Proceedings table.

**DATES:** *Effective Date:* November 10, 2010.

**FOR FURTHER INFORMATION CONTACT:** Sheila E. Forbes, Office of AD/CVD Operations, Customs Unit, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, telephone: (202) 482–4697.

**Backgound**

In the **Federal Register** of October 28, 2010, 75 FR 66349, under the tables entitled "Antidumping Duty Proceedings and Countervailing Duty Proceedings," we note that the Department inadvertently listed the exporter names: Asia Pacific CIS (Wuxi) Co., Ltd., Asia Pacific CIS (Thailand) Co., Ltd., Hengtong Hardware Manufacturing (Huizhou) Co., Ltd., Taiwan Rail Company, and King Shan Wire Co., Ltd. under case numbers A–570–941 and C–570–942. For reasons explained in footnote #'s 5 & 6 in the October 28, 2010 **Federal Register** notice, the Department retracts its initiation of an administrative review of the antidumping duty order and the countervailing duty order with respect to the above referenced company names for case numbers A–570–941 and C–570–942 for the period of review 09/01/09 through 08/31/10.

Dated: November 4, 2010.

**Susan H. Kuhbach,**

*Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2010–28408 Filed 11–9–10; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XA026**

### Caribbean Fishery Management Council; Public Meeting

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

**ACTION:** Notice of public meetings.

**SUMMARY:** The Catch Share Panel of the Caribbean Fishery Management Council will hold a public meeting to discuss

the issues contained in the enclosed agenda.

**DATES:** The meeting will be held on December 8, 2010, from 7 p.m. to 9 p.m.

**ADDRESSES:** The meeting will be held at the Holiday Inn Hotel in Mayaguez, Puerto Rico.

**FOR FURTHER INFORMATION CONTACT:** Caribbean Fishery Management Council, 268 Muñoz Rivera Avenue, Suite 1108, San Juan, Puerto Rico 00918–2577; telephone: (787) 766–5926.

**SUPPLEMENTARY INFORMATION:** The Catch Share Panel of The Caribbean Fishery Management Council will hold a public meeting to discuss the following agenda items:

—Alternatives for the collection of statistical data for the deep-water fishes in the west coast of Puerto Rico.

—Report on the "Energy and Fisheries" Workshop—Nelson Crespo.

—"Catch Shares Experience in the United States" Presentation—Greg Engstron.

—Other Issues.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

### Special Accommodations

These meetings are physically accessible to people with disabilities. Simultaneous interpretation will be provided (English-Spanish). For more information or request for sign language interpretation and other auxiliary aids, please contact Mr. Miguel A. Rolón, Executive Director, Caribbean Fishery Management Council, 268 Muñoz Rivera Avenue, Suite 1108, San Juan, Puerto Rico, 00918–2577, telephone: (787) 766–5926, at least 5 days prior to the meeting date.

Dated: November 5, 2010.

**Tracey L. Thompson,**

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

[FR Doc. 2010–28411 Filed 11–9–10; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–928]**

## Uncovered Innerspring Units From the People's Republic of China: Preliminary Results of First Antidumping Duty Administrative Review

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

**SUMMARY:** The Department of Commerce (the "Department") is conducting an administrative review of the antidumping duty order on uncovered innerspring units ("innersprings") from the People's Republic of China ("PRC"), covering the period of review ("POR") August 6, 2008–January 31, 2010. As discussed below, we preliminarily determine that the PRC-wide entity made sales in the United States at prices below normal value ("NV"). If these preliminary results are adopted in our final results of review, we will instruct U.S. Customs and Border Protection ("CBP") to assess antidumping duties on entries of subject merchandise during the POR.

**DATES:** *Effective Date:* November 10, 2010.

**FOR FURTHER INFORMATION CONTACT:** Toni Dach, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington DC 20230; telephone (202) 482–1655.

**SUPPLEMENTARY INFORMATION:** On March 1, 2010, we received a request from the Petitioner [1] to conduct administrative reviews for two companies, Foshan Jingxin Steel Wire & Spring Co., Ltd. ("Jingxin") and Top One Manufacturing Factory ("Top One"). On March 30, 2010, we initiated an administrative review of the antidumping order on innersprings from the PRC.[2]

On March 31, 2010, the Department issued antidumping duty questionnaires to Jingxin and Top One, since they were the only two companies for which a review was requested.[3] On April 3, 2010, Jingxin received the antidumping duty questionnaire. On April 23, 2008, the Department re-issued the antidumping duty questionnaire to Top One because the initial questionnaire had not been delivered by FedEx.[4] On April 26, 2010 Top One received the antidumping duty questionnaire reissued by the Department on April 23, 2010.[5] We note that neither Jingxin nor Top One responded to the Department's questionnaire.

### Scope of the Order

The merchandise subject to the order is uncovered innerspring units composed of a series of individual metal springs joined together in sizes corresponding to the sizes of adult mattresses (*e.g.,* twin, twin long, full, full long, queen, California king and king) and units used in smaller constructions, such as crib and youth mattresses. All uncovered innerspring units are included in the scope regardless of width and length. Included within this definition are innersprings typically ranging from 30.5 inches to 76 inches in width and 68 inches to 84 inches in length. Innersprings for crib mattresses typically range from 25 inches to 27 inches in width and 50 inches to 52 inches in length.

Uncovered innerspring units are suitable for use as the innerspring component in the manufacture of innerspring mattresses, including mattresses that incorporate a foam encasement around the innerspring.

Pocketed and non-pocketed innerspring units are included in this definition. Non-pocketed innersprings are typically joined together with helical wire and border rods. Non-pocketed innersprings are included in this definition regardless of whether they have border rods attached to the perimeter of the innerspring. Pocketed innersprings are individual coils covered by a "pocket" or "sock" of a nonwoven synthetic material or woven material and then glued together in a linear fashion.

Uncovered innersprings are classified under subheading 9404.29.9010 and have also been classified under subheadings 9404.10.0000, 7326.20.0070, 7320.20.5010, or 7320.90.5010 of the Harmonized Tariff Schedule of the United States ("HTSUS"). The HTSUS subheadings are provided for convenience and customs purposes only; the written description of the scope of the order is dispositive.

### Facts Available

Section 776(a)(2) of the Tariff Act of 1930, as amended ("the Act"), provides that, if an interested party: (A)

[1] The petitioner is Leggett & Platt, Incorporated (hereinafter referred to as the "Petitioner").

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 75 FR 15679 (March 30, 2010) ("*Initiation*").

[3] *See* the Department's letters dated March 31, 2010.

[4] *See* the Department's letter dated April 23, 2010; *see also* Delivery Memo.

[5] *See* Delivery Memo.

Withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested subject to sections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

As discussed in the **SUPPLEMENTARY INFORMATION** section above, neither Jingxin nor Top One responded to the antidumping duty questionnaires issued by the Department on March 31, 2010, and April 23, 2010, respectively. Additionally, the Department confirmed delivery for the initial questionnaires.[6] Therefore, the Department finds that Jingxin and Top One did not cooperate to the best of their abilities, and their non-responsiveness necessitates the use of facts available, pursuant to sections 776(a)(2)(A), (B) and (C) of the Act.

Based upon Jingxin's and Top One's failure to submit responses to the Department's questionnaires, the Department finds that Jingxin and Top One withheld requested information, failed to provide the information in a timely manner and in the form requested, and significantly impeded this proceeding, pursuant to sections 776(a)(2)(A), (B) and (C) of the Act. Further, because Jingxin and Top One failed to demonstrate that they qualify for separate rate status,[7] we consider both entities to be part of the PRC-wide entity. Thus, we find that the PRC-wide entity, including Jingxin and Top One, withheld requested information, failed to provide information in a timely manner and in the form requested, and significantly impeded this proceeding. Therefore, the Department must rely on the facts otherwise available in order to determine a margin for the PRC-wide entity, pursuant to section 776(a)(2)(A), (B) and (C) of the Act.[8]

**Adverse Facts Available**

Section 776(b) of the Act states that if the Department "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission * * *, in reaching the applicable determination under this title, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available."[9] Adverse inferences are appropriate "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[10] An adverse inference may include reliance on information derived from the petition, the final determination in the investigation, any previous review, or any other information placed on the record.[11]

Because Jingxin and Top One, which are part of the PRC-wide entity, failed to cooperate to the best of their ability in providing the requested information, as discussed above, we find it appropriate, in accordance with sections 776(a)(2)(A), (B) and (C), as well as section 776(b), of the Act, to assign total adverse facts available ("AFA") to the PRC-wide entity.[12] By doing so, we ensure that the companies that are part of the PRC-wide entity will not obtain a more favorable result by failing to cooperate than had they cooperated fully in this review.

As discussed above, section 776(b) of the Act authorizes the Department to use, as AFA, information derived from the petition, the final determination in the less-than-fair-value ("LTFV") investigation, any previous administrative review, or any other information placed on the record. In selecting an AFA rate, the Department's practice has been to assign non-cooperative respondents the highest margin determined for any party in the LTFV investigation or in any administrative review.[13] As AFA, we are assigning the PRC-wide entity, which includes Jingxin and Top One, the highest rate from any segment of this proceeding, which in this case is 234.51 percent, as establish in the investigation.[14]

**Corroboration of PRC-Wide Entity Rate**

Section 776(c) of the Act requires that where the Department relies on secondary information, the Department corroborate, to the extent practicable, a figure which it applies as AFA. To be considered corroborated, information must be found to be both reliable and relevant. As noted above, we are applying as AFA the highest rate from any segment of this proceeding, which is the rate currently applicable to all exporters subject to the PRC-wide rate. The AFA rate in the current review (*i.e.,* the PRC-wide rate of 234.51 percent) represents the highest rate from the petition in the LTFV investigation.[15]

For purposes of corroboration, the Department will consider whether that margin is both reliable and relevant. The AFA rate we are applying for the current review was corroborated in the LTFV investigation.[16] Moreover, no information has been presented in the current review that calls into question the reliability of this information.

With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal to determine whether a margin continues to have relevance. Where circumstances indicate that the selected margin is not appropriate as AFA, the Department will disregard the margin and determine an appropriate margin. For example, in *Fresh Cut Flowers from Mexico; Final Results of Antidumping Administrative Review,* 61 FR 6812, 6814 (February 22, 1996), the Department disregarded the highest margin in that case as best information available (the predecessor to adverse facts available) because the margin was based on another company's uncharacteristic business expense resulting in an unusually high margin. The information used in calculating this margin was based on sales and production data submitted by the petitioner in the LTFV investigation, together with the most appropriate surrogate value information available to the Department chosen from submissions by the parties in the LTFV investigation. Furthermore, the calculation of this margin was subject to comment from interested parties in the

[6] *See* Delivery Memo.

[7] In a non-market economy companies that do not submit a response to the questionnaire or do not adequately establish that they are independent of government control are subject to the single economy-wide rate. In this case, by failing to respond to the antidumping duty questionnaire, Jingxin and Top One did not provide evidence that they are independent of government control.

[8] *See Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China: Final Results of Antidumping Duty Administrative Review,* 71 FR 69546 (December 1, 2006) and accompanying Issues and Decision Memorandum at Comment 1.

[9] *See also* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316 at 870 (1994).

[10] *Id.*

[11] *See* section 776(b) of the Act.

[12] *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results of the First Administrative Review and New Shipper Review,* 72 FR 10689, 10692 (March 9, 2007) (decision to apply total AFA to the NME-wide entity unchanged in *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of the First Antidumping Duty Administrative Review and First New Shipper Review,* 72 FR 52052 (September 12, 2007).

[13] *See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances,* 73 FR 33977 (June 16, 2008).

[14] *See Uncovered InnerspringUnits from the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 73 FR 79443 (December 29, 2008).

[15] *Id.*

[16] *Id.*

proceeding after this margin was selected in calculating the rate for the PRC-wide entity in the investigation's *Innersprings Investigation Prelim.*[17] As there is no information on the record of this review that demonstrates that this rate is not appropriate for use as AFA, we determine that this rate continues to have relevance.

As the 234.51 percent rate is both reliable and relevant, we determine that it has probative value and is corroborated to the extent practicable, in accordance with section 776(c) of the Act. Therefore, we have assigned this AFA rate to exports of the subject merchandise by the PRC-wide entity.

**Preliminary Results of Review**

The Department has determined that the following preliminary dumping margin exists for the period August 6, 2008–January 31, 2010:

INNERSPRINGS FROM THE PRC

| Manufacturer/Exporter | Margin (percent) |
|---|---|
| PRC-wide Entity[18] ..... | 234.51 |

In accordance with section 351.301(c)(3)(ii) of the Department's regulations, for purposes of the final results of this administrative review, interested parties may submit publicly available information to value factors of production within 20 days after the date of publication of these preliminary results. Interested parties must provide the Department with supporting documentation for the publicly available information to value each factor of production. Additionally, in accordance with section 351.301(c)(1) of the Department's regulations, for purposes of the final results of this administrative review, interested parties may submit factual information to rebut, clarify, or correct factual information submitted by an interested party less than ten days before, on, or after, the applicable deadline for submission of such factual information. However, the Department notes that section 351.301(c)(1) of the Department's regulations permits new information only insofar as it rebuts, clarifies, or corrects information recently placed on the record. The Department generally cannot accept the submission of additional, previously absent-from-the-record alternative surrogate value information pursuant to section 351.301(c)(1) of the Department's regulations.[19]

Interested parties may submit case briefs and/or written comments no later than 30 days after the date of publication of these preliminary results of review.[20] Rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments, may be filed no later than 37 days after the date of publication of these preliminary results of review.[21] The Department urges interested parties to provide an executive summary of each argument contained within the case briefs and rebuttal briefs.

The Department will issue the final results of this administrative review, which will include the results of its analysis of issues raised in any such comments, within 120 days of publication of these preliminary results, pursuant to section 751(a)(3)(A) of the Act.

**Assessment Rates**

Upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review. The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review excluding any reported sales that entered during the gap period.

**Cash Deposit Requirements**

The following cash-deposit requirements will be effective upon publication of these final results for shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of these final results, as provided by section 751(a)(2)(C) of the Act: (1) For subject merchandise exported by Jingxin and Top One the cash deposit rate will be the PRC-wide rate of 234.51 percent; (2) for all other PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, and thus, are a part of the PRC-wide entity, the cash-deposit rate will be the PRC-wide rate of 234.51 percent; and (3) for all non-PRC exporters of subject merchandise, the cash-deposit rate will be the rate applicable to the PRC supplier of that exporter. These deposit requirements shall remain in effect until further notice.

**Notification of Interested Parties**

This notice also serves as a preliminary reminder to importers of their responsibility under section 351.402(f) of the Department's regulations to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review, and this notice are in accordance with sections 751(a)(1) and 777(i) of the Act, and sections 351.213 and 351.221(b)(4) of the Department's regulations.

Dated: October 27, 2010.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 2010–28415 Filed 11–9–10; 8:45 am]

**BILLING CODE 3510–DS–P**

[17] *See Uncovered Innerspring Units from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value,* 73 FR 45729 (August 6, 2008) ("*Innersprings Investigation Prelim*").

[18] The PRC-wide entity includes Jingxin and Top One.

[19] *See Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission, in Part,* 72 FR 58809 (October 17, 2007) and accompanying Issues and Decision Memorandum at Comment 2.

[20] *See* section 351.309(c)(ii) of the Department's regulations.

[21] *See* section 351.309(d) of the Department's regulations.

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

### Foreign-Trade Zone 226—Merced, Madera, Fresno, and Tulare Counties, California; Site Renumbering Notice

Foreign-Trade Zone 226 was approved by the Foreign-Trade Zones Board on December 22, 1997 (Board Order 946, 63 FR 778–779, 01/07/98) and expanded on May 14, 2003 (Board Order 1276, 68 FR 27985, 05/22/03).

FTZ 226 currently consists of 12 "Sites" totaling some 2,424 acres located within and adjacent to the Fresno Customs port of entry area. The current update does not alter the physical boundaries that have previously been approved, but instead involves an administrative renumbering of existing Site 4A to separate unrelated, non-contiguous sites for recordkeeping purposes.

Under this revision, the site list for FTZ 226 will be as follows: Site 1 (791 acres)—Castle Airport (formerly Castle Air Force Base) Morimoto Industrial Park, 3450 C Street, Atwater (Merced County); Site 2 (242 acres)—within the MidState 99 Distribution Center, Visalia (Tulare County) (includes 65 acres located at 2525 North Plaza Drive approved on a temporary basis until 3/1/11); Site 3 (191 acres)—Mid Cal Business Park, Highway 33, Gustine

(Merced County); Site 4 (101 acres)—within the Applegate Business Park, Highway 33, Air Park Road, Atwater (Merced County); Site 6 (87 acres)—City of Madera Airport Industrial Park/State Center Commerce Park, Falcon Drive, Madera (Madera County); Site 7 (10 acres)—City of Madera Industrial Park, 2500 West Industrial Avenue, Madera (Madera County); Site 8 (102 acres)—Airways East Business Park, East Shields Avenue, Fresno (Fresno County); Site 9 (225 acres)—Central Valley Business Park, East North Avenue, Fresno (Fresno County); Site 10 (497 acres)—consisting of the Fresno Airport Industrial Park area located on Aircorp Way and at the intersection of E. Anderson and E. Clinton Avenues, Fresno, and the adjacent City of Clovis Industrial Park located at the intersection of West Dakota Avenue & West Pontiac Way, Clovis (Fresno County); Site 11 (35 acres)—Reedley Industrial Park II, 1301 South Buttonwillow Avenue, Reedley (Fresno County); Site 12 (128 acres)—City of Selma Industrial Park, East Nebraska Avenue, Selma (Fresno County); and, Site 13 (15 acres)—located at 810 E. Continental Avenue, Tulare, (Tulare County).

For further information, contact Christopher Kemp at *Christopher.Kemp@trade.gov* or (202) 482–0862.

Dated: November 4, 2010.

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. 2010–28409 Filed 11–9–10; 8:45 am]

**BILLING CODE P**

## COMMODITY FUTURES TRADING COMMISSION

### Request for Comment on a Proposal to Exempt, Pursuant to the Authority in Section 4(c) of the Commodity Exchange Act, the Trading and Clearing of Certain Products Related to the CBOE Gold ETF Volatility Index and Similar Products

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of Proposed Order and Request for Comment.

**SUMMARY:** The Commodity Futures Trading Commission ("CFTC" or the "Commission") is proposing to exempt the trading and clearing of certain contracts called "options" ("Options") on the CBOE Gold ETF Volatility Index ("GVZ Index"), which would be traded on the Chicago Board Options Exchange ("CBOE"), a national securities exchange, and cleared through the Options Clearing Corporation ("OCC") in its capacity as a registered securities clearing agency, from the provisions of the Commodity Exchange Act ("CEA")[1] and the regulations thereunder, to the extent necessary to permit such Options on the GVZ Index to be so traded and cleared. Authority for this exemption is found in Section 4(c) of the CEA.[2] The Commission is also requesting comment regarding whether the Commission should provide a categorical exemption that would permit the trading and clearing of options on indexes that measure the volatility of shares of gold exchange-traded funds ("ETFs") generally, regardless of issuer, including options on any index that measures the magnitude of changes in, and is composed of the price(s) of shares of one or more gold ETFs and the price(s) of any other instrument(s), which other instruments are securities as defined in the Securities Exchange Act of 1934 ("the '34 Act").[3]

**DATES:** Comments must be received on or before December 10, 2010.

**ADDRESSES:** Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *E-mail: goldvolatility4c@cftc.gov*. Include "Options on GVZ Index and Similar Products" in the subject line of the message.
- *Fax:* 202–418–5521.
- *Mail:* Send to David A. Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.
- *Courier:* Same as mail above.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments may be posted as received to *http://www.cftc.gov*. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the established procedures in CFTC Regulation 145.9.

**FOR FURTHER INFORMATION CONTACT:** Robert B. Wasserman, Associate Director, 202–418–5092, *rwasserman@cftc.gov*, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street, NW., Washington, DC 20581, or Anne C. Polaski, Special Counsel, 312–596–0575, *apolaski@cftc.gov*, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, 525 W. Monroe Street, Suite 1100, Chicago, Illinois 60661.

**SUPPLEMENTARY INFORMATION:**

### I. Introduction

The OCC is both a Derivatives Clearing Organization ("DCO") registered pursuant to Section 5b of the CEA,[4] and a securities clearing agency registered pursuant to Section 17A of the '34 Act.[5]

OCC has filed with the CFTC, pursuant to Section 5c(c) of the CEA and Commission Regulations 39.4(a) and 40.5 thereunder,[6] a request for approval of a rule that would enable OCC to clear and settle Options on the GVZ Index traded on the CBOE, a national securities exchange, in its capacity as a registered securities clearing agency (and not in its capacity as a DCO).[7] Section 5c(c)(3) of the CEA provides that the CFTC must approve such a rule submitted for approval unless it finds that the rule would violate the CEA.

The GVZ Index is an index that measures the implied volatility of options on shares of the SPDR® Gold Trust ("SPDR® Gold Trust Shares"), an ETF designed to reflect the performance of the price of gold bullion.[8]

[1] 7 U.S.C. 1 *et seq.*

[2] 7 U.S.C. 6(c).

[3] 15 U.S.C. 78a *et seq*. The Commission has provided exemptions for gold and silver ETF products on three prior occasions. *See* Order Exempting the Trading and Clearing of Certain Products Related to SPDR® Gold Trust Shares, 73 FR 31981 (June 5, 2008), Exemptive Order for SPDR® Gold Futures Contracts, 73 FR 31979 (June 5, 2008), Order Exempting the Trading and Clearing of Certain Products Related to iShares® COMEX Gold Trust Shares and iShares® Silver Trust Shares, 73 FR 79830 (December 30, 2008), and Order Exempting the Trading and Clearing of Certain Products Related to ETFS Physical Swiss Gold Shares and ETFS Physical Silver Shares, 75 FR 37406 (June 29, 2010) (collectively, the "Previous Orders").

[4] 7 U.S.C. 7a–1.

[5] 15 U.S.C. 78q–l.

[6] 7 U.S.C. 7a–2(c), 17 CFR 39.4(a), 40.5.

[7] *See* Securities Exchange Act Release No. 62094 (May 13, 2010), 75 FR 28085 (May 19, 2010) (File No. SR–OCC–2010–07 filed with both the CFTC and the Securities and Exchange Commission ("SEC")) and the SEC's approval in Securities Exchange Act Release No. 62290 (June 14, 2010), 75 FR 35861 (June 23, 2010). *See also* Securities Exchange Act Release No. 62139 (May 19, 2010), 75 FR 29597 (May 26, 2010) (SEC approval of the CBOE's listing and trading of Options on the GVZ Index).

[8] *See* Securities Exchange Act Release No. 50603 (October 28, 2004), 69 FR 64614 (November 5, 2004) (original GLD Approval Order for listing and trading on the NYSE).

## II. Section 4(c) of the Commodity Exchange Act

Section 4(c)(1) of the CEA empowers the CFTC to "promote responsible economic or financial innovation and fair competition" by exempting any transaction or class of transactions from any of the provisions of the CEA (subject to exceptions not relevant here) where the Commission determines that the exemption would be consistent with the public interest.[9] The Commission may grant such an exemption by rule, regulation or order, after notice and opportunity for hearing, and may do so on application of any person or on its own initiative.

In enacting Section 4(c), Congress noted that the goal of the provision "is to give the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner."[10] Permitting Options on the GVZ Index to be traded on a national securities exchange and to be cleared by OCC in its capacity as a securities clearing agency, as discussed above, may foster both financial innovation and competition and may be consistent with public interest and the CEA. The CFTC is requesting comment on whether it should exempt Options on the GVZ Index, as described above, that are traded on a national securities exchange, and cleared through OCC in its capacity as a registered securities clearing agency, from the provisions of the CEA and the Commission's regulations thereunder, to the extent necessary to permit such Options to be so traded and cleared. The CFTC previously granted exemptions for options on shares of gold ETFs on June 5, 2008, December 30, 2008, and June 29, 2010.[11]

In proposing this exemption, the CFTC need not—and does not—find that Options on the GVZ Index are (or are not) options subject to the CEA. During the legislative process leading to the enactment of Section 4(c) of the CEA, the House-Senate Conference Committee noted that:

> The Conferees do not intend that the exercise of exemptive authority by the Commission would require any determination beforehand that the agreement, instrument, or transaction for which an exemption is sought is subject to the [CEA]. Rather, this provision provides flexibility for the Commission to provide legal certainty to novel instruments where the determination as to jurisdiction is not straightforward. Rather than making a finding as to whether a product is or is not a futures contract, the Commission in appropriate cases may proceed directly to issuing an exemption.[12]

The Options on the GVZ Index described above raise questions involving their nature and the appropriate resulting jurisdiction over them. Given their potential usefulness to the market, however, the Commission believes that this may be an appropriate case for issuing an exemption without making a finding as to the nature of these particular instruments.

Section 4(c)(2) of the CEA provides that the Commission may grant exemptions only when it determines that the requirements for which an exemption is being provided should not be applied to the agreements, contracts or transactions at issue, and the exemption is consistent with the public interest and the purposes of the CEA; that the agreements, contracts or transactions will be entered into solely between appropriate persons; and that the exemption will not have a material adverse effect on the ability of the Commission or Commission-regulated markets to discharge their regulatory or self-regulatory responsibilities under the CEA.[13]

The purposes of the CEA include "promot[ing] responsible innovation and fair competition among boards of trade, other markets and market participants."[14] It may be consistent with these and the other purposes of the CEA and with the public interest for the mode of trading and clearing the Options on the GVZ Index—whether the mode applicable to options on securities indexes or commodity indexes—to be determined by competitive market forces. Accordingly, the Commission proposes to use its authority under Section 4(c) of the CEA to exempt the trading of Options on the GVZ Index on a national securities exchange, and clearing thereof by a registered securities clearing agency, from the provisions of the CEA and the Commission's regulations thereunder to the extent necessary to permit such Options to be so traded and cleared.

In addition, the Commission proposes to use its authority under Section 4(c) of the CEA to exempt the trading and clearing of options on indexes that measure the volatility of shares of gold ETFs generally, regardless of issuer. In particular, the Commission proposes to exempt the following categories of Options from the provisions of the CEA and the Commission's regulations thereunder to the extent necessary to permit such Options to be traded on a national securities exchange and cleared by OCC, in its capacity as a securities clearing agency:

(a) Options on the GVZ Index;

(b) Options on any index that measures the volatility (historical or expected) of the price(s) of shares of one or more gold ETFs; and

(c) Options on any index that measures the volatility (historical or expected) of price(s) of shares of one or more gold ETFs and the price(s) of any other instrument(s), which other instruments are securities as defined in Section 3(a)(10) of the '34 Act.

The CFTC is requesting comment as to whether an exemption from the requirements of the CEA and regulations thereunder should be granted in the context of these transactions.

On September 24, 2010, the Commission issued a Request for Comment on Options for a Proposed Exemptive Order Relating to the Trading and Clearing of Precious Metal

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[9] Section 4(c)(1) of the CEA, 7 U.S.C. 6(c)(1), provides in full that:

> In order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation, or order, after notice and opportunity for hearing, may (on its own initiative or on application of any person, including any board of trade designated or registered as a contract market or derivatives transaction execution facility for transactions for future delivery in any commodity under section 7 of this title) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) of this section (including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the agreement, contract, or transaction), either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively, or both, from any of the requirements of subsection (a) of this section, or from any other provision of this chapter (except subparagraphs (c)(ii) and (D) of section 2(a)(1) of this title, except that the Commission and the Securities and Exchange Commission may by rule, regulation, or order jointly exclude any agreement, contract, or transaction from section 2(a)(1)(D) of this title), if the Commission determines that the exemption would be consistent with the public interest.

[10] House Conf. Report No. 102–978, 1992 U.S.C.C.A.N. 3179, 3213 ("4(c) Conf. Report").

[11] *See* footnote 3, above.

[12] 4(c) Conf. Report at 3214–3215.

[13] Section 4(c)(2) of the CEA, 7 U.S.C. 6(c)(2), provides in full that:

> The Commission shall not grant any exemption under paragraph (1) from any of the requirements of subsection (a) of this section unless the Commission determines that—
>
> (A) The requirement should not be applied to the agreement, contract, or transaction for which the exemption is sought and that the exemption would be consistent with the public interest and the purposes of this Act; and
>
> (B) The agreement, contract, or transaction—
>
> (i) Will be entered into solely between appropriate persons; and
>
> (ii) Will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory duties under this Act.

[14] CEA 3(b), 7 U.S.C. 5(b). *See also* CEA 4(c)(1), 7 U.S.C. 6(c)(1) (purpose of exemptions is "to promote responsible economic or financial innovation and fair competition").

Commodity-Based ETFs and a Concept Release ("Precious Metal ETF Release").[15] In the Precious Metal ETF Release, the Commission requested comment, in part, regarding whether it should issue a categorical Section 4(c) exemption to permit options and futures on shares of all or some precious metal commodity-based ETFs to be traded and cleared as options on securities and security futures, respectively. The comment period for the Precious Metal ETF Release expires on November 1, 2010.

The Commission proposes to use its authority under Section 4(c) of the CEA to exempt options on *indexes* that measure the volatility of shares of gold ETFs at this time while it continues to seek comments and consider the appropriateness of a categorical exemption with respect to options and futures on shares of precious metal commodity-based ETFs. The Commission believes that options on an index that measures commodity price volatility based on shares of such an ETF do not raise the same regulatory concerns that may be associated with options and futures on shares of an ETF that is based on the underlying commodity. In this regard, trading in options and futures on shares of a gold ETF could have a potential impact on the deliverable supply by removing physical gold from physical marketing channels, while an index based on volatility measures does not raise these concerns in that such an index does not involve ownership of the commodity, either directly or indirectly, by traders in options on such an index.

Section 4(c)(3) of the CEA includes within the term "appropriate persons" a number of specified categories of persons, and also in subparagraph (K) thereof "such other persons that the Commission determines to be appropriate in light of * * * the applicability of appropriate regulatory protections." National securities exchanges and securities clearing agencies, as well as their members who will intermediate Options on the GVZ Index and other options on indexes that measure the volatility of shares of gold ETFs as described herein, are subject to extensive and detailed regulation by the SEC under the '34 Act.

## III. Request for Comment

The Commission requests comment on all aspects of the issues presented by this proposed order.

## IV. Related Matters

### *A. Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 ("PRA")[16] imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. The proposed exemptive order would not, if approved, require a new collection of information from any entities that would be subject to the proposed order.

### *B. Cost-Benefit Analysis*

Section 15(a) of the CEA[17] requires the Commission to consider the costs and benefits of its action before issuing an order under the CEA. By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs. Rather, Section 15(a) simply requires the Commission to "consider the costs and benefits" of its action.

Section 15(a) of the CEA further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the CEA.

The Commission has determined that the costs of this proposed order are not significant. Although the order would exempt the subject options from regulation under the CEA, market participants and the public will nonetheless be protected because the options, the markets on which they trade, and the intermediaries through which they will be traded will be subject to comprehensive regulation by the SEC. The Commission has determined that the benefits of the proposed order are substantial. The proposed order would promote efficiency in the markets, as it would provide certainty that the subject options will not be subject to duplicative regulation.

After considering these factors, the Commission has determined to seek comment on the proposed order as discussed above. The Commission invites public comment on its application of the cost-benefit considerations. Commenters are also are invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the proposal with their comment letters.

Issued in Washington, DC, on November 4, 2010 by the Commission.

**David A. Stawick,**

*Secretary of the Commission.*

[FR Doc. 2010–28377 Filed 11–9–10; 8:45 am]

**BILLING CODE 6351–01–P**

[15] *See* 75 FR 60411 (September 30, 2010).

[16] 44 U.S.C. 3507(d).

[17] 7 U.S.C. 19(a).

## DEPARTMENT OF DEFENSE

### Department of the Army

### Intent To Grant an Exclusive License for a U.S. Government-Owned Invention

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

**ACTION:** Notice.

**SUMMARY:** In accordance with 35 U.S.C. 209(e), and 37 CFR 404.7 (a)(1)(i) and 37 CFR 404.7 (b)(1)(i), announcement is made of the intent to grant an exclusive, revocable license for the invention claimed in U.S. Patent Application No. 12/670,250, entitled "Obstetrics Simulation and Training Method and System," filed on January 22, 2010, and related foreign patent applications deriving from PCT/US2008/076725 to Gaumard Scientific Company, Inc., with its principal place of business at 14700 SW 136 Street, Miami, FL 33196–5691.

**ADDRESSES:** Commander, U.S. Army Medical Research and Materiel Command, ATTN: Command Judge Advocate, MCMR–JA, 504 Scott Street, Fort Detrick, Frederick, MD 21702–5012.

**FOR FURTHER INFORMATION CONTACT:** For licensing issues, Dr. Paul Mele, Office of Research and Technology Applications (ORTA), (301) 619–6664. For patent issues, Ms. Elizabeth Arwine, Patent Attorney, (301) 619–7808, both at telefax (301) 619–5034.

**SUPPLEMENTARY INFORMATION:** Anyone wishing to object to the grant of this license can file written objections along with supporting evidence, if any, within 15 days from the date of this publication. Written objections are to be

filed with the Command Judge Advocate (*see* **ADDRESSES**).

**Brenda S. Bowen,**

*Army Federal Register Liaison Officer.*

[FR Doc. 2010–28343 Filed 11–9–10; 8:45 am]

**BILLING CODE 3710–08–P**

## DEPARTMENT OF ENERGY

### Senior Executive Service; Performance Review Board

**AGENCY:** U.S. Department of Energy.

**ACTION:** SES Performance Review Board Standing Register.

**SUMMARY:** This notice provides the Performance Review Board Standing Register for the Department of Energy. This listing supersedes all previously published lists of PRB members.

**DATES:** These appointments are effective as of September 30, 2010.

Adams, Vincent Nmn
Allison, Jeffrey M
Amaral, David M
Anderson, Cynthia V
Anderson, Margot H
Aoki, Steven Nmn
Ascanio, Xavier Nmn
Baker, Kenneth E
Barker Jr, William L
Barwell, Owen F
Battershell, Carol J
Beamon, Joseph A
Beard, Jeanne M
Beard, Susan F
Beaudry-Losique, Jacques A
Beausoleil, Geoffrey L
Bekkedahl, Larry N
Bell, Melody C
Berkowitz, Barry E
Bieniawski, Andrew J
Bishop, Clarence T
Bishop, Tracey L
Black, Richard L
Black, Steven K
Boardman, Karen L
Bonilla, Sarah J
Borgstrom, Carol M
Borgstrom, Howard G
Bosco, Paul Nmn
Boulden Iii, John S
Boyd, David O
Boyd, Gerald G
Boyko, Thomas R
Boyle, William J
Brese, Robert F
Brewer, Stephanie J
Brockman, David A
Bromberg, Kenneth M
Brott, Matthew J
Brown Iii, Robert J
Brown, Fred L
Brown, Stephanie H
Brown, Thomas E
Bryan, Paul F
Bryan, William N
Burch, Linda C
Burrows, Charles W
Buttress, Larry D
Buzzard, Christine M
Cadieux, Gena E
Callahan, Samuel N
Campbell Ii, Hugh T
Cannon, Scott C
Carabetta, Ralph A
Carosino, Robert M
Cavanagh, James J
Cerveny, Thelma J
Chalk, Steven G
Charboneau, Stacy L
Check, Peter L
Choi, Joanne Y
Chung, Dae Y
Clapper, Daniel R
Clark, Diana D
Clinton, Rita M
Cohen, Daniel Nmn
Collazo, Yvette T
Como, Anthony J
Connor, Michael A
Conti, John J
Cook, John S
Corbin, Robert F
Corey, Ray J
Costlow, Brian D
Craig Jr, Jackie R
Crandall, David H
Crawford, Glen D
Crouther, Desi A
Cugini, Anthony V
Cutler, Thomas Russell
Davenport, Shari T
Davis, Kimberly A
Davis, Patrick B
De Vos, Erica Nmn
Dearolph, Douglas J
Decker, Anita J
Dedik, Patricia Nmn
Deeney, Christopher Nmn
Dehaven, Darrel S
Dehmer, Patricia M
Dehoratiis Jr, Guido Nmn
Delhotal, Katherine Casey
Der, Victor K
Diamond, Bruce M
Dicapua, Marco S
Difiglio, Carmen Nmn
Dixon, Robert K
Dowell, Jonathan A
Duke Jr, Richard D
Eckroade, William A
Edwards Jr, Robert H
Ehli, Cathy L
Ekimoff, Lana Nmn
Elkind, Jonathan H
Ely, Lowell V
Erhart, Steven C
Eschenberg, John R
Ferraro, Patrick M
Flohr, Connie M
Foley, Thomas C
Franco Jr., Jose R
Franklin, Rita R
Frantz, David G
Fremont, Douglas E
Fresco, Mary Ann E
Furstenau, Raymond V
Fygi, Eric J
Garcia, Donald J
Gasperow, Lesley A
Geernaert, Gerald L
Geiser, David W
Gelles, Christine M
Gendron, Mark O
Gerrard, John E
Gibbs, Robert C
Gibson Jr, William C
Gilbertson, Mark A
Gillo, Jehanne E
Gist, Walter J
Golan, Paul M
Goldsmith, Robert Nmn
Golub, Sal Joseph
Goodrum, William S
Goodwin, Karl E
Gordon, Theanne E
Greenaugh, Kevin C
Greenwood, Johnnie D
Gruenspecht, Howard K
Guevara, Arnold E
Guevara, Karen C
Hale, Andrew M
Hallman, Timothy J
Handschy, Mark A
Handwerker, Alan I
Hannigan, James J
Hardwick Jr, Raymond J
Harms, Timothy C
Harrell, Jeffrey P
Harrington, Paul G
Harris, Robert J
Harvey, Stephen J
Held, Edward B
Henderson Iii, Clyde H
Henneberger, Karen O
Henneberger, Mark W
Henry, Eugene A
Herrera, C Robert D
Hine, Scott E
Hintze, Douglas E
Hoffman, Dennis J
Hogan, Kathleen B
Holecek, Mark L
Holland, Michael D
Holland, Michael J
Holland, Wendolyn S
Hollrith, James W
Horton, Linda L
Howard, Michael F
Huffer, Warren L
Huizenga, David G
Hunteman, William J
Jenkins, Amelia F
Johns, Christopher S
Johnson, David F
Johnson, Kristina M
Johnson, Robert Shane
Johnson, Sandra L
Jonas, David S
Jones, Gregory A
Jones, Marcus E
Jones, Wayne Nmn
Juarez, Liova D

Kaempf, Douglas E
Kane, Michael C
Kaplan, Stan M
Kearney, James H
Kelly, Henry C
Kelly, Larry C
Kenchington, Henry S
Kendell, James M
Ketcham, Timothy E
Kidd Iv, Richard G
Kight, Gene H
Klara, Scott M
Klausing, Kathleen A
Kling, Jon Nmn
Knoell, Thomas C
Knoll, William S
Kolb, Ingrid A C
Koury, John F
Kovar, Dennis G
Krahn, Steven L
Krol, Joseph J
Kung, Huijou Harriet
Kusnezov, Dimitri F
Lagdon Jr, Richard H
Lambert, James B
Lange, Robert G
Lawrence, Andrew C
Lawrence, Steven J
Leckey, Thomas J
Lee, Steven Nmn
Lee, Terri Tran
Legg, Kenneth E
Lehman, Daniel R
Leifheit, Kevin R
Leistikow, Daniel A
Lempke, Michael K
Lev, Sean A
Levitan, William M
Lewis Iii, Charles B
Lewis Jr, William A
Lewis, Roger A
Lingan, Robert M
Livengood, Joanna M
Lockwood, Andrea K
Lowe, Owen W
Loyd, Richard Nmn
Luczak, Joann H
Lushetsky, John M
Lynch, Timothy G
Lyons, Peter B
Macintyre, Douglas M
Mainzer, Elliot E
Malosh, George J
Marcinowski Iii, Francis N
Marlay, Robert C
Marmolejos, Poli A
Mcarthur, Billy R
Mcbrearty, Joseph A
Mccloud, Floyd R
Mcconnell, James J
Mccormick, Matthew S
Mcginnis, Edward G
Mcguire, Patrick W
Mckee, Barbara N
Mckenzie, John M
Mcrae, James Bennett
Meacham, A Avon
Meeks, Timothy J
Mellington, Stephen A
Mellington, Suzanne P
Miller, Wendy L
Milliken, Joann Nmn
Minvielle, Thomas M
Miotla, Dennis M
Moe, Darrick C
Mollot, Darren J
Monette, Deborah D
Montano, Pedro A
Montoya, Anthony H
Moody Iii, David C
Moore, Johnny O
Moorer, Richard F
Moredock, J Eun
Mortenson, Victor A
Mueller, Troy J
Murphie, William E
Mustin, Tracy P
Naples, Elmer M
Nassif, Robert J
Nelson Jr, Robert M
Neuhoff, Jon W
Newman, Larry Nmn
Nicoll, Eric G
Niedzielski-Eichner, P A
Nolan, Elizabeth A
O'connor, J Roderick
O'connor, Stephen C
O'connor, Thomas J
O'konski, Peter J
Olencz, Joseph Nmn
Olinger, Shirley J
Oliver, Leann M
Osheim, Elizabeth L
Ott, Merrie Christine
Owendoff, James M
Palmisano, Anna C
Pavetto, Carl S
Pease, Harrison G
Penry, Judith M
Person Jr, George L
Peterson, Bradley A
Phan, Thomas H
Podonsky, Glenn S
Porter, Steven A
Powers, Kenneth W
Procario, Michael P
Provencher, Richard B
Purucker, Roxanne E
Raines, Robert B
Ramsey, Clay Harrison
Rhoderick, Jay E
Richards, Aundra M
Richardson, Susan S
Rider, Melissa D
Risser, Roland J
Rodgers, David E
Rodgers, Stephen J
Roege, William H
Rohlfing, Eric A
Russo, Frank B
Salmon, Jeffrey T
Satyapal, Sunita Nmn
Savage, Carter D
Scheinman, Adam M
Schoenbauer, Martin J
Schuneman, Patricia J
Scott, Randal S
Seward, Lachlan W
Shafik, Christine M
Sheely, Kenneth B
Sheppard, Catherine M
Sherry, Theodore D
Shoop, Doug S
Short, Stephanie A
Silver, Jonathan M
Simonson, Steven C
Sitzer, Scott B
Skubel, Stephen C
Smith, Christopher A
Smith, Kevin W
Smith, Thomas Z
Smith-Kevern, Rebecca F
Snider, Eric S
Snyder, Roger E
Spears, Terrel J
Sperling, Gilbert P
Staker, Thomas R
Stallman, Robert M
Stark, Richard M
Stenseth, William Lynn
Stone, Barbara R
Strayer, Michael R
Streit, Lisa D
Surash, John E
Sweetnam, Glen E
Sykes, Merle L
Synakowski, Edmund J
Talbot Jr, Gerald L
Taylor, William J
Thompson, Michael A
Thress Jr, Donald F
Toczko, James E
Tomer, Bradley J
Trautman, Stephen J
Tucker, Craig A
Turnbull, William Thomas
Turner, Shelley P
Tyner, Teresa M
Utech, Dan G
Valdez, William J
Vavoso, Thomas G
Venuto, Kenneth T
Waddell, Joseph F
Wagner, M Patrice
Waisley, Sandra L
Ward, Gary K
Warnick, Walter L
Warren, Bradley S
Weatherwax, Sharlene C
Weedall, Michael J
Weis, Michael J
Welling, David Craig
Weston-Dawkes, Andrew P
Whitney, James M
Wilber, Deborah A
Wilcher, Larry D
Wilken, Daniel H
Williams, Alice C
Williams, Rhys M
Wilson Jr, Thomas Nmn
Wood, James F
Worley, Michael N
Worthington, Jon C
Worthington, Patricia R
Wu, Chuan-Fu Nmn
Wyka Jr, Theodore A
Yoshida, Phyllis G

Yuan-Soo Hoo, Camille C
Zabransky, David K
Zamorski, Michael J
Zeh, Charles M

Issued in Washington, DC, November 3, 2010.

**Sarah J. Bonilla,**

*Director, Office of Human Capital Management.*

[FR Doc. 2010–28370 Filed 11–9–10; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Senior Executive Service; Performance Review Board

**AGENCY:** U.S. Department of Energy.

**ACTION:** Designation of Performance Review Board Chair.

**SUMMARY:** This notice provides the Performance Review Board Chair designee for the Department of Energy.

**DATES:** This appointment is effective as of September 30, 2010. Susan F. Beard.

Issued in Washington, DC, November 3, 2010.

**Sarah J. Bonilla,**

*Director, Office of Human Capital Management.*

[FR Doc. 2010–28372 Filed 11–9–10; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 1432–010]**

### Port Bailey Wild Enterprises, LLC; PB Energy, Inc.; Notice of Application for Transfer of License, and Soliciting Comments and Motions To Intervene

November 3, 2010.

On October 22, 2010, Port Bailey Wild Enterprises, LLC (transferor) and PB Energy, Inc. (transferee) filed a joint application for transfer of license for the Dry Spruce Bay Project No. 1432, located on the Dry Spruce Bay on Kodiak Island, Alaska.

Applicants seek Commission approval to transfer the license for the Dry Spruce Bay Project from transferor to transferee.

*Applicants' Contact:* Robert S. Shane II, Port Bailey Wild Enterprises, LLC, P.O. Box KPY, Kodiak, AK 99697, (360) 989–9843 (Transferor); Robert S. Shane II and Anita Shane, PB Energy, Inc., P.O. Box KPY, Kodiak, AK 99697, (360) 989–9843 (Transferee).

*FERC Contact:* Kim Carter (202) 502–6486.

*Deadline for filing comments and motions to intervene:* 30 days from the issuance date of this notice. Comments and motions to intervene may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1) and the instructions on the Commission's Web site under *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original plus seven copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. More information about this project can be viewed or printed on the eLibrary link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–1432) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–28328 Filed 11–9–10; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. PR10–29–003]**

### Enbridge Pipelines (North Texas) L.P.; Notice of Baseline Filing

November 4, 2010.

Take notice that on November 3, 2010, Enbridge Pipelines (North Texas) L.P. submitted a revised baseline filing of its Statement of Operating Conditions for services provided under section 311 of the Natural Gas Policy Act of 1978 (NGPA).

Any person desiring to participate in this rate proceeding must file a motion to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern Time on Monday, November 15, 2010.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–28329 Filed 11–9–10; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–R03–OW–2009–0985; FRL–9224–4]**

### Extension of the Period for Preparation of the Clean Water Act Section 404(c) Final Determination and Consultation Concerning the Spruce No. 1 Mine, Logan County, WV

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

**ACTION:** Notice.

**SUMMARY:** On September 24, 2010, the EPA Region III Regional Administrator signed a Recommended Determination, under Section 404(c) of the Clean Water Act, recommending withdrawal of the specification embodied in DA Permit No. 199800436–3 (Section 10: Coal River) of Pigeonroost Branch and Oldhouse Branch as disposal sites for discharges of dredged and/or fill material associated with construction of the Spruce No. 1 Surface Mine in Logan County, West Virginia. The transmission of the Recommended Determination to

EPA Headquarters initiated a 60-day period for the Assistant Administrator for the Office of Water to review the recommendation of the Regional Administrator. As part of this review period, EPA has also notified the Department of the Army, the State of West Virginia, Arch Coal, Inc. (the permittee), and the landowners of record as to the Recommended Determination, and has notified these groups that they have 15 days in which to notify the Assistant Administrator for the Office of Water of their intent to take corrective action to prevent the unacceptable adverse impacts to wildlife detailed in the recommendation.

In response, attorneys for the permittee have requested a 30-day extension of this consultation period, to November 29, 2010, in order to review the Recommended Determination and associated technical appendices. Provided in 40 CFR 231.8, EPA may, upon showing of good cause, extend the time requirements in the 404(c) regulations. In this case, EPA believes it is appropriate to grant the permittee's request for a 30-day extension to the consultation process. This extension will provide additional time to evaluate any corrective actions proposed by the permittee, or other participants in the consultation process described in 40 CFR 231.6, that would prevent the likely unacceptable adverse effects described in the Recommended Determination. The consultation process will therefore expire on November 29, 2010.

As described above, EPA's 404(c) regulations provide that the Assistant Administrator for the Office of Water shall issue a Final Determination within 60 days of receiving the Regional Administrator's Recommended Determination. This 60-day period is scheduled to expire on November 23, 2010. EPA may extend this deadline upon a showing of good cause. EPA believes that good cause exists to extend this deadline in order to complete the Final Determination by February 22, 2011. This extension will permit the Office of Water to more closely evaluate Region III's Recommended Determination and the administrative record, which includes more than 50,000 public comments. It will also enable more careful consideration of any new information that arises during the consultation process undertaken pursuant to 40 CFR 231.6, as described above. Finally, this date is consistent with an order issued by the U.S. District Court for the Southern District of West Virginia on November 2, granting a continued stay in litigation over the Spruce #1 permit until February 22, 2011.

**FOR FURTHER INFORMATION CONTACT:** Mr. David Evans, Wetlands Division Director, Office of Wetlands, Oceans, and Watersheds; U.S. Environmental Protection Agency, Mail Code 4502T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Mr. Evans can also be reached via electronic mail at *Evans.David@epa.gov*.

Dated: November 4, 2010.

**Peter S. Silva,**

*Assistant Administrator, Office of Water.*

[FR Doc. 2010–28383 Filed 11–9–10; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9224–6; Docket ID No. EPA–HQ–ORD–2010–0540]**

## Draft Toxicological Review of Hexavalent Chromium: In Support of Summary Information on the Integrated Risk Information System (IRIS)

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

**ACTION:** Notice of Extension of Public Comment Period to December 29, 2010.

**SUMMARY:** EPA published a 60-day public comment period on September 30, 2010 (75 FR 60454) for the external review draft human health assessment titled, "Toxicological Review of Hexavalent Chromium: In Support of Summary Information on the Integrated Risk Information System (IRIS)" EPA/635/R–10/004C. We are extending the public comment period 30 days at the request of the American Chemistry Council (ACC). The draft assessment was prepared by the National Center for Environmental Assessment (NCEA) within the EPA Office of Research and Development (ORD). EPA released this draft assessment solely for the purpose of pre-dissemination peer review under applicable information quality guidelines. This draft assessment has not been formally disseminated by EPA. It does not represent and should not be construed to represent any Agency policy or determination. After public review and comment, an EPA contractor will convene an expert panel for independent external peer review of this draft assessment. The public comment period and external peer review meeting are separate processes that provide opportunities for all interested parties to comment on the assessment. The external peer review meeting will be scheduled at a later date and announced in the **Federal Register**. Public comments submitted during the public comment period will be provided to the external peer reviewers before the panel meeting and considered by EPA in the disposition of public comments. Public comments received after the public comment period closes will not be submitted to the external peer reviewers and will only be considered by EPA if time permits.

**DATES:** The public comment period will be extended from November 29, 2010 to December 29, 2010. Comments should be in writing and must be received by EPA by December 29, 2010.

**ADDRESSES:** The draft "Toxicological Review of Hexavalent Chromium: In Support of Summary Information on the Integrated Risk Information System (IRIS)" is available primarily via the Internet on the NCEA home page under the Recent Additions and Publications menus at *http://www.epa.gov/ncea.* A limited number of paper copies are available from the Information Management Team (Address: Information Management Team, National Center for Environmental Assessment (Mail Code: 8601P), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone: 703–347–8561; facsimile: 703–347–8691). If you request a paper copy, please provide your name, mailing address, and the draft assessment title.

Comments may be submitted electronically via *http://www.regulations.gov,* by e-mail, by mail, by facsimile, or by hand delivery/courier. Please follow the detailed instructions provided in the **SUPPLEMENTARY INFORMATION** section of the previous notice (75 FR 60454).

**FOR FURTHER INFORMATION CONTACT:** For information on the docket, *http://www.regulations.gov,* or the public comment period, please contact the Office of Environmental Information (OEI) Docket (Mail Code: 2822T), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone: 202–566–1752; facsimile: 202–566–1753; or e-mail: *ORD.Docket@epa.gov.*

For information on the draft assessment, please contact Ted Berner, National Center for Environmental Assessment (8601P), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone: (703) 347–8583; facsimile: (703) 347–8689; or e-mail: *FRN_Questions@epa.gov.*

Dated: November 2, 2010.

**Darrell A. Winner,**

*Acting Director, National Center for Environmental Assessment.*

[FR Doc. 2010–28382 Filed 11–9–10; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9224–5]**

### Draft Toxicological Review of Urea: In Support of Summary Information on the Integrated Risk Information System (IRIS)

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

**ACTION:** Notice of peer review meeting.

**SUMMARY:** EPA is announcing that Versar, Inc., an EPA contractor for external scientific peer review, will convene an independent panel of experts and organize and conduct an external peer review meeting to review the draft human health assessment titled, "Toxicological Review of Urea: In Support of Summary Information on the Integrated Risk Information System (IRIS)" (EPA/635/R–10/005). The draft assessment was prepared by the National Center for Environmental Assessment (NCEA) within the EPA Office of Research and Development.

On September 28 EPA released this draft assessment [75 FR 59716] solely for the purpose of pre-dissemination peer review under applicable information quality guidelines. This draft assessment has not been formally disseminated by EPA. It does not represent and should not be construed to represent any Agency policy or determination.

Versar, Inc. invites the public to register to attend this workshop as observers. In addition, Versar, Inc. invites the public to give brief oral comments and/or provide written comments at the workshop regarding the draft assessment under review. Time is limited, and reservations will be accepted on a first-come, first-served basis. In preparing a final report, EPA will consider Versar, Inc.'s report of the comments and recommendations from the external peer review workshop and any written public comments that EPA receives in accordance with this notice.

**DATES:** The peer review panel workshop on the draft assessment for Urea will be held via teleconference on December 13, 2010, beginning at 1 p.m. and ending at 5 p.m. Eastern Standard Time.

**ADDRESSES:** The draft "Toxicological Review of Urea: In Support of Summary Information on the Integrated Risk Information System (IRIS)" is available primarily via the Internet on the NCEA home page under the Recent Additions and Publications menus at *http://www.epa.gov/ncea.* A limited number of paper copies are available from the Information Management Team (Address: Information Management Team, National Center for Environmental Assessment [Mail Code: 8601P], U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone: 703–347–8561; facsimile: 703–347–8691). If you request a paper copy, please provide your name, mailing address, and the draft assessment title.

The peer review meeting on the draft Urea assessment will be held via teleconference. To attend the teleconference, register no later than December 6, 2010, by contacting Versar Inc. by e-mail: *saundkat@versar.com* (subject line: Urea Peer Review Meeting), by phone: 703–750–3000, ext. 545 or toll free at 1–800–2–VERSAR (1–800–283–7727), ask for Kathy Coon, the Urea Peer Review Meeting Coordinator, or by faxing a registration request to 703–642–6809 (please reference the Urea Peer Review Meeting and include your name, title, affiliation, full address and contact information). There will be limited time at the peer review workshop for comments from the public. Please inform Versar, Inc. if you wish to make comments during the workshop.

**FOR FURTHER INFORMATION CONTACT:** For information on registration, access or services for individuals with disabilities, or logistics for the external peer review workshop, please contact Versar, Inc. at 6850 Versar Center, Springfield, VA 22151; by e-mail: *saundkat@versar.com* (subject line: Urea Peer Review Meeting), by phone: 703–750–3000, ext. 545 or toll free at 1–800–2–VERSAR (1–800–283–7727), ask for Kathy Coon, the Urea Peer Review Meeting Coordinator, or by faxing a registration request to 703–642–6809 (please reference the Urea Peer Review Meeting and include your name, title, affiliation, full address and contact information).

For information on the draft assessment, please contact Amanda Persad, National Center for Environmental Assessment [Mail Code: B–243–01], U.S. Environmental Protection Agency, National Center for Environmental Assessment, Office of Research and Development U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone: 919–541 9781; facsimile: 919–541–2985; or e-mail: *FRN_Questions@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

#### I. Information About IRIS

EPA's IRIS is a human health assessment program that evaluates quantitative and qualitative risk information on effects that may result from exposure to chemical substances found in the environment. Through the IRIS Program, EPA provides the highest quality science-based human health assessments to support the Agency's regulatory activities. The IRIS database contains information for more than 540 chemical substances that can be used to support the first two steps (hazard identification and dose-response evaluation) of the risk assessment process. When supported by available data, IRIS provides oral reference doses (RfDs) and inhalation reference concentrations (RfCs) for chronic noncancer health effects as well as assessments of potential carcinogenic effects resulting from chronic exposure. Combined with specific exposure information, government and private entities use IRIS to help characterize public health risks of chemical substances in a site-specific situation and thereby support risk management decisions designed to protect public health.

Dated: November 4, 2010.

**Darrell A. Winner,**

*Acting Director, National Center for Environmental Assessment.*

[FR Doc. 2010–28381 Filed 11–9–10; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2002–0262; FRL–8852–4]**

### Endosulfan: Final Product Cancellation Order

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

**ACTION:** Notice.

**SUMMARY:** This notice announces EPA's order for the cancellations, voluntarily requested by the registrants and accepted by the Agency of pesticide products containing endosulfan, pursuant to section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. This cancellation order follows an August 18, 2010, **Federal Register** Notice of Receipt of Requests from the endosulfan registrants to voluntarily cancel their product registrations. In the August 18, 2010, notice, EPA indicated that it

would grant the request and issue a cancellation order unless the Agency received substantive comments within the 30-day comment period that would merit its further review of these requests, or unless the registrants withdrew their requests within this period. The Agency received three comments on the notice in support of the cancellations of all endosulfan products, which included signatures from over 53,000 individuals. Upon review of these comments, EPA determined that the Agency should, nonetheless, grant the registrants' cancellation requests. The registrants did not withdraw their requests. Accordingly, EPA hereby issues in this notice a cancellation order granting the requested cancellations. Any FIFRA section 3 or 24(c) registration, distribution, sale, or use of endosulfan products subject to this cancellation order is permitted only in accordance with the terms of this order.

**DATES:** The use deletions and cancellations in this order are effective as provided in Unit IV.

**FOR FURTHER INFORMATION CONTACT:** Melanie Biscoe, Pesticide Re-evaluation Division, Office of Pesticide Programs (7508P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–7106; e-mail address: *biscoe.melanie@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. General Information

*A. Does this action apply to me?*

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

*B. How can I get copies of this document and other related information?*

EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2002–0262. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the Office of Pesticide Programs (OPP), Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility's telephone number is (703) 305–5805.

## II. What action is the agency taking?

This notice announces the cancellations, as requested by registrants, of all endosulfan products registered under sections 3 and 24(c) of FIFRA. These registrations are listed in sequence by registration number in Table 1 of this unit. Note that the product names of several registration numbers were corrected in this table subsequent to the August 18, 2010, **Federal Register** Notice of Receipt of Requests (75 FR 51049) (FRL–8841–5) from the endosulfan registrants to voluntarily cancel their product registrations. However the registration numbers listed in the August 18, 2010, **Federal Register** Notice were correct and did not need to be amended in this notice.

TABLE 1—ENDOSULFAN PRODUCTS SUBJECT TO THIS CANCELLATION ORDER

| Registration No. | Product name | Chemical name |
|---|---|---|
| 11678–5 .. | Thionex Endosulfan Technical. | Endosulfan. |
| 19713–9 .. | Drexel Endosulfan 2EC. | Endosulfan. |
| 19713–319 | Drexel Endosulfan Technical. | Endosulfan. |
| 19713–399 | Drexel Endosulfan 3EC. | Endosulfan. |
| 61483–65 | Endalfly Insecticide Cattle Ear Tag. | Endosulfan. |
| 66222–62 | Thionex 50W .. | Endosulfan. |
| 66222–63 | Thionex 3EC .. | Endosulfan. |
| 66222–64 | Thionex Technical. | Endosulfan. |
| AZ030004 | Thionex 3EC .. | Endosulfan. |
| AZ980004 | Drexel Endosulfan 3EC. | Endosulfan. |
| HI030001 | Thionex 50W .. | Endosulfan. |
| HI030002 | Thionex 3EC .. | Endosulfan. |
| HI070006 | Thionex 3EC .. | Endosulfan. |
| ID030002 | Thionex 3EC .. | Endosulfan. |
| ID030004 | Thionex 3EC .. | Endosulfan. |
| ID980003 | Drexel Endosulfan 3EC. | Endosulfan. |
| NC080001 | Thionex 3EC .. | Endosulfan. |
| NV030001 | Thionex 3EC .. | Endosulfan. |
| OR030007 | Thionex 3EC .. | Endosulfan. |
| OR030010 | Thionex 3EC .. | Endosulfan. |
| OR030012 | Thionex 50W .. | Endosulfan. |
| OR030013 | Thionex 3EC .. | Endosulfan. |
| OR030024 | Thionex 3EC .. | Endosulfan. |
| UT030003 | Thionex 3EC .. | Endosulfan. |
| WA030013 | Thionex 3EC .. | Endosulfan. |
| WA030017 | Thionex 50W .. | Endosulfan. |
| WA030018 | Thionex 3EC .. | Endosulfan. |
| WA030024 | Thionex 3EC .. | Endosulfan. |
| WA030027 | Thionex 3EC .. | Endosulfan. |
| WA980012 | Drexel Endosulfan 3EC. | Endosulfan. |

Table 2 of this unit includes the names and addresses of record, in sequence by EPA company number, for all registrants of the products in Table 1 of this unit.

TABLE 2—REGISTRANTS OF CANCELED PRODUCTS

| EPA company No. | Company name and address |
|---|---|
| 11678 ... | Makhteshim Chemical Works, Ltd., 4515 Falls of Neuse Rd., Suite 300, Raleigh, NC 27609. |
| 19713 ... | Drexel Chemical Company, 1700 Channel Avenue, P.O. Box 13327, Memphis, TN 38113–0327. |
| 61483 ... | KMG-Bernuth, Inc., 9555 W. Sam Houston Pkwy., South, Suite 600, Houston, TX 77099. |
| 66222 ... | Makhteshim-Agan of North America, Inc., 4515 Falls of Neuse Rd., Suite 300, Raleigh, NC 27609. |

## III. Summary of Public Comments Received and Agency Response to Comments

The Agency received three comments on the notice, published on August 18, 2010, that announced receipt of the requests for voluntary cancellation and opened a 30-day public comment period that ended on September 17, 2010. These comments were received from Pesticide Action Network North America (PANNA) and over 3,000 supporters, Defenders of Wildlife and over 50,000 supporters, and a private citizen. All comments support cancellation of all endosulfan pesticide products in the United States. The comments from PANNA, Defenders of Wildlife, and by extension the supporters of those organizations, request that EPA shorten the phase-out schedule for endosulfan, referring in general terms to a concern over continued risks to farmworkers, wildlife and the environment, and indigenous

peoples in the Arctic, as well as each organization's assertion that alternatives to endosulfan are available.

The Agency appreciates the comments submitted by the public. Pursuant to the cancellation request made as part of the endosulfan Memorandum of Agreement (MOA) with endosulfan registrants, most currently approved endosulfan crop uses will end in 2 years, including over 30 crop uses plus use on ornamental trees, shrubs, and herbaceous plants. The remaining 12 crop uses will end over the following 4 years. Of these remaining uses, the last four endosulfan uses will end on July 31, 2016.

EPA expects growers currently using endosulfan to successfully transition to lower risk pest control strategies. The endosulfan phase-out schedule helps facilitate this transition by providing growers time to research and adopt lower risk alternatives. Recognizing that endosulfan affords benefits in producing certain individual crops, the phase-out schedule allows a longer phase-out period where EPA determined there are benefits of endosulfan use and/or fewer available alternatives to endosulfan.

With regard to the commenters' concern about farmworker and environmental risks, EPA is requiring new mitigation measures for many crops during the endosulfan phase-out period in addition to mitigation requirements placed on endosulfan labels in previous years. Although these additional mitigation measures are designed to reduce worker risks, restricting and phasing out all uses of endosulfan will also address risks to wildlife and the environment.

Additional mitigation required during the phase-out varies by crop and includes measures such as:

- Canceling aerial use and specifying other application methods.
- Extending Restricted Entry Intervals (REIs).
- Extending Pre-harvest Intervals (PHIs).
- Reducing maximum single and/or seasonal application rates.

Detailed information about the additional mitigation measures is provided in the Appendices to the endosulfan MOA, which can be found at docket number EPA–HQ–OPP–2002–0262–0181 on *http://www.regulations.gov.*

With regard to the commenters' concern for endosulfan contamination of subsistence foods, the Agency's human health risk assessment has determined that there are no dietary risks of concern resulting from endosulfan use for all populations including indigenous people in the Arctic.

Because of the extensive additional mitigation required for many endosulfan uses for the duration of the phase-out period, in combination with the benefits afforded by and/or limited alternatives for certain uses of endosulfan, the Agency has decided not to alter the phase-out schedule requested by the endosulfan registrants and detailed in the endosulfan MOA.

## IV. Cancellation Order

Pursuant to FIFRA section 6(f), EPA hereby approves the requested cancellations of registrations identified in Table 1 of Unit II. and hereby orders that:

- All endosulfan product registrations, identified in Table 1 of Unit II. are canceled for uses listed in List 1 of Unit VI. as of November 10, 2010.
- All endosulfan product registrations, identified in Table 1 of Unit II. are canceled for uses listed in List 2 of Unit VI. as of March 31, 2012.
- All endosulfan product registrations, identified in Table 1 of Unit II. are canceled for uses listed in List 3 of Unit VI. as of March 31, 2013.
- All endosulfan product registrations, identified in Table 1 of Unit II. are canceled for uses listed in List 4 of Unit VI. as of September 1, 2014.
- All endosulfan product registrations, identified in Table 1 of Unit II. are canceled for uses listed in List 5 of Unit VI. as of March 31, 2015.
- All endosulfan product registrations, identified in Table 1 of Unit II. are canceled for uses listed in List 6 of Unit VI. as of March 31, 2016.

EPA further orders that effective July 31, 2016, all section 3 registrations of endosulfan are canceled. The effective date of canceled section 3 registrations will therefore correspond with end use dates established in this order. As a matter of clarification, all FIFRA 24(c) Special Local Need registrations may remain in effect until their respective expiration dates, which will correspond with end use dates established in this order.

## V. What is the agency's authority for taking this action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the Administrator may approve such a request.

## VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. In any order issued in response to these requests for amendments to terminate uses, the Agency proposes to include the following provisions for the treatment of any existing stocks of the products identified or referenced in Table 1. These provisions are consistent with the requests for use deletions and requests for voluntary cancellations outlined in Unit II. of this notice:

1. *For the uses in List 1 of this unit.*—

i. EPA prohibits the registrants' distribution, sale, and reformulation of products permitting the following uses after December 31, 2010, except sale or distribution of such products for the purposes of proper disposal, or export consistent with section 17 of FIFRA.

ii. EPA prohibits the distribution or sale of products permitting the following uses by persons other than the registrants after May 31, 2011, except sale or distribution of such products for the purposes of proper disposal, or export consistent with section 17 of FIFRA.

iii. EPA prohibits registration and use of those products that show uses listed in List 1 on the label for those same uses after July 31, 2012. The stop use date for the uses listed in List 1 of this unit must be reflected on amended product labeling. Any use of existing stocks must be consistent with the previously approved directions for use on product labeling.

**List 1.—Phase-Out Group A**

Almond
Apricot
Broccoli
Brussels sprouts
Carrots
Cauliflower
Celery (non-AZ)
Citrus (non-bearing)
Collard greens
Dry beans
Dry peas
Eggplant
Filbert
Kale
Kohlrabi
Macadamia
Mustard greens
Nectarine (CA only)
Plum & prune

Poplars grown for pulp and timber
Strawberry (Annual)
Sweet potato
Tart cherry
Turnip
Walnut
Ornamental trees, shrubs, and herbaceous plants—includes boxelder, dogwood, lilac, Douglas fir (grown for ornamentals nursery stock or Christmas trees; Pacific Northwest only), elms, leatherleaf fern, pines (Austrian, jack, red, scotch, white), shade trees (except birch), shrubs, spruce (New England area only), taxus, orchids, hybrid poplars, Christmas trees Other uses that may appear on section 3 registration labels or on a 24(c) registration and are not listed above or on Lists 2, 3, 4, 5, or 6 of this unit.

2. *For the uses in List 2 of this unit.*—

i. EPA prohibits the registrants' distribution, sale, and reformulation of products permitting the following uses after March 31, 2012, except sale or distribution of such products for the purposes of proper disposal, or export consistent with section 17 of FIFRA.

ii. EPA prohibits the distribution or sale of products permitting the following uses by persons other than the registrants after May 31, 2012, except sale or distribution of such products for the purposes of proper disposal, or export consistent with section 17 of FIFRA.

iii. EPA prohibits registration and use of those products that show uses listed in List 2 on the label for those same uses after July 31, 2012. The stop use date for the uses listed in List 2 of this unit must be reflected on amended product labeling. Any use of existing stocks must be consistent with the previously approved directions for use on product labeling.

**List 2.—Phase-Out Group B**

Cabbage
Celery (AZ only)
Cotton
Cucumbers
Lettuce
Stone fruits not listed in List 1 of this unit, including nectarine (non-CA), peaches, and sweet cherry
Summer melons (cantaloupe, honeydew, watermelon)
Summer squash
Tobacco

3. *For the uses in List 3 of this unit.*—

i. EPA prohibits the registrants' distribution, sale, and reformulation of products permitting the following uses after March 31, 2013, except sale or distribution of such products for the purposes of proper disposal, or export consistent with section 17 of FIFRA.

ii. EPA prohibits the distribution or sale of products permitting the following uses by persons other than the registrants after May 31, 2013, except sale or distribution of such products for the purposes of proper disposal, or export consistent with section 17 of FIFRA.

iii. EPA prohibits registration and use of those products that show uses listed in List 3 on the label for those same uses after July 31, 2013. The stop use date for the uses listed in List 3 of this unit must be reflected on amended product labeling. Any use of existing stocks must be consistent with the previously approved directions for use on product labeling.

**List 3.—Phase-Out Group C**

Pear

4. *For the uses in List 4 of this unit.*—

i. EPA prohibits the registrants' distribution, sale, and reformulation of products permitting the following uses in the state of Florida after September 30, 2014, except sale or distribution of such products for the purposes of proper disposal, or export consistent with section 17 of FIFRA.

ii. EPA prohibits the distribution or sale in the state of Florida of products permitting the following uses by persons other than the registrants after October 31, 2014, except sale or distribution of such products for the purposes of proper disposal, or export consistent with section 17 of FIFRA.

iii. EPA prohibits registration and use of those products that show uses listed in List 4 on the label for those same uses in the state of Florida after December 31, 2014. The stop use date for the uses listed in List 4 of this unit must be reflected on amended product labeling. Any use of existing stocks must be consistent with the previously approved directions for use on product labeling.

**List 4.—Phase-Out Group D**

All Florida uses of:
Apple
Blueberry
Peppers
Potatoes
Pumpkins
Sweet corn
Tomato
Winter squash

5. *For the uses in List 5 of this unit.*—

i. EPA prohibits the registrants' distribution, sale, and reformulation of products permitting the following uses after March 31, 2015, except sale or distribution of such products for the purposes of proper disposal, or export consistent with section 17 of FIFRA.

ii. EPA prohibits the distribution or sale of products permitting the following uses by persons other than the registrants after May 31, 2015, except sale or distribution of such products for the purposes of proper disposal, or export consistent with section 17 of FIFRA.

iii. EPA prohibits registration and use of those products that show uses listed in List 5 on the label for those same uses after July 31, 2015. The stop use date for the uses listed in List 5 of this unit must be reflected on amended product labeling. Any use of existing stocks must be consistent with the previously approved directions for use on product labeling.

**List 5.—Phase-Out Group E**

Apple
Blueberry
Peppers
Potatoes
Pumpkins
Sweet corn
Tomato
Winter squash

6. *For the uses in List 6 of this unit.*—

i. EPA prohibits the registrants' distribution, sale, and reformulation of products permitting the following uses after March 31, 2016, except sale or distribution of such products for the purposes of proper disposal, or export consistent with section 17 of FIFRA.

ii. EPA prohibits the distribution or sale of products permitting the following uses by persons other than the registrants after May 31, 2016, except sale or distribution of such products for the purposes of proper disposal, or export consistent with section 17 of FIFRA.

iii. EPA prohibits registration and use of those products that show uses listed in List 6 on the label for those same uses after July 31, 2016. The stop use date for the uses listed in List 6 of this unit must be reflected on amended product labeling. Any use of existing stocks must be consistent with the previously approved directions for use on product labeling.

**List 6.—Phase-Out Group F**

Livestock ear tags
Pineapple
Strawberry (perennial/biennial)
Vegetable crops for seed (alfalfa, broccoli, Brussels sprouts, cabbage, cauliflower, Chinese cabbage, collard greens, kale, kohlrabi, mustard greens, radish, rutabaga, turnip)

**List of Subjects**

Environmental protection, Pesticides and pests.

Dated: October 28, 2010.

**Richard P. Keigwin, Jr.,**

*Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.*

[FR Doc. 2010–28138 Filed 11–9–10; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9224–8]**

## Science Advisory Board Staff Office Notification of a Public Meeting of the SAB Lead Review Panel

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

**ACTION:** Notice.

**SUMMARY:** The EPA Science Advisory Board (SAB) Staff Office announces a public meeting of the SAB Lead Review Panel to peer review two draft EPA documents entitled *Approach for Developing Lead Dust Hazard Standards for Residences and Approach for Developing Lead Dust Hazard Standards for Public and Commercial Buildings.*

**DATES:** There will be a public meeting held on December 6, 2010 from 9 a.m. to 5 p.m. (Eastern Time) and December 7, 2010 from 8:30 a.m. to 12:30 p.m. (Eastern Time).

**ADDRESSES:** The face-to-face meeting on December 6–7, 2010 will be held at the Madison Hotel, 1177 15th Street, NW., Washington, DC 20005; telephone (202) 862–1600.

**FOR FURTHER INFORMATION CONTACT:** Any member of the public wishing to obtain information concerning the public meeting may contact Mr. Aaron Yeow, Designated Federal Officer (DFO), EPA Science Advisory Board Staff Office (1400R), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; by telephone/voice mail at (202) 564–2050 or at *yeow.aaron@epa.gov.* General information about the SAB, as well as any updates concerning the meeting announced in this notice, may be found on the EPA Web site at *http://www.epa.gov/sab.*

**SUPPLEMENTARY INFORMATION:** Pursuant to the Federal Advisory Committee Act (FACA), 5 U.S.C., App. 2, notice is hereby given that the SAB Lead Review Panel will hold a public face-to-face meeting to peer review two draft EPA documents entitled *Approach for Developing Lead Dust Hazard Standards for Residences and Approach for Developing Lead Dust Hazard Standards for Public and Commercial Buildings.* The SAB was established pursuant to 42 U.S.C. 4365 to provide independent scientific and technical advice to the Administrator on the technical basis for Agency positions and regulations. The SAB is a Federal Advisory Committee chartered under FACA. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

*Background:* Human exposure to lead may cause a variety of adverse health effects, particularly in children. EPA's Office of Pollution Prevention and Toxics (OPPT) regulates toxic substances, such as lead, through the Toxic Substances Control Act (TSCA). In 2001, EPA established standards for lead-based paint hazards, which include lead in residential dust. OPPT is considering possible revision of the residential lead-based paint dust hazard standards and the development of lead-based paint dust hazard standards for public and commercial buildings. As part of this effort, OPPT has developed two draft documents, *Approach for Developing Lead Dust Standards for Residences and Approach for Developing Lead Dust Standards for Public and Commercial Buildings.* OPPT sought consultative advice from the SAB Lead Review Panel on early drafts of the documents on July 6–7, 2010 [**Federal Register** Notice dated June 3, 2010 (75 FR 31433–31434)]. EPA has considered the advice provided by individual members of the SAB Lead Review Panel in revising the two documents that will be peer reviewed by the SAB Lead Review Panel on December 6–7, 2010. For this peer review, EPA has requested that the SAB panel provide recommendations on: The technical approaches for developing the hazard standards, empirical blood lead modeling, analysis of variability and uncertainty, and biokinetic blood lead modeling.

*Availability of Meeting Materials:* Agendas and materials in support of this meeting will be placed on the EPA Web site at *http://www.epa.gov/sab* in advance of the meeting. For technical questions and information concerning EPA's documents please contact Dr. Jennifer Seed at (202) 564–7634, or *seed.jennifer@epa.gov.*

*Procedures for Providing Public Input:* Public comment for consideration by EPA's federal advisory committees and panels has a different purpose from public comment provided to EPA program offices. Therefore, the process for submitting comments to a federal advisory committee is different from the process used to submit comments to an EPA program office.

Federal advisory committees and panels, including scientific advisory committees, provide independent advice to EPA. Members of the public can submit comments for a federal advisory committee to consider as it develops advice for EPA. They should send their comments directly to the Designated Federal Officer for the relevant advisory committee. *Oral Statements:* In general, individuals or groups requesting an oral presentation at a public face-to-face meeting will be limited to five minutes, with no more than a total of one hour for all speakers. Each person making an oral statement should consider providing written comments as well as their oral statement so that the points presented orally can be expanded upon in writing. Interested parties should contact Mr. Aaron Yeow, DFO, in writing (preferably via e-mail) at the contact information noted above by November 29, 2010 for the face-to-face meeting, to be placed on the list of public speakers. *Written Statements:* Written statements should be supplied to the DFO via e-mail at the contact information noted above by November 29, 2010 for the face-to-face meeting so that the information may be made available to the Panel members for their consideration. Written statements should be supplied in one of the following electronic formats: Adobe Acrobat PDF, MS Word, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP format. Submitters are requested to provide versions of signed documents, submitted with and without signatures, because the SAB Staff Office does not publish documents with signatures on its Web sites.

*Accessibility:* For information on access or services for individuals with disabilities, please contact Mr. Aaron Yeow at (202) 564–2050 or *yeow.aaron@epa.gov.* To request accommodation of a disability, please contact Mr. Yeow preferably at least ten days prior to each meeting to give EPA as much time as possible to process your request.

Dated: November 4, 2010.

**Anthony F. Maciorowski,**

*Deputy Director, EPA Science Advisory Staff Office.*

[FR Doc. 2010–28379 Filed 11–9–10; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9224–2]**

### Notice of Meeting of the EPA's Children's Health Protection Advisory Committee (CHPAC)

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

**ACTION:** Notice of meeting.

**SUMMARY:** Pursuant to the provisions of the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the next meeting of the Children's Health Protection Advisory Committee (CHPAC) will be held December 2 and 3, 2010 at the Westin City Center, 1400 M Street, NW., Washington, DC. The CHPAC was created to advise the Environmental Protection Agency on science, regulations, and other issues relating to children's environmental health.

**DATES:** The CHPAC will meet December 2 and 3, 2010.

**ADDRESSES:** Westin City Center, 1400 M Street, NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Martha Berger, Office of Children's Health Protection, USEPA, MC 1107T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 564–2191, *berger.martha@epa.gov.*

**SUPPLEMENTARY INFORMATION:** The meetings of the CHPAC are open to the public. The CHPAC will meet on Thursday, December 2 from 8:30 a.m. to 5 p.m., and Friday, December 3 from 9 a.m. to 12:30 p.m. Agenda will be posted at *http://www.epa.gov/children.*

*Access:* For information on access or services for individuals with disabilities, please contact Martha Berger at 202–564–2191 or *berger.martha@epa.gov.*

Dated: November 1, 2010.

**Martha Berger,**

*Designated Federal Official.*

[FR Doc. 2010–28384 Filed 11–9–10; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2010–0014; FRL–8851–9]**

### Notice of Receipt of Requests To Voluntarily Cancel Certain Pesticide Registrations

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

**ACTION:** Notice.

**SUMMARY:** In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of requests by registrants to voluntarily cancel certain pesticide registrations. EPA intends to grant these requests at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the requests, or unless the registrants withdraw their requests. If these requests are granted, any sale, distribution, or use of products listed in this notice will be permitted after the registrations have been cancelled only if such sale, distribution, or use is consistent with the terms as described in the final order.

**DATES:** Comments must be received on or before May 9, 2011.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2010–0014, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

Submit written withdrawal request by mail to: Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. Attention: Maia Tatinclaux.

- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

*Instructions:* Direct your comments to docket ID number EPA–HQ–OPP–2010–0014. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at: *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected through regulations.gov or e-mail. The regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although, listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** Maia Tatinclaux, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 347–0123; e-mail address: *tatinclaux.maia@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

#### I. General Information

*A. Does this Action Apply to Me?*

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. If you

have any questions regarding the information in this notice, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

*B. What Should I Consider as I Prepare My Comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

## II. What Action Is the Agency Taking?

This notice announces receipt by the Agency of requests from registrants to cancel 49 pesticide products registered under FIFRA section 3 or 24(c). These registrations are listed in sequence by registration number (or company number and 24(c) number) in Table 1 of this unit.

Unless the Agency determines that there are substantive comments that warrant further review of the requests or the registrants withdraw their requests, EPA intends to issue an order in the **Federal Register** canceling all of the affected registrations.

TABLE 1—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

| Registration No. | Product name | Active ingredient |
|---|---|---|
| 000264–00499 | Rootone F Brand Rooting Hormone | 1–Naphthaleneacetamide, Thiram. |
| 000432–01454 | Merit 240 SC Insecticide | Imidacloprid. |
| 000707–00302 | Cunilate 2002 | Copper, bis(8-quinolinolato-N1, O8)-. |
| 001475–00159 | Willert Mosquito Coils | Bioallethrin. |
| 001529–00054 | Nuosept 91T | Grotan. |
| 002517–00006 | Double Duty Cat Flea & Tick Spray | Pyrethrins, Piperonyl butoxide, MGK 264. |
| 002517–00034 | Sergeant's Foam 'N Comb Dry Shampoo for Dogs and Cats. | Pyrethrins, Piperonyl butoxide. |
| 002517–00099 | Pyrethroid W.B. Concentrate | Permethrin. |
| 002517–00104 | Preventic L.A. Flea and Tick Spray for Dogs | Permethrin. |
| 002517–00105 | Natura Flea & Tick Collar for Dogs and Cats | Permethrin. |
| 002517–00108 | Permethrin-IGR #1 Flea and Tick Spray for Dogs | Permethrin, Pyriproxyfen. |
| 002517–00113 | Permethrin-Pyriproxifen Residual Shampoo for Dogs #2. | Permethrin, Pyriproxyfen. |
| 002829–00042 | Socci 3500 WP | Copper, bis(8-quinolinolato-N1, O8)-. |
| 002829–00044 | Cunilate 2174–NO | Copper, bis(8-quinolinolato-N1, O8)-. |
| 002829–00049 | Socci 3500 | Copper, bis(8-quinolinolato-N1, O8)-. |
| 002829–00082 | Vinyzene BP–5 | 10, 10′-Oxybisphenoxarsine. |
| 002829–00112 | Cunilate 2419–75 | Copper, bis(8-quinolinolato-N1, O8)-. |
| 002829–00135 | Nytek 10WP | Copper, bis(8-quinolinolato-N1, O8)-. |
| 002829–00136 | Nytek 10 | Copper, bis(8-quinolinolato-N1, O8)-. |
| 002829–-00137 | Nytek WD | Copper, bis(8-quinolinolato-N1, O8)-. |
| 005905–00066 | MSMA Plus | MSMA (and salts). |
| 005905–00162 | Helena Brand MSMA High Concentrate | MSMA (and salts). |
| 005905–00164 | MSMA Plus* H.C. | MSMA (and salts). |
| 006218–00041 | Summit Sumithrin Greenhouse Spray | Phenothrin. |
| 006218–00046 | Summit Sumithrin Greenhouse Aerosol | MGK 264, Phenothrin. |
| 009630–00004 | 6% Copper Nap-All | Copper naphthenate. |
| 009630–00005 | M-Gard S120 | Copper naphthenate. |
| 009630–00006 | 8% Zinc Nap-All | Zinc naphthenate. |
| 009630–00007 | Zinc Hydro-Nap | Zinc naphthenate. |
| 009630–00010 | M-Gard W550 | Zinc naphthenate. |
| 009630–00012 | M-Gard S520 | Copper naphthenate. |
| 009630–00021 | M-Gard S550 | Zinc naphthenate. |
| 040849–00069 | Scorcher Total Vegetation Killer | Prometon. |
| 043437–00003 | 8% Zinc Naphthenate | Zinc naphthenate. |
| 043437–00004 | 8% Copper Naphthenate | Copper naphthenate. |
| 044446–00072 | Areo Blast | Piperonyl butoxide, Tetramethrin, Permethrin. |
| 053853–00002 | Black Flag Fogging Insecticide Formula 2 | Permethrin, Piperonyl butoxide, Tetramethrin. |
| 066330–00313 | Bifenthrin 98% Technical | Bifenthrin. |
| 066330–00322 | Sulfometuron Methyl Technical | Sulfometuron. |
| 066330–00326 | Sulfometuron 75EG Herbicide | Sulfometuron. |

TABLE 1—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

| Registration No. | Product name | Active ingredient |
|---|---|---|
| 074530–00024 | Helm Diquat AG | Diquat dibromide. |
| 082498–00005 | Glyphosate Technical | Glyphosate. |
| 083071–00001 | Activ-Ox 20 | Sodium chlorite, Sodium hypochlorite. |
| 084456–00001 | Abamectin Technical | Abamectin. |
| 084456–00003 | Abamectin 2% Ornamental Miticide/Insecticide | Abamectin. |
| 084456–00004 | Abamectin 2% Miticide/Insecticide | Abamectin. |
| AR980003 | Dylox 80 Turf and Ornamental Insecticide | Trichlorfon. |
| OR050018 | Prometryne 4L Herbicide | Prometryn. |
| WA040010 | Warrior Insecticide with Zenon Technology | Lambda-Cyhalothrin. |

Table 2 of this unit includes the names and addresses of record for all registrants of the products in Table 1 of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in this unit.

TABLE 2—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION

| EPA company number | Company name and address |
|---|---|
| 264 | Bayer CropScience LP, P.O. Box 12014, Research Triangle Park, NC 27709. |
| 432 | Bayer Environmental Science, 2 T.W. Alexander Drive, P.O. Box 12014, Research Triangle Park, NC 27709. |
| 707 | Rohm & Hass Co., 100 Independence Mall West, Philadelphia, PA 19106–2399. |
| 1475 | Willert Home Products, 4044 Park Ave., St. Louis, MO 63110. |
| 1529 | International Specialty Products, 1361 Alps Rd., Wayne, NJ 07470. |
| 2517 | Sergeant's Pet Care Products, Inc., 2625 South 158th Plaza, Omaha, NE 68130–1703. |
| 2829 | Rohm & Hass Co., 100 Independence Mall West, Suite 1A, Philadelphia, PA 19106–2399. |
| 5905 | Helena Chemical Company, Agent Name: Wagner Regulatory Associates, Inc., P.O. Box 640, Hockessin, DE 19707. |
| 6218 | Summit Chemical Co., 235 S Kresson St., Baltimore, MD 21224. |
| 9630 | OMG Americas Inc., 811 Sharon Drive, Westlake, OH 44145. |
| 40849 | ZEP Inc., 1310 Seaboard Industrial Blvd., NW., Atlanta, GA 30318. |
| 43437 | OMG Belleville Limited, 811 Sharon Drive, Cleveland, OH 44145–1522. |
| 44446 | Quest Chemical Company, 12255 F.M., 529 Northwoods Industrial Park, Houston, TX 77041. |
| 53853 | The Fountainhead Group, Inc., 23 Garden Street, New York Mills, NY 13417. |
| 66330 | Arysta Lifescience North America, LLC, 15401 Weston Parkway, Suite 150, Cary, NC 27513. |
| 74530 | Helm Agro US, Inc., 8275 Tournament Drive, Suite 340, Memphis, TN 38125. |
| 82498 | Agril Packaging & Logistics, Inc., 2509 South Frontage Road, Sardis, MS 38666. |
| 83071 | Feedwater Limited, 1415 Crystal Court, Naperville, IL 60563–0142. |
| 84456 | Hebei Veyong Bio-Chemical Company, Ltd., Agent Name: Wagner Regulatory Associates, Inc., 7460 Lancaster Pike, Suite 9, P.O. Box 640, Hockessin, DE 19707–0640. |
| AR980003 | Arkansas Bait and Ornamental Fish Growers Assn., P.O. Box 509, Lonoke, AR 72086. |
| OR050018 | Loveland Products, Inc., P.O. Box 1286, Greeley, CO 80632–1286. |
| WA040010 | Syngenta Crop Protection, Inc., P.O. Box 18300, Greensboro, NC 27419–8300. |

## III. What Is the Agency's Authority for Taking This Action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**.

Section 6(f)(1)(B) of FIFRA requires that before acting on a request for voluntary cancellation, EPA must provide a 30-day public comment period on the request for voluntary cancellation or use termination. In addition, FIFRA section 6(f)(1)(C) requires that EPA provide a 180-day comment period on a request for voluntary cancellation or termination of any minor agricultural use before granting the request, unless:

1. The registrants request a waiver of the comment period, or

2. The EPA Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

The registrants in Table 2 of Unit II. have not requested that EPA waive the 180-day comment period. Accordingly, EPA will provide a 180-day comment period on the proposed requests.

## IV. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for cancellation should submit such withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. If the products have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

## V. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. Because the Agency has identified no significant potential risk concerns associated with these pesticide products, upon cancellation of the products identified in Table 1 of Unit II., EPA anticipates allowing registrants to sell and distribute existing stocks of these products for 1 year after publication of the Cancellation Order in the **Federal Register**. Thereafter, registrants will be prohibited from selling or distributing

the pesticides identified in Table 1 of Unit II., except for export consistent with FIFRA section 17 or for proper disposal. Persons other than registrants will generally be allowed to sell, distribute, or use existing stocks until such stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products.

**List of Subjects**

Environmental protection, Pesticides and pests.

Dated: October 28, 2010.

**Richard P. Keigwin, Jr.,**

*Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.*

[FR Doc. 2010–28262 Filed 11–9–10; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2009–1017; FRL–8851–5]**

## Notice of Receipt of Requests To Voluntarily Cancel Certain Pesticide Registrations

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

**ACTION:** Notice.

**SUMMARY:** In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of requests by registrants to voluntarily cancel certain pesticide registrations. EPA intends to grant these requests at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the requests, or unless the registrants withdraw their requests. If these requests are granted, any sale, distribution, or use of products listed in this notice will be permitted after the registrations have been canceled only if such sale, distribution, or use is consistent with the terms as described in the final order.

**DATES:** Comments must be received on or before December 10, 2010.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2009–1017, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

Submit written withdrawal request by mail to: Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. Attention: Maia Tatinclaux.

- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

*Instructions:* Direct your comments to docket ID number EPA–HQ–OPP–2009–1017. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** Maia Tatinclaux, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 347–0123; e-mail address: *tatinclaux.maia@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. If you have any questions regarding the information in this notice, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

*B. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying

information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

## II. What action is the agency taking?

This notice announces receipt by the Agency of requests from registrants to cancel 117 pesticide products registered under FIFRA section 3 or 24(c). These registrations are listed in sequence by registration number (or company number and 24(c) number) in Tables 1a, 1b, and 1c of this unit.

Unless the Agency determines that there are substantive comments that warrant further review of the requests or the registrants withdraw their requests, EPA intends to issue an order in the **Federal Register** canceling all of the affected registrations. The requests to cancel products with EPA Reg. Nos. 66330–63 and 66330–69 would terminate the last Sodium tetrathiocarbonate products registered for use in the United States.

The cancellations of products listed in Table 1b will be effective December 31, 2015. The requests to cancel these products would terminate the last Temephos products registered for use in the United States.

The cancellations of products containing active ingredients other than Sodium tetrathiocarbonate and Temephos would not terminate the last products registered for use in the United States of those active ingredients.

TABLE 1A—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

| EPA reg. no. | Product name | Active ingredients |
|---|---|---|
| 000228–00196 | Riverdale Patron TM DP–4 Ester | 2, 4–DP. |
| 000228–00212 | Riverdale Prometon 1.5 Ready To Use Vegetation Killer. | Prometon. |
| 000228–00213 | Riverdale Prometon 5E Vegetation Killer | Prometon. |
| 000228–00214 | Riverdale Prometon 3.73E Vegetation Killer | Prometon. |
| 000228–00685 | Imazapyr E–Pro 2E—Site Prep & Basal Herbicide | Imazapyr, isopropylamine salt. |
| 000228–00686 | Imazapyr E–Pro 2—VM & Aquatic Herbicide | Imazapyr. |
| 000228–00687 | Imazapyr E–Pro 4—Forestry Herbicide | Imazapyr, isopropylamine salt. |
| 000239–02391 | Ortho Dormant Disease Control | Calcium polysulfide. |
| 000264–01001 | Scout Manufacturing Use Product | Tralomethrin. |
| 000264–01003 | Scout Insecticide | Tralomethrin. |
| 000264–01004 | Scout X-tra Insecticide | Tralomethrin. |
| 000264–01005 | Scout 0.3 EC Insecticide | Tralomethrin. |
| 000264–01009 | HR 20900 Insecticide | Deltamethrin<br>Tralomethrin. |
| 000264–01010 | Scout X-tra Gel Insecticide | Tralomethrin. |
| 000432–00755 | Saga WP Insecticide | Tralomethrin. |
| 000432–00760 | Saga WSB | Tralomethrin. |
| 000432–00784 | Saga RTU–FA Insecticide | Tralomethrin. |
| 000432–01278 | Tralex Manufacturing Use Product II | Tralomethrin. |
| 000506–00157 | Tat House & Garden Insecticide Killer | Tetramethrin<br>Phenothrin. |
| 000655–00805 | Noxfish Fish Toxicant Liquid-Emulsifiable | Rotenone<br>Cube Resins other than rotenone. |
| 000655–00806 | Cube Powder Fish Toxicant | Rotenone<br>Cube Resins other than rotenone. |
| 000655–00807 | Powdered Cube Root | Rotenone<br>Cube Resins other than rotenone. |
| 000802–00533 | Noxall Vegetation Killer | Prometon. |
| 001448–00093 | Busan 1016 | Metam-sodium<br>Carbamodithioic acid, cyano-, disodium salt. |
| 001448–00361 | Busan 1236 | Metam-sodium. |
| 001663–00035 | Grant's Flying & Crawling Insect Killer | Piperonyl butoxide<br>Permethrin<br>Tetramethrin. |
| 001677–00219 | Sanova Base (25%) | Sodium chlorite. |
| 001839–00115 | Onyxide 200 Oil Field Application Preservative | Hexahydro-1,3,5-tris(2-hydroxyethyl)-s-triazine. |
| 001839–00156 | Onyxide 200–50% | Hexahydro-1,3,5-tris(2-hydroxyethyl)-s-triazine. |
| 004822–00491 | Windex Antibacterial Glass & Surface Cleaner | Isopropyl alcohol<br>Propylene glycol. |
| 005741–00009 | Sparquat 256 Germicidal Cleaner | 1–Decanaminium, *N,N*-dimethyl-*N*-octyl-, chloride; 1-Octanaminium, *N,N*-dimethyl-*N*-octyl-, chloride; Alkyl dimethyl benzyl ammonium chloride (50% C-14, 40%C12, 10%C16); 1-Decanaminium, *N*-decyl-*N,N*-dimethyl-, chloride. |
| 009688–00192 | Chemsico Herbicide Concentrate P | Prometon. |
| 009779–00133 | Riverside 912 Herbicide | MSMA (and salts). |
| 028293–00160 | Unicorn House and Carpet Spray 11 | Phenothrin<br>Tetramethrin. |

TABLE 1A—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

| EPA reg. no. | Product name | Active ingredients |
|---|---|---|
| 028293–00215 | Unicorn IGR Pressurized Spray. | Phenothrin<br>Tetramethrin<br>Pyriproxyfen. |
| 033753–00025 | Myacide DZ | Dazomet. |
| 033753–00028 | Myacide HT T | Hexahydro-1,3,5-tris(2-hydroxyethyl)-s-triazine. |
| 033753–00029 | Myacide HT | Hexahydro-1,3,5-tris(2-hydroxyethyl)-s-triazine. |
| 034704–00647 | Metam Soil Fumigant | Metam-sodium. |
| 034704–00769 | Nemasol 42% | Metam-sodium. |
| 053883–00071 | Martin's Permethrin Termiticide/Insecticide | Permethrin. |
| 053883–00093 | Glyphosate Technical | Glyphosate. |
| 053883–00190 | Permethrin .5% Multi-Purpose Insecticide Spray | Permethrin. |
| 066330–00063 | ETK–1101 | Sodium tetrathiocarbonate. |
| 066330–00069 | Enzone | Sodium tetrathiocarbonate. |
| 072155–00007 | Merit + Tempo Ready-to-Spray Insecticide | Cyfluthrin<br>Imidacloprid. |
| 072155–00008 | Tempo 0.1 Fire Ant Granular | Cyfluthrin. |
| 072155–00011 | Merit 0.0003% PM Plus Fertilizer | Imidacloprid. |
| 072155–00016 | Glyphosate 2% RTU Herbicide | Glyphosate-isopropylammonium. |
| 072155–00017 | Prodiamine 0.26% Granular Herbicide Plus Lawn Fertilizer. | Prodiamine. |
| 072155–00018 | Prodiamine 0.28%G Lawn Herbicide | Prodiamine. |
| 072155–00020 | Trimec Granular Herbicide Plus Fertilizer | Dicamba<br>Mecoprop-P<br>2,4-D. |
| 072155–00025 | Beta-Cyfluthrin 0.0015% RTU Insecticide | beta-Cyfluthrin. |
| 072155–00026 | Beta-Cyfluthrin 0.38% Concentrate Insecticide | beta-Cyfluthrin. |
| 072155–00030 | Imidacloprid 0.36% + Beta-Cyfluthrin 0.18% RTS Insecticide. | beta-Cyfluthrin<br>Imidacloprid. |
| 072155–00033 | Dylox Insect Granules | Trichlorfon. |
| 072155–00037 | Merit Concentrate Insecticide | Imidacloprid. |
| 072155–00038 | Merit RTU Insecticide | Imidacloprid. |
| 072155–00041 | Merit + Tempo Ready-to-Use Insecticide | Cyfluthrin<br>Imidacloprid. |
| 072155–00042 | Merit + Tempo Concentrated Insecticide | Cyfluthrin<br>Imidacloprid. |
| 072155–00045 | Tempo Insecticide | Cyfluthrin. |
| 072155–00050 | Merit + Tempo Concentrate Insecticide II | Cyfluthrin<br>Imidacloprid. |
| 072155–00052 | Laser Ant & Roach Killer Pump Spray II | Cyfluthrin. |
| 072155–00053 | Merit PM Plus Fertilizer | Imidacloprid. |
| 072155–00054 | Tempo 1 FAD | Cyfluthrin. |
| 072155–00059 | Imidacloprid 1.85 RD Insecticide | Imidacloprid. |
| 072155–00060 | Trimec+ Prodiamine Granular Herbicide Plus Fertilizer. | Dicamba<br>Mecoprop-P<br>2,4-D; Prodiamine. |
| 072155–00065 | Tempo 0.38% Concentrated Insecticide | beta-Cyfluthrin. |
| 072642–00007 | Spinosad Ear Tag | Spinosad. |
| AL000001 | Penncap-M Microencapsulated Insecticide | Methyl parathion. |
| AL050003 | Waylay 3.2 Ag Permethrin Insecticide | Permethrin. |
| AL060003 | Permethrin 3.2 E.C. | Permethrin. |
| AR000006 | Penncap-M Microencapsulated Insecticide | Methyl parathion. |
| AR050009 | Waylay 3.2 Ag Permethrin Insecticide | Permethrin. |
| CA000001 | Penncap-M Microencapsulated Insecticide | Methyl parathion. |
| GA050006 | Waylay 3.2 Ag Permethrin Insecticide | Permethrin. |
| IL100001 | Prentox Prenfish Toxicant | Rotenone<br>Cube Resins other than rotenone. |
| LA050012 | Waylay 3.2 Ag Permethrin Insecticide | Permethrin. |
| LA090005 | Penncap-M Microencapsulated Insecticide | Methyl parathion. |
| MO990005 | Dylox 80 Turf and Ornamental Insecticide | Trichlorfon. |
| MS000009 | Penncap-M Microencapsulated Insecticide | Methyl parathion. |
| MS050018 | Waylay 3.2 Ag Permethrin Insecticide | Permethrin. |
| MT050002 | Prentox Prenfish Toxicant | Rotenone<br>Cube Resins other than rotenone. |
| NY080011 | Prentox Prenfish Toxicant | Rotenone<br>Cube Resins other than rotenone. |
| SC050005 | Waylay 3.2 Ag Permethrin Insecticide | Permethrin. |
| TX050004 | Waylay 3.2 Ag Permethrin Insecticide | Permethrin. |
| TX990012 | Penncap-M Microencapsulated Insecticide | Methyl parathion. |

TABLE 1B—TEMEPHOS REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

| EPA reg. No. | Product name | Active ingredients |
|---|---|---|
| 000192–00213 | Temexx Mini-G Larvicide | Temephos. |
| 000192–00215 | Temexx Micro-G Larvicide | Temephos. |
| 000769–00678 | Temexx 4EC Larvicide | Temephos. |
| 000769–00722 | Temexx 5G Larvicide | Temephos. |
| 000769–00723 | Temexx 1G Larvicide | Temephos. |
| 000769–00725 | Temexx 2G Larvicide | Temephos. |
| 000769–00990 | Temephos Technical | Temephos. |
| 008329–00015 | 5% Skeeter Abate | Temephos. |
| 008329–00016 | Clarke Abate 2-BG | Temephos. |
| 008329–00017 | Clarke 1% Skeeter Abate | Temephos. |
| 008329–00030 | Clarke Abate 5% Tire Treatment | Temephos. |
| 008329–00056 | Abate Insecticide MUP | Temephos. |
| 008329–00060 | Abate 4E Insecticide | Temephos. |
| 008329–00069 | Abate 4E Insecticide-For Use Only in California | Temephos. |
| 008329–00070 | 5% Skeeter Abate-For Use Only in California | Temephos. |
| 008329–00071 | Abate 2 BG-For Use Only in California | Temephos. |
| FL070008 | Abate 4E Insecticide | Temephos. |
| FL080015 | Allpro Provect 4E Larvicide | Temephos. |

TABLE 1C—METHYL BROMIDE AND METAM-SODIUM REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

| EPA reg. No. | Product name | Active ingredients |
|---|---|---|
| 005481–00467 | Vapam Soil Fumigant Solution | Metam-sodium. |
| 005785–00004 | Brom-O–Gas | Methyl bromide. |
| 008622–00005 | Ameribrom Methyl Bromide—Grain Fumigant | Methyl bromide. |
| 008622–00006 | Metabrom 98 | Methyl bromide. |
| 008622–00014 | 70–30 Soil Fumigant | Methyl bromide |
| 008622–00017 | Metabrom 99 | Methyl bromide. |
| 051036–00060 | Fume V Soil Fumigant | Metam-sodium. |
| AZ900003 | Brom-O-Gas 2% Chloropicrin | Methyl bromide. |
| AZ900008 | Brom-O-Gas | Methyl bromide. |
| FL970009 | Terr-O-Gas 67 | Methyl bromide Chloropicrin. |
| FL970010 | Terr-O-Gas 98 Preplant Soil Fumigant | Methyl bromide Chloropicrin. |
| HI910006 | Terr-O-Gas 98 Preplant Soil Fumigant | Methyl bromide Chloropicrin. |

Table 2 of this unit includes the names and addresses of record for all registrants of the products in Tables 1a, 1b, and 1c of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in this unit.

TABLE 2—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION

| Company number | Company name and address |
|---|---|
| 192 | Value Gardens Supply, LLC, P.O. Box 585, Saint Joseph, MO 64502. |
| 228 | Nufarm Americas Inc., 150 Harvester Drive, Suite 150, Burr Ridge, IL 60527. |
| 239 | The Scotts Company, 14111 Scottslawn Road, Marysville, OH 43041. |
| 264 | Bayer CropScience LP, 2 T.W. Alexander Drive, P.O. Box 12014, Research Triangle Park, NC 27709. |
| 432 | Bayer Environmental Science, 2 T.W. Alexander Drive, P.O. Box 12014, Research Triangle Park, NC 27709. |
| 506 | Walco Linck Company, 30856 Rocky Rd, Greeley, CO 80631–9375. |
| 655 | Prentiss, INC., 3600 Mansell Rd, Suite 350, Alpharetta, GA 30022. |
| 769 | Value Gardens Supply, LLC, P.O. Box 585, St. Joseph, MO 64502. |
| 802 | Lilly Miller Brands, P.O. Box 1019, Salem, VA 24153–3805. |
| 1448 | Buckman Laboratories Inc., 1256 North McLean Blvd, Memphis, TN 38108. |
| 1663 | Grant Laboratories, Inc., Registrations by Design, Inc., P.O. Box 1019, Salem, VA 24153. |
| 1677 | Ecolab Inc., 370 North Wabasha St., St. Paul, MN 55102. |
| 1839 | Stepan Company, 22 W. Frontage Rd, Northfield, IL 60093. |
| 4822 | S.C. Johnson & Son, Inc., 1525 Howe St., Racine, WI 53403. |
| 5481 | Amvac Chemical Corporation, 4695 MacArthur Court, Suite 1250, Newport Beach, CA 92660. |
| 5741 | Spartan Chemical Company, Inc., 1110 Spartan Drive, Maumee, OH 43537. |
| 5785 | Great Lakes Chem Corps, P.O. Box 2200, West Lafayette, IN 47996–2200. |
| 8329 | Clarke Mosquito Control Products, Inc., P.O. Box 72197, Roselle, IL 60172. |

TABLE 2—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION—Continued

| Company number | Company name and address |
|---|---|
| 8622 | ICL–IP America, Inc., 95 MacCorkle Avenue, SW, South Charleston, WV 25303. |
| 9688 | Chemsico, Div of United Industries Corp, P.O. Box 142642, St Louis, MO 63114–0642. |
| 9779 | Agriliance, LLC, P.O. Box 64089, St. Paul, MN 55164–0089. |
| 28293 | Phaeton Corporation, Agent Registrations By Design, Inc, P.O. Box 1019 Salem, VA 24153. |
| 33753 | BASF Corporation, 100 Campus Drive, Florham Park, NJ 07932. |
| 34704 | Loveland Products, Inc., P.O. Box 1286, Greeley, Colorado 80632–1286. |
| 51036 | Basf Sparks LLC, PO Box 13528, Research Triangle Park, NC 27709–3528. |
| 53883 | Control Solutions, Inc., 427 Hide Away Circle, Cub Run, KY 42729. |
| 66330 | Arysta Lifescience North America, LLC, 155401 Weston Parkway, Suite 150, Cary, NC 27513. |
| 72155 | Bayer Advanced, A Business Unit of Bayer Cropscience LP, 2 T.W. Alexander Drive, P.O. Box 12014, Research Triangle Park, NC 27709. |
| 72642 | Elanco Animal Health, A Division of Eli Lilly & Co., 4061 North 156th Drive, Goodyear, AZ 85338. |
| AL000001, AL050003 AL060003, AR000006, AR050009, CA000001, GA050006, LA050012, LA090005, MS000009, MS050018, SC050005, TX050004. | United Phosphorus, Inc., 630 Freedom Business Center, Suite 402, King of Prussia, PA 19406. |
| AZ900003, AZ900008, FL970009, FL970010, HI910006,. | Great Lakes Chem Corps, P.O. Box 2200 West Lafayette, IN 47996–2200. |
| FL070008 | Clarke Mosquito Control Products, Inc., P.O. Box 72197, Roselle, IL 60172. |
| FL080015 | Value Gardens Supply, LLC, P.O. Box 585, Saint Joseph, MO 64502. |
| MO990005 | Missouri Aquaculture Association, P.O. Box 630, Jefferson City, MO 65102–6864. |
| MT050002, NY080011, IL100001 | Prentiss, Inc., 3600 Mansell Rd, Suite 350, Alpharetta, GA 30022. |
| TX990012 | Cerexagri, Inc., 630 Freedom Business Center, Suite 402, King of Prussia, PA 19406. |

## III. What is the agency's authority for taking this action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register.**

Section 6(f)(1)(B) of FIFRA requires that before acting on a request for voluntary cancellation, EPA must provide a 30-day public comment period on the request for voluntary cancellation or use termination. In addition, FIFRA section 6(f)(1)(C) requires that EPA provide a 180-day comment period on a request for voluntary cancellation or termination of any minor agricultural use before granting the request, unless:

1. The registrants request a waiver of the comment period, or

2. The EPA Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

The registrants in Table 2 of Unit II. have requested that EPA waive the 180-day comment period. Accordingly, EPA will provide a 30-day comment period on the proposed requests.

## IV. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for cancellation should submit such withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. If the products have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

## V. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. If the requests for voluntary cancellations are granted, the Agency intends to publish the cancellation order in the **Federal Register**.

### *A. For All Products Listed in Table 1a in Unit II*

Because the Agency has identified no significant potential risk concerns associated with these pesticide products, upon cancellation of the products identified in Table 1a of Unit II., EPA anticipates allowing registrants to sell and distribute existing stocks of these products for 1 year after publication of the Cancellation Order in the **Federal Register**. Thereafter, registrants will be prohibited from selling or distributing the pesticide products identified in Table 1a of Unit II., except for export consistent with FIFRA section 17 or for proper disposal. Persons other than registrants will generally be allowed to sell, distribute, or use existing stocks until such stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products.

### *B. For All Products Listed in Table 1b in Unit II*

Because the Agency has identified no significant potential risk concerns associated with these pesticide products, EPA proposes to include the following provisions for the treatment of any existing stocks of products containing temephos identified or referenced in Table 1b in Unit II.:

After December 31, 2015, registrants are prohibited from selling or distributing existing stocks of products containing temephos labeled for all uses.

After December 31, 2016, persons other than registrants are prohibited from selling or distributing existing stocks of products containing temephos labeled for all uses.

After December 31, 2016, existing stocks of products containing temephos labeled for all uses, already in the hands of users can be used legally until they are exhausted, provided that such use complies with the EPA-approved label and labeling of the affected product.

*C. For All Products Listed in Table 1c in Unit II*

Because the Agency has identified no significant potential risk concerns associated with these pesticide products, EPA proposes to include the following provisions for the treatment of any existing stocks of products containing methyl bromide or metam-sodium identified or referenced in Table 1c in Unit II.:

All sale or distribution by the registrant of existing stocks is prohibited after publication of the cancellation order in the **Federal Register**, unless that sale or distribution is solely for the purpose of facilitating disposal or export of the product.

Existing stocks may be sold and distributed by persons other than the registrant for 120 days from the date of the cancellation order.

Existing stocks may be used until exhausted, provided that such use complies with the EPA-approved label and labeling of the product.

**List of Subjects**

Environmental protection, Pesticides and pests.

Dated: October 29, 2010.

**Richard P. Keigwin, Jr.,**

*Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.*

[FR Doc. 2010–28141 Filed 11–5–10; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9224–7]**

### Workshop To Review Draft Materials for the Lead (Pb) Integrated Science Assessment (ISA)

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

**ACTION:** Notice of Workshop.

**SUMMARY:** As part of the review of the air quality criteria and National Ambient Air Quality Standards (NAAQS) for Lead (Pb), EPA is announcing that a workshop to evaluate initial draft materials for the Pb Integrated Science Assessment (ISA) is being organized by EPA's National Center for Environmental Assessment (NCEA) within the Office of Research and Development. The workshop will be held on December 2 and 3, 2010 in Research Triangle Park, NC and will be open to attendance by interested public observers on a first-come first-serve basis up to the limits of available space.

**DATES:** The workshop will be held on December 2 and 3, 2010 at 8 a.m. and end at 5 p.m.

**ADDRESSES:** The workshop will be held in the Auditorium of EPA's main campus, 109 T.W. Alexander Drive, Research Triangle Park, NC. The EPA contractor, Versar, is providing logistical support for the workshop.

**FOR FURTHER INFORMATION CONTACT:** Questions regarding information, registration, and logistics for the workshop should be directed to Bethzaida Colon, Versar, Inc., Conference Coordinator, 6850 Versar Center, Springfield, VA 22151, telephone: 703–642–6727; facsimile: 703–642–6809; e-mail: *BColon@versar.com.* Questions regarding the scientific and technical aspects of the workshop should be directed to Dr. Ellen Kirrane, telephone: 919–541–1340; facsimile: 919–541–2895; e-mail: *kirrane.ellen@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

**I. Summary of Information About the Workshop**

Section 109–(d) of the Clean Air Act requires the U.S. Environmental Protection Agency (EPA) to conduct periodic reviews of the air quality criteria for each air pollutant listed under section 108 of the Act. Based on such review, EPA is to retain or revise the NAAQS for a given pollutant as appropriate. As part of these reviews, NCEA assesses newly available scientific information and develops ISA documents (formerly known as Criteria Documents) that provide the scientific basis for the reviews of the NAAQS for Pb, particulate matter, carbon monoxide, nitrogen oxides, sulfur oxides, and ozone. Based on the information in the ISA, EPA's Office of Air Quality Planning and Standards typically conducts quantitative and qualitative risk and exposure assessments. The ISA and the risk/exposure assessments are used to prepare a policy assessment that informs subsequent rulemaking actions.

NCEA–RTP is holding this workshop to inform the Agency's evaluation of the scientific evidence for the review of the NAAQS for Pb. The purpose of the workshop is to obtain review of the scientific content of initial draft materials or sections for the draft ISA. Workshop sessions will include review and discussion of initial draft sections on the health effects evidence from in vivo and in vitro animal toxicology studies, and from epidemiology studies as well as evidence of the ecological effects of Pb. In addition, roundtable discussions will help identify key studies or concepts within each discipline to assist EPA in integrating within and across disciplines. This workshop is intended to help ensure that the ISA is up-to-date and focuses on the key evidence to inform the scientific understanding for the review of the NAAQS for Pb. EPA is planning to release the first external review draft ISA for Pb for review by the Clean Air Scientific Advisory Committee and the public in May 2011.

**II. Workshop Information**

Members of the public may attend the workshop as observers. Space is limited, and reservations will be accepted on a first-come, first-serve basis.

Dated: Novemer 2, 2010.

**Darrell A. Winner,**

*Acting Director, National Center for Environmental Assessment.*

[FR Doc. 2010–28380 Filed 11–9–10; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 6, 2010.

A. Federal Reserve Bank of Atlanta (Clifford Stanford, Vice President) 1000 Peachtree Street, NE., Atlanta, Georgia 30309:

*Feliciana Bancshares, Inc.,* Clinton, Louisiana; to become a bank holding company by acquiring 100 percent of the voting shares of Feliciana Bank & Trust Company, Clinton, Louisiana.

Board of Governors of the Federal Reserve System, November 5, 2010.

**Robert de V. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 2010–28404 Filed 11–9–10; 8:45 am]

**BILLING CODE 6210–01–P**

## FEDERAL RESERVE SYSTEM

### Notice of Proposals To Engage in Permissible Nonbanking Activities or To Acquire Companies That Are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR Part 225) to engage *de novo,* or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 24, 2010.

A. Federal Reserve Bank of New York (Ivan Hurwitz, Vice President) 33 Liberty Street, New York, New York 10045–0001:

*1. Deutsche Bank Aktiengesellschaft,* Frankfurt, Germany; to acquire up to 100 percent of the voting shares of PB Capital Corporation and PB (USA) Realty Corporation, both of New York, New York, and thereby engage in brokering, servicing loans and other extensions of credit, and in commercial real estate lending and leasing, pursuant to sections 225.28(b)(1) and (b)(3) of Regulation Y.

Board of Governors of the Federal Reserve System, November 5, 2010.

**Robert de V. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 2010–28403 Filed 11–9–10; 8:45 am]

**BILLING CODE 6210–01–P**

## FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

### Sunshine Act; Notice of Meeting

**TIME AND DATE:** 9 a.m. (Eastern Time) November 16, 2010.

**PLACE:** 4th Floor Conference Room, 1250 H Street, NW., Washington, DC 20005.

**STATUS:** Parts will be open to the public and parts will be closed to the public.

**MATTERS TO BE CONSIDERED:**

**Parts Open to the Public**

1. Approval of the minutes of the October 18, 2010 Board Member Meeting.
2. Thrift Savings Plan Activity Report by the Executive Director.
   a. Monthly Participant Activity Report.
   b. Monthly Investment Performance Review.
   c. Legislative Report.

**Parts Closed to the Public**

3. Confidential Data.

**CONTACT PERSON FOR MORE INFORMATION:** Thomas J. Trabucco, Director, Office of External Affairs, (202) 942–1640.

Dated: November 8, 2010.

**Thomas K. Emswiler,**

*Secretary, Federal Retirement Thrift Investment Board.*

[FR Doc. 2010–28534 Filed 11–8–10; 4:15 pm]

**BILLING CODE 6760–01–P**

## FEDERAL MARITIME COMMISSION

### Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*http://www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

*Agreement No.:* 011261–009.

*Title:* ACL/Wallenius Wilhelmsen Lines Agreement.

*Parties:* Atlantic Container Line AB and Wallenius Wilhelmsen Logistics AS ("WWL").

*Filing Party:* Wayne R. Rohde, Esq.; Cozen O'Connor; 1627 I Street, NW., Suite 1100; Washington, DC 20006.

*Synopsis:* The amendment extends the duration of the Agreement through 2015, clarifies the geographic scope and the amount of space to be purchased, and restates the Agreement.

*Agreement No.:* 012108.

*Title:* The World Liner Data Agreement.

*Parties:* A.P. Moller-Maersk A/S; CMA CGM S.A.; Compania Chilena de Navegacion Interoceanica S.A.; Hamburg-Sud; Hapag-Lloyd AG; Mediterranean Shipping Company S.A.; Orient Overseas Container Line Ltd.; and United Arab Shipping Company S.A.G.

*Filing Party:* Wayne Rohde, Esq.; Cozen O'Connor; 627 I Street, NW.; Suite 1100; Washington, DC 20006.

*Synopsis:* The pending agreement has been changed to include MSC as a party to the Agreement.

*Agreement No.:* 012109.

*Title:* CSAV/Hoegh Autoliners Mexico/USA Space Charter Agreement.

*Parties:* Compania Sud Americana De Vapores S.A. and Hoegh Autoliners AS.

*Filing Parties:* Walter H. Lion, Esq.; McLaughlin & Stern, LLP; 260 Madison Avenue; New York, NY 10016.

*Synopsis:* The agreement authorizes CSAV to charter space from Hoegh Autoliners in the trade from ports in Mexico to the U.S. Atlantic ports.

*Agreement No.:* 012110.

*Title:* Trailer Bridge/HLUSA Space Charter Agreement.

*Parties:* Hapag-Lloyd USA, LLC and Trailer Bridge, Inc.

*Filing Parties:* Marc J. Fink, Esq.; Cozen O'Connor; 1627 I Street, NW., Suite 1100; Washington, DC 20006.

*Synopsis:* The agreement authorizes Trailer Bridge, Inc. to charter space to Hapag Lloyd in the trade from Jacksonville, FL to the Dominican Republic on an "as needed/as available" basis.

By Order of the Federal Maritime Commission.

Dated: November 5, 2010

**Karen V. Gregory,**

*Secretary.*

[FR Doc. 2010–28422 Filed 11–9–10; 8:45 am]

**BILLING CODE P**

## FEDERAL MARITIME COMMISSION

### Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for a license as a Non-Vessel-Operating Common Carrier (NVO), and/or Ocean Freight Forwarder (OFF)—Ocean Transportation Intermediary (OTI) pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. Chapter 409 and 46 CFR 515). Notice is also hereby given of the filing of applications to amend an existing OTI license or the Qualifying Individual (QI) for a license.

Interested persons may contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Advanced Logistics Inc. (NVO), 3301 NW 97th Avenue, Miami, FL 33172, Officers: Arturo R. Alvarez, Vice President (Qualifying Individual), Jose R. Castillo, President/Director, Application Type: QI Change.

Americargo Express Inc. (NVO & OFF), 1428 NW 82 Avenue, Doral, FL 33126, Officer: Natalia Diaz, President (Qualifying Individual), Application Type: New NVO & OFF License.

American Star Logistics, Inc. (NVO), 2021 Midwest Road, #200, Oak Brook, IL 60523, Officer: Ylli Karaqica, President (Qualifying Individual), Application Type: New NVO License.

Capito Enterprises, Inc. (NVO & OFF), 190 Ellis Road, Lake In The Hills, IL 60156, Officers: Rizalina D. Capito, President/Treasurer (Qualifying Individual), Rosette Capito, Vice President, Application Type: New NVO & OFF License.

Freight Forwarder International, Inc. (OFF), 200 Crofton Road, Building 14–A, Kenner, LA 70062, Officers: Gary J. Cheramie, President (Qualifying Individual), George Talbot, Jr., Secretary/Treasurer/CFO, Application Type: New OFF License.

GT Int'l Logistic Inc. (NVO & OFF), 863 N. Douglas Street, #100, 2nd Floor, El Segundo, CA 90245, Officers: Johnny T.C. Liu, CEO (Qualifying Individual), Yen Ting Lin, CFO, Application Type: New NVO & OFF License.

Manheim Export, Inc. (NVO & OFF), 6205 Peachtree-Dunwoody Road, Atlanta, GA 30328, Officers: Christopher S. Stephens, Vice President/General Manager (Qualifying Individual), Michael J. Langhorne, Assistant Secretary, Application Type: New NVO & OFF License.

Morais Ltd. (NVO), 216 Warren Avenue, East Providence, RI 02914, Officers: Marta Morais, Vice President (Qualifying Individual), Jorge V. Morais, President, Application Type: New NVO License.

R.H. Shipping & Chartering (USA) (NVO), 10077 Grogans Mill Road, #310, Spring, TX 77380, Officers: Janette M. Marlowe, COO (Qualifying Individual), Rudolf Hess, President, Application Type: License Transfer.

Total Global Solutions, Inc. (NVO & OFF), 4290 Bells Ferry Road #224, Suite 106, Kennesaw, GA 30144, Officers: Tomomi Hamamura, CFO/Treasurer (Qualifying Individual), Dennis R. Smith, President/CEO/Director, Application Type: Add NVOCC Service.

United Customs Services Inc. (NVO), 110 Jericho Turnpike, #201, Floral Park, NY 11001, Officers: Pailing P. Huang, President (Qualifying Individual), Daryih D. Wu, Vice President, Application Type: New NVO License.

Dated: November 5, 2010.

**Karen V. Gregory,**

*Secretary.*

[FR Doc. 2010–28423 Filed 11–9–10; 8:45 am]

**BILLING CODE P**

## GENERAL SERVICES ADMINISTRATION

**[FMR Bulletin PBS–2010–B5; Docket 2010–0005; Sequence 12]**

### Federal Management Regulation; FMR Bulletin PBS–2010–B5; Redesignations of Federal Buildings

**AGENCY:** Public Buildings Service (P), General Services Administration.

**ACTION:** Notice of a bulletin.

**SUMMARY:** The attached bulletin announces the designation and redesignation of two Federal buildings.

**DATES:** *Expiration Date:* This bulletin announcement expires April 30, 2011. The building designation and redesignation remains in effect until canceled or superseded by another bulletin.

**FOR FURTHER INFORMATION CONTACT:** U.S. General Services Administration, Public Buildings Service (P), *Attn:* David E. Foley, 1800 F Street, NW., Washington, DC 20405, e-mail at *david.foley@gsa.gov.* (202) 501–1100.

Dated: October 27, 2010.

**Martha Johnson,**

*Administrator of General Services.*

## U.S. GENERAL SERVICES ADMINISTRATION

### REDESIGNATIONS OF FEDERAL BUILDINGS

TO: Heads of Federal Agencies

SUBJECT: Redesignations of Federal Buildings

1. *What is the purpose of this bulletin*? This bulletin announces the designation and redesignation of two Federal buildings.

2. *When does this bulletin expire*? This bulletin announcement expires April 30, 2011. The building designation and redesignation remains in effect until canceled or superseded by another bulletin.

3. *Designation.* The name of the designated building (annex building under construction for the Elbert P. Tuttle United States Court of Appeals Building in Atlanta, Georgia) is as follows: John C. Godbold Federal Building 96 Poplar Street Atlanta, GA 30303

4. *Redesignation.* The former and new name of the redesignated building is as follows: *Former Name* Federal Building 1220 Echelon Parkway Jackson, MS 39213 *New Name* James Chaney, Andrew Goodman, Michael Schwerner, and Roy K. Moore Federal Building 1220 Echelon Parkway Jackson, MS 39213

5. *Who should we contact for further information regarding designation and redesignation of these Federal buildings*? U.S. General Services Administration, Public Buildings Service (P), Attn: David E. Foley, 1800 F Street, NW, Washington, DC 20405, telephone number: (202) 501–1100, e-mail at *david.foley@gsa.gov.* Dated: October 27, 2010

**Martha Johnson,**

*Administrator of General Services.*

[FR Doc. 2010–28378 Filed 11–9–10; 8:45 am]

**BILLING CODE 6820–23–P**

## GENERAL SERVICES ADMINISTRATION

### Federal Travel Regulation (FTR)

Fly America Act; United States and European Union "Open Skies" Air Transport Agreement (US–EU Open Skies Agreement)

**AGENCY:** Office of Governmentwide Policy, General Services Administration (GSA).

**ACTION:** Notice of FTR Bulletin 11–02, revising Fly America Act air transport agreement between US and EU.

**SUMMARY:** The General Services Administration (GSA) has issued FTR Bulletin 11–02, updating the Fly America Act information on the GSA web site with recent changes to the new US–EU Open Skies agreement signed June 24, 2010.

**DATES:** *Effective Date:* This final rule is effective November 10, 2010.

*Applicability Date:* This final rule is applicable for travel performed on and after October 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Rick Miller, Office of Governmentwide Policy, at (202) 501–3822. Please cite FTR Bulletin 11–02.

Dated: November 3, 2010.

**Janet Dobbs,**

*Acting Deputy Associate Administrator.*

[FR Doc. 2010–28425 Filed 11–9–10; 8:45 am]

**BILLING CODE 6820–14–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

**[Document Identifier: OS–0990—New; 30-Day Notice]**

### Agency Information Collection Request; 30-Day Public Comment Request

**AGENCY:** Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov*, or call the Reports Clearance Office on (202) 690–5683. Send written comments and recommendations for the proposed information collections within 30 days of this notice directly to the OS OMB Desk Officer; faxed to OMB at 202–395–5806.

*Proposed Information Collection:* ONC Temporary Certification Program's Application, Reporting and Records Requirements—OMB No. 0990—NEW—Office of National Coordinator for Health Information Technology (ONC).

*Abstract:* ONC received emergency approval from OMB under section 3507(j) of the Paperwork Reduction Act (PRA) for this collection of information on June 14, 2010 (OMB No. 0990–0358). This emergency approval expires on December 31, 2010. Accordingly, ONC seeks public comment and OMB's approval for this collection of information under section 3504(h) of the PRA.

In a notice of proposed rulemaking implementing section 3001(c)(5) of the Public Health Service Act, ONC proposed to establish two certification programs, a temporary certification program and a permanent certification program. On June 24, 2010, a final rule was published that established the temporary certification program ("Establishment of the Temporary Certification Program for Health Information Technology," 75 FR 36158) (Temporary Certification Program final rule).

The temporary certification program, which is anticipated to sunset on December 31, 2011, requires: Applicants that wish to become ONC-Authorized Testing and Certification Bodies (ONC–ATCBs) to respond to and submit an application; collection and reporting requirements for ONC–ATCBs, and requirements for ONC–ATCBs to retain records of tests and certifications and disclose the final results of all completed tests and certifications (*i.e.,* provide copies of all completed tests and certifications) to ONC at the conclusion of testing and certification activities under the temporary certification program.

**Estimated Annualized Burden Hours**

APPLICATION FOR ONC–ATCB STATUS UNDER THE TEMPORARY CERTIFICATION PROGRAM

| Type of respondent | Form name | Number of respondents | Number of responses per respondent | Burden hours per response | Total burden hours |
|---|---|---|---|---|---|
| Conformant Applicant | ONC–ATCB Application | 3 | 1 | 4.5 | 14 |
| Partially Conformant Applicant | ONC–ATCB Application | 2 | 1 | 400.5 | 801 |
| Total | | | | | 815 |

ONC–ATCB COLLECTION AND REPORTING OF INFORMATION RELATED TO COMPLETE EHR AND/OR EHR MODULE CERTIFICATIONS

| Type of respondent | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| ONC–ATCB Testing and Certification Results | 5 | 52 | 1 | 260 |

ONC–ATCB RETENTION OF TESTING AND CERTIFICATION RECORDS AND THE SUBMISSION OF COPIES OF RECORDS TO ONC

| Type of respondent | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| ONC–ATCB Testing and Certification Records | 5 | 1 | 8 | 40 |

**Seleda Perryman,**

*Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.*

[FR Doc. 2010–28334 Filed 11–9–10; 8:45 am]

**BILLING CODE 4150–45–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Medicaid, the Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2011 through September 30, 2012

**AGENCY:** Office of the Secretary, DHHS.

**ACTION:** Notice.

**SUMMARY:** The Federal Medical Assistance Percentages (FMAP) and Enhanced Federal Medical Assistance Percentages (eFMAP) for Fiscal Year 2012 have been calculated pursuant to the Social Security Act (the Act). These percentages will be effective from October 1, 2011 through September 30, 2012. This notice announces the calculated FMAP and eFMAP rates that the U.S. Department of Health and Human Services (HHS) will use in determining the amount of Federal matching for state medical assistance (Medicaid) and Children's Health Insurance Program (CHIP) expenditures, Temporary Assistance for Needy Families (TANF) Contingency Funds, Child Support Enforcement collections, Child Care Mandatory and Matching Funds of the Child Care and Development Fund, Foster Care Title IV–E Maintenance payments, and Adoption Assistance payments. The table gives figures for each of the 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

Programs under title XIX of the Act exist in each jurisdiction. Programs under titles I, X, and XIV operate only in Guam and the Virgin Islands, while a program under title XVI (Aid to the Aged, Blind, or Disabled) operates only in Puerto Rico. The percentages in this notice apply to state expenditures for most medical assistance and child health assistance, and assistance payments for certain social services. The Act provides separately for Federal matching of administrative costs.

Sections 1905(b) and 1101(a)(8)(B) of the Act require the Secretary of HHS to publish the FMAP rates each year. The Secretary calculates the percentages, using formulas in sections 1905(b) and 1101(a)(8)(B), and calculations by the Department of Commerce of average income per person in each state and for the Nation as a whole. The percentages must fall within the upper and lower limits given in section 1905(b) of the Act. The percentages for the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands are specified in statute, and thus are not based on the statutory formula that determines the percentages for the 50 states.

Section 1905(b) of the Act specifies the formula for calculating FMAPs as follows:

> "Federal medical assistance percentage" for any State shall be 100 per centum less the State percentage; and the State percentage shall be that percentage which bears the same ratio to 45 per centum as the square of the per capita income of such State bears to the square of the per capita income of the continental United States (including Alaska) and Hawaii; except that (1) the Federal medical assistance percentage shall in no case be less than 50 per centum or more than 83 per centum, (2) the Federal medical assistance percentage for Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa shall be 50 per centum.

Section 4725(b) of the Balanced Budget Act of 1997 amended section 1905(b) to provide that the FMAP for the District of Columbia for purposes of titles XIX and XXI shall be 70 percent. For the District of Columbia, we note under the table of FMAPs that other rates may apply in certain other programs. In addition, we note the rate that applies for Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands in certain other programs pursuant to section 1118 of the Act.

Section 2105(b) of the Act specifies the formula for calculating the eFMAP rates as follows:

> The "enhanced FMAP", for a State for a fiscal year, is equal to the Federal medical assistance percentage (as defined in the first sentence of section 1905(b)) for the State increased by a number of percentage points equal to 30 percent of the number of percentage points by which (1) such Federal medical assistance percentage for the State, is less than (2) 100 percent; but in no case shall the enhanced FMAP for a state exceed 85 percent.

The eFMAP rates are used in the Children's Health Insurance Program under Title XXI, and in the Medicaid program for certain children for expenditures for medical assistance described in sections 1905(u)(2) and 1905(u)(3) of the Act. There is no specific requirement to publish the eFMAP rates. We include them in this notice for the convenience of the states.

**DATES:** *Effective Dates:* The percentages listed will be effective for each of the four quarter-year periods beginning October 1, 2011 and ending September 30, 2012.

**FOR FURTHER INFORMATION CONTACT:** Carrie Shelton, Office of Health Policy, Office of the Assistant Secretary for Planning and Evaluation, Room 447D—Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, (202) 690–6870.

(Catalog of Federal Domestic Assistance Program Nos. 93.558: TANF Contingency Funds; 93.563: Child Support Enforcement; 93.596: Child Care Mandatory and Matching Funds of the Child Care and Development Fund; 93.658: Foster Care Title IV–E; 93.659: Adoption Assistance; 93.769: Ticket-to-Work and Work Incentives Improvement Act (TWWIIA) Demonstrations to Maintain Independence and Employment; 93.778: Medical Assistance Program; 93.767: Children's Health Insurance Program)

Dated: October 12, 2010.

**Kathleen Sebelius,**

*Secretary.*

FEDERAL MEDICAL ASSISTANCE PERCENTAGES AND ENHANCED FEDERAL MEDICAL ASSISTANCE PERCENTAGES, EFFECTIVE OCTOBER 1, 2011–SEPTEMBER 30, 2012 (FISCAL YEAR 2012)

| State | Federal medical assistance percentages | Enhanced federal medical assistance percentages |
|---|---|---|
| Alabama | 68.62 | 78.03 |
| Alaska | 50.00 | 65.00 |
| American Samoa* | 50.00 | 65.00 |
| Arizona | 67.30 | 77.11 |
| Arkansas | 70.71 | 79.50 |
| California | 50.00 | 65.00 |
| Colorado | 50.00 | 65.00 |
| Connecticut | 50.00 | 65.00 |
| Delaware | 54.17 | 67.92 |
| District of Columbia** | 70.00 | 79.00 |
| Florida | 56.04 | 69.23 |
| Georgia | 66.16 | 76.31 |
| Guam* | 50.00 | 65.00 |
| Hawaii | 50.48 | 65.34 |
| Idaho | 70.23 | 79.16 |
| Illinois | 50.00 | 65.00 |
| Indiana | 66.96 | 76.87 |
| Iowa | 60.71 | 72.50 |
| Kansas | 56.91 | 69.84 |
| Kentucky | 71.18 | 79.83 |
| Louisiana | 61.09 | 72.76 |
| Maine | 63.27 | 74.29 |
| Maryland | 50.00 | 65.00 |
| Massachusetts | 50.00 | 65.00 |
| Michigan | 66.14 | 76.30 |
| Minnesota | 50.00 | 65.00 |
| Mississippi | 74.18 | 81.93 |
| Missouri | 63.45 | 74.42 |
| Montana | 66.11 | 76.28 |
| Nebraska | 56.64 | 69.65 |
| Nevada | 56.20 | 69.34 |
| New Hampshire | 50.00 | 65.00 |
| New Jersey | 50.00 | 65.00 |
| New Mexico | 69.36 | 78.55 |
| New York | 50.00 | 65.00 |
| North Carolina | 65.28 | 75.70 |
| North Dakota | 55.40 | 68.78 |
| Northern Mariana Islands* | 50.00 | 65.00 |
| Ohio | 64.15 | 74.91 |
| Oklahoma | 63.88 | 74.72 |
| Oregon | 62.91 | 74.04 |
| Pennsylvania | 55.07 | 68.55 |
| Puerto Rico* | 50.00 | 65.00 |
| Rhode Island | 52.12 | 66.48 |
| South Carolina | 70.24 | 79.17 |
| South Dakota | 59.13 | 71.39 |
| Tennessee | 66.36 | 76.45 |
| Texas | 58.22 | 70.75 |
| Utah | 70.99 | 79.69 |
| Vermont | 57.58 | 70.31 |
| Virgin Islands* | 50.00 | 65.00 |
| Virginia | 50.00 | 65.00 |
| Washington | 50.00 | 65.00 |
| West Virginia | 72.62 | 80.83 |
| Wisconsin | 60.53 | 72.37 |
| Wyoming | 50.00 | 65.00 |

* For purposes of section 1118 of the Social Security Act, the percentage used under titles I, X, XIV, and XVI will be 75 per centum.

** The values for the District of Columbia in the table were set for the state plan under titles XIX and XXI and for capitation payments and DSH allotments under those titles. For other purposes, the percentage D.C. is 50.00, unless otherwise specified by law.

[FR Doc. 2010–28319 Filed 11–9–10; 8:45 am]
**BILLING CODE 4150–05–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

### Public Meeting To Solicit Input for a Strategic Plan for Federal Youth Policy

**AGENCY:** Office of the Assistant Secretary for Planning and Evaluation, DHHS.

**ACTION:** Notice of meeting.

**SUMMARY:** The U.S. Department of Health and Human Services, in its role as the Chair of the Interagency Working Group on Youth Programs, is announcing a meeting to solicit input from the public that will inform the development of a strategic plan for Federal youth policy.

**DATES:** November 12, 2010, from 9 a.m. to 1 p.m.

**ADDRESSES:** The meeting will take place at the Thomas P. O'Neill, Jr., Federal Building at 10 Causeway Street, Suite 108, Boston, MA 02222–1001.

**FOR FURTHER INFORMATION CONTACT:** Visit the Web site for the Interagency Working Group on Youth Programs at *http://www.FindYouthInfo.gov* for information on how to register, or contact the Interagency Working Group on Youth Programs help desk, by telephone at 1–877–231–7843 [**Note:** this is a toll-free telephone number], or by e-mail at *FindYouthInfo@air.org.*

**SUPPLEMENTARY INFORMATION:**

#### I. Background

On March 11, 2009, the Congress passed the Omnibus Appropriations Act, 2009 (Pub. L. 111–8). The House Appropriations Committee Print, Division F—Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations included language directing the Interagency Working Group on Youth Programs to solicit input from young people, State children's cabinet directors, and non-profit organizations on youth programs and policies; develop an overarching strategic plan for Federal youth policy; and prepare recommendations to improve the coordination, effectiveness, and efficiency of programs affecting youth.

The Interagency Working Group on Youth Programs is comprised of staff from twelve Federal agencies that support programs and services that focus on youth: The U.S. Department of Agriculture; U.S. Department of Commerce; U.S. Department of Defense; U.S. Department of Education; U.S. Department of Health and Human Services (Chair); U.S. Department of Housing and Urban Development; U.S. Department of Justice (Vice-Chair); U.S. Department of Labor; U.S. Department of the Interior; U.S. Department of Transportation; Corporation for National and Community Service; and Office of National Drug Control Policy.

The Working Group seeks to promote achievement of positive results for at-risk youth through the following activities:

- Promoting enhanced collaboration at the Federal, state, and local levels, including with faith-based and other community organizations, as well as among families, schools and communities, in order to leverage existing resources and improve outcomes;
- Disseminating information about critical resources, including evidence-based programs, to assist interested citizens and decision-makers, particularly at the community level, to plan, implement, and participate in effective strategies for at-risk youth;
- Developing an overarching strategic plan for Federal youth policy, as well as recommendations for improving the coordination, effectiveness and efficiency of youth programs, using input from community stakeholders, including youth; and
- Producing a Federal Web site, *FindYouthInfo.gov,* to promote effective community-based efforts to reduce the factors that put youth at risk and to provide high-quality services to at-risk youth.

#### II. Registration, Security, Building, and Parking Guidelines

For security purposes, members of the public who wish to attend the meeting must pre-register online at *http://www.findyouthinfo.gov* no later than November 5, 2010. Should problems arise with Web registration, call the help desk at 1–877–231–7843 or send a request to register for the meeting to *FindYouthInfo@air.org.* To register, complete the online registration form, which will ask for your name, title, organization or other affiliation, full address and phone, fax, and e-mail information or e-mail this information to *FindYouthInfo@air.org.* Additional identification documents may be required.

The meetings are held in a Federal government building; therefore, Federal security measures are applicable. In planning your arrival time, we recommend allowing additional time to clear security. Space is limited. In order to gain access to the building and grounds, participants must bring government-issued photo identification as well as their pre-registration confirmation.

**Authority:** Division F, Pub. L. 111–8; E.O. 13459, 73 FR 8003, February 12, 2008.

Dated: October 21, 2010.

**Sherry Glied,**

*Assistant Secretary for Planning and Evaluation.*

[FR Doc. 2010–28318 Filed 11–9–10; 8:45 am]
**BILLING CODE 4154–05–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

### Public Meeting To Solicit Input for a Strategic Plan for Federal Youth Policy

**AGENCY:** Office of the Assistant Secretary for Planning and Evaluation, DHHS.

**ACTION:** Notice of meeting.

**SUMMARY:** The U.S. Department of Health and Human Services, in its role as the Chair of the Interagency Working Group on Youth Programs, is announcing a meeting to solicit input from the public that will inform the development of a strategic plan for federal youth policy.

**DATES:** November 16, 2010, from 9 a.m. to 1 p.m.

**ADDRESSES:** The meeting will take place at the Educational Leadership Center at 445 W. Amelia Street, Orlando, FL 32801.

**FOR FURTHER INFORMATION CONTACT:** Visit the Web site for the Interagency Working Group on Youth Programs at *http://www.FindYouthInfo.gov* for information on how to register, or contact the Interagency Working Group on Youth Programs help desk, by telephone at 1–877–231–7843 [**Note:** this is a toll-free telephone number], or by e-mail at *FindYouthInfo@air.org.*

**SUPPLEMENTARY INFORMATION:**

#### I. Background

On March 11, 2009, the Congress passed the Omnibus Appropriations Act, 2009 (Pub. L. 111–8). The House Appropriations Committee Print, Division F—Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations directed the Interagency Working Group on Youth Programs to solicit input from young people, State children's cabinet directors, and non-profit organizations on youth programs and policies; develop an overarching

strategic plan for Federal youth policy; and prepare recommendations to improve the coordination, effectiveness, and efficiency of programs affecting youth.

The Interagency Working Group on Youth Programs is comprised of staff from twelve Federal agencies that support programs and services that focus on youth: the U.S. Department of Agriculture; U.S. Department of Commerce; U.S. Department of Defense; U.S. Department of Education; U.S. Department of Health and Human Services (Chair); U.S. Department of Housing and Urban Development; U.S. Department of Justice (Vice-Chair); U.S. Department of Labor; U.S. Department of the Interior; U.S. Department of Transportation; Corporation for National and Community Service; and Office of National Drug Control Policy.

The Working Group seeks to promote achievement of positive results for at-risk youth through the following activities:

- Promoting enhanced collaboration at the Federal, State, and local levels, including with faith-based and other community organizations, as well as among families, schools and communities, in order to leverage existing resources and improve outcomes;
- Disseminating information about critical resources, including evidence-based programs, to assist interested citizens and decision-makers, particularly at the community level, to plan, implement, and participate in effective strategies for at-risk youth;
- Developing an overarching strategic plan for Federal youth policy, as well as recommendations for improving the coordination, effectiveness and efficiency of youth programs, using input from community stakeholders, including youth; and
- Producing a Federal Web site, *FindYouthInfo.gov,* to promote effective community-based efforts to reduce the factors that put youth at risk and to provide high-quality services to at-risk youth.

**II. Registration, Security, Building, and Parking Guidelines**

For security purposes, members of the public who wish to attend the meeting must pre-register online at *http://www.findyouthinfo.gov* no later than November 9, 2010. Should problems arise with Web registration, call the help desk at 1–877–231–7843 or send a request to register for the meeting to *FindYouthInfo@air.org.* To register, complete the online registration form, which will ask for your name, title, organization or other affiliation, full address and phone, fax, and e-mail information or e-mail this information to *FindYouthInfo@air.org.* Additional identification documents may be required.

Dated: November 4, 2010.

**Sherry Glied,**

*Assistant Secretary for Planning and Evaluation.*

**Authority:** Division F, Pub. L. 111–8; E.O. 13459, 73 FR 8003, February 12, 2008.

[FR Doc. 2010–28392 Filed 11–9–10; 8:45 am]

**BILLING CODE 4154–05–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

### Public Meeting To Solicit Input for a Strategic Plan for Federal Youth Policy

**AGENCY:** Office of the Assistant Secretary for Planning and Evaluation, DHHS.

**ACTION:** Notice of meeting.

**SUMMARY:** The U.S. Department of Health and Human Services, in its role as the Chair of the Interagency Working Group on Youth Programs, is announcing a meeting to solicit input from the public that will inform the development of a strategic plan for federal youth policy.

**DATES:** November 18, 2010, from 9 a.m. to 1 p.m.

**ADDRESSES:** The meeting will take place at the Houston Housing Authority Neighborhood Resource Center at 815 Crosby Street, Houston, TX 77019.

**FOR FURTHER INFORMATION CONTACT:** Visit the Web site for the Interagency Working Group on Youth Programs at *http://www.FindYouthInfo.gov* for information on how to register, or contact the Interagency Working Group on Youth Programs help desk, by telephone at 1–877–231–7843 [**Note:** this is a toll-free telephone number], or by e-mail at *FindYouthInfo@air.org.*

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On March 11, 2009, the Congress passed the Omnibus Appropriations Act, 2009 (Pub. L. 111–8). The House Appropriations Committee Print, Division F—Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations directed the Interagency Working Group on Youth Programs to solicit input from young people, State children's cabinet directors, and non-profit organizations on youth programs and policies; develop an overarching strategic plan for Federal youth policy; and prepare recommendations to improve the coordination, effectiveness, and efficiency of programs affecting youth.

The Interagency Working Group on Youth Programs is comprised of staff from twelve Federal agencies that support programs and services that focus on youth: the U.S. Department of Agriculture; U.S. Department of Commerce; U.S. Department of Defense; U.S. Department of Education; U.S. Department of Health and Human Services (Chair); U.S. Department of Housing and Urban Development; U.S. Department of Justice (Vice-Chair); U.S. Department of Labor; U.S. Department of the Interior; U.S. Department of Transportation; Corporation for National and Community Service; and Office of National Drug Control Policy.

The Working Group seeks to promote achievement of positive results for at-risk youth through the following activities:

- Promoting enhanced collaboration at the Federal, state, and local levels, including with faith-based and other community organizations, as well as among families, schools and communities, in order to leverage existing resources and improve outcomes;
- Disseminating information about critical resources, including evidence-based programs, to assist interested citizens and decisionmakers, particularly at the community level, to plan, implement, and participate in effective strategies for at-risk youth;
- Developing an overarching strategic plan for Federal youth policy, as well as recommendations for improving the coordination, effectiveness and efficiency of youth programs, using input from community stakeholders, including youth; and
- Producing a Federal Web site, *FindYouthInfo.gov,* to promote effective community-based efforts to reduce the factors that put youth at risk and to provide high-quality services to at-risk youth.

**II. Registration, Security, Building, and Parking Guidelines**

For security purposes, members of the public who wish to attend the meeting must pre-register on-line at *http://www.findyouthinfo.gov* no later than November 11, 2010. Should problems arise with Web registration, call the help desk at 1–877–231–7843 or send a request to register for the meeting to *FindYouthInfo@air.org.* To register, complete the online registration form, which will ask for your name, title,

organization or other affiliation, full address and phone, fax, and e-mail information or e-mail this information to *FindYouthInfo@air.org*. Additional identification documents may be required.

Dated: November 4, 2010.

**Sherry Glied,**

*Assistant Secretary for Planning and Evaluation.*

**Authority:** Division F, Pub. L. 111–8; E.O. 13459, 73 FR 8003, February 12, 2008.

[FR Doc. 2010–28396 Filed 11–9–10; 8:45 am]

**BILLING CODE 4154–05–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[30Day–10–10DE]**

### Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC), Agency for Toxic Substances and Disease Registry (ATSDR) publishes a list of information collection requests under review by the Office of management and Budget (OMB) in compliance with the Paperwork Reduction Act (33 U.S.C. chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer, at (404) 639–5960 or send an e-mail to *omb@cdc.gov*. Send written comments to ATSDR Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

**Proposed Project**

Creation of State and Metropolitan Area-based Surveillance Projects for Amyotrophic Lateral Sclerosis (ALS)—New—Agency for Toxic Substances and Disease Registry (ATSDR).

*Background and Brief Description*

On October 10, 2008, President Bush signed S. 1382: ALS Registry Act which amended the Public Health Service Act to provide for the establishment of an Amyotrophic Lateral Sclerosis (ALS) Registry. The activities described are part of the effort to create the National ALS Registry. The purpose of the registry is to: (1) Better describe the incidence and prevalence of ALS in the United States; (2) examine appropriate factors, such as environmental and occupational, that might be associated with the disease; (3) better outline key demographic factors (such as age, race or ethnicity, gender, and family history of individuals diagnosed with the disease); and (4) better examine the connection between ALS and other motor neuron disorders that can be confused with ALS, misdiagnosed as ALS, and in some cases progress to ALS. The registry will collect personal health information that may provide a basis for further scientific studies of potential risks for developing ALS.

This project purposes to collect information-specific data related to ALS. The objective of this project is to develop state-based and metropolitan area-based surveillance projects for ALS. The primary goal of the state-based and metropolitan area-based surveillance project is to use these data to evaluate the completeness of the National ALS Registry. The secondary goal of the surveillance project is to obtain reliable and timely information on the incidence and prevalence of ALS and to better describe the demographic characteristics (*e.g.,* age, race, sex, and geographic location) of those with ALS.

Neurologists or their staff will complete an ALS Case Reporting Form on each of their ALS patients. This will be transmitted to the state or metropolitan health department. The contract surveillance staff assigned to the state and metropolitan area health departments will train medical personnel how to complete the ALS Case Reporting Form (Attachment 3) and assist with abstracting records as requested. An ALS Medical Record Verification Form will be collected on a subset of cases reported. Each medical provider reporting source should keep a line listing of individuals diagnosed with or thought to have ALS along with information on whether or not the case was reported and if not, the reason. Surveillance items to be collected include information to make sure that there are no duplicates. There are no costs to the respondents other than their time. The estimated annualized burden hours are 703.

ESTIMATED ANNUALIZED BURDEN HOURS

| Type of data collection instrument | Type of respondent | Number of respondents | Number of responses per respondent | Average burden per response (in hours) |
|---|---|---|---|---|
| Training | Medical Personnel/Neurologist | 243 | 1 | 30/60 |
| ALS Case Reporting Form | Medical Personnel/Neurologist | 2,250 | 1 | 5/60 |
| ALS Medical Record Verification Form | Neurologist | 450 | 1 | 20/60 |
| Line Listing (record keeping) | Medical Personnel | 243 | 1 | 1 |

Dated: November 4, 2010.

**Carol E. Walker,**

*Acting Reports Clearance Officer, Centers for Disease Control and Prevention/Agency for Toxic Substances and Disease Registry.*

[FR Doc. 2010–28337 Filed 11–9–10; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Submission for OMB review; comment request; NCCAM Office of Communications and Public Liaison Communications Program Planning and Evaluation Research

**SUMMARY:** Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Center for Complementary and Alternative Medicine (NCCAM), the National Institutes of Health (NIH), has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection was previously published in the **Federal Register** on August 25, 2010 (Vol. 75, No. 164, p. 52349) and allowed 60-days for public comment. There was one public comments received during this time. The purpose of this notice is to allow an additional 30 days for public comment. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to

respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

*Proposed Collection: Title:* NCCAM Office of Communications and Public Liaison Communications Program Planning and Evaluation Research. *Type of Information Collection Request:* Extension. *Need and Use of Information Collection:* To carry out NCCAM's legislative mandate to educate and disseminate information about complementary and alternative medicine (CAM) to a wide variety of audiences and organizations, the NCCAM Office of Communications and Public Liaison (OCPL) requests clearance to carry out (1) formative and (2) evaluative research of a variety of print and online materials, outreach activities, and messages to maximize their impact and usefulness.

OCPL wishes to continue to carry out formative research to further understand the knowledge, attitudes, and behaviors of its core constituent groups: members of the general public, researchers, and providers of both conventional and CAM health care. In addition, it seeks to test newly formulated messages and identify barriers and impediments to the effective communication of those messages. With this formative audience research, OCPL test audience responses to NCCAM's fact sheets, Web content, and other materials and messages.

Clearance is also requested to continue evaluative research on existing materials and messages, as part of OCPL's ongoing effort to develop a comprehensive program of testing and evaluation of all of its communications strategies. This evaluative research will include pilot testing of recently developed messages and information products such as consumer fact sheets and brochures. It will address the need to evaluate the processes by which new materials and messages were developed, the effectiveness of an outreach activity or the extent to which behaviors were changed by the message, and the impact of a message on health knowledge and behaviors.

The tools to collect this information have been selected to minimize burden on NCCAM's audiences, produce or refine messages that have the greatest potential to influence target audience attitudes and behavior in a positive manner, and to use Government resources efficiently. They may include individual in-depth interviews, focus group interviews, intercept interviews, self-administered questionnaires, gatekeeper reviews, and omnibus surveys.

The data will enhance OCPL's understanding of the unique information needs and distinct health-information-seeking behaviors of its core constituencies, and the segments within these constituencies with special information needs (for example, among the general public these segments include cancer patients, the chronically ill, minority and ethnic populations, the elderly, users of dietary supplements, and patients integrating complementary therapies with conventional medical treatments).

*Frequency of Response:* On occasion. *Affected Public:* Individuals and households; non-profit institutions; Federal Government; State, Local, or Tribal Government. *Type of Respondents:* Adult patients; members of the public; health care professionals; organizational representatives. The annual reporting burden is as follows: *Estimated Number of Respondents:* 2,500; *Estimated Number of Responses per Respondent:* 1; *Average Burden Hours per Response:* 0.58; and *Estimated Total Burden Hours Requested:* 2,109 for the 3-year clearance period (approximately 703 hours annually). The annualized cost to respondents is estimated at $18,123. There are no Capital Costs, Operating Costs, or Maintenance Costs to report.

TABLE 1—ANNUAL BURDEN HOURS

| Type of respondents | Estimated number of respondents | Estimated number of responses per respondent | Average burden hours per response | Estimated total annual burden hours requested |
|---|---|---|---|---|
| In-depth interviews with general public | 30 | 1 | .75 | 23 |
| Focus groups | 20 | 1 | 1.5 | 30 |
| Omnibus surveys | 1,900 | 1 | 0.25 | 475 |
| Intercept interviews with public and healthcare professionals | 300 | 1 | .25 | 75 |
| In-depth interviews health professionals | 50 | 1 | .50 | 25 |
| Self-administered questionnaires with health professionals | 200 | 1 | .25 | 50 |
| Total | 2,500 | | | 678 |

*Request for Comments:* Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

*Direct Comments to OMB:* Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Attention: NIH Desk Officer, Office of Management and Budget, at *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Christy Thomsen, Director, Office of Communications and Public Liaison, NCCAM, 31 Center Drive, Room 2B11, Bethesda, MD 20892, or fax your request to 301–402–4741, or e-mail *thomsenc@mail.nih.gov*. Ms. Thomsen can be contacted by telephone at 301–451–8876.

*Comments Due Date:* Comments regarding this information collection are best assured of having their full effect if received within 30 days of the date of this publication.

Dated: November 1, 2010.

**Christy Thomsen,**

*Director, Office of Communications and Public Liaison, National Center for Complementary and Alternative Medicine, National Institutes of Health.*

[FR Doc. 2010–28290 Filed 11–9–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Proposed Information Collection Activity; Comment Request

### Proposed Projects

*Title:* Strengthening Communities Fund (SCF) Evaluation.

*OMB No.:* New Collection.

*Description:* This proposed information collection activity is to obtain information from participants in two Strengthening Communities Fund (SCF) programs: The Nonprofit Capacity Building Program and the State, Local, and Tribal Government Capacity Building Program. Both programs are designed to contribute to the economic recovery as authorized in the American Recovery and Reinvestment Act of 2009 (ARRA). The SCF evaluation is an important opportunity to examine outcomes achieved by the Strengthening Communities Fund and progress toward the objective of improving the capacity of organizations served by program grantees to address broad economic recovery issues in their communities.

The evaluation will be designed to assess progress and measure increased organizational capacity of each participating organization. The purpose of this request is to receive approval of the data collection instruments that will be used in this study.

A significant amount of information is already being collected through program-specific OMB-approved PPR forms or is available through secondary sources. Proposed surveys and phone interviews are very brief to reduce the burden on respondents.

*Respondents:* SCF grantees,and faith-based and Community Organizations (FBCOs).

ANNUAL BURDEN ESTIMATES

| Instrument | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| An on-line survey of SCF grantees | 84 | 1 | 0.25 | 21 |
| Telephone interview of SCF grantees | 84 | 1 | 1.50 | 126 |
| On-line survey of faith-based and community organizations (FBCOs) that received capacity building services from the SCF grantees | 1,000 | 1 | 0.50 | 500 |

*Estimated Total Annual Burden Hours:* 647

In compliance with the requirements of Section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: November 4, 2010.

**Robert Sargis,**

*Reports Clearance Officer.*

[FR Doc. 2010–28304 Filed 11–9–10; 8:45 am]

**BILLING CODE 4184–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2009–P–0273]**

### Determination That Amphetamine Sulfate, 5 and 10 Milligram Tablets, Was Not Withdrawn From Sale for Reasons of Safety or Effectiveness

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) has determined that Amphetamine sulfate, 5 and 10 milligram (mg) tablets, was not withdrawn from sale for reasons of safety or effectiveness. This determination will allow FDA to approve abbreviated new drug applications (ANDAs) for Amphetamine sulfate, 5 mg and 10 mg tablets, if all other legal and regulatory requirements are met.

**FOR FURTHER INFORMATION CONTACT:** Patrick Raulerson, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6368, Silver Spring, MD 20993–0002, 301–796–3522.

**SUPPLEMENTARY INFORMATION:** In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) (the 1984 amendments), which authorized the approval of duplicate versions of drug products approved under an ANDA procedure. ANDA applicants must, with certain exceptions, show that the drug for which they are seeking approval contains the same active ingredient in the same strength and dosage form as the "listed drug," which is a version of the drug that was previously approved. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA). The only clinical data required in an ANDA are data to show that the drug that is the subject of the ANDA is bioequivalent to the listed drug.

The 1984 amendments include what is now section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)(7)), which requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the "Approved Drug Products With Therapeutic Equivalence Evaluations," which is known generally as the "Orange Book." Under FDA regulations, drugs are removed from the list if the Agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162). Under § 314.161(a)(1) (21 CFR 314.161(a)(1)), the Agency must determine whether a listed drug was withdrawn from sale for reasons of safety or effectiveness before an ANDA that refers to that listed drug may be approved. FDA may not approve an ANDA that does not refer to a listed drug.

Amphetamine sulfate, 5 mg and 10 mg tablets, is the subject of ANDA 083901 held by Lannett Company Inc. (Lannett). Amphetamine sulfate is a sympathomimetic amine indicated for treatment of narcolepsy, attention deficit disorder with hyperactivity, and exogenous obesity, as described in the labeling.

In a letter dated April 4, 1994, Lannett notified FDA that Amphetamine sulfate, 5 mg and 10 mg tablets, had been discontinued, and FDA moved the drug product to the "Discontinued Drug Product List" section of the Orange Book.

Lachman Consultant Services submitted a citizen petition dated June 12, 2009 (Docket No. FDA–2009–P–0273), under 21 CFR 10.30, requesting that the Agency determine whether Amphetamine sulfate, 5 mg and 10 mg tablets, was withdrawn from sale for reasons of safety or effectiveness.

After considering the citizen petition and reviewing Agency records, FDA has determined under § 314.161 that Amphetamine sulfate, 5 mg and 10 mg tablets, was not withdrawn for reasons of safety or effectiveness. The petitioner has identified no data or other information suggesting that Amphetamine sulfate, 5 mg and 10 mg tablets, was withdrawn for reasons of safety or effectiveness. We have carefully reviewed our files for records concerning the withdrawal of Amphetamine sulfate, 5 mg and 10 mg tablets, from sale. We have also independently evaluated relevant literature and data for possible postmarketing adverse events and have found no information that would indicate that this product was withdrawn from sale for reasons of safety or effectiveness.

Accordingly, the Agency will continue to list Amphetamine sulfate, 5 mg and 10 mg tablets, in the "Discontinued Drug Product List" section of the Orange Book. The "Discontinued Drug Product List" delineates, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness. ANDAs that refer to Amphetamine sulfate, 5 mg and 10 mg tablets, may be approved by the Agency as long as they meet all other legal and regulatory requirements for the approval of ANDAs. If FDA determines that labeling for this drug product should be revised to meet current standards, the Agency will advise ANDA applicants to submit such labeling.

Dated: November 3, 2010.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2010–28358 Filed 11–9–10; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2010–D–0514]**

### Guidance for Industry and Food and Drug Administration Staff; Class II Special Controls Guidance Document: Tissue Adhesive With Adjunct Wound Closure Device Intended for the Topical Approximation of Skin; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of the guidance entitled "Class II Special Controls Guidance Document: Tissue Adhesive with Adjunct Wound Closure Device Intended for the Topical Approximation of Skin." This guidance document describes a means by which tissue adhesives with adjunct wound closure devices intended for the topical approximation of skin may comply with the requirement of special controls for class II devices. Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule to classify tissue adhesive with adjunct wound closure device intended for the topical approximation of skin into class II (special controls). This guidance document is immediately in effect as the special control for tissue adhesive with adjunct wound closure device intended for approximation of skin, but it remains subject to comment in accordance with the agency's good guidance practices (GGPs).

**DATES:** Submit either electronic or written comments on the guidance at any time. General comments on agency guidance are welcome at any time.

**ADDRESSES:** Submit written requests for single copies of the guidance document entitled "Class II Special Controls Guidance Document: Tissue Adhesive with Adjunct Wound Closure Device Intended for the Topical Approximation of Skin" to the Division of Small Manufacturers, International, and Consumer Assistance, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–847–8149. *See* the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit electronic comments on the guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** George J. Mattamal, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1434, Silver Spring, MD 20993–0002, 301–796–6396.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule classifying tissue adhesive with adjunct wound closure device intended for the topical approximation of skin into class II (special controls), under section 513(f)(2) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360c(f)(2)). This guidance document will serve as the special control for the tissue adhesive with adjunct wound closure device intended for the topical approximation of skin device. Section 513(f)(2) of the FD&C Act provides that any person who submits a premarket notification under section 510(k) of the FD&C Act (21 U.S.C. 360(k)) for a device that has not previously been classified may, within 30 days after receiving an order classifying the device in class III

under section 513(f)(1) of the FD&C Act, request FDA to classify the device under the criteria set forth in section 513(a)(1) of the FD&C Act. FDA shall, within 60 days of receiving such a request, classify the device by written order. This classification shall be the initial classification of the device. Within 30 days after the issuance of an order classifying the device, FDA must publish a notice in the **Federal Register** announcing such classification. Because of the timeframes established by section 513(f)(2) of the act, FDA has determined, under § 10.115(g)(2) (21 CFR 10.115(g)(2)), that it is not feasible to allow for public participation before issuing this guidance as a final guidance document. Therefore, FDA is issuing this guidance document as a level 1 guidance document that is immediately in effect. FDA will consider any comments that are received in response to this notice to determine whether to amend the guidance document.

**II. Significance of Guidance**

This guidance is being issued consistent with FDA's good guidance practices regulation (§ 10.115). The guidance represents the agency's current thinking on tissue adhesive with adjunct wound closure device intended for topical approximation of skin. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

**III. Electronic Access**

Persons interested in obtaining a copy of the guidance may do so by using the Internet. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm*. Guidance documents are also available at *http://www.regulations.gov*. To receive "Class II Special Controls Guidance Document: Tissue Adhesive with Adjunct Wound Closure Device Intended for the Topical Approximation of Skin," you may either send an email request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to 301–796–8149 to receive a hard copy. Please use the document number 1683 to identify the guidance you are requesting.

**IV. Paperwork Reduction Act of 1995**

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C.3501–3520). The collections of information in 21 CFR part 807, subpart E have been approved under OMB control number 0910–0120; the collections of information in 21 CFR parts 50 and 56 have been approved under OMB control number 0910–0130; the collections of information in 21 CFR part 812 have been approved under OMB control number 0910–0078; the collections of information in 21 CFR part 58 have been approved under OMB control number 0910–0119; and the collections of information in 21 CFR part 801 have been approved under OMB control number 0910–0485.

**V. Comments**

Interested persons may submit to the Division of Dockets Management (*see* **ADDRESSES**), either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: November 4, 2010.

**Nancy K. Stade,**

*Deputy Director for Policy, Center for Devices and Radiological Health.*

[FR Doc. 2010–28333 Filed 11–9–10; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of General Medical Sciences Special Emphasis Panel Research Centers in Trauma, Burn and Peri-Operative Injury.

*Date:* December 3, 2010.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Residence Inn By Marriott-Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Brian R. Pike, PhD Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN18, Bethesda, MD 20892. 301–594–3907. *pikbr@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: *November 3, 2010.*

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–28300 Filed 11–9–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Alcohol Abuse and Alcoholism; Initial Review Group; Biomedical Research Review Subcommittee.

*Date:* March 15–16, 2011.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Philippe Marmillot, PhD, Scientific Review Officer, National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, 5635 Fishers Lane, Room 2019, Bethesda, MD 20892, 301–443–2861, *marmillotp@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards., National Institutes of Health, HHS)

Dated: November 3, 2010.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–28376 Filed 11–9–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 USC, as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Alcohol Abuse and Alcoholism Initial Review Group; Clinical Treatment and Health Services Research Review Subcommittee.

*Date:* March 15–16, 2011.

*Time:* 8:30 a.m. to 6 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hyatt Regency Bethesda, 7400 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Katrina Foster, PhD, Scientific Review Officer, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 5635 Fishers Lane, Room 2019, Rockville, MD 20852, 301–443–4032, *katrinaf@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards, National Institutes of Health, HHS)

Dated: November 3, 2010.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–28374 Filed 11–9–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Office of the Director, Office of Biotechnology Activities; Notice of Meeting

There will be a workshop entitled "Retroviral and Lentiviral Vectors for Long-Term Gene Correction: Clinical Challenges in Vector and Trial Design." The meeting will be open to the public; attendance is limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

*Name of Committee:* Recombinant DNA Advisory Committee.

*Date:* December 9, 2010.

*Time:* 8 a.m. to 5:30 p.m.

*Date:* December 10, 2010.

*Time:* 8 a.m. to 1 p.m.

*Agenda:* The Office of Biotechnology Activities (OBA), NIH Recombinant DNA Advisory Committee and the European Network for the Advancement of Clinical Gene Transfer (CliniGene) will host a workshop on *Retroviral and Lentiviral Vectors for Long-Term Gene Correction: Clinical Challenges in Vector and Trial Design* at the Bethesda Marriott on December 9 and 10, 2010. The meeting will cover the following topics: Developments in retrovirus and lentivirus integration and insertional mutagenesis research, including non-enhancer mediated mechanisms of insertional mutagenesis; modifications to retroviral and lentiviral vectors to enhance their safety; research on in vitro and animal models to evaluate the safety of human gene transfer; and ethical issues in the design of new clinical trials. The agenda is posted to OBA's Web site: *http://oba.od.nih.gov/rdna_rac/rac_meetings.html.* Please check the meeting agenda for more information.

*Place:* Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, Maryland 20814.

*Contact Person:* Chezelle George, Program Assistant, Office of Science Policy, Office of Biotechnology Activities, National Institutes of Health, 6705 Rockledge Drive, Suite 750, Bethesda, MD 20892, 301–496–9838, 301–496–9839, *georgec@mail.nih.gov.*

Any interested person may file written comments with the panel by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and, when applicable, the business or professional affiliation of the interested person. Background information may be obtained by contacting NIH OBA by e-mail *oba@od.nih.gov*

Dated: November 1, 2010.

**Jacqueline Corrigan-Curay,**

*Acting Director, Office of Biotechnology Activities, National Institutes of Health.*

[FR Doc. 2010–28373 Filed 11–9–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Mental Health; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Interagency Autism Coordinating Committee (IACC) Subcommittee on Safety.

The Interagency Autism Coordinating Committee (IACC) Subcommittee on Safety will be meeting on Monday, November 29, 2010. The subcommittee plans to discuss issues related to autism and safety. This meeting will be open to the public and will be accessible through a conference call.

*Name of Committee:* Interagency Autism Coordinating Committee (IACC).

*Type of Meeting:* Subcommittee on Safety.

*Date:* November 29, 2010.

*Time:* 9 a.m. to 12 p.m. Eastern Time.

*Agenda:* To discuss issues related to autism and safety.

*Place:* The Neuroscience Center, 6001 Executive Boulevard, Conference Room B1/B2, Rockville, MD 20852.

*Conference Call Access:* Dial: 800–369–1754. Access code: 5105457.

*Cost:* The meeting is free and open to the public.

*Registration: http://www.acclaroresearch.com/oarc/11–29–10/.* Pre-registration is recommended to expedite check-in. Seating in the meeting room is limited to room capacity and on a first come, first served basis.

*Access:* Metro accessible—White Flint Metro (Red Line).

*Contact Person:* Ms. Lina Perez, Office of Autism Research Coordination, National Institute of Mental Health, NIH, 6001 Executive Boulevard, NSC, Room 8185a, Rockville, MD 20852. Phone: 301–443–6040. E-mail: *IACCPublicInquiries@mail.nih.gov.*

*Please Note:*

The meeting will be open to the public and accessible through a conference call. Members of the public who participate using the conference call phone number will be

able to listen to the meeting but will not be heard. If you experience any technical problems with the conference call, please e-mail: *IACCTechSupport@acclaroresearch.com.*

Individuals who participate in person or by using these electronic services and who need special assistance, such as captioning of the conference call or other reasonable accommodations, should submit a request to the Contact Person listed on this notice at least 7 days prior to the meeting.

As a part of security procedures, attendees should be prepared to present a photo ID at the meeting registration desk during the check-in process. Pre-registration is recommended. Seating will be limited to the room capacity and seats will be on a first come, first served basis, with expedited check-in for those who are pre-registered. Please note: Online pre-registration will close by 5 p.m. the day before the meeting. After that time, registration will have to be done onsite the day of the meeting.

Meeting schedule subject to change.

Information about the IACC and a registration link for this meeting are available on the Web site: *http//:www.iacc.hhs.gov.*

Dated: *November 2, 2010.*

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–28299 Filed 11–9–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of General Medical Sciences Special Emphasis Panel MBRS SCORE Meeting.

*Date:* December 2–3, 2010.

*Time:* 10 a.m. to 4 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Natcher Building, 45 Center Drive, Room 3AN12, Bethesda, MD 20892. (Virtual Meeting)

*Contact Person:* Lisa Dunbar, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN12, Bethesda, MD 20892. 301–594–2849. *dunbarl@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: *November 3, 2010.*

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–28298 Filed 11–9–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of General Medical Sciences Special Emphasis Panel MBRS Behavioral Science Panel.

*Date:* December 2, 2010.

*Time:* 11 a.m. to 1 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Natcher Building, 45 Center Drive, Room 3AN18, Bethesda, MD 20892. (Telephone Conference Call)

*Contact Person:* Rebecca H. Johnson, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN18C, Bethesda, MD 20892. 301–594–2771. *johnsonrh@nigms.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: November 3, 2010.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–28297 Filed 11–9–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Diabetes and Digestive And Kidney Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, DDK–B Conflicts.

*Date:* December 2, 2010.

*Time:* 9 a.m. to 12 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892. (Telephone Conference Call)

*Contact Person:* Ann A. Jerkins, PhD, Scientific Review Officer, Review Branch, Dea, NIDDK, National Institutes of Health, Room 759, 6707 Democracy Boulevard, Bethesda, MD 20892–5452. 301–594–2242. *Jerkinsa@Niddk.Nih.Gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, CKD And CVD Ancillary Studies.

*Date:* December 17, 2010.

*Time:* 1 p.m. to 4 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Two Democracy Plaza, 6707 Democracy

Boulevard, Bethesda, MD 20892. (Telephone Conference Call)

*Contact Person:* Robert Wellner, PhD, Scientific Review Officer, Review Branch, Dea, Niddk, National Institutes of Health, Room 706, 6707 Democracy Boulevard, Bethesda, MD 20892–5452. 301–594–4721. *Rw175w@Nih.Gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: November 3, 2010.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–28295 Filed 11–9–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Pediatric Ancillary Study to ASSESS–AKI.

*Date:* December 7, 2010.

*Time:* 2:15 p.m. to 3 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892. (Telephone Conference Call)

*Contact Person:* Lakshmanan Sankaran, PhD Scientific Review Officer, Review Branch, Dea, NIDDK, National Institutes Of Health, Room 755, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7799, *Ls38z@Nih.Gov.*

*Name of Committee:* National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Bone Morphogenesis Program Project Review.

*Date:* December 8, 2010.

*Time:* 2 p.m. to 4:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health. Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892. (Telephone Conference Call)

*Contact Person:* Lakshmanan Sankaran, PhD Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 755, 6707 Democracy Boulevard, Bethesda, Md 20892–5452. (301) 594–7799. *Ls38z@Nih.Gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: November 3, 2010.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–28293 Filed 11–9–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2010–N–0128]**

### Prescription Drug User Fee Act; Reopening of the Comment Period

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice; reopening of the comment period.

**SUMMARY:** The Food and Drug Administration (FDA) is reopening until October 31, 2011, the comment period for the notice of public meeting that published in the **Federal Register** of March 16, 2010 (75 FR 12555). In the notice, FDA announced a public meeting to solicit input on the reauthorization of the Prescription Drug User Fee Act (PDUFA) program. The Federal Food, Drug, and Cosmetic Act (the FD&C Act) requires public review of the recommendations for the human drug review program after negotiations with the regulated industry conclude. FDA expects that this additional public process will be complete by October 2011. FDA is reopening the comment period for the expected duration of the public part of the reauthorization process to ensure that all interested stakeholders have the opportunity to share their views on the matter.

**DATES:** Submit either electronic or written comments by October 31, 2011.

**ADDRESSES:** Submit electronic comments to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Patrick Frey, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 1174, Silver Spring, MD 20993–0002, 301–796–3844, FAX: 301–847–8443, e-mail: *PDUFAReauthorization@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:**

#### I. Background

In the **Federal Register** of March 16, 2010 (75 FR 12555), FDA published a notice of a public meeting on PDUFA reauthorization and invited comments. In the notice, the Agency stated that the authority for PDUFA expires in September 2012. Without new legislation, FDA will no longer be able to collect user fees to fund the human drug review process. Section 736B(d)(2) (21 U.S.C. 379h-2(d)(2)) of the FD&C Act requires that before FDA begins negotiations with the regulated industry on PDUFA reauthorization, we do the following: (1) Publish a notice in the **Federal Register** requesting public input on the reauthorization, (2) hold a public meeting at which the public may present its views on the reauthorization, (3) provide a period of 30 days after the public meeting to obtain written comments from the public suggesting changes, and (4) publish the comments on the FDA Web site.

The public meeting was held on April 12, 2010, and interested persons were given until May 12, 2010, to submit comments. The written comments submitted during that period are now published on the FDA Web site at *http://www.fda.gov/ForIndustry/UserFees/PrescriptionDrugUserFee/ucm215804.htm.* To ensure that all interested persons have sufficient opportunity to share their views on PDUFA throughout the reauthorization process, FDA is reopening the comment period until October 31, 2011. The FD&C Act requires public review of the recommendations for the human drug review program after negotiations with the regulated industry conclude. FDA expects that the public component of the reauthorization process will be complete by October 2011. Therefore, the Agency is reopening the comment period for this anticipated duration to ensure that all interested stakeholders have the opportunity to share their views on the matter.

## II. Additional Information on PDUFA

There are several sources of information on FDA's Web site that may be useful for interested stakeholders to better understand the history and evolution of the PDUFA program and its current status:

- Information on the April 2010 public meeting on PDUFA Reauthorization, the **Federal Register** notice announcing the meeting, and the transcript of the meeting are available at *http://www.fda.gov/ForIndustry/UserFees/PrescriptionDrugUserFee/ucm117890.htm.* The slide presentations from the meeting can be found at *http://www.regulations.gov* using Docket No. FDA–2010–N–0128.
- FDA created a webinar on the PDUFA program, drug development, and FDA's drug review in PDUFA IV. These presentations are available at *http://www.fda.gov/ForIndustry/UserFees/PrescriptionDrugUserFee/ucm207597.htm.*
- Key **Federal Register** documents, PDUFA-related guidances, legislation, performance reports, and financial reports and plans are posted at *http://www.fda.gov/ForIndustry/UserFees/PrescriptionDrugUserFee/default.htm.*
- Specific information on the FDA Amendments Act of 2007 is available at: *http://www.fda.gov/RegulatoryInformation/Legislation/FederalFoodDrugandCosmeticActFDCAct/SignificantAmendmentstotheFDCAct/FoodandDrugAdministrationAmendmentsActof2007/default.htm.*

## III. How To Submit Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: November 3, 2010.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2010–28357 Filed 11–9–10; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Agency for Healthcare Research and Quality

### Solicitation for Nominations for Members of the U.S. Preventive Services Task Force (USPSTF)

**AGENCY:** Agency for Healthcare Research and Quality (AHRQ), HHS.

**ACTION:** Solicits nominations for new members of USPSTF.

**SUMMARY:** The Agency for Healthcare Research and Quality (AHRQ) invites nominations of individuals qualified to serve as members of the U.S. Preventive Services Task Force (USPSTF).

The USPSTF, a standing, independent panel of non-Federal experts that makes evidence-based recommendations to the health care community and the public regarding the provision of clinical preventive services, *see* 42 U.S.C. 299b–4(a), is composed of members appointed to serve for four-year terms with an option for a one-year or two-year extension. New members are selected each year to replace those members who are completing their appointments. Individuals nominated but not appointed in previous years, as well as those newly nominated, are considered in the annual selection process.

USPSTF members meet three times a year for two days in the Washington, DC area. Between meetings, member duties include reviewing and preparing comments (off site) on systematic evidence reviews prior to discussing and making recommendations on preventive services, drafting final recommendation documents, and participating in workgroups on specific topics or methods.

A diversity of perspectives is valuable to the work of the USPSTF. To help obtain a diversity of perspectives among nominees, AHRQ particularly encourages nominations of women, members of minority populations, and persons with disabilities. Interested individuals can self nominate. Organizations and individuals may nominate one or more persons qualified for membership on the USPSTF.

*Qualification Requirements:* The mission of the USPSTF is to review the scientific evidence related to the effectiveness and appropriateness of clinical preventive services for the purpose of developing recommendations for the health care community. Therefore, in order to qualify for the USPSTF, an applicant or nominee MUST demonstrate the following:

1. Knowledge and experience in the critical evaluation of research published in peer reviewed literature and in the methods of evidence review;
2. Understanding and experience in the application of synthesized evidence to clinical decisionmaking and/or policy;
3. Expertise in disease prevention and health promotion;
4. Ability to work collaboratively with peers; and,
5. Clinical expertise in the primary health care of children and/or adults, and/or expertise in counseling and behavioral interventions for primary care patients.

Some USPSTF members without primary health care clinical experience may be selected based on their expertise in methodological issues such as medical decisionmaking, clinical epidemiology, behavioral medicine, health equity, and health economics. For individuals with clinical expertise in primary health care, additional qualifications in one or more of these areas would enhance their candidacy.

Consideration will be given to individuals who are recognized nationally for scientific leadership within their field of expertise. Applicants must have no substantial conflicts of interest, whether financial, professional, or other conflicts, that would impair the scientific integrity of the work of the USPSTF.

**DATES:** Nominations are welcome at any time. To be considered for appointment in 2011, complete nominations must be received by November 29, 2010.

Nominated individuals will be selected for the USPSTF on the basis of their qualifications (in particular, those that address the required qualifications, outlined above) and the current expertise needs of the USPSTF. All individuals with complete nominations will be considered. AHRQ will retain and consider for future vacancies the nominations of those not selected during this cycle.

**ADDRESSES:** Submit your responses either in writing or electronically to: Gloria Washington, *ATTN:* USPSTF Nominations, Center for Primary Care, Prevention, and Clinical Partnerships, Agency for Healthcare Research and Quality, 540 Gaither Road, Rockville, Maryland 20850, *USPSTFnominations@AHRQ.hhs.gov.*

### Nomination Submissions

Nominations may be submitted in writing or electronically, but must include:

(1) The applicant's current curriculum vitae and contact information, including

mailing address, e-mail address, and telephone number and

(2) A letter explaining how this individual meets the qualification requirements and how he/she would contribute to the USPSTF. The letter should also attest to the nominee's willingness to serve as a member of the USPSTF.

AHRQ will later ask persons under serious consideration for membership to provide detailed information that will permit evaluation of possible significant conflicts of interest. Such information will concern matters such as financial holdings, consultancies, and research grants or contracts.

**Nominee Selection**

Appointments to the USPSTF will be made on the basis of qualifications as outlined above (see Qualification Requirements) and the current expertise needs of the USPSTF.

**Arrangement for Public Inspection**

Nominations and applications are kept on file at the Center for Primary care, Prevention, and Clinical Partnerships, AHRQ and are available for review during business hours. AHRQ does not reply to individual nominations, but considers all nominations in selecting members. Information regarded as private and personal, such as a nominee's Social Security number, home and e-mail addresses, home telephone and fax numbers, or names of family members will not be disclosed to the public. This is in accord with AHRQ confidentiality policies and Department of Health and Human Services regulations (45 CFR 5.67).

**FOR FURTHER INFORMATION CONTACT:** Gloria Washington at *USPSTFnominations@AHRQ.hhs.gov.*

**SUPPLEMENTARY INFORMATION:**

**Background**

Under Title IX of the Public Health Service Act, AHRQ is charged with enhancing the quality, appropriateness, and effectiveness of health care services and access to such services. 42 U.S.C. 299(b). AHRQ accomplishes these goals through scientific research and promotion of improvements in clinical practice, including clinical prevention of diseases and other health conditions, and improvements in the organization, financing, and delivery of health care services. *See* 42 U.S.C. 299(b).

The USPSTF is a panel of non-Federal experts that makes independent evidence-based recommendations regarding the provision of clinical preventive services. *See* 42 U.S.C. 299b–4(a). The USPSTF was first established in 1984 under the auspices of the U.S. Public Health Service. Currently, the USPSTF is convened by the Director of AHRQ, and AHRQ provides ongoing administrative, research and technical support for the USPSTF's operation. The USPSTF is charged with rigorously evaluating the effectiveness and appropriateness of clinical preventive services and formulating or updating recommendations for primary care clinicians regarding the appropriate provision of preventive services. *See* 42 U.S.C. 299b–4(a)(1). Current USPSTF recommendations and associated evidence reviews are available on the Internet (*http://USPreventiveServicesTaskForce.org*).

Dated: November 1, 2010.

**Carolyn M. Clancy,**

*AHRQ Director.*

[FR Doc. 2010–28041 Filed 11–8–10; 8:45 am]

**BILLING CODE 4160–90–M**

## DEPARTMENT OF HOMELAND SECURITY

### United States Immigration and Customs Enforcement

### Agency Information Collection Activities: Revision of an Existing Information Collection; Comment Request

**ACTION:** 60-Day Notice of Information Collection for Review; Student and Exchange Visitor Information System (SEVIS); OMB Control No. 1653–0038.

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (ICE), will be submitting the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until January 10, 2011.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time should be directed to the Department of Homeland Security (DHS), Joseph M. Gerhart, Chief, Records Management Branch, U.S. Immigration and Customs Enforcement, 500 12th Street, SW., STOP 5705, Washington, DC 20536–5705.

Comments are encouraged and will be accepted for sixty days until January 10, 2011. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency's, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

*Overview of this information collection:*

(1) *Type of Information Collection:* Revision of a currently approved information collection.

(2) *Title of the Form/Collection:* Student and Exchange Visitor Information System (SEVIS).

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Forms I–17 and I–20; U.S. Immigration and Customs Enforcement.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Not-for-profit institutions and individuals or households.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

| Number of respondents | Form name/form No. | Average burden per response (in hours) |
|---|---|---|
| 280,000 | Certificate of Eligibility for Nonimmigrant (F–1) Student Status—For Academic and Language Students/ICE Form I–20 (Students). | 0.5 |
| 90,000 | Certificate of Eligibility for Nonimmigrant (M–1) Student Status—For Academic and Language Students/ICE Form I–20 (Spouse/Dependents). | 0.5 |
| 280,000 | Optional Practical Training 12 Month Request/No Form | 0.083 |
| 12,000 | Optional Practical Training 17 Month Extension Request/No Form | 0.083 |
| 5,525 | Maintenance of SEVP Certification/ICE Form I–17 | 4 |

(6) *An estimate of the total public burden (in hours) associated with the collection:* 557,816 annual burden hours.

Comments and/or questions; requests for a copy of the proposed information collection instrument, with instructions; or inquiries for additional information should be directed to: Office of the Chief Financial Officer/OAM/Records Branch, U.S. Immigration and Customs Enforcement, 500 12th Street, SW., STOP 5705, Washington, DC 20536–5705.

Dated: November 4, 2010.

**Katherine H. Westerlund,**

*Acting Branch Chief, Policy Branch, Student and Exchange Visitor Program, U.S. Immigration and Customs Enforcement, Department of Homeland Security.*

[FR Doc. 2010–28301 Filed 11–9–10; 8:45 am]

**BILLING CODE 9111–28–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[Docket ID: FEMA–2010–0065]**

### Public Meetings of National Flood Insurance Program (NFIP) Reform Effort

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Announcement of public meetings.

**SUMMARY:** This notice announces two public meetings of the National Flood Insurance Program (NFIP) Reform Effort. In performing its mission, the Federal Emergency Management Agency (FEMA) believes it is important to continually update stakeholders on its programs and answer any questions and listen to comments from them on how its programs can be more efficient and effective at meeting the needs of the public. To this end, FEMA has engaged in a comprehensive reform effort to address the concerns of the wide array of stakeholders involved in the ongoing debate about the NFIP. FEMA chose a participatory policy analysis framework to guide the NFIP Reform effort. Policy analysis employs systematic inquiry and evaluation to assess policy alternatives. The participatory policy analysis process allows public decisions to be made in a structured, defensible, and collaborative manner.

The effort is comprised of three phases designed to engage the greatest number of stakeholders and consider the largest breadth of public policy options. Phase I focused on the capture and analysis of stakeholder concerns and recommendations. During Phase II, FEMA performed additional analysis of existing data and identified a set of evaluation criteria. In Phase III, a portfolio of public policy alternatives is being developed and will be analyzed using the evaluation criteria. The resulting recommendations will be reported to FEMA leadership. The purpose of the public meetings is to describe, update, and explain straw man policy alternatives and to answer questions and listen to comments from interested stakeholders. Additional information on the straw man policy alternatives will be made available prior to the meeting via the NFIP Reform Web site and will be posted to Docket ID: FEMA–2010–0065.

In addition, through these public meetings, FEMA will accept stakeholder input of the policy evaluation process through the use of a pair-wise comparison method. The pair-wise tool is also available via the NFIP Reform Web site at *http://www.fema.gov/business/nfip/nfip_reform.shtm.*

**DATES:**

*Meeting Date:* The first public meeting will be held on December 2, 2010, from 10 a.m. to 5 p.m. EST. This meeting will be held in Washington, DC. The second public meeting will be held on December 9, 2010, from 10 a.m. to 5 p.m. MST. This meeting will be held in Denver, CO.

*Comment Date:* Written comments must be received by December 31, 2010.

**ADDRESSES:** All written comments must be received by Friday, December 31, 2010. All submissions received must include the Docket ID: FEMA–2010–0065 and may be submitted by any one of the following methods:

*Federal Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments on the Web site.

*E-mail: FEMA–RULES@dhs.gov*. Include Docket ID: FEMA–2010–0065 in the subject line of the message.

*Facsimile:* (703) 483–2999.

*Mail:* FEMA, Office of Chief Counsel, 500 C Street, SW., Room 840, Washington, DC 20472–3100.

*Hand Delivery/Courier:* FEMA, Office of Chief Counsel, 500 C Street, SW., Room 840, Washington, DC 20472–3100.

*Instructions:* All submissions received must include the Docket ID: FEMA–2010–0065. Comments received will also be posted without alteration at *http://www.regulations.gov,* including any personal information provided. You may want to read the Privacy Act Notice located on the Privacy and Use Notice link on the Administration Navigation Bar of the Web site *http://www.regulations.gov*.

*Docket:* For access to the docket to read documents or comments received by FEMA, go to *http://www.regulations.gov*. The straw man policy alternatives will be posted to Docket ID: FEMA–2010–0065.

*Special Accommodations:* For anyone attending the meeting who is hearing or visually impaired, or who requires special assistance or accommodations, please contact Jason "Tommy" Kennedy by November, 15, 2010 for the first meeting and by November 22, 2010 for the second meeting. For further information, please contact Mr. Kennedy by telephone at 202–646–3779.

*Meeting Locations:* The first public meeting will be held in Washington, DC, at the Washington Marriott at Metro Center, 775 12th Street, NW., Washington, DC. The second public meeting will be held in Denver, Colorado at the Denver Federal Center, Building 810—Entrance W–5, Denver, CO.

*Meeting Accessibility:* Due to space constraints of the facilities, seating will

be limited to 200 participants. To reserve a seat in advance, please provide a request via email or mail with the contact information of the participant (including name, mailing address, and e-mail address), the meeting(s) to be attended, and include the subject/attention line (or on the envelope if by mail): **Reservation Request for NFIP Reform Meeting**. Advance reservations must be received 3 business days prior to the meeting to ensure processing. Unregistered participants will be accepted after all participants with reservations have been accommodated and will be admitted on a first-come, first-serve basis, provided the 200 person capacity is not exceeded. To submit reservations, please e-mail: *nfip_reform@dhs.gov* or send by mail to the address listed in the **FOR FURTHER INFORMATION CONTACT** caption.

*Web Site: http://www.fema.gov/business/nfip/nfip_reform.shtm.*

**FOR FURTHER INFORMATION CONTACT:** Michael Grimm, by telephone at 202–646–2878 or by e-mail at *nfip_reform@dhs.gov*. *Mailing Address:* NFIP Reform, 1800 South Bell Street, Room 970, Arlington, VA 20598–3030.

*Meeting Topics:* Background information about these topics is available on the NFIP Reform Web site. The straw man policy alternatives will also be posted to Docket ID: FEMA–2010–0065.

*Procedure:* This meeting is open to the public.

**W. Craig Fugate,**

*Administrator, Federal Emergency Management Agency.*

[FR Doc. 2010–28424 Filed 11–9–10; 8:45 am]

**BILLING CODE 9110–12–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5452–N–01]**

## Allocations and Common Application and Reporting Waivers Granted to and Alternative Requirements for Community Development Block Grant (CDBG) Disaster Recovery Grantees Under the Supplemental Appropriations Act, 2010 (Pub. L. 111–212)

**AGENCY:** Office of the Secretary, HUD.

**ACTION:** Notice of allocations, waivers, and alternative requirements.

**SUMMARY:** This Notice advises the public of the allocation of CDBG disaster recovery funds for the purpose of assisting the recovery efforts in areas declared a major disaster under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*) as a result of the severe storms and flooding that occurred from March through May, 2010. As described in the **SUPPLEMENTARY INFORMATION** section of this Notice, HUD is authorized by statute and regulations to waive statutory and regulatory requirements and specify alternative requirements upon the request of a grantee. Therefore, this Notice describes applicable waivers and alternative requirements, as well as the application process, eligibility requirements, and relevant statutory provisions for grants provided under this Notice.

**DATES:** *Effective Date:* November 15, 2010.

**FOR FURTHER INFORMATION CONTACT:** Scott Davis, Director, Disaster Recovery and Special Issues Division, Office of Block Grant Assistance, Department of Housing and Urban Development, 451 7th Street, SW., Room 7286, Washington, DC 20410, telephone number 202–708–3587. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at 800–877–8339. Facsimile inquiries may be sent to Mr. Davis at 202–401–2044. (Except for the "800" number, these telephone numbers are not toll-free.)

**SUPPLEMENTARY INFORMATION:**

### Authority To Grant Waivers

The Supplemental Appropriations Act, 2010 (Pub. L. 111–212, approved July 29, 2010) appropriates $100 million, to remain available until expended, in CDBG funds for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure, housing, and economic revitalization in areas affected by severe storms and flooding from March 2010 through May 2010 for which the President declared a major disaster covering an entire State, or States with more than 20 counties declared major disasters, under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974 (42 U.S.C. 5121 *et seq.*).

The Supplemental Appropriations Act authorizes the Secretary to waive, or specify alternative requirements for any provision of any statute or regulation that the Secretary administers in connection with the obligation by the Secretary, or use by the recipient, of these funds and guarantees, except for requirements related to fair housing, nondiscrimination, labor standards, and the environment (including requirements concerning lead-based paint), upon: (1) A request by the grantee explaining why such a waiver is required to facilitate the use of such funds or guarantees, and (2) a finding by the Secretary that such a waiver would not be inconsistent with the overall purpose of Title I of the Housing and Community Development Act of 1974 (HCD Act). Regulatory waiver authority is also provided by 24 CFR 5.110, 91.600, and 570.5.

The Secretary finds that the following waivers and alternative requirements, as described below, are necessary to facilitate the use of these funds for the statutory purposes, and are not inconsistent with the overall purpose of Title I of the HCD Act or the Cranston-Gonzalez National Affordable Housing Act, as amended. Under the requirements of the Supplemental Appropriations Act and the Department of Housing and Urban Development Reform Act of 1989 (the HUD Reform Act), regulatory waivers must be justified and published in the **Federal Register.**

### Allocations

This Notice makes available $50 million of the $100 million appropriation for the CDBG program for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure, housing, and economic revitalization in areas affected by severe storms and flooding that occurred from March 2010 through May 2010, for which the President declared a major disaster covering an entire State, or States with more than 20 counties declared major disasters, under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974 (42 U.S.C. 5121 *et seq.*).

The Supplemental Appropriations Act further notes:

> That funds shall be awarded directly to the State or unit of general local government at the discretion of the Secretary * * * *Provided further,* that funds allocated under this heading shall not adversely affect the amount of any formula assistance received by a State or subdivision thereof under the Community Development Fund: *Provided further,* that a State or subdivision thereof may use up to 5 percent of its allocation for administrative costs * * *

Almost all of the prior appropriations to the CDBG disaster recovery program have required funds to be administered through an entity or entities designated by the Governor of each State. In contrast, the Supplemental Appropriations Act, 2010, states that funds may be awarded directly to a State or unit of general local government, at the discretion of the Secretary. Based on the eligible date range specified by Congress,

communities affected by the relevant disasters, and estimates of unmet need, HUD has determined that, in addition to Tennessee, Rhode Island, and Kentucky, multiple units of general local government will also receive a direct allocation under today's Notice. Therefore, except as described in this Notice, statutory and regulatory provisions governing the State CDBG program shall apply to any State receiving an allocation under this Notice, while statutory and regulatory provisions governing the CDBG entitlement program shall apply to any unit of general local government receiving a direct allocation in this Notice. Applicable State and entitlement regulations can be found at 24 CFR part 570. Unless noted otherwise, the term "grantee" refers to any grantee—whether State, city, or county—receiving a direct award under this Notice.

HUD computes allocations based on data that are generally available and that cover all the eligible affected areas. As a result, HUD is making the following allocations in today's Notice:

TABLE 1—INITIAL ALLOCATIONS UNDER PUB. L. 111–212

| Disaster No. | State | Grantee | Allocation |
|---|---|---|---|
| 1912 | Kentucky | State Government | $13,000,000 |
| 1894 | Rhode Island | City of Cranston | 1,277,067 |
| 1894 | Rhode Island | City of Warwick | 2,787,697 |
| 1894 | Rhode Island | State Government | 8,935,237 |
| 1909 | Tennessee | City of Memphis | 2,031,645 |
| 1909 | Tennessee | Nashville-Davidson County | 10,731,831 |
| 1909 | Tennessee | Shelby County | 1,212,788 |
| 1909 | Tennessee | State Government | 10,023,735 |
| Total | | | 50,000,000 |

Please see Appendix A for a complete description of the allocation methodology.

Subsequent to this Notice, HUD will make a final review of long-term disaster recovery needs for all States or subdivisions thereof affected by the disasters that occurred between March and May, 2010, to allocate the remaining $50 million. This review will include unmet housing, infrastructure, and economic revitalization needs.

The Supplemental Appropriations Act requires funds to be used only for specific purposes. The statute directs that each grantee will describe, in an Action Plan for Disaster Recovery, criteria for eligibility and how the use of the grant funds will address long-term recovery, and restoration of infrastructure, housing, and economic revitalization. HUD will monitor compliance with this directive and may disallow expenditures if it finds that funds duplicate other benefits or do not meet a statutory purpose. HUD encourages grantees to contact their assigned HUD offices for guidance in complying with these requirements during development of their Action Plans for Disaster Recovery.

As provided for in the Supplemental Appropriations Act, funds may be used as a matching requirement, share, or contribution for any other Federal program. However, the funds may not be used for activities reimbursable by, or for which funds are made available by, the Federal Emergency Management Agency (FEMA) or the Army Corps of Engineers.

**Prevention of Fraud, Abuse, and Duplication of Benefits**

To prevent fraud, abuse of funds, and duplication of benefits under the Supplemental Appropriations Act, this Notice includes specific reporting, written procedures, monitoring, and internal audit requirements applicable to each grantee. Please see the note regarding duplication of benefits at paragraph 27. Also see paragraph 5, sections B–D, under "Applicable Rules, Statutes, Waivers, and Alternative Requirements; Pre-Grant Process," for these requirements. In addition, the Department will: (1) Institute risk analysis and on-site monitoring of grantee management of the grants and of the specific uses of funds, (2) be extremely cautious in considering any waiver related to basic financial management requirements; the standard, time-tested CDBG financial requirements will continue to apply, and (3) collaborate with the HUD Office of Inspector General to plan and implement oversight of these funds.

**Waiver Justification**

This section of the Notice briefly describes the basis for each waiver and related alternative requirements, if any. Each grantee under today's Notice may request additional waivers from the Department as needed to address specific needs related to its recovery activities. The Department will respond to requests for waivers of provisions not covered in this Notice, after working with the grantee to tailor its program(s) to best meet its disaster recovery needs.

Each grantee under today's Notice receives an annual CDBG allocation, and therefore has a consolidated plan, citizen participation plan, monitoring plan, and has made CDBG certifications. To facilitate the timeliness of assistance, and expedite community recovery, HUD encourages each grantee to carry out its CDBG disaster recovery activities, to the extent possible, in the context of its ongoing community development programs (for example, by selecting activities consistent with the consolidated plan, by providing overall benefit to at least 70 percent low- and moderate-income persons, and by holding hearings or meetings to solicit public comment).

The waivers, alternative requirements, and statutory changes described in this Notice apply only to the CDBG supplemental disaster recovery funds appropriated in the Supplemental Appropriations Act, and not to funds provided under the regular CDBG program or those provided under any other component of the CDBG program, such as the Neighborhood Stabilization Program. These actions provide additional flexibility in program design and implementation and implement statutory requirements unique to this appropriation.

The following application and reporting waivers and alternative requirements are in response to requests from each grantee under this Notice.

**Application for Allocations Under the Supplemental Appropriations Act, 2010**

These waivers and alternative requirements streamline the pre-grant process and set guidelines for each

grantee's application. HUD encourages each grantee that receives an allocation to submit an Action Plan for Disaster Recovery to HUD as soon as practicable following this Notice. Please see paragraph 5 under "Applicable Rules, Statutes, Waivers, and Alternative Requirements; Pre-Grant Process," for more detailed information regarding the Action Plan requirements.

**Overall Benefit to Low- and Moderate-Income Persons**

The primary objective of Title I of the HCD Act and of the funding program of each grantee is the "development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." 42 U.S.C. 5301(c). The statute goes on to require that 70 percent of the aggregate of a regular CDBG program's funds be used to support activities benefitting low- and moderate-income persons. Many communities that have suffered a Presidentially-declared disaster find this target difficult, if not impossible, to reach. Furthermore, previous disasters, and disasters covered by the Supplemental Appropriations Act, 2010, affect entire communities regardless of income, often causing extensive damage to community structures, housing occupied by persons and families of varying incomes, and infrastructure. Disaster-affected communities are also often faced with the dissolution, or relocation of income-producing jobs.

Therefore, today's Notice provides grantees with greater flexibility to carry out recovery activities and grants an overall benefit waiver that allows for up to 50 percent of the grant to assist activities under the urgent need, or prevention or elimination of slums or blight, national objectives, rather than the 30 percent allowed under the regular CDBG programs.

HUD may provide additional waivers of this requirement only if the Secretary specifically finds a compelling need to further reduce or eliminate the percentage requirement. The requirement that each activity meet one of the three national objectives of the CDBG program is not waived.

**Expanded Distribution and Direct Action**

The waivers and alternative requirements allowing distribution of funds by a State to entitlement communities and Indian tribes, and to allow a State to carry out activities directly, rather than distribute all funds to units of local government, are consistent with waivers granted for previous, similar CDBG disaster recovery supplemental appropriations. HUD believes that, in using statutory language similar to that used for prior CDBG supplemental appropriations, Congress is signaling its intent that the States under this appropriation also be able to carry out activities directly. Therefore, HUD is waiving program requirements in order to support this intent. HUD is also including in this Notice the necessary complementary waivers and alternative requirements related to subrecipients to ensure proper management and disposition of funds during grant execution and at closeout.

Please note that any city or county receiving a direct award under today's Notice will be subject to the standard entitlement regulations. Thus, the waiver and alternative requirement allowing a State to carry out activities directly are inapplicable and unnecessary.

**Use of Subrecipients**

The State CDBG program rule does not make specific provision for the treatment of entities called "subrecipients" in the CDBG entitlement program. The waiver allowing the State to directly carry out activities creates a situation in which the State may use subrecipients to carry out activities in a manner similar to an entitlement community. HUD and its Office of Inspector General have long identified the use of subrecipients as a practice that increases the risk of abuse of funds. However, HUD's experience is that this risk can be successfully managed by following the CDBG entitlement requirements and related guidance. Therefore, a State taking advantage of the waiver to carry out activities directly must follow the alternative requirements drawn from the CDBG entitlement rule and specified in this Notice whenever using a subrecipient. Any city or county receiving a direct award under today's Notice is subject to the standard CDBG entitlement regulations regarding subrecipients.

**Consistency With the Consolidated Plan**

HUD is waiving the requirement for consistency with the consolidated plan because the effects of a major disaster usually alter a grantee's priorities for meeting housing, employment, and infrastructure needs. To emphasize that uses of grant funds must be consistent with the overall purposes of the HCD Act, HUD is limiting the scope of the waiver for consistency with the consolidated plan; the waiver applies only until the grantee first updates its strategic plan priorities (and the full consolidated plan) following the disaster. At that time, the grantee should also update its Analysis of Impediments, so that it more accurately reflects the impacts of the disaster.

**Action Plan for Disaster Recovery**

HUD is waiving the CDBG action plan requirements and substituting an Action Plan for Disaster Recovery. This will allow rapid implementation of disaster recovery grant programs and ensure conformance with provisions of the Supplemental Appropriations Act. Where possible, the Action Plan for Disaster Recovery, including certifications, should not repeat common action-plan elements the grantee has already committed to carry out as part of its annual CDBG submission.

Any grantee receiving an allocation under this Notice will be responsible for compliance with Federal requirements. During the course of the grant, HUD will monitor the grantee's actions and use of funds for consistency with the Action Plan. The grantee may submit an initial partial Action Plan and amend it one or more times subsequently until the Action Plan describes uses for the total grant amount. An Action Plan may also be amended to modify activities.

**Citizen Participation**

The citizen participation waiver and alternative requirements will permit a more streamlined public process, but one that still provides for reasonable public notice, appraisal, examination, and comment on the activities proposed for the use of CDBG disaster recovery grant funds. The waiver removes the requirement at both the grantee and grant recipient levels for public hearings or meetings as the method for disseminating information or collecting citizen comments.

The CDBG program normally requires a grantee to solicit comments from its citizens for at least 30 days before it submits an annual action plan to HUD, which then has 45 days to accept or reject the plan. To expedite the process and to ensure that the disaster recovery grants are awarded in a timely manner, while preserving reasonable citizen participation, HUD is waiving the requirement that the grantee follow its citizen participation plan to the extent necessary to allow a grantee to submit an Action Plan for Disaster Recovery in an expedited manner. HUD is shortening the minimum time for citizen comments and is requiring the proposed Action Plan for Disaster Recovery, and any amendment thereof, to be posted on the grantee's official Web site as the plan or amendment is

developed, published, and submitted to HUD.

In combination, this Notice's alternative requirements provide the following expedited steps for disaster recovery grants:

- Proposed Action Plan for Disaster Recovery published via the usual methods and on the grantee's official Web site for no less than 7 calendar days of public comment;
- Final Action Plan posted on the Internet and submitted to HUD (grant application includes Standard Form 424 (SF–424) and certifications; other parts of the Action Plan may initially be submitted through the Department's Disaster Recovery Grant Reporting (DRGR) system, or by mailing/e-mailing a paper copy);
- HUD expedites review;
- HUD accepts the plan and prepares a cover letter, grant agreement, and grant conditions;
- Grant agreement signed by HUD and immediately transmitted to the grantee;
- Grantee signs and returns the grant agreement;
- HUD establishes the line of credit and the grantee requests and receives DRGR access (if the grantee does not already have it);
- If it has not already done so, grantee enters the Action Plan into DRGR and submits it to HUD. (Funds can be drawn from the line of credit only for an activity that is established in an Action Plan in DRGR.)

After completing the environmental review(s) pursuant to 24 CFR part 58 and, as applicable, receiving from HUD or the State an approved Request for Release of Funds and certification, the grantee may draw down funds from the line of credit.

The Department expects each grantee to make a reasonable effort to notify all affected citizens that the Action Plan is available for comment. Examples of a reasonable effort include electronic mailings, press releases, statements by public officials, media advertisements, and personal contacts with neighborhood representatives. Grantees are cautioned that, despite the expedited application and plan process, they are still responsible for ensuring that all citizens have equal access to information about the programs, including persons with disabilities. In addition, each grantee must ensure that program information is available in the appropriate languages for the geographic area served by the jurisdiction. This issue may be particularly applicable to States receiving an award under this Notice. Unlike grantees in the regular State CDBG program, State grantees under today's Notice may make grants throughout the State, including into CDBG entitlement areas if these entitlements are included in a relevant disaster declaration. Thus, State CDBG staff may not be aware of limited-English-proficient (LEP) speaking populations in those metropolitan jurisdictions. For assistance in ensuring that this information is available to LEP populations, recipients should consult the *Final Guidance to Federal Financial Assistance Recipients Regarding Title VI, Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* published on January 22, 2007, in the **Federal Register** (72 FR 2732).

**Administration Limitation**

For all State grantees under today's Notice, the annual State CDBG program administration requirements must be modified to be consistent with the Supplemental Appropriations Act, which allows up to 5 percent of the grant to be used for administrative costs, whether by the State, by entities designated by the State, by units of general local government, or by subrecipients. The provisions at 42 U.S.C. 5306(d) and 24 CFR 570.489(a)(1)(i) and (iii) will not apply to any State grantee to the extent that they cap administration expenditures and require a dollar-for-dollar match of State funds for administrative costs exceeding $100,000. However, a State under today's Notice may fund *planning activities* that exceed the 5 percent limitation on general administrative costs. HUD does not waive 24 CFR 570.489(a)(3), which allows a State to spend up to 20 percent of its total allocation on a combination of planning and program administration costs.

Any city or county receiving a direct award under today's Notice is also subject to the 5 percent administrative cap. This 5 percent applies to all administrative costs—whether incurred by the grantee or its subrecipients. However, the provisions at 24 CFR 570.200(g) allow a city or county to fund planning activities that may exceed the 5 percent general administration cap. Thus, similar to a State grantee, a city or county receiving a direct allocation under today's Notice is allowed to spend 20 percent of its total allocation on a combination of planning and program administration costs.

**Planning**

The annual State CDBG program requires that local government grant recipients for planning-only grants must document that the use of funds meets a national objective. In the State CDBG program, these planning grants are typically used for individual project plans. By contrast, planning activities carried out by entitlement communities are more likely to include non-project specific plans such as functional land-use plans, master plans, historic preservation plans, comprehensive plans, community recovery plans, development of housing codes, zoning ordinances, and neighborhood plans. These plans may guide long-term community development efforts comprising multiple activities funded by multiple sources. In the annual entitlement program, these more general stand-alone planning activities are presumed to meet a national objective under the requirements at 24 CFR 570.208(d)(4). The Department notes that almost all effective CDBG disaster recoveries in the past have relied on some form of area-wide or comprehensive planning activity to guide overall redevelopment independent of the ultimate source of implementation funds. Therefore, for State grantees receiving an award under this Notice, the Department is removing the eligibility requirements at 24 CFR 570.483(b)(5) or (c)(3). Instead, States must comply with 24 CFR 570.208(d)(4) when funding disaster recovery-assisted planning-only grants, or directly administering planning activities that guide recovery in accordance with the Supplemental Appropriations Act. 24 CFR 570.208(d)(4) will apply to any city or county receiving a direct allocation under this Notice.

**Reporting**

HUD is waiving the annual reporting requirement. In the alternative and to ensure consistency between grants allocated under today's Notice and grants allocated previously under the CDBG disaster recovery program, HUD is requiring quarterly reports from each grantee on the uses of the awarded funds, the funded activities, and other various aspects. HUD will use many of the data elements to exercise oversight for compliance with the requirements of this Notice and for prevention of fraud, abuse of funds, and duplication of benefits. To collect these data elements, HUD is requiring each grantee to report to HUD quarterly using the online DRGR system, which uses a streamlined, Internet-based format. Grantees will also use DRGR to record obligations and to make draws of funds from the line of credit established for each grant. HUD will use transactional data from DRGR, and grantee reports, to: (1) Monitor for anomalies or performance problems that suggest fraud, abuse of funds, and duplication of benefits; (2) reconcile

budgets, obligations, funding draws, and expenditures; (3) calculate applicable administrative and public service limitations and the overall percent of benefit to low- and moderate-income persons; and (4) report to Congress and the public. Furthermore, the grantee reports and DRGR will be used as a basis for risk analysis in determining a monitoring plan.

The grantee must post the quarterly report on an Internet site for its citizens within 3 business days of the report's submission to HUD.

**Eligibility—Housing Related**

The broadening of the Section 105(a)(24) of the 1974 Act, and a waiver of Section 105(a) is necessary following major disasters in which large numbers of affordable housing units have been damaged or destroyed, as is the case of the disasters eligible under this Notice. Thus, in accordance with the grantees' requests, the following is eligible: New housing construction, homeownership assistance for families whose income is up to 120 percent of median income, and payment of up to 100 percent of a housing down payment. These modifications will allow each grantee to implement mixed-use housing recovery programs included in its HUD-accepted action plan.

In addition, Metropolitan Nashville and Davidson County has stated that it may be necessary for the community to offer incentives to promote suitable housing development or resettlement in accordance with its comprehensive recovery plan. Generally, incentives are offered in addition to other programs or funding (such as insurance), to try to influence individual residential location decisions, when these decisions are in doubt. For example, a grantee may offer an incentive payment (possibly in addition to buyouts) for households that volunteer to relocate within a particular period of time, or who choose to resettle outside a 100- or 500-year floodplain.

In the past, the State of New York successfully used an incentive program to induce rapid and stable resettlement of lower Manhattan following September 11, 2001. Also, the city of Grand Forks, North Dakota, provided a very affordable soft-second loan as an incentive to help induce households to resettle within the city during its recovery. Therefore, Metropolitan Nashville and Davidson County may provide housing incentives so long as it maintains documentation, at least at a programmatic level, describing how the amount of assistance was determined to be necessary and reasonable. The Department is waiving 42 U.S.C. 5305(a) and associated regulations to make this use of grant funds eligible. Please note that this waiver does not permit a compensation program. Additionally, if the Entitlement grantee requires the incentives to be used for a particular purpose by the household receiving the assistance, then the activity will be that required use, and not considered as an incentive.

**Eligibility—Emergency Grant Payments**

Upon its request, HUD is waiving 42 U.S.C. 5305(a) so that Metropolitan Nashville and Davidson County may extend interim mortgage assistance to qualified individuals for up to 20 months. Several hundred families are in the position of paying a mortgage and rent while awaiting reconstruction or the implementation of a FEMA-funded hazard mitigation program. Thus, this interim assistance will be critical for many households facing financial hardship.

**Eligibility—Buildings for the General Conduct of Government**

Grantees under this Notice (except for the State of Tennessee) have requested a limited waiver of the prohibition on funding buildings for the general conduct of government. HUD has considered the request and agrees that it is consistent with the overall purposes of the 1974 Act for each requesting grantee to be able to use the grant funds under this notice to repair or reconstruct buildings used for the general conduct of government. Provided that the building is selected in accordance with the method described in the grantee's Action Plan for Disaster Recovery, and it has been determined that the building has substantial value in promoting disaster recovery. However, as stated by the Supplemental Appropriations Act, funds allocated under today's Notice may not be used for activities reimbursable by, or for which funds are made available by, FEMA or the Army Corps of Engineers.

**Anti-Pirating**

The limited waiver of the job relocation requirements allows a grantee to provide assistance to a business located in another State, or another labor market area within the same State, if the business was displaced from a declared area and wishes to return. This waiver is necessary to allow a grantee affected by a major disaster to reestablish and rebuild its employment base. This waiver will not apply to the City of Cranston.

**Relocation Requirements**

The grantees have indicated that they plan to engage in, or wish to facilitate, voluntary acquisition and relocation activities (in a form often called "buyouts"), by using waivers related to acquisition and relocation requirements under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, (42 U.S.C. 4601 *et seq.*) (URA), and the replacement of housing and relocation assistance provisions under section 104(d) of the HCD Act (42 U.S.C. 5304(d)). The grantees believe these waivers will more effectively assist displaced persons in a timely and efficient manner.

CDBG funds are Federal financial assistance. Therefore, CDBG-assisted programs or projects are subject to the URA and the government-wide implementing regulations at 49 CFR part 24. The URA's protection and assistance apply to acquisitions of real property and displacements resulting from the acquisition, rehabilitation, or demolition of real property for CDBG-assisted programs or projects. The URA provides assistance and protections to individuals and businesses affected by Federal or federally-assisted projects. HUD is waiving the following URA requirements to help promote accessibility to suitable, decent, safe, and sanitary housing for victims of severe storms and flooding that occurred from March through May, 2010.

The acquisition requirements of the URA and implementing regulations are waived so that they do not apply to an arm's length voluntary purchase carried out by a person who does not have the authority to acquire by power of eminent domain, in connection with the purchase and occupancy of a principal residence by that person. The failure to suspend these requirements would impede disaster recovery and may result in windfall payments.

A limited waiver is granted of the URA's implementing regulations to the extent that they require grantees to provide URA financial assistance sufficient to reduce the displaced person's post-displacement rent/utility cost to 30 percent of household income. The failure to suspend these one-size fits-all requirements could impede disaster recovery. To the extent that a tenant has been paying rent in excess of 30 percent of household income without demonstrable hardship, rental assistance payments to reduce tenant costs to 30 percent would not be required.

The URA and implementing regulations are waived to the extent necessary to permit a grantee to meet all or a portion of a grantee's replacement housing financial assistance obligation

to a displaced renter by offering rental housing through a tenant-based rental assistance (TBRA) housing program subsidy (*e.g.,* Section 8 rental voucher or certificate), provided that the tenant is also provided with referrals to suitable, available rental replacement dwellings where the owner is willing to participate in the TBRA program, and the period of authorized assistance is at least 42 months. Failure to grant this waiver would impede disaster recovery whenever TBRA program subsidies are available but funds for cash relocation assistance are limited. This waiver gives grantees an additional relocation resource option.

The URA and implementing regulations are waived to the extent that they require a grantee to offer a person displaced from a dwelling the option to receive a "moving expense and dislocation allowance" based on the current schedule of allowances prepared by the Federal Highway Administration. In the alternative, the grantee must establish and offer the person a moving expense and dislocation allowance under a schedule of allowances that is reasonable for the jurisdiction and takes into account the number of rooms in the displacement dwelling, whether the person owns and must move the furniture, and, at a minimum, the kinds of expenses described in 49 CFR 24.301. Failure to suspend and provide alternative requirements in this case would impede disaster recovery by requiring grantees to offer allowances that do not reflect current local labor and transportation costs. Persons displaced from a dwelling remain entitled to choose a payment for actual reasonable moving and related expenses if they find that approach preferable to the locally established moving expense and dislocation allowance.

In addition to the URA waivers, HUD is waiving requirements of section 104(d) of the HCD Act dealing with one-for-one replacement of lower-income dwelling units demolished or converted in connection with a CDBG-assisted development project for housing units damaged by one or more disasters. HUD is waiving this requirement because it does not take into account the large, sudden changes a major disaster may cause to the local housing stock, population, or local economy. Further, the requirement does not take into account the threats to public health and safety and to economic revitalization that may be caused by the presence of disaster-damaged housing structures that are unsuitable for rehabilitation. As it stands, the requirement would impede disaster recovery and discourage grantees from converting or demolishing disaster-damaged housing because of excessive costs that would result from replacing all such units within the specified time frame. HUD is also waiving the relocation assistance requirements contained in section 104(d) of the HCD Act to the extent that they differ from those of the URA (42 U.S.C. 4601 *et seq.*). This change will simplify implementation while preserving statutory protections for persons displaced by projects assisted with CDBG disaster recovery grant funds.

Some disaster recovery CDBG funds may be used to support programs receiving FEMA funding, *e.g.* buyouts and relocation activities. The statutory requirements of the URA are also applicable to the administration of FEMA mitigation funding, and disparities in rental assistance payments for activities funded by HUD and FEMA will thus be eliminated. FEMA is subject to the requirements of the URA. Pursuant to this authority, FEMA requires that rental assistance payments be calculated on the basis of the amount necessary to lease or rent comparable housing for a period of 42 months. HUD is also subject to these requirements, but is also covered by alternative relocation provisions authorized under 42 U.S.C. 5304(d)(2)(A)(iii) and (iv), and implementing regulations at 24 CFR 42.350. These alternative relocation benefits, available to low- and moderate-income displacees opting to receive them in certain HUD programs, require the calculation of similar rental assistance payments on the basis of 60 months, rather than 42 months, thereby creating a disparity between the available benefits offered by HUD and FEMA (although not always an actual cash difference). The waiver assures uniform and equitable treatment by allowing the URA benefits requirements to be the standard for assistance under this Notice.

**Program Income**

The waivers and alternative requirements pertaining to program income are most significant for State grantees under this Notice. Prior to 2002, program income earned on disaster recovery grants was usually considered program income in accordance with the rules of the regular State CDBG program of the applicable grantee. As a result, the funds lost their disaster recovery identity, and thereby lost use of the waivers and streamlined alternative requirements.

The HCD Act provides that a unit of general local government in receipt of CDBG funds from a State can retain program income if it uses the funds for additional eligible activities under the annual CDBG program; although the Act also states that under certain circumstances, a State may require the program income to be returned.

This Notice waives the existing statute and regulations to give each State grantee, in all circumstances, the choice of whether a unit of general local government receiving a distribution of CDBG disaster recovery funds and using program income for activities in the Action Plan may retain this income and use it for additional disaster recovery activities.

Additionally, this Notice addresses the use of program income for both State grantees, and units of general local government receiving a direct allocation under today's Notice. Any program income to the disaster recovery grant generated by activities undertaken directly by the grantee or its agent(s) will retain the original disaster recovery grant's alternative requirements and waivers and remain under the grantee's discretion until grant closeout. At closeout, any program income on hand or received subsequently will become program income to the grantee's annual CDBG program. The alternative requirements provide all the necessary conforming changes to the program income regulations.

**Economic Development**

Grantees under today's Notice (except for Shelby County) have asked to apply individual salaries or wages-per-job and the income limits for a household of one when documenting the national objective for business assistance activities. This method would replace the usual CDBG standard of total household income and income limits by total household size. The grantees have asserted that this proposed documentation would be simpler and quicker for participating lenders to administer, easier to verify, and would not misrepresent the amount of low- and moderate-income benefit provided. Upon consideration, HUD is granting this waiver. CDBG disaster recovery grantees received this waiver following September 11, 2001, the Gulf Coast hurricanes of 2005, and the Presidentially-declared 2008 disasters. Due to the significant breadth of many State and local economic development programs, this waiver will play a key role in streamlining the documentation process because it allows collection of wage data for each position created or retained from the assisted businesses, rather than from each individual household.

In addition to national objective documentation, grantees under today's

Notice (except for the State of Tennessee) have requested a waiver of the standard public benefit provisions. The public benefit provisions set standards for individual economic development activities (such as a single loan to a business) and for economic development activities in the annual aggregate. Currently, public benefit standards limit the amount of CDBG assistance per job retained or created, or the amount of CDBG assistance per low- and moderate-income person to which goods or services are provided by the activity. These dollar thresholds were set more than a decade ago and, under disaster recovery conditions (which often require a larger investment to achieve a given result), can impede recovery by limiting the amount of assistance the grantee may provide to a critical activity. Requesting grantees will make public in their Action Plans the disaster recovery needs each activity is addressing and the public benefits expected.

After consideration, today's **Federal Register** Notice waives the public benefit standards for the cited activities, except that each grantee requesting the waiver shall report and maintain documentation on the creation and retention of: (a) Total jobs, (b) number of jobs within certain salary ranges, (c) the average amount of assistance per job by activity or program, and (d) the types of jobs. As a conforming change for the same activities or programs, HUD is also waiving paragraph (g) of 24 CFR 570.482 and paragraph (c) of 24 CFR 570.209 to the extent these provisions are related to public benefit.

**Certifications**

HUD is waiving the standard CDBG certifications and substituting an alternative requirement for certifications that are tailored to the CDBG disaster recovery grants.

**Applicable Rules, Statutes, Waivers, and Alternative Requirements; Pre-Grant Process**

Unless stated otherwise, the following waivers and alternative requirements apply to any State or unit of general local government receiving a direct award under this Notice.

1. *General note.* Prerequisites to a grantee's receipt of CDBG disaster recovery assistance include: (1) Adoption of a citizen participation plan; (2) publication of a proposed Action Plan for Disaster Recovery; (3) public notice and comment; and (4) submission to HUD of an Action Plan for Disaster Recovery, including certifications. Except as described in this Notice, statutory and regulatory provisions governing the State CDBG program shall apply to any State receiving an allocation under this Notice, while statutory and regulatory provisions governing the CDBG entitlement program shall apply to any unit of general local government receiving a direct allocation in this Notice. Applicable statutory provisions can be found at 42 U.S.C. 5301 *et seq.* Applicable State and entitlement provisions can be found at 24 CFR part 570.

2. *Overall benefit waiver and alternative requirement.* The requirements at 42 U.S.C. 5301(c), 42 U.S.C. 5304(b)(3)(A), 24 CFR 570.484, and 24 CFR 570.200(a)(3), that 70 percent of funds are for activities that benefit low- and moderate-income persons are waived to stipulate that at least 50 percent of a grant's funds are for activities that principally benefit low- and moderate-income persons.

3. *Direct grant administration and means of carrying out eligible activities—applicable to State grantees only.* Requirements at 42 U.S.C. 5306 are waived to the extent necessary to allow a State to use its disaster recovery grant allocation directly to carry out State-administered activities eligible under this Notice. Activities eligible under this Notice may be undertaken, subject to State law, by the grantee through its employees, or through procurement contracts, or through loans or grants under agreements with subrecipients. Unless a waiver provides otherwise, activities made eligible under section 105(a)(15) of the HCD Act, as amended, may only be undertaken by entities specified in that section, whether the assistance is provided to such an entity from the State or from a unit of general local government.

4. *Consolidated Plan waiver.* Requirements at 42 U.S.C. 12706, 24 CFR 91.325(a)(5), and 24 CFR 91.225(a)(5), that housing activities undertaken with CDBG funds be consistent with the consolidated plan, are waived. Further, 42 U.S.C. 5304(e), to the extent that it would require HUD to annually review grantee performance under the consistency criteria, is also waived. These waivers apply only until the grantee first updates its strategic plan priorities (and the full consolidated plan) following the disaster. At that time, the grantee must also update its Analysis of Impediments, so that it more accurately reflects the impacts of the disaster.

5. *Action Plan waiver and alternative requirement.* The requirements at 42 U.S.C. 12705(a)(2), 42 U.S.C. 5304(a)(1), 42 U.S.C. 5304(m), 42 U.S.C. 5306(d)(2)(C)(iii), 24 CFR 1003.604, 24 CFR 91.220, and 24 CFR 91.320 are waived for these disaster recovery grants. Each State or unit of general local government receiving a direct award under this Notice must submit to HUD an Action Plan for Disaster Recovery that describes:

A. The effects of the covered disasters, especially in the most affected areas and populations, and the greatest recovery needs resulting from the covered disasters that have not been addressed by insurance proceeds, other Federal assistance, or any other funding source;

B. The grantee's overall plan for disaster recovery including:

(1) How it will promote sound short- and long-term recovery planning at the State (if applicable) and local levels, especially land-use decisions that reflect responsible flood plain management, removal of regulatory barriers to reconstruction, and coordination with planning requirements of other local, State and Federal programs and entities;

(2) How it will leverage CDBG disaster recovery funds with funding provided by other HUD programs, FEMA (and specifically the Hazard Mitigation Grant Program), the Small Business Administration, the Army Corps of Engineers, the U.S. Department of Agriculture, and other State, local, private, and non-profit sources to generate a more effective and comprehensive recovery;

(3) How it will encourage construction methods that emphasize high quality, durability, energy efficiency, sustainability, and mold resistance, including how it will support adoption and enforcement of modern building codes and mitigation of flood risk, where appropriate; and

(4) How it will provide or encourage provision of adequate, flood-resistant housing for all income groups that lived in the disaster-affected areas prior to the incident date(s) of the applicable disaster(s), including a description of the activities it plans to undertake to address emergency shelter and transitional housing needs of homeless individuals and families (including subpopulations), to prevent low-income individuals and families with children (especially those with incomes below 30 percent of median) from becoming homeless, to help homeless persons make the transition to permanent housing and independent living, and to address the special needs of persons who are not homeless identified in accordance with 24 CFR 91.315(e) or 24 CFR 91.215(e) (as applicable);

C. Monitoring standards and procedures that are sufficient to ensure program requirements, including nonduplication of benefits, are met and

that provide for continual quality assurance, investigation, and internal audit functions with responsible staff reporting independently to the Governor of the State or, at a minimum, to the chief officer of the governing body of any designated administering entity;

D. A description of the steps the grantee will take to avoid or mitigate occurrences of fraud, abuse, and mismanagement, especially with respect to accounting, procurement, and accountability. Also, a description of how it will provide for increasing the capacity for implementation and compliance of local government grant recipients, subrecipients, subgrantees, contractors, and any other entity responsible for administering activities under this grant; and

E. Projected uses of funds.

(1) *Funds awarded to a State; method of distribution.* A State's method of distribution shall describe the method of allocating funds to units of local government and descriptions of specific programs or projects the State will carry out directly, as applicable. The descriptions will include:

(a) When funds are allocated to units of local government, all criteria used to distribute funds, including: (1) The relative importance of each criterion, (2) a description of how the disaster recovery grant resources will be allocated among all funding categories, and (3) the threshold factors and grant size limits that are to be applied; and

(b) The projected uses for the CDBG disaster recovery funds, by responsible entity, activity, and geographic area, when the State carries out an activity directly;

(c) How the method of distribution to local governments or use of funds described in accordance with the above subparagraphs will result in eligible uses of grant funds related to long-term recovery from specific effects of the disaster(s), and/or restoration of infrastructure, housing, and economic revitalization.

(2) *Funds awarded directly to a unit of general local government.* The unit of local government shall describe specific programs and projects it will carry out. The Action Plan will describe:

(a) How the disaster recovery grant resources will be allocated and the relative importance of all criteria by which projects are selected; and

(b) The threshold factors and grant size limits that are to be applied; and

(c) The projected uses for the CDBG disaster recovery funds, by responsible entity, activity, and geographic area; and

(d) How the use of funds described in accordance with the above subparagraphs will result in eligible uses of grant funds related to long-term recovery from specific effects of the disaster(s), or restoration of infrastructure, housing, and economic revitalization.

(3) *Clarity of Action Plan.* All grantees must include sufficient information so that citizens, units of general local government (where applicable), and other eligible subgrantees or subrecipients will be able to understand and comment on the Action Plan and, if applicable, be able to prepare responsive applications to the grantee. If a grantee submits an action plan that includes sufficient detail and clarity for only a portion of the allocation, HUD may still issue a grant agreement for the entire grant amount. However, HUD will restrict access to the portion of the funds for which the grantee has not clearly described eligible activities.

6. *Citizen participation waiver and alternative requirement.* Provisions of 42 U.S.C. 5304(a)(2) and (3), 42 U.S.C. 12707, 24 CFR 570.486, 24 CFR 91.105(b), and 24 CFR 91.115(b), with respect to citizen participation requirements, are waived and replaced by the requirements below. The streamlined requirements do not mandate public hearings at a State, entitlement, or local government level, but do require providing a reasonable opportunity (at least 7 days) for citizen comment and ongoing citizen access to information about the use of grant funds. The streamlined citizen participation requirements for a grant administered under this Notice are:

A. Before the grantee adopts the Action Plan for this grant or any substantial amendment to this grant, the grantee will publish the proposed plan or amendment (including the information required in this Notice for an Action Plan for Disaster Recovery). The manner of publication must include prominent posting on the State, local, or other relevant Internet site and must afford citizens, affected local governments, and other interested parties a reasonable opportunity to examine the plan or amendment's contents. Subsequent to publication, the grantee must provide a reasonable time frame and method(s) (including electronic submission) for receiving comments on the plan or substantial amendment. The grantee's plans to minimize displacement of persons or entities, and to assist any persons or entities displaced, must be published with the Action Plan.

B. Each grantee will specify in its Action Plan criteria for determining what changes in the grantee's activities constitute a substantial amendment to the plan. At a minimum, adding or deleting an activity or changing the planned beneficiaries of an activity will constitute a substantial change. The grantee may modify or substantially amend the Action Plan if it follows the same procedures required in this Notice for the preparation and submission of an Action Plan for Disaster Recovery. Prior to submission of a substantial amendment, the grantee is encouraged to work with the Department to ensure the proposed change is consistent with this Notice, and all applicable regulations and Federal law.

C. The grantee must notify HUD, but is not required to notify the public, when it makes any plan amendment that is not substantial. The Department may acknowledge receipt of the notification via e-mail within 5 business days.

D. The grantee must consider all comments received on the Action Plan or any substantial amendment. A summary of the comments and the grantee's response to each must be submitted to HUD with the Action Plan or substantial amendment.

E. The grantee must make the Action Plan, any substantial amendments, and all performance reports available to the public on the Internet and on request. In addition, the grantee must make these documents available in a form accessible to persons with disabilities and non-English-speaking persons. During the term of this grant, the grantee will provide citizens, affected local governments, and other interested parties with reasonable and timely access to information and records relating to the Action Plan and to the grantee's use of this grant.

F. The grantee will provide a timely written response to every citizen complaint. The response will be provided within 15 working days of the receipt of the complaint, if practicable.

7. *Modify requirement for consultation with local governments—applicable to State grantees only.* Currently, the statute and regulations require consultation with affected units of local government in the non-entitlement areas of the State regarding the State 's proposed method of distribution. HUD is waiving 42 U.S.C. 5306(d)(2)(C)(iv), 24 CFR 91.325(b), and 24 CFR 91.110, with the alternative requirement that any State receiving an allocation under this Notice consult with all disaster-affected units of general local government, including any CDBG-entitlement communities, in determining the use of funds.

8. *Note on change to administration limitation.* Up to 5 percent of the grant amount may be used for administrative costs.

A. The provisions of 42 U.S.C. 5306(d) and 24 CFR 570.489(a)(1)(i) and (iii) will not apply to the extent that they cap State administration expenditures, limit a State's ability to charge a *de minimis* application fee for grant applications for activities the State carries out directly, and require a dollar-for-dollar match of State funds for administrative costs exceeding $100,000. HUD does not waive 24 CFR 570.489(a)(3), which will allow the State to carry out planning activities that may exceed the 5 percent limitation on general administrative costs.

B. Any city or county receiving a direct award under today's Notice is also subject to the 5 percent administrative cap. This 5 percent applies to all administrative costs—whether incurred by the grantee or its subrecipients. To the extent necessary, HUD retains the provisions of 24 CFR 570.200(g) which allow a city or county to fund planning activities that may exceed the 5 percent general administration cap. Thus, similar to a State grantee, a city or county receiving a direct allocation under today's Notice is ultimately limited to spending 20 percent of its total allocation on a combination of planning and program administration costs.

9. *Planning activities.* For CDBG disaster recovery-assisted general planning activities that will guide recovery in accordance with the Supplemental Appropriations Act, the State CDBG program rules at 24 CFR 570.483(b)(5) and (c)(3) are waived and the presumption at 24 CFR 570.208(d)(4) applies for any State grantee under this Notice. 24 CFR 570.208(d)(4) will apply to any unit of general local government that receives a direct allocation under this Notice.

10. *Waiver and alternative requirement for distribution to CDBG metropolitan cities and urban counties—applicable to State grantees only.*

A. Section 5302(a)(7) of title 42, U.S.C. (definition of "nonentitlement area") and provisions of 24 CFR part 570 that would prohibit a State from distributing CDBG funds to UGLGs regardless of their status in the entitlement CDBG program and to Indian tribes, are waived, including 24 CFR 570.480(a), to the extent that such provisions limit the distribution of funds to units of local government located in entitlement areas, and to State or federally recognized Indian tribes. Instead, the State is required to distribute funds to activities assisting a declared county or counties and eligible under this Notice without regard to the status of a local government or Indian tribe under any other CDBG program.

B. Additionally, because the State grantees under this appropriation have requested a waiver to carry out activities directly, HUD is applying the regulations at 24 CFR 570.480(c) with respect to the basis for HUD determining whether the State has failed to carry out its certifications so that such basis shall be that the State has failed to carry out its certifications in compliance with applicable program requirements.

11. *Use of subrecipients—applicable to State grantees only.* The following alternative requirement applies for any activity that a State carries out directly by funding a subrecipient:

A. 24 CFR 570.503, except that specific references to 24 CFR parts 84 and 85 need not be included in subrecipient agreements.

B. 24 CFR 570.502(a), in instances where a State's subrecipients are governmental entities, except that HUD recommends, but does not require, application of the requirements at 24 CFR part 85.

C. 24 CFR 570.502(b), in instances where a State's subrecipients are not governmental entities, except that HUD recommends, but does not require, application of the requirements at 24 CFR part 84.

12. *Recordkeeping—applicable to State grantees only.* Recognizing that the State may carry out activities directly, 24 CFR 570.490(b) is waived in such a case and the following alternative provision shall apply: The State shall establish and maintain such records as may be necessary to facilitate review and audit by HUD of the State's administration of CDBG disaster recovery funds under 24 CFR 570.493. Consistent with applicable statutes, regulations, waivers and alternative requirements, and other Federal requirements, the content of records maintained by the State shall be sufficient to: Enable HUD to make the applicable determinations described at 24 CFR 570.493; make compliance determinations for activities carried out directly by the State; and show how activities funded are consistent with the descriptions of activities proposed for funding in the Action Plan. For fair housing and equal opportunity purposes, and as applicable, such records shall include data on the racial, ethnic, and gender characteristics of persons who are applicants for, participants in, or beneficiaries of the program.

13. *Change of use of real property—applicable to State grantees only.* This waiver conforms the change of use of real property rule to the waiver allowing a State to carry out activities directly. For purposes of this program, in 24 CFR 570.489(j), (j)(1), and the last sentence of (j)(2), "unit of general local government" shall be read as "unit of general local government or State ."

14. *Responsibility for review and handling of noncompliance —applicable to State grantees only.* This change is in conformance with the waiver allowing the State to carry out activities directly. 24 CFR 570.492 is waived and the following alternative requirement applies for any State receiving a direct award under this Notice: The State shall make reviews and audits, including onsite reviews of any subrecipients, designated public agencies, and units of general local government, as may be necessary or appropriate to meet the requirements of section 104(e)(2) of the HCD Act, as amended, as modified by this Notice. In the case of noncompliance with these requirements, the State shall take such actions as may be appropriate to prevent a continuance of the deficiency, mitigate any adverse effects or consequences, and prevent a recurrence. The State shall establish remedies for noncompliance by any designated public agencies or units of general local governments and for its subrecipients.

15. *Waiver of performance report and alternative requirement.* The requirements for submission of a Performance Evaluation Report (PER) pursuant to 42 U.S.C. 12708 and 24 CFR 91.520 are waived. The alternative requirement is that:

A. Each grantee must submit its Action Plan for Disaster Recovery, including performance measures, into HUD's Internet-based DRGR system. (The signed certifications and the SF–424 must be, and the initial Action Plan for Disaster Recovery may be, submitted in hard copy.) As additional information about uses of funds becomes available to the grantee, the grantee must enter such detail into DRGR, in sufficient detail to serve as the basis for acceptable performance reports.

B. Each grantee must submit a quarterly performance report, as HUD prescribes, no later than 30 days following each calendar quarter, beginning after the first full calendar quarter after grant award and continuing until all funds have been expended and all expenditures reported. Each quarterly report will include information about the uses of funds during the applicable quarter including (but not limited to) the project name, activity, location, and national objective; funds budgeted, obligated, drawn down, and expended; the

funding source and total amount of any non-CDBG disaster funds; beginning and ending dates of activities; and performance measures such as numbers of low- and moderate-income persons or households benefiting. Quarterly reports to HUD must be submitted using HUD's Internet-based DRGR system and, within 3 days of submission, be posted on the grantee's official Internet site open to the public.

16. *Housing-related eligibility waivers. 4*2 U.S.C. 5305(a) is waived to the extent necessary to allow: (1) Homeownership assistance for households with up to 120 percent of area median income, (2) downpayment assistance for up to 100 percent of the down payment (42 U.S.C. 5305(a)(24)(D)), and (3) new housing construction.

17. *Housing incentives to resettle in disaster-affected communities.* 42 U.S.C. 5305(a) and associated regulations are waived to the extent necessary to make eligible incentives to resettle in Metropolitan Nashville and Davidson County. The incentives must be in accordance with Metropolitan Nashville and Davidson County's approved Action Plan and published program design(s). Furthermore, the Entitlement grantee must maintain documentation, at least at a programmatic level, describing how the amount of assistance was determined to be necessary and reasonable. Please note that this waiver does not permit a compensation program. Additionally, if the Entitlement grantee requires the incentives to be used for a particular purpose by the household receiving the assistance, then the activity will be that required use, and not considered as an eligible incentive.

18. *Limitation on emergency grant payments.* 42 U.S.C. 5305(a) is waived so that Metropolitan Nashville and Davidson County can extend interim mortgage assistance to qualified individuals for up to 20 months.

19. *Buildings for the general conduct of government.* 42 U.S.C. 5305(a) is waived to the extent necessary to allow the grantee to fund the rehabilitation or reconstruction of public buildings that are otherwise ineligible and that are selected in accordance with its approved Action Plan for Disaster Recovery and that are determined have substantial value in promoting disaster recovery. Please note that this waiver is inapplicable to the State of Tennessee.

20. *Waiver and modification of the job relocation clause to permit assistance to help a business return.* 42 U.S.C. 5305(h), 24 CFR 570.210, and 24 CFR 570.482 are hereby waived only to allow the grantee to provide assistance under this grant to any business that was operating in the covered disaster area before the incident date of the applicable disaster and has since moved, in whole or in part, from the affected area to another State or to a labor market area within the same State to continue business. Please note that this waiver and modification is inapplicable to the City of Cranston.

21. *URA provisions.*

A. One-for-one replacement requirements at 42 U.S.C. 5304(d)(2) and (d)(3), and 24 CFR 42.375(a) are waived for lower-income dwelling units: (1) Damaged by the disaster, (2) for which CDBG funds are used for conversion or demolition, and (3) which are not suitable for rehabilitation.

B. Relocation assistance requirements at 42 U.S.C. 5304(d)(2)(A) and 24 CFR 42.350 are waived, to the extent that they differ from those of the URA and its implementing regulation at 49 CFR part 24, for activities involving buyouts and other activities covered by the URA and related to disaster recovery activities assisted by the funds covered by this Notice and included in an approved Action Plan.

C. The requirements at 49 CFR 24.101(b)(2)(i)–(ii) are waived to the extent that they apply to an arm's length voluntary purchase carried out by a person who does not have the power of eminent domain, in connection with the purchase and occupancy of a principal residence by that person.

D. The requirements at sections 204(a) and 206 of the URA, 49 CFR 24.2, 24.402(b)(2), and 24.404 are waived to the extent that they require the State to provide URA financial assistance sufficient to reduce the displaced person's post-displacement rent/utility cost to 30 percent of household income.

To the extent that a tenant has been paying rent in excess of 30 percent of household income without demonstrable hardship, rental assistance payments to reduce tenant costs to 30 percent would not be required. Before using this waiver, the State must establish a definition of "demonstrable hardship."

E. The requirements of sections 204 and 205 of the URA, and 49 CFR 24.402(b) are waived to the extent necessary to permit a grantee to meet all or a portion of a grantee's replacement housing financial assistance obligation to a displaced tenant by offering rental housing through a TBRA housing program subsidy (*e.g.,* Section 8 rental voucher or certificate), provided that the tenant is also provided referrals to suitable, available rental replacement dwellings where the owner is willing to participate in the TBRA program, and the period of authorized assistance is at least 42 months.

F. The requirements of section 202(b) of the URA and 49 CFR 24.302 are waived to the extent that they require a grantee to offer a person displaced from a dwelling the option to receive a "moving expense and dislocation allowance" based on the current schedule of allowances prepared by the Federal Highway Administration, provided that the grantee establishes and offers the person a moving expense and dislocation allowance under a schedule of allowances that is reasonable for the jurisdiction and takes into account the number of rooms in the displacement dwelling, whether the person owns and must move the furniture, and, at a minimum, the kinds of expenses described in 49 CFR 24.301.

22. *Program income alternative requirement.*

A. Units of general local government receiving a direct allocation under this Notice. Any unit of general local government receiving a direct allocation under this award will be subject to 24 CFR 570.500 and 24 CFR 570.504. However, please note:

(1) Program income that is received and retained by the unit of local government *before closeout* of the grant (that generated the program income), is treated as additional disaster recovery CDBG funds and is subject to the requirements of this Notice.

(2) Program income that is received and retained by the unit of local government *after closeout* of the grant (that generated the program income), but that is used to continue the disaster recovery activity that generated the program income, is subject to the waivers and alternative requirements of this Notice.

B. State grantees under this Notice. 42 U.S.C. 5304(j), and 24 CFR 570.489(e) are waived to the extent necessary to allow additional flexibility in the administration of program income.

(1) Program income.

(a) For the purposes of this subpart, "program income" is defined as gross income generated from the use of CDBG funds, except as provided in paragraph (a)(2) of this section, and received by: (1) A State, unit of local government, or tribe, or (2) a subrecipient of a State, unit of general local government, or tribe. When income is generated by an activity that is only partially assisted with CDBG funds, the income shall be prorated to reflect the percentage of CDBG funds used (*e.g.,* a single loan supported by CDBG funds and other funds; a single parcel of land purchased with CDBG funds and other funds).

Program income includes, but is not limited to, the following:

(i) Proceeds from the disposition by sale or long-term lease of real property purchased or improved with CDBG funds;

(ii) Proceeds from the disposition of equipment purchased with CDBG funds;

(iii) Gross income from the use or rental of real or personal property acquired by the unit of general local government or a tribe or subrecipient of a State, a tribe, or a unit of general local government with CDBG funds, less the costs incidental to the generation of the income;

(iv) Gross income from the use or rental of real property owned by a State, tribe, or the unit of general local government or a subrecipient of a State, tribe, or unit of general local government, that was constructed or improved with CDBG funds, less the costs incidental to the generation of the income;

(v) Payments of principal and interest on loans made using CDBG funds;

(vi) Proceeds from the sale of loans made with CDBG funds;

(vii) Proceeds from the sale of obligations secured by loans made with CDBG funds;

(viii) Interest earned on program income pending disposition of the income, but excluding interest earned on funds held in a revolving fund account;

(ix) Funds collected through special assessments made against properties owned and occupied by households not of low- and moderate-income, where the special assessments are used to recover all or part of the CDBG portion of a public improvement; and

(x) Gross income paid to a State, tribe, unit of local government, or subrecipient from the ownership interest in a for-profit entity acquired in return for the provision of CDBG assistance.

(b) "Program income" does not include the following:

(i) The total amount of funds which is less than $25,000 received in a single year and retained by a unit of local government, tribe, or subrecipient;

(ii) Amounts generated by activities eligible under section 105(a)(15) of the HCD Act and carried out by an entity under the authority of section 105(a)(15) of the HCD Act;

(c) A State may permit a unit of local government or tribe which receives or will receive program income to retain the program income, subject to the requirements of paragraph B(1)(c)(ii) of this section. In the alternative, the State may require the unit of local government or tribe to pay the program income to the State.

(i) Program income paid to a State. Program income that is paid to the State or received by the State is treated as additional disaster recovery CDBG funds subject to the requirements of this Notice and must be used by the State or distributed to units of general local government (if applicable) in accordance with the applicable Action Plan for Disaster Recovery. To the maximum extent feasible, program income shall be used or distributed before the grantee makes additional withdrawals from the U.S. Treasury, except as provided in paragraph (b) of this section.

(ii) Program income retained by a unit of local government or tribe.

(A) Program income that is received and retained by the unit of local government or tribe *before closeout* of the grant (that generated the program income), is treated as additional disaster recovery CDBG funds and is subject to the requirements of this Notice.

(B) Program income that is received and retained by the unit of local government or tribe *after closeout* of the grant (that generated the program income), but that is used to continue the disaster recovery activity that generated the program income, is subject to the waivers and alternative requirements of this Notice.

(C) All other program income is subject to the requirements of 42 U.S.C. 5304(j) and subpart I of 24 CFR part 570.

(D) Unit of local government or tribes, to the maximum extent feasible, should disburse program income that is subject to the requirements of this Notice before requesting additional funds from the grantee for activities, except as provided in paragraph (b) of this section.

(2) Revolving funds.

(a) The State may establish or permit a unit of local government or tribe to establish revolving funds to carry out specific, identified activities. A revolving fund, for this purpose, is a separate fund (with a set of accounts that are independent of other program accounts) established to carry out specific activities. These activities generate payments, which will be used to support similar activities going forward. These payments to the revolving fund are program income and must be substantially disbursed from the revolving fund before additional grant funds are drawn from the U.S. Treasury for revolving fund activities. Such program income is not required to be disbursed for non-revolving fund activities.

(b) The State may also establish a revolving fund to distribute funds to units of local government or tribes to carry out specific, identified activities. A revolving fund, for this purpose, is a separate fund (with a set of accounts that are independent of other program accounts) established to fund grants to units of local government to carry out specific activities. These activities generate payments to the fund so that additional grants can be made to units of local government to carry out similar activities going forward. Program income in the revolving fund must be disbursed from the fund before additional grant funds are drawn from the U.S. Treasury for payments to units of local government that could be funded from the revolving fund.

(c) A revolving fund established by the State shall not be directly funded or capitalized with grant funds.

(3) Transfer of program income. Notwithstanding other provisions of this Notice, the State may transfer program income before closeout of the grant that generated the program income to its own annual CDBG program or to any annual CDBG-funded activities administered by a unit of local government or Indian tribe within the State .

(4) Program income on hand at the State or at its subrecipients at the time of grant closeout by HUD, and program income received by the grantee after such grant closeout, shall be program income to the most recent annual CDBG program grant.

23. *National Objective Documentation for Economic Development Activities.* 24 CFR 570.483(b)(4)(i) and 570.208(a)(4)(i) are waived to allow the grantees under this Notice (except for Shelby County) to establish low- and moderate-income jobs benefit by documenting, for each person employed, the name of the business, type of job, and the annual wages or salary of the job. HUD will consider the person income-qualified if the annual wages or salary of the job is at or under the HUD-established income limit for a one-person family.

24. *Public benefit for certain economic development activities.* For economic development activities designed to create or retain jobs or businesses (including, but not limited to, long-term, short-term, and infrastructure projects), the public benefit standards at 42 U.S.C. 5305(e)(3), 24 CFR 570.482(f)(1), (2), (3), (4)(i), (5), and (6), and 24 CFR 570.209(b)(1), (2), (3)(i), (4) are waived. However, grantees shall report and maintain documentation on the creation and retention of total jobs; the number of jobs within certain salary ranges; the average amount of assistance provided

per job, by activity or program; and the types of jobs. Paragraph (g) of 24 CFR 570.482, and 24 CFR 570.209(c), and (d) are also waived to the extent these provisions are related to public benefit. Please note that these waivers and alternative requirements will not apply to the State of Tennessee.

25. *Allow reimbursement for pre-agreement costs.* The provisions of 24 CFR 570.489(b) are applied to permit a State to reimburse itself for otherwise allowable costs incurred on or after the incident date of the covered disaster. Any unit of general local government receiving a direct allocation under this Notice is subject to the provisions of 24 CFR 570.200(h) but may reimburse itself for otherwise allowable costs incurred on or after the incident date of the covered disaster. 24 CFR 570.200(h)(1)(i) will not apply to the extent that it requires pre-agreement activities to be included in a consolidated plan.

The Department expects both State grantees and units of general local government receiving a direct award under this Notice to include all pre-agreement activities in their Action Plans.

26. *Clarifying note on the process for environmental release of funds when a State carries out activities directly.* Usually, a State distributes CDBG funds to units of local government and takes on HUD's role in receiving environmental certifications from the grant recipients and approving releases of funds. For this grant, HUD will allow a State grantee to also carry out activities directly instead of distributing them to other governments. According to the environmental regulations at 24 CFR 58.4, when a State carries out activities directly, the State must submit the certification and request for release of funds to HUD for approval.

27. *Duplication of benefits.* In general, section 312 of the Robert T. Stafford Disaster Assistance and Emergency Relief Act (42 U.S.C. 5155), as amended, prohibits any person, business concern, or other entity from receiving financial assistance with respect to any part of a loss resulting from a major disaster as to which he has received financial assistance under any other program or from insurance or any other source.

In order to comply with this law, grantees should ensure that each program provides assistance to a person or entity only to the extent that the person or entity has a disaster recovery need that has not been fully met. Generally, all sources of assistance should be included in this needs analysis, including, but not limited to, funds received (or to be received) via insurance, FEMA, the SBA, other local, State, or Federal programs, or recovery support from private charity organizations. However, the Stafford Act prohibition on duplication of disaster recovery assistance does not require the ultimate CDBG award to be reduced by: (1) Private loans; (2) funds provided for a general, non-specific purpose, *i.e.* "disaster recovery"; and (3) other assets or lines of credit available to a homeowner or a business owner. This last category includes, but is not limited to, the following: Checking or savings accounts, stocks, bonds, mutual funds, pension or retirement benefits, credit cards, mortgages or lines of credit, and life insurance. Please note that these items may be held in the name of an individual, or in the name of a business. (Of course, such other resources may be considered as the grantee determines, in accordance with the principles of cost circular OMB A–87, the necessary and appropriate amount of assistance to provide to achieve program purposes.)

In general, please note that CDBG disaster recovery funds should not be used to pay down an SBA loan. Rather, if need remains after an SBA loan has been executed, additional CDBG funds may be used to address that need. However, in certain situations (to be determined and defined by each grantee), SBA loans may be paid down, upon inclusion of this activity in a HUD-accepted Action Plan or Action Plan Amendment.

Last, the Supplemental Appropriations Act stipulates that funds may not be used for activities reimbursable by, or for which funds have been made available by, FEMA or by the Army Corps of Engineers.

28. *Note that use of grant funds must relate to the purposes of the Supplemental Appropriations Act, 2010.* In addition to being eligible under 42 U.S.C. 5305(a) or this Notice, and meeting a CDBG national objective, the Supplemental Appropriations Act requires that activities funded under this Notice must be necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure, housing, and economic revitalization in areas affected by severe storms and flooding from March through May, 2010, for which the President declared a major disaster covering an entire State, or States with more than 20 counties declared major disasters, under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974 (42 U.S.C. 5121 *et seq.*).

29. *Notes on flood buyouts.*

A. Payment of pre-flood values for buyouts. Grant recipients under this Notice have the discretion to pay pre-flood or post-flood values for the acquisition of properties located in a floodway or floodplain. In using CDBG disaster recovery funds for such acquisitions, the grantee must uniformly apply whichever valuation method it chooses.

B. Ownership and maintenance of acquired property. Any property acquired with disaster recovery grants funds being used to match FEMA Section 404 Hazard Mitigation Grant Program funds is subject to section 404(b)(2) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, which requires that such property be dedicated and maintained in perpetuity for a use that is compatible with open space, recreational, or wetlands management practices. In addition, with minor exceptions, no new structure may be erected on the property and no subsequent application for Federal disaster assistance may be made for any purpose. The acquiring entity may want to lease such property to adjacent property owners or other parties for compatible uses in return for a maintenance agreement. Although Federal policy encourages leasing rather than selling such property, the property may be sold. In all cases, a deed restriction or covenant running with the land must require that the property be dedicated and maintained for compatible uses in perpetuity. HUD urges grantees carrying out buyouts with funds under this Notice to consider implementing the same or similar use restrictions on properties acquired under CDBG-assisted buyouts.

C. Future Federal assistance to owners remaining in floodplain.

(1) Section 582 of the National Flood Insurance Reform Act of 1994, as amended, (42 U.S.C. 5154a) prohibits flood disaster assistance in certain circumstances. In general, it provides that no Federal disaster relief assistance made available in a flood disaster area may be used to make a payment (including any loan assistance payment) to a person for repair, replacement, or restoration for damage to any personal, residential, or commercial property if that person at any time has received Federal flood disaster assistance that was conditional on the person first having obtained flood insurance under applicable Federal law and the person has subsequently failed to obtain and maintain flood insurance as required under applicable Federal law on such property. (Section 582 is self-implementing without regulations.) This means that a grantee may not provide disaster assistance for the

abovementioned repair, replacement, or restoration to a person who has failed to meet this requirement.

(2) Section 582 also implies a responsibility for a grantee that receives CDBG disaster recovery funds or that, under 42 U.S.C. 5321, designates annually appropriated CDBG funds for disaster recovery. That responsibility is to inform property owners receiving disaster assistance that triggers the flood insurance purchase requirement that they have a statutory responsibility to notify any transferee of the requirement to obtain and maintain flood insurance, and that the transferring owner may be liable if he or she fails to do so. These requirements are described below.

(3) Duty to notify. In the event of the transfer of any property described in paragraph d., the transferor shall, not later than the date on which such transfer occurs, notify the transferee in writing of the requirements to:

(a) Obtain flood insurance in accordance with applicable Federal law with respect to such property, if the property is not so insured as of the date on which the property is transferred; and

(b) Maintain flood insurance in accordance with applicable Federal law with respect to such property. Such written notification shall be contained in documents evidencing the transfer of ownership of the property.

(4) Failure to notify. If a transferor fails to provide notice as described above and, subsequent to the transfer of the property:

(a) The transferee fails to obtain or maintain flood insurance, in accordance with applicable Federal law, with respect to the property;

(b) The property is damaged by a flood disaster; and

(c) Federal disaster relief assistance is provided for the repair, replacement, or restoration of the property as a result of such damage, the transferor shall be required to reimburse the Federal Government in an amount equal to the amount of the Federal disaster relief assistance provided with respect to the property.

D. The notification requirements apply to personal, commercial, or residential property for which Federal disaster relief assistance made available in a flood disaster area has been provided, prior to the date on which the property is transferred, for repair, replacement, or restoration of the property, if such assistance was conditioned upon obtaining flood insurance in accordance with applicable Federal law with respect to such property.

E. The term "Federal disaster relief assistance" applies to HUD or other Federal assistance for disaster relief in "flood disaster areas." The term "flood disaster area" is defined in section 582(d)(2) of the National Flood Insurance Reform Act of 1994, as amended, to include an area receiving a presidential declaration of a major disaster or emergency as a result of flood conditions.

30. *Procurement.*

A. Grants to States. Per 24 CFR 570.489(d), a State must have fiscal and administrative requirements for expending and accounting for all funds. Furthermore, per 24 CFR 570.489(g), a State shall establish requirements for procurement policies and procedures for units of general local government based on full and open competition. All subgrantees of a State (including units of general local government) are subject to the procurement policies and procedures required by the State.

A State may meet the above requirements by adopting 24 CFR part 85. If a State has adopted part 85 in full, it must follow the same policies and procedures it uses when procuring property and services with its non-Federal funds. However, the State must ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations per 24 CFR 85.36(a).

If a State has *not* adopted 24 CFR 85.36(a), but *has* adopted 24 CFR 85.36(b)–(i), the State and its subgrantees must follow State and local law (as applicable), so long as the procurements conform to applicable Federal law and the standards identified in 24 CFR 85.36(b)–(i).

B. Direct grants to units of general local government. Any unit of general local government receiving a direct appropriation under today's Notice will be subject to 24 CFR 85.36(b) through (i).

31. *Timely distribution of funds.* 24 CFR 570.494 and 24 CFR 570.902 regarding timely distribution of funds are waived. However, HUD expects each grantee to expeditiously obligate and expend all funds, including any recaptured funds or program income, and to carry out activities in a timely manner.

32. *Information collection approval note.* HUD has approval for information collection requirements in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) under OMB control number 2506–0165. In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, nor is a person required to respond to, a collection of information, unless the collection displays a valid control number.

33. *Certifications waiver and alternative requirement.* Sections 91.325 and 91.225 of title 24 of the Code of Federal Regulations are waived. Each State or unit of general local government receiving a direct allocation under this Notice must make the following certifications prior to receiving a CDBG disaster recovery grant:

A. The grantee certifies that it will affirmatively further fair housing, which means that it will conduct an analysis to identify impediments to fair housing choice within its jurisdiction, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions in this regard. (*See* 24 CFR 570.487(b)(2).)

B. The grantee certifies that it has in effect and is following a residential anti-displacement and relocation assistance plan in connection with any activity assisted with funding under the CDBG program.

C. The grantee certifies its compliance with restrictions on lobbying required by 24 CFR part 87, together with disclosure forms, if required by part 87.

D. The grantee certifies that the Action Plan for Disaster Recovery is authorized under State and local law and that the grantee, and any entity or entities designated by the State, possess(es) the legal authority to carry out the program for which it is seeking funding, in accordance with applicable HUD regulations and this Notice.

E. The grantee certifies that it will comply with the acquisition and relocation requirements of the URA, as amended, and implementing regulations at 49 CFR part 24, except where waivers or alternative requirements are provided for this grant.

F. The grantee certifies that it will comply with section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u), and implementing regulations at 24 CFR part 135.

G. The grantee certifies that it is following a detailed citizen participation plan that satisfies the requirements of 24 CFR 91.105 or 91.115, as applicable (except as provided for in notices providing waivers and alternative requirements for this grant). Also, each unit of local government receiving assistance from the grantee must follow a detailed citizen participation plan that satisfies the requirements of 24 CFR 570.486 (except as provided for in notices

providing waivers and alternative requirements for this grant).

H. Each State receiving a direct award under this Notice certifies that it has consulted with affected units of local government in counties designated in covered major disaster declarations in the non-entitlement, entitlement, and tribal areas of the State in determining the method of distribution of funding.

I. The grantee certifies that it is complying with each of the following criteria:

(1) Funds will be used solely for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure, housing, and economic revitalization in areas affected by severe storms and flooding that occurred between March and May, 2010, for which the President declared a major disaster covering an entire State, or States with more than 20 counties declared major disasters, under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974 (42 U.S.C. 5121 *et seq.*).

(2) With respect to activities expected to be assisted with CDBG disaster recovery funds, the Action Plan has been developed so as to give the maximum feasible priority to activities that will benefit low- and moderate-income families.

(3) The aggregate use of CDBG disaster recovery funds shall principally benefit low- and moderate-income families in a manner that ensures that at least 50 percent of the amount is expended for activities that benefit such persons during the designated period.

(4) The grantee will not attempt to recover any capital costs of public improvements assisted with CDBG disaster recovery grant funds, by assessing any amount against properties owned and occupied by persons of low- and moderate-income, including any fee charged or assessment made as a condition of obtaining access to such public improvements, unless: (A) Disaster recovery grant funds are used to pay the proportion of such fee or assessment that relates to the capital costs of such public improvements that are financed from revenue sources other than under this title; or (B) for purposes of assessing any amount against properties owned and occupied by persons of moderate income, the grantee certifies to the Secretary that it lacks sufficient CDBG funds (in any form) to comply with the requirements of clause (A).

J. The grantee certifies that the grant will be conducted and administered in conformity with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and the Fair Housing Act (42 U.S.C. 3601–3619) and implementing regulations.

K. The grantee certifies that it has and that it will require UGLGs that receive grant funds to certify that they have adopted and are enforcing:

(1) A policy prohibiting the use of excessive force by law enforcement agencies within its jurisdiction against any individuals engaged in nonviolent civil rights demonstrations; and

(2) A policy of enforcing applicable State and local laws against physically barring entrance to or exit from a facility or location that is the subject of such nonviolent civil rights demonstrations within its jurisdiction.

L. Each State receiving a direct award under this Notice certifies that each State grant recipient or administering entity has the capacity to carry out disaster recovery activities in a timely manner, or the State has a plan to increase the capacity of any State grant recipient or administering entity that lacks such capacity.

M. The grantee certifies that it will not use CDBG disaster recovery funds for any activity in an area delineated as a special flood hazard area in FEMA's most current flood advisory maps, unless it also ensures that the action is designed or modified to minimize harm to or within the floodplain, in accordance with Executive Order 11988 and 24 CFR part 55.

N. The grantee certifies that it will comply with applicable laws.

**Duration of Funding**

Availability of funds provisions in 31 U.S.C. 1551–1557, added by section 1405 of the National Defense Authorization Act for Fiscal Year 1991 (Pub. L. 101–510), limit the availability of certain appropriations for expenditure. This limitation may not be waived. However, the Supplemental Appropriations Act for these grants directs that these funds be available until expended unless, in accordance with 31 U.S.C. 1555, HUD determines that the purposes for which the appropriation has been made have been carried out and no disbursement has been made against the appropriation for 2 consecutive fiscal years. In such a case, HUD shall close out the grant prior to expenditure of all funds.

**Catalog of Federal Domestic Assistance**

The Catalog of Federal Domestic Assistance numbers for the disaster recovery grants under this Notice are as follows: 14.218; 14.228.

**Finding of No Significant Impact**

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The FONSI is available for public inspection between 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, an advance appointment to review the docket file must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Hearing or speech-impaired individuals may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

**Appendix A—Allocation Methodology Detail**

HUD determined that only four States met the statutory requirements for funding eligibility under Pub. L. 111–212: Tennessee, Rhode Island, Kentucky, and Nebraska each had federally declared disasters due to *both* flooding and severe storms that occurred between March 1 and May 31, 2010 where either the whole State or at least 20 counties were declared by the President to be major disasters.

HUD made preliminary estimates of unmet needs for each State. In total, HUD estimated across the four disasters nearly $694 million in remaining unmet needs after taking into account losses already covered by insurance, FEMA Public Assistance, FEMA Individual Assistance, and SBA Business Disaster Loans (*see* Table 1). With only $50 million allocated by this Notice, awards were made to the three States with the greatest unmet needs—Tennessee, Rhode Island, and Kentucky.

TABLE 1—PRELIMINARY ESTIMATES OF UNMET NEEDS

| State | Housing | Infrastructure | Business | Total |
|---|---|---|---|---|
| Tennessee | $363,412,407 | $64,907,061 | $108,349,875 | $536,669,343 |
| Rhode Island | 54,111,522 | 3,290,878 | 23,910,814 | 81,313,214 |
| Kentucky | 60,379,939 | 3,540,307 | 10,899,431 | 74,819,677 |

TABLE 1—PRELIMINARY ESTIMATES OF UNMET NEEDS—Continued

| State | Housing | Infrastructure | Business | Total |
|---|---|---|---|---|
| Nebraska | 0 | 1,186,985 | 0 | 1,186,985 |
| Total | 477,903,868 | 72,925,231 | 143,160,120 | 693,989,220 |

For Tennessee, Rhode Island, and Kentucky, the amount of unmet needs substantially exceeded the amount available for allocation. Therefore, today's Notice allocated $13 million to both Rhode Island and Kentucky, and $24 million to Tennessee. These base allocations were designed to address a part of the unmet needs existing in each State.

The substate allocations were made to entitlement jurisdictions within the State based on their proportional share of need within the State, provided that no grant to a local government would be less than $1 million.

TABLE 2—FORMULA ALLOCATIONS

| Disaster No. | State | Grantee | Allocation |
|---|---|---|---|
| 1912 | Kentucky | State Government | $13,000,000 |
| 1894 | Rhode Island | City of Cranston | 1,277,067 |
| 1894 | Rhode Island | City of Warwick | 2,787,697 |
| 1894 | Rhode Island | State Government | 8,935,237 |
| 1909 | Tennessee | City of Memphis | 2,031,645 |
| 1909 | Tennessee | Nashville-Davidson County | 10,731,831 |
| 1909 | Tennessee | Shelby County | 1,212,788 |
| 1909 | Tennessee | State Government | 10,023,735 |
| Total | | | 50,000,000 |

*Available Data*

The Department identified available data to calculate "relative damage and anticipated assistance from Federal sources" from the following sources:

- FEMA Individual Assistance program data on housing unit damage;
- SBA for management of its disaster assistance loan program for housing repair and replacement;
- SBA for management of its disaster assistance loan program for business real estate repair and replacement as well as content loss; and
- FEMA estimated and obligated amounts under its Public Assistance program, Federal and State cost share.

*Calculating Unmet Housing Needs*

The core data on housing damage for both the unmet housing needs calculation and the concentrated damage were based on home inspection data for FEMA's Individual Assistance program. For unmet housing needs, the FEMA data were supplemented by Small Business Administration data from its Disaster Loan Program. HUD calculated "unmet housing needs" as the number of housing units with unmet needs times the estimated cost to repair those units less repair funds already provided by FEMA, where:

- The number of owner-occupied units with unmet needs were units FEMA housing inspectors determined would require more than $3,000 to become habitable AND were determined by FEMA to be eligible for a repair or replacement grant (now up to $30,300, earlier disasters in the year had a cap of $28,800). In general, when HUD refers to units "seriously damaged", it is referring to unit with a FEMA damage assessment of $3,000 or greater.
- The number of rental units with unmet needs were units FEMA housing inspectors determined received more than $1,000 in personal property damage AND were occupied by households with an income reported to FEMA of less than $20,000. The use of the $20,000 income cut-off for calculating rental unmet needs is intended to capture the loss of affordable rental housing.
- Each of the FEMA inspected units were categorized by HUD into one of five categories:
  - Minor-Low: Less than $3,000 of FEMA inspected damage.
  - Minor-High: $3,000 to $7,999 of FEMA inspected damage.
  - Major-Low: $8,000 to $14,999 of FEMA inspected damage.
  - Major-High: $15,000 to $28,800 of FEMA inspected damage.
  - Severe: Greater than $28,800 of FEMA inspected damage or determined destroyed.

(Please note that FEMA has recently raised its maximum grant amount above $28,800. For this allocation, HUD continued to use the $28,800 as the threshold to be consistent with past allocations. FEMA no longer estimates the cost to repair rental properties, it only estimates the cost to replace the personal property of renters. Based on a comparison of personal property loss to real property repair loss of homeowners, HUD has made a rough calculation that personal property loss of renters of $7,500 or greater equates to Severe real property damage; $3,500 to $7,499 equates to Major-High damage; $2,000 to $3,499 equals Major-Low damage; $1,000 to $1,999 equals Minor-High damage; and less than $1,000 equals Minor-Low damage.)

- The average cost to fully repair a home for a specific disaster within each of the damage categories noted above was calculated using the average real property damage repair costs determined by the Small Business Administration for its disaster loan program for the subset of homes inspected by both SBA and FEMA. Because SBA was inspecting for full repair costs, it is presumed to reflect the full cost to repair the home, which is generally more than the FEMA estimates on the cost to make the home habitable. If fewer than 100 SBA inspections were made for homes within a FEMA damage category, the estimated damage amount in the category for that disaster has a cap applied at the 75th percentile of all damaged units for that category for all disasters and has a floor applied at the 25th percentile.
- The base amount of unmet housing needs was then increased by 20 percent to reflect an assumed premium associated with the additional costs needed to run a repair program with CDBG funding.

*Calculating Infrastructure Needs*

Unmet infrastructure need was calculated as the required match portion for the public assistance program for the categories of activities most likely to require CDBG funding above the Public Assistance and State Match requirement. Those activities were categories: C–Roads and Bridges; D–Water Control Facilities; E–Public Buildings; F–Public Utilities; and G–Recreational-Other. Categories A (Debris Removal) and B (Protective Measures) were largely expended immediately after a disaster and reflect interim recovery measures rather than the long-term recovery measures the CDBG funds are generally used for. Not all disasters have the same match requirements under Public Assistance. Each State 's match unmet need infrastructure was calculated at the FEMA determined match requirement.

*Calculating Economic Revitalization Needs*

Based on SBA disaster loans to businesses, HUD used the sum of real property and real content loss of small businesses not receiving an SBA disaster loan. This was adjusted upward by the proportion of applications that were received for a disaster that content and real property loss were not calculated because the applicant had inadequate credit or income. For example, if a State had 160 applications for assistance, 150 had calculated needs and 10 were denied in the pre-processing stage for not enough income or poor credit, the estimated unmet need calculation would be increased as (1 + 10/160) * calculated unmet real content loss.

Because applications denied for poor credit or income are the most likely measure of requiring the type of assistance available with CDBG recovery funds, the calculated unmet business needs for each State were adjusted upwards by the proportion of total application that were denied at the pre-process stage because of poor credit or inability to show repayment ability.

Dated: November 3, 2010.

**Mercedes M. Márquez,**

*Assistant Secretary for Community Planning and Development.*

[FR Doc. 2010–28421 Filed 11–9–10; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5450–N–01]**

## Federal Housing Administration (FHA): Notice of FHA PowerSaver Home Energy Retrofit Loan Pilot Program: Request for Comments and Expressions of Interest

**AGENCY:** Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

**ACTION:** Notice.

**SUMMARY:** This notice announces HUD's proposal to conduct an FHA Home Energy Retrofit Loan Pilot Program (Retrofit Pilot Program or Pilot Program) known as FHA PowerSaver. The Consolidated Appropriations Act, 2010 directs HUD to conduct an Energy Efficient Mortgage Innovation pilot program targeted to the single family housing market. The Retrofit Pilot Program is designed by HUD to meet this statutory directive and provides funding to support that effort.

Under the Retrofit Pilot Program, HUD, through FHA-approved lenders, will insure loans for homeowners who are seeking to make energy improvements to their homes. HUD intends to select a limited number of lenders to participate in the Retrofit Pilot Program. The Pilot Program will be for loans originated during a 2-year period, will be restricted to lenders approved by HUD to participate in the Pilot Program, and will be conducted in geographic areas identified by HUD as optimum locations to conduct the Pilot Program. In making these determinations, HUD will consider the factors and criteria that are proposed in this notice to establish the framework for the Pilot Program, and for which HUD specifically solicits public comment.[1]

For this Pilot Program, HUD will deploy up to $25 million appropriated by the Act for an Energy Efficient Mortgage Innovation Fund pilot program directed at the single family housing market. HUD will utilize those funds primarily to provide incentive payments with grant funds to participating lenders to support approved activities that deliver bona fide benefits to borrowers, with remaining funds available to support the evaluation of the Pilot Program.

Following the public comment period, HUD will announce the lenders that have been selected to participate in the Pilot Program, the geographic areas in which the Pilot Program will be conducted, and any modifications to the Retrofit Pilot Program made in response to public comment and/or in response to HUD's further consideration of how the pilot program should be structured. At the conclusion of the Pilot Program, HUD will assess the results of the Retrofit Pilot Program, and determine any additional action based on that assessment. HUD will assess the extent to which energy retrofits under the Pilot Program delivered expected benefits in terms of energy reductions, cost savings, and property value improvement, among other results.

In addition to seeking comments on the proposed Pilot Program, HUD invites lenders interested in participating in this Pilot Program to notify HUD of such interest as provided in Appendix A to this notice.

**DATES:** *Comment Due Date:* December 27, 2010.

[1] Section 470 of the Housing and Urban-Rural Recovery Act of 1983 (42 U.S.C. 3542) provides that: "No demonstration program not expressly authorized in law may be commenced by the Secretary of Housing and Urban Development until (1) a description of such demonstration program is published in the **Federal Register**, which description may be included in a notice of funding availability; and (2) there expires a period of sixty calendar days following the date of such publication, during which period the Secretary shall fully consider any public comments submitted with respect to such demonstration program." The Retrofit Pilot Program is specifically authorized by the Consolidated Appropriations Act, 2010. Accordingly, HUD is not required to solicit comment on this demonstration. Nevertheless, HUD welcomes public comment on the proposed pilot program.

**ADDRESSES:** **Note:** The following procedures pertain to the submission of general comments on this notice. Lenders interested in participating in this Pilot Program must e-mail their Expressions of Interest to *FHAPowerSaver@hud.gov* in accordance with Appendix A of this notice.

Interested persons are invited to submit comments regarding this notice to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *http://www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

**Note:** To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the notice. *No Facsimile Comments.* Facsimile (FAX) comments are not acceptable.

*Public Inspection of Public Comments.* All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal

Information Relay Service at 800–877–8339. Copies of all comments submitted are available for inspection and downloading at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Patricia McBarron, Office of Single Family Housing Development, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410–8000; telephone number 202–708–2121 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

## I. Background

### *A. Energy Efficient Mortgage Innovation Pilot Program*

The Consolidated Appropriations Act, 2010 (Pub. L. 111–117, approved December 16, 2009, 123 Stat. 3034) (2010 Appropriations Act), which appropriated Fiscal Year (FY) 2010 funds for HUD, among other agencies, appropriated $50 million for an Energy Innovation Fund to enable HUD to catalyze innovations in the residential energy efficiency sector that have the promise of replicability and help create a standardized home energy efficient retrofit market. Of the $50 million appropriated for the Energy Innovation Fund, the 2010 Appropriations Act stated that "$25,000,000 shall be for the Energy Efficient Mortgage Innovation pilot program directed at the single family housing market." (*See* Pub. L. 111–117, at 123 Stat. 3089.)

In considering how to structure the pilot program directed by the 2010 Appropriations Act, HUD looked to the findings of the Administration's Recovery through Retrofit Report, which specifically addressed retrofitting homes for energy efficiency, and the suitability of building the pilot program by supplementing FHA's Title I Property Improvement Loan Insurance program.

### *B. Recovery Through Retrofit*

On October 19, 2009, the Vice President and the White House Middle Class Task Force released the *Recovery through Retrofit* Report (RTR Report), which builds on the foundation laid out in the American Recovery and Reinvestment Act (Pub. L. 111–5, approved February 17, 2009) to expand green job opportunities in the United States and boost energy savings for middle class Americans by retrofitting homes for energy efficiency.[2] The White House Council on Environmental Quality developed the Report through an interagency process, involving eleven Departments and Agencies (including HUD) and 6 White House offices.

The RTR Report recognizes that making American homes and buildings more energy efficient presents an unprecedented opportunity for communities throughout the country. The funding of home retrofit projects can potentially help people earn money as home retrofit workers, while also helping them save money by lowering their utility bills. By encouraging nationwide home energy efficiency improvements, workers of all skill levels can be trained, engaged, and have the opportunity to participate in expanding a national home retrofit market. According to the RTR Report, there are almost 130 million homes in this country,[3] generating more than 20 percent of our Nation's carbon dioxide emissions.[4] The RTR Report indicates that existing home energy retrofit techniques and technologies can reduce home energy use by up to 40 percent per home and lower associated greenhouse gas emissions by up to 160 million metric tons annually by the year 2020.[5] The RTR Report also stated that home energy efficiency retrofits have the potential to reduce home energy bills by $21 billion annually.[6]

The RTR Report identified several barriers that have prevented a self-sustaining retrofit market from forming. Among other barriers, the RTR Report found that homeowners face high upfront costs and many are concerned that they will be prevented from recouping the value of their investment if they choose to sell their home. The upfront costs of home retrofit projects are often beyond the average homeowner's budget.[7]

[2] Middle Class Task Force and Council on Environmental Quality, *Recovery through Retrofit* (2009). *http://www.whitehouse.gov/assets/documents/Recovery_Through_Retrofit_Final_Report.pdf.*

[3] U.S. Census Bureau, American Housing Survey National Tables: 2007, All Housing. *http://www.census.gov/hhes/www/housing/ahs/ahs07/ahs07.html.*

[4] U.S. Energy Information Agency, "U.S. Carbon Dioxide Emissions from Energy Sources: 2008 Flash Estimate." *http://www.eia.doe.gov/oiaf/1605/flash/pdf/flash.pdf.*

[5] Choi Granade, H; J Creyts; A Derkach; Ph Farese; and S. Nyquist, K. Ostrowski, "Unlocking Energy Efficiency in the U.S. Economy," July 2009.

[6] *Id.*

[7] Middle Class Task Force and Council on Environmental Quality, Id.

### *C. Title I Property Improvement Loan Insurance Program*

Through the Title I Property Improvement Loan Insurance program (Title I program), FHA offers consumers the opportunity to obtain affordable home improvement loans by insuring loans made by private lenders to improve properties that meet certain requirements. Lending institutions make loans from their own funds to eligible borrowers to finance these improvements. The program is authorized by section 2 of Title I of the National Housing Act (12 U.S.C. 1703). Specifically, under section 2(a) of the National Housing Act, HUD is authorized to help homeowners finance alterations, repairs, and improvements in connection with existing structures or manufactured homes. The Title I program regulations are codified in 24 CFR part 201.

Eligible borrowers include owners of the properties to be improved, the person leasing the property (provided that the lease will extend at least 6 months beyond the date when the loan must be repaid), or someone purchasing the property under a land installment contract. Only lenders approved by HUD specifically for the Title I program can make loans covered by Title I loan insurance. Title I loans can be disbursed directly to the borrower or, if the loan is made through a dealer, the disbursement will be made jointly to the dealer and the borrower.

Title I program loans may be used to finance permanent property improvements that protect or improve the basic livability or utility of the property—including manufactured homes, single family and multifamily homes, nonresidential structures, and the preservation of historic homes. The loans can also be used for fire safety equipment. The Title I program may be used to insure such loans for up to 20 years on either single family or multifamily properties. The maximum loan amount is $25,000 for improving a single family home or a nonresidential structure. Funds can also be used for the construction of a nonresidential structure. FHA insures private lenders against the risk of default for up to 90 percent of any single loan, although FHA liability is capped at the lender's reserve pool—10 percent of the amount of all insured Title I loans in the financial institution's portfolio.

### *D. Goals of the Home Energy Retrofit Loan Pilot Program*

FHA's goals for the Pilot Program are: (1) To facilitate the testing and scaling of a mainstream mortgage product for

home energy retrofit loans that includes liquidity options for lenders, resulting in more affordable and widely available loans than are currently available for home energy retrofits; and (2) to establish a robust set of data on home energy improvements and their impact—on energy savings, borrower income, property value, and other metrics—for the purpose of driving development and expansion of mainstream mortgage products to support home energy retrofits. More broadly, FHA recognizes that affordable and available financing in and of itself may not drive widespread adoption of home energy retrofits in every market; however, research suggests that lack of financing is a primary barrier.[8] Thus, FHA intends for the Pilot Program to help determine the extent to which affordable and available financing, along with other strategies and tactics, can increase retrofit activity among homeowners.

As a result of discussions with national experts in housing finance and home energy efficiency, HUD determined that utilizing the existing FHA Title I program, with additional incentives and requirements, is the most efficient and effective opportunity it could deploy to deliver federally insured financing to homeowners in markets that are ready and able to utilize it. After analyzing the viability of the Title I program to achieve these goals, FHA determined that several changes to the program are necessary for the purposes of the Pilot Program. These changes are described in detail in Section II.D. of this notice. Broadly, the changes are intended to protect consumers, provide low-cost financing, and generate lender and secondary market participation in home energy retrofit loans.

Section II of this notice, which immediately follows, presents the structure, requirements, and criteria that will govern HUD's proposed Retrofit Pilot Program, and HUD welcomes comment on all aspects of the proposed pilot program. HUD invites interested lenders to advise HUD of their interest, as described in Appendix A of this notice, so that HUD may contact them and explore their interest and the possibility of their participation in the pilot program. No proprietary information should be submitted by any interested lender, only expressions of interest in participating.

After reviewing public comments submitted in response to HUD's solicitation of comment, HUD will issue a second **Federal Register** notice that will formally announce the establishment of the Retrofit Pilot Program, and the commencement date.

## II. The Home Energy Retrofit Loan Pilot Program

### *A. Authority*

The Retrofit Pilot Program is authorized by the provisions of the Energy Innovation Fund of the 2010 Appropriations Act, which directs HUD to conduct an Energy Efficient Mortgage Innovation pilot program targeted to the single family housing market (Pub. L. 111–117, at 123 Stat. 3089). The Pilot Program is based on the requirements of Title I, section 2 of the National Housing Act (12 U.S.C. 1703). Under section 2(a) of the National Housing Act, HUD is authorized to provide loan insurance in order to help homeowners finance alterations, repairs, and improvements in connection with existing structures or manufactured homes. HUD's implementing regulations are codified at 24 CFR part 201.

### *B. Duration and Geographic Scope*

1. *Duration.* The Retrofit Pilot Program will be conducted for loans originated during a period of 2 years commencing on the effective date specified by the final notice that announces and establishes the Pilot Program. HUD, however, may extend the duration of the Pilot Program, after its commencement, beyond the 2-year period to accurately assess the Pilot's effectiveness. HUD will announce any such extension through **Federal Register** notice.

2. *Geographic scope.* The success of the Retrofit Pilot Program and its potential to inform further efforts to expand financing for energy-efficient home retrofits will be advanced by focusing on properties located in communities that have already taken affirmative steps to address energy efficiency retrofits. HUD is aware that a number of communities have already developed the programmatic infrastructure to help ensure that the critical non-financial components of a holistic retrofit initiative are in place. In selecting communities in which to conduct the Pilot Program, HUD will target communities that have already developed a robust home energy efficiency retrofit infrastructure.

The Department of Energy's (DOE's) Energy Efficiency and Conservation Block Grants (EECBG) program is authorized under Title V, Subtitle E of the Energy Independence and Security Act (EISA), signed into law on December 19, 2007. Through formula and competitive grants administered by DOE, this program empowers local communities to make strategic investments to meet the nation's long-term goals for energy independence and leadership on climate change.

With funding for the EECBG program provided by the American Recovery and Reinvestment Act, DOE initiated the Retrofit Ramp-up Program, now known as the Better Buildings program, a demonstration program directed to stimulating activities and investments that can: (1) Deliver verified energy savings from a variety of projects in the local jurisdiction of the applicant, with a particular emphasis on efficiency improvements in residential, commercial, industrial, and public buildings; (2) achieve broader market participation and greater efficiency savings from building retrofits; (3) highly leverage grant funding in order to significantly enhance the resources available for supporting the program; (4) sustain themselves beyond the grant monies and the grant period by designing a viable strategy for program sustainability; (5) serve as pilot building retrofit programs that demonstrate the benefits of gaining economy of scale; and (6) serve as examples of comprehensive community-scale energy-efficiency approaches that could be replicated in other communities across the country.

Under the Better Buildings Program, approximately $485 million was allocated by DOE through competitive grants to initiatives in the following locations: Austin, TX; 16 towns in Maryland: Berlin, Cambridge, Chestertown, Cumberland, Denton, Easton, Elkton, Frostburg, Oakland, Princess Anne, Dundalk, Westminster, Havre de Grace, Salisbury, Takoma Park, and University Park, MD; Fayette County, PA; Bedford, NY; Berlin, Nashua, and Plymouth, NH; Boulder County, City and County of Denver, Garfield County, and Eagle County, CO; Camden, NJ; Chicago region, IL; Cincinnati, Ohio and northeast Kentucky; Consortium of 14 Connecticut Towns: Bethany, Cheshire, East Haddam, East Hampton, Glastonbury, Lebanon, Mansfield, Portland, Ridgefield, Weston, Westport, Wethersfield, Wilton and Windom; Detroit, Grand Rapids, and southeast MI; Greensboro, NC; Indianapolis and Lafayette, IN; Kansas City, MO; Los Angeles, San Francisco Bay Area, Sacramento, San Diego, and Santa Barbara County, CA; Lowell, MA; Madison, Milwaukee, and Racine, WI; Maine statewide; Missouri statewide; New York statewide; Omaha and

[8] Choi Granade, H; J Creyts; A. Derkach; Ph. Farese; and S.Nyquist, K. Ostrowski, *Unlocking Energy Efficiency in the U.S. Economy,* July 2009.

Lincoln, NE; Oregon statewide; Philadelphia, PA; Phoenix, AZ; Riley County, KS; San Antonio, TX; Seattle, and Bainbridge Island, WA; Select Southeastern cities: Atlanta GA, Carrboro NC, Chapel Hill, NC, Charlotte, NC, Charleston, SC, Charlottesville, VA, Decatur GA, Hampton Roads/Virginia Beach, VA, Huntsville, AL, Jacksonville FL and New Orleans, LA; Toledo, OH; and U.S. Virgin Islands.

The locations listed above are all eligible markets for lenders to serve in the Pilot. In addition, FHA will consider lenders' interest in other communities, subject to an assessment of such communities' infrastructure for implementing residential retrofit programs. HUD expects to consult with DOE in such cases. In providing HUD with Expressions of Interest to Participate, lenders must specify the market(s) they intend to target.

FHA considered targeting the pilot to a smaller number of markets, which may have increased the likelihood of lender competition within some markets, potentially benefitting consumers. FHA determined that such an approach could limit the number and diversity of lenders that could participate in the program overall, however. FHA determined it was important for the Pilot to be open to a reasonably wide range of lenders—by size and type, as well as service area—especially given the challenging conditions facing lenders in the current environment, which may create barriers to participation for some, even if interested. In selecting lenders to participate, HUD will evaluate the extent to which lenders intend to provide loans at the most favorable rate to consumers, thus directly addressing a major benefit that lender competition would potentially foster.

*C. Lender Eligibility*

Lender participation in the Retrofit Pilot Program is voluntary. Of the pool of interested lenders that meet the criteria described in Section II of this notice, HUD intends to select a limited number of lenders to participate in the Retrofit Pilot Program. HUD is currently undertaking efforts to identify FHA-approved lenders that may be suitable candidates for participation in the Retrofit Pilot Program. To be eligible, lenders must satisfy the criteria set forth in this Section II.C. HUD reserves the right to terminate a lender's participation in the Retrofit Pilot Program for unacceptable performance.

1. *Approval as an FHA Title I or Title II program lender.* Lenders must hold valid Title I contracts of insurance and be approved pursuant to the requirements of 24 CFR part 202 to originate, purchase, hold, service, or sell loans insured under the Title I program regulations at 24 CFR part 201. However, approved Title II lenders may obtain Title I eligibility under an expedited process.

2. *Experience with similar lending initiatives.* Lenders must be able to demonstrate experience with the type of lending initiative being undertaken in the Retrofit Pilot Program. In particular, HUD will consider the extent to which lenders have experience in successfully originating and/or servicing small loans, home equity loans, second liens, FHA section 203(k) rehabilitation loans, and Title I Property Improvement Loans. Lenders that do not have experience in such lending may still be able to participate in the Pilot Program to the extent they can demonstrate how their other experience is relevant to determining their ability to participate in the pilot, and they agree to meet the Title I requirements before participation in the pilot program.

3. *Computer system capabilities.* Lenders must have the technical capability to interface with FHA through FHA Connection. In addition, lenders must have the technical capability to interface with any other computer systems utilized by FHA or its contractors pertaining to the Retrofit Pilot Program.

4. *Audit capabilities.* Lenders must have a demonstrated capacity to provide timely reports to FHA on origination and performance of retrofit loans. FHA envisions requiring monthly reports on loan and portfolio performance. In addition, a lender must be able to provide an electronic loan package to HUD for a random sample of loans chosen for quality reviews.

5. *Collaborative capacity.* Lenders must have demonstrated capacity to work with public sector agencies, nonprofit organizations, utilities, and/or home improvement contractors.

*D. Lender Incentives*

HUD recognizes that even with Federal mortgage insurance such as would be available under the Pilot Program, small loans for home energy retrofits may have relatively high transaction costs for lenders, discouraging some from offering such loans and forcing others that do offer them to increase costs to borrowers. HUD will utilize the appropriated funds provided under the Act to provide lender incentive payments to support activities that lower costs to borrowers. Eligible uses of such payments will include lowering loan interest rates and, for lenders that will also service their own loans, reducing servicing costs. HUD will also consider other proposed uses of such funds. Any use of funds must show, to HUD's satisfaction, bona fide benefit to borrowers. The amount of payment to each lender and the eligible uses of funds by each lender will be determined by HUD based on the lender's Expression of Interest. A significant factor in determining payment amounts to each lender will be the number of loans the lender anticipates making during the 2-year period of the Pilot Program. Lenders will be required to report to HUD on their use of incentive payments funds.

HUD anticipates that the amount of grant funds will not exceed $5 million per lender.

Funds may be available to lenders who request them, but are not required for participation. Lenders who do not seek funds may still participate in the Pilot Program. HUD is specifically seeking comment on the incentive payments available under the program.

*E. Selection of Lenders*

As noted above, lenders interested in potentially participating in the Retrofit Pilot Program must submit an Expression of Interest using the template in Appendix A and *following the instructions in this notice.* Lenders that fail to do so will not be considered for participation.

In evaluating Expressions of Interest and selecting lenders to participate, HUD will first review each Expression of Interest to verify that the lender is eligible to participate in the program. HUD will then evaluate the Expressions of Interest from all eligible lenders primarily by weighing the following factors in the Expression of Interest: (1) The lender's anticipated loan volume and target markets; (2) the lender's business model for participating in the pilot; (3) the lender's capacity (experience and/or potential) to work in public-private partnerships; and (4) the extent to which the lender intends to deliver the most favorable loan product to consumers. HUD anticipates that these primary weighing factors will have generally equal weighing significance. In addition, HUD may consider the following factors in selecting lenders to participate: (1) Diversity of lender type and target market; and (2) impact on low-income households and communities.

*F. Differences Between Retrofit Pilot Program and Existing Title I Program*

With the exceptions discussed below, the Retrofit Pilot Program will be governed by the Title I program regulations at 24 CFR part 201. This

notice does not make any changes to the current Title I Property Improvement Program. The differences specified in this notice are only applicable to lenders selected to participate in the Pilot Program.

Lenders selected to participate in the Retrofit Pilot Program must enter into a Retrofit Pilot Program Agreement by which they commit to adhere to the Title I program regulations, except as modified in this notice and in subsequent refinements, such modifications being applicable only to loans insured under the Retrofit Pilot Program. There will also be other requirements applicable to the Retrofit Pilot Program; for example, insuring Retrofit Pilot Program loans only in communities selected for the Pilot Program.

In summary, the proposed changes described below, in combination with the appropriated funds, have the effect of creating an innovative pilot program that accords with Congress' direction in the Act. These changes fall into the following categories: (1) Changes designed to enhance FHA underwriting of program loans; (2) changes related to FHA administration of the program, specifically in the areas of loan servicing, claim procedures, and reporting; (3) changes to target the pilot program specifically on its purpose of improving home energy performance; and (4) changes to provide additional benefits to borrowers. Finally, as noted, FHA proposes to augment these changes with incentives for lenders to participate, using funding appropriated under the Act. In summary, these changes adjust the current flexible framework for the Title I program to enable it to encourage and directly support home improvements that improve energy performance, while reducing barriers to making financing under the program more widely available and more affordable.

1. *Definition 24 CFR 201.2.* For purposes of the Retrofit Pilot Program, the following terms have the following meanings.

a. *Single family property improvement loans.* Only "single family property improvement loans" as that term is defined in 24 CFR 201.2 are eligible for FHA insurance and the Retrofit Pilot Program. Properties must also be principal residences as defined in 24 CFR 201.2. HUD intends to further limit the Pilot Program to single unit detached properties in order to control the number of variables in the Pilot Program. Loans used to finance the property improvements for manufactured homes and multifamily properties [9] are not eligible for the Retrofit Pilot Program, but remain eligible for Title I program insurance under 24 CFR part 201.

2. *Loan maturities (24 CFR 201.11).* Under the Title I program regulations at 24 CFR 201.11 an insured loan may have a term as long as 20 years. Under the Retrofit Pilot Program, loan terms generally will be limited to 15 years to better align the term of financing with the useful life of, and benefits from, most energy retrofit improvements. Under the Pilot Program, loan terms that are for 20 years can only be for certain specified improvements: Renewable energy measures, geothermal systems, and other improvements as approved by HUD. See "Eligible use of loan proceeds" in Section II.D.4(b) below.

3. *Interest and discount points (24 CFR 201.13).* Under the Title I program regulations at 24 CFR 201.13, the lender may not require or allow any party, other than the borrower, to pay discount points or other financing charges in connection with the loan transaction. This restriction, while helping to assure that borrowers have a personal stake in the repayment of the loan, also has the effect of hindering state and local efforts to support home energy retrofits by lowering the cost of capital to consumers, such as through interest-rate write downs. The Retrofit Pilot Program expressly contemplates that third parties (including state and local governments, private organizations, and nonprofit organizations) may pay discount points or other financing charges in connection with the Title I loan transaction and encourages third parties to work with participating lenders on this basis. In addition, as noted, lenders may utilize HUD incentive payments under the Pilot Program for this purpose.

The interest shall be calculated on a traditional mortgage interest basis.

4. *Property improvement loan eligibility (24 CFR 201.20).*

a. *Borrower eligibility (24 CFR 201.20(a)).* As under Title I loans, Retrofit Pilot Program borrowers shall have at least a one-half interest in one of the following:

(i) Fee simple title of the property; or

(ii) A properly recorded land installment contract.

Unlike the Title I program, lessees of the property will not be eligible to participate in the Pilot Program. The limitation of eligibility to owner-occupied properties is designed to reduce the variables in the Pilot Program for purposes of evaluation, as well as to help ensure compliance with the minimum property loan to value ratios described in section II.F.5., below.

b. *Eligible use of the loan proceeds (24 CFR 201.20(b)).* Similar to the Title I program, loan proceeds shall be used only for the purposes disclosed in the loan application. Under the standard Title I loan, proceeds shall be used only to finance property improvements that substantially protect or improve the basic livability or utility of the property. Further, HUD has the authority to establish a list of items and activities that may not be financed with the proceeds of any property improvement loan.

Under the Retrofit Pilot Program, loan proceeds may be used only for measures that improve home energy performance or directly make such measures possible. If a lender has any doubt as to the eligibility of any item or activity, the lender must request a determination from FHA before making a loan. The proposed list of eligible measures, to be finalized after the period for public comment on this notice, is attached as Appendix B. HUD is specifically seeking comments on this aspect of the Pilot Program.

The reason for this limitation is that the purpose of the Retrofit Pilot Program is to provide financing specifically for home energy retrofits. In addition, HUD believes that limiting the eligible uses of loan proceeds, as described, will allow better evaluation of the Retrofit Pilot Program for its intended purpose and facilitate broader analysis of Pilot Program data to improve the structure of other future financing efforts to support home energy retrofits. HUD encourages the use of home energy audits and other tools to enable consumers to determine the most beneficial improvements they should seek to undertake.

5. *Property valuation (24 CFR 201.20).* The combined loan-to-value ratio of the mortgage and energy retrofit loan cannot exceed 100 percent and will require a method to determine current valuation of the property, such as an Exterior-Only Inspection Residential Appraisal Report (Form HUD–2055) or other approved valuation method. HUD is specifically seeking comments on this aspect of the Pilot Program.

6. *Credit requirements for borrowers (24 CFR 201.22).* In addition to the requirements under the Title I program, all borrowers participating in the Retrofit Pilot Program must have a decision credit score of 660 or higher. The decision credit score used by FHA is based on methodologies developed by the FICO Corporation. FICO scores, which range from a low of 300 to a high

[9] Manufactured home improvement loan and multifamily property improvement loan are terms defined in § 201.2.

of 850, are calculated by each of the three National Credit Bureaus and are based upon credit-related information reported by creditors, specific to each applicant. Lower credit scores indicate greater risk of default on any new credit extended to the applicant. The decision credit score is based on the middle of three National Credit Bureau scores or the lower of two scores when all three are not available, for the lowest scoring applicant. While FHA's guidance is based on the "FICO-based" decision credit score, it is not FHA's intent to prohibit the use of other credit scoring models to assess a borrower's credit profile.

The borrower's total debt-to-income ratio cannot exceed 45 percent, as under the Title I program. HUD recognizes that requiring a minimum credit score for participation in the pilot program will mean that some homeowners cannot participate. However, given that this is a pilot program, HUD has determined to limit the Retrofit Pilot Program to borrowers with these credit scores in order to make an initial assessment of the interaction of credit ratings and repayment in connection with home energy retrofit loans.

7. *Charges to borrower to obtain loan (24 CFR 201.25).* The regulations for the Title I program provide that HUD will establish a list of fees and charges that may be included in a property improvement loan. The Retrofit Pilot Program will also establish a similar list of fees and charges.

8. *Conditions for loan disbursement (24 CFR 201.26).* In addition to current Title I requirements pertaining to disbursement of loan proceeds, the Retrofit Pilot Program funds shall be disbursed to the borrower(s) in two increments: (1) 50 percent of the proceeds shall be disbursed at loan funding/closing; and (2) the remaining 50 percent of the proceeds shall be disbursed after the energy retrofit improvements have been completed as evidenced by an executed Completion Certificate for Property Improvements (Form HUD–56002) by the borrower(s), and a lender-required inspection.

9. *Requirements for dealer loans (24 CFR 201.27).* Under the Title I program a dealer loan (defined at 24 CFR 201.2) "means a loan where a dealer, having a direct or indirect financial interest in the transaction between the borrower and the lender, assists the borrower in preparing the credit application or otherwise assists the borrower in obtaining the loan from the lender." Dealer loans will not be permitted in the Retrofit Pilot Program.

The reason for this limitation is that dealer loans have been disproportionately correlated with poor loan performance under Title I and other home improvement loan programs in the past. While HUD recognizes that there are many responsible dealers who can and would provide financing through dealer loans in a responsible manner, it is limiting the Retrofit Pilot Program to "direct loans." "Direct loans" is defined under the Title I program (at 24 CFR 201.2) as "a loan for which a borrower makes application directly to a lender without any assistance from a dealer." HUD believes that home improvement contractors and others whose activity may be described under the definition of "dealer" for the Title I program will play an important role in ensuring the pilot's success by performing the actual work related to the retrofits.

10. *Loan servicing (24 CFR 201.41).* Under the Title I program, lenders remain responsible for proper collection efforts, even though actual loan servicing and collection may be performed by an agent of the lender. In addition to these requirements, the servicer of a Retrofit Pilot Program loan, whether the servicer is the original lender or a subsequent servicer, as under FHA's major single family program (commonly referred to as the Title II program), is fully responsible for the required servicing responsibilities. As under the Title II program, "the mortgagee shall remain fully responsible for proper servicing, and the actions of its servicer shall be considered to be the actions of the mortgagee." HUD emphasizes that the servicer shall also be fully responsible for its actions as a servicer. HUD intends to seek recovery from servicers if FHA losses are attributable to servicing errors.

In addition, as noted, lenders that also service loans they originate under the pilot program may utilize HUD incentive payments under the program to reduce servicing costs that deliver bona fide benefits to borrowers.

11. *Insurance claim procedure (24 CFR 201.54).* Under the Title I program, HUD requires that insurance claims be fully documented.

Under the Pilot Program, the holder of the note will be accountable to HUD for origination/underwriting errors, and the servicer will be accountable to HUD for servicing errors. If a claim would be denied due to servicing errors, FHA will pay the claim to the holder of the note and seek recovery of its losses from the servicer. To effectuate this, the insured lender must obtain an indemnification agreement from the subservicer at loan origination that will be assigned to HUD when an insurance claim is filed. As an alternative to an indemnification agreement from the subservicer, the insured lender shall execute and submit with the claim a subrogation agreement that allows HUD to obtain indemnification directly from the subservicer. Losses to HUD will be mitigated by recoveries from defaulted borrowers.

## III. Evaluating the Success of the Retrofit Pilot Program

As a pilot program, one of the principal purposes of the Pilot is to generate data on key questions that can help make the case for additional mainstream mortgage products to support home energy retrofits, including first mortgage options. FHA is therefore committed to a robust evaluation program in connection with the Pilot. (The evaluation will also enable HUD to assess the success of possible modifications to the existing Title I program before initiating, through rulemaking, any changes to the Title I regulations.)

FHA has identified three core questions on which the evaluation program will focus: (1) Did homes reduce energy consumption after retrofits? (2) did homeowners realize lower energy bills as a result of the retrofit? and (3) was home value affected as a result of the retrofit? Data from the PowerSaver Pilot Program suggesting answers to these questions will help fill a major void and start to establish a basis for analyzing other financing options.

FHA acknowledges that these can be challenging impacts to evaluate, for reasons ranging from "rebound effects" to consumer concerns about accessing utility billing data. FHA believes that it must attempt to do so, however; otherwise, FHA is concerned that continued progress on mainstream mortgage financing options for home energy retrofits will be frustrated.

FHA notes that HUD will also be tracking information on loan performance, through regular lender reporting, as under other FHA programs. The evaluation effort will therefore include loan performance as a component as well. In addition, FHA will explore the feasibility of adding to the core evaluation scope, potentially including: (1) Lender costs for originating and servicing; (3) impact of interest rates on consumer participation; (2) relative effectiveness of non-financial programmatic elements (consumer education, product marketing, auditing tools, and workforce quality assurance); and (4) the extent to which specific home energy improvements are chosen and the results from specific measures.

FHA recognizes the limitations in drawing conclusions from evaluating the Pilot Program. FHA anticipates utilizing a third party to conduct the evaluation and anticipates sharing the results with the public. FHA expressly encourages comment on the goals and scope of the evaluation.

## IV. Findings and Certifications

*Paperwork Reduction Act*

The information collection requirements in this rule have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (PRA) and paperwork approval is pending. In accordance with the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number.

*Executive Order 12866, Regulatory Planning and Review*

The Office of Management and Budget (OMB) reviewed this notice rule under Executive Order 12866 (entitled "Regulatory Planning and Review"). A determination was made that this notice is an "economically significant regulatory action," as defined in section 3(f)(1) of the Order, and the notice is accompanied by an impact analysis. The impact analysis is available at *http://www.hud.gov/offices/adm/hudclips/ia/*. The following provides a brief summary of the finding relating to the aggregate costs, benefits, and transfers of the pilot program contained in the analysis:

*Introduction.* As discussed more fully in the accompanying impact analysis, FHA envisions that the pilot program will provide insurance for up to 24,000 loans over the 2-year period of the pilot program, with an expected average loan size of $12,500. The program is therefore expected to result in the extension of $300 million in FHA-insured energy efficiency property improvement loans over the 2-year period.

*Benefits.* The aggregate net benefits are obtained by multiplying the individual net benefits by the expected number of loans and adding the expected social benefits of reduced energy consumption. As a base case, HUD assumes a consumer household with annual savings of $1,000, a 0 percent price growth, and a 7 percent discount rate. The present value of a technical retrofit for this base case scenario is $11,400. Assuming a rebound effect of 30 percent yields a comfort benefit of $3,400 and energy savings of $8,000 per participant.[10] As noted, approximately 24,000 loans are expected over 2 years. For the base case scenario, this would equal $41 million in comfort benefits and $96 million in energy savings for each year of the program. The benefits of the FHA program may not equal the sum of the benefits of all retrofits financed through the program, but only reflect the benefits of the retrofits that would not have occurred without the program; however, the existence of significant market imperfections and the lack of affordable financing make it reasonable to assume that a large proportion, if not all of the loans, will generate benefits.

*Costs.* The cost of receiving the energy-savings is the upfront investment plus the costs of financing the investment. The cost per investment is thus equal to the size of the loan.

*Transfers to Consumers.* The transfer to consumers is equal to the difference between the FHA interest rate and the interest rates on other loans available for the same purpose. As discussed, alternative means of financing are limited and come with higher interest costs. The gain to consumers is not limited to reduced loan costs but will consist also of the benefits of energy-efficient investment. The extent of these benefits depends upon the subsidy from an FHA loan guarantee.

The docket file is available for public inspection in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at 202–402–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Information Relay Service at 800–877–8339.

*Environmental Impact*

A Finding of No Significant Impact (FONSI) with respect to the environment was prepared in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C). That FONSI is available for public inspection between the hours of 8 a.m. and 5 p.m., weekdays in the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the FONSI by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

Dated: October 28, 2010.

**David H. Stevens,**

*Assistant Secretary for Housing—Federal Housing Commissioner.*

[10] The "rebound effect" refers to the fact that the reaction of the consumer to the energy-saving technology will not necessarily reduce energy consumption by what is technically possible. By increasing energy efficiency, the retrofit reduces the expense of physical comfort and will thus increase the demand for comfort. In fact, the retrofit may have been driven for a demand for more heating in the winter or cooling in the summer. The size of the rebound effect will depend on the income of the household and the path of energy prices.

## Appendix A

**Home Energy Retrofit Loan Pilot Program Criteria for Expressions of Interest From Lenders**

*Introduction*

Lender participation in the Retrofit Pilot Program is voluntary. HUD intends to select a limited number of lenders to participate.

Lenders interested in potentially participating in the Retrofit Pilot Program must submit an Expression of Interest using the format below and *following the instructions in this notice.* Lenders that fail to do so will not be considered for participation.

Lenders interested in potentially participating may also provide general comments on the Pilot Program. Any such comments should be submitted separately from the Expression of Interest, following the instructions in the notice, but may be referenced in the Expression of Interest.

As noted in the notice, all properly submitted comments and communications submitted to HUD in connection with this pilot program will be available for public inspection and copying. Expressions of Interest should not therefore contain any proprietary information. HUD may seek additional information from lenders that submit Expressions of Interest. Such information would be available for public inspection and copying as well, unless it is proprietary.

Expressions of Interest are non-binding. HUD will execute contracts with participating lenders after reviewing all Expressions of Interest and the issuance of the final notice for the Retrofit Pilot Program in the **Federal Register**.

*Submission Instructions*

To be considered for participation in the Pilot Program, a lender must e-mail its Expression of Interest to *FHAPowerSaver@hud.gov* by the public comment deadline set forth in the **DATES** section of this notice. Late submissions and Expressions of Interest not submitted to

*FHAPowerSaver@hud.gov* will not be considered for participation in the Pilot Program.

Expressions of Interest must address each of the 10 factors identified below (labeled I through X). There is no minimum or maximum page number or required format for Expressions of Interest. Lenders should provide whatever manner of information they believe would be most relevant to HUD in evaluating their Expression of Interest in participating in the Retrofit Pilot Program. Each Expression of Interest must also contain a one page executive summary that sequentially summarizes the factors addressed below.

**Factors to be Addressed in Expressions of Interest**

*I. Contact Information*

Institution Name:
Address:
Contact Name, Title, Phone Number and Email Address:

*II. Statement of Interest*

Please describe your institution's interest in potentially participating in the program. HUD is interested in understanding the reasons for your interest, how it fits with your business strategy and goals, and how, specifically, your institution would be able to meet the goals of the Pilot Program as described in the notice.

*III. Status as an FHA Title I or Title II Program Lender*

Please provide evidence that your institution has a valid Title I contract of insurance and is approved under the requirements of 24 CFR part 202 to originate, purchase, hold, service, or sell loans insured under the Title I program regulations at 24 CFR part 201.

If you do not meet the criteria above but are an approved Title II lender, please provide evidence to that effect.

*IV. Experience With Similar Lending Initiatives*

Please describe your experience successfully originating and/or servicing small loans, home equity loans, second liens, FHA section 203(k) rehabilitation loans, and/or Title I Property Improvement Loans.

If your institution does not have such experience and capacity, please describe how any other experience is relevant to determining your institution's ability to participate in the Pilot Program.

*V. Computer System Capabilities*

Please provide evidence of your institution's technical capability to interface with FHA through FHA Connection and the Single Family Default Monitoring system.

**Note:** Participating lenders will be required to have the technical capability to interface with any other computer systems utilized by FHA or its contractors pertaining to the Retrofit Pilot Program.

*VI. Audit and Reporting Capabilities*

Please provide evidence of your institution's capacity to provide timely reports to FHA on origination and performance of loans under the Pilot Program, specifically including an electronic loan package to HUD for a random sample of loans chosen for quality reviews.

**Note:** FHA envisions requiring monthly reports on loan and portfolio performance.

*VII. Collaborative Capacity*

Please provide evidence of your institution's capacity to work with public sector agencies, nonprofit organizations, utilities, and/or home improvement contractors.

*VIII. Projected Activity and Markets*

Please describe the volume of lending your institution anticipates doing under the two-year Pilot Program and the markets you intend to serve.

**Note:** FHA may allow less volume than described.

*IX. Product Plan and Business Model*

Please describe your institution's product plan and business model as you envision it for lending under the Pilot Program. Specifically, please inform HUD of the following: (1) Will you originate and service loans, or originate only? (2) What do you expect in terms of loan performance? (3) What fees will you charge? (4) What steps will you take to ensure the lowest cost of financing for consumers? (5) How will you market the product? (6) To what extent will you work with public agencies, contractors, utilities, and other organizations? (7) How will you ensure quality control of contractors? (8) Will you hold loans, sell whole loans and/or issue securities backed by pools of loans, or some combination?

*X. Use of HUD Incentive Payments*

To the extent that you request to utilize funds from HUD for incentive payments to lower costs for borrowers, either through lower interest rates, lower servicing costs, and potentially other purposes, please describe how much funding you request, the number of loans you anticipate making (a range is appropriate if necessary), and the bona fide benefit that would accrue to borrowers through the uses of the funds.

**Note:** As noted, Expressions of Interest are non-binding. The purpose of this question is to get a sense of your institution's intent at this stage, understanding that specifics may change.

**Note:** To the extent these answers would contain proprietary information, please contact HUD based on information provided in the notice.

*XI. Final comments*

Please provide any additional information that would be relevant to HUD in evaluating your Expression of Interest to participate in the Retrofit Pilot Program, either as a narrative response or attachment(s), or both.

## Appendix B

**Eligible Improvements Under Retrofit Pilot Program**

| Improvement | Standards |
|---|---|
| Whole House | Whole house air sealing measures, including interior and exterior measures, utilizing sealants, caulks, insulating foams, gaskets, weather-stripping, mastics, and other building materials in accordance with BPI standards or other procedures approved by the Secretary. (Reference: *http://www.bpi.org/standards.aspx*) |
| Insulation: Attic | Attic insulation measures that—<br>(A) Include sealing of air leakage between the attic and the conditioned space, in accordance with BPI standards or the attic portions of the DOE or EPA thermal bypass checklist or other procedures approved by the Secretary;<br>(B) add at least R–19 insulation to existing insulation;<br>(C) result in at least R–38 insulation in DOE climate zones 1 through 4 and at least R–49 insulation in DOE climate zones 5 through 8, including existing insulation, within the limits of structural capacity, except that a State, with the approval of the Secretary, may designate climate zone sub regions as a function of varying elevation; and (Map Page: *http://www.energystar.gov/index.cfm?c=home_sealing.hm_improvement_insulation_table)*<br>(D) cover at least—<br>(i) 100 percent of an accessible attic; or<br>(ii) 75 percent of the total conditioned footprint of the house.<br>(BPI Standards reference: *http://www.bpi.org/standards.aspx*) |
| Insulation: Wall | Wall insulation that—<br>(A) is installed in accordance with BPI standards or other procedures approved by the Secretary;<br>(B) is to full-stud thickness or adds at least R–10 of continuous insulation; and<br>(C) covers at least 75 percent of the total external wall area of the home. |

| Improvement | Standards |
|---|---|
| | (BPI Reference: *http://www.bpi.org/standards.aspx*) |
| Insulation: Crawl Space | Crawl space insulation or basement wall and rim joist insulation that is installed in accordance with BPI standards or other procedures approved by the Secretary and—<br>(A) covers at least 500 square feet of crawl space or basement wall and adds at least—<br>(i) R–19 of cavity insulation or R–15 of continuous insulation to existing crawl space insulation; or<br>(ii) R–13 of cavity insulation or R–10 of continuous insulation to basement walls; and<br>(B) fully covers the rim joist with at least R–10 of new continuous or R–13 of cavity insulation.<br>(BPI Reference: *http://www.bpi.org/standards.aspx*) |
| Duct Sealing | Duct sealing or replacement and sealing that—<br>(A) is installed in accordance with BPI standards or other procedures approved by the Secretary; and<br>(B) in the case of duct replacement and sealing, replaces and seals at least 50 percent of a distribution system of the home.<br>(BPI Reference: *http://www.bpi.org/standards.aspx*) |
| | Reference: *http://www1.eere.energy.gov/buildings/windowsvolumepurchase/* |
| Skylight Replacement | Skylight replacement that meets most recent Energy Star specifications. |
| Door Replacement | Door replacement that meets most recent Energy Star specifications. |
| Storm Doors | Storm doors that—<br>• meet the most recent Energy Star specifications |
| Storm Windows | Storm windows that—<br>• meet the requirements for low-e storm windows under the Department of Energy Windows Volume Purchase Program |
| Heating System Gas/Propane/Oil Boiler/Furnace. | Heating system replacement that meets most recent Energy Star specifications. |
| Air Conditioner | Air-source air conditioner or air-source heat pump replacement with a new unit that meets most recent Energy Star specifications. |
| Geothermal | Heating or cooling system replacement with an Energy Star qualified geothermal heat pump that meets Tier 2 efficiency requirements and that is installed in accordance with ANSI/ACCA Standard 5 QI–2007. |
| Water Heater (gas, propane, electric, tank less) | Replacement of a natural gas, propane, or electric water heater that meets most recent Energy Star specifications. |
| Water Heater (solar) | Solar water heating property must be Energy Star Qualified, or certified by the Solar Rating and Certification Corporation or by comparable entity endorsed by the state in which the system is installed. |
| Fuel Cells and Micro turbine Systems. | Efficiency of at least 30% and must have a capacity of at least 0.5 kW. |
| Solar Panels (Photovoltaic Systems). | Photovoltaic systems must provide electricity for the residence, and must meet applicable fire and electrical code requirement. |
| Wind Turbine Residential | A wind turbine collects kinetic energy from the wind and converts it to electricity that is compatible with a home's electrical system, and has a nameplate capacity of no more than 100 kilowatts. |
| Roofs Metal & Asphalt | Metal or asphalt roofs that meet most recent Energy Star specifications. |

[FR Doc. 2010–28015 Filed 11–9–10; 8:45 am]
**BILLING CODE 4210–67–P**

## DEPARTMENT OF THE INTERIOR

### National Natural Landmark Designations

**AGENCY:** National Park Service, Department of the Interior.

**ACTION:** Public Notice of National Natural Landmark Designations.

**SUMMARY:** On January 16, 2009, then Secretary of the Interior Dirk Kempthorne designated the following National Natural Landmarks: Big Bone Lick, Boone County, Kentucky; Cave Without a Name, Kendall County, Texas; Chazy Fossil Reef, Grand Isle County, Vermont and Clinton County, New York; and Nottingham Park Serpentine Barrens, Chester County, PA

**FOR FURTHER INFORMATION CONTACT:** Dr. Margaret Brooks, National Natural Landmark Program Manager, at 520–791–6470.

**SUPPLEMENTARY INFORMATION:** The Secretary of the Interior established the National Natural Landmarks Program in 1962, under the authority of the Historic Sites Act of 1935 (16 U.S.C. 461 *et seq.*). The National Park Service manages this program using regulations found at 36 CFR part 62. Potential natural landmarks are identified in studies by the NPS and from other sources, evaluated by expert natural scientists, and if determined nationally significant, designated as landmarks by the Secretary of the Interior. When designated, a landmark is included in the National Registry of Natural Landmarks, which currently lists 586 National Natural Landmarks nationwide. Of the 586 listed landmarks, half are administered solely by public agencies; *i.e.,* Federal, State, county or municipal governments. Nearly one-third are owned solely by private parties.

National Natural Landmark designation is not a land withdrawal, does not change the ownership of an area, does not dictate activity, and does not imply a right of public access. However, Federal agencies should consider impacts to the unique properties of these nationally significant areas in carrying out their responsibilities under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*). Designation could result in State or local planning or land use implications. National Natural Landmark preservation is made possible by the long-term, voluntary commitments of public and private owners to protect the outstanding values of the areas. Information on the National Natural Landmarks Program can be found in 36 CFR part 62 or on the Internet at *http://www.nature.nps.gov/nnl.*

*Site Descriptions:*

The Big Bone Lick site is located within the State of Kentucky, southwest of Cincinnati, Ohio, and is unique in the Interior Low Plateaus for its combination of salt springs and associated late Pleistocene bone beds. Many types of animals, especially large herbivores, were attracted to the springs for salt, and became mired in the mud. The site became a burial ground over time. Layers of disarticulated bones have been uncovered to depths of 30 feet. The site has been referred to as a major New World fossil locality, and

plays an important role in the development of scientific thought on the concept of extinction and the relationship of geology/paleontology.

Cave Without a Name is located outside of Boerne, Texas, and is significant for some of the largest and best examples of speleothems in the Edwards Plateau region. Blue speleothems found in the cave are the only ones known to exist in Texas and are exceedingly rare nationally. The cave also contains a rich fauna and significant paleontological deposits.

The Chazy Fossil Reef is a surface exposure of an Ordovician fossil reef, approximately 450 million years old. It is significant as the oldest known occurrence of a biologically diverse fossil reef, the earliest appearance of fossil coral in a reef environment, and the first documented example of the ecological principle of faunal succession.

The Nottingham Park Serpentine Barrens site is an outstanding example of the serpentine barren natural feature in the Piedmont Upland region. This feature is characterized by thin soils that are high in concentrations of metals which are toxic to many plant species. The site supports shallow serpentine soils, rock outcrops, and unique vegetation communities, including serpentine grasslands and open savanna that contain rare and endemic species. The site is within a county park and is actively used for science and education.

Dated: December 22, 2009.

**Herbert C. Frost,**

*Associate Director, Natural Resource Stewardship and Science.*

**Editorial Note:** This document was received in the Office of the Federal Register on November 5, 2010.

[FR Doc. 2010–28426 Filed 11–9–10; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

**[2608–VFF]**

### Information Collection Sent to the Office of Management and Budget (OMB) for Approval; OMB Control Number 1024–0252; The Interagency Access and Senior Pass Application Processes

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice; request for comments.

**SUMMARY:** We (National Park Service) have sent an Information Collection Request (ICR) to OMB for review and approval. We summarize the ICR below and describe the nature of the collection and the estimated burden and cost. This ICR is scheduled to expire on February 28, 2011. We may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Under OMB regulations, we may continue to conduct or sponsor this information collection while it is pending at OMB.

**DATES:** You must submit comments on or before December 10, 2010.

**ADDRESSES:** Send your comments and suggestions on this information collection to the Desk Officer for the Department of the Interior, Office of Information and Regulatory Affairs, OMB, at (202) 395–5806 (fax) or *OIRA_DOCKET@OMB.eop.gov* (e-mail). Please provide a copy of your comments to NPS, WASO Recreation Fee Program Office, 1849 C St. NW, (2608), Washington, DC 20240; phone: (202) 513–7096; e-mail: *brandon_flint@nps.gov,* or by fax at (202) 371–2401.

**FOR FURTHER INFORMATION CONTACT:** To request additional information about this ICR, contact Brandon Flint by mail, fax, or e-mail (*see* **ADDRESSES**) or by telephone at (202) 513–7096.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 1024–0252.

*Title:* The Interagency Access and Senior Pass Application Processes.

*Form Number:* None.

*Type of Request:* Revision of a current approved collection.

*Description of Respondents:* Individuals applying for free access passes to multiple agency recreational areas based on disability or age.

*Respondent's Obligation:* Required to obtain or retain benefits.

*Frequency of Collection:* Once per respondent.

*Estimated Number of Respondents:* 100,900.

*Estimated Number of Responses:* 100,900.

*Completion Time per Response:* 69,730 @ 5minutes (0.083 hours) and 31,170 @ 10 minutes (0.167 hours).

*Estimated Annual Burden Hours:* 11,006.

*Estimated Annual Nonhour Burden Cost:* $19,949.

*Abstract:* The America the Beautiful—the National Parks and Federal Recreational Lands Access Pass and Senior Passes are free, lifetime Passes issued by the Bureau of Land Management, the Bureau of Reclamation, the U.S. Fish and Wildlife Service, the U.S. Forest Service, and the National Park Service. The Interagency Access Pass is available to citizens or persons domiciled in the United States, regardless of age, who have a medical determination and documentation of permanent disability. The Interagency Senior Pass is available to citizens or persons domiciled in the United States who are 62 years of age or older.

In the past, the processes to obtain these Passes required in-person application. The proposed revision to current policy creates processes for applicants to obtain either Pass through the mail. Standard Operating Procedures have been updated to reflect the change to allow applicants to submit applications by mail along with photo copies of identification verifying U.S. residency or citizenship and documentation of disability for the Interagency Access Pass or U.S. residency or citizenship, and age for the Interagency Senior Pass. The process for obtaining an Interagency Access or Senior Pass in person is not changing.

*Comments:* On June 9, 2010, we published in the **Federal Register** (75 FR 32810–32811) a notice of our intent to request that OMB renew this information collection. In that notice, we solicited comments for 60 days, ending on August 9, 2010. We did not receive any comments in response to that notice.

We again invite comments concerning this information collection on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on respondents.

Comments you submit in response to this notice are a matter of public record. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee it will be done.

Dated: November 5, 2010.

**Robert Gordon,**

*NPS, Information Collection Clearance Officer.*

[FR Doc. 2010–28429 Filed 11–9–10; 8:45 am]

**BILLING CODE 4312–52–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Ocean Energy Management, Regulation and Enforcement

### Outer Continental Shelf (OCS), Western and Central Planning Areas, Gulf of Mexico (GOM) Oil and Gas Lease Sales for the 2007–2012 5-Year OCS Program

**AGENCY:** Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), Interior.

**ACTION:** Notice of Intent to Prepare a Supplemental Environmental Impact Statement.

**1. Authority**

This Notice of Intent (NOI) is published pursuant to the regulations (40 CFR 1501.7) implementing the provisions of the National Environmental Policy Act (NEPA) of 1969 as amended (42 U.S.C. 4321 *et seq.* (1988)).

**2. Purpose of the Notice of Intent**

The BOEMRE is announcing its intent to prepare a supplemental environmental impact statement (SEIS) for Western Planning Area (WPA) Lease Sale 218 and Central Planning Area (CPA) Lease Sale 222 in the 2007–2012 5-Year OCS Program. The proposed sales are in the Gulf of Mexico's WPA off the States of Texas and Louisiana and in the CPA off the States of Texas, Louisiana, Mississippi, and Alabama. The SEIS will update the environmental and socioeconomic analyses in the Gulf of Mexico OCS Oil and Gas Lease Sales: 2007–2012; WPA Sales 204, 207, 210, 215, and 218; CPA Sales 205, 206, 208, 213, 216, and 222, Final Environmental Impact Statement (OCS EIS/EA MMS 2007–018) (Multisale EIS), the NOI for which was published in the **Federal Register** on March 7, 2006 (Vol. 71, No. 44, Page 11444). The SEIS will also update the environmental and socioeconomic analyses in the GOM OCS Oil and Gas Lease Sales: 2009–2012; CPA Sales 208, 213, 216, and 222; WPA Sales 210, 215, and 218; Final SEIS (OCS EIS/EA MMS 2008–041), the NOI for which was published in the **Federal Register** on September 10, 2007 (Vol. 72, No. 174, Page 51654). The SEIS for 2009–2012 was prepared after the Gulf of Mexico Energy and Security Act (Pub. L. 109–432, December 20, 2006), which required BOEMRE to offer approximately 5.8 million acres in the CPA ("181 South Area") for oil and gas leasing, "as soon as practicable after the date of enactment of this Act." Lease Sales 218 and 222 are proposed to be held in late 2011 or early 2012, before the end of the 2007–2012 5-Year OCS Program.

A SEIS is deemed appropriate to supplement the NEPA documents cited above for these lease sales in order to consider new circumstances and information arising, among other things, from the *Deepwater Horizon* blowout and spill. The SEIS analysis will focus on updating the baseline conditions and potential environmental effects of oil and natural gas leasing, exploration, development, and production in the WPA and CPA.

*Scoping Process:* Federal, State, and local government agencies, and other interested parties may assist BOEMRE in determining the significant issues and alternatives to be analyzed in the SEIS. Early planning and consultation is important for ensuring that all interests and concerns are communicated to the Department of the Interior for future decisions in the leasing process pursuant to the Outer Continental Shelf Lands Act and regulations at 30 CFR 256. At a minimum, alternatives that will be considered for the sales are no action (*i.e.,* cancel the sale) or to exclude certain areas from the sales. Input is requested on additional measures (*e.g.,* technology or water depth limitations) that would maximize avoidance and minimize impacts to environmental and socioeconomic resources. Formal consultation with other Federal agencies, the affected states, and the public will be carried out during the NEPA process and will be completed before a final decision is made on Lease Sales 218 and 222.

For more information on the proposed sales or the SEIS, you may contact Mr. Gary Goeke, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard, Mail Stop 5410, New Orleans, Louisiana 70123–2394 or by calling (504) 736–3233.

**3. Description of the Area**

The general area proposed for Lease Sale 218 covers approximately 28.57 million acres in 5,240 blocks in the western portion of the GOM (excluding whole and partial blocks within the boundary of the Flower Garden Banks National Marine Sanctuary), Lease Sale 222 covers approximately 66.45 million acres in 12,409 blocks in the Central portion of GOM (excluding blocks that were previously included within the Eastern Planning Area (EPA) and that are within 100 miles of the Florida coast; or beyond the U.S. Exclusive Economic Zone in the area known as the northern portion of the Eastern Gap). A map is available on the BOEMRE Web site at *http://www.gomr.boemre.gov/homepg/lsesale/mau_gom_pa.pdf.*

**4. Cooperating Agency**

The BOEMRE invites other Federal agencies and state, tribal, and local governments to consider becoming cooperating agencies in the preparation of the SEIS. Following the guidelines from the Council of Environmental Quality (CEQ), qualified agencies and governments are those with "jurisdiction by law or special expertise." Potential cooperating agencies should consider their authority and capacity to assume the responsibilities of a cooperating agency and to remember that an agency's role in the environmental analysis neither enlarges nor diminishes the final decisionmaking authority of any other agency involved in the NEPA process.

Upon request, BOEMRE will provide potential cooperating agencies with an information package with a draft Memorandum of Agreement that includes a schedule with critical action dates and milestones, mutual responsibilities, designated points of contact, and expectations for handling predecisional information. Agencies should also consider the "Factors for Determining Cooperating Agency Status" in Attachment 1 to CEQ's January 30, 2002, Memorandum for the Heads of Federal Agencies: Cooperating Agencies in Implementing the Procedural Requirements of the NEPA. A copy of this document is available at *http://ceq.hss.doe.gov/nepa/regs/cooperating/cooperatingagenciesmemorandum.html* and *http://ceq.hss.doe.gov/nepa/regs/cooperating/cooperatingagencymemofactors.html.*

The BOEMRE, as the lead agency, will not provide financial assistance to cooperating agencies. Even if an organization is not a cooperating agency, opportunities will exist to provide information and comments to BOEMRE during the normal public input phases of the NEPA/EIS process. If further information about cooperating agency status is needed, please contact Mr. Gary Goeke at (504) 736–3233.

**5. Comments**

Public meetings will be held in locations near these areas in early to mid November 2010. The meetings are being planned for, but not necessarily limited to:

- Tuesday, November 16, 2010, New Orleans, Louisiana, Hilton New Orleans Airport, 901 Airline Drive Kenner, Louisiana 70062, 1 p.m. CST.
- Wednesday, November 17, 2010, Houston, Texas, Houston Airport Marriott at George Bush Intercontinental, 18700 John F. Kennedy

Boulevard, Houston, Texas 77032, 1 p.m. CST.

• Thursday, November 18, 2010, Mobile, Alabama, The Battle House Renaissance Mobile Hotel and Spa, 26 North Royal Street, Mobile, Alabama 36602 1 p.m. CST.

The BOEMRE will use and coordinate the NEPA commenting process to satisfy the public involvement process for Section 106 of the National Historic Preservation Act (16 U.S.C. 470f) as provided for in 36 CFR 800.2(d)(3).

Federal, State, local government agencies, and other interested parties are requested to send their written comments on the scope of the SEIS, significant issues that should be addressed, and alternatives that should be considered in one of the following ways:

1. Electronically to the BOEMRE e-mail address: *sales218&222@boemre.gov.*

2. In written form, delivered by hand or by mail, enclosed in an envelope labeled "Comments on the Sales 218 and 222 SEIS" to the Regional Supervisor, Leasing and Environment (MS 5410), Bureau of Ocean Energy Management, Regulation, and Enforcement, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394.

Comments should be submitted no later than December 27, 2010.

Dated: November 4, 2010.

**L. Renee Orr,**

*Acting Associate Director for Offshore Energy and Minerals Management.*

[FR Doc. 2010–28355 Filed 11–9–10; 8:45 am]

**BILLING CODE 4310–MR–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

**[Account No. 3950–SZM]**

### Withdrawal of Notice of Intent To Prepare an Environmental Assessment for a Proposed Project Involving the Area in and Around President's Park South.

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice of Withdrawal of Notice of Intent to Prepare an Environmental Assessment.

**SUMMARY:** The National Park Service and the United States Secret Service are withdrawing the September 22, 2010, **Federal Register** notice (75 FR 57811) announcing their intent to prepare an Environmental Assessment and to conduct scoping in accordance with the National Environmental Policy Act, 42 U.S.C. 4321 (NEPA), to aid their consideration of certain proposed actions, including permanent roadway closures, the re-design of security elements, and the preservation of the historic landscape within President's Park South, to include the portion of E Street, NW., between 15th Street and 17th Street, in Washington, DC. The scoping process, public comment period, and public meeting referenced in that notice are now cancelled.

**DATES:** Effective November 10, 2010.

**FOR FURTHER INFORMATION CONTACT:** The Office of the National Park Service Liaison to the White House, National Park Service, National Capital Region, 1100 Ohio Drive, SW., Washington, DC 20242, *Telephone:* (202) 619–6344.

**SUPPLEMENTARY INFORMATION:** The September 22, 2010, **Federal Register** notice was published in error. The notice will be reissued when the National Park Service and the United States Secret Service are ready to begin preparation of this NEPA Environmental Assessment, conduct scoping, and receive public comments. In that notice they expect to announce when a public scoping meeting will be held. Comments that have been received to date as a result of the September 22, 2010, **Federal Register** notice of scoping will be incorporated into this subsequent NEPA process.

Dated: October 8, 2010.

**Lisa Mendelson-Ielmini,**

*Acting Regional Director, National Capital Region.*

[FR Doc. 2010–28428 Filed 11–9–10; 8:45 am]

**BILLING CODE 4312–54–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R4–R–2010–N176; 40136–1265–0000–S3]**

### Cape Romain National Wildlife Refuge, Charleston County, SC; Final Comprehensive Conservation Plan and Finding of No Significant Impact for Environmental Assessment

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

**ACTION:** Notice of availability.

**SUMMARY:** We, the Fish and Wildlife Service (Service), announce the availability of our final comprehensive conservation plan (CCP) and finding of no significant impact (FONSI) for the environmental assessment for Cape Romain National Wildlife Refuge (NWR). In the final CCP, we describe how we will manage this refuge for the next 15 years.

**ADDRESSES:** You may obtain a copy of the CCP by writing to: Raye Nilius, Refuge Manager, Cape Romain NWR, 5801 Highway 17 North, Awendaw, SC 29429. The CCP may also be accessed and downloaded from the Service's Web site: *http://southeast.fws.gov/planning/* under "Final Documents."

**FOR FURTHER INFORMATION CONTACT:** Raye Nilius; telephone: 843/928–3264.

**SUPPLEMENTARY INFORMATION:**

#### Introduction

With this notice, we finalize the CCP process for Cape Romain NWR. We started this process through a notice in the **Federal Register** on January 3, 2007 (72 FR 141).

Established in 1932 as a migratory bird refuge, Cape Romain NWR encompasses a 22-mile segment of the southeast Atlantic coast. The refuge contains 66,267 acres and consists of barrier islands, salt marshes, intricate coastal waterways, sandy beaches, fresh and brackish water impoundments, and maritime forests. Points of interest include Bulls Island, Cape Island, and Lighthouse Island. Two lighthouses, though no longer operational, still stand on Lighthouse Island. The refuge's original objectives were to conserve in public ownership habitat for waterfowl, shorebirds, and resident species. In recent years, objectives have expanded to include managing endangered species, protecting the 28,000-acre Class 1 Wilderness Area, and conserving the Bulls Island and Cape Island forests and associated diverse plant communities. Currently, the refuge is actively working to aid in the recovery of the threatened loggerhead sea turtle. Recognizing the high migratory bird benefits and recreational opportunities served by the lands and waters of the refuge, Cape Romain NWR was established under the Migratory Bird Conservation Act, the Fish and Wildlife Act, and the Refuge Recreation Act, thus outlining the following primary purposes of these lands and waters:

• "For use as an inviolate sanctuary, or for any other management purpose, for migratory birds" (16 U.S.C. 715d; Migratory Bird Conservation Act);

• "to conserve and protect migratory birds * * * and other species of wildlife that are listed * * * as endangered species or threatened species and to restore or develop adequate wildlife habitat" (16 U.S.C. 715i; Migratory Bird Conservation Act);

• "for the development, advancement, management, conservation, and protection of fish and wildlife resources" (16 U.S.C. 742f(a)(4)) "for the benefit of the United States Fish and

Wildlife Service, in performing its activities and services. Such acceptance may be subject to the terms of any restrictive or affirmative covenant, or condition of servitude" (16 U.S.C. 742f(b)(1); Fish and Wildlife Act of 1956);

• "suitable for (1) incidental fish and wildlife-oriented recreational development, (2) the protection of natural resources, and (3) the conservation of endangered species or threatened species" (16 U.S.C. 406k–2 and 16 U.S.C. 406k–4; Refuge Recreation Act, as amended);

• "so as to provide protection of these areas * * * and to ensure * * * the preservation of their wilderness character" (Wilderness Act of 1964; Pub. L. 88–577)

We announce our decision and the availability of the final CCP and FONSI for Cape Romain NWR in accordance with the National Environmental Policy Act (42 U.S.C. 4321 *et seq.;* NEPA) (40 CFR 1506.6(b)) requirements. We completed a thorough analysis of impacts on the human environment, which we included in the Draft Comprehensive Conservation Plan and Environmental Assessment (Draft CCP/EA) for Cape Romain NWR. The CCP will guide us in managing and administering Cape Romain NWR for the next 15 years.

The compatibility determinations for hunting, beach use, environmental education and interpretation, surf fishing, wildlife observation and photography, and bicycling are available in the CCP.

**Background**

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 6668dd–668ee) (Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose in developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Administration Act.

**Comments**

We made copies of the Draft CCP/EA available for a 30-day public review and comment period via a **Federal Register** notice on April 30, 2010 (75 FR 22838). We received 16 comments on the Draft CCP/EA.

**Selected Alternative**

The Draft CCP/EA identified and evaluated three alternatives for managing the refuge. After considering the comments we received, and based on the professional judgment of the planning team, we selected Alternative C for implementation.

Under Alternative C, greater effort will be placed on increasing overall wildlife and habitat quality. Although management of sea turtles, waterfowl, threatened and endangered species, and migratory birds will remain a focus of the refuge, wetland habitat manipulations will also consider the needs of multiple species, such as marsh and wading birds. Maritime forests and fields for neotropical migratory birds will be more actively managed. Landscape-level consideration of habitats will include identifying areas of importance that will become critical to wildlife as sea level rises and reduces habitat currently available. Multiple species consideration will include species and habitats identified by the South Atlantic Migratory Bird Initiative and the State's Strategic Conservation Plan.

This alternative will provide additional monitoring and surveying of migratory neotropical and breeding songbirds, secretive marsh birds, and plants. Monitoring efforts will be increased with the assistance of additional staff, trained volunteers, and academic researchers.

Wildlife-dependent recreational uses of the refuge will continue. Hunting and fishing will continue to be allowed; however, hunting will be managed with a greater focus on achieving biological needs of the refuge, such as deer population management. Environmental education and interpretation will continue, with additional education and outreach efforts aimed at the importance of climate change, sea level rise, and wilderness. A significantly greater effort will be made with outreach to nearby developing urban communities and a growing human population. Existing environmental education programs, such as the Earth Stewards Program conducted in concert with the SEWEE Association, the refuge friends group, will be expanded to include additional elementary schools, students, and teachers.

The refuge staff will be increased with the addition of a wildlife refuge specialist and two biologists to carry out habitat management and monitoring needs. An additional park ranger will be hired to enhance visitor services and environmental education programs. Greater emphasis will be placed on recruiting and training volunteers, and worker/camper opportunities will be expanded to accomplish maintenance programs and other refuge goals and objectives. The biological programs will actively seek funding and researchers to study primarily management-oriented needs.

Greater emphasis will be placed on developing and maintaining active partnerships, including seeking grants to assist the refuge in reaching primary objectives.

**Authority**

This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997, Public Law 105–57.

Dated: September 14, 2010.

**Mark J. Musaus,**

*Acting Regional Director.*

[FR Doc. 2010–28340 Filed 11–9–10; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[WY–923–1310–FI; WYW160109]**

### Notice of Proposed Reinstatement of Terminated Oil and Gas Lease WYW 160109 Wyoming

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice.

**SUMMARY:** Under the provisions of the Mineral Leasing Act of 1920, as amended, the Bureau of Land Management (BLM) received a petition for reinstatement from Craig Settle for competitive oil and gas lease WYW160109 for land in Fremont County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

**FOR FURTHER INFORMATION CONTACT:** Bureau of Land Management, Julie L. Weaver, Chief, Fluid Minerals Adjudication, at (307) 775–6176.

**SUPPLEMENTARY INFORMATION:** The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10 per acre, or fraction thereof, per year

and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the BLM is proposing to reinstate lease WYW160109 effective April 1, 2010, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. The BLM has not issued a valid lease to any other interest affecting the lands.

**Julie L. Weaver,**

*Chief, Fluid Minerals Adjudication.*

[FR Doc. 2010–28341 Filed 11–9–10; 8:45 am]

**BILLING CODE 4310–22–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

### River Raisin National Battlefield Park, MI ; Account Number: 6495

**AGENCY:** National Park Service, Department of the Interior.

**ACTION:** Notification of a New National Park, River Raisin National Battlefield Park.

**SUMMARY:** As authorized by Section 7003 of the Omnibus Public Land Management Act of 2009, Public Law 111–11 (codified at 16 U.S.C. 430vv), the National Park Service (NPS) announces the Secretary of the Interior (Secretary) has designated acquired lands related to the Battles of River Raisin on January 18–22, 1813, as a unit of the National Park System to be known as the River Raisin National Battlefield Park.

**SUPPLEMENTARY INFORMATION:** Section 7003 of the Omnibus Public Land Management Act of 2009 (Pub. L. 111–11) includes specific provisions relating to establishment of this unit of the National Park System as follows:

a. If Monroe County or Wayne County, or other willing landowners in either county offer to donate to the United States lands relating to the Battles of River Raisin on January 18 and 22, 1813, or the aftermath of the battles, the Secretary of the Interior shall accept the donated land.

b. On the acquisition of land that is of sufficient acreage to permit efficient administration, the Secretary shall designate the acquired land as a unit of the National Park System to be known as the River Raisin National Battlefield Park.

The County of Monroe, the City of Monroe, and the Monroe County Port Authority donated land, including one improvement and the personal property therein, to the Federal Government on October 12, 2010, with a transfer of deeds. The Secretary has determined that the donation of these lands represents sufficient acreage to permit efficient management as a unit of the National Park System to be known as the River Raisin National Battlefield Park. This park is now a unit of the National Park System and subject to all laws, regulations and policy pertaining to such units.

**FOR FURTHER INFORMATION CONTACT:** Nick Chevance, Midwest Regional Office, at (402) 661–1844.

Dated: October 26, 2010.

**Daniel N. Wenk,**

*Deputy Director, Operations.*

[FR Doc. 2010–28427 Filed 11–9–10; 8:45 am]

**BILLING CODE 4312–51–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation Nos. 701–TA–469 and 731–TA–1168 (Final)]**

### Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From China

#### Determination

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (Commission) determines, pursuant to sections 705(b) and 735(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)) and (19 U.S.C. 1673d(b)) (the Act), that an industry in the United States is threatened with material injury by reason of imports from China of certain seamless carbon and alloy steel standard, line, and pressure pipe ("seamless SLP pipe"), provided for in subheadings 7304.19.10, 7304.19.50, 7304.31.30, 7304.31.60, 7304.39.00, 7304.51.50, 7304.59.60, and 7304.59.80 of the Harmonized Tariff Schedule of the United States, that the U.S. Department of Commerce has determined are subsidized and sold in the United States at less than fair value ("LTFV").[2] [3]

#### Background

The Commission instituted these investigations effective September 16, 2009, following receipt of a petition filed with the Commission and Commerce by U.S. Steel Corp, Pittsburgh, PA and V&M Star L.P., Houston, TX.[4] The final phase of the investigations was scheduled by the Commission following notification of preliminary determinations by Commerce that imports of seamless SLP pipe from China were subsidized within the meaning of section 703(b) of the Act (19 U.S.C. 1671b(b)) and dumped within the meaning of 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on May 11, 2010 (75 FR 26273). The hearing was held in Washington, DC, on September 14, 2010, and all persons who requested the opportunity were permitted to appear in person or by counsel. The Commission transmitted its determination in these investigations to the Secretary of Commerce on November 4, 2010. The views of the Commission are contained in USITC Publication 4190 (November 2010), entitled *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from China: Investigation Nos. 701–TA–469 and 731–TA–1168 (Final).*

By order of the Commission.

Issued: November 4, 2010.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 2010–28323 Filed 11–9–10; 8:45 am]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Under The Clean Air Act

Notice is hereby given that on November 3, 2010, a proposed Consent Decree (the "Decree") in *United States* v. *Commonwealth of Pennsylvania,* Civil Action No. 2:10–cv–01469–JFC, was lodged with the United States District

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] Commissioner Charlotte R. Lane determines that the domestic seamless SLP pipe industry is materially injured by reason of imports of the subject merchandise from China.

[3] Chairman Deanna Tanner Okun, Commissioner Daniel R. Pearson, Commissioner Shara L. Aranoff, Commissioner Irving A. Williamson, and Commissioner Dean A. Pinkert determine that they would not have found material injury but for the suspension of liquidation.

[4] On September 25, 2009, the petition was amended to add TMK IPSCO and The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Worker International Union ("USW") as additional petitioners.

Court for the Western District of Pennsylvania.

In a complaint, filed simultaneously with the Decree, the United States alleges that the Slippery Rock University and the Commonwealth of Pennsylvania violated the Clean Air Act, 42 U.S.C. 7401 *et seq.,* and 25 Pa. Code §§ 123.11, 123.41 and 123.444, regulations included in the Pennsylvania State Implementation Plan, by causing excess particulate emissions from boilers on the university campus.

Pursuant to the Decree, Slippery Rock University and the Commonwealth will install pollution control technology to reduce particulate emissions, will comply with the regulatory emissions limits for particulate matter, will store its coal in a coal storage building to protect coal from degradation, and will perform periodic testing to ensure that the facility is complying with the emissions limits. Slippery Rock and the Commonwealth will also pay a $50,000 civil penalty to the United States pursuant to the Decree.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Commonwealth of Pennsylvania,* D.J. Ref. 90–5–2–1–07931.

During the public comment period, the Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $7.75 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

**Maureen Katz,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 2010–28311 Filed 11–9–10; 8:45 am]

**BILLING CODE 4410–15–P**

## DEPARTMENT OF LABOR

### Proposed Information Collection Request (ICR) for the Workforce Investment Act Random Assignment Impact Evaluation of the Adult and Dislocated Worker Program; Comment Request

**AGENCY:** Employment and Training Administration (ETA), Labor.

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL or Department), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that required data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

The Department notes that a Federal agency cannot conduct or sponsor a collection of information unless it is approved by the Office of Management and Budget (OMB) under the PRA, and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless it displays a currently valid OMB control number. Also, notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. *See* 5 CFR 1320.5(a) and 1320.6.

A copy of the proposed ICR can be obtained by contacting the office listed below in the addressee section of this notice or by accessing: *http://www.doleta.gov/OMBCN/OMBControlNumber.cfm.*

**DATES:** Written comments must be submitted to the office listed in the addressee section below on or before January 10, 2011.

**ADDRESSES:** Send comments to Eileen Pederson, U.S. Department of Labor, Employment and Training Administration, Office of Policy Development and Research, 200 Constitution Avenue, NW., Frances Perkins Bldg., Room N–5641, Washington, DC, 20210, telephone number (202) 693–3647 (this is not a toll-free number). Her e-mail address is *Pederson.eileen@dol.gov* and fax number is (202) 693–2766 (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

#### I. Background

In 1998, Congress significantly reformed the public workforce investment system by replacing the Job Training Partnership Act (JTPA) with the Workforce Investment Act (WIA). Key WIA reforms included consolidating the fragmented system of employment and training programs under JTPA and providing universal access to basic (core) services. To determine whether the adult and dislocated worker services funded by Title I of the WIA are effective, ETA is undertaking the WIA Random Assignment Impact Evaluation of the Adult and Dislocated Worker Programs. ETA has contracted with Mathematica Policy Research and its subcontractors—Social Policy Research Associates, MDRC, and the Corporation for a Skilled Workforce—to conduct this evaluation.

The evaluation will address the following research questions:

- Does access to WIA intensive and training services—both individually and combined—lead adults and dislocated workers to achieve better educational, employment, earnings, and self-sufficiency outcomes than they would achieve in the absence of access to those services?
- Does the effectiveness of WIA vary by population subgroup? Is there variation by sex, age, race/ethnicity, unemployment insurance (UI) receipt, education level, previous employment history, adult and dislocated worker status, and veteran and disability status?
- How does the implementation of WIA vary by Local Workforce Investment Area (LWIA)? Does the effectiveness of WIA vary by how it is implemented? To what extent do implementation differences explain variations in WIA's effectiveness?
- Do the benefits from WIA services exceed program costs? Do the benefits of intensive services exceed their costs? Do the benefits of training exceed its costs? Do the benefits exceed the costs for adults? Do they for dislocated workers?

To obtain rigorous, nationally representative estimates of WIA's effectiveness, the evaluation will take place in 30 randomly selected LWIAs. WIA applicants who are eligible for intensive services will be randomly assigned to one of three groups. The three research groups to which they will be assigned are: (1) The full-WIA group—adults and dislocated workers in this group can receive any WIA services for which they are eligible, (2) the core-and-intensive group—adults and dislocated workers in this group can receive any WIA services for which they are eligible other than training, and (3) the core-only group—adults and dislocated workers in this group can receive only WIA core services but no intensive or training services. Applicants who do not consent to participate in the study will be allowed to receive core services only. The sample intake period will be about 18 months at each site. A total of about 68,000 WIA adult and dislocated worker applicants will be randomly assigned to the evaluation. Data for the study will be collected from the following five major sources:

• 1. *Study Enrollment Forms.* Three forms will be used at intake to enroll participants into the study, a consent form, a baseline information form (BIF), and a contact information form (CIF). WIA adult and dislocated worker applicants will be asked to sign a consent form to confirm that they have been informed about the study and agree to participate. During the study enrollment process and after agreeing to participate in the study, information on each participant's basic demographic and socio-economic characteristics will be collected on a short BIF. In addition, contact information will be collected on the CIF.

• 2. *Two Follow-Up Surveys.* Follow-up telephone surveys will be conducted with 6,000 study participants. These will be conducted at about 15 and 30 months after random assignment. The first survey will collect baseline data that will not have changed since random assignment, such as place of birth. Both surveys will collect data on study participants' receipt of services and outcomes on attainment of education credentials, labor market outcomes, and family self-sufficiency.

• 3. *WIA Service and Cost Data.* To ensure that random assignment is being implemented correctly, as well as to collect data on the receipt of WIA services, data extracts from the State and/or local management information systems will be requested. If data on all services are not regularly collected in a site's specific management information system, then Mathematica will negotiate with that site to determine the best way to obtain basic service data, whether it is from another system, from modifications to their system, or from staff recording service provision in a study-specific system. Data on LWIA expenditures during the study period will be collected through quarterly reports that the LWIAs routinely submit to ETA. In addition, data on the costs of each service (for example, staff time and cost, cost of materials, overhead) will be collected through cost collection forms and interviews with program staff during the second site visit.

• 4. *Administrative Data from Other Agencies and Programs.* Both baseline (such as past earnings) and outcome data on quarterly earnings and UI benefits will be collected from records of state UI agencies. Data on service and benefit receipt may also be collected from the Employment Service, Social Security Administration, Temporary Assistance for Needy Families Program, and/or the Supplemental Nutrition Assistance Program.

• 5. *Site Visits.* Data on the context for the program and its implementation will be collected during two rounds of site visits to each of the 30 sites. The site visits will involve interviews with key staff, group interviews with study participants, observations of program activities, and case file reviews.

## II. Desired Focus of Comments

Currently, the Department is soliciting comments concerning the above data collection for the WIA Random Assignment Impact Evaluation. Comments are requested to:

• Evaluate whether the proposed ICR is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed ICR, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the ICR; and

• Minimize the burden of the ICR on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

## III. Current Actions

At this time, ETA is requesting clearance for the three study enrollment forms (the consent form, the BIF, and the CIF) and the protocols for the site visits. A future request will be submitted for the follow-up surveys and the cost collection forms.

*Type of review:* New ICR.

*OMB Number:*

*Affected Public:* WIA Customers and Staff at 30 One-Stop Career Centers

*Cite/Reference/Form/etc.:* Workforce Investment Act Section 172.

*For the study enrollment forms:*

*Frequency:* One-time collection.

*Total Responses:* 68,000.

*Average Time per Response:* 13 minutes for study participants and 13 minutes per staff person per participant.

*Estimated Total Burden Hours:* 29,467 (= 14,733 for participants and 14,733 for staff)

*Total Burden Cost:* $379,383 (= $106,817 for participants and $272,567 for staff)

**Note:** Due to rounding, total burden amounts and cost amounts may differ from the sum of the component amounts.

*For the site visits:*

*Frequency:* Once for participants; twice for staff.

*Total Responses:* 240 responses for participants and 2,160 responses for staff (= twice per staff for 1,080 staff).

*Average Time per Response:* 60 minutes for participants and 60 minutes per staff for each response.

*Estimated Total Burden Hours:* 2,400 (= 240 for participants and 2,160 for staff).

*Total Burden Cost:* $41,700 (= $1,740 for participants and $39,960 for staff).

**Note:** Due to rounding, the numbers for the totals may differ from the sum of the component numbers.

| Respondents | Total respondents | Frequency of collection | Average time per response (minutes) | Burden (hours) | Burden cost |
|---|---|---|---|---|---|
| Intake forms: | | | | | |
| Study Participants | 68,000 | Once | 13 minutes | 14,733 | 106,817 |

| Respondents | Total respondents | Frequency of collection | Average time per response (minutes) | Burden (hours) | Burden cost |
|---|---|---|---|---|---|
| Staff | 270 | Once | 13 minutes per customer, with an average of 252 customers per respondent. | 14,733 | 272,567 |
| Total for intake | 68,270 | | | 29,467 | 379,383 |
| Site Visits: | | | | | |
| Study Participants | 240 | Once | 60 minutes | 240 | 1,740 |
| Staff | 1,080 | Twice | 60 minutes | 2,160 | 39,960 |
| Total for site visits | 1,320 | | | 2,400 | $41,700 |
| Total for Intake and Site Visits | 69,590 | | | 31,867 | $421,083 |

**Note:** Due to rounding, the numbers for the totals may differ from the sum of the component numbers.

The total burden cost for the enrollment forms represents 13 minutes, on average, for participant respondents to complete the study enrollment forms multiplied by the number of respondents (68,000) and by an estimated average hourly wage of $7.25 per hour, which is the current Federal minimum wage. Thus, the total participant burden for the completion of the enrollment forms is $106,817 (= $68,000 \times 13/60 \times 7.25$). The projected burden for enrollment forms represents 13 minutes, on average, for each staff person to process documents for each study participant, including reviewing the participant's information, completing the counselor-only section, and data-entering the necessary information. (Each of an estimated 270 staff members will complete the forms for an average of 252 participants.) The total staff burden cost is $272,567, which is 13 minutes per participant multiplied by the number of respondents (68,000) and an average hourly wage of $18.50 per hour for staff (The hourly wage of $18.50 per hour for staff is the average wage in the range of wages found in "Managing Customers' Training Choices: Findings from the Individual Training Account Experiment," a report prepared for the U.S. Department of Labor, Employment and Training Administration (December 2006), McConnell, Sheena, Elizabeth Stuart, Kenneth Fortson and others.). The total burden cost for the enrollment forms is $379,383, which is the sum of the burden costs for participants and staff.

The burden cost for site visits is 2,400 hours. The site visits will involve interviews with an average of four study participants during each of two visits to each of 30 sites. Hence, about 240 (= $4 \times 2 \times 30$) participants will be involved in the interviews. Each interview will last about one hour. Hence, assuming a wage of $7.25 per hour, the total burden on participants for the site visits is estimated to be 240 hours with a total cost of $1,740 (= $7.25 \times 240$). About 36 staff persons will be interviewed at each of 30 sites. Hence, in total about 1,080 staff (= $36 \times 30$) will be interviewed. These staff will be interviewed for about one hour during each visit, for each of two visits. Hence, the total burden on staff for the site visits is estimated to 2,160 hours (= $1,080 \times 2$), representing a burden cost of $39,960 assuming an hourly wage for staff of $18.50 per hour. The total burden cost for the site visits is $41,700, which is the sum of the burden costs for participants and staff. The total burden is estimated to be 31,867 hours ($421,083 in burden cost), which is the sum of the burdens (and burden costs) for the enrollment forms and site visits.

Comments submitted in response to this request will be summarized and/or included in the request for OMB approval; they will also become a matter of public record.

Signed: at Washington, DC, this 29th day of October, 2010.

**Jane Oates,**

*Assistant Secretary, Employment and Training Administration.*

[FR Doc. 2010–28322 Filed 11–9–10; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Bureau of Labor Statistics

### Proposed Collection, Comment Request

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Bureau of Labor Statistics (BLS) is soliciting comments concerning the proposed new collection of the "Quarterly Census of Employment and Wages Green Goods and Services Survey." A copy of the proposed information collection request (ICR) can be obtained by contacting the individual listed below in the Addresses section of this notice.

**DATES:** Written comments must be submitted to the office listed in the Addresses section of this notice on or before January 10, 2011.

**ADDRESSES:** Send comments to Carol Rowan, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue, NE., Washington, DC 20212. Written comments also may be transmitted by fax to 202–691–5111 (this is not a toll free number).

**FOR FURTHER INFORMATION CONTACT:** Carol Rowan, BLS Clearance Officer, at 202–691–7628 (this is not a toll free number). (*See* **ADDRESSES** section.)

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Bureau of Labor Statistics (BLS) is seeking clearance for the collection of data on employment related to the production of green goods and services. The new Green Goods and Services (GGS) survey will collect data on employment, fiscal year, and the share of revenue or employment associated with production of green goods or services at the establishment. Additionally, BLS will expand the existing Occupational Employment Statistics (OES) survey to collect data on occupational employment and wages in establishments included in the GGS survey. The expansion of the existing OES survey will be handled through a separate nonsubstantive change request.

As the chief source of government data on employment, BLS will produce data on green goods and services businesses' employment as tasked by the 2010 Congressional Appropriation. This initiative will produce regular tabulations of aggregate employment for businesses whose primary activities fall into green goods and services as defined by BLS. This series will be key to analyzing workforce trends in this area. In addition, data will be published on occupational employment and wages related to these establishments through the OES expansion.

**II. Current Action**

Office of Management and Budget clearance is being sought for the Quarterly Census of Employment and Wages Green Goods and Services Survey.

From the GGS survey, BLS intends to publish a quarterly count of employment associated with the output of green goods and services at U.S. business establishments to meet the requirement outlined in the 2010 Congressional Appropriation. BLS plans to publish detailed industry data for the U.S. and limited data for States.

This survey will use the business register, Quarterly Census of Employment and Wages (QCEW), maintained by BLS as its sampling frame. The register contains employment information on establishments in the U.S. subject to unemployment insurance taxes. This register covers 98 percent of U.S. jobs, available at the county, Metropolitan Statistical Area (MSA), State, and national levels by industry. The sampling frame for the GGS survey will be restricted to those establishments classified in NAICS codes that are determined to be in scope in the BLS definition of green goods and services.

BLS undertook extensive research to develop data collection forms and methodology and to understand the collection environment related to green goods and services. This research was outlined in a prior **Federal Register** Notice (75 FR 3926). The research was completed in September 2010; the forms put forth for clearance in this package were field-tested and incorporate the research and lessons learned from field testing of earlier versions of the survey form. The survey will collect data on employment, fiscal year, and revenue or employment share related to green goods and services at each establishment surveyed. The share of revenue will be used to estimate employment when employment share is not reported. BLS determined from prior research and from the recent forms development research that businesses have difficulty providing employment associated with the production of green goods and services while revenue is readily available and less burdensome for the respondent to report.

**III. Desired Focus of Comments**

The Bureau of Labor Statistics is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

*Type of Review:* New Collection.
*Agency:* Bureau of Labor Statistics.
*Title:* Green Goods and Services Survey.
*OMB Number:* 1220–NEW.
*Affected Public:* Private sector businesses or other for-profits, not-for-profit institutions, farms; Federal Government; State and local governments.
*Total Respondents:* 120,000.
*Frequency:* Annual.
*Total Responses:* 120,000.
*Average Time per Response:* 15 minutes.
*Estimated Total Burden Hours:* 30,000.
*Total Burden Cost (capital/startup):* 482,400.
*Total Burden Cost (operating/maintenance*): 482,400.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they also will become a matter of public record.

Signed at Washington, DC, this 5th day of November 2010.

**Kimberley Hill,**

*Chief, Division of Management Systems, Bureau of Labor Statistics.*

[FR Doc. 2010–28364 Filed 11–9–10; 8:45 am]

**BILLING CODE 4510–24–P**

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

### Proposed Revision of Information Collection: Comment Request National Medical Support Notice—Part B

**AGENCY:** Employee Benefits Security Administration.

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (the Department), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that the data the Department collects can be provided in the desired format, that the reporting burden on the public (time and financial resources) is minimized, that the public understands the Department's collection instruments, and that the Department can accurately assess the impact of its collection requirements on respondents.

Currently, the Employee Benefits Security Administration (EBSA) is soliciting comments concerning a revision to the information collections contained in the National Medical Support Notice—Part B. A copy of EBSA's information collection request (ICR) can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

**DATES:** Comments must be submitted to the office shown in the **ADDRESSES** section on or before January 10, 2011.

**ADDRESSES:** Direct all comments regarding the ICR and burden estimates to G. Christopher Cosby, Office of Policy

and Research, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Comments may be submitted in writing to the above address, via facsimile to (202) 219–4745, or electronically to the following Internet e-mail address: *ebsa.opr@dol.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Section 609(a) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), requires each group health plan, as defined in ERISA section 607(1), to provide benefits in accordance with the applicable requirements of any "qualified medical child support order" (QMCSO). A QMCSO is, generally, an order issued by a state court or other competent state authority that requires a group health plan to provide group health coverage to a child or children of an employee eligible for coverage under the plan. In accordance with Congressional directives contained in the Child Support Performance and Incentive Act of 1998 (CSPIA), EBSA and the Federal Office of Child Support Enforcement (OCSE) in the Department of Health and Human Services (HHS) cooperated in the development of regulations to create a National Medical Support Notice (NMSN or Notice). The Notice simplifies the issuance and processing of qualified medical child support orders issued by state child support enforcement agencies, provides for standardized communication between state agencies, employers, and plan administrators, and creates a uniform and streamlined process for enforcement of medical child support obligations ordered by state child support enforcement agencies. The NMSN comprises two parts: Part A was promulgated by HHS and pertains to state child support enforcement agencies and employers; Part B was promulgated by the Department and pertains to plan administrators pursuant to ERISA. This solicitation of public comment relates only to Part B of the NMSN, which was promulgated by the Department. In connection with promulgation of Part B of the NMSN, the Department submitted an ICR to the Office of Management and Budget (OMB) for review, and OMB approved the information collections contained in Part B under OMB control number 1210–0113. OMB's approval of this ICR is scheduled to expire on October 31, 2012.

## II. Desired Focus of Comments

The Department is currently soliciting comments on the information collections contained in the National Medical Support Notice—Part B. The Department is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* by permitting electronic submissions of responses.

## III. Current Actions

This notice requests comments on a revision to the ICR included in Part B of the NMSN. The Department is planning to make conforming changes to Part B of the NMSN reflecting changes HHS plans to make to Part A of the notice that were the subject of a 60-day public comment notice published by HHS in the **Federal Register** on June 28, 2010 (75 FR 36658). HHS has informed the Department that it received comments requesting HHS and the Department to synchronize their OMB approval dates (HHS's approval expires on March 31, 2011) and make the same revisions to data elements on Parts A and B of the NMSN. In response to these comments, the Department and HHS plan to make simultaneous submissions to OMB revising Parts A and B of the NMSN. A summary of the Department's ICR and its current burden estimates follows:

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* National Medical Support Notice—Part B.

*Type of Review:* Extension of a currently approved collection of information.

*OMB Number:* 1210–0113.

*Affected Public:* Individuals or households; Business or other for-profit; Not-for-profit institutions.

*Respondents:* 432,995.

*Responses:* 10,754,484.

*Estimated Total Burden Hours:* 896,207.

*Estimated Total Burden Cost (Operating and Maintenance):* $5,807,421.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the ICR; they will also become a matter of public record.

Dated: November 3, 2010.

**Joseph S. Piacentini,**

*Director, Office of Policy and Research, Employee Benefits Security Administration.*

[FR Doc. 2010–28305 Filed 11–9–10; 8:45 am]

**BILLING CODE 4510–29–P**

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## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

### Proposed Extension of Information Collection Request Submitted for Public Comment; Prohibited Transaction Exemptions 81–8, 96–62, 77–4, 98–54; Delinquent Filer Voluntary Compliance Program; Suspension of Benefits Regulation

**AGENCY:** Employee Benefits Security Administration, Department of Labor.

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Employee Benefits Security Administration (EBSA) is soliciting comments on the proposed extension of the information collection requests (ICRs) contained in the documents that are described below. A copy of the ICRs may be obtained by contacting the office listed in the **ADDRESSES** section of this notice. ICRs also are available at reginfo.gov (*http://www.reginfo.gov/public/do/PRAMain*).

**DATES:** Written comments must be submitted to the office shown in the **ADDRESSES** section on or before January 10, 2011.

**ADDRESSES:** G. Christopher Cosby, Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Washington,

DC 20210, (202) 693–8410, FAX (202) 693–4745 (these are not toll-free numbers).

**SUPPLEMENTARY INFORMATION:** This notice requests public comment on the Department's request for extension of the Office of Management and Budget's (OMB) approval of ICRs contained in the rules described below. The Department is not proposing any changes to the existing ICRs at this time. An agency may not conduct or sponsor, and a person is not required to respond to, an information collection unless it displays a valid OMB control number. A summary of the ICRs and the current burden estimates follows:

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* Class Exemption for Investment of Plan Assets in Certain Types of Short-Term Investments.

*Type of Review:* Extension without change of a currently approved collection of information.

*OMB Number:* 1210–0061.

*Affected Public:* Business or other for-profit; Not-for-profit institutions.

*Respondents:* 50,000.

*Responses:* 250,000.

*Estimated Total Burden Hours:* 41,700.

*Estimated Total Burden Cost (Operating and Maintenance):* $102,500.

*Description:* Prohibited Transaction Class Exemption 81–8 permits the investment of plan assets that involve the purchase or other acquisition, holding, sale, exchange or redemption by or on behalf of an employee benefit plan in certain types of short-term investments. These include investments in banker's acceptances, commercial paper, repurchase agreements, certificates of deposit, and bank securities. Absent the exemption, certain aspects of these transactions might be prohibited by section 406 and 407(a) of the Employee Retirement Income Security Act (ERISA).

In order to ensure that the exemption is not abused, that the rights of participants and beneficiaries are protected, and that the conditions of the exemption have been satisfied, the Department has included in the exemption two basic disclosure requirements. Both affect only the portion of the exemption dealing with repurchase agreements. The first requirement calls for the repurchase agreements between the seller and the plan to be in writing. The second requirement obliges the seller of such repurchase agreements to agree to provide financial statements to the plan at the time of the sale and as future statements are issued. The seller must also represent, either in the repurchase agreement or prior to the negotiation of each repurchase agreement transaction, that there has been no material adverse change in the seller's financial condition since the date that the most recent financial statement was furnished which has not been disclosed to the plan fiduciary with whom the written agreement is made.

Without the recording and disclosure requirements included in this ICR, participants and beneficiaries of a plan would not be protected in their investments, the Department would be unable to monitor a plan's activities for compliance, and plans would be at a disadvantage in assessing the value of certain short-term investment activities. The ICR is scheduled to expire on April 30, 2011.

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* Prohibited Transaction Class Exemption 96–62, Process for Expedited Approval of Exemption for Prohibited Transaction.

*Type of Review:* Extension without change of a currently approved collection of information.

*OMB Number:* 1210–0098.

*Affected Public:* Business or other for-profit; Not-for-profit institutions.

*Respondents:* 50.

*Responses:* 50.

*Estimated Total Burden Hours:* 62.

*Estimated Total Burden Cost (Operating and Maintenance):* $67,375.

*Description:* Section 408(a) of ERISA provides that the Secretary of Labor may grant exemptions from the prohibited transaction provisions of sections 406 and 407(a) of ERISA, and directs the Secretary to establish an exemption procedure with respect to such provisions. On July 31, 1996, the Department published Prohibited Transaction Exemption 96–62, which, pursuant to the exemption procedure set forth in 29 CFR 2570, subpart B, permits a plan to seek approval on an accelerated basis of otherwise prohibited transactions. A class exemption will only be granted on the conditions that the plan demonstrate to the Department that the transaction is substantially similar to those described in at least two prior individual exemptions granted by the Department and that it presents little, if any, opportunity for abuse or risk of loss to a plan's participants and beneficiaries. This ICR is intended to provide the Department with sufficient information to support a finding that the exemption meets the statutory standards of section 408(a) of ERISA, and to provide affected parties with the opportunity to comment on the proposed transaction, while at the same time reducing the regulatory burden associated with processing individual exemptions for transactions prohibited under ERISA. The ICR is scheduled to expire on April 30, 2011.

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* Class Exemption 77–4 for Certain Transactions Between Investment Companies and Employee Benefit Plans.

*Type of Review:* Extension without change of a currently approved collection of information.

*OMB Number:* 1210–0049.

*Affected Public:* Business or other for-profit; Not-for-profit institutions.

*Respondents:* 900.

*Responses:* 118,000.

*Estimated Total Burden Hours:* 10,301.

*Estimated Total Burden Cost (Operating and Maintenance):* $167,000.

*Description:* Without the relief provided by this exemption, an open-end mutual fund would be unable to sell shares to, or purchase shares from, a plan when the fiduciary with respect to the plan is also the investment advisor for the mutual fund. As a result, plans would be compelled to liquidate their existing investments involving such transactions and to amend their plan documents to establish new investment structures and policies.

In order to ensure that the exemption is not abused and that the rights of participants and beneficiaries are protected, the Department has included in the exemption three basic disclosure requirements. The first requires at the time of the purchase or sale of such mutual fund shares that the plan's independent fiduciary receive a copy of the current prospectus issued by the open-end mutual fund and a full and detailed written statement of the investment advisory fees charged to or paid by the plan and the open-end mutual fund to the investment advisor. The second requires that the independent fiduciary approve in writing such purchases and sales. The third requires that the independent fiduciary, once notified of changes in the fees, re-approve in writing the purchase and sale of mutual fund shares. The ICR is scheduled to expire on April 30, 2011.

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* PTE 98–54 Relating to Certain Employee Benefit Plan Foreign Exchange Transactions Executed Pursuant to Standing Instructions.

*Type of Review:* Extension without change of a currently approved collection of information.

*OMB Number:* 1210–0111.

*Affected Public:* Business or other for-profit; Not-for-profit institutions.

*Respondents:* 35.

*Responses:* 8,400.

*Estimated Total Burden Hours:* 4,200.

*Estimated Total Burden Cost (Operating and Maintenance):* $0.

*Description:* PTE 98–54 permits certain foreign exchange transactions between employee benefit plans and certain banks, broker-dealers, and domestic affiliates thereof, which are parties in interest with respect to such plans, pursuant to standing instructions. In the absence of an exemption, foreign exchange transactions pursuant to standing instructions would be prohibited under circumstances where the bank or broker-dealer is a party in interest or disqualified person with respect to the plan under ERISA or the Internal Revenue Code.

The class exemption has five basic information collection requirements. The first requires the bank or broker-dealer to maintain written policies and procedures for handling foreign exchange transactions for plans for which it is a party in interest, which policies and procedures ensure that the party acting for the bank or broker-dealer knows it is dealing with a plan. The second requires that the transactions are performed in accordance with a written authorization executed in advance by an independent fiduciary of the plan. The third requires that the bank or broker-dealer provides the authorizing fiduciary with a copy of its written policies and procedures for foreign exchange transactions involving income item conversions and de minimis purchase and sale transactions prior to the execution of a transaction. The fourth requires the bank or broker-dealer to furnish the authorizing fiduciary a written confirmation statement with respect to each covered transaction within five days after execution. The fifth requires that the bank or broker-dealer maintains records necessary for plan fiduciaries, participants, the Department, and the Internal Revenue Service, to determine whether the conditions of the exemption are being met for a period of six years form the date of execution of a transaction.

By requiring that records pertaining to the exempted transaction be maintained for six years, this ICR ensures that the exemption is not abused, the rights of the participants and beneficiaries are protected, and that compliance with the exemption's conditions can be confirmed. The exemption affects participants and beneficiaries of the plans that are involved in such transactions, as well as, certain banks, broker-dealers, and domestic affiliates thereof. The ICR currently is scheduled to expire on April 30, 2011.

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* Delinquent Filer Voluntary Compliance Program.

*Type of Review:* Extension without change of a currently approved collection of information.

*OMB Number:* 1210–0089.

*Affected Public:* Business or other for-profit; Not-for-profit institutions.

*Respondents:* 15,000.

*Responses:* 15,000.

*Estimated Total Burden Hours:* 750.

*Estimated Total Burden Cost (Operating and Maintenance):* $608,250.

*Description:* The Secretary of Labor has the authority, under section 502(c)(2) of ERISA, to assess civil penalties of up to $1,000 a day against plan administrators who fail or refuse to file complete and timely annual reports (Form 5500 Series Annual Return/Reports) as required under section 101(b)(4) of ERISA-related regulations. Pursuant to 29 CFR 2560.502c–2 and 2570.60 et seq., EBSA has maintained a program for the assessment of civil penalties for noncompliance with the annual reporting requirements. Under this program, plan administrators filing annual reports after the date on which the report was required to be filed may be assessed $50 per day for each day an annual report is filed after the date on which the annual report(s) was required to be filed, without regard to any extensions for filing.

Plan administrators who fail to file an annual report may be assessed a penalty of $300 per day, up to $30,000 per year, until a complete annual report is filed. Penalties are applicable to each annual report required to be filed under Title I of ERISA. The Department may, in its discretion, waive all or part of a civil penalty assessed under section 502(c)(2) upon a showing by the administrator that there was reasonable cause for the failure to file a complete and timely annual report.

The Department has determined that the possible assessment of these civil penalties may deter certain delinquent filers from voluntarily complying with the annual reporting requirements under Title I of ERISA. In an effort to encourage annual reporting compliance, therefore, the Department implemented the Delinquent Filer Voluntary Compliance (DFVC) Program (the Program) on April 27, 1995 (60 FR 20873). Under the Program, administrators otherwise subject to the assessment of higher civil penalties are permitted to pay reduced civil penalties for voluntarily complying with the annual reporting requirements under Title I of ERISA.

This ICR covers the requirement of providing data necessary to identify the plan along with the penalty payment. This data is the means by which each penalty payment is associated with the appropriate plan. With respect to most pension plans and welfare plans, the requirement is satisfied by sending a photocopy of the delinquent Form 5500 annual report that has been filed, along with the penalty payment.

Under current regulations, apprenticeship and training plans may be exempted from the reporting and disclosure requirements of Part 1 of Title I, and certain pension plans maintained for highly compensated employees, commonly called "top hat" plans, may comply with these reporting and disclosure requirements by using an alternate method by filing a one-time identifying statement with the Department. The DFVC Program provides that apprenticeship and training plans and top hat plans may, in lieu of filing any past due annual reports and paying otherwise applicable civil penalties, complete and file specific portions of a Form 5500, file the identifying statements that were required to be filed, and pay a one-time penalty. The ICR currently is scheduled to expire on May 31, 2011.

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* Suspension of Pension Benefits Regulation Pursuant to 29 CFR 2530.203–3.

*Type of Review:* Extension without change of a currently approved collection of information.

*OMB Number:* 1210–0048.

*Affected Public:* Business or other for-profit; Not-for-profit institutions.

*Respondents:* 47,614.

*Responses:* 233,181.

*Estimated Total Burden Hours:* 162,274.

*Estimated Total Burden Cost (Operating and Maintenance):* $107,263.

*Description:* Section 203(a)(3)(B) of ERISA governs the circumstances under which pension plans may suspend pension benefit payments to retirees that return to work or to participants that continue to work beyond normal retirement age. Furthermore, section 203(a)(3)(B) of ERISA authorizes the Secretary to prescribe regulations necessary to carry out the provisions of this section.

In this regard, the Department issued a regulation which describes the circumstances and conditions under which plans may suspend the pension benefits of retirees that return to work,

or of participants that continue to work beyond normal retirement age (29 CFR 2530.203–3). In order for a plan to suspend benefits pursuant to the regulation, it must notify affected retirees or participants (by first class mail or personal delivery) during the first calendar month or payroll period in which the plan withholds payment, that benefits are suspended. This notice must include the specific reasons for such suspension, a general description of the plan provisions authorizing the suspension, a copy of the relevant plan provisions, and a statement indicating where the applicable regulations may be found (*i.e.,* 29 CFR 2530.203–3). In addition, the suspension notification must inform the retiree or participant of the plan's procedure for affording a review of the suspension of benefits. The ICR currently is scheduled to expire on May 31, 2011.

### III. Focus of Comments

The Department is particularly interested in comments that:

- Evaluate whether the collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the collections of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* by permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the ICRs for OMB approval of the extension of the information collection; they will also become a matter of public record.

Dated: November 3, 2010.

**Joseph S. Piacentini,**

*Director, Office of Policy and Research, Employee Benefits Security Administration.*

[FR Doc. 2010–28306 Filed 11–9–10; 8:45 am]

**BILLING CODE 4510–29–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Notice of a Change in Status of an Extended Benefit (EB) Period for Alaska and Wisconsin

**AGENCY:** Employment and Training Administration, Labor.

**ACTION:** Notice.

**SUMMARY:** This notice announces a change in benefit period eligibility under the Extended Benefits program for Alaska and Wisconsin.

The following changes have occurred since the publication of the last notice regarding the States' EB status:

- The Total Unemployment Rate (TUR) data for August 2010, released on September 21, 2010, by the Bureau of Labor Statistics, brought the three-month average seasonally adjusted TURs in Alaska and Wisconsin below the 8.0% threshold to remain "on" for a High Unemployment Period (HUP) in the Extended Benefits program. As a result, Alaska and Wisconsin concluded their HUP on October 16 and eligibility for claimants has been reduced from a maximum potential entitlement of 20 weeks to a maximum potential entitlement of 13 weeks in the Extended Benefits program.

The trigger notice covering state eligibility for the Extended Benefit program can be found at: *http://ows.doleta.gov/unemploy/claims_arch.asp.* A new trigger notice is posted at this location each week.

### Information for Claimants

The duration of benefits payable in the EB Program, and the terms and conditions on which they are payable, are governed by the Federal-State Extended Unemployment Compensation Act of 1970, as amended, and the operating instructions issued to the states by the U.S. Department of Labor. In the case of a state beginning an EB period, the State Workforce Agency will furnish a written notice of potential entitlement to each individual who has exhausted all rights to regular benefits and is potentially eligible for EB (20 CFR 615.13(c)(1)).

Persons who believe they may be entitled to EB, or who wish to inquire about their rights under the program, should contact their State Workforce Agency.

**FOR FURTHER INFORMATION CONTACT:** Scott Gibbons, U.S. Department of Labor, Employment and Training Administration, Office of Workforce Security, 200 Constitution Avenue, NW., Frances Perkins Bldg. Room S–4231, Washington, DC 20210, telephone number (202) 693–3008 (this is not a toll-free number) or by *e-mail: gibbons.scott@dol.gov.*

Signed in Washington, DC, this 4th day of November 2010.

**Jane Oates,**

*Assistant Secretary, Employment and Training Administration.*

[FR Doc. 2010–28350 Filed 11–9–10; 8:45 am]

**BILLING CODE 4510–FW–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Announcement Regarding the Virgin Islands Triggering "on" to Tier Three of Emergency Unemployment Compensation 2008 (EUC08)

**AGENCY:** Employment and Training Administration, Labor.

**ACTION:** Notice.

**SUMMARY:** Announcement regarding the Virgin Islands triggering "on" to Tier Three of Emergency Unemployment Compensation 2008 (EUC08).

Public Law 111–205 extended provisions in public law 111–92 which amended prior laws to create a Third and Fourth Tier of benefits within the EUC08 program for qualified unemployed workers claiming benefits in high unemployment states. The Department of Labor produces a trigger notice indicating which states qualify for EUC08 benefits within Tiers Three and Four and provides the beginning and ending dates of payable periods for each qualifying state. The trigger notice covering state eligibility for the EUC08 program can be found at: *http://ows.doleta.gov/unemploy/claims_arch.asp.* A new trigger notice is posted at this location each week that the program is in effect.

Based on data published October 8, 2010 by the Bureau of Labor Statistics, the following trigger change has occurred for the Virgin Islands' EUC08 program:

- The seasonally-adjusted total unemployment rate for the 3-month period ending September 2010 for the Virgin Islands rose to 6.2 percent, causing the Virgin Islands to begin a payable period in the third tier of EUC effective October 24, 2010. Eligibility for claimants in the Virgin Islands will be increased from a maximum potential entitlement of 34 weeks to a maximum potential entitlement of 47 weeks in the EUC program.

**Information for Claimants**

The duration of benefits payable in the EUC program, and the terms and conditions under which they are payable, are governed by public laws 110–252, 110–449, 111–5, 111–92, 111–118, 111–144, 111–157, and 111–205, and the operating instructions issued to the states by the U.S. Department of Labor. Persons who believe they may be entitled to additional benefits under the EUC08 program, or who wish to inquire about their rights under the program, should contact their State Workforce Agency.

**FOR FURTHER INFORMATION CONTACT:** Scott Gibbons, U.S. Department of Labor, Employment and Training Administration, Office of Workforce Security, 200 Constitution Avenue, NW., Frances Perkins Bldg. Room S–4231, Washington, DC 20210, telephone number (202) 693–3008 (this is not a toll-free number) or by email: *gibbons.scott@dol.gov.*

Signed in Washington, DC, this 4th day of November 2010.

**Jane Oates,**

*Assistant Secretary, Employment and Training Administration.*

[FR Doc. 2010–28349 Filed 11–9–10; 8:45 am]

**BILLING CODE 4510–FW–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Announcement Regarding States Triggering "off" of Tiers Three and Four of Emergency Unemployment Compensation 2008 (EUC08)

**AGENCY:** Employment and Training Administration, Labor.

**ACTION:** Notice.

**SUMMARY:** Announcement regarding states triggering "off" of Tiers Three and Four of the Emergency Unemployment Compensation (EUC08) program.

Public Law 111–205 extended provisions in Public Law 111–92 which amended prior laws to create a Third and Fourth Tier of benefits within the EUC08 program for qualified unemployed workers claiming benefits in high unemployment states. The Department of Labor produces a trigger notice indicating which states qualify for EUC08 benefits within Tiers Three and Four and provides the beginning and ending dates of payable periods for each qualifying state. The trigger notice covering state eligibility for the EUC08 program can be found at: *http://ows.doleta.gov/unemploy/claims_arch.asp.* A new trigger notice is posted at this location each week that the program is in effect.

Based on data published September 21, 2010 by the Bureau of Labor Statistics, the following trigger changes have occurred for states in the EUC08 program:

- New Hampshire's three month average seasonally-adjusted TUR for August declined to 5.8%, below the 6.0% threshold to remain "on" Tier Three, hence the state triggered off of Tier Three. As a result, New Hampshire concluded its payable period in the third tier of the EUC program on October 16, 2010. Eligibility for claimants in New Hampshire have been reduced from a maximum potential entitlement of 47 weeks to a maximum potential entitlement of 34 weeks in the EUC program.
- Delaware's three month average seasonally-adjusted TUR for August 2010 declined to 8.4%, below the 8.5% threshold to remain "on" Tier Four hence the state has triggered off of Tier Four. As a result, Delaware concluded its payable period in the Fourth tier of the EUC program on October 16, 2010. Eligibility for claimants in Delaware has been reduced from a maximum potential entitlement of 53 weeks to a maximum potential entitlement of 47 weeks in the EUC program.

**Information for Claimants**

The duration of benefits payable in the EUC program, and the terms and conditions under which they are payable, are governed by Public Laws 110–252, 110–449, 111–5, 111–92, 111–118, 111–144, 111–157, and 111–205, and the operating instructions issued to the states by the U.S. Department of Labor. Persons who believe they may be entitled to additional benefits under the EUC08 program, or who wish to inquire about their rights under the program, should contact their State Workforce Agency.

**FOR FURTHER INFORMATION CONTACT:** Scott Gibbons, U.S. Department of Labor, Employment and Training Administration, Office of Workforce Security, 200 Constitution Avenue, NW., Frances Perkins Bldg. Room S–4231, Washington, DC 20210, telephone number (202) 693–3008 (this is not a toll-free number) or by e-mail: *gibbons.scott@dol.gov.*

Signed in Washington, DC, this 4th day of November 2010.

**Jane Oates,**

*Assistant Secretary, Employment and Training Administration.*

[FR Doc. 2010–28348 Filed 11–9–10; 8:45 am]

**BILLING CODE 4510–FW–P**

## NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

### Submission for OMB Review, Comment Request, Proposed Collection: Public Libraries Survey, FY 2011–2013

**AGENCY:** Institute of Museum and Library Services, National Foundation for the Arts and the Humanities.

**ACTION:** Submission for OMB review, comment request.

**SUMMARY:** The Institute of Museum and Library Services announces the following information collection has been submitted to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

**DATES:** Written comments must be submitted to the office listed in the **CONTACT** section below on or before December 7, 2010.

OMB is particularly interested in comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used;
- Enhance the quality, utility and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.* permitting electronic submissions of responses.

**ADDRESSES:** Kim A. Miller, Management Analyst, Office of Policy, Planning, Research, and Communication, Institute of Museum and Library Services, 1800 M Street, NW., 9th Floor, Washington, DC 20036. *Telephone:* 202–653–4762; *Fax:* 202–653–4600; or e-mail: *kmiller@imls.gov*, or by *teletype* (TTY/

TDD) for persons with hearing difficulty at 202/653–4614.

**SUPPLEMENTARY INFORMATION:** The Institute of Museum and Library Services (IMLS) is an independent Federal grant-making agency and is the primary source of Federal support for the Nation's 123,000 libraries and 17,500 museums. IMLS provides a variety of grant programs to assist the Nation's museums and libraries in improving their operations and enhancing their services to the public. IMLS is responsible for identifying national needs for, and trends of, museum and library services funded by IMLS; reporting on the impact and effectiveness of programs conducted with funds made available by IMLS in addressing such needs; and identifying, and disseminating information on, the best practices of such programs. (20 U.S.C. Chapter 72, 20 U.S.C. 9108).

*Abstract:* The Public Libraries Survey has been conducted by the Institute of Museum and Library Services under the clearance number 3137–0074, which expires 11/30/2010. This survey collects annual descriptive data on the universe of public libraries in the U.S. and the Outlying Areas. Information such as public service hours per year, circulation of library books, etc., number of librarians, population of legal service area, expenditures for library collection, staff salary data, and access to technology are collected.

*Current Actions:* This notice proposes clearance of the Public Libraries Survey. The 60-day notice for the Public Libraries Survey, FY 2011–2013, was published in the **Federal Register** on August 23, 2010, (FR vol. 75, No. 162, pgs. 51853–51854). The agency has taken into consideration the two comments that were received under this notice.

*Agency:* Institute of Museum and Library Services.

*Title:* Public Libraries Survey, 2011–2013.

*OMB Number:* 3137–0074.

*Agency Number:* 3137.

*Affected Public:* State and local governments, State library agencies, and public libraries.

*Number of Respondents:* 55.

*Note:* 55 StLAs administer state-based surveys to the public libraries in their respective States and Outlying Areas on an annual basis. A portion of the state-based survey data is then provided to IMLS, which aggregates the information into the national PLS dataset.

*Frequency:* Annually.

*Burden hours per respondent:* 85.7.

*Total burden hours:* 4,541.

*Total Annualized capital/startup costs:* n/a.

*Total Annual Costs:* $119,428.

Contact: Comments should be sent to Office of Information and Regulatory Affairs, *Attn.:* OMB Desk Officer for Education, Office of Management and Budget, Room 10235, Washington, DC 20503, (202) 395–7316.

Dated: November 5, 2010.

**Kim A. Miller,**

*Management Analyst, Office of Policy, Planning, Research, and Communication.*

[FR Doc. 2010–28353 Filed 11–9–10; 8:45 am]

**BILLING CODE 7036–01–P**

## NATIONAL SCIENCE FOUNDATION

### Agency Information Collection Activities: Comment Request

**AGENCY:** National Science Foundation.

**ACTION:** Submission for OMB review; comment request.

**SUMMARY:** The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. This is the second notice for public comment; the first was published in the **Federal Register** at 74 FR 32196, and no comments addressing the areas in question were received. NSF is forwarding the proposed renewal submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for National Science Foundation, 725–17th Street, NW., Room 10235, Washington, DC 20503, and to Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230 or send e-mail to *splimpto@nsf.gov.* Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling 703–292–7556.

NSF may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

**SUPPLEMENTARY INFORMATION:**

*Title of Collection:* Evaluation of the National Science Foundation's Math and Science Partnership (MSP) Program.

*OMB Control No.:* 3145–0200.

*Abstract:* The National Science Foundation (NSF) requests a three-year clearance for an evaluation of the Math and Science Partnership (MSP) program. The MSP program is a research and development (R&D) effort funded by the NSF to integrate the work of higher education, especially disciplinary faculty in math, sciences, and engineering, with that of K–12 communities in order to strengthen and reform math and science education. The program is authorized under the NSF Authorization Act of 2002 (Pub. L. 107–368), December 19, 2002 (to authorize appropriations for FY 2003–07 and "for other purposes"). MSP is among 11 programs specifically authorized by the legislation (Sec. 11 authorizes a 12th program, the Centers for Research on Mathematics and Science Learning and Education Improvement).

NSF's MSP program portfolio consists of about 80 awards or projects (*e.g.* design grants, standard or continuing grants or cooperative agreements) that initially were funded between 2002 and 2004. The type of awards subject to study and data collection, however, include only the comprehensive MSPs, targeted MSPs and teacher institute partnerships, or a universe of approximately 65 discrete projects.

The evaluation's data collection and analysis activities will be conducted by COSMOS Corporation, Bethesda, MD, in partnership with Brown University via a contract administered by the NSF's Division of Research, Evaluation and Communication (REC). This evaluation involves both quantitative and qualitative data, collected from multiple sources using multiple methods, including secondary analyses of project-related materials such as existing databases (MSP Management Information System—OMB 3145–0199), annual reports, Web sites, and relevant

policy and methodological documents and original data collection through one-on-one interviews with key stakeholders conducted during site visits. For the MSP Management Information System, the contract team will analyze these data using quantitative statistical models. A second data source consists of annual project reports and other reports submitted by the MSP grantees to the NSF in accordance with Federal research project reporting requirements established at NSF under OMB 3145–0058. A third source is U.S. Department of Education's public use files on student achievement and school systems' demographic characteristics.

The fourth source for data is the proposed evaluation's original data collection activities. In particular and principally a series of site visits will be conducted during 2006–2011.

The evaluation's overall framework consists of several substudies each focusing on a different, but essential part of the MSP grantees' work (*e.g.,* partnerships, the role of disciplinary faculty, student achievement). The relevant evaluation design under these conditions might be considered a meta-analytic rather than singular design—*e.g.,* providing a rationale for the selection of substudies as well as some guidance for conducting the substudies. Consultations have occurred with a team of external experts on the research design during the evaluation's design phase and will continue to take place throughout the evaluation. The team of external experts represents the nation's leading researchers and scholars on methodology and content in the field of evaluation and representatives are from top-tier university schools of education and departments of mathematics or science; an education advocacy group; and an education research council.

The data collection instruments include face-to-face interviews, such as focus groups, and telephone or electronic surveys. An interview protocol based on the evaluation framework will be administered during the site visits. Expected respondents at site visits are Principal Investigators, co-Principal Investigators, administrators, teams of external experts, and other stakeholders who participated in MSP. There are no costs to respondents other than the time involved in the interview or survey process.

Information from the evaluation's data collections and analysis will be used to improve the NSF's program processes and outcomes. It will enable NSF to prepare and publish reports, and to respond to requests from Committees of Visitors, Congress, and the Office of Management and Budget, particularly as related to the Government Performance and Results Act (GPRA) and the Program Effectiveness Rating Tool (PART).

The primary evaluation questions include but are not limited to:

(1) How has the MSP Program effected or influenced the expertise, numbers, and diversity of the mathematics and science teaching force, K–12 student achievement in mathematics and science, and other presumed program outcomes?

(2) What factors or attributes have accelerated or constrained progress in the MSP Program's achievements? and

(3) How have institutions of higher education (IHEs) disciplinary faculty (mathematics, science, and engineering) participated in the MSP Program, and what has been their role in the Program's achievements?

*Respondents:* Individuals and not-for-profit institutions.

*Estimated Number of Total Respondents:* 352.

*Total Burden on the Public:* 960 hours.

Dated: November 4, 2010.

**Suzanne H. Plimpton,**

*Reports Clearance Officer, National Science Foundation.*

[FR Doc. 2010–28308 Filed 11–9–10; 8:45 am]

**BILLING CODE 7555–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 50–361 and 50–362; NRC–2010–0101]**

## Southern California Edison Company, San Onofre Nuclear Generating Station, Units 2 and 3; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an exemption, pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR) Section 73.5, "Specific exemptions," from the implementation date for certain new requirements of 10 CFR part 73, "Physical protection of plants and materials," for Facility Operating License Nos. NPF–10, and NPF–15, issued to Southern California Edison Company (SCE, the licensee), for operation of the San Onofre Nuclear Generating Station, Units 2 and 3 (SONGS 2 and 3), located in San Diego County, California. In accordance with 10 CFR 51.21, the NRC prepared an environmental assessment documenting its finding. The NRC concluded that the proposed actions will have no significant environmental impact.

**Environmental Assessment**

*Identification of the Proposed Action*

The proposed action would exempt SCE from the required implementation date of March 31, 2010, for one new requirement of 10 CFR part 73. Specifically, SCE would be granted a second exemption, further extending the date for full compliance with one new requirement contained in 10 CFR 73.55, from October 31, 2010 (the date specified in a prior exemption granted by NRC on March 16, 2010), until February 28, 2011. SCE has proposed an alternate full compliance implementation date of February 28, 2011, which is approximately 11 months beyond the compliance date required by 10 CFR Part 73. The proposed action, an extension of the schedule for completion of certain actions required by the revised 10 CFR part 73, does not involve any physical changes to the reactors, fuel, plant structures, support structures, water, or land at the SONGS 2 and 3 site.

The proposed action is in accordance with the licensee's application dated August 24, 2010, as supplemented by letter dated October 17, 2010. The NRC staff's safety evaluation will be provided in the exemption that will be issued as part of the letter to the licensee approving the exemption from the regulation, if granted.

*The Need for the Proposed Action*

The proposed action, a second scheduler exemption, is needed to provide the licensee with additional time to implement one specific element of the new requirements in 10 CFR part 73, which involves significant physical modifications to the SONGS 2 and 3 security systems. While the licensee completed much of the work required by the 10 CFR Part 73 rule change at SONGS 2 and 3 by the March 31, 2010, implementation date, and has made substantial progress on completing the remaining item for which the previous scheduler exemption was granted, SCE requires additional time to complete all modifications associated with the single remaining item to achieve full compliance with 10 CFR part 73.

*Environmental Impacts of the Proposed Action*

The NRC has completed its environmental assessment of the proposed action. The staff has concluded that the proposed action to further extend the implementation deadline for one item would not

significantly affect plant safety and would not significantly affect the probability of an accident.

The proposed action would not result in an increased radiological hazard beyond those hazards previously analyzed in the environmental assessment and finding of no significant impact made by the Commission in promulgating its revisions to 10 CFR part 73 as discussed in a **Federal Register** notice dated March 27, 2009; 74 FR 13926. There will be no change to radioactive effluents or emissions that affect radiation exposures to plant workers and members of the public. Therefore, no radiological impacts are expected as a result of the proposed exemption.

The proposed action is an extension of the compliance deadline and will not result in any additional construction or major renovation of any buildings or structures, nor any ground disturbing activities, beyond the security improvements previously planned to achieve compliance with the new rule. No changes in the size of the workforce, or in traffic to or around SONGS 2 and 3, are expected as a result of an extension of the compliance deadline. Providing the licensee with additional time to comply with the revised requirements of 10 CFR 73.55 would not alter land use, air quality, and water use (quality and quantity) conditions or National Pollutant Discharge Elimination System permits at SONGS 2 and 3. Aquatic and terrestrial habitat in the vicinity of the plant; threatened, endangered, and protected species under the Endangered Species Act; and essential fish habitat covered by the Magnuson-Stevens Act would not be affected. In addition, historic and cultural resources, socioeconomic conditions, and minority- and low-income populations in the vicinity of SONGS 2 and 3 would also not be affected by this action. Therefore, no changes to or different types of non-radiological environmental impacts are expected as a result of the proposed exemption.

As previously noted, in promulgating its amendments to 10 CFR part 73, the Commission prepared an environmental assessment of the rule change and published a finding of no significant impact (10 CFR parts 50, 52, 72, and 73, Power Reactor Security Requirements, March 27, 2009; 74 FR 13926). Thus, through the proposed action, the Commission would be granting additional time for the licensee to comply with regulatory requirements for which the Commission has already found no significant impact.

For the foregoing reasons, the NRC concludes that there would be no significant radiological or non-radiological environmental impacts associated with the extension of the implementation date for one element of the new requirements of 10 CFR 73.55 for SONGS 2 and 3.

*Environmental Impacts of the Alternatives to the Proposed Action*

As an alternative to the proposed action, the NRC staff considered denial of the proposed action (*i.e.,* the "no-action" alternative). Denial of the exemption request would result in no change in current environmental impacts. Denial of the exemption request would result in the licensee being in non-compliance with 10 CFR 73.55(a)(1) and thus, subject to NRC enforcement action. The end result, however, would still be ultimate licensee compliance with the requirements of 10 CFR 73.55, but with the added expense to both the NRC and the licensee of any enforcement actions. The NRC concludes that the environmental impacts of the proposed exemption and the "no action" alternative are similar.

*Alternative Use of Resources*

The proposed action does not involve the use of any different resources than those previously considered in the Final Environmental Statement for SONGS Units 2 and 3, dated May 12, 1981.

*Agencies and Persons Consulted*

In accordance with its stated policy, on October 22, 2010, the NRC staff consulted with the California State official, Mr. Stephen Hsu of the California Department of Public Health, regarding the environmental impact of the proposed action. The State official had no comments.

**Finding of No Significant Impact**

On the basis of the above environmental assessment, which in accordance with 10 CFR 51.32(a)(4), is incorporated into this finding of no significant impact by reference, the NRC concludes that the proposed action constitutes an administrative change (timing) that would not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated August 24, 2010, as supplemented by letter dated October 17, 2010. Portions of the August 24 and October 17, 2010, submittals contain safeguards and security-related information and, accordingly, redacted versions of those letters are available for public review in the Agencywide Documents Access and Management System (ADAMS), at Accession Nos. ML102380401 and ML102920691, respectively. These documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O–1F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available records will be accessible electronically from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site: *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209 or 301–415–4737, or send an e-mail to pdr.resource@nrc.gov.

Dated at Rockville, Maryland, November 3, 2010.

For the Nuclear Regulatory Commission.

**James R. Hall,**

*Senior Project Manager, Plant Licensing Branch IV, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2010–28395 Filed 11–9–10; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 50–366; NRC–2010–0345]**

## Southern Nuclear Operating Company Inc. Edwin I. Hatch Nuclear Plant, Unit No. 2 Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering the issuance of an exemption from Title 10 of the *Code of Federal Regulations,* (10 CFR), Section 50.46, "Acceptance criteria for emergency core cooling systems for light-water nuclear power reactors," and 10 CFR Part 50, Appendix K, "ECCS Evaluation Models," for the Renewed Facility Operating License No. NPF–5, issued to Southern Nuclear Company (SNC, the licensee), for operation of the Edwin I. Hatch Nuclear Plant (HNP), Unit 2, located in Appling County, Georgia. In accordance with the requirements of 10 CFR Part 51, the NRC has prepared an Environmental Assessment (EA) in support of this exemption. Based on the EA, the NRC has concluded that a Finding of No Significant Impact (FONSI) is appropriate.

**Environmental Assessment**

*Identification of the Proposed Action*

The proposed action would allow SNC to use GNF–Ziron (GNF—Global Nuclear Fuel), an advanced alloy fuel cladding material for boiling-water reactors which is similar in composition to Zircaloy-2, but contains slightly higher iron content than specified in American Society for Testing and Materials B350 (ASTM B350). The proposed action is in accordance with the licensee's application dated May 12, 2010 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML101340739).

*The Need for the Proposed Action*

The proposed action is needed so that SNC can use GNF–Ziron as an advanced alloy for fuel rod cladding and other assembly structural components at the HNP.

Section 50.46 of 10 CFR and 10 CFR Part 50, Appendix K, make no provisions for use of fuel rods clad in a material other than zircaloy or ZIRLO™. Since the chemical composition of the GNF–Ziron alloy differs from the specifications for zircaloy or ZIRLO™, a plant-specific exemption is required to allow the use of the GNF–Ziron alloy as a cladding material or in other assembly structural components at the HNP.

*Environmental Impacts of the Proposed Action*

The NRC has completed its environmental assessment of the proposed exemption. The staff has concluded that the proposed action to use GNF–Ziron fuel rod cladding material would not significantly affect plant safety and would not have a significant adverse effect on the probability of an accident occurring.

The proposed action would not result in an increased radiological hazard beyond those previously analyzed in the Safety Analysis Report. There will be no change to radioactive effluents that affect radiation exposures to plant workers and members of the public. No changes will be made to plant buildings or the site property. Therefore, no changes or different types of radiological impacts are expected as a result of the proposed exemption.

The proposed action does not result in changes to land use or water use, or result in changes to the quality or quantity of non-radiological effluents. No changes to the National Pollution Discharge Elimination System permit are needed. No effects on the aquatic or terrestrial habitat in the vicinity of the plant, or to threatened, endangered, or protected species under the Endangered Species Act, or impacts to essential fish habitat covered by the Magnuson-Steven's Act are expected. There are no impacts to the air or ambient air quality.

There are no impacts to historical and cultural resources. There would be no noticeable effect on socioeconomic conditions in the region. Therefore, no changes to or different types of non-radiological environmental impacts are expected as a result of the proposed action. Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action. The details of the NRC staff's safety evaluation will be provided in the exemption that will be issued as part of the letter to the licensee approving the exemption to the regulation, if granted.

*Environmental Impacts of the Alternatives to the Proposed Action*

As an alternative to the proposed action, the staff considered denial of the proposed action (i.e., the "no-action" alternative). Denial of the exemption request would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

*Alternative Use of Resources*

The action does not involve the use of any different resources than those considered in the Final Environmental Statement for the Edwin I. Hatch Nuclear Plant, Unit No. 2, dated 1978 and the Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding Edwin I. Hatch Nuclear Plant, Units 1 and 2—Final Report (NUREG–1437, Supplement 4) dated May 2001 (ADAMS Accession No. ML011420057)

*Agencies and Persons Consulted*

In accordance with its stated policy, on October 25, 2010, the staff consulted with the Georgia State official, Mr. Jim Hardeman of the Department of Natural Resources, regarding the environmental impact of the proposed action. The State official had no comments.

**Finding of No Significant Impact**

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

**Further Information**

Documents related to this action, including the application for an exemption and license amendment and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession number for the document related to this notice, "Edwin I. Hatch, Unit 2 Proposed Exemption from Fuel Cladding Material Requirements in 10 CFR 50.46 and 10 CFR Appendix K," dated May 12, 2010, including non-proprietary publically available versions of its enclosures, is ML101340739. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr.resource@nrc.gov.*

The document may also be viewed electronically on the public computers located at the NRC's Public Document Room (PDR), O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at Rockville, Maryland, November 2, 2010.

For the Nuclear Regulatory Commission.

**Robert E. Martin,**

*Senior Project Manager, Plant Licensing Branch II–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2010–28400 Filed 11–9–10; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 50–133; NRC–2010–0346]**

## Environmental Assessment and Finding of No Significant Impact Related to Exemption of Material for Proposed Disposal Procedures for the Humboldt Bay Power Plant, Unit No. 3, License DPR–007, Eureka, CA

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Environmental Assessment and Finding of No Significant Impact.

**FOR FURTHER INFORMATION CONTACT:** John Hickman, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental

Management Programs, U.S. Nuclear Regulatory Commission, Mail Stop: T8F5, Washington, DC 20555–00001, telephone (301) 415–3017, e-mail *john.hickman@nrc.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) staff is considering a request dated April 1, 2010, as supplemented August 12, 2010, by Pacific Gas and Electric Company (PG&E, the licensee) for alternate disposal of approximately 200,000 cubic feet of hazardous waste containing low-activity radioactive debris, at the US Ecology Idaho (USEI) Resource Conservation and Recovery Act (RCRA) Subtitle C hazardous disposal facility located near Grand View, Idaho. This request was made under the alternate disposal provision contained in 10 CFR 20.2002 and the exemption provision in 10 CFR 30.11.

This Environmental Assessment (EA) has been developed in accordance with the requirements of 10 CFR 51.21.

## II. Environmental Assessment

*Identification of Proposed Action*

On July 2, 1976, Humboldt Bay Power Plant (HBPP) Unit 3 was shut down for annual refueling and to conduct seismic modifications. In 1983, updated economic analyses indicated that restarting Unit 3 would probably not be cost-effective, and in June 1983, Pacific Gas and Electric Company (PG&E) announced its intention to decommission the unit. On July 16, 1985, the U.S. Nuclear Regulatory Commission (NRC) issued Amendment No. 19 to the HBPP Unit 3 Operating License to change the status to possess-but-not-operate. In December of 2008, the transfer of spent fuel from the fuel storage pool to the dry-cask Independent Spent Fuel Storage Installation was completed, and the decontamination and dismantlement phase of HBPP Unit 3 decommissioning commenced. In 2010 the construction of a new power generation facility on site will be completed and the licensee will begin dismantlement of the non-nuclear HBPP Units 1 and 2.

PG&E requested NRC authorization for the disposal of waste from the HBPP at the US Ecology Idaho (USEI) facility in accordance with 10 CFR 20.2002. This waste would be generated during the decommissioning of the non-nuclear Units 1 and 2 and the nuclear Unit 3. This waste consists of approximately 200,000 $ft^3$ (5,663 $m^3$) of concrete, steel, insulation, roofing material, and other debris from Units 1 and 2 as well as concrete shielding, building materials, and soil debris from Unit 3.

The waste would be transported by truck from HBPP in Eureka, CA to the USEI facility, Grand View, Idaho in the Owyhee Desert. The USEI facility is a Subtitle C Resource Conservation and Recovery Act (RCRA) hazardous waste disposal facility permitted by the State of Idaho. The USEI site has both natural and engineered features that limit the transport of radioactive material. The natural features include the low precipitation rate [*i.e.,* 18.4 cm/y (7.4 in. per year)] and the long vertical distance to groundwater (*i.e.,* 61-meter (203-ft) thick on average unsaturated zone below the disposal zone). The engineered features include an engineered cover, liners and leachate monitoring systems. Because the USEI facility is not licensed by the NRC, this proposed action would require the NRC to exempt the low-contaminated material authorized for disposal from further AEA and NRC licensing requirements.

*Need for Proposed Action*

The subject waste material consists of concrete, steel, insulation, roofing material, gravel and other metal, wood and soil debris generated during dismantlement activities located at the HBPP site, the majority being from the non-nuclear Units 1 and 2. This proposed alternate disposal would conserve low-level radioactive waste disposal capacity.

*Environmental Impacts of the Proposed Action*

The NRC staff has reviewed the evaluation performed by the Licensee to demonstrate compliance with the 10 CFR 20.2002 alternate disposal criteria. Under these criteria, a licensee may seek NRC authorization to dispose of licensed material using procedures not otherwise authorized by the NRC's regulations. A licensee's supporting analysis must show that the radiological doses arising from the proposed 10 CFR 20.2002 disposal will be as low as reasonably achievable and within the 10 CFR Part 20 dose limits.

PG&E performed a radiological assessment in consultation with USEI. Based on this assessment, PG&E concludes that potential doses to members of the public, including workers involved in the transportation and placement of this waste, will be less than one millirem total effective dose equivalent (TEDE) in one calendar year for this project, and well within the "few millirem" criteria that the NRC has established.

The staff evaluated activities and potential doses associated with transportation, waste handling and disposal as part of the review of this 10 CFR 20.2002 application. The projected doses to individual transportation and USEI workers have been appropriately estimated and are demonstrated to meet the NRC's alternate disposal requirement of contributing a dose of not more than "a few millirem per year" to any member of the public. Independent review of the post-closure and intruder scenarios confirmed that the maximum projected dose over a period of 1,000 years is also within "a few millirem per year." Additionally, the proposed action will not significantly increase the probability or consequences of accidents and there is no significant increase in occupational or public radiation exposures.

With regard to potential non-radiological impacts, the proposed action does not have a potential to affect any historic sites. The proposed action does not affect non-radiological plant effluents, air quality or noise.

The proposed action and attendant exemption of the material from further AEA and NRC licensing requirements will not significantly increase the probability or consequences of accidents, no changes are being made in the types of any effluents that may be released off site, and there is no significant increase in occupational or public radiation exposure.

*Environmental Impacts of the Alternatives to the Proposed Action*

Due to the very small amounts of radioactive material involved, the environmental impacts of the proposed action are small. Therefore, the only alternative the staff considered is the no-action alternative, under which the staff would deny the disposal request. This denial of the request would result in no change in current environmental impacts. The environmental impacts of the proposed action and the no-action alternative are therefore similar and the no-action alternative is accordingly not further considered.

*Conclusion*

The NRC staff has concluded that the proposed action will not significantly impact the quality of the human environment, and that the proposed action is the preferred alternative.

*Agencies and Persons Consulted*

NRC provided a draft of this Environmental Assessment to the State of Idaho Department of Environmental Quality for review on October 6, 2010. On October 18, 2010, the State replied

by e-mail. The State stated that they did not intend to respond.

The NRC staff has determined that the proposed action is of a procedural nature, and will not affect listed species or critical habitat. Therefore, no further consultation is required under Section 7 of the Endangered Species Act. The NRC staff has also determined that the proposed action is not the type of activity that has the potential to cause effects on historic properties. Therefore, no further consultation is required under Section 106 of the National Historic Preservation Act.

**III. Finding of No Significant Impact**

The NRC staff has prepared this EA in support of the proposed action. On the basis of this EA, the NRC finds that there are no significant environmental impacts from the proposed action, and that preparation of an environmental impact statement is not warranted. Accordingly, the NRC has determined that a Finding of No Significant Impact is appropriate.

**IV. Further Information**

Documents related to this action, including the application and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html*. From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The documents related to this action are listed below, along with their ADAMS accession numbers.

(1) Letter dated April 1, 2010, "Request for 10 CFR 20.2002 Alternate Disposal Approval and 10 CFR 30.11 Exemption of Humboldt Bay Power Plant Waste for Disposal at US Ecology Idaho." [ADAMS Accession Number ML101170554]

(2) E–Mail dated August 11, 2010, providing Radiological Characterization Report for Humboldt Bay Power Plant. [ML102300557]

(3) Letter dated August 12, 2010, "Revision to Request for 10 CFR 20.2002 Alternate Disposal Approval and 10 CFR 30.11 Exemption of Humboldt Bay Power Plant Waste for Disposal at US Ecology Idaho." [ML102290019]

(4) E–Mail dated September 18, 2010, providing MARSAME process for Humboldt Bay Power Plant. [ML102700555]

(5) Letter dated January 21, 2010, providing supplemental information on USEI [ML100291004]

(6) Letter dated March 31, 2010, providing supplemental information on USEI [ML100950386]

If you do not have access to ADAMS, or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov*. These documents may also be viewed electronically on the public computers located at the NRC's PDR, O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at Rockville, Maryland, November 2, 2010.

For the Nuclear Regulatory Commission.

**Keith I. McConnell,**

*Deputy Director, Decommissioning and Uranium Recovery Licensing Directorate, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs.*

[FR Doc. 2010–28397 Filed 11–9–10; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2010–0344]**

## NUREG–1953, Confirmatory Thermal-Hydraulic Analysis To Support Specific Success Criteria in the Standardized Plant Analysis Risk Models—Surry and Peach Bottom; Draft Report for Comment

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of availability and request for comments.

**SUMMARY:** The Nuclear Regulatory Commission has issued for public comment a document entitled: NUREG–1953, "Confirmatory Thermal-Hydraulic Analysis to Support Specific Success Criteria in the Standardized Plant Analysis Risk Models—Surry and Peach Bottom, Draft Report for Comment."

**DATES:** Please submit comments by December 15, 2010. Comments received after this date will be considered if it is practical to do so, but the NRC staff is able to ensure consideration only for comments received on or before this date.

**ADDRESSES:** You may submit comments by any one of the following methods. Please include Docket ID NRC–2010–0344 in the subject line of your comments. Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site Regulations.gov. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

*Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2010–0344. Address questions about NRC dockets to Carol Gallagher 301–492–3668; e-mail *Carol.Gallagher@nrc.gov.*

*Mail comments to:* Cindy Bladey, Chief, Rules Announcements and Directives Branch (RADB), Division of Administrative Services, Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, or by fax to RADB at 301–492–3446.

You can access publicly available documents related to this notice using the following methods:

*NRC's Public Document Room (PDR):* The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, Public File Area O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

*NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.* NUREG–1953 is available electronically under ADAMS Accession Number ML102940233.

*Federal Rulemaking Web site:* Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching on Docket ID: NRC–2010–0344.

**FOR FURTHER INFORMATION CONTACT:** Donald Helton, Division of Risk Analysis, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory

Commission, Washington, DC 20555–0001. *Telephone:* 301–251–7594, *e-mail: Donald.Helton@nrc.gov.*

**SUPPLEMENTARY INFORMATION:** NUREG–1953, "Confirmatory Thermal-Hydraulic Analysis to Support Specific Success Criteria in the Standardized Plant Analysis Risk Models—Surry and Peach Bottom, Draft Report for Comment," investigates specific thermal-hydraulic aspects of the Surry and Peach Bottom Standardized Plant Analysis Risk models, with the goal of further strengthening the technical basis for decisionmaking that relies on the SPAR models. This analysis employs the MELCOR computer code to analyze a number of scenarios with different assumptions.

Dated at Rockville, Maryland, October 27, 2010.

For the Nuclear Regulatory Commission.

**Kevin A. Coyne,**

*Chief, Probabilistic Risk Assessment Branch, Division of Risk Analysis, Office of Nuclear Regulatory Research.*

[FR Doc. 2010–28401 Filed 11–9–10; 8:45 am]

**BILLING CODE 7590–01–P**

## OFFICE OF PERSONNEL MANAGEMENT

**[OMB Control No. 3206–0219]**

### Submission for Review: Revision of an Existing Information Collection, USAJOBS

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** 60-Day notice and request for comments.

**SUMMARY:** The Office of Personnel Management (OPM) offers the general public and other Federal agencies the opportunity to comment on a revised information collection request (ICR) 3206–0219, USAJOBS. As required by the Paperwork Reduction Act of 1995, (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection. In particular, we invite comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

**DATES:** Comments are encouraged and will be accepted until January 10, 2011. This process is conducted in accordance with 5 CFR 1320.1.

**ADDRESSES:** Interested persons are invited to submit written comments on the proposed information collection to the U.S. Office of Personnel Management, Employment Services, USAJOBS®, 1900 E. Street, NW., Washington, DC 20415, Attention: Patricia Stevens, or send them via electronic mail to *patricia.stevens@opm.gov.*

**FOR FURTHER INFORMATION CONTACT:** A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the U.S. Office of Personnel Management, Employment Services, USAJOBS, 1900 E. Street, NW., Washington, DC 20415, Attention: Patricia Stevens, or by sending a request via electronic mail to *patricia.stevens@opm.gov.*

**SUPPLEMENTARY INFORMATION:** USAJOBS is the Federal Government's official one-stop source for Federal jobs and employment information. The Applicant Profile and Resume Builder are two components of the USAJOBS application system. USAJOBS reflects the minimal critical elements collected across the Federal Government to assess an applicant's qualifications for Federal jobs under the authority of sections 1104, 1302, 3301, 3304, 3320, 3361, 3393, and 3394 of title 5, United States Code. This revision proposes to add optional questions to the Applicant Profile in USAJOBS that will allow applicants to self-identify themselves (subject to subsequent verification by the appointing agency) as eligible for certain special hiring authorities. This is expected to streamline some hiring actions by allowing agencies to mine or search for resumes of applicants who have volunteered information about their eligibility under special hiring authorities. Information volunteered by applicants about their potential eligibility under one or more special hiring authorities will be stored in USAJOBS and will only become visible to agencies that are considering filling a job using a special hiring authority. In that case, the hiring agency will be able to search USAJOBS for potential applicants who have chosen to indicate that they believe they are eligible to be selected under the special authority the agency seeks to use. The special hiring authorities are as follows:

1. Employment of a disabled veteran who has a compensable service-connected disability of 30 percent or more.

5 CFR 316.402(b)(4) Temporary Appointment.

5 CFR 316.302(b)(4) Term Appointment.

2. Military Spouse—Executive Order 13473, Noncompetitive Appointing Authority for Certain Military Spouses.

5 CFR 315.612.

Non-competitive appointment of certain former overseas military spouse employees.

5 CFR 315.608.

3. Schedule "A"—Excepted Service—Appointment of Persons with Disabilities.

5 CFR 213.3102(u).

4. Veterans Employment Opportunities Act (VEOA).

5 CFR 315.611.

5. Veterans Recruitment Appointment (VRA).

5 CFR 307.

5 CFR 316.302(b)(2) Term Appointment.

5 CFR 316.402(b)(2) Temporary Appointment.

6. Employment of disabled veterans who completed a training course under Chapter 31 of title 38 United States Code.

5 CFR 315.604.

Applicants who do not choose to use this opportunity to volunteer information about their eligibility under a special hiring authority may still choose to apply for jobs, as they are announced, under any of these special hiring authorities for which they are eligible. If applicants volunteer to provide information through the Web site about the special hiring authorities for which they believe they are eligible, then agencies that are searching for potential applicants to hire under one of these authorities may be able to locate their resume through USAJOBS and invite them to apply. Otherwise, this information will be retained in the USAJOBS database and not disclosed.

This Notice also announces that OPM intends to submit to the Office of Management and Budget a request to discontinue the use of the Application for Federal Employment, Optional Form (OF) 612. The OF 612 has been used as an optional form to apply for Federal jobs. Applicants for Federal positions

may submit a resume as an alternative. The information contained in the OF 612 is incorporated in the online Resume Builder on the USAJOBS Web site. The need to maintain the OF 612 as an alternative means of applying for Federal positions no longer exists as job seekers now have the option to either build or upload resumes. This action is being taken to facilitate a more seamless employment application process for both Federal agencies and job seekers, consistent with the goals of Federal hiring reform. We estimate it will take approximately 38 minutes to initially complete the Resume Builder, depending on the amount of information the applicant wishes to include, and approximately five minutes to initially complete the Applicant Profile. We estimate over 3,500,000 new USAJOBS accounts will be submitted annually. The total annual estimated burden is 2,508,333 hours.

**John Berry,**

*Director, U.S. Office of Personnel Management.*

[FR Doc. 2010–28430 Filed 11–9–10; 8:45 am]

**BILLING CODE 6325–38–P**

## POSTAL REGULATORY COMMISSION

**[Docket No. CP2011–26; Order No. 575]**

### Postal Rate and Classification Changes

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** The document provides the public with notice that the Postal Service has filed with the Commission notice of its intention of planned rate and classification changes rates for certain competitive domestic and international products. The changes have an anticipated effective date of January 2, 2011. The Postal Service's filing triggers a review process, which includes an opportunity for the public to comment. This document addresses the comment process and other matters that pertain to the planned changes.

**DATES:** *Supplemental information (from Postal Service) due:* November 10, 2010. *Public comments due:* November 19, 2010.

**ADDRESSES:** Submit documents electronically via the Commission's Filing Online System at *http://www.prc.gov.* Those who cannot submit filings electronically should contact the person identified in the **FOR FURTHER INFORMATION SECTION** for advice on alternatives.

**FOR FURTHER INFORMATION CONTACT:** Stephen L. Sharfman, General Counsel, at 202–789–6824 or *stephen.sharfman@prc.gov.*

**SUPPLEMENTARY INFORMATION:** On November 2, 2010, the Postal Service filed notice with the Commission concerning changes in rates of general applicability for competitive products.[1] The Filing also includes related mail classification changes. The Postal Service represents that, as required by the Commission's rules, 39 CFR 3015.2(b), the Filing includes an explanation and justification for the changes, the effective date, and a schedule of the changed rates. The price changes are scheduled to become effective January 2, 2011.

Attached to the Filing is the Governors' Decision evaluating the new prices and classification changes in accordance with 39 U.S.C. 3632–33 and 39 CFR 3015.2. The Governors' Decision provides an analysis of the competitive products' price and classification changes intended to demonstrate that the changes comply with section 3633(a) of title 39 and the Commission's rules. *See* 39 CFR 3015.7(c).

The Attachment to the Governors' Decision sets forth the price changes and includes a draft Mail Classification Schedule for competitive products of general applicability. Selected highlights of the price and classification changes follow.

*Express Mail.* Overall, Express Mail prices increase by 4.6 percent. Retail prices increase, on average, by 5.0 percent. Commercial Base prices do not change. The Commercial Plus prices decrease by 5.0 percent. The volume threshold for Commercial Plus decreases from 6,000 to 5,000 pieces of Express Mail.

*Priority Mail.* Priority Mail prices increase by 3.5 percent overall, with average retail prices increasing by about 3.9 percent. The average increase for Commercial Base prices is 3.2 percent. Commercial Plus prices increase by 2.0 percent.

Changes to the price structure include the following: (1) Adding price categories called Regional Rate Box and Critical Mail; (2) adding Legal Flat Rate Envelopes and Padded Flat Rate Envelopes, both priced at $4.95 retail; (3) the parcel volume threshold in Commercial Plus is reduced from 100,000 to 75,000 pieces (all shapes); (4) the letter- and flat-size volume threshold in Commercial Plus is reduced from 100,000 pieces to 5,000 pieces; (5) customers who ship more than 600 Priority Mail Open and Distribute containers annually will qualify for Commercial Plus.

*Parcel Select.* Parcel Select service increases, on average, by 4.4 percent. For destination entry parcels, the average price increases 8.0 percent for dropshipping at destination delivery units, 0.2 percent for parcels entered at a destination plant, and 0.6 percent for parcels entered at a destination Network Distribution Center (NDC). For nondestination-entered parcels, the average increases are 9.8 percent for origin NDC presort, 7.7 percent for NDC presort, and 7.6 percent for barcoded nonpresort.

*Parcel Return.* Parcel Return Service increases, on average, by 3.1 percent. Return NDC prices will increase by 0.9 percent, and the price for parcels picked up at a delivery unit will increase by 8.0 percent.

*Domestic Extra Services.* Premium Forwarding Service prices increase 5.0 percent. The weekly reshipment fee increases to $14.75. On average, Address Enhancement Service prices increase 5.0 percent.

*Global Express Guaranteed.* Global Express Guaranteed service increases, on average, by 3.7 percent. A classification change allows postage payment by permit indicia. Published discounts for Express Mail Corporate Accounts and for users of Information-based indicia (IBI) devices are eliminated.

*Express Mail International.* Express Mail International (EMI) service increases, on average, by 3.1 percent. Classification changes include the introduction of a legal-sized EMI Flat Rate Envelope, seven new country groups for EMI, elimination of published discounts for Express Mail Corporate Accounts and for users of IBI devices, elimination of Return Receipt service, and combination of Mexico with the "All Other Countries" price tier for Flat Rate Envelopes.

*Priority Mail International.* Overall, Priority Mail International (PMI) prices increase on average by 3.8 percent. Classification changes include the introduction of several new flat rate options, seven new country groups, and the elimination of published discounts for users of IBI devices.

[1] Notice of the United States Postal Service of Changes in Rates of General Applicability for Competitive Products Established in Governors' Decision No. 10–4, November 2, 2010 (Filing). The Filing is available on the Commission's Web site, *http://www.prc.gov,* under Daily Listing for November 2, 2010. Pursuant to 39 U.S.C. 3632(b)(2), the Postal Service is obligated to publish the Governors' Decision and record of proceedings in the **Federal Register** at least 30 days before the effective date of the new rates or classes.

*International Priority Airmail.* International Priority Airmail has a price increase of 3.3 percent.

*International Surface Air Lift.* International Surface Air Lift has a price increase of 6.4 percent.

*Airmail M–Bags.* The published prices for Airmail M–Bags increase by 5.8 percent.

*International Ancillary Services.* Prices for paper money orders and for insurance with EMI and PMI increase. The unique price tier for Canada when optional insurance is purchased for PMI parcels is eliminated.

Details of these changes may be found in the Attachment to Governors' Decision No. 10–4.

The Filing also includes two additional attachments: A redacted table that shows FY 2011 projected volumes, revenues, attributable costs, contribution, and cost coverage for each product, and an application for non-public treatment of the unredacted version of that table.

*Notice.* The establishment of rates of general applicability for competitive products and the associated mail classification changes effect a change in the draft Mail Classification Schedule. Pursuant to subpart E of part 3020 of its rules, 39 CFR 3020.90 *et seq.,* the Commission provides notice of the Postal Service's Filing. Interested persons may express views and offer comments on whether the planned changes are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642 and 39 CFR part 3015 and 39 CFR 3020, subpart B. Comments are due no later than November 19, 2010.

Pursuant to 39 U.S.C. 505, Cassandra L. Hicks is appointed as Public Representative to represent the interests of the general public in the above-captioned docket.

*Supplemental information.* Pursuant to 39 CFR 3015.6, the Postal Service is requested to provide a written response to the questions below. To assist in the completion of the record, answers should be provided as soon as possible, but by no later than November 10, 2010.

1. Please refer to the redacted tables attached to the Request which present "Competitive Product Contribution & Cost Coverage Analysis" for FY 2011 "January 2, 2011 Implementation" and "October 1, 2010 Implementation."

a. Provide FY 2011 volumes, revenues, attributable costs, contribution, and cost coverage data similar to that provided in Docket No. CP2010–8 to support all data in both the redacted and unredacted tables.[2]

b. Provide a narrative explaining the method used to forecast data in the referenced tables.

c. Provide attributable costs, revenues, and volumes data for each product grouped in "All Other Competitive International (including Services)" at the same level of detail provided for all other competitive products in this docket. For each of these international products, explain how the expected revenues and costs comply with 39 U.S.C. 3633(a).

2. Please refer to Governors' Decision No. 10–4. The Postal Service provides overall price increases for the following products: Express Mail 4.6 percent, Priority Mail 3.5 percent, Parcel Select 4.4 percent, Parcel Return Service 3.1 percent, Premium Forwarding Service 5.0 percent, Address Enhancement Service 5.0 percent, Global Express Guaranteed 3.7 percent, Express Mail International 3.1 percent, and Priority Mail International 3.8 percent, International Priority Airmail and International Surface Air Lift 4.4 percent, Airmail M–Bags 5.8 percent. Please provide the weights used to derive the Before Rates and After Rates indices relied upon to calculate the overall (average) percentage price increase for each product and service referenced above similar to the supplemental data filed in CP2010–8. *Id.* Please show all calculations in Excel, and explain any adjustments made due to classification changes.

3. Please refer to the Draft Mail Classification Schedule (MCS) in the Attachment to Governors' Decision 10–4 sections 2115.2 and 2115.3. Please confirm that "Lightweight" Parcel Select size and volume thresholds should not be included in the Draft MCS.[3] If not confirmed, please explain.

4. The Postal Service's request includes two new Priority Mail price categories: Critical Mail and Regional Rate Boxes. Please provide a detailed description of Critical Mail and Regional Rate Boxes. The response should include a discussion of how the proposed price categories differ from the existing Priority Mail price categories.

*It is ordered:*

1. The Commission establishes Docket No. CP2011–26 to provide interested persons an opportunity to express views and offer comments on whether the planned changes are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642 and 39 CFR part 3015 and 39 CFR 3020, subpart B.

2. Comments on the Filing are due no later than November 19, 2010.

3. The Commission appoints Cassandra L. Hicks as Public Representative to represent the interests of the general public in this proceeding.

4. The Postal Service shall provide a written response to the supplemental information requested in this order no later than November 10, 2010.

5. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

**Shoshana M. Grove,**

*Secretary.*

[FR Doc. 2010–28309 Filed 11–9–10; 8:45 am]

**BILLING CODE 7710–FW–P**

[2] *See e.g.,* Docket No. CP2010–8 Notice of the United States Postal Service of Filing Supplemental Information Under Seal In Response To Commission Order No. 333, November 16, 2009 and November 19, 2009; Supplemental Information Provided by the United States Postal Service in Response to Commission Order No. 333; and Notice of Filing Material Under Seal, November 19, 2009.

[3] Docket No. MC2010–36, Transferring Commercial Standard Mail Parcels to the Competitive Product List, is still under review by the Commission.

## POSTAL REGULATORY COMMISSION

**[Docket No. R2011–1; Order No. 577]**

## Postal Rate and Classification Changes

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** This document addresses a recently-filed Postal Service request for three postal rate and classification changes. One change will affect certain senders of First-Class Mail Presort and Automation Letters. Another change will affect Standard Mail and High Density milers. The third change affects the Move Update Charge threshold. This document provides details about the anticipated changes and addresses procedural steps associated with this filing.

**DATES:** *Comments are due:* November 22, 2010.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Commenters who cannot submit their views electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on alternatives to electronic filing.

**FOR FURTHER INFORMATION CONTACT:** Stephen L. Sharfman, General Counsel, 202–789–6820 and *stephen.sharfman@prc.gov.*

**SUPPLEMENTARY INFORMATION:**

I. Introduction
II. Postal Service Filing
III. Commission Action
IV. Ordering Paragraphs

## I. Introduction

On November 2, 2010, the Postal Service filed with the Commission a notice of three price adjustments and related classification changes for market dominant products.[1] The adjustments affecting First-Class Mail and Standard Mail are scheduled to become effective January 2, 2011.

These three adjustments and changes were previously filed and included with the Postal Service's recent request to adjust market dominant rates due to extraordinary or exceptional circumstances.[2] In rejecting that exigent rate request, the Commission noted that its decision made it unnecessary to address the merits of the classification change requests, but stated that the Postal Service may refile one or more of the requests as separate proposals and may designate relevant testimony or supporting documents filed in that case as part of supporting materials.[3]

## II. Postal Service Filing

*Reply Rides Free.* This pricing initiative is available for mailers of First-Class Mail Automation Letters. Automation Letters weighing more than one ounce but not more than one and two-tenths (1.2) ounces when the letters include a reply card or reply envelope will qualify for postage payment at the one-ounce rate. A typical reply envelope weighs 0.2 ounces. For participating mailers, Automation Letters would qualify until May 1, 2010, and thereafter only with the full-service Intelligent Mail barcode (IMb). All presort and automation letter volumes will quality for an annual incentive. Mailers must agree to meet a volume threshold of First-Class Mail Presort and Automation Letters, and enclose either a reply card or envelope as a courtesy reply or business reply which may be a reusable envelope. For compliance purposes, samples must be presented with each mailing. Notice at 1–2.

Only customers who mailed First-Class Mail Presort and Automation Letters in FY 2009 and FY 2010 qualify for this initiative. The volume commitment is the trend of those volumes between FY 2009 and FY 2010 plus 2.5 percent. *Id.* at 4.

In support, the Postal Service states that the initiative is designed to slow mailers' diversion of mail to online bill and statement delivery, and payment acceptance. Mailers include promotional inserts only if a mailpiece remains subject to the one-ounce rate. Allowing up to 1.2 ounces for qualifying envelopes will offer mailers an incentive to retain reply envelopes in mailings in order to generate revenues and offset mailing costs. Reply Rides Free would increase the value of the mail for marketing purposes and encourage mailers to use mailings for direct marketing purposes. It would also encourage customers to reply with single-piece First-Class Mail and slow electronic diversion of responses. *Id.* at 3–4.

*Saturation and High Density incentive.* The Standard Mail and High Density incentive provides a rebate on incremental mailpieces above a predetermined volume baseline, which each participant is equal to the aggregate total Standard Mail Saturation and High Density volume in calendar year 2010 plus 5.0 percent. Volumes above the baseline will be eligible for a rebate of 22 percent of participant's average revenue per piece for commercial Saturation Mail and 13 percent for commercial High Density mail. For nonprofit High Density and Saturation volumes, the rebate is 8 percent. *Id.* at 4. This discount is less than the discount for commercial mailers, but the ratio between nonprofit and commercial mailers will meet the statutory requirement of 60 percent. 39 U.S.C. 3626(a)(6). *Id.* at 13.

To participate, mailers who apply must meet several requirements:

1. To identify current and frequent mailers of this product, mailers must be current Saturation and High Density customers with at least six mailings in FY 2010;

2. Mailers must be holders of a permit imprint advance deposit account or owners of qualifying volume entered through a similar account by a mail service provider at a facility having PostalOne! capability;

3. Only the volume of mail owners will be eligible. Mail service providers and customers supplying inserts or the components of Saturation or High Density mailings of another mailer are not eligible; and

4. Mailers must electronically submit postage statements and mail documentation to the PostalOne! system during the specified period. Mailers using defined market area(s) must use Mail.dat or Mail.XML. Other applicants may submit postal statements via Postal Wizard. *Id.* at 5.

During participation in this incentive, customers may not participate in any other Standard Mail incentive or "sale" including Saturation or High Density products to prevent receiving two incentives for the same mail volume. *Id.*

Customers have the option of participating under one of two market models:

1. Total Market (or National) volume. Customers must demonstrate increased total Saturation and High Density mail volume letters and flats over the base year for their total market.

2. Specific Geographic Markets. Subject to Postal Service approval, customers designate specific geographic target markets of specific Postal Service Sectional Center Facilities (SCFs) for increased volume over the base year. Up to 20 SCFs may be selected or up to five target markets (consisting of multiple contiguous SCFs). Customers must have made the qualifying six mailing during FY 2010 for each market in which they participate. *Id.* at 6.

*Increases in Move Update Assessment Charge threshold.* For First-Class Mail subject to Move Update Standards and all Standard Mail, the threshold below which the Move Update Assessment Charge is assessed is increased from 70 to75 percent. That is, the tolerance will be reduced from 30 percent to 25 percent. The Postal Service states that the change is consistent with plans announced in a previous docket,[4] is needed to encourage the use of Move Update processes, and will affect few mailings. Notice at 6–7.

*Impact on price cap.* To comply with 39 CFR 3010.14(b)(1), the Postal Service discusses and provides tables listing the amount of unused price adjustment authority available for First-Class Mail and Standard Mail, the percentage change in prices for each of those classes of mail, and the amount of any new unused price adjustment authority for those two classes generated by this price change. *Id.* at 7–9.

Workpapers intended to demonstrate how the prices comply with the price cap are designated in the Notice as follows: USPS–R2011–1–1/1—First-Class Worksheets; USPS–R2011–1–1/2—Standard Mail Worksheets; and USPS–R2011–1–1/3—Impact of Move Update Assessment Charge. *Id.* at 8. The Postal Service states the workpapers demonstrate that the calculated negative price changes serve to increase the banked amount for First-Class and Standard Mail and thus comply with the available overall price adjustment authority. *Id.* at 9.

*Objectives and factors.* The Postal Service lists and discusses the

[1] United States Postal Service Notice of Market Dominant Price Adjustment, November 2, 2010 (Notice).

[2] Docket No. R2010–4, Exigent Request of the United States Postal Service, July 6, 2010.

[3] Docket No. R2010–4, Order Denying Request for Exigent Rate Adjustments, September 30, 2010, at 30.

[4] Docket No. R2010–1, United States Postal Service Notice of Market Dominant Price Adjustment and Classification Changes, October 15, 2009, at 3–4.

objectives and factors of 39 U.S.C. 3622 and their relationship to the proposed changes. The Postal Service asserts that changes do not substantially alter the degree First-Class Mail rates address the objectives and factors. *Id.* at 11. Reply Rides Free is an example of increased flexibility allowed the Postal Service (Objective 4), and it is an initiative to enhance the Postal Service's financial position (Objective 5). The incentive to mailers to continue using First-Class Mail (Factor 3) encourages increased mail volume (Factor 7), but does not imperil the coverage of attributable costs (Factor 2). Move Update improves overall efficiency of mail processing (Objective 1, Factors 5 and 12). *Id.* at 11–12.

Similarly, for Standard Mail, the changes do not alter the degree that prices and system design already address the objectives and factors of section 3622. Move Update improves overall efficiency (Objective 1, Factors 5 and 12). The Saturation and High Density initiative is also an example of increased flexibility allowed the Postal Service (Objective 4) and provides an incentive to mailers to enhance the financial position of the Postal Service (Objective 5). It also encourages increased mail volume (Factor 7), incents the use of Standard Mail (Factor 3), and will not inhibit coverage of attributable costs (Factor 2). *Id.* at 12.

*Workshare discounts.* The Postal Service states that none of the price changes impacts workshare discounts for First-Class Mail or for Standard Mail. *Id.* at 13.

*Conformance with 39 CFR part 3010.* The Postal Service provides notice pursuant to section 3622 and 39 CFR part 3010 that the Governors have authorized the Postal Service to adjust the classification language and prices for these market dominant products. The Postal Service represents that, in conformance with the notice requirements of 39 CFR 3010.14(a)(3), it will publish notice of these changes at least 45 days prior to the planned implementation date. The Notice will be published at *USPS.com,* the Postal Explorer Web site, the *DMM Advisory,* the *P&C Weekly,* and a press release. Public notice will also be provided in future issues of *PCC Insider, MailPro,* the *Postal Bulletin,* and the **Federal Register**. Id. at 1. Pursuant to 39 CFR 3010.14(a)(4), the Postal Service identifies Greg Dawson, Manager, Pricing Strategy, as the official available to provide prompt responses to requests for clarification from the Commission. *Id.* at 2.

Pursuant to 39 CFR 3010.14(b)(9), the changes in the product descriptions within the Mail Classification Schedule are included in Appendix A attached to the Notice.

## III. Commission Action

The Commission establishes Docket No. R2011–1 to consider all matters related to the Notice as required by 39 U.S.C. 3622. Interested persons may express views and offer comments on whether the planned changes are consistent with the policies of 39 U.S.C. 3622 and the Commission's applicable regulations. Comments are due no later than November 22, 2010.

The Commission appoints James Waclawski to represent the interests of the general public in this proceeding. *See* 39 U.S.C. 505.

## IV. Ordering Paragraphs

*It is ordered:*

1. The Commission establishes Docket No. R2011–1 to consider the matters raised by the Postal Service's November 2, 2010 Notice.

2. Interested persons may submit comments on the planned adjustments to classification language and price changes. Comments are due November 22, 2010.

3. Pursuant to 39 U.S.C. 505, the Commission appoints James Waclawski to represent the interests of the general public (Public Representative) in this proceeding.

4. The Commission directs the Secretary of the Commission to arrange for prompt publication of this Notice in the **Federal Register**.

By the Commission.

**Shoshana M. Grove,**

*Secretary.*

[FR Doc. 2010–28362 Filed 11–9–10; 8:45 am]

**BILLING CODE 7710–FW–P**

## POSTAL REGULATORY COMMISSION

**[Docket No. CP2011–27; Order No. 578]**

## Postal Rate Changes

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission is noticing a recently-filed Postal Service request to change rates for Inbound Air Parcel Post at Universal Postal Union (UPU) rates. This notice addresses procedural steps associated with this filing.

**DATES:** *Comments are due:* November 18, 2010.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Commenters who cannot submit their views electronically should contact the person identified in **FOR FURTHER INFORMATION CONTACT** by telephone for advice on alternatives to electronic filing.

**FOR FURTHER INFORMATION CONTACT:** Stephen L. Sharfman, General Counsel, at 202–789–6820 or *stephen.sharfman@prc.gov.*

**SUPPLEMENTARY INFORMATION:**

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I. Introduction
II. Background
III. Notice of Filing
IV. Ordering Paragraphs

## I. Introduction

On November 3, 2010, the Postal Service filed a notice announcing changes in rates not of general applicability for Inbound Air Parcel Post at Universal Postal Union (UPU) rates effective January 1, 2011.[1] The Notice incorporates by reference the explanation of Inbound Air Parcel Post at UPU Rates and the mechanism for setting rates contained in its request and supporting documentation filed in Docket Nos. MC2010–11 and CP2010–11.[2] *Id.* at 2.

In support of its Notice, the Postal Service filed four attachments as follows:

1. Attachment 1—an application for non-public treatment of materials to maintain redacted rates and supporting documents under seal;

2. Attachment 2—a redacted copy of Governors' Decision No. 09–15 which establishes prices and classifications for Inbound Air Parcel Post at UPU Rates, proposed Mail Classification Schedule language which includes a description of Inbound Air Parcel Post at UPU Rates, certification of prices in conformity with 39 U.S.C. 3633, an analysis of the procedures for setting rates, and certification of the Governors' vote;

3. Attachment 3—a redacted version of the new rates; and

4. Attachment 4—a certified statement required by 39 CFR 3015.5(c)(2) for Inbound Air Parcel Post at UPU rates.

[1] Notice of the United States Postal Service of Filing Changes in Rates Not of General Applicability and Application for Non-Public Treatment of Materials Filed Under Seal, November 3, 2010 (Notice).

[2] *See* Docket Nos. MC2010–11 and CP2010–11, Request of the United States Postal Service to Add Inbound Air Parcel Post at Universal Postal Union (UPU) Rates to the Competitive Products List, Notice of Establishment of Prices and Classifications Not of General Applicability for Inbound Air Parcel Post at UPU Rates Established in Governors' Decision No. 09–15, and Application for Non-Public Treatment of Materials Filed Under Seal, November 17, 2009 (Request).

## II. Background

The Notice states that Governors' Decision No. 09–15 established prices and classifications not of general applicability for Inbound Air Parcel Post at UPU Rates on November 16, 2009. *Id.* at 1. The rates authorized by Governors' Decision No. 09–15 when there is no contractual relationship with the tendering postal operator are the highest possible inward land rates that the United States is eligible for under the parcel post regulations. *Id.* at 2. Air parcels comprise inbound parcels eligible to receive transportation by air rather than surface. *Id.,* Attachment 2, at 1.

In the Postal Service's Request in Docket Nos. MC2010–11 and CP2010–11, it explains the process for determining Inbound Air Parcel Post at UPU Rates. In its Request, the Postal Service indicates that the United States receives both air and surface parcels from foreign postal administrations which compensate the Postal Service for delivery of these parcels in the United States. Request at 2. It maintains that it has negotiated separate agreements for parcel rates with certain foreign posts, but most compensate it at the United States default rates for inbound parcel delivery. *Id.* Payments between postal administrations for handling and delivering parcel post are referred to as inward land rates. The Postal Service notes that inward land rates are set according to formulas in the UPU Parcel Post Regulations which constitute international law. *Id.* More specifically, the UPU Postal Operations Council establishes inward land rates.[3] Such rates are based on a percentage of each member's inward land rate in 2004. *Id.* at 3. UPU members may qualify for percentage "bonuses" to their base rate based upon their provision of certain value-added services.[4] *Id.* The Postal Service states it is responsible for gathering information that the UPU Postal Operations Council uses to calculate the rates, including completion of a questionnaire on service bonus eligibility and submission of annual inflation information from the Consumer Price Index for All Urban Consumers. *Id.* Based on this and similar information from the member posts, the UPU International Bureau publishes an annual notice establishing the postal administration's parcel rates for the following year. *Id.*

The Postal Service states that because of the unique mechanism for setting inward land rates, it chose to establish rates for inbound air parcels by reference to the Universal Postal Convention. *Id.*

In Order No. 362, the Commission approved the addition of Inbound Air Parcel Post at UPU Rates to the competitive product list.[5]

The Postal Service states in its Notice that the rates in its filing comport with the Governors' Decision are "the highest possible inward land rates for which the Postal Service was eligible based on inflation increases and other factors." Notice at 2–3.

The Postal Service asserts that its filing demonstrates compliance with 39 U.S.C. 3633. *Id.* at 3.

## III. Notice of Filing

The Commission establishes Docket No. CP2011–27 for consideration of matters related to the issues identified in the Postal Service's Notice.

Interested persons may submit comments on whether the Postal Service's filing is consistent with the policies of 39 U.S.C. 3632 or 3633, and 39 CFR part 3015. Comments are due no later than November 18, 2010. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Paul L. Harrington as Public Representative in this proceeding.

## IV. Ordering Paragraphs

*It is ordered:*

1. The Commission establishes Docket No. CP2011–27 for consideration of the issues raised in this docket.

2. Comments by interested persons in this proceeding are due no later than November 18, 2010.

3. Pursuant to 39 U.S.C. 505, Paul L. Harrington is appointed to serve as officer of the Commission (Public Representative) to represent the interest of the general public in this proceeding.

4. The Secretary shall arrange for publication of this order in the **Federal Register.**

By the Commission.

**Shoshana M. Grove,**

*Secretary.*

[FR Doc. 2010–28371 Filed 11–9–10; 8:45 am]

**BILLING CODE 7710–FW–P**

[3] The UPU Postal Operations Council is a designated body of the UPU which is responsible for rate setting.

[4] The Postal Service states that services such as "track and trace, home delivery, published delivery standards, and use of a common inquiry system" qualify UPU members for bonuses. *Id.* Members may also seek an inflation-related adjustment to the base rate which is capped at 5 percent per year.

[5] Docket Nos. MC2010–11 and CP2010–11, Order Adding Inbound Air Parcel Post at UPU Rates to Competitive Product List, December 15, 2009 (Order No. 362).

## RAILROAD RETIREMENT BOARD

### 2011 Railroad Experience Rating Proclamations, Monthly Compensation Base and Other Determinations

**AGENCY:** Railroad Retirement Board.

**ACTION:** Notice.

**SUMMARY:** Pursuant to section 8(c)(2) and section 12(r)(3) of the Railroad Unemployment Insurance Act (Act) (45 U.S.C. 358(c)(2) and 45 U.S.C. 362(r)(3), respectively), the Board gives notice of the following:

1. The balance to the credit of the Railroad Unemployment Insurance (RUI) Account, as of June 30, 2010, is $109,226.81;

2. The September 30, 2010, balance of any new loans to the RUI Account, including accrued interest, is $47,377,543.22;

3. The system compensation base is $3,509,356,938.87 as of June 30, 2010;

4. The cumulative system unallocated charge balance is ($328,338,446.22) as of June 30, 2010;

5. The pooled credit ratio for calendar year 2011 is zero;

6. The pooled charged ratio for calendar year 2011 is zero;

7. The surcharge rate for calendar year 2011 is 2.5 percent;

8. The monthly compensation base under section 1(i) of the Act is $1,330 for months in calendar year 2011;

9. The amount described in sections 1(k) and 3 of the Act as "2.5 times the monthly compensation base" is $3,325 for base year (calendar year) 2011;

10. The amount described in section 4(a–2)(i)(A) of the Act as "2.5 times the monthly compensation base" is $3,325 with respect to disqualifications ending in calendar year 2011;

11. The amount described in section 2(c) of the Act as "an amount that bears the same ratio to $775 as the monthly compensation base for that year as computed under section 1(i) of this Act bears to $600" is $1,718 for months in calendar year 2011;

12. The maximum daily benefit rate under section 2(a)(3) of the Act is $66 with respect to days of unemployment and days of sickness in registration periods beginning after June 30, 2011.

**DATES:** The balance in notice (1) and the determinations made in notices (3) through (7) are based on data as of June 30, 2010. The balance in notice (2) is based on data as of September 30, 2010. The determinations made in notices (5) through (7) apply to the calculation, under section 8(a)(1)(C) of the Act, of employer contribution rates for 2011. The determinations made in notices (8) through (11) are effective January 1,

2011. The determination made in notice (12) is effective for registration periods beginning after June 30, 2011.

**ADDRESSES:** Secretary to the Board, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611–2092.

**FOR FURTHER INFORMATION CONTACT:** Marla L. Huddleston, Bureau of the Actuary, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611–2092, telephone (312) 751–4779.

**SUPPLEMENTARY INFORMATION:** The RRB is required by section 8(c)(1) of the Railroad Unemployment Insurance Act (Act) (45 U.S.C. 358(c)(1)) as amended by Public Law 100–647, to proclaim by October 15 of each year certain system-wide factors used in calculating experience-based employer contribution rates for the following year. The RRB is further required by section 8(c)(2) of the Act (45 U.S.C. 358(c)(2)) to publish the amounts so determined and proclaimed. The RRB is required by section 12(r)(3) of the Act (45 U.S.C. 362(r)(3)) to publish by December 11, 2010, the computation of the calendar year 2011 monthly compensation base (section 1(i) of the Act) and amounts described in sections 1(k), 2(c), 3 and 4(a–2)(i)(A) of the Act which are related to changes in the monthly compensation base. Also, the RRB is required to publish, by June 11, 2011, the maximum daily benefit rate under section 2(a)(3) of the Act for days of unemployment and days of sickness in registration periods beginning after June 30, 2011.

**Surcharge Rate**

A surcharge is added in the calculation of each employer's contribution rate, subject to the applicable maximum rate, for a calendar year whenever the balance to the credit of the RUI Account on the preceding June 30 is less than the greater of $100 million or the amount that bears the same ratio to $100 million as the system compensation base for that June 30 bears to the system compensation base as of June 30, 1991. If the RUI Account balance is less than $100 million (as indexed), but at least $50 million (as indexed), the surcharge will be 1.5 percent. If the RUI Account balance is less than $50 million (as indexed), but greater than zero, the surcharge will be 2.5 percent. The maximum surcharge of 3.5 percent applies if the RUI Account balance is less than zero.

The system compensation base as of June 30, 1991 was $2,763,287,237.04. The system compensation base for June 30, 2010 was $3,509,356,938.87. The ratio of $3,509,356,938.87 to $2,763,287,237.04 is 1.26999354. Multiplying 1.26999354 by $100 million yields $126,999,354. Multiplying $50 million by 1.26999354 produces $63,499,677. The Account balance on June 30, 2010, was $109,226.81. Accordingly, the surcharge rate for calendar year 2011 is 2.5 percent.

**Monthly Compensation Base**

For years after 1988, section 1(i) of the Act contains a formula for determining the monthly compensation base. Under the prescribed formula, the monthly compensation base increases by approximately two-thirds of the cumulative growth in average national wages since 1984. The monthly compensation base for months in calendar year 2011 shall be equal to the greater of (a) $600 or (b) $600 [1 + {(A − 37,800)/56,700}], where A equals the amount of the applicable base with respect to tier 1 taxes for 2011 under section 3231(e)(2) of the Internal Revenue Code of 1986. Section 1(i) further provides that if the amount so determined is not a multiple of $5, it shall be rounded to the nearest multiple of $5.

The calendar year 2011 tier 1 tax base is $106,800. Subtracting $37,800 from $106,800 produces $69,000. Dividing $69,000 by $56,700 yields a ratio of 1.21693122. Adding one gives 2.21693122. Multiplying $600 by the amount 2.21693122 produces the amount of $1,330.16, which must then be rounded to $1,330. Accordingly, the monthly compensation base is determined to be $1,330 for months in calendar year 2011.

**Amounts Related to Changes in Monthly Compensation Base**

For years after 1988, sections 1(k), 3, 4(a–2)(i)(A) and 2(c) of the Act contain formulas for determining amounts related to the monthly compensation base.

Under section 1(k), remuneration earned from employment covered under the Act cannot be considered subsidiary remuneration if the employee's base year compensation is less than 2.5 times the monthly compensation base for months in such base year. Under section 3, an employee shall be a "qualified employee" if his/her base year compensation is not less than 2.5 times the monthly compensation base for months in such base year. Under section 4(a–2)(i)(A), an employee who leaves work voluntarily without good cause is disqualified from receiving unemployment benefits until he has been paid compensation of not less than 2.5 times the monthly compensation base for months in the calendar year in which the disqualification ends.

Multiplying 2.5 by the calendar year 2011 monthly compensation base of $1,330 produces $3,325. Accordingly, the amount determined under sections 1(k), 3 and 4(a–2)(i)(A) is $3,325 for calendar year 2011.

Under section 2(c), the maximum amount of normal benefits paid for days of unemployment within a benefit year and the maximum amount of normal benefits paid for days of sickness within a benefit year shall not exceed an employee's compensation in the base year. In determining an employee's base year compensation, any money remuneration in a month not in excess of an amount that bears the same ratio to $775 as the monthly compensation base for that year bears to $600 shall be taken into account.

The calendar year 2011 monthly compensation base is $1,330. The ratio of $1,330 to $600 is 2.21666667. Multiplying 2.21666667 by $775 produces $1,718. Accordingly, the amount determined under section 2(c) is $1,718 for months in calendar year 2011.

**Maximum Daily Benefit Rate**

Section 2(a)(3) contains a formula for determining the maximum daily benefit rate for registration periods beginning after June 30, 1989, and after each June 30 thereafter. Legislation enacted on October 9, 1996, revised the formula for indexing maximum daily benefit rates. Under the prescribed formula, the maximum daily benefit rate increases by approximately two-thirds of the cumulative growth in average national wages since 1984. The maximum daily benefit rate for registration periods beginning after June 30, 2011, shall be equal to 5 percent of the monthly compensation base for the base year immediately preceding the beginning of the benefit year. Section 2(a)(3) further provides that if the amount so computed is not a multiple of $1, it shall be rounded down to the nearest multiple of $1.

The calendar year 2010 monthly compensation base is $1,330. Multiplying $1,330 by 0.05 yields $66.50, which must then be rounded down to $66. Accordingly, the maximum daily benefit rate for days of unemployment and days of sickness beginning in registration periods after June 30, 2011, is determined to be $66.

Dated: November 4, 2010.

By authority of the Board.

**Beatrice Ezerski,**

*Secretary to the Board.*

[FR Doc. 2010–28345 Filed 11–9–10; 8:45 am]

**BILLING CODE 7905–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–63244; File No. SR–CBOE–2010–100]**

## Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated: Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to PULSe Fees

November 4, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 28, 2010, the Chicago Board Options Exchange, Incorporated ("CBOE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by CBOE. The Exchange has designated this proposal as one establishing or changing a due, fee, or other charge imposed by CBOE under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend its fees schedule as it relates to the PULSe workstation. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary and at the Commission.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. CBOE has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, Proposed Rule Change*

1. Purpose

The purpose of this proposed rule change is to address the use of the PULSe workstation for C2 Options Exchange, Incorporated ("C2"), to expand on the description of the PULSe workstation licensing process, to revise the monthly PULSe workstation fee schedule to introduce a reduction for certain non-Trading Permit Holder ("TPH") workstations, to introduce a new fee for non-standard services, to extend the Routing Intermediary fee waiver, and to delete outdated text from the CBOE fees schedule.

By way of background, the PULSe workstation is a front-end order entry system designed for use with respect to orders that may be sent to the trading systems of CBOE and CBOE Stock Exchange ("CBSX"). In addition, the PULSe workstation provides a user with the capability to send options orders to other U.S. options exchanges and stock orders to other U.S. stock exchanges through a "PULSe Routing Intermediary" ("away-market routing"). In anticipation of the launch of the PULSe workstation, the Exchange previously filed a rule change, SR–CBOE–2010–051, that established a monthly PULSe workstation fee, an away-market routing fee, and a Routing Intermediary fee (which fee has been waived through November 30, 2010) for CBOE and CBSX TPHs.[5]

The first purpose of this proposed rule change is to address the use of the PULSe workstation for CBOE/CBSX affiliate, C2, which is anticipated to initiate trading on October 29, 2010. In rule filing SR–CBOE–2010–051, the Exchange noted that C2 had not yet begun trading and that use of the PULSe workstation as a front-end system interface to C2 would be addressed in a separate rule filing prior to the initiation of trading on C2. In that regard, C2 intends to submit a separate rule change proposing that Signal Trading Systems, LLC ("STS"), an affiliate of CBOE, make the PULSe workstation available to C2 TPHs and to incorporate the PULSe workstation, away-market routing and Routing Intermediary fees into the C2 fees schedule.

[5] *See* Securities Exchange Act Release No. 62286 (June 11, 2010), 75 FR 34799 (June 18, 2010) (SR–CBOE–2010–051). TPHs were previously referred to as "members" in the Exchange Rules, however, references to "members" have been replaced with the term Trading Permit Holders or TPH. *See, e.g.,* Securities Exchange Act Release No. 62382 (June 25, 2010), 75 FR 38164 (July 1, 2010) (SR–CBOE–2010–058).

The Exchange notes that the PULSe workstation offers the ability to route orders to any market, including C2. Therefore, to the extent a CBOE TPH that is also a C2 TPH obtains a PULSe workstation through CBOE, it is not necessary for that TPH to obtain a separate PULSe workstation through C2 to route orders to C2. When the PULSe workstation is made available through CBOE to a CBOE TPH that is also a C2 TPH, the PULSe workstation, away-market routing and Routing Intermediary fees would be assessed by CBOE only (*e.g.,* the monthly fee for a CBOE TPH for one PULSe workstation is $350 and the monthly fee for a C2 TPH for one PULSe workstation is $350; if a PULSe workstation is made available through CBOE to a CBOE TPH that is also a C2 TPH, the monthly fee would be $350, not $700). To the extent a CBOE TPH is also a C2 TPH, the away-market routing fee would not apply for the TPH's executions on CBOE or C2 because the fee is only applicable for away-market routing. The TPH would not be routing away, but instead would be submitting orders directly to CBOE as a CBOE TPH or C2 as a C2 TPH, as applicable, where the TPH's activity would be subject to the transaction fee schedule of CBOE or C2, respectively. However, to the extent a CBOE TPH is not a C2 TPH, the away-market routing fee would apply to the CBOE TPH's executions on C2.

As described in rule filing SR–CBOE–2010–051, the PULSe workstation is currently configured by the Exchange to cause CBOE (CBSX) to be the default destination exchange for individually executed marketable option (stock) orders if CBOE (CBSX) is at the national best bid or offer ("NBBO"), regardless of size or time, but allow any user to manually override CBOE (CBSX) as the default destination on an order-by-order basis. The workstation also incorporates a function allowing option (stock) orders at a specified price to be sent to multiple exchanges with a single click ("sweep function"), and the sweep function is configured by the Exchange to cause an option (stock) order to be sent to CBOE (CBSX) for up to the full size quoted by CBOE (CBSX) if CBOE (CBSX) is at the NBBO. Given the initiation of trading on C2, the Exchange is herein proposing to revise the default parameters with respect to options to provide that the PULSe workstation may be configured by the Exchange to cause CBOE and/or C2 to be the default destination exchange(s). Consistent with rule filing SR–CBOE–2010–051, any user may manually override CBOE and/or C2 as the default option exchange

destination(s) on an order-by-order basis. The Exchange notes that the away-market routing functionality is offered as a convenience to TPHs and is not an exclusive means available to a TPH to send orders intermarket.[6]

The second purpose of this proposed rule change is to refine the PULSe workstation licensing process. In rule filing SR–CBOE–2010–051, the Exchange indicated that the PULSe workstation will be made available by STS. The filing indicated that STS will grant licenses to use the workstation directly to CBOE and CBSX TPHs. In addition, the filing indicated that TPHs may also make the workstation available to their customers, including sponsored users.[7] CBOE is herein proposing to expand on the description of the licensing process to provide that STS has the ability to grant licenses to use the workstation directly to TPHs or TPHs' customers. STS would also have the ability, if it determines to do so, to permit TPHs to make the workstation available to their customers, including sponsored users, through the use of a sublicense. Whether the workstation technology is made available to TPHs' customers through a direct license or sublicense, any order routed to CBOE or CBSX through a PULSe workstation must continue to be routed through a TPH or by a sponsored user (whose orders are sponsored by a TPH). The TPH will also remain responsible for any applicable PULSe fees.

The third purpose of this proposed rule change is to revise the monthly PULSe workstation fee schedule. As indicated above, TPHs may make the workstation available to their customers, which may include non-broker dealer public customers and non-TPH broker dealers (referred to herein as "non-TPHs"). For such non-TPH workstations, the Exchange is proposing to introduce a flat fee of $350/month per workstation. In instances where two or more TPHs wish to make a PULSe workstation available to the same non-TPH customer, the Exchange is proposing to introduce a fee reduction. Under the reduction, if two or more TPHs make the PULSe workstation available to the same non-TPH customer, then the monthly fee will be $250 per workstation per TPH. The Exchange believes it is reasonable and appropriate to reduce the monthly fee in these instances because, while we would still establish and maintain PULSe workstation technology arrangements with each TPH, we also anticipate that the non-TPH's use of the workstation would be distributed among the TPHs.

The fourth purpose of this proposed rule change is to introduce a fee for non-standard services provided by STS. Non-standard services may include time and materials for non-standard installations of or modifications to PULSe to accommodate a TPH's use of PULSe with other technologies. The Exchange is proposing a fee of $350 per hour plus costs.

The fifth purpose of this proposed rule change is to extend the waiver of the Routing Intermediary fee. Currently the Exchange has waived the Routing Intermediary through November 30, 2010. The Exchange is proposing to extend this waiver through December 31, 2010. Thus this fee will be assessed beginning January 1, 2011.

Finally, the sixth purpose of this proposed rule change is to delete outdated text from the CBOE fees schedule. Specifically, the Exchange had waived the PULSe workstation and away-market routing fees through September 15, 2010 and September 30, 2010, respectively. As those dates have passed and the Exchange does not intend to extend the fee waivers, the Exchange is proposing to remove references to the waiver dates from the fees schedule.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Section 6(b)(4) of the Act,[9] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among TPHs in that the same fees and fee waivers are applicable to all users of the PULSe workstation.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The proposed rule change is designated by the Exchange as establishing or changing a due, fee, or other charge, thereby qualifying for effectiveness on filing pursuant to Section 19(b)(3)(A)(ii) of the Act[10] and subparagraph (f)(2) of Rule 19b–4[11] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2010–100 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2010–100. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the

[6] With respect to options (stocks), the Exchange also notes that the away-market functionality in the PULSe workstation will not displace the provisions of the Options Order Protection and Locked/Crossed Market Plan (Regulation NMS), which will continue to apply in the circumstances described in the Plan (Regulation NMS).

[7] The PULSe workstation may be made available by a TPH to its customers on a pass-through basis (where orders pass through the TPH's systems prior to reaching the Exchange) or a sponsored access basis. To the extent that a TPH makes the workstation available to a customer on a sponsored access basis, the customer would be considered a "sponsored user" and the TPH-customer relationship would be considered a Sponsoring Participant/Sponsored User relationship subject to the requirements of Rule 6.20A, *Sponsored Users.*

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78s(b)(3)(A)(ii).

[11] 17 CFR 240.19b–4(f)(2).

submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2010–100 and should be submitted on or before December 1, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–28330 Filed 11–9–10; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–63245; File No. SR–DTC–2010–12]**

## Self-Regulatory Organizations; The Depository Trust Company; Order Approving Proposed Rule Change To Automate the Approval Process in Providing Trustee Access to the Security Position Report Service

November 4, 2010.

### I. Introduction

On September 14, 2010, The Depository Trust Company ("DTC") filed with the Securities and Exchange Commission ("Commission") proposed rule change SR–DTC–2010–12 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").[1] Notice of the proposal was published in the **Federal Register** on September 29, 2010.[2] The Commission received no comment letters in response to the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

### II. Description

DTC's Security Position Report ("SPR") service provides valuable information on the record date holdings of an issuer's security in DTC Participant accounts. An SPR provides information needed to contact shareholders about corporate-related events such as annual meetings. DTC currently provides SPRs to issuers, trustees, and authorized third parties.

DTC's Proxy area receives requests for SPR services access and reviews such requests to ensure that only appropriate parties receive access. The current review process to approve a trustee's access to the SPR service for a security is done manually, and the process is therefore subject to error. Currently, the SPR system sends an e-mail to the DTC Proxy mailbox notifying the Proxy staff that a trustee has added a CUSIP to its eligible issues list. Any trustee can add a CUSIP to its eligible issues list. The CUSIP will show "unauthorized" until reviewed and approved by the DTC Proxy staff. DTC Proxy staff requires that the trustee provide to it one of the following: Trust agreement, Annual Report, 10K, 10Q, SEC filing, or any other document deemed necessary and appropriate to prove that the trustee is in fact the trustee for the CUSIP and therefore is entitled to access to SPRs for the CUSIP. Generally, it takes two or more days for a decision on access requests because of the manual process associated with the review of trustee information.

To increase the efficiency by which DTC provides trustees with access to the SPR service, DTC is seeking to collect trustee data at the point of eligibility of the issue. This will allow DTC to store and maintain trustee data on the Entity Master File and the Security Master File ("Master Files"). DTC will then have the ability to automate the validation using the information stored on the Master Files in response to a trustee's request for SPR access.

Initially, DTC will populate and update the trustee field on the Master Files through DTC's Participant Terminal System. Ultimately and as set forth below this information will be supplied by underwriters at the time of issue eligibility through DTC's UW (underwriting) Source System. This change requires DTC to update the UW Source System to designate trustee data as a mandatory field at the time of eligibility. In order to provide the time it may take for underwriters to update their systems to supply the information required by this new mandatory field, DTC plans to implement the change to the UW Source System in the fourth quarter of 2011. In the event of a change in trustee, DTC will require that the new and the prior trustees both update the trustee information using Form 17Ad-16, which is used today to update transfer agent changes. By automating the trustee authorization process, DTC will increase the efficiency of the SPR system and will reduce the risk of error associated with the manual processing of trustee data.

### III. Discussion

Section 19(b) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to protect investors and the public interest.[3] The Commission believes that DTC's rule change is consistent with this requirement because by replacing the current manual process for approving a trustee's access to DTC's SPR service for an issue with an automated approval process, DTC will be able to reduce the number of errors associated with manual processing and thereby better protect investors' confidential information.

### IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder. In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR–DTC–2010–12) be and hereby is approved.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[4]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–28331 Filed 11–9–10; 8:45 am]

**BILLING CODE 8011–01–P**

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 62990 (September 24, 2010), 75 FR 60158.

[3] 15 U.S.C. 78q–1(b)(3)(F).

[4] 17 CFR 200.30–3(a)(12).

## SMALL BUSINESS ADMINISTRATION

### Small Business Jobs Act: 504 Loan Program Debt Refinancing

**AGENCY:** U.S. Small Business Administration; Office of Financial Assistance.

**ACTION:** Notice of open meeting.

**SUMMARY:** The SBA is issuing this notice to announce the location, date, time and agenda for a meeting regarding the Small Business Jobs Act: 504 Loan Program Debt Refinancing. The meeting will be open to the public.

**DATES:** The meeting will be held on November 17, 2010, from 10:30 a.m. to approximately 1 p.m. Eastern Time.

**ADDRESSES:** The meeting will be held at the O'Neil Federal Building (Room # 301 [U.S. Housing and Urban Development]) located at 10 Causeway Street, Boston, Massachusetts 02222.

**SUPPLEMENTARY INFORMATION:** SBA announces a public meeting to be held by the SBA Office of Financial Assistance to discuss the 504 Loan Program Debt Refinancing established by § 1122 of the Small Business Jobs Act (Pub. L. 111–240). The purpose of the meeting is for the SBA Office of Financial Assistance to receive comments and suggestions on the implementation of the 504 Loan Program Debt Refinancing Program. All lenders and Certified Development Companies are invited to attend.

**FOR FURTHER INFORMATION CONTACT:** The meeting is open to the public; however, seating is limited so advance notice of attendance is requested. Anyone wishing to attend and/or make a presentation to the Office of Financial Assistance must contact Grady Hedgespeth, Director, Office of Financial Assistance by fax or e-mail, in order to be placed on the agenda: Grady Hedgespeth, Director, Office of Financial Assistance, 409 3rd Street, SW., 8th Floor, Washington, DC 20414, phone: (202) 205–7562 fax: (202) 481–0248 e-mail: *Publicmeeting504debtrefi@sba.gov*.

If you are not able to attend the meeting but would like to participate in the Ready Talk Conference call of the event, the telephone number is (866) 740–1260 and the Access Code is 3010101#.

Additionally, if you need accommodations because of a disability or require additional information, please contact Robert Nelson, District Director, at (617) 565–5561, e-mail: *robert.nelson@sba.gov*, SBA, Massachusetts District Office, 10 Causeway Street, Boston, Massachusetts 02222.

**Grady B. Hedgespeth,**

*Director, Office of Financial Assistance.*

[FR Doc. 2010–28352 Filed 11–9–10; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF TRANSPORTATION

**[Docket No. DOT–OST–2010–0212]**

### Agency Request for Revision of Previously Approved Information Collections: Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments and for Grants and Cooperative Agreements With Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations

**AGENCY:** Office of the Secretary.

**ACTION:** Notice and request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below is being forwarded to the Office of Management and Budget (OMB) for review and comments. A **Federal Register** notice with a 60-day comment period soliciting comments on the following information collection was published on September 3, 2010, in the **Federal Register** (75 FR, page 54215). No comments were received; however, in that notice, the Department incorrectly estimated a total of 3,329 respondents and annual burden of 756,980 hours. The Department is correcting the document as set forth below.

**DATES:** Written comments must be submitted December 10, 2010.

**ADDRESSES:** Send comments regarding the burden estimate, including suggestions for reducing the burden, to the Office of Management and Budget, Attention: Desk Officer for the Office of the Secretary of Transportation, 725 17th Street, NW., Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Ellen Shields, Associate Director of the Financial Assistance Management Division, M–65, Office of the Senior Procurement Executive, Office of the Secretary, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 366–4268.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 2105–0520.

*Title:* Uniform Administrative Requirements For Grants and Cooperative Agreements to State and Local Governments and For Grants and Cooperative Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations.

*Form Numbers:* SF–424, SF–425, SF–270, and SF–271.

*Type of Request:* Revision of a previously approved collection.

*Abstract:* The Department of Transportation (DOT) requests approval to combine OMB Control numbers 2105–0520 and 2105–0531 into OMB Control Number 2105–0520. This information collection involves the use of various forms necessary because of management and oversight responsibilities of the agency imposed by OMB Circular 2 CFR 215 (A–110) (Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations) and OMB Circular A–102 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments). These forms include Application for Federal Assistance (SF–424), Federal Financial Report (SF–425), Request for Advance or Reimbursement (SF–270), and Outlay Report and Request for Reimbursement for Construction Programs (SF–271). The Department has discontinued the use of the Financial Status Report (SF–269 and SF–269A) and Federal Cash Transactions Report (SF–272 and SF–272A). The information contained in these forms have been consolidated into SF–425, which is a new form approved by OMB for Federal-wide use on October 1, 2008 and recently revised on June 28, 2010. According to the **Federal Register** notice dated August 13, 2008, agencies were to begin using SF–425 "as soon as possible after October 1, 2008, and no later than October 1, 2009, each agency must transition from the SF–269, SF–269A, SF–272, and SF–272A to the SF–425, by requiring recipients to use the FFR for all financial reports submitted after the date it makes the transition. In making the transition, an agency would incorporate the requirement to use the FFR into terms and conditions of new and ongoing grant and cooperative agreement awards, State plans, and/or program regulations that specify financial reporting requirements." Comments on this notice were received and addressed in a **Federal Register** notice dated August 13, 2008 (73 FR, 47246). These comments and responses can be found on the OMB Forms Web site at *http://www.whitehouse.gov/omb/grants/*

*grants_standard_report_forms.html.* The Department is also requesting approval to discontinue OMB Control Number 2105–0531.

*Correction:*

*Respondents:* Grant Awardees.

*Estimated Number of Respondents:* 2,704.

*Estimate Frequency:* Quarterly.

*Estimated Number of Responses:* 10,816.

*Estimated Total Annual Burden:* 189,280 hours.

*Public Comments Invited:* You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for the Department's performance; (b) the accuracy of the estimated burden; (c) ways for the Department to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information.

All comments will also become a matter of public record.

**Authority:** The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1:48.

Issued in Washington, DC, on November 3, 2010.

**Patricia Lawton,**

*Departmental Paperwork Reduction Act Clearance Officer, Office of the Chief Information Officer.*

[FR Doc. 2010–28361 Filed 11–9–10; 8:45 am]

**BILLING CODE 4910–9X–P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[Docket No. AB 303 (Sub-No. 36X)]**

### Wisconsin Central Ltd.—Abandonment Exemption—in Brown County, WI

Wisconsin Central Ltd. (WCL) filed a verified notice of exemption under 49 CFR part 1152 subpart F—*Exempt Abandonments* to abandon a 1.92-mile railroad line starting at milepost 3.88, in the Village of Howard, Wis., and ending at milepost 5.8, on the Oneida Tribe of Indians of Wisconsin Reservation, in Brown County, Wis.[1] The line traverses United States Postal Service Zip Code 54307.

WCL has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic on the line to be rerouted; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7(c) (environmental report), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on December 10, 2010, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[2] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[3] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by November 22, 2010. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by November 30, 2010, with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to WCL's representative: Michael J. Barron, Jr., Fletcher & Sippel LLC, 29 N. Wacker Drive, Suite 920, Chicago, IL 60606–2832.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

WCL has filed a combined environmental and historic report which addresses the effects, if any, of the abandonment on the environment and historic resources. OEA will issue an environmental assessment (EA) by November 15, 2010. Interested persons may obtain a copy of the EA by writing to OEA (Room 1100, Surface Transportation Board, Washington, DC 20423–0001) or by calling OEA, at (202) 245–0305. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339. Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), WCL shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by WCL's filing of a notice of consummation by November 10, 2011, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: November 4, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

**Jeffrey Herzig,**

*Clearance Clerk.*

[FR Doc. 2010–28302 Filed 11–9–10; 8:45 am]

**BILLING CODE 4915–01–P**

[1] WCL states that the line appears to contain a Federally granted right-of-way.

[2] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Office of Environmental Analysis (OEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Serv. Rail Lines,* 5 I.C.C. 2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[3] Each OFA must be accompanied by the filing fee, which is currently set at $1,500. *See* 49 CFR 1002.2(f)(25).

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Agency Information Collection Activities: Requests for Comments; Clearance of a New Information Collection: AST Collection of Voluntary Lessons Learned From External Sources

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

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval for a new information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on July 14, 2010, vol. 75, no. 134, page 40863. The FAA/AST will collect lessons learned from members of the commercial space

industry in order to carry out the safety responsibilities in 49 U.S.C. Chapter 701 Section 70103 (c).

**DATES:** Written comments should be submitted by December 10, 2010.

**FOR FURTHER INFORMATION CONTACT:** Carla Scott on (202) 267–9895, or by e-mail at: *Carla.Scott@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 2120–XXXX.

*Title:* AST Collection of Voluntary Lessons Learned from External Sources.

*Form Numbers:* There are no FAA forms associated with this collection.

*Type of Review:* Clearance of a new information collection.

*Background:* The FAA/AST collects lessons learned from members of the commercial space industry in order to carry out the safety responsibilities in 49 USC Chapter 701 Section 70103 (c). These responsibilities include "encourage, facilitate, and promote the continuous improvement of the safety of launch vehicles designed to carry humans." The FAA/AST collects and shares lessons learned between members of the amateur rocket community, experimental permit holders, licensed launch and reentry operators, and licensed launch and reentry site operators to ensure the safe and successful outcome of launch activities, allowing AST to meet our public safety goals without creating a regulatory burden.

*Respondents:* Approximately 20 members of the commercial space industry.

*Frequency:* Information is collected on occasion.

*Estimated Average Burden per Response:* 1 hour.

*Estimated Total Annual Burden:* 30 hours.

**ADDRESSES:** Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503.

*Public Comments Invited:* You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC, on November 4, 2010.

**Carla Scott,**

*FAA Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.*

[FR Doc. 2010–28391 Filed 11–9–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Agency Information Collection Activities: Requests for Comments; Clearance of a New Information Collection: FAA Safety Briefing Readership Survey

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

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval for a new information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on August 27, 2010, vol. 75, no. 166, pages 52801–52802. The survey will help the editors learn more about the target audience and how they elect to improve their safety skills/practices, and what they need to know to improve their safety skills/practices. With this information, the editors can craft FAA Safety Briefing content targeted to its audience to help accomplish the FAA and Department of Transportation's mission of improving safety.

**DATES:** Written comments should be submitted by December 10, 2010.

**FOR FURTHER INFORMATION CONTACT:** Carla Scott on (202) 267–9895, or by e-mail at: *Carla.Scott@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 2120–XXXX.

*Title:* FAA Safety Briefing Readership Survey.

*Form Numbers:* There are no FAA forms associated with this collection.

*Type of Review:* Clearance of a new information collection.

*Background:* The bimonthly print and online publication FAA Safety Briefing is designed to improve general aviation safety by: (a) Making the community aware of FAA resources, (b) helping readers understand safety and regulatory issues, and (c) encouraging continued training. It is targeted to members of the non-commercial general aviation community, primarily pilots and mechanics. This survey is intended to help the editors of FAA Safety Briefing better understand the target audience.

*Respondents:* Approximately 7,000 pilots, flight instructors, mechanics, and repairmen.

*Frequency:* One time per respondent.

*Estimated Average Burden per Response:* Approximately 10 minutes per survey.

*Estimated Total Annual Burden:* An estimated 1016.6 hours.

**ADDRESSES:** Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503.

*Public Comments Invited:* You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC, on November 4, 2010.

**Carla Scott,**

*FAA Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.*

[FR Doc. 2010–28389 Filed 11–9–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

### Environmental Impact Statement: Kern County, CA

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Rescind Notice of Intent to prepare an Environmental Impact Statement.

**SUMMARY:** The FHWA, on behalf of the California Department of Transportation (Caltrans), is issuing this notice to advise the public that the Notice of Intent (NOI) published on April 23, 2008, to prepare an Environmental Impact Statement (EIS) for the proposed 24th Street Improvement Project in Kern County, California, is being rescinded.

**FOR FURTHER INFORMATION CONTACT:** Kirsten Helton, Senior Environmental Planner, Southern Valley Environmental Analysis Branch, Caltrans, 2015 E. Shields Avenue, Suite 100, Fresno, California 93726 or call (559) 243–8224.

**SUPPLEMENTARY INFORMATION:** Effective July 1, 2007, the FHWA assigned, and Caltrans assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Caltrans, in cooperation with the City of Bakersfield, is rescinding the NOI to prepare an EIS for the 24th Street Improvement Project in Kern County, California.

The proposed project would improve transportation operations along 24th Street and the Oak Street/24th Street intersection to accommodate existing and future traffic volumes and achieve acceptable levels of service within the corridor. The proposed infrastructure improvements would alleviate existing traffic congestion and would result in improvement of local circulation. Since the NOI to prepare an EIS was published in the **Federal Register** on April 23, 2008, Caltrans has conducted public involvement and agency coordination, developed a purpose and need for the project, and developed preliminary alternatives to be examined. The preliminary alternatives included a No-Build and a set of three build alternatives for the improvements to the Oak Street/24th Street intersection, a set of three alternatives for the proposed widening of 24th Street between Oak Street and D Street; and reconstruction of 23rd Street and 24th Street between D Street and M Street (approximately 1.7 miles). Preliminary screenings identified sensitive environmental features associated with the proposed alternatives that could result in potentially significant adverse impacts.

Caltrans, as the assigned NEPA lead agency, has determined that a reduction of proposed project alternatives and upgrade improvements along existing State Route 178 would meet the need and purpose of the project and could be accomplished without potentially significant adverse impacts to sensitive environmental features. Caltrans will evaluate these improvements along the existing route within an Environmental Assessment. Comments and questions concerning the proposed action should be directed to Caltrans at the address provided above.

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

Issued on: November 4, 2010.

**Cindy Vigue,**

*Director, State Programs, Federal Highway Administration, Sacramento, California.*

[FR Doc. 2010–28342 Filed 11–9–10; 8:45 am]

**BILLING CODE 4910–22–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Land Release for Long Island MacArthur Airport

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice, request for public comment.

**SUMMARY:** The Federal Aviation Administration is requesting public comment on the Long Island MacArthur Airport (ISP), Ronkonkoma, New York, notice of proposed release from aeronautical use of approximately 17.69 acres of airport property, to allow for non-aeronautical development.

The parcel is located on the northeast corner of the Long Island MacArthur Airport. The tract currently consists of 17.69 acres of land and it is currently vacant. The requested release is for the purpose of permitting the airport owner to sell and convey title of 17.62 acres for use by the Long Island Rail Road.

Documents reflecting the Sponsor's request are available, by appointment only, for inspection at the Airport Managers office and the FAA New York Airport District Office.

**DATES:** Comments must be received by December 10, 2010.

**ADDRESSES:** Comments on this application may be mailed or delivered to the FAA at the following address: John R. Dermody, Manager, FAA New York Airports District Office, 600 Old Country Road, Suite 446, Garden City, New York 11530. In addition, a copy of any comments submitted to the FAA must be mailed or delivered to Ms. Teresa Rizzuto, Airport Manager, at the following address: 100 Arrival Avenue Ronkonkoma, NY. 11799–7398.

**FOR FURTHER INFORMATION CONTACT:** John R. Dermody, Manager, New York Airports District Office, 600 Old Country Road, Suite 446, Garden City, New York 11530; telephone (516) 227–3803; FAX (516) 227–3813; e-mail *John.Dermody@faa.gov.*

**SUPPLEMENTARY INFORMATION:** Section 125 of the Wendell H. Ford Aviation Investment and Reform Act for the 1st Century (AIR21) requires the FAA to provide an opportunity for public notice and comment before the Secretary may waive a sponsor's Federal obligation to use certain airport land for aeronautical use.

Issued in Garden City, New York on November 2, 2010.

**John R. Dermody,**

*Manager, New York Airports District Office, Eastern Region.*

[FR Doc. 2010–28317 Filed 11–9–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Notice of Meeting of the National Parks Overflights Advisory Group Aviation Rulemaking Committee

**ACTION:** Notice of meeting.

**SUMMARY:** The Federal Aviation Administration (FAA) and the National Park Service (NPS), in accordance with the National Parks Air Tour Management Act of 2000, announce the next meeting of the National Parks Overflights Advisory Group (NPOAG) Aviation Rulemaking Committee (ARC). This notification provides the dates, location, and agenda for the meeting.

*Dates and Location:* The NPOAG ARC will meet on November 30, 2010 and December 1, 2010. The meeting will take place at the Hilton Garden Inn, 7830 South Las Vegas Blvd., Las Vegas, NV 89123. The phone number is (702) 453–7830. The meetings will be held from 8:30 a.m. to 5 p.m. on November 30th and from 8:30 a.m. to 12 p.m. on December 1st. This NPOAG meeting will be open to the public.

**FOR FURTHER INFORMATION CONTACT:** Barry Brayer, AWP–1SP, Special Programs Staff, Federal Aviation Administration, Western-Pacific Region Headquarters, P.O. Box 92007, Los

Angeles, CA 90009–2007, telephone: (310) 725–3800, e-mail: *Barry.Brayer@faa.gov,* or Karen Trevino, National Park Service, Natural Sounds Program, 1201 Oakridge Dr., Suite 100, Fort Collins, CO 80525, telephone: (970) 225–3563, e-mail: *Karen_Trevino@nps.gov.*

**SUPPLEMENTARY INFORMATION:**

**Background**

The National Parks Air Tour Management Act of 2000 (NPATMA), enacted on April 5, 2000, as Public Law 106–181, required the establishment of the NPOAG within one year after its enactment. The Act requires that the NPOAG be a balanced group of representatives of general aviation, commercial air tour operations, environmental concerns, and Native American tribes. The Administrator of the FAA and the Director of NPS (or their designees) serve as ex officio members of the group. Representatives of the Administrator and Director serve alternating 1-year terms as chairman of the advisory group.

The duties of the NPOAG include providing advice, information, and recommendations to the FAA Administrator and the NPS Director on: Implementation of Public Law 106–181; quiet aircraft technology; other measures that might accommodate interests to visitors of national parks; and at the request of the Administrator and the Director, on safety, environmental, and other issues related to commercial air tour operations over national parks or tribal lands.

**Agenda for the November 30–December 1, 2010 NPOAG Meeting**

The agenda for the meeting will include, but is not limited to, final adoption of a Strategic Plan, update on ongoing Air Tour Management Program projects; and a discussion on the competitive bidding process.

**Attendance at the Meetings**

Although these are not public meetings, interested persons may attend. Because seating is limited, if you plan to attend please contact one of the persons listed under **FOR FURTHER INFORMATION CONTACT** so that meeting space may be made to accommodate all attendees.

**Record of the Meetings**

If you cannot attend the NPOAG meeting, a summary record of the meeting will be made available under the NPOAG section of the FAA ATMP Web site at: *http://www.faa.gov/about/office_org/headquarters_offices/arc/programs/air_tour_management_plan/parks_overflights_group/minutes.cfm* or through the Special Programs Staff, Western-Pacific Region, P.O. Box 92007, Los Angeles, CA 90009–2007, telephone: (310) 725–3808.

Issued in Hawthorne, CA on November 1, 2010.

**Barry Brayer,**

*Manager, Special Programs, Western-Pacific Region.*

[FR Doc. 2010–28312 Filed 11–9–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Notice of Passenger Facility Charge (PFC) Approvals and Disapprovals

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

**ACTION:** Monthly Notice of PFC Approvals and Disapprovals. In October 2010, there were four applications approved. This notice also includes information on one application, approved in September 2010, inadvertently left off the September 2010 notice. Additionally, 18 approved amendments to previously approved applications are listed.

**SUMMARY:** The FAA publishes a monthly notice, as appropriate, of PFC approvals and disapprovals under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158). This notice is published pursuant to paragraph d of § 158.29.

**PFC APPLICATIONS APPROVED**

Public Agency: Tulsa Airports Improvement Trust, Tulsa, Oklahoma.

Application Number: 10–07–C–00–TUL.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in this Decision: $7,875,712.

Earliest Charge Effective Date: April 1, 2019.

Estimated Charge Expiration Date: June 1, 2020.

Class of Air Carriers Not Required to Collect PFC's: Air taxi/commercial operators filing FAA Form 1800–31.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than I percent of the total annual enplanements at Tulsa International Airport.

Brief Description of Projects Approved for Collection and Use:

Passenger loading bridges.

Sliding and revolving doors in terminal.

PFC services consulting fees.

Decision Date: September 30, 2010.

**FOR FURTHER INFORMATION CONTACT:** Lana Logan, Arkansas/Oklahoma Airport Development Office, (817) 222–5636.

Public Agency: Cities of Midland, Saginaw, and County of Bay, Freeland, Michigan.

Application Number: 10–07–C–00–MBS.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in this Decision: $10,449,784.

Earliest Charge Effective Date: February 1, 2011.

Estimated Charge Expiration Date: February 1, 2029.

Class of Air Carriers Not Required to Collect PFC's: Air taxi/commercial operators filing FAA Form 1800–31.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at MBS International Airport.

Brief Description of Projects Approved for Collection and Use:

Phase IV terminal construction, taxiway construction.

PFC application fees.

Reimbursement of administrative expenses of PFC program.

Airfield pavement marking.

All phases of terminal construction.

Brief Description of Projects Approved for Collection:

Partial parallel taxiway and apron connector.

Completion of perimeter road.

Snow removal equipment procurement, high speed airport broom.

Decision Date: October 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** Irene Porter, Detroit Airports District Office, (734) 229–2915.

Public Agency: City of Bismarck, North Dakota.

Application Number: 10–05–C–00–BIS.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in this Decision: $7,100,309.

Earliest Charge Effective Date: September 1, 2014.

Estimated Charge Expiration Date: September 1, 2025.

Class of Air Carriers Not Required to Collect PFC's: Air taxi.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Bismarck Airport.

Brief Description of Projects Approved for Collection and Use:

Runway 13/31 surface treatment.

Taxiway C improvements.

Install lighted wind sock for runway 3/21.

Replace taxiway C edge lighting and signs.

Install two boarding bridge baggage lift devices.

North side service road.

Environmental assessment.

Surface treatment for runway 3/21.

Surface treatment for taxiway C.

Realign taxiway C.

Runway protection zone land purchase (phase 1).

Construct taxiway (phase 1).

PFC application preparation.

Purchase broom #2.

Purchase and install additional passenger loading bridge.

Rehabilitate a portion of taxiway C.

Purchase broom #3.

Modify aircraft rescue and firefighting building doors and rehabilitate aircraft rescue and firefighting building.

Purchase deicer and sander.

Purchase aircraft rescue and firefighting truck with extendable penetrating nozzle.

Rehabilitate aircraft rescue and firefighting parking ramp.

Brief Description of Withdrawn Projects:

Rehabilitate or construct snow removal equipment building.

Date of withdrawal: September 21, 2010.

Rehabilitate snow removal equipment parking ramp.

Rehabilitate taxiways B, C, and D.

Rehabilitate or expand apron, phase 1.

Rehabilitate and expand apron (phase 2).

Date of withdrawal: October 1, 2010.

Decision Date: October 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** Steven Obenauer, Bismarck Airports District Office, (701) 323–7380.

Public Agency: City of Bangor, Maine.

Application Number: 10–02–C–00–BGR.

Application Type: Impose and use a PFC. PFC Level: $4.50.

Total PFC Revenue Approved in this Decision: $1.998,100.

Earliest Charge Effective Date: December 1, 2010.

Estimated Charge Expiration Date: May 1, 2012.

Class of Air Carriers Not Required to Collect PFC's: On-demand air taxi commercial operators.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Bangor International Airport.

Brief Description of Projects Approved for Collection and Use:

Purchase snow removal equipment.

PFC application assistance.

Decision Date: October 7, 2010.

**FOR FURTHER INFORMATION CONTACT:** Priscilla Scott, New England Region Airports Division, (781) 238–7614.

Public Agency: City of Chico, California.

Application Number: 10–05–C–00–CIC.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in this Decision: $590,000.

Charge Effective Date: December 1, 2010.

Estimated Charge Expiration Date: December 1, 2015.

Class of Air Carriers Not Required to Collect PFC's: None.

Brief Description of Projects Approved for Collection and Use:

Interactive aircraft rescue and firefighting training system.

PFC administrative costs.

Brief Description of Project Approved for Collection:

Reconfiguration of baggage processing and baggage claim areas—design and construction.

Brief Description of Project Partially Approved for Collection:

Renovation of terminal building—design and construction.

Determination: Partially approved for collection. The costs associated with revenue producing concessions including the temporary rental car concession are disapproved. Decision Date: October 25, 2010.

**FOR FURTHER INFORMATION CONTACT:** Gretchen Kelly, San Francisco Airports District Office, (650) 876–2778, extension 623.

Amendments to PFC Approvals:

| Amendment No., city, state | Amendment approved date | Original approved net PFC revenue | Amended approved net PFC revenue | Original estimated charge exp. date | Amended estimated charge exp. date |
|---|---|---|---|---|---|
| 04–05–C–O1–GCC Gillette, WY. | 09/27/10 | $170,000 | $34,644 | 07/01/08 | 07/01/10 |
| 93–01–C–03–AVP Avoca, PA. | 09/28/10 | 4,588,122 | 4,453,122 | 05/01/01 | 05/01/01 |
| 97–02–U–02–AVP Avoca, PA. | 09/28/10 | NA | NA | 05/01/01 | 05/01/01 |
| 06–04–C–01–UNV State College, PA. | 09/29/10 | 1,420,524 | 1,261,493 | 12/01/14 | 12/01/14 |
| *08–06–C–01–TUL Tulsa, OK. | 09/30/10 | 65,043,406 | 57,177,803 | 04/01/27 | 04/01/19 |
| 03–08–C–02–SLC Salt Lake City, UT. | 09/30/10 | 9,035,419 | 10,288,588 | 07/01/07 | 08/01/07 |
| 03–09–C–01–SLC Salt Lake City, UT. | 09/30/10 | 25,265,000 | 24,686,131 | 05/01/08 | 05/01/08 |
| 06–10–C–01–SLC Salt Lake City, UT. | 09/30/10 | 75,362,174 | 72,172,545 | 02/01/10 | 07/01/09 |
| 08–12–C–02–COS Colorado Springs, CO. | 10/04/10 | 2,991,994 | 2,880,883 | 12/01/11 | 02/01/11 |
| 94–01–I–04–LWS Lewiston, ID. | 10/05/10 | 2,509,907 | 2,478,343 | 10/01/06 | 10/01/06 |
| 95–02–U–03–LWS Lewiston, ID. | 10/05/10 | NA | NA | 10/01/06 | 10/01/06 |
| *07–03–C–0I–TRI Blountville, TN. | 10/14/09 | 1,264,140 | 668,500 | 10/01/14 | 07/01/13 |
| *97–01–C–06–SDF Louisville, KY. | 10/20/10 | 90,600,000 | 90,600,000 | 11/01/14 | 12/01/13 |
| 01–02–C–05–SDF Louisville, KY. | 10/20/10 | 10,012,140 | 10,012,140 | 03/01/16 | 04/01/14 |
| 03–03–C–03–SDF Louisville, KY. | 10/20/10 | 5,666,800 | 5,666,800 | 04/01/18 | 02/01/15 |
| 06–04–C–04–SDF Louisville, KY. | 10/20/10 | 1,267,315 | 1,267,315 | 06/01/18 | 05/01/15 |
| 02–05–C–01–DCA Arlington, VA. | 10/20/10 | 33,895,949 | 30,727,768 | 02/01/08 | 02/02/08 |
| 07–05–C–01–TOL Toledo, OH. | 10/27/10 | 1,492,000 | 1,680,498 | 12/01/11 | 12/01/11 |

**Notes:** The amendments denoted by an asterisk (*) include a change to the PFC level charged from $3.00 per enplaned passenger to $4.50 per enplaned passenger. For Tulsa, OK and Louisville, KY, this change is effective on December 1, 2010.

Issued in Washington, DC, on November 1, 2010.

**Joe Hebert,**

*Manager, Financial Analysis and Passenger Facility Charge Branch.*

[FR Doc. 2010–28094 Filed 11–9–10; 8:45 am]

**BILLING CODE 4910–13–M**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Petition for Waiver of Compliance

In accordance with part 211 of title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

**Virginia & Truckee Railroad**

[Waiver Petition Docket Number FRA–2010–0093]

The Virginia & Truckee Railroad (V&T) petitioned FRA for relief from the requirements of 49 CFR 215.203 *Restricted Cars,* for five pieces of freight equipment used in tourist/excursion service and the associated stenciling as required under 49 CFR 215.303.

V&T is a tourist, excursion, or educational railroad operating between Virginia City and Carson City via Gold Hill, Nevada. The railroad was relayed after having been removed at the conclusion of commercial operations. The railroad operates an average of seven round trips between Virginia City and Gold Hill Depot, NV, per day, May through October. They also operate three trains between Carson City to Virginia City, NV, Saturday & Sunday May through October, with special trains scheduled in November. The maximum operating speed for the entire railroad is 20 mph.

All of the freight equipment referenced in the petition is operated by V&T on a non-insular, not part of the general system of transportation railroad. The railroad line is not connected to the general system at either end, but has public highway crossings at grade. This Special Approval shall apply only to the following five cars: V&T 50, V&T 55, V&T 54, V&T 123, and V&T MW 124, owned and operated by V&T. A consolidated list of the equipment and the prohibited components was provided as an attachment to their petition.

These freight cars were either converted to passenger excursion cars, or used in conjunction with their tourist/excursion operation, none carry freight. Some of the equipment is used for photographic subjects in an educational setting to depict the type of freight trains that would have operated in the era during mining operations. Therefore, stenciling the required information on the equipment would not be consistent with the educational setting that the railroad strives to depict. Therefore, the railroad seeks relief from the requirements to stencil the equipment indicating the restricted components. There have been no derailments or other safety issues with the operation of the equipment, nor their prohibited components. As stated by V&T, loss of use of this equipment would cause the railroad to cease operations.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (*e.g.,* Waiver Petition Docket Number FRA–2010–0093) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.—5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the 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 (65 FR 19477) or at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC, on November 3, 2010.

**Robert C. Lauby,**

*Deputy Associate Administrator for Safety Compliance and Program Implementation.*

[FR Doc. 2010–28313 Filed 11–9–10; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Notice of Intent To Rule on Request To Release Airport Property at the Plains Airport, Plains, MT.

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

**ACTION:** Notice of Request to Release Airport Property.

**SUMMARY:** The FAA proposes to rule and invite public comment on the release of land at Plains Airport under the provisions of 49 U.S.C. 47107(h)(2).

**DATES:** Comments must be received on or before December 10, 2010.

**ADDRESSES:** Comments on this application may be mailed or delivered to the FAA at the following address: Mr. David S. Stelling, Manager, Federal Aviation Administration, Northwest Mountain Region, Airports Division, Helena Airports District Office, 2725 Skyway Drive, Suite 2, Helena, Montana 59602.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Ms. Carol Brooker, Chair, Sanders County Commission, at the following address: Ms. Carol Brooker, Commissioner, Sanders County Commission, 1111 Main Street, Thompson Falls, MT 59873.

**FOR FURTHER INFORMATION CONTACT:** Mr. Gary M. Gates, Airport Planner/Engineer, Federal Aviation Administration, Northwest Mountain Region, Airports Division, Helena Airports District Office, 2725 Skyway Drive, Suite 2, Helena, Montana 59602.

The request to release property may be reviewed, by appointment, in person at this same location.

**SUPPLEMENTARY INFORMATION:** The FAA invites public comment on the request to release property at the Plains Airport under the provisions of 49 U.S.C. 47107(h)(2).

On August 12, the FAA determined that the request to release property at Plains Airport submitted by the airport meets the procedural requirements of the Federal Aviation Administration. The FAA may approve the request, in whole or in part, no later than December 10, 2010.

The following is a brief overview of the request:

Plains Airport is proposing the release of approximately 3.75 acres of non-aeronautical airport property to an adjacent land owner in order to conclude on-going land negotiations. The Airport Sponsor will receive fair market value for the property, which will be subsequently reinvested in eligible airport improvement projects.

Any person may inspect, by appointment, the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

In addition, any person may, upon appointment and request, inspect the application, notice and other documents germane to the application in person at Plains Airport.

Issued in Helena, Montana, on November 2, 2010.

**Gary M. Gates,**

*Acting Manager, Helena Airports District Office.*

[FR Doc. 2010–28310 Filed 11–9–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Quarterly Publication of Individuals, Who Have Chosen To Expatriate, as Required by Section 6039G

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice.

**SUMMARY:** This notice is provided in accordance with IRC section 6039G, as amended, by the Health Insurance Portability and Accountability Act (HIPPA) of 1996. This listing contains the name of each individual losing their United States citizenship (within the meaning of section 877(a) or 877A) with respect to whom the Secretary received information during the quarter ending September 30, 2010.

| Last name | First name | Middle name/ initials |
|---|---|---|
| Aboutboul | Stephen | Samuel |
| Altenpohl-Steurer | Bettina | Annette |
| Amgwerd-Sheaff | Christina | |
| Amstutz | Betty | Gerson |
| Amstutz | Patrick | |
| Anderson | David | Patrick |
| Aschmann | Thomas | Hans |
| Atkinson | Lavinia | |
| Aucan | Jerome | P. |
| Auger | Judy | Ann |
| Auyang | William | C. |
| Azhar | Shariq | |
| Azrieli | Stephanie | Joyce |
| Bachman | Mary | Arnold |
| Bachman | Van | Cleaf |
| Banks | Samuel | Roy |
| Baronti | Emanuele | Fernando |
| Bastos | Petrus | Pinheiro |
| Beguin | Christophe | Frederic |
| Bendat | Paul | Nathan |
| Benitez | Alfredo | Abelardo |
| Berlin | Barbara | |
| Berlin | Kristi | Simone |
| Berlin | Kim | Mishell |
| Besner | Rejean | |
| Besson | William | Thomas Lim |
| Bider | Marc | Daniel |
| Bignell | Carl | |
| Black | Johanna | Marie |
| Blackwell | Cecelia | Caroline |
| Bodmer-Gilgen | Carolyn | |
| Boh | Jennie | |
| Borgerding | Edward | James |
| Bornstein | Michael | S. |
| Borsetti | Renata | |
| Bovet | Robert | Eduard |
| Brodlieb | Jesse | Samuel |
| Brofferio | Costanza | Luisa |
| Browning | Andrew | John |
| Bucher | Virginia | Williams |
| Bucher | Steffen | Maximilian |
| Burdge | Lawrence | |
| Burger | Simone | Claudia |
| Burger | Elizabeth | Joyce |
| Callaghan | John | Arthur |
| Campeau | Pamela | Gail |
| Cannon | Ralph | George |
| Carlson | Helma | Maria |
| Carstairs | Emma | Jane |
| Causton | Clare | R. |
| Causton | Richard | |
| Chan | Siu-Fai (Sam) | |
| Chan | Yuen-Wah | |
| Chan | Yat | Chiu |
| Chan | Adrian | |
| Chandler | Howard | |
| Chandler | Jennifer | |
| Chen | David | Guang Miao |
| Chen | Charles | |
| Cheng | Ricky | Man-Shan |
| Cheng | Doreen | |
| Cheung | William | Wai Man |
| Chiu | Eric | Hsiuchun |
| Choi | Elliott | Gar-Hung |
| Chow | Theresa | Lynn |
| Chu | Jim | Kay Ping |
| Chua | Qi Xian | Jason |
| Chua | Theodore | Yuan-Shiun |
| Chung | Hyeon | Joo |
| Clark | Lisa | Michele |
| Clarke | Elizabeth | Ann |
| Coldren | Patricia | Mary |
| Cook | Dennis | Eugene |
| Corbett | Meryle | Lynn |
| Corbin | Tamara | Diane |
| Costelo | Michael | Philip |
| Costelo | Katherine | Ann |
| Cuenod | Antoine | Bernard |
| Cummins | Annetta | Susanne |
| Dale | Averil | |
| D'alessio | Diamante | O. |
| De Fecchino | Ileana | Celia Aiello |
| De Goyet | Claude | De Ville |
| De Palacio | Patricia | Cavanaugh |
| De Talans | Corinne | Rouveure |
| Dean | Jason | Leiser |
| Decker | John | C. |
| Dennig | Ti | Hua |
| Denye | Simon | Francis |
| Denye | Maoliosa | |
| Dicker | Keith | Christopher |
| Dickson | Alexander | Gerard James |
| Dickson | Theodore | Michael Stuart |
| Dietrick | Linda | Jane |
| Dimant | Alan | |
| Dittmar | Marc | Michael |
| Drake | Pamela | Jean |
| Driscoll | John | Timothy |
| Duncan | James | Michael |
| Ehrenbaum-Marti | Caroline | Tosca |
| Elliott | Francis | Patrick |
| Enav | Orie | |
| Eschholz | Elizabeth | |
| Faermark | Nicole | Esther |
| Feiler | Diane | Michelle |
| Fibiger | Hans | C. |
| Figueres | Shanon | Muni |
| Fink | Robert | |
| Fisher | John | Clinton |
| Fisher | Marjorie | Edith |
| Flesch | Karin | Gerda |
| Forget | Guy | Gilles |
| Foster | Thomas | Ross |
| Fox | Kenneth | R. |
| Freyler | Sonia | Renate |
| Furrer | Nicole | Breanan |
| Garcia | Vincent | James |
| Gargash | Ali Abdul | Jabbar |
| Garrison | Charles | |
| Gartmann-Breymeier | Karen | |
| Gazi | Diana | |
| Gertner | Matthew | I. |
| Giegerich | Susan | Carol |
| Giles | Ryan | William |
| Gillespie | Caroline | Pierce |
| Given | Gail | Kathleen |
| Gorr | Marc-Andrew | George |
| Grace | John | S. |
| Graf | Robert | Henri |
| Grau | Joachim | |
| Gray | Laurence | Brian |
| Gray | Douglas | Lee |
| Green | Ronald | Milner |
| Guerrero | Tempest | Manzano |
| Haag | Toralf | Andrew |
| Haberstich | Anne | |
| Hahr | Thomas | Joseph |
| Halkias | Constantinos | |
| Halkias | Stavris | |
| Halter | Sylvia | |

| Last name | First name | Middle name/ initials |
|---|---|---|
| Hamber-Schlueter | Ellen | Mary |
| Hampton | Peter | Henry |
| Han | Choi | Sang |
| Han | Richard | Jin Soo |
| Hare | David | Edwin George |
| Harmon | Sangboon | |
| Hayden | Sandra | Juliet Ferera |
| Heider | Andy | |
| Henderson | Lisa | Marie |
| Hesseln | Wolfgang | |
| Hill | David | Carson |
| Hill | Richard | Walter |
| Hirai | Aiko | |
| Hirai | Kihei | |
| Hirano | Mutsuo | |
| Hirsh | Denton | Hugo |
| Ho | Keung | |
| Hodler | Alice | Carolyn |
| Hoffman | Roger | Scott |
| Hofmann | Albert | J. |
| Hofmann | Kristan | Michael |
| Hou | Lee-Fang | |
| Hoyt | John | Philip |
| Huegli | George | Erwin |
| Huie | Allen | Tat Yan |
| Hungerford | Michael | Lyall Maclaren |
| Hurgli | Christine | Magdalena |
| Hurip | Eddie | |
| Irvine | James | Fitton |
| Jacob | Allison | Denee |
| Jaeckel | Michael | Steven |
| Jarng | Ann | Barngwoo |
| Jenny | Jachen | Dury |
| Jenny | Peider | Curdin |
| Jenny | Reto | Daniel Andry |
| Jensen | Torjus | |
| Johnson | Christopher | Lind |
| Johnston | Doreen | Loina |
| Jones Iii | Randall | Logan |
| Kaithan | Peter | Hilmar |
| Kirchner | Manfred | Gustaf |
| Kirn | Dawna | Lea |
| Kirn | John | Howard |
| Kirpalani | Ravina | |
| Knoblauch | Bettina | Deneen |
| Koenitzer | Thomas | Edward |
| Konovalenko | Evgueni | |
| Korody | Istvan | Paku |
| Kuster | Stephen | Louis |
| Kwan | Ringo | Cheukkai |
| Kwan | Charlotte | C. L |
| Kwong | Win | Win |
| Kwong | Chun | Chuan |
| Labonville | Jean | Marc |
| Lai | Allan | C. |
| Lai | Daniel | Sai-Hong |
| Lall | Lyndon | |
| Lam | Salina | Sai Lin |
| Lam | Jada | Wing Yan |
| Lang | Walter | Otto |
| Lassen | Lianne | Marie |
| Lau | Isaac | Bok Man Kaleo |
| Leatherman | Charles | Brooke |
| Leaver Jr | Thomas | Mcgregor |
| Lecomte-Cuendet | Claire-Lise | |
| Lee | Francis | Jong Sang |
| Lee | Christina | Maisenne |
| Lee | Bobbie | Wai Lang |
| Lee | Phyllis | Pang-Chi |
| Lee | Grace | Meina |
| Lemos | Christina | Carras |
| Leung | Shu | Tim |
| Lewis | Elva | Gertrude |
| Lewis Jr | Eben | Willingham |
| Li | Kai | |
| Li | Evan | Ming-Hon |
| Li | Christina | Po Man |
| Lianos | Panayotis | |
| Lombard | Pamela | Lawrence |
| Long | Gaye | Lenore |
| Louit | Nicolas | Paul |
| Low | Elizabeth | |
| Lowrie | Marcia | |
| Lu | Chun | Ching |
| Luntz | Reagan | Mather |
| Lusser | Christoph | Ursus |
| Lusser | Prisca | Julia Studi |
| Luu | Dewitt | |
| Ma | Derek | Hing Kwok |
| Mackay | Donald | R. |
| Mackenzie | Donald | Gordon |
| Mair | Susan | Goodrich |
| Maita | Hikaru | |
| Maniere | Chantal | De Poilloue |
| Mar | Pamela | Chia-Ming |
| Marsh | Kenneth | John |
| Matter | Jeremy | Antoine |
| Mcclintock | Wayne | Delbert |
| Mcdougall | James | Mcgregor |
| Mclean | Leslie | Moseman |
| Mcnab | Alan | |
| Mcnab | Anne | |
| Mead | Shepherd | |
| Mendieta, Jr | Edwin | A. |
| Merkle | Barbara | Christine |
| Metcalf | Barbara | Ann |
| Mettler | Julian | |
| Meurzec | Maelle | Paulette |
| Miksha | Ronald | Michael |
| Miller | Judith | Natalie |
| Miller | Craig | Cameron |
| Ming | Bo | Jean |
| Morcerf | Renato | |
| Mori | Tetsuya | |
| Morin | Pascal | Charles |
| Morrison | David | Gibson |
| Mulroney | Ashley | Dianne |
| Munsch | Ann | Beeler |
| Murillo | Vanessa | Pogacnik |
| Murray | Betty | Caroline |
| Murray | Irwin | Mackay |
| Murray | Eddie | Dean |
| Muto | Toshinao | |
| Naccache | Hermine | Helene |
| Naccache | Paul | Henri |
| Nadal | Samantha | Faith |
| Naito | Kunihiko | |
| Nayer | Gerald | Rolla |
| Naylor | Gordon | Albert |
| Neergaard | Rita | Jan |
| Neilson | Garry | Stuart |
| Newman | Patricia | Ann |
| Ng | Victoria | Hwa-Yuan Yang |
| Ngan | Godwin | Wing Kay |
| Ngoi | Natalie | Yan Li |
| Norman | David | George |
| Noyes | Keith | Samuel |
| Obbard | Andrew | K. |
| Ollivier | Florian | Marie Bernard |
| | Antoine | |
| Ong | Peng | Tsin |
| Ortega | James | |
| Ourada | Christine | M. |
| Ourada | Jan | F. |
| Pacheco | Kent | Richard |
| Padovano | Susan | Goldlust |
| Palisetti | Ramana | |
| Pan | Hai-Yen | Alice |
| Parschau | Bernhard | C. |
| Paton | Craig | |
| Penner | Thomas | Carson |
| Perez | Sharon | |
| Perry | Henry | Atterbury |
| Phounsavan | Saylom | |
| Phounsayan | Saylom | |
| Piccinin | Andrea | |
| Prenoveau | Guy | Joseph |
| Prenoveau | Lucile | Marie |
| Rice | Ann | C. |
| Rice | Patrick | Ralph |
| Richter | Liesl | |
| Ritter | Judith | |
| Robertson | Andrew | Brian |
| Robinson | Christopher | Douglas |
| Rodd | Celia | Jane |
| Rogers-Perz | Beryl | M. |
| Sabukosek | Thomas | Michael |
| Sakai | Sumie | |
| Sattler | Glenn | Francis |
| Saw | Boo | Guan |
| Schachenmann | Teano | Andre |
| Schachler | Jurgen | |
| Schaeffer | Jacobus | H. |
| Scherer | Ana | Catarina |
| Schiegg | Samuel | Frederic |
| Schmidt | Pamela | Lindsey |
| Schmutzler | Armin | Rolf Marc |
| Schroeder | Rosalina | |
| Schueller | Amos | |
| Schwartz | Angela | Carlisle |
| Scollay | Roland | Guy |
| Searle | Heather | Michele |
| Seo | Min | Sik |
| Shao | Nicholas | |
| Shih | Royce | |
| Shonozaki | Mari | |
| Shun | Mei | Wah |
| Signer | Deborah | Ursula |
| Sinyaev | Andrey | |
| Slovenski | Richard | Thaddeus |
| Steiner-Kaithan | Christine | Andrea |
| Stevens | Brita | |
| Stindt | Patricia | Eve |
| Straub-Baumann | Regula | |
| Stubbs | Christopher | David |
| Su | Tung | Ping |
| Su | Landon | Wei-Yang |
| Sugay | Teresita | Rosario |
| Suthimai | Catherine | |
| Sweeney | Ann | Marie |
| Takahashi | Takako | |
| Tang | George | Yuen-Shun |
| Tartini-Rostropovich | Alessandro | Paolo |
| Teh | Delores | Eng-Hua |
| Teng | Paul | Piang-Siong |
| Thadani | Shyamla | Vinod |
| Thaiss | Nahid | |
| Thaiss | Gustav | Edward |

| Last name | First name | Middle name/ initials |
|---|---|---|
| Thakkar | Rajiv | D. |
| Tsai | Jeffrey | T. |
| Tsang | Chi | Kin |
| Tseng | Kenneth | Hing Key |
| Tsunomori | Mieko | |
| Tsunomori | Motoki | |
| Tye | Mei | Peng |
| Uhl | Matthias | William |
| Uhle' | Anton | Frederic |
| Unger | Kelly | Bernadette |
| Vallin | Daniel | James |
| Van | Douglas | |
| Vandevelde | Mark | Robert |
| Vaughn | Kathryn | Blair |
| Vermandel | Kurt | |
| Vice Consul | Marc | J. Young |
| Vlad | Lucian | |
| Von Stiernhielm | Maximilian | Olof Winkler |
| Wagner | Susanne | Anneliese |
| Wang | Shi | Ming |
| Wang | John | |
| Ward | Laurie | T. |
| Ward | Marie | I. |
| Ward | Bradley | James |
| Wasserman | Gregory | George Rene |
| Wegener | Annette | |
| Weng | Xiangwei | |
| Wenger | Laurence | Paul |
| Whitehead | Phillip | |
| Woehlbier | Christian | Herbert |
| Woehlbier | Anne | Kristin |
| Wong | Jason | Chong |
| Wong | Kun | Wah |
| Wong | Jonathon | Chun Ho |
| Wong | Sean | Hung Sui |
| Woodruff | Margaret | Eva Simmons |
| Woppert | Allen | Jerome |
| Wu | Benjamin | Bin |
| Xiao | Sharon | Y. |
| Yang | Wei-Sun | |
| Yang | Alex | Keun Mo |
| Yen | Chi | Tan |
| Yenny | Jacques | G. |
| Yenny | Monique | Y. |
| Yokokawa | Jun | |
| Yu | Pearl | |
| Zang | Wenyi | |
| Zedan | Mohamed | F. |
| Zeinalzade | Cyrus | |
| Zwicky | Lynn | |

Dated: October 26, 2010.

**Angie Kaminski,**

*Manager Team 103, Examinations Operations—Philadelphia Compliance Services.*

[FR Doc. 2010–28314 Filed 11–9–10; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Quarterly Publication of Individuals, Who Have Chosen To Expatriate, as Required by Section 6039G

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice.

**SUMMARY:** This notice is provided in accordance with IRC section 6039G, as amended, by the Health Insurance Portability and Accountability Act (HIPPA) of 1996. This listing contains the name of each individual losing their United States citizenship (within the meaning of section 877(a) or 877A) with respect to whom the Secretary received information during the quarter ending June 30, 2010.

| Last name | First name | Middle name/ initials |
|---|---|---|
| Abobo | Vincente | Dumadag |
| Adams | D. | Michael |
| Ahmad | Amir | K. |
| Aiello | Heana | Celia |
| Aita | Stephan | Anthony |
| Akazawa | Haruyuki | |
| Albuquerque | Sean | David |
| Alder | Caroline | Jane |
| Alpen | Jens | A. |
| Alzouman | Bazza | S. |
| Alzouman | Suad | I. |
| Amano | Keiko | |
| Amano | Kenichi | |
| Amiti | Tatjana | |
| Anderson | Barbara | Christa |
| Anderson | John | Derek |
| Anderson | Rose | Mary |
| Andreen | Clas | Svante Joel |
| Ang | Diana | Shu-Zhen |
| Angelini | Kevin | Yang |
| Aomori | Miki | |
| Arakaki | Shigeo | |
| Archer | Neal | K. |
| Arene | Eugene | Aroneanu |
| Arksey | Gregory | |
| Au | Kevin | |
| Bachmann | Dorothea | Anna |
| Bae | Bok | Soon |
| Bailey | Dylan | Ivan |
| Bamford | George | |
| Barp | Mario | Bruno |
| Bates | Beverley | J. |
| Bates | Leslie | A. |
| Baudon | Thierry | Marie |
| Beattie | Daniel | |
| Becker | Kaja | K. |
| Bednarz | Andrew | James |
| Beirnes | Denise | |
| Bell | William | Anthony |
| Bergandi | Marco | Lee |
| Berre | Jean | N. |
| Berryman | Curtis | Frederick |
| Beveridge | Richard | Henry Earle |
| Beveridge | Suzanne | Maree |
| Birkelid | Carrie | Nell |
| Bisgaard | Keld | |
| Bisgaard | Nathalie | |
| Bisgaard | Stephanie | |
| Blanshard | Nigel | Gove |
| Blin | John | |
| Bobillier | Rachel | |
| Bonnet | Servane | Michele |
| Borer | Robert | Chamberlain |
| Bourguignon | Monique | J. |
| Bourguignon | Patrick | H. |
| Bozicevich | Mario | S. |
| Brady | Mary | I. |
| Brandl | Marilyn | Hester |
| Bratsberg | Bo | Magnus |
| Braziunas | Darius | |
| Bree | David | Nathan |
| Brenninkmeyer | Roderick | Alphons Ludgeros |
| Brodie | John | B. |
| Broshy | Gad | |
| Busch | Tristan | David Charles |
| Cake | Terry | E. |
| Campbell-Scherer | Denise | |
| Carison | Helma | Maria |
| Cha | Benjamin | Hau Tsung |
| Chabot | Jean | L. |
| Chan | Charles | T. |
| Chan | Chi | Ming |
| Chan | Ching | Chung |
| Chan | Dennis | Kwok-Leung |
| Chan | Myles | Po Loi |
| Chang | Chien-Hui | |
| Chang | Michael | Lt |
| Chang | Sheng | En |
| Chang | Shu-Chin | |
| Chau | Ling | Ki |
| Chaves | Ricardo | |
| Chen | Betty | Wong |
| Chen | Che | Ted |
| Chen | Helen | Yan Heung |
| Chen | Jai Qing | |
| Chen | Kuei | Yung |
| Cheng | Chuck | Cheuk-Wing |
| Cheng | Mabel | Po Fam Lam |
| Cheuk | Alexander | Siu-Bun |
| Cheuk | Victoria | Wai Ki |
| Cheung | Alice | Sin Ting |
| Cheung | Ling-Lun | Yeung |
| Cheung | Mark | Quintin |
| Chih-Hsiang | Lisa | Lee |
| Chiu | Sammy | Kai-Kong |
| Christianson | Marlys | |
| Chun | Jessica | |
| Chung | Hyeeinn | Jennifer |
| Clark | Martin | V. |
| Clasper | David | B. |
| Connaughty | Margaret | Sharon |
| Connell | Marcos | |
| Cook (Vaughan) | Jean | Lois |
| Costermans | Claire | |
| Crawford | Annette | |
| Cussen | Antonio | Jose |
| Cussen | Antonio | Jose |
| Davaucourt | Marie-Laure | Dominique, Devitry |
| De Terra | Magnolia | |
| Degunzburg | Marc | David |
| Dempfle | Carl-Erik | Hartmut |
| Dimingo | Tatiana | Santo |
| Djeu | Tuck | Shing |
| Djordjevic | Marianna | Wagener |
| Douglas | Louise | E. |
| Douglas-Good | Johanne | B. |
| Drake | William | E. |
| Driscoll | John | T. |
| Dutt | Ashu | |
| Eggenschwiler | Julie | Ann |
| Eisele | Nichelle | Lynn |
| Eksioglu | Burak | |
| Elkin-Mocatta | Frederick | Edward |
| Engle | Colin | Mckinley |

| Last name | First name | Middle name/ initials |
|---|---|---|
| Epp | Matthias | |
| Epstein | Joshua | P. |
| Eslampour | Robert | |
| Esterhuizen | Femmy | W. |
| Esterhuizen | Willem | L. |
| Estes | Katherine | L. |
| Etheart | Florence | |
| Fairchild | Peter | Tappen |
| Fairweather | Nicholas | |
| Falkehed | Sven | Erik |
| Farrell | Douglas | John |
| Fay | Mary Susan | Standish |
| Fernandez-Bianci | Jorge | Miguel |
| Ferro | Patricia | |
| Fischer | Jurg | |
| Fish | Ian | T. |
| Flader | Jack | W. |
| Fleming | Hildegard | Jennifer |
| Fleming | Richard | Michael |
| Fok | Vincent | C. |
| Fong | Hoi | Sze Amy |
| Foo | Pauline | Chu |
| Franchitto | Mary | Jane |
| Fried | Josephine | M. |
| Froemel | Beate | |
| Fu | Po | Lin |
| Fukunaga | Miki | |
| Fuller | Frances | T. |
| Garston | Adrian | |
| Giraud | Jean-Paul | M. |
| Goes | Rodrigo | S. |
| Goes | Rodrigo | S. |
| Gonzales | Joseph | Robert |
| Gonzales | Marc | Daniel |
| Goodman | Jeffrey | H. |
| Graebert | Astric | Laurence |
| Graziano | Mylene | |
| Greville | John | B. |
| Grimstad | Oystein | Herman |
| Grindrod | Fiona | E. |
| Grozev | Roumen | G. |
| Guerreri | Joshua | Nicholas D'aluisio |
| Gut | Rainer | Alexander |
| Haettenschwiller | David | Laurence |
| Hall | Alastair | R. |
| Hamilton | Barry | Manely |
| Hammerich | Bo | Jorgen |
| Hammond-Myhre | Susanna | M. |
| Hanan | Christopher | Charles |
| Hand | Jeremy | |
| Hara | Sueko | |
| Haussmann | William | Frederick |
| Hawit | Lizette | |
| Hayashi | Mariko | |
| Hayashi | Yasunori | |
| He | Fei | |
| Heald | Pamela | |
| Heine | Andreas | |
| Heinecke | Patricia | Ann |
| Hellings | Marcel | |
| Henderson | Edward | Lloyd |
| Hickman | Patricia | Hazel |
| Hickson | Louis | Joseph |
| Hill-Saran | Jennifer | Elizabeth |
| Ho | Mark | Chin Wei |
| Hoel | Karina | Vieira |
| Hohl-Desmarais | Corinne | |
| Hojo | Hiroshi | |
| Hoomani | Susan | |
| Hooper | Jeremy | Whitney |
| Hori | Masahiro | |
| Horisberger-Cuendet | Laure | Gabrielle |
| Hsia | Mia | Mu Yi |
| Hsu | Kay | Wong |
| Hui | Kington | Kin Bong |
| Hui | Kwok-Kit | |
| Hui | Man | Yan Mark |
| Hui | Ng Suk | Ha |
| Hung | Janet | Yi Kui |
| Hung | San-Hsiung | |
| Husain | Syed | F. |
| Huttinger | Dorothea | Anne |
| Ihii | Kiyoshi | |
| Ikeda | Tomoharu | |
| Imanishi | George | Kiyohisa |
| Imhoof | Claude | R. |
| Indergand | Corinne | Ann Veya |
| Ireton | Peter | S. |
| Irving | Laura | Nadine |
| Ishibashi | Keiko | |
| Ishigaki | Fumie | |
| Ishigaki | Kiyochika | |
| Ishii | Kuniko | |
| Ishiyama | Maki | |
| Issa | Muna | M. |
| Itabashi | Yasuhisa | |
| Itakura | Yuuichi | |
| Jacob | John | |
| Jaeggi | Ann | M. |
| Jaffe | Nicholas | David John |
| Jagan-Brancier | Nadira | S. |
| Javorcik | Beata | S. |
| Jimenez | Marvin | |
| Johnson | Keith | |
| Johnson | Patricia | Margaret |
| Jung | Manfred | F. |
| Justice | Rose | Ong |
| Kadoorie | Phillip | Lawrence |
| Kaizuka | Atsuko | |
| Kaizuka | Chisato | |
| Kaizuka | Fumiko | |
| Kaizuka | Masao | |
| Kalinjowska | Teresa | |
| Kan | Kei | Nap |
| Kan | Mandy | Kit Ming |
| Karl | Jarkko | |
| Kayal | Hawazen | Alawi |
| Kayser | Carolyn | Sue |
| Keil | Jared | Tao |
| Kendall | Don | |
| Kendall | Teresa | |
| Kennedy | Christin | Susan |
| Kim | Chung | H. |
| Kim | Hannah | Boyoung |
| Kim | Johnny | Han |
| Kin | Tse | Wing |
| Kiresepi | Sami | |
| Kito | Ryusuko | |
| Klein | Bradley | John |
| Ko | Edward | Suk |
| Ko | Margaret | Yuyin |
| Kong | Harvey | |
| Kothari | Dilip | Tulsidas |
| Kwok | Kendrick | Wing-Kay |
| Lahey | Linda | Soewarni Widjaja |
| Lam | Karen | Suk-Yan |
| Lam | Keith | Brendan Xun-Yu |
| Lam | Sharon | Ka Suet |
| Lam | Sian | Yan Iwalani |
| Lam | Thomas | Ying-Tai |
| Lamare | Joanne | T. |
| Langley | Rhonda | Elizabeth |
| Langley | Ronald | |
| Lao | Man Bee | |
| Lao | Ruperto | C. |
| Laty | Fabrice | S. |
| Lau | Kwok | Chu |
| Lau | Lawrence | Juen-Yee |
| Lau | Megan | Shirley |
| Lau | Ross | B. |
| Lauzat | Eric | Jean Pierre |
| Law | Stephanie | Kai Nin |
| Law | Stephanie | Kai Nin |
| Law | Ying | Chee Fogg |
| Lawless | Joanne | Murphy |
| Layman | Thomas | |
| Lee | Hoon | |
| Lee | Hye | Young |
| Lee | Kristina | |
| Lee | Ming-Chih | |
| Lenders | Karine | |
| Leonard | Paul | Richard |
| Leong | Camellia | Yuet Yee |
| Leung | Jerome | Ty |
| Leung | Jonathan | Ted |
| Leung | Tom | Koon-Cheung |
| Levin | David | Joseph |
| Levine | Zuriel | Meshulam |
| Lewis | Brian | Stuart |
| Li | Evan | Ming-Hon |
| Li | Gregg | Great Ka Lok |
| Li | Karen | Fung Ling |
| Lim | Elsie | Chui-Ling |
| Lim | Lawrence | Fengyuan |
| Lin | Ho-Ping | |
| Lin | Jixan | |
| Liu | Erh | Fei |
| Liu | Xingxie | |
| Lo | David | Tai Wai |
| Lo | John | Yen Chak |
| Lok | Si | |
| Losert | Peter | |
| Louey | Winifred | Wai Fong |
| Low | Elaine | |
| Lowery | Don | |
| Lu | Min | |
| Lund | Uwe | |
| Lyonel | Roturier | |
| Ma | Cheryl | Ann Pei Wen |
| Ma | Theodore | H. |
| Ma | Yu | |
| Machlin | Anna | Farra |
| Machlin | Katherine | Samantha |
| Machlin | Laura | Ann |
| Machlin | Rachel | Shirley |
| Maduro | Jaime | Eduardo |
| Maggard | James | Douglas |
| Magnoni | Olivia | |
| Malik | Akhtar | Hussain |
| Manley | Morgan | J. |
| Martin | Elsi | Maria |
| Martin | Monique | C. |
| Martin | Theresa | Y. |
| Mashlenko | Irina | |
| Matsuoka | Shinya | |
| Matthieu | Mingasson | |
| Maxwell | Marius | |
| Mcdonald | Matthew | E. |
| Mcdonnell | Gerald | E. |
| Mcdonnell | James | Gerald |

| Last name | First name | Middle name/ initials |
|---|---|---|
| Mcgoldrick | Patrick | R. |
| Mckenzie | Maria | E. |
| Mehalko | Evelyn | Cindy |
| Mell | Hilda | Odette |
| Melnyk | Kevin | W. |
| Melton | Ursula | Margarethe |
| Meneghini | Bruno | Mario |
| Meng | Liang | |
| Michael | Kayla | Rynn |
| Migrino | Martin | C. |
| Miles | Nicola | Jane |
| Miltcheva | Radosveta | G. |
| Mioni | Marcello | |
| Mitchell | Charles | Henry |
| Monoson | Leslie | Uriel |
| Montague | Eric | Stephane |
| Moon | Diana | |
| Moore | Giampier | |
| Morgalis | Chong | Nan |
| Morison | Andrew | Malcolm |
| Moscona | Gabriel | |
| Muck | Linda | |
| Mullenworth | John | Christopher |
| Munshi | Saleh | Mohamed |
| Murdock Jr. | John | Thomas |
| Murdock | John | Thomas |
| Murfitt | Gerard | John |
| Muto | Eita | |
| Muto | Hiroko | |
| Nagata | Y. | |
| Nahas | Marie | Anne |
| Nelson | Barbara | Belle |
| Newsome | Mara | |
| Ng | Bertha | |
| Ng | Edwin | Sai-Wah |
| Ng | Fong | Shing |
| Ng | Madeline | |
| Ng | Ronald | Sai Cheong |
| Niiori | Kay | K. |
| Noh | David | Hyo Joon |
| Norfleet | Coburn | T. |
| North | Richard | Alan |
| O'neill | Swentana | Viktorovna |
| Onodera | Akira | |
| Oswald | Sarah | Catherine |
| Owen | Richard | J. |
| Pakir | Sheila | Kaye |
| Parayno | Bonafe | Devera |
| Park | Kee | Hwa |
| Park | Song | Soon |
| Patel | Prayank | Pravinkumar |
| Patterson | Jane | Meghan |
| Peckford | Louise | Adele |
| Peet | Sylvia | |
| Peet | William | Edward |
| Peterson | Nancy | L. |
| Pethe | Ellen | Nmi |
| Petith | Howard | Carl |
| Pfeifer | Monique | Evelyne |
| Phillips | Michael | Robert |
| Philpott | Thomas | P. |
| Polemitis | Andreas | Charalampou |
| Pope | Mary | Anna |
| Protopopov | Andrew | |
| Pynaker | Linda | Louise |
| Quinn | Rafael | A. |
| Rachen | Lars | |
| Radaza | Harry | Don Anderson |
| Ramalho | Sonia | Machado |
| Ravindran | Vappalak | A. |
| Razis | Evangelia | |
| Renold | Octavia | Lavia |
| Reppelin-Hill | Valerie | |
| Richie | James | Drake |
| Richman | Eliot | Marshall |
| Richter | Andrea | Virginia |
| Rigazzi | Alain | R. |
| Ritter | John | D. |
| Roden-Davis | Ulla | K. |
| Rolfe | Pamela | Anne |
| Roman | Yeon | Hee |
| Rosario | Hanzel | Danoise |
| Rose | James | B. |
| Rousso | Renee | |
| Rubner-Dhaens | Carolin | |
| Sakka | Akiko | |
| Sakka | Mitsumasa | |
| Salles | Joao | Moreira |
| Salvi | Vanessa | Jennifer |
| Samper | Dario | |
| Sani | Dalina | Abdul |
| Sarmiento | Sonia | |
| Satrap | Alireza | |
| Saumweber | Helena | Maria |
| Schatz | John | Barkley |
| Scherer | Stefan | |
| Schmid | Oliver | |
| Schmidberger | Maria | A. |
| Schneider | Franziska | Corinna |
| Schneider | Maria | Madalene |
| Schnell | Marlies | G. |
| Schnell | Sidney | P.W. |
| Scott-Perry | Pilar | |
| Seiler | Amada | Helena |
| Selden | Janet | Elizabeth |
| Selden | Robin | Geoffrey |
| Sele | Joan | Helen |
| Serruya | Raphael | Jose |
| Shackleton | David | Ian |
| Shaeffer | Sheldon | Floyd |
| Shaker | Nawal | |
| Shantz | Wayne | Ralph |
| Sharma | Pratibha | |
| Shen | Hung | Yat Allen |
| Shih | Jonathan | Hung-Yee |
| Shih | Jonathan | Chih Cheng |
| Shih | Kendrick | Co |
| Shizuka | Emiko | |
| Shmuilovich | Svetlana | |
| Siravanta | Sammy | |
| Smith | Alan | A. |
| Smith | Judi | A. |
| Smith | Linda | C. |
| Smith | Robin | L. |
| So | Jonathan | Wing Lok |
| So | Wendy | Wan Yee |
| Solomon | Stephan | Joel |
| Son | Jenie | |
| Son | Kon | Ok |
| Song | Chi | Mi |
| Songkla | Dee | Cee Na |
| Sophonpanich | Donna | |
| Southergill Speight Feller | Bryan Senta | Taft |
| Speyer | Jacques-Paul | Fabien |
| Spoliansky | Dimitri | Patrick Rouxel |
| Spring | Annabel | F. |
| Srinivasan | Rajan | Ramaswamy |
| Stamatopoulos | Konstantinos | |
| Stauffer | Jeanne | |
| Stetzenmeyer | Marie-Claude | |
| Stiernhielm | Maximilian | Olof Winkler Von |
| Stirling | Erin | |
| Stockburger | Bernd | E. |
| Stokes | Peter | |
| Sugimoto | Chihiro | |
| Sugimoto | Iwaki | |
| Suica | Igor | |
| Sun | Jenny | |
| Sung | Pauline | C. |
| Sweeney | Kathleen | Sachiko |
| Szeto | Margaret | Po |
| Tai | Vincent | Po-Ka |
| Taimi | Tomoko | |
| Takahashi | Kazuo | |
| Tan | Alice | |
| Tan | Peter | |
| Tan | Willie | |
| Tanielian | Adam | Richard |
| Testa | Carlo | |
| Thow | Xin | Yuan |
| Ting | Arthur | Kwang-Hung |
| Tintor | Isabel | Reed |
| Toepel | Wolfgang | |
| Toh | Andrew | Yung-Wei See |
| Tokcan | Atil | Enis |
| Tokoro | Midori | |
| Tokoro | Mikiya | |
| Tong | Andrew | Wai-Chung |
| Tsang | Wai Po | Polly |
| Tsangrides | Philippos | Alexandros |
| Tse | Anthony | Wai Chung |
| Tse | Christopher | |
| Tung | Alan | Leih-Sing |
| Tung | Po Ming | Janet |
| Turner | Susan | Claire |
| Uhl | Matthias | William |
| Urdahl | Eric | Carl Johan |
| Valls | Mary | C. |
| Waechter | Hanspeter | |
| Wang | Danchi | |
| Wang | Jenny | Shin-Yee |
| Wang | Lisa | Chia-Yee |
| Wang | Yue | |
| Waple | Gudrun | |
| Wardman | George | Alfred |
| Waterbury | Clair | |
| Watson | Mark | A. |
| Webbe | Jill | Periton |
| Weiss | Jochen | |
| Weissmann | Arie | Efraim |
| Wiesmann | Christian | |
| Wiesmann | Marion | |
| Williams | Gabrielle | Ashley |
| Wong | Andrew | C.K. |
| Wong | Catherine | Hwansei |
| Wong | Eric | Dylan |
| Wong | Helen | Siu Ming |
| Wong | Nelson | |
| Wong | Polly | Po-Yee |
| Wong | Suzanne | |
| Wossink | Grada | A. |
| Writesman | Christopher | Michael |
| Wun | Harvey | |
| Wylie | Harvey | |
| Xu | Hang | Michael |
| Yamazaki | Megumi | |
| Yang | Mei-Ni | |
| Yates | Richard | I. |
| Yau | Tsz-Chung | Anthony |
| Ying | Long | Shang Ying |
| Yip | Kamchuen | Oliver |

| Last name | First name | Middle name/ initials |
|---|---|---|
| Yip | Katherine | Ching |
| Yokoo | Kenji | |
| Yokoo | Mitsuko | |
| Young | Peter | Leung |
| Yukawa | Hideto | |
| Yukawa | Noriko | |
| Zavatti | Gabriella | Alana |
| Zhang | Alex | Mingtang |
| Zhang | Ling | |
| Zhang | Sharon | Xiaoyu |
| Zhao | Qing | |
| Zho | Hao | |
| Zimmermann | Erika | Christel |
| Zong | Kelly | Fuli |

Dated: August 3, 2010.

**Angie Kaminski,**

*Manager Team 103, Examinations Operations—Philadelphia Compliance Services.*

[FR Doc. 2010–28316 Filed 11–9–10; 8:45 am]

**BILLING CODE 4830–01–P**

Federal Register

**Wednesday,**
**November 10, 2010**

## Part II

# Department of Transportation

**Federal Railroad Administration**

**49 CFR Part 242**
**Conductor Certification; Proposed Rule**

**DEPARTMENT OF TRANSPORTATION**

**Federal Railroad Administration**

**49 CFR Part 242**

**[Docket No. FRA–2009–0035, Notice No. 1]**

**RIN 2130–AC08**

## Conductor Certification

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

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

**SUMMARY:** FRA proposes to prescribe regulations for certification of conductors, as required by the Rail Safety Improvement Act of 2008. The proposed rule would require railroads to have a formal program for certifying conductors. As part of that program, railroads would be required to have a formal process for training prospective conductors and determining that all persons are competent before permitting them to serve as a conductor. FRA is proposing this regulation to ensure that only those persons who meet minimum Federal safety standards serve as conductors, to reduce the rate and number of accidents and incidents, and to improve railroad safety. Although this NPRM does not propose any specific amendments to the regulation governing locomotive engineer certification, it does highlight areas in that regulation that may require conforming changes.

**DATES:** Written Comments: Written comments on the proposed rule must be received by January 10, 2011. Comments received after that date will be considered to the extent possible without incurring additional expense or delay. FRA anticipates being able to determine these matters without a public hearing. However, if prior to December 10, 2010, FRA receives a specific request for a public hearing accompanied by a showing that the party is unable to adequately present his or her position by written statement, a hearing will be scheduled and FRA will publish a supplemental notice in the **Federal Register** to inform interested parties of the date, time, and location of any such hearing.

**ADDRESSES:** You may submit comments identified by the docket number FRA–2009–0035 by any one of the following methods:

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

*Instructions:* All submissions must include the agency name, docket name and docket number or Regulatory Identification Number (RIN) for this rulemaking (2130–AC08). Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time or to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Mark H. McKeon, Special Assistant to the Associate Administrator for Railroad Safety/Chief Safety Officer, U.S. Department of Transportation, Federal Railroad Administration, Mail Stop 25, West Building 3rd Floor West, Room W35–334, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone: 202–493–6350); or John Seguin, Trial Attorney, U.S. Department of Transportation, Federal Railroad Administration, Office of Chief Counsel, RCC–10, Mail Stop 10, West Building 3rd Floor, Room W31–217, 1200 New Jersey Avenue, SE., Washington, DC 20590 (*telephone:* 202–493–6045).

**SUPPLEMENTARY INFORMATION:**

### I. Statutory Background

Pursuant to the Rail Safety Improvement Act of 2008 § 402, Public Law 110–432, 122 Stat. 4884, (Oct. 16, 2008) (codified at 49 U.S.C. 20163) (hereinafter "RSIA") Congress required the Secretary of Transportation (Secretary) to prescribe regulations to establish a program requiring the certification of train conductors. The Secretary delegated this authority to the Federal Railroad Administrator. 49 CFR 1.49(oo).

Section 20163(a) of 49 U.S.C. (Section 402 of the RSIA) provides that:

> The Secretary of Transportation shall prescribe regulations to establish a program requiring the certification of train conductors. In prescribing such regulations, the Secretary shall require that train conductors be trained, in accordance with the training standards developed pursuant to section 20162.

Section 20163(b) provides that "[i]n developing the regulations required by subsection (a), the Secretary may consider the requirements of section 20135(b) through (e)." The requirements in 49 U.S.C. 20135 concern the certification of locomotive engineers.

Section 20162(a)(2) of 49 U.S.C. (Section 401 of the RSIA) provides that:

> "(a) IN GENERAL.—The Secretary of Transportation shall, not later than 1 year after the date of enactment of the Rail Safety Improvement Act of 2008, establish—
> * * *
> (2) a requirement that railroad carriers, contractors, and subcontractors develop and submit training and qualification plans to the Secretary for approval, including training programs and information deemed necessary by the Secretary to ensure that all safety-related railroad employees receive appropriate training in a timely manner.
> * * *"

Section 20162(b) of 49 U.S.C. provides that "[t]he Secretary shall review and approve the plans required under subsection (a)(2) utilizing an approval process required for programs to certify the qualification of locomotive engineers pursuant to part 240 of title 49, Code of Federal Regulations."

### II. RSAC Overview

In March 1996, FRA established the Railroad Safety Advisory Committee (RSAC), which provides a forum for collaborative rulemaking and program development. RSAC includes representatives from all of the agency's major stakeholder groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. A list of RSAC members follows:

American Association of Private Railroad Car Owners (AARPCO);
American Association of State Highway & Transportation Officials (AASHTO);
American Chemistry Council;
American Petroleum Institute;
American Public Transportation Association (APTA);
American Short Line and Regional Railroad Association (ASLRRA);
American Train Dispatchers Association (ATDA);
Association of American Railroads (AAR);
Association of Railway Museums (ARM);

Association of State Rail Safety Managers (ASRSM);
Brotherhood of Locomotive Engineers and Trainmen (BLET);
Brotherhood of Maintenance of Way Employes Division (BMWED);
Brotherhood of Railroad Signalmen (BRS);
Chlorine Institute;
Federal Transit Administration (FTA);*
Fertilizer Institute;
High Speed Ground Transportation Association (HSGTA);
Institute of Makers of Explosives;
International Association of Machinists and Aerospace Workers;
International Brotherhood of Electrical Workers (IBEW);
Labor Council for Latin American Advancement (LCLAA);*
League of Railway Industry Women;*
National Association of Railroad Passengers (NARP);
National Association of Railway Business Women;*
National Conference of Firemen & Oilers;
National Railroad Construction and Maintenance Association;
National Railroad Passenger Corporation (Amtrak);
National Transportation Safety Board (NTSB);*
Railway Supply Institute (RSI);
Safe Travel America (STA);
Secretaria de Comunicaciones y Transporte;*
Sheet Metal Workers International Association (SMWIA);
Tourist Railway Association Inc.;
Transport Canada;*
Transport Workers Union of America (TWU);
Transportation Communications International Union/BRC (TCIU/BRC);
Transportation Security Administration (TSA); and
United Transportation Union (UTU).

*Indicates associate, non-voting membership.

When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. The working group may establish one or more task forces or other subgroups to develop facts and options on a particular aspect of a given task. The task force, or other subgroup, reports to the working group. If a working group comes to consensus on recommendations for action, the package is presented to RSAC for a vote. If the proposal is accepted by a simple majority of RSAC, the proposal is formally recommended to FRA. FRA then determines what action to take on the recommendation. Because FRA staff play an active role at the working group level in discussing the issues and options and in drafting the language of the consensus proposal, and because the RSAC recommendation constitutes the consensus of some of the industry's leading experts on a given subject, FRA is often favorably inclined toward the RSAC recommendation. However, FRA is in no way bound to follow the recommendation and the agency exercises its independent judgment on whether the recommended rule achieves the agency's regulatory goals, is soundly supported, and is in accordance with applicable policy and legal requirements. Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal or final rule. Any such variations would be noted and explained in the rulemaking document issued by FRA. If the working group or RSAC is unable to reach consensus on recommendations for action, FRA resolves the issue(s) through traditional rulemaking proceedings or other action.

## III. RSAC Conductor Certification Working Group

On December 10, 2008, the RSAC accepted a task (No. 08–07) entitled "Conductor Certification." The purpose of this task was defined as follows: "To develop regulations for certification of railroad conductors, as required by the Rail Safety Improvement Act of 2008 (Act), and to consider any appropriate related amendments to existing regulations." The task called for the RSAC Conductor Certification Working Group (Working Group) to perform the following:

- Review safety data bearing on opportunities for reducing risk associated with the duties performed by freight and passenger conductors.
- Assist FRA in developing regulations responsive to the legislative mandate.
- Consider any revisions to 49 CFR Part 240 appropriate to conform and update the certification programs for locomotive engineers and conductors.

The task also listed issues requiring specific report:

- What requirements for training and experience are appropriate?
- What classifications of conductors should be recognized?
- To what extent do existing requirements and procedures for certification of locomotive engineers provide a model for conductor certification?
- To what extent should unsafe conduct occurring while a locomotive engineer affect certification status as a conductor, and vice versa?
- Starting with the locomotive engineer certification model, what opportunities are available for simplifying appeals from decertification decisions of the railroads?

The Working Group was formed from interested organizations that are members of the RSAC. In addition to FRA, the following organizations contributed members:

AAR, including members from BNSF Railway Company (BNSF), Canadian National Railway (CN), Canadian Pacific Railway (CP), CSX Transportation, Inc. (CSX), Iowa Interstate Railroad, LTD, Kansas City Southern Railway (KCS), Northeast Illinois Regional Commuter Railroad Corporation (METRA), Norfolk Southern Railway Company (NS), and Union Pacific Railroad (UP);

The National Railroad Passenger Corporation (Amtrak);

APTA, including members from Long Island Rail Road (LIRR), Metro-North Railroad (MNCW), Southeastern Pennsylvania Transportation Authority (SEPTA), Southern California Regional Rail Authority (Metrolink), and Transit Solutions Group (TSG);

ASLRRA, including members from Anacostia Rail Holdings (ARH), Genesee & Wyoming Inc. (GNWR), Omnitrax Inc. (Omnitrax), Rio Grande Pacific Corporation (RGP), and WATCO Companies, Inc. (WATCO);

BLET;

National Railroad Construction & Maintenance Association, including members from Herzog Transit Services (Herzog);

NTSB;

TWU; and

UTU.

DOT's John A. Volpe National Transportation Systems Center (Volpe Center) also contributed members to the Working Group.

The Working Group convened 6 times on the following dates and locations:

- July 21–23, 2009 in Washington, DC;
- August 25–27, 2009 in Overland Park, KS;
- September 15–17, 2009 in Colorado Springs, CO;
- October 20–22, 2009 in Arlington, VA;
- November 17–19, 2009 in Scottsdale, AZ; and
- December 16–18, 2009 in Washington, DC.

To aid the Working Group in its development of recommendations for certification of conductors, FRA prepared draft regulatory text, which it distributed prior to the July meeting. The draft text closely followed 49 CFR part 240 which governs the qualification and certification of locomotive engineers.

During each meeting, Working Group members made recommendations regarding changes and additions to the draft text. Following each meeting, FRA

considered all of the recommendations and revised the draft text accordingly. Minutes of each of these meetings are part of the docket in this proceeding and are available for public inspection.

Having worked closely with the RSAC in developing its recommendations, FRA believes that the RSAC has effectively addressed concerns with regard to the certification of conductors. FRA has greatly benefited from the open, informed exchange of information during the meetings. The Working Group reached consensus on all of its recommended regulatory provisions. On March 18, 2010, the Working Group presented its recommendations to the full RSAC for concurrence. All of the members of the full RSAC in attendance at the March meeting accepted the regulatory recommendations submitted by the Working Group. Thus, the Working Group's recommendations became the full RSAC's recommendations to FRA.

As contemplated by the Working Group's task statement, the promulgation of the conductor certification regulation opens up consideration of conforming changes to 49 CFR part 240, "Qualification and certification of locomotive engineers." Such changes could include amending the program submission process, adding 49 CFR 218, subpart F violations as revocable offenses, and handling engineer and conductor petitions for review with a single FRA board. Although FRA intended for the Working Group to consider changes to part 240 during its July–December meetings, the Working Group was unable to undertake that task. Moreover, members of the Working Group felt that it would be more efficient to discuss changes to part 240 after the conductor certification regulation is finalized and comments are received. Therefore, FRA expects the Working Group to continue meeting after publication of this NPRM and to provide recommendations that address both the comments to this NPRM and conforming changes to part 240.

In addition to the conductor certification Working Group, interested parties should also be aware that other RSAC working groups are currently meeting to discuss potential FRA regulations which may impact the conductor certification regulation. The Medical Standards for Safety-Critical Personnel Working Group (RSAC Task No.: 06–03), for example, is developing recommendations for a FRA medical standards regulation. That regulation, if promulgated, could supersede some of the medically-related requirements in the conductor certification regulation. Further, the Training Standards Working Group (RSAC Task No.: 10–01) is developing recommendations for a FRA training regulation. While FRA does not expect that such a training regulation would supersede the training requirements in the conductor certification regulation, FRA does not know at this time what the final training regulation will provide. Some modification of the training requirements in this proposed part (*e.g.,* removal of the task analysis requirement) may be necessary to conform to the final requirements of the training regulation.

## IV. Section-by-Section Analysis

*Subpart A—General*

Subpart A of the proposal contains the general provisions of the rule, including a formal statement of the rule's purpose and scope. The subpart also provides that this proposed rule would not constrain a railroad's ability to prescribe additional or more stringent requirements for its conductors that are not inconsistent with this proposed rule.

Section 242.1 Purpose and Scope

This section, derived from 49 CFR 240.1, provides that the proposed rule prescribes minimum standards for the eligibility, training, testing, certification and monitoring of persons who serve as "conductors." This section indicates that the purpose of the proposed rule is to ensure that only those persons who meet minimum Federal safety standards serve as conductors, to reduce the rate and number of accidents and incidents, and to improve railroad safety.[1]

Despite the fact that a person may have a job classification title other than that of conductor, the conductor certification requirements of this proposed rule would apply to that person if he or she meets the definition of conductor. That definition (and who would be covered by the definition) is discussed in more detail in the section analysis for proposed § 242.7 below.

Section 242.3 Application and Responsibility for Compliance

This section is derived, essentially verbatim, from 49 CFR 240.3. The section provides that the proposed rule would apply to all railroads with two exclusions. The first exclusion addresses several types of operations that occur on tracks that are not part of the general railroad system. This exclusion would encompass operations commonly described as tourist, scenic, or excursion service to the extent that they occur on tracks that are not part of the general railroad system. This exclusion also addresses operations that occur within the confines of industrial installations commonly referred to as "plant railroads" and typified by operations such as those in steel mills that do not go beyond the plant's boundaries and that do not involve the switching of rail cars for entities other than themselves.

The second exclusion covers rapid transit operations in an urban area that are not connected to the general system. It should be noted, however, that some rapid transit type operations, given their links to the general system, are within FRA's jurisdiction and FRA specifically intends to have this proposed rule apply to those rapid transit type operations. This proposed rule is not intended to have any effect on FRA's jurisdiction. Since this proposed rule is intended to apply to the same railroads covered by part 240, one should refer to the preamble discussions of 49 CFR 240.3 in 64 FR 60966, 60974 (Nov. 8, 1999), 63 FR 50626, 50636–50637 (Sept. 22, 1998), and 56 FR 28228, 28240 (June 19, 1991) for a more detailed analysis of the applicability of this proposed rule.

Section 242.5 Effect and Construction

This section addresses several legal issues.[2] Paragraph (a) addresses the relationship of this proposed rule to preexisting legal relationships. Paragraph (b) states that FRA does not intend to alter the authority of a railroad to initiate disciplinary sanctions against its employees by issuance of this proposed rule.

Paragraph (c) of this section addresses the issue of "flowback." The term flowback has been used in the industry to describe a situation where an employee leaves his or her current position to return to a previously held position or craft. An example of flowback occurs when a person who holds the position of a conductor subsequently qualifies for the position of locomotive engineer, and at some later point in time the person finds it necessary or preferable to revert back to a conductor position. The reasons for

[1] Paragraph (a) of this section has been slightly modified from the version voted on by the Working Group and full RSAC. The modification is meant to clarify that only those persons that meet the minimum safety standards in this proposed rule would be permitted to serve as conductors.

[2] This section has been modified from the version of the section voted on by the Working Group and full RSAC, including the removal of paragraphs (a) and (b). Those paragraphs addressed preemption of State law which FRA now believes would be unnecessary because 49 U.S.C. 20106 and other Federal railroad safety statutes sufficiently address the preemptive effect of FRA's regulations. Providing a separate Federal regulatory provision concerning the regulation's preemptive effect would be duplicative and unnecessary.

reverting back to the previous craft may derive from personal choice or a less voluntary nature; *e.g.,* downsizing.

Many collective bargaining agreements address the issue of flowback. As a general matter, FRA does not intend to create or prohibit the right to flowback or take a position on whether flowback is desirable. However, paragraph (c) of this section must be read in conjunction with § 242.213, which limits flowback in certain situations.[3] As described in the section analysis for that section below, a person who holds a conductor and locomotive engineer certificate and who has had his or her locomotive engineer certificate revoked could not work as a conductor during the period of revocation. In addition, a person who holds a conductor and locomotive engineer certificate and who has had his or her conductor certification revoked for certain violations could not work as a locomotive engineer during the period of revocation.

Paragraph (d) of this section addresses employee rights. The intent of the proposed rule is to explicitly preserve any remedy already available to the person and not to create any new entitlements. FRA expects that employees would benefit from this paragraph by referring to it should a railroad use this regulation as an inappropriate explanation for ignoring an employee's rights or remedies. A railroad must consider whether any procedural rights or remedies available to the employee would be inconsistent with this part.

Section 242.7 Definitions

This section contains the definitions that FRA proposes to employ in this rule. Most of the definitions are taken essentially verbatim from 49 CFR part 240 and have been thoroughly analyzed in that rulemaking. Parties seeking a detailed analysis of those definitions should refer to the part 240 rulemaking documents. *See,* 54 FR 50890 (Dec. 11, 1989), 56 FR 28228 (June 19, 1991), 58 FR 18982 (Apr. 9, 1993), 60 FR 53133 (Oct. 12, 1995), 63 FR 50626 (Sept. 22, 1998), 73 FR 80349 (Dec. 31, 2008), and 74 FR 68173 (Dec. 23, 2009). Some of the definitions in this proposed rule, however, are not found in part 240 or have been substantively modified from their use in part 240. Those definitions are analyzed below.

As mentioned above, potential rulemakings involving medical standards and 49 CFR part 219 (Control of Alcohol and Drug Use) may impact many of the definitions in part 240 and proposed part 242. For example, definitions relating to medical standards (*e.g.,* "medical examiner") and drug and alcohol control (*e.g.,* "substance abuse disorder") in parts 240 and 242 may be superseded by definitions provided in those rulemakings. However, until those rulemakings are promulgated, the definitions in parts 240 and 242 will control.

Conductor

Although the RSIA requires FRA to establish a program for the certification of conductors, the Act does not define the term "conductor." Without guidance from the Act, FRA proposes, and RSAC recommended, that the definition of "conductor" be based on the generally understood responsibilities of that position, similar to Part 240's approach to defining locomotive engineer. This proposed rule defines conductor as "the crewmember in charge of a train or yard crew as defined in part 218 of this chapter." Part 218 defines "train or yard crew" as:

> "one or more railroad employees assigned a controlling locomotive, under the charge and control of one crew member; called to perform service covered by Section 2 of the Hours of Service Act; involved with the train or yard movement of railroad rolling equipment they are to work with as an operating crew; reporting and working together as a unit that remains in close contact if more than one employee; and subject to the railroad operating rules and program of operational tests and inspections required in §§ 217.9 and 217.11 of this chapter."

As the use of the singular form of "crewmember" suggests, FRA's proposed definition mandates that only one person could be in charge of the train or yard crew and that person would be deemed the conductor for purposes of this proposed regulation only. Moreover, in some circumstances, a locomotive engineer, including a remote control operator, would be required to be certified as both a locomotive engineer under 49 CFR part 240 and as a conductor under this proposed rule. *See* proposed 49 CFR 242.213(d) and (e). All other train or yard crew members (*e.g.,* assistant conductors, brakemen, hostlers, trainmen, switchmen, utility persons, flagmen, yard helpers, and others who might have different job titles but perform similar duties and are not in charge of a train or yard crew) do not fall within the definition of "conductor" for purposes of this proposed rule.

Ineligible or Ineligibility[4]

The term "ineligible" or "ineligibility," which is not used in part 240, means that a person is legally disqualified from serving as a certified conductor. The term is broadly defined to cover a number of circumstances in which a person may not serve as a certified conductor. Revocation of certification pursuant to § 242.407 and denial of certification pursuant to § 242.401 are two examples in which a person would be ineligible to serve as a conductor. A period of ineligibility may end when a condition or conditions are met—for example, when a person meets the conditions to serve as a conductor following an alcohol or drug violation pursuant to proposed § 242.115.

Job Aid

The term "job aid," which is not used in part 240, is defined as information regarding other than main track physical characteristics that supplements the operating instructions of the territory over which the locomotive or train movement will occur. The terms "main track" and "physical characteristics" are discussed below.

The term "job aid" is broadly defined in this proposed rule. A job aid would consist of information that could be obtained from a variety of sources, including but not limited to, training on the territory pursuant to proposed § 242.119, maps, charts or visual aids of the territory, or a person or persons to contact who are qualified on the territory and who can describe the physical characteristics of the territory. While each railroad would have flexibility in how it conveys the information in a job aid to a conductor, the job aid would, at a minimum have to cover the characteristics of the territory over which the locomotive or train movement will occur including: permanent close clearances, location of permanent derails and switches, assigned radio frequencies in use and special instructions required for movement, if any, and railroad-identified unique operating conditions.

Pursuant to proposed § 242.121(c)(4)(v), each railroad would be required to test conductors and conductor candidates on the use of any job aid that a railroad could provide a conductor. Proposed § 242.301(d) describes the conditions under which a railroad should provide a conductor with a job aid.

[3] The reference to § 242.213 in § 242.5(c) was not considered by the Working Group or the full RSAC, but was added by FRA to clarify this proposed rule's position on flowback.

[4] The definition of this term was not considered by the Working Group or the full RSAC. However, the use of term in part 240 has generated some confusion and, therefore, FRA hopes to avoid any confusion in this proposed rule by defining the term.

Main Track

The term "main track" is defined as a track upon which the operation of trains is governed by one or more of the following methods of operation: timetable; mandatory directive; signal indication; positive train control as defined in 49 CFR part 236; or any form of absolute or manual block system. That definition mirrors the definition of "main track" in 49 CFR part 240, but also includes a reference to positive train control.

Medical Examiner

The term "medical examiner" is defined as a person licensed as a doctor of medicine or doctor of osteopathy. A medical examiner could be a qualified full-time salaried employee of a railroad, a qualified practitioner who contracts with the railroad on a fee-for-service or other basis, or a qualified practitioner designated by the railroad to perform functions in connection with medical evaluations of employees. As used in this proposed rule, the medical examiner would owe a duty to make an honest and fully informed evaluation of the condition of an employee.

The only difference between the definition of medical examiner in this proposed rule and the definition in 49 CFR part 240 is that under part 240, the medical examiner owes "a duty to the railroad." In this proposed rule, however, the words "to the railroad" have been deleted. This change was made to address a concern of some Working Group members that a medical examiner should not owe a duty to just the railroad but rather should owe a duty to both the railroad and the employee being evaluated.

On-the-Job Training

The term "on-the-job training," which is not defined in part 240, means job training that occurs in the work place (*i.e.,* the employee learns the job while doing the job). In this proposed rule, the "on-the-job training" portion of the training program (*see* proposed § 242.119) would be required to be based on a model generally accepted by the educational community, and must consist of three key components: (1) A brief statement describing the tasks and related steps the employee must be able to perform; (2) a statement of the conditions (*i.e.,* tools, equipment, documentation, briefings, demonstrations, and practice) necessary for learning transfer; and (3) a statement of the standards by which proficiency can be measured through a combination of task/step accuracy, completeness, and repetition.

Passenger Conductor

The term "passenger conductor" is defined as a conductor who has also received emergency preparedness (EPREP) training under 49 CFR part 239. Interested parties should note that nothing in this proposed rule requires a conductor for private/non-revenue movements (*e.g.,* business car specials) to have the EPREP training. This position is consistent with 49 CFR 239.3(b).

Physical Characteristics

The term "physical characteristics," which is not defined in part 240, means the actual track profile of and physical location for points within a specific yard or route that affect the movement of a locomotive or train. "Physical characteristics" include both main track physical characteristics (the term "main track" is analyzed above) and other than main track physical characteristics. Examples of physical characteristics could include permanent close clearances, location of permanent derails and switches, and grade.

Qualified

The term "qualified" is defined as a person who has successfully completed all instruction, training and examination programs required by the employer, and the applicable parts of this chapter and therefore could reasonably be expected to be proficient on all safety related tasks the person is assigned to perform. The definition of "qualified" in this proposed rule differs from its definition in part 240 in that part 240's definition focuses on a person's knowledge whereas the definition in this proposed rule focuses not only on knowledge but also on whether the person could reasonably be expected to be proficient at performing all assigned tasks. The revision to the definition of "qualified" is an attempt to ensure that a railroad's instruction and training program not only provide knowledge of how to perform a task but also the ability to proficiently perform the task.

Qualified Instructor

The term "qualified instructor," which is derived from the definition of "instructor engineer" in part 240, means a person who has demonstrated, pursuant to the railroad's written program, an adequate knowledge of the subjects under instruction and, where applicable, has the necessary operating experience to effectively instruct in the field. A qualified instructor would be required to have the following qualifications:

(1) Is a certified conductor under this part; and

(2) Has been selected as such by a designated railroad officer, in concurrence with the designated employee representative, where present; or

(3) In absence of concurrence provided in paragraph (2) of this definition, has a minimum of 12 months service working as a train service employee.

If a railroad does not have designated employee representation, then a person employed by the railroad need not comply with items (2) or (3) of this definition to be a "qualified instructor."

Items (2) and (3), while not found in part 240's definition of "instructor engineer," are included here to address the concerns of some Working Group members that employees, through their representatives, should have input in the selection of instructors who might be viewed as inexperienced (*i.e.,* a person with less than 12 months service working as a train service employee).

Remote Control Operator

The term "remote control operator" (RCO) means a certified locomotive engineer, as defined in § 240.7 of this chapter, certified by a railroad to operate remote control locomotives pursuant to § 240.107 of this chapter. Although this term is not defined in part 240, FRA intends for the term to have the same meaning in this proposed rule as it does in part 240. FRA defines the term in this proposed rule to avoid any confusion as to who this proposed rule is referring to when it references a remote control operator.

The definition of RCO recommended by the Working Group used the word "trained" instead of "certified." FRA, however, believes the definition in this proposed part should to be consistent with the definition of RCO in 49 CFR 218.93. Thus, FRA replaced the word "trained" with "certified" in this proposed rule to parallel 49 CFR 218.93.

Substance Abuse Disorder

The term "substance abuse disorder" refers to a psychological or physical dependence on alcohol or a drug or another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation. A substance abuse disorder is "active" within the meaning of this proposed rule if the person (1) is currently using alcohol or other drugs, except under medical supervision consistent with the restrictions described in § 219.103 of this chapter or (2) has failed to successfully complete primary treatment or successfully participate in

aftercare as directed by a Substance Abuse Professional (SAP).

The definition of substance abuse disorder in this proposed rule is the same as the definition in part 240 except in two respects. First, part 240's definition refers to an "EAP Counselor" rather than a SAP. Since SAPs have more stringent credential, knowledge, training, and continuing education requirements than EAPs, SAPs may be better qualified to direct a person's treatment or aftercare. Second, part 240 uses the phrase "is currently using alcohol and other drugs" when describing active substance abuse disorders. The proposed rule would revise that phrase to read "is currently using alcohol or other drugs." FRA is proposing the revision to clarify its intent that a person with an active substance abuse disorder could be using alcohol *or* other drugs.

The proposed definition for "substance abuse disorder" is similar to the language employed to govern disposition of employees referred to an employee assistance program under the "co-worker report" (bypass) provision of the alcohol/drug regulations. It describes the condition of chemical dependency, as determined by an appropriate professional. Reference is made to other disorders involving abuse of alcohol and other drugs (*i.e.,* "another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation") to avoid disputes concerning diagnoses of "underlying" problems. The crux of the definition is that a person making uncontrolled use of alcohol or drugs is not a suitable candidate for the highly sensitive duties entrusted to a conductor. Since chemical dependency typically involves or has the potential for poly-drug abuse, the appropriate long-term therapy is abstinence from alcohol and all other drugs, except those taken under medical supervision.

The proposed definition explains that the disorder would be considered "active" within the meaning of the rule if the person is not currently abstaining from use of alcohol and drugs (except under medical supervision consistent with FRA's alcohol/drug regulations) or has not participated in treatment as required. FRA is aware that many individuals abuse alcohol and drugs, with consequent ill-effects on their health and potential implications for fitness, without fitting within common definitions of chemical dependency. However, degrees of abuse are difficult to define; and significant disagreements prevail with regard to appropriate therapeutic responses. Accordingly, FRA has not required withholding of certification for patterns of abuse that fall short of chemical dependency. At the same time, FRA does not intend to convey that the concept of chemical dependency need meet the most rigid test used in any particular segment of the health care or mental health communities. The critical point here with respect to safety is that conductors not be in the grip of uncontrolled abuse patterns that, if addressed through treatment and permanent abstinence, could be put behind them.

Substance Abuse Professional (SAP)

The term "Substance Abuse Professional" (SAP)[5] means a person who meets the qualifications of a SAP, as provided in 49 CFR Part 40. Pursuant to this proposed rule, the SAP would owe a duty to the railroad to make an honest and fully informed evaluation of the condition and progress of an employee. FRA notes that the duty owed by a SAP does not parallel the duty owed by a "medical examiner" (*see* above) in the proposed rule recommend by the full RSAC. As currently written, a medical examiner would owe a duty to both the railroad and the employee being evaluated while a SAP would owe a duty only to the railroad. FRA welcomes comments as to whether a SAP should owe a duty to both the employee being evaluated and the railroad (*i.e.,* whether the words "to the railroad" should be deleted from the definition of SAP).

Territorial Qualifications

The term "territorial qualifications" means possessing the necessary knowledge concerning a railroad's operating rules and timetable special instructions including familiarity with applicable *main track and other than main track physical characteristics* of the territory over which the locomotive or train movement will occur. Although not defined in part 240, the term is derived from part 240's requirement that, with certain exceptions, a locomotive engineer may not operate a locomotive over a territory unless the engineer is "qualified on the physical characteristics of the territory." *See* 49 CFR 240.231. Pursuant to § 242.301 of this proposed rule, a person could not serve as a conductor unless the person was certified and possessed the necessary territorial qualifications for the applicable territory.

[5] The draft recommended by the Working Group and the full RSAC used the term "Substance Abuse Profession." That was a clerical error on FRA's part and the term has been corrected in this NPRM to read "Substance Abuse Professional."

Section 242.9 Waivers

This section tracks the regulatory language in 49 CFR 240.9 and provides the proposed requirements for a person seeking a waiver of any section of this proposed rule. After review, however, FRA believes this section is unnecessary because 49 CFR part 211 sufficiently addresses the waiver process. FRA welcomes comments as to whether this proposed section should be removed.

Section 242.11 Penalties and Consequences for Noncompliance

This section tracks the regulatory language in 49 CFR 240.11 and provides minimum and maximum civil penalty amounts determined in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410 Stat. 890, 28 U.S.C. 2461 note, as amended by the Debt Collection Improvement Act of 1996 Public Law 104–134, April 26, 1996, and the RSIA.

Section 242.13 Information Collection Requirements

This section lists the sections of the proposed rule which contain information collection requirements.

*Subpart B—Program and Eligibility Requirements*

This subpart contains the basic elements of the conductor certification program required by this proposed rule. Based on the RSIA's requirement for "certification" of conductors and FRA's experience with certification of locomotive engineers, this rulemaking proposes to adopt a certification system (*i.e.,* FRA sets eligibility criteria but leaves it to the railroads to evaluate candidates by those standards) rather than a traditional licensing system (*i.e.,* a government agency sets eligibility criteria and evaluates candidates). As with part 240, this proposed rule affords railroads considerable discretion in the daily administration of their certification programs.

Section 242.101 Certification Program Required

This section proposes to require railroads to have a written program composed of six elements, each of which comports with specific provisions relating to that element.[6] To give the railroads time to put their conductor programs into place and to accommodate the fact that many

[6] FRA deleted paragraphs (a) and (b) of this section from the version considered by the Working Group and full RSAC. FRA believes those paragraphs are superfluous in light of the proposed dates provided in other sections of the NPRM regarding submission and approval of railroad programs.

railroads perform training and certification of locomotive engineers at the beginning of each calendar year, FRA is proposing to make January 1, 2012, the effective date of the final rule. FRA is proposing that date based on FRA's anticipation that the Final Rule will be published in early 2011. The rest of the dates proposed in this rule (*e.g.,* dates by which each railroad must grandfather its eligible conductors in § 242.105) are based on the proposed effective date of January 1, 2012. Interested parties should note that FRA cannot guarantee any of the dates proposed in this NPRM. The dates have been included merely to generate discussion regarding the amount of time needed to implement a conductor certification program once a Final Rule has been published. FRA welcomes comments on the dates proposed in this NPRM.

Section 242.103 Approval of Design of Individual Railroad Programs by FRA

This section proposes to require each railroad to submit its certification program to FRA for approval in accordance with a schedule to be provided in the final rule. The proposed schedule for submissions in paragraph (a) would require Class I railroads, Amtrak, the commuter railroads, and Class II railroads to submit their programs at an earlier date than the Class III railroads or others not classified elsewhere.[7] The format and contents of the submission are discussed at length in appendix B to this proposed rule.

Unlike part 240, this proposed rule would require railroads to serve a copy of their submissions, resubmissions and material modifications on the president of each labor organization that represents the railroad's certified conductors. Within 45 days of the filing of any of those submissions with FRA, any designated representative of certified conductors could submit comments on the railroad's submissions to FRA. Although FRA, and not the commenters, would determine whether a railroad's submission was approved, FRA expects that comments would be useful in determining whether the railroad's program conforms to the criteria set forth in this proposed rule.

This section also proposes to require each railroad to indicate how it intends to acquire future conductors. If a railroad accepts the responsibility for training a previously uncertified person to become a conductor, the railroad must explain its training regimen for such trainees, including provisions for relying on an outside training organization to provide the actual training.

The proposed rule provides 30 days for FRA review and approval of railroad programs. FRA is proceeding in this manner because most railroads have existing programs, including locomotive engineer certification programs, intended to accomplish a similar goal that can be easily modified. The quality of such programs is generally good and the problems that may be encountered would not likely involve basic design flaws and generally would not surface until FRA has had time to observe the actual administration of the program. In screening all submissions FRA should be able to quickly detect any substantial deficiencies. Given the quality of existing programs, FRA sees little value in delaying implementation of the programs for time-consuming agency review. FRA may, of course, disapprove any program during the review cycle or at a later date. FRA will explain any deficiencies in writing. This section proposes to require a timely railroad response to an FRA disapproval action as a railroad will have no more than 30 days to revise and resubmit its program.

Section 242.105 Schedule for Implementation

This section contains the timetable for implementation of the proposed rule. Paragraphs (a) and (b) of this section would require that railroads, in writing, designate as certified conductors all persons authorized by the railroad to perform the duties of a conductor as of the effective date of the final rule, or authorized between the effective date of the final rule and dates specified in paragraph (d) or (f) of this section, and to issue a certificate to each person it designates. The mandatory designation requirement of this section is included to address the concerns of some Working Group members that railroads should not be given the discretion to engage in disparate treatment of its employees (*i.e.,* designate and provide a certificate to some people who are authorized to perform the duties of a conductor as of the effective date of the final rule but not others).

Paragraph (c) of this section would require each railroad to make formal determinations concerning those employees it has "grandfathered" (*i.e.,* designated as conductors) within 36 months of the date for compliance by its class of railroad. Pursuant to that paragraph, a grandfathered conductor could serve as a conductor for up to 36 months from the date of compliance for the railroad (*i.e.,* the date specified in paragraph (d) or (e) of this section). At the end of the 36 months, however, the grandfathered conductor could no longer serve as a conductor unless he or she successfully completed the tests and evaluations provided in subpart B of this proposed rule (*i.e.,* the full certification process).

In order to test and evaluate all of its grandfathered conductors by the end of the 36-month period, a large railroad would likely have to begin that process well in advance of the end of the 36 months. For example, paragraph (c), which is derived from part 240's grandfathering provision, would permit a railroad to test and evaluate one-third of its grandfathered conductors within 12 months of the railroad's date of compliance; another one-third within 24 months of its date of compliance; and the final one-third within 36 months of its date of compliance.

Some of the Working Group members raised concerns about grandfathered conductors who would be eligible to retire within 36 months of the date for compliance by their class of railroad. Specifically, some members did not believe it was an efficient use of resources to perform the full certification process on a grandfathered conductor who was going to retire before the end of the 36-month grandfathering period. To address those concerns, subparagraph (c)(1) provides that a grandfathered conductor, who is eligible to receive a retirement pension in accordance with the terms of an applicable agreement or with the terms of the Railroad Retirement Act (45 U.S.C. 231) within 36-months prior to the date they would be required to be tested and evaluated under subpart B of this proposed rule, may request, in writing, that the railroad not perform the full certification process on that grandfathered conductor until 36 months from the date of required testing and evaluation.

Paragraph (c)(2) provides that, upon receipt of that written request, a railroad may wait to perform the full certification process on the person making the request until the end of the 36-month grandfathering period. Thus, paragraphs (c)(1) and (c)(2) would allow grandfathered conductors to serve as conductors for the full 36-month grandfathering period and then retire before being subjected to the full certification process.

While it is in the railroads' interest not to perform the full certification process for a person who is going to retire once the grandfathering period

[7] FRA has made some modifications to paragraph (a) of this section from the version considered by the Working Group and full RSAC. FRA believes those modifications are necessary to ensure a sensible schedule and future implementation of the conductor certification regulation.

expires and thus in their interest to grant as many requests as possible, it may not be feasible to accommodate every request that is made. If, for example, a significant number of grandfathered conductors on a railroad properly request that the railroad wait to recertify them at the end of the grandfathering period, but then do not, in fact, retire by the expiration of the 36-month grandfathering period, the railroad might not be able to certify everyone in time and would risk violating this proposed rule. In recognition of that risk and the need to give the railroads some flexibility to comply with the proposed rule, paragraph (c)(2) also provides that a railroad that grants any request must grant the request of all eligible persons "to every extent possible."

In addition, paragraph (c)(3) provides that a grandfathered conductor who is also subject to recertification under part 240 may not make a request under subparagraph (c)(1) of this section. That provision recognizes that railroads would likely want to have concurrent certification processes for certifying a person who will be both a certified locomotive engineer and a conductor and thus it would not be appropriate, in that instance, for a grandfathered conductor who is already subject to recertification under part 240 to make a request to delay the full conductor certification process.

Paragraphs (d), (e), and (f) provide that after specified dates, no railroad could certify or recertify a person as a conductor and no person could serve as a conductor unless that person had been tested and evaluated in accordance with the procedures provided in subpart B of the proposed rule and issued a certificate.

Section 242.107 Types of Service

This section proposes to create two types of conductor service: Conductor and passenger conductor. As indicated in the definition section of this proposed rule, a "passenger conductor" is a "conductor" who has also received emergency preparedness training under 49 CFR part 239.

Paragraph (c) of this section, derived from 49 CFR 240.107(e), proposes to prohibit a railroad from reclassifying the certification of any type of certified conductor to a different type of conductor certification during the period in which the certification is otherwise valid except when a conductor completes 49 CFR part 239 emergency training and is certified as a passenger conductor. For example, this proposed rule would prohibit a railroad from requiring a passenger conductor to exchange his or her passenger conductor certificate for a conductor certificate during the period in which the passenger conductor certificate is otherwise valid.

While this proposed rule would prohibit the practice of reclassification, it would not prevent the railroads from pursuing other measures to ensure the safe performance of conductor service. For example, the proposed rule would not prevent a railroad from placing restrictions on a certificate pursuant to paragraph (d) of this section. It should be noted, however, that while paragraph (d) would permit a railroad to place restrictions on a certificate, any restrictions would be applied and reviewed in accordance with internal railroad rules, procedures and processes. Proposed part 242 would not govern the issuance or review of restrictions as that would be a matter handled under a railroad's internal discipline system or collective bargaining agreement. *See* § 242.5(a), (b), and (d).

Section 242.109 Determinations Required for Certification and Recertification

This section lists the proposed determinations required for evaluating a candidate's eligibility to be certified or recertified. Since motor vehicle data is required to be sent to the railroad rather than to the candidate, paragraphs (d) and (e) of this section would require a railroad to provide a candidate for certification or recertification an opportunity to review and comment on any record which contains adverse information. This review would avoid the potential for reliance on records that were somehow erroneously associated with a candidate.

Section 242.111 Prior Safety Conduct As Motor Vehicle Operator

This section, derived from 49 CFR 240.111 and 240.115, provides the proposed requirements and procedures that a railroad would have to follow when evaluating a conductor or conductor candidate's prior conduct as a motor vehicle operator. Although some members of the Working Group suggested that information regarding the prior safety conduct as a motor vehicle operator was unnecessary in determining whether a person should be certified as a conductor, FRA believes that the prior safety conduct of a motor vehicle operator is one indicator of that person's drug and/or alcohol use and therefore an important piece of information for a railroad to consider.

Pursuant to this section, each person seeking certification or recertification as a conductor would have to request in writing that the chief of each driver licensing agency that issued him or her a driver's license within the preceding five years provide a copy of the person's driving record to the railroad. Unlike part 240, this proposed rule would not require individuals to also request motor vehicle operator information from the National Driver Registry (NDR). It is FRA's understanding that, based on the NDR statute and regulation (*see* 49 U.S.C. chapter 303 and 23 CFR 1327), railroads are prohibited from running NDR checks or requesting NDR information from individuals seeking employment as certified conductors.[8]

During the Working Group meetings, members of the Working Group raised concerns about conductor candidates who had properly requested motor vehicle operator information but were unable to be certified or recertified as conductors because of a delay or mix-up by a driver licensing agency in sending the required information to the railroad. To address that concern, paragraphs (c) and (d) of this section would require a railroad to certify or recertify a person for 60 days if the person: (1) Requested the required information at least 60 days prior to the date of the decision to certify or recertify; and (2) otherwise meets the eligibility requirements provided in § 242.109 of this proposed rule. If a railroad certifies or recertifies a person for 60 days pursuant to paragraphs (c) or (d) but is unable to obtain and evaluate the required information during those 60 days, the person would be ineligible to perform as a conductor until the information can be evaluated. However, if a person is simply unable to obtain the required information, that person or the certifying or recertifying railroad could petition for a waiver from FRA (*see* 49 CFR part 211). During the pendency of the waiver request, a railroad would have to certify or recertify a person if the person otherwise meets the eligibility requirements of § 242.109 of this proposed rule.

Paragraph (l) of this section would require certified conductors or persons seeking initial certification to notify the employing railroad of motor vehicle incidents described in paragraph (n) of this section within 48 hours of the conviction or completed state action to cancel, revoke, suspend, or deny a

[8] As an alternative to the NDR, some members of the Working Group suggested that motor vehicle operator information could be obtained from the National Crime Information Center (NCIC) run by the Federal Bureau of Investigation. However, FRA does believe the NCIC is an appropriate option since the information provided by the NCIC cannot be limited to just motor vehicle data.

motor vehicle driver's license. The paragraph also provides that, for purposes of conductor certification, a railroad could not have a more restrictive company rule requiring an employee to report a conviction or completed state action to cancel, revoke, or deny a motor vehicle drivers license in less than 48 hours.

The reasoning behind paragraph (l) involves several intertwined objectives. As a matter of fairness, a railroad should not revoke, deny, or otherwise make a person ineligible for certification until that person had received due process from the state agency taking the action against the motor vehicle license. Otherwise, action pursuant to this part might be deemed premature since the American judicial system is based on the concept of a person being innocent until proven guilty. Further, by not requiring reporting until 48 hours after the completed state action, the proposed rule would have the practical effect of ensuring that a required referral to a SAP under paragraph (o) of this section would not occur prematurely. Interested parties should note however, that paragraph (l) would not prevent an eligible person from choosing to voluntarily self-refer pursuant to § 242.115(d)(3). Nor would it prevent the railroad from referring the person to a SAP pursuant to § 240.115 if other information exists that identifies the person as possibly having a substance abuse disorder. Further, the restriction would apply only to actions taken against a person's certificate and would have no effect on a person's right to be employed by that railroad.

As mentioned above, paragraph (o) of this section would require that if such a motor vehicle incident described in paragraph (n) is identified, the railroad would be required to provide the data to its SAP along with "any information concerning the person's railroad service record." Furthermore, the person would have to be referred for evaluation to determine if the person had an active substance abuse disorder. If the person has such a disorder, the person could not be currently certified. Alternatively, even if the person is evaluated as not currently affected by an active substance abuse disorder, the railroad would be required, on recommendation of the SAP, to condition certification upon participation in any needed aftercare and/or follow-up testing for alcohol or drugs, or both. The intent of this provision is to use motor vehicle records to expose conductors or conductor candidates who may have active substance abuse disorders and make sure they are referred for evaluation and any necessary treatment before allowing them to perform safety sensitive service.

Section 242.113 Prior Safety Conduct as an Employee of a Different Railroad

This section of the proposed rule, which is derived from 49 CFR 240.113 and 240.205, proposes a process for requesting information regarding the candidate's prior safety conduct, if any, as an employee of a different railroad.

Section 242.115 Substance Abuse Disorders and Alcohol Drug Rules Compliance

This proposed section, which is derived from 49 CFR 240.119 and 240.205, would address two separate dimensions of the alcohol/drug problem in relation to conductors—(1) active substance abuse disorders and (2) specific alcohol/drug regulatory violations. This section and § 242.111 address certain situations in which inquiry must be made into the possibility that the individual has an active substance abuse disorder if the individual is to obtain or retain a certificate. The fact that specific instances are cited in this section would not exclude the general duty of the railroad to take reasonable and proportional action in other appropriate cases. Declining job performance, extreme mood swings, irregular attendance and other indicators may, to the extent not immediately explicable, indicate the need for a SAP evaluation.

Paragraph (a) would require each railroad to address both dimensions of this issue in its program. Paragraphs (b) and (c) would require each railroad to determine that a person initially certifying or a conductor recertifying meets the eligibility requirements of this section. Additionally, each railroad would be required to retain the documents used to make that determination.

Paragraph (d) provides that a person with an active substance abuse disorder could not be currently certified as a conductor. This means that appropriate action would have to be taken with respect to a certificate (whether denial or suspension) whenever the existence of an active substance abuse disorder comes to the official attention of the railroad, with the exception discussed below. Paragraph (d) would also provide a mechanism for an employee to voluntarily self-refer for substance abuse counseling or treatment.

Paragraph (e) would address conduct constituting a violation of § 219.101 or § 219.102 of the alcohol/drug regulations. Section 219.101 prohibits any employee from going or remaining on duty in covered service while using, possessing, or being under the influence of or impaired by alcohol or a controlled substance or with a blood alcohol concentration of .04% or more. This is conduct that specifically and directly threatens safety in a way that is wholly unacceptable, regardless of its genesis and regardless of whether it has occurred previously. In its more extreme forms, such conduct is punishable as a felony under the criminal laws of the United States (18 U.S.C. 341 *et seq.*) and a number of states.

Section 219.102 prohibits use of a controlled substance by a covered employee, at any time, on or off duty, except under the exception for approved medical use. Abuse of marijuana, cocaine, amphetamines, and other controlled substances poses unacceptable risks to safety. However, where on-the-job use, possession, or impairment is not established, as is most often the case where urinalysis is the means of detection (*e.g.,* through a random drug test which can detect drugs remaining in the system for some period after actual use), this violation is marginally less serious than a § 219.101 violation.

Under the alcohol/drug regulations, whenever a violation of § 219.101 or § 219.102 is established based on authorized or mandated chemical testing, the employee must be removed from service and may not return until after a SAP evaluation, any needed treatment, or a negative return-to-duty test, and is subject to follow-up testing (§ 219.104). This structure suggests an absolute minimum for action when a conductor is determined to have violated one of these prohibitions. Considering the need both for general and specific deterrence with respect to future unsafe conduct, additional action should be premised on the severity of the violation and whether the same individual has prior violations.

One key consideration in evaluating this conduct and appropriate responses is the duration of retrospective review. This proposed rule would require railroads to consider conduct that occurred within the period of 60 consecutive months prior to the review. This is the same period proposed in this rule as the maximum period of ineligibility for certification following repeated alcohol/drug violations and is the same period used in part 240.

Use of a 5-year cycle reflects anecdotal experience in the railroad industry indicating that conduct committed as much as 5 years before may tend to predict future alcohol or drug abuse behavior (and recognizes the reality that most individual violations are probably not detected). It also

reflects a certain confidence in the resilience of human nature—*i.e.,* a reasonable expectation that the person who remains in compliance for that period of time will not again be found in violation. Of course, railroads would retain the flexibility to consider prior conduct (including conduct more than 5 years prior) in determining whom they will hire as conductors.

Interested parties should note that conduct violative of the FRA proscriptions against alcohol and drugs need not occur while the person is serving in the capacity of a conductor in order to be considered. For instance, an employee who violated § 219.101 while working as a brakeman and then sought conductor certification six months later (under the provision described below) would not be currently eligible for certification. The same is true under part 240—an employee who violates § 219.101 while working as a brakeman and then seeks locomotive engineer certification six months later would not be eligible for certification at that time. The railroad's responsibility would not be limited to periodic recertification. This proposed rule would prompt a review of certification status for any conduct in violation of § 219.101 or § 219.102.

The proposed rule requires a determination of ineligibility for a period of 9 months for an initial violation of § 219.101. This parallels the 9-month disqualification in § 240.119(c)(4)(iii) and for a refusal to cooperate in post-accident or random testing. FRA does not believe that a conductor should be able to seek the shelter of a collective bargaining agreement or more lenient company policy in the case of a clear on-the-job violation, insofar as Federal eligibility to serve as a conductor is concerned. Specifying a period of ineligibility would serve the interest of deterrence while giving further encouragement to co-workers to deal with the problem before it is detected by management.

In order to preserve and encourage co-worker referrals, the 9-month period would be waived only in the case of a qualifying co-worker report (*see* § 219.405). FRA believes that this distinction in treatment is warranted as a strong inducement to participation because co-worker referral programs help identify troubled employees prior to those employees getting into accidents. A strong inducement to refer a co-worker is a worthy goal if it may contribute to a reduction in accidents and incidents. Although we do not know how many actual co-worker reports may be generated, the intended result would be served if an atmosphere of intolerance for drug abusing behavior is reinforced in the workplace and violators know that they may be turned in by their colleagues if they report for duty impaired.

In the case of a second violation of § 219.101, the conductor would be ineligible for a period of 5 years. Given railroad employment practices and commitment to alcohol/drug compliance, it is likely, of course, that any individual so situated may also be permanently dismissed from employment. However, it is important that the employing railroad also follow through and revoke the certificate under this rule so that the conductor could not go to work for another railroad within the 5-year period using the unexpired certificate issued by the first railroad as the basis for certification. These proposed sanctions mirror the sanctions in § 240.119.

Under this proposed rule, one violation of § 219.102 within the 5-year window would require only temporary suspension and the minimum response described in § 242.115(f) (referral for evaluation, treatment as necessary, negative return-to-duty test, and appropriate follow-up). This parallels the approach in part 240 and reflects FRA's wish not to undercut the therapeutic approach to drug abuse employed by many railroads. This approach would permit first-time positive drug tests to be handled in a non-punitive manner that concentrates on remediation of any underlying substance abuse problem and avoids the adversarial process associated with investigations, grievances and arbitrations under the Railway Labor Act and collective bargaining agreements. A second violation of § 219.102 would subject the employee to a mandatory 2-year period of ineligibility. A third violation within 5 years would lead to a 5-year period of ineligibility. This proposed rule would also address violations of §§ 219.101 and 219.102 in combination. A person violating § 219.101 after a prior § 219.102 violation would be ineligible for 3 years; and the same would be true for the reverse sequence.

Refusals and failures to participate in chemical tests would be treated as if the test were positive. A refusal or failure to provide a breath or body fluid sample for testing under the requirements of 49 CFR part 219 when instructed to do so by a railroad representative shall be treated, for purposes of ineligibility under this section, in the same manner as a violation of: (1) § 219.101, in the case of a refusal or failure to provide a breath sample (49 CFR subpart D), or a blood specimen for mandatory post-accident toxicological testing (49 CFR subpart C)); or (2) § 219.102, in the case of a refusal or failure to provide a urine specimen for testing.

Interested parties should note that if a person, covered by 49 CFR part 219, refuses to provide a breath or a body fluid specimen or specimens when required to by the railroad under a mandatory provision of 49 CFR part 219, then the railroad, apart from any action it would take under proposed part 242, is required to remove that person from covered service and disqualify that person from working in covered service for 9 months. *See,* 49 CFR 219.104 and 219.107; *see also,* 49 CFR § 219 subpart H and 49 CFR 40.191 and 40.261.

Proposed § 242.115(f) would prescribe the conditions under which employees may be certified or recertified after a determination that the certification should be denied, suspended, or revoked, due to a violation of § 219.101 or § 219.102 of the alcohol/drug regulations. These conditions mirror the conditions in § 240.119(d) and closely parallel the return-to-duty provisions of the alcohol/drug rule. Interested parties should note that the proposed regulation would not require compensation of the employee for the time spent in this testing, which is a condition precedent to retention of the certificate; but the issue of compensation would ultimately be resolved by reference to the collective bargaining agreement or other terms and conditions of employment under the Railway Labor Act. Moreover, a railroad that intends to withdraw its conditional certification would have to afford the conductor the hearing procedures provided by § 242.407 if the conductor did not waive his or her right to the hearing.

Proposed paragraph (g) would ensure that a conductor, like any other covered employee, could self-refer for treatment under the alcohol/drug rule (§ 219.403) before being detected in violation of alcohol/drug prohibitions and would be entitled to confidential handling of that referral and subsequent treatment. This means that a railroad would not normally receive notice of any substance abuse disorder identified by the SAP. However, the paragraph would also require that the railroad policy must (rather than may) provide that confidentiality is waived if the conductor fails to participate successfully in treatment as directed by the SAP, to the extent that the railroad must receive notice that the employee has an active substance abuse disorder so that appropriate certificate action can be taken. The effect of this provision is

that the certification status of a conductor who seeks help and cooperates in treatment would not be affected, unless the conductor fails to follow through.

Section 242.117 Vision and Hearing Acuity

This section contains proposed requirements for visual and hearing acuity testing that a railroad must incorporate in its conductor certification program. The proposed visual requirements are the same as those provided in 49 CFR 240.121. The testing procedures and standards for the proposed hearing requirements, however, are more stringent than those contained in 49 CFR 240.121 and were derived from the procedures and standards provided in 49 CFR part 227.

Although some individuals may not be able to meet the threshold acuity levels in this proposed rule, they may be able to compensate in other ways that will permit them to function at an appropriately safe level despite their physical limitations. Paragraph (j) of this section would permit a railroad to have procedures whereby doctors can evaluate such individuals and make discrete determinations about each person's ability to compensate for his or her physical limitations. If the railroad's medical examiner concluded that an individual had compensated for his or her limitations and could safely serve as a conductor on that railroad, the railroad could certify that person under this proposed regulation once the railroad possessed the medical examiner's professional medical opinion to that effect.

Paragraph (k) of this proposed section, would address the issue of how soon after learning of a deterioration of his or her best correctable vision or hearing a certified conductor would have to notify the railroad of the deterioration. FRA is concerned with the safe performance of conductor service, not whether a person can notify a railroad within a set time frame. Thus, FRA proposes, and the RSAC recommended, to require notification "prior to any subsequent performance as a conductor." Certified conductors should note that willful noncompliance with this requirement could result in enforcement action.

As mentioned above it is possible that a regulation recommended by the Medical Standards Working Group and adopted by FRA could supersede the hearing and vision standards and requirements in this proposed rule.

Section 242.119 Training

This section, in compliance with the training requirements of the RSIA, proposes to require railroads to provide initial and periodic training of conductors. That training would be necessary to ensure conductors have the knowledge, skills, and abilities necessary to competently and safely perform all of the safety-related duties mandated by Federal laws, regulations, and orders.

Paragraph (c) of this proposed section would require railroads to document a conductor's knowledge of, and ability to comply with, Federal railroad safety laws and regulations, and railroad rules used to implement them. In addition, that paragraph would require railroads to document that a conductor demonstrated that he or she is qualified on the physical characteristics of the railroad, or its pertinent segments, over which that person will perform service. This section would require railroads to review and modify their training program whenever new safety-related railroad laws, regulations, technologies, procedures, or equipment are introduced into the workplace.

Under this section, railroads would have latitude to design and develop the training and delivery methods they will employ; but paragraphs (d), (e), and (f) provide proposed requirements for railroads that elect to train a previously untrained person to be a conductor. Pursuant to paragraph (d),[9] a railroad that makes this election would be required to perform a *task analysis* in order to ensure completeness when developing training courses for both initial and periodic training courses, and on-the-job training standards for new conductors. Subparagraph (d)(1) of this section would permit a railroad to demonstrate that a task analysis, or portions of a task analysis, was performed for a program developed prior to the effective date of the regulation.

In the context of this proposed rule, a *task analysis* is the analysis of how conductor tasks are accomplished, including a detailed description of both manual and mental activities, durations, frequency, allocation, complexity, environmental conditions, necessary clothing and equipment, and any other unique factors involved in or required for one or more people to perform a given task. A task analysis is typically performed by a group of subject matter experts (SMEs) and a skilled educational specialist. In some cases, SMEs are also skilled as educational specialists. This group of SMEs should develop task lists, then the subtasks and steps. A task does not always have subtasks, but unless it is very simple, it will always have steps. The "natural" progression would be for the employer(s) to develop their learning objectives and on-the-job standards from this list. For purposes of this proposed rule, railroads should review all of the Federal requirements (such as 49 CFR Part 215 Appendix D, 49 CFR Part 218, 49 CFR Part 219 Subpart D, 49 CFR Parts 220, 232, and 241, hazardous materials handling and documentation requirements, *etc.*) when developing their task list in order to ensure the task analysis is complete from an FRA perspective. FRA intends to review the railroad task analyses with its own SMEs.

Paragraphs (g), (h), (i), (j), and (k) of this section contain the proposed requirements with respect to acquiring familiarity with the physical characteristics of a territory. Except for the requirements in paragraphs (j) and (k), the requirements parallel those in part 240. Paragraphs (j) and (k) of this section would require railroads to designate in their programs the time period in which a conductor must be absent from a territory or yard, before requalification on physical characteristics is required and the procedures used to qualify or requalify a person on the physical characteristics.

Paragraphs (l) and (m) would require railroads to perform initial instructional briefings to ensure that each of its conductors have knowledge of the Federal railroad safety laws, regulations, and orders that relate to the safety-related tasks the employees are assigned to perform. The purpose of the proposed instructional briefing requirement is to ensure accountability for both railroads and conductors. For many years, FRA has encountered situations in which railroad employees have been non-compliant with Federal requirements, but FRA was unable to determine whether one of the root causes of the non-compliance was inadequate training. FRA intends to remedy this issue by requiring railroads to perform these instructional briefings. FRA would also expect railroads to provide this information to new employees as part of their formal training program. In paragraph (n) of this section, FRA proposes to permit each railroad to demonstrate that it has met the requirements of paragraphs (l) and (m) through prior training records.

Paragraph (o) would require each railroad to provide for the continuing education of certified conductors to ensure that each conductor maintains the necessary knowledge concerning

[9] Subparagraphs (d)(1) and (d)(2) have been modified somewhat from the language recommended by the RSAC to clarify the scope of what the training plan and curriculum need to cover.

railroad safety and operating rules and compliance with all applicable Federal regulations, including, but not limited to, hazardous materials, passenger train emergency preparedness, brake system safety standards, pre-departure inspection procedures, and passenger equipment safety standards, and physical characteristics of a territory. This proposed paragraph, which is derived from 49 CFR 240.123(b), was included in several drafts reviewed by the Working Group but was not in the draft voted on by the Working Group or full RSAC. FRA has included it in this NPRM because we suspect that it was inadvertently omitted and believe that continuing education is critical for conductors. FRA welcomes comments on this paragraph.

Section 242.121 Knowledge Testing

This section, derived from 49 CFR 240.125 and 240.209, would require railroads to provide for the initial and periodic testing of conductors. That testing would have to effectively examine and measure a conductor's knowledge of five subject areas: Safety and operating rules; timetable instructions; compliance with all applicable Federal regulations; the physical characteristics of the territory on which a person will be or is currently serving as a conductor; and the use of any job aid that a railroad may provide a conductor.

Under this section, railroads would have discretion to design the tests that will be employed; for most railroads that will entail some modification of their existing "book of rules" examination to include new subject areas. This section does not specify things like the number of questions to be asked or the passing score to be obtained. However, it does propose that the test not be conducted with open reference books unless use of such materials is part of a test objective and the test be in written or electronic form. Moreover, since the testing effort selected by the railroad must be submitted to FRA for approval, the exercise of the discretion being afforded railroads by this section would be monitored by FRA. To address a concern of some of the members of the Working Group that persons being tested were unable to obtain clarification of test questions by someone who possessed knowledge of a relevant territory, paragraph (e) of this proposed section would require railroads to provide the person(s) being tested with an opportunity to consult with a supervisory employee, who possesses territorial qualifications for the territory, to explain a question.

Section 242.123 Monitoring Operational Performance

This proposed section, derived from 49 CFR 240.129 and 240.303, contains the proposed requirements for conducting unannounced compliance tests.

Paragraph (b) of this section would require each railroad to have a program to monitor the conduct of its conductors by performing unannounced operating rules compliance tests.

Paragraph (c) provides that each conductor would have to be given at least one unannounced compliance test in each calendar year by a railroad officer who meets the requirements of 49 CFR 217.9(b)(1).

Paragraph (d) provides the operational tests that conductors and passenger conductors would have to be tested on. That paragraph would also allow passenger conductors who do not require compliance with 49 CFR 218 subpart F, except under emergency circumstances, to meet the annual, unannounced test requirement with annual training.

Paragraph (e) of this section would require railroads to indicate the types of actions they will take in the event they find deficiencies with a conductor's performance during an unannounced compliance test. FRA believes it is up to each railroad to decide the appropriate action to take in light of various factors, including collective bargaining agreements. Further, FRA believes that the vast majority of railroads have adequate policies to deal with deficiencies with a conductor's performance and have handled them appropriately for many years.

To avoid restricting the options available to the railroads and employee representatives to develop processes for handling test failures, FRA designed this proposal to be as flexible as possible. There are a variety of actions and approaches that a railroad could take in response to a test failure and FRA does not want to stifle a railroad's ability to adopt an approach that is best for its organization. Some of the actions railroads could consider include: develop and provide formal remedial training for conductors who fail tests or have deficiencies in their performance; automatically download event recorder data, if relevant, upon a test failure or deficient performance in order to preserve evidence of the failure/deficiency; and require two supervisors to accompany a retest. Each railroad could also consider implementing a formal procedure whereby a conductor is given the opportunity to explain, in writing, the factors that he or she believes caused their test failure or performance deficiencies. This explanation may allow a railroad to determine what areas of training to focus on or perhaps discover that the reason for the failure/deficiency was due to something other than a lack of skills. FRA believes there are numerous other approaches that could and should be considered and evaluated by railroads and their employees. FRA realizes that a railroad's list of actions it will take in response to a test failure or deficient performance could be expansive given the various circumstances that could contribute to a test failure or deficient performance.

Paragraphs (b) and (f) of this section recognize that some certified conductors may not be performing a service that requires conductor certification and thus a railroad may not be able to provide those conductors with the annual, unannounced compliance test. For example a certified conductor may be on furlough, in military service, off with an extended illness, or working in another service. Unlike part 240, which requires railroads to seek a waiver from FRA's Safety Board for engineers it is unable to annually test, this proposed section would not require railroads to give an unannounced compliance test to conductors who are not performing service requiring certification. However, when the certified conductor returns to certified service, he or she would have to be tested within 30 days of their return. Moreover, the railroad would have to retain a written record documenting certain dates regarding a conductor's service.

Section 242.125 Certification Determinations Made by Other Railroads

This section, derived from 49 CFR 240.225, provides the proposed requirements that would apply when a certified or previously certified conductor is about to begin service for a different railroad. The section would permit the hiring railroad to rely on determinations made by another railroad concerning a person's certification. However, the section would require a railroad's certification program to address how the railroad will administer the training of previously uncertified conductors with extensive operating experience or previously certified conductors who have had their certification expire. In both these instances, FRA is providing a railroad with the opportunity to shorten the on-the-job training that might be required if a person is treated as having no operational experience. If a railroad's certification program fails to

specify how to train a previously certified engineer hired from another railroad, then the railroad would have to require the newly hired conductor to take the hiring railroad's entire training program.

Section 242.127 Reliance on Qualification Requirements of Other Countries

This section, derived from 49 CFR 240.227, proposes to provide Canadian railroads that operate in the United States and U.S. railroads that conduct joint operations with Canadian railroads the option to rely on the system of conductor certification established by the Canadian Government as long as the conductor is employed by a Canadian railroad.

*Subpart C—Administration of the Certification Program*

Section 242.201 Time Limitations for Certification

This section, derived from 49 CFR 240.217, contains various time constraints that FRA proposes to preclude railroads from relying on stale information when evaluating a candidate for certification or recertification. Although some members of the Working Group advocating for extending the certification period from 3 years to 5 years, FRA could not discern the safety justification for doing so. FRA has, however, extended the period provided in 49 CFR 240.217(a)(2) upon which a railroad could rely on a visual and hearing acuity examination from 366 days to 450 days. The 450 days corresponds to the requirement in 49 CFR 227.109 that railroads must offer employees included in a hearing conservation program a hearing test at an interval not to exceed 450 days.

Section 242.203 Retaining Information Supporting Determinations

This section, derived from 49 CFR 240.215, contains the proposed record keeping requirements for railroads that certify conductors. While both 49 CFR 240.215 and this section permit railroads to retain records electronically, paragraph (g) of this section proposes more specific requirements regarding the electronic storage system used to retain the records than those found in § 240.215. In that paragraph, FRA proposes minimum standards for electronic record-keeping provisions that a railroad would have to utilize to maintain the records required by this section electronically.

FRA recognizes the growing prevalence of electronic records, and acknowledges the unique challenges that electronic transmission, storage, and retrieval of records can present. FRA also recognizes the need to maintain the integrity and security of records stored electronically. Thus, FRA believes that more specific requirements for electronic storage systems than those found in § 240.215 are needed. Further, to allow for future advances in technology, FRA is proposing electronic record storage provisions in paragraph (g) that are technology-neutral.

Section 242.205 Identification of Certified Persons and Record Keeping

This proposed section, derived from 49 CFR 240.221, would require each railroad to maintain a list of its certified conductors. Although derived from § 240.221, this section also contains some significant differences. Unlike § 240.221(c) which requires the railroad responsible for controlling joint operations territory to maintain a list of all engineers certified to operate in the joint operations, paragraph (b) of this section would require the railroad who employs conductors working in joint operations territory to maintain the list.

With respect to engineers, FRA has found that, under actual industry practices, the controlling railroad seldom qualifies foreign engineers over its trackage. Rather, the controlling railroad usually qualifies the employing railroad's designated supervisor of locomotive engineers (DSLEs) on its territory and allows those DSLEs to qualify their own engineers on the controlling railroad's trackage. Considering that practice, the employing railroad would be better able to maintain the list of conductors it qualifies on the controlling railroad. Additionally, the employing railroad has more of an interest in keeping track of its conductors that are qualified on the controlling railroad. Should an employing railroad order a crew for a train that will operate over the controlling railroad, and the crew is not qualified, the train would have to stop at the controlling railroad. Moreover, it is much easier for the employing railroad to keep the list updated as it qualifies conductors or it removes conductors who have lost qualification because of time limitations. This section also differs from § 240.221 in that this section would make it unlawful for a railroad to knowingly or an individual to willfully make a false entry on the list or to falsify the list. Similar language is found in § 240.215(i) but not in § 240.221.

While both § 240.221 and this section permit railroads to retain records electronically, paragraph (e) of this section proposes more specific requirements regarding the electronic storage system used to retain the records than those found in § 240.215(f) and would not require a railroad to obtain FRA approval to maintain the records electronically. The electronic storage requirements in paragraph (e) of this section track those in § 242.203(g).

Section 242.207 Certificate Components

This proposed section, derived from 49 CFR 240.223, contains the proposed requirements for the certificate that each conductor must carry. To address the privacy concerns of some Working Group members, FRA's proposal for what must be on the certificate slightly differs from the certificate requirements in Part 240. While § 240.223(a)(3) requires locomotive engineer certificates to include "the person's name, date of birth and employee identification number, and either a physical description or photograph of the person," proposed § 242.207(a)(3) would require conductor certificates to include "the person's name, employee identification number, and either the year of birth or photograph of the person." [10]

As currently written, this proposed section would not require a conductor's certificate to include a physical description or photograph of the conductor as is required in part 240. FRA is considering requiring a conductor's certificate to include a physical description or photograph of the conductor. FRA believes that requirement would enable FRA inspectors, railroad officers, and police officers to quickly verify that the person in possession of the certificate is in fact the person listed on the certificate. FRA welcomes comments on that proposal.

While FRA expects that, in the future, § 240.223(a)(3) will be amended to conform to § 242.207(a)(3), FRA notes that pursuant to proposed § 242.213(n), a single certificate issued to a person that is certified as both a conductor and a locomotive engineer would have to comply, for now, with § 242.207 and § 240.223.

Section 242.209 Maintenance of the Certificate

This section, derived from 49 CFR 240.305(b), (c) and (e), proposes to require conductors to: Have their certificates in their possession while on duty as a conductor; display their

[10] FRA has made two clarifying changes to the language of § 242.207(a)(3) that were not considered by the Working Group or the full RSAC: (1) The words "either the" were added between "and" and "year"; and (2) the word "the" was added between "of" and "person."

certificates when requested to do so by FRA representatives, State inspectors authorized under 49 CFR 212, and certain railroad officers; and notify a railroad if he or she is called to serve as a conductor in a service that would cause them to exceed their certificate limits. Although State inspectors authorized under 49 CFR 212 could be considered "FRA representatives," they were mentioned separately in this section to ensure that there would be no dispute regarding their authority.

Section 242.211 Replacement of Certificates

This proposed section, derived from 49 CFR 240.301, would require railroads to have a system for the prompt replacement of certificates when necessary. Unlike § 240.301, which does not address the question of who will bear the cost of a replacement certificate, this section proposes that certificates will be replaced by the railroad at no cost to the conductor. While FRA expected that the railroad would bear the cost for a replacement locomotive engineer certificate under part 240, a few Working Group members indicated that some locomotive engineers had been charged (or asked by a railroad to pay) for replacement certificates. The provision in this proposed part clarifies that the railroad would bear the cost of replacement certificates.

To address the concerns of some Working Group members that a full replacement certificate can take some time to generate and provide to a conductor, paragraph (b) of this section proposes to permit railroads to issue temporary replacement certificates. The paragraph describes what the certificate would have to contain and who could authorize the temporary replacement. The temporary replacement certificate could be delivered electronically (*e.g.,* faxed, e-mailed, etc.) and would be valid for no more than 30 days.

Section 242.213 Multiple Certifications

This proposed section would permit a person to hold certification for multiple types of conductor service and/or certification for both conductor and locomotive engineer service. A railroad would only need to issue one certificate to a person with multiple certifications. However, a certificate issued to a person certified as a conductor and locomotive engineer would not only have to comply with proposed § 242.207 but also with § 240.223. To the extent possible, a railroad that issued multiple certificates to a person would have to coordinate the expiration date of those certificates.

With the exception of a situation in which a conductor is removed from a train for a medical, police, or other such emergency, this section would require that a locomotive engineer, including a RCO, who is operating without an assigned certified conductor to either be: (1) Certified as both a locomotive engineer and a conductor; or (2) accompanied by a certified conductor who will attach to the crew "in a manner similar to that of an independent assignment." Since a lone engineer/RCO would be serving as and performing duties as both locomotive engineer and conductor, FRA believes, and the Working Group and full RSAC voted to recommend, that the engineer/RCO must hold dual certification or be accompanied by a certified conductor. The language concerning how an accompanying conductor would attach to the crew conveys FRA's intent that this proposed regulation be neutral on the issue of crew consist (*i.e.,* how many crewmembers must be on a train).

During the RSAC process, representatives of FRA, the railroads, and labor engaged in extensive discussions regarding the potential effect of proposed 49 CFR 242.213 ("Multiple certifications") on the issue of crew consist. It is FRA's intent that this proposed conductor certification regulation, including section 242.213, be neutral on the crew consist issue. Nothing in the proposed part 242 should be read as FRA's endorsement of any particular crew consist arrangement.

In instances where a person, who is serving as both the conductor and the engineer (*i.e.,* a lone engineer or RCO), is involved in a revocable event, railroads may be faced with determining which certification to revoke. For example, a railroad that finds that a RCO, who is certified both as an engineer and as a conductor but who was not accompanied by a certified conductor, has failed to comply with prohibitions against tampering with a locomotive mounted safety device would have to determine whether to revoke the person's conductor certification pursuant to § 242.403(e)(5) or the person's locomotive engineer certification pursuant to § 240.117(e)(5). To address that situation, FRA is considering adding a provision to this proposed section which would require railroads to make the determination as to which certification to revoke based on the work the person was performing at the time the conduct occurred. This determination would be similar to the determination made under the reporting requirements in this proposed rule (§ 242.215(f)) and under part 225 in which railroads determine whether an accident was caused by poorly performing what is traditionally considered a conductor's job function (*e.g.,* switch handling, derail handling, *etc.*) or whether it was caused by poorly performing what is traditionally considered a locomotive engineer's job function (*e.g.,* operation of the locomotive, braking, *etc.*). FRA welcomes comments on that proposed provision.

This section also addresses the consequences of certification denial or revocation for a conductor who is certified to perform multiple types of conductor service or both conductor and locomotive engineer service. A person who holds a current conductor and/or locomotive engineer certificate from more than one railroad would have to immediately notify the other certifying railroad(s) if he or she is denied engineer or conductor recertification or has his or her conductor or engineer certification revoked by another railroad.

Pursuant to this section, a person certified to perform multiple types of conductor service and who has had any of those certifications revoked would not be permitted to perform any type of conductor service during the period of revocation. Likewise, a person who holds a conductor and locomotive engineer certificate and has his or her engineer certificate revoked would not be permitted to work as a conductor during the period of revocation. Similarly, a person who holds a conductor and engineer certificate and has his or her conductor certification revoked for violation of §§ 242.403(e)(1)–(e)(5) or (e)(12) would not be permitted to work as an engineer during the period of revocation. However, a person who holds a conductor and engineer certificate and has his or her conductor certification revoked for a violation of §§ 242.403(e)(6)–(e)(11) (*i.e.,* violations involving provisions of part 218, subpart F) would be permitted to work as an engineer during the period of revocation. To aid interested parties, FRA has included a table in Appendix E [11] to this proposed rule which explains, in a spreadsheet-style form, when a person certified as both an engineer and conductor would be permitted to work following a certification revocation.

Currently under part 240, an engineer cannot have his or her certificate

[11] Appendix E was not considered by the Working Group or the full RSAC. It was added by FRA to assist interested parties in determining the application of revocable events.

revoked for violations of part 218, subpart F. While part 240 may be amended in the future to include part 218, subpart F violations as revocable events, this proposed rule recognizes that it would be unfair to prohibit a person from working as an engineer for a violation that currently would not result in the revocation of his or her engineer certificate. This section also proposes that, in determining the period in which a person may not work as a locomotive engineer due to a revocation of his or her conductor certification, only violations of §§ 242.403(e)(1)–(e)(5) or (e)(12) may be counted. To assist railroads in determining the correct period, paragraph (h)(1) of this section provides a hypothetical scenario and an explanation of how the period would be calculated.

To avoid treating a person who only holds one certification differently than a person who holds multiple certifications, this section would prohibit a person who has had his or her locomotive engineer certification revoked from obtaining a conductor certificate during the revocation. Likewise, a person who has had his or her conductor certification revoked for violations of §§ 242.403(e)(1)–(e)(5) or (e)(12) would be prohibited from obtaining a locomotive engineer certificate during the period of revocation. With respect to denial of certification or recertification, this section provides that a railroad that denies a person locomotive engineer certification or recertification would not be permitted, solely on the basis of the denial, to deny or revoke that person's conductor certification or recertification and vice versa.

Section 242.215 Railroad Oversight Responsibilities

This section, derived from 49 CFR 240.309, proposes to require Class I (including the National Railroad Passenger Corporation and a railroad providing commuter service) and Class II railroads to conduct an annual review and analysis of its program for responding to detected instances of poor safety conduct by certified conductors. FRA has formulated the information collection requirements of this proposed section to ensure that railroads collect data on conductor safety behavior and feed that information into its operational monitoring efforts, thereby enhancing safety.

This section would require Class I (including the National Railroad Passenger Corporation and a railroad providing commuter service) and II railroads to have an internal auditing plan to keep track of 8 distinct kinds of events that involve poor safety conduct by conductors. For each event, the railroad would have to indicate what response it took to that situation. The railroad would evaluate this information, together with data showing the results of annual operational testing and the causation of FRA reportable train accidents, to determine what additional or different efforts, if any, are needed to improve the safety performance of that railroad's certified conductors. FRA is not proposing to require that a railroad furnish this data or its analysis of the data to FRA. Instead, FRA is proposing to require that the railroad be prepared to submit such information when requested.

For purposes of the reporting requirement in this section, an instance of poor safety conduct involving a person who holds both a conductor and engineer certification would only have to be reported once (*i.e.,* either under 49 CFR 240.309 or this section). The determination as to where to report the instance of poor safety conduct would be based on the work the person was performing at the time the conduct occurred. This determination would be similar to the determination made under part 225 in which railroads determine whether an accident was caused by poorly performing what is traditionally considered a conductor's job function (*e.g.,* switch handling, derail handling, *etc.*) or whether it was caused by poorly performing what is traditionally considered a locomotive engineer's job function (*e.g.,* operation of the locomotive, braking, *etc.*).

*Subpart D—Territorial Qualification and Joint Operations*

Section 242.301 Requirements for Territorial Qualification

This proposed section, derived from 49 CFR 240.229 and 240.231, explains the requirements for territorial qualification. Paragraph (a) of this section provides that, except for two circumstances,[12] a railroad, including a railroad that employs conductors working in joint operations territory, could not permit or require a person to serve as a conductor unless that railroad determines that the person is a certified conductor and possesses the necessary territorial qualifications.

Paragraph (a) reflects the Working Group and full RSAC recommendation to realign the burden for determining which party is responsible for allowing an unqualified person to operate in joint operations. While part 240 puts the burden on the controlling railroad, this proposed rule puts the burden on the employing railroad. This change is based on the experiences of the Working Group members who believe that an inordinate amount of the liability currently rests with the controlling railroad. The perceived unfairness rests on the fact that it is not always feasible for the controlling railroad to make all of the determinations proposed in § 242.119. The employing railroad may provide the controlling railroad with a long list of hundreds or thousands of locomotive engineers that it deems eligible for joint operations; following up on a long, and ever changing list is made much more difficult since a controlling railroad would not control the personnel files of the conductors on this list.

The proposed realignment would lead to a sharing of the burden among a controlling railroad, an employing railroad and an employing railroad's conductor. Although a controlling railroad would be obligated to make sure the person is qualified, paragraph (a) would require that an employing railroad make these same determinations before calling a person to serve in joint operations. Paragraph (b) of this section would require a conductor to notify a railroad when the person is being asked to exceed his or her territorial qualifications. That paragraph parallels § 242.209(b) of this proposed rule.

Paragraphs (c) and (d) propose requirements for situations where a conductor lacks territorial qualification on main track and other than main track physical characteristics. On main track, the conductor would have to be assisted by a person who is (1) a certified conductor or certified locomotive engineer and (2) meets the territorial qualification requirements for the main track physical characteristics. On other than main track, the conductor, where practicable, would have to be assisted by a person who is a certified conductor and meets the territorial qualification requirements for other than main track physical characteristics. Where not practicable, the conductor would have to be provided with an appropriate, up-to-date job aid. Two points should be made about the other than main track proposal in paragraph (d) of this section. First, the person assisting the conductor could be the locomotive engineer as long as the engineer is also a certified conductor and meets the territorial qualification requirements for the other than main track physical characteristics. Second, FRA does not intend for the

[12] The phrase "[e]xcept as provided in paragraph (c) or (d) of this section" in paragraph (a) was not considered by the Working Group or the full RSAC, but has been added to clarify the section.

proposed requirements of § 242.301(d) to apply to sidings.

*Subpart E—Denial and Revocation of Certification*

This subpart parallels part 240's approach to adverse decisions concerning certification (*i.e.,* decisions to deny certification or recertification and revoke certification). With respect to denials, the approach of this proposed rule is predicated principally on the theory that decisions to deny certification or recertification would come at the conclusion of a prescribed evaluation process which would be conducted in accordance with the provisions set forth in this subpart. Thus, this proposed rule and part 240 contain specific procedures designed to assure that a person, in jeopardy of being denied certification or recertification, would be given a reasonable opportunity to explore and respond to the negative information that might serve as the basis for being denied certification or recertification.

When considering revocation, this proposed rule contemplates that decisions to revoke certification would only occur for the reasons specified in this subpart. Since revocation decisions by their very nature involve a clear potential for factual disagreement, this subpart is structured to ensure that such decisions would come only after a certified conductor had been afforded an opportunity for an investigatory hearing at which the presiding officer would determine whether there was sufficient evidence to establish that the conductor's conduct warranted revocation of his or her certification.

This subpart also includes the concept of certificate suspension. Certificate suspension would be employed in instances where there is reason to think the certificate should be revoked or made conditional but time is needed to resolve the situation. Certificate suspension would be applicable in instances where a person is awaiting an investigatory hearing to determine whether that person violated certain provisions of FRA's alcohol and drug control rules or engaged in operational misconduct and situations in which the person is being evaluated or treated for an active substance abuse disorder.

While this proposed subpart follows part 240's approach to adverse decisions concerning certification, it does include some modifications to the processes in part 240. Those modifications are discussed below.

Section 242.401 Denial of Certification

This section, derived from 49 CFR 240.219, proposes minimum procedures that must be accorded to a certification candidate before a railroad denies the candidate certification or recertification. Except for two changes, the provisions in this section mirror the provisions in § 240.219 including: Providing a certification candidate with a reasonable opportunity to explain or rebut adverse information; and notifying a candidate of an adverse decision and providing a written explanation of the basis for its decision within 10 days.

This section differs from § 240.219 in two ways. First, this section would require that a written explanation of an adverse decision be "served" on a certification candidate (*see* definition of *service* in § 242.7). Use of the defined term, rather than part 240's more general phrase "mailed or delivered," not only makes this proposed rule internally consistent but would likely help FRA in determining whether a petition seeking review of a denial decision was filed within 120 days of the date the denial was served on the petitioner (*see* § 242.503(c)). Second, paragraph (d) of this section, which is not included in § 240.219, would prohibit a railroad from denying certification based on a failure to comply with § 242.403(e)(1)–(11) if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the conductor's ability to comply with those sections. Paragraph (d) parallels the intervening cause exception for revocation in § 242.407(i)(1). FRA welcomes comments on whether the intervening cause exception in paragraph (d) should be modified to include certification and recertification requirements in addition to the revocable events in § 242.403. For example, paragraph (d) could be modified to read as follows: A railroad shall not determine that a person failed to meet the eligibility requirements of this part and shall not deny the person's certification if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the conductor's ability to comply with the railroad operating rule or practice or certification or recertification requirement which forms the basis for denying the person certification or recertification.

As a supplement to this proposed section, FRA is considering whether to add two provisions which FRA believes would improve the transparency of the certification denial process and improve FRA's ability to adjudicate petitions seeking review of a railroad's denial decision pursuant to subpart E of this proposed rule. One of the challenges that FRA faces when reviewing denial decisions in the locomotive engineer context is that, unlike revocation decisions which are usually accompanied by a documentary record and transcript generated at a railroad hearing, no such hearing is required for denial decisions and often there is little or no documentary record.

To overcome that challenge, FRA is considering two additional provisions. First, FRA is considering adding the following sentence to paragraph (a) of this section: The railroad shall provide the conductor candidate with any written documents or records, including written statements, which support its pending denial decision. Second, FRA is considering adding the following sentence to paragraph (c) of this section: The basis for a railroad's denial decision shall address any explanation or rebuttal information that the conductor candidate may have provided in writing pursuant to paragraph (a) of this section. FRA welcomes comments on those proposed provisions.

Section 242.403 Criteria for Revoking Certification

This section, derived from 49 CFR 240.117 and 240.305, proposes the circumstances under which a conductor may have his or her certification revoked. In addition, paragraph (b) of this section would make it unlawful to fail to comply with any of the events listed in paragraph (e) of this section (*i.e.,* events which would require a railroad to initiate revocation action). Paragraph (b) would be needed so that FRA could initiate enforcement action. For example, FRA might want to initiate enforcement action in the event that a railroad fails to initiate revocation action or a person is not a certified conductor under this part.

Paragraph (c)(1) of this section proposes that a certified conductor who fails to comply with the events listed in paragraph (e) of this section would have his or her conductor certification revoked. Paragraph (c)(2) proposes that a certified conductor, who is monitoring, piloting, or instructing a conductor, could have his or her certification revoked if he or she fails to take "appropriate action" to prevent a violation of paragraph (e) of this section. As explained in paragraph (c)(2), "appropriate action" does not mean that a supervisor, pilot, or instructor must prevent a violation from occurring at all costs, but rather the duty may be met by warning the conductor or engineer, as appropriate, of a potential or foreseeable violation. The term "appropriate action"

is also used in paragraph (e) of this section as well as 49 CFR 240.117(c)(2).

Paragraph (c)(3) proposes that a person who is a certified conductor but is called by a railroad to perform the duty of a train crew member other than that of conductor or locomotive engineer would not have his or her certification revoked based on actions taken or not taken while performing that duty. For example, a person who is called to be the crew's brakeman and who does not serve as a conductor or locomotive engineer during that tour of duty could not have his or her certification revoked for a violation listed in paragraph (e) of this section. Interested parties should note that the exemption would not apply to violations of § 242.403(e)(12) so that conductors working in other capacities who violate certain alcohol and drug rules would have their certification revoked for the appropriate period pursuant to §§ 242.403 and 242.115.

Paragraph (d) proposes that the time frame for considering operating rule compliance would only apply to conduct described in paragraphs (e)(1) through (e)(11) of this section and not paragraph (e)(12). When alcohol and drug violations are at issue, the window in which prior operating rule misconduct will be evaluated would be dictated by § 242.115 and not limited to the 36 month period prescribed in this paragraph. This proposed rule would require that certification reviews consider alcohol and drug misconduct that occurred within a period of 60 consecutive months prior to the review pursuant to § 242.115(e).

Paragraph (e) proposes 12 kinds of rule infractions that could result in certification revocation. The infractions listed in paragraphs (e)(1)-(e)(5) and (e)(12) derive from the revocable events provided in 49 CFR 240.117(e) but have been modified to account for a conductor's duties. For example, paragraphs (e)(1) and (e)(2) recognize that a conductor does not operate the train and thus those subparagraphs would only require a conductor to take "appropriate action" to prevent an engineer from failing to control a locomotive or train in accordance with a signal or to adhere to speed limitations. As explained in those subparagraphs, "appropriate action" does not mean that a conductor must prevent a violation from occurring at all costs; but rather the duty may be met by warning the engineer of a potential or foreseeable violation. Moreover, paragraph (e)(2) recognizes that a conductor who is not in the operating cab should not be held to held to the same responsibility with respect to monitoring train speed as a conductor who is located in the operating cab.

Interested parties should note that with respect to paragraph (e)(4), a conductor would be considered to have occupied main track or a segment of main track without proper authority or permission if the conductor failed to stop and protect/flag a crossing on main track when required to do so pursuant to a railroad operating rule or practice, including a mandatory directive.

The infractions listed in paragraphs (e)(6)–(e)(11) of this section describe violations of part 218, subpart F which are not listed as revocable events in part 240. For the reasons listed below, FRA proposes, and the RSAC recommended, that violations of part 218, subpart F should be revocable events for conductors. In the future, FRA expects to review whether those violations should also be revocable events for locomotive engineers. Subpart F of part 218 requires that each railroad have in effect certain operating rules concerning shoving or pushing movements, equipment left out to foul a track, switches, and derails.[13] The operating rules identified in part 218, subpart F are not only considered core competencies for conductors but are also designed to address the most frequently caused human factor accidents. Human factors are the leading cause of train accidents, accounting for 38 percent of the total in 2005. Human factors also contribute to employee injuries. Subpart F violations account for approximately 43% of all human factor caused accidents. From 2005–2009, there were approximately 2,227 accidents due to Subpart F violations. Those accidents resulted in approximately 13 fatalities, 363 injured, and $104,855,224 in damages.

In addition to the 12 kinds of revocable events proposed in this NPRM, FRA welcomes comments as to whether a violation of the final rule in 49 CFR part 220 ("Restrictions on Railroad Operating Employees' Use of Cellular Telephones and Other Electronic Devices") should constitute a revocable event for conductors and locomotive engineers. In the NPRM for 49 CFR part 220 (75 FR 27672, 27678 (May 18, 2010)), FRA noted that it was "considering amending 49 CFR part 240 * * * to add violations of this subpart as a basis for revoking a locomotive engineer's certification" and requested comments on the issue. However, since the issue deals with revocation of certification, FRA believes that the issue is more appropriately addressed in the conductor and locomotive engineer rules. Comments regarding whether FRA should use its other enforcement tools (*e.g.,* monetary civil penalty against an individual, disqualification of an individual from performing safety-sensitive service, *etc.*) instead of mandating revocation would be particularly helpful as would comments describing how a railroad would acquire the necessary evidence to revoke a conductor's and/or locomotive engineer's certification for violation of 49 CFR part 220.

Paragraph (e)(13) of this section, which does not have a counterpart in part 240, would prohibit a railroad from denying or revoking an employee's certification based upon additional conditions or operational restrictions imposed pursuant to § 242.107(d). Thus, a railroad could not revoke a conductor's certificate for an alleged violation of a railroad rule or practice that was more stringent than the condition or restrictions required by this proposed part. In the future, FRA expects to review whether a similar provision should also apply to locomotive engineers.

Paragraph (f) of this section proposes that if a single incident contravenes more than one operating rule or practice listed in paragraph (e) of this section, that event would be treated as a single violation. Moreover, paragraph (f) proposes that a conductor may have his or her certification revoked for violations that occur during properly conducted operational compliance tests. However, violations that occur during an improperly conducted operational compliance test would not be considered for revocation purposes.

Section 242.405 Periods of Ineligibility[14]

This proposed section, derived from § 240.117, describes how a railroad would determine the period of ineligibility (*e.g.,* for revocation or denial of certification) that a conductor or conductor candidate would have to undergo. With respect to revocation, this section proposes that once a railroad has determined that a conductor has failed to comply with its safety rule concerning one or more events listed in § 242.403(e), two consequences would occur. First, the railroad would be required to revoke the

[13] For a detailed analysis of part 218, interested parties should review the notice of proposed rulemaking (71 FR 60372 (Oct. 12, 2006)), the final rule (73 FR 8442 (Feb. 13, 2008)), and the response to petitions for reconsideration (73 FR 33888 (June 16, 2008)) issued in that rulemaking.

[14] When considered by the Working Group and full RSAC, the title of this section was "Periods of revocation." FRA has modified that title to describe more clearly what the section would cover.

conductor's certification for a period of time provided in this section. Second, that revocation would initiate a period during which the conductor would be subject to an increasingly more severe response if additional revocable events occur in the next 24 to 36 months.

Except for incidents occurring on other than main track where restricted speed or the operational equivalent is in effect, the standard periods of revocation proposed in this section track the periods provided in part 240: 1 event = revocation for 30 days; 2 events within 24 months of each other = 6 months; 3 events within 36 months of each other = 1 year; and 4 events within 36 months of each other = 3 years. This section notes, however, that violations of § 219.101 (Alcohol & Drugs) could result in different periods of ineligibility and in those cases, the longest period of revocation would control. FRA has included a table in Appendix E to this proposed rule which provides the revocation periods in a spreadsheet-style form. The table should be useful in determining the correct period of revocation.

The period of revocation in both part 240 and this proposed rule is based on a floating window. Hence, under this proposed rule and part 240, if a second offense occurs 25 months after the first offense, the revocation period would be the same as a first offense; however, if a third offense occurs within 36 months of the first offense, the revocation period would be one year. The anomaly will be that a person's certificate could be revoked twice for one month under paragraph (a)(3)(ii) of this section but that the third incident could result in a one year revocation under paragraph (a)(3)(iv) of this section without the benefit of the interim six month revocation period under paragraph (a)(3)(iii).

This section also contains two provisions which would reduce the period of ineligibility if certain criteria are met. The first provision, which is contained in paragraph (a)(3)(i) of this section, proposes that "on other than main track where restricted speed or the operational equivalent thereof is in effect," the periods of revocation for violations of certain provisions of § 242.403(e) shall be reduced by one half provided that another revocable event has not occurred within the previous 12 months. That provision, which does not have an equivalent provision in part 240, recognizes that some violations which occur on other than main track where slower speeds are in effect may pose less of a danger to safety than violations that occur on main track and thus a reduced period of revocation is warranted. The second provision, which may reduce the period of ineligibility if certain criteria are met, is contained in paragraph (c) of this section.[15] That provision, which parallels § 240.117(h), proposes that a person whose conductor certification is denied or revoked would be eligible for grant or reinstatement of the certificate prior to the expiration of the initial period of revocation if, among other things, at least one half of the initial period of ineligibility has elapsed.

In certain instances, both proposed provisions may apply to a conductor who has had his or her certification revoked. For example, if a conductor's certification is revoked for a violation of proposed § 242.403(e)(6) which occurred on other than main track where restricted speed is in effect and it is the only revocation that the conductor has ever had, then, under § 242.405(a)(3)(i), the revocation period would be 15 days. Moreover, if the conductor meets the criteria in § 242.405(c), then the conductor would be eligible for reinstatement of his or her certificate in 8 days.[16]

Paragraph (b) of this section proposes that all periods of revocation may consist of training. While that provision is not explicitly stated in part 240, it is certainly not prohibited and is included in this proposed rule to make the rule clear.

Section 242.407 Process for Revoking Certification

This proposed section, derived from 49 CFR 240.307, provides the procedures a railroad would have to follow if it acquires reliable information regarding a conductor's violation of § 242.115(e) or § 242.403(e).

Paragraph (b)(1) of this section provides that upon receipt of reliable information regarding a violation of § 242.403(e), a railroad would have to suspend the person's certificate. Paragraph (b)(2) provides that prior to or upon suspending the person's certificate, the railroad would have to provide either oral or written notice of the reason for the suspension, the pending revocation, and an opportunity for a hearing. If the initial notice was verbal, then the notice would have to be promptly confirmed in writing. The amount of time the railroad has to confirm the notice in writing would depend on whether or not a collective bargaining agreement is applicable. In the absence of such an agreement, a railroad would have 96 hours to provide this important information. Interested parties should note that if a notice of suspension is amended after a hearing is convened and/or does not contain citations to all railroad rules and practices that may apply to a potentially revocable event, the Operating Crew Review Board, if asked to review the revocation decision, might subsequently find that that constituted procedural error pursuant to § 242.505.

Paragraphs (b)(3)–(b)(7) and paragraphs (c), (d), (e), and (f) of this section provide the proposed requirements and procedures for conducting or waiving a railroad hearing regarding the alleged revocable event. Except for paragraph (b)(4), discussed below, those proposed requirements mirror the hearing requirements in part 240.

Although the requirements in paragraph (c) regarding the written decision issued in a railroad hearing track the requirements in part 240, FRA is considering modifying those requirements to ensure that clearer and more detailed decisions are issued. Clearer and more detailed decisions would allow a conductor to understand exactly why his or her certification was revoked and would allow the Operating Crew Review Board to have a more detailed understanding of the case if it is asked to review the revocation decision pursuant to subpart E of this proposed rule. Specifically, FRA is considering requiring the decision to: (1) State whether the railroad official found that a revocable event occurred and the applicable period of revocation with a citation to 49 CFR 242.405 (Periods of revocation); (2) contain an explanation of the factual findings and citations to all applicable railroad rules and practices; (3) not cite a railroad rule or practice that was not cited in the written notice of suspension; and (4) be served on the employee and the employee's representative, if any, with the railroad to retain proof of that service. FRA welcomes comments on those proposals.

Pursuant to paragraph (b)(4) of this section, no later than the convening of a hearing, the railroad convening the hearing would have to provide the person with a copy of the written information and list of witnesses the railroad would present at the hearing. If requested, a recess to the start of the hearing would be granted if the copy of the written information list of witnesses is not provided until just prior to the

[15] Following the Working Group meetings, FRA changed the word "revocation" in the beginning of paragraph (c) to the word "ineligibility" to accurately reflect the scope of that paragraph.

[16] If, as in the example, the revocation calculation results in any fraction of a day (*e.g.,* 7.5 days), then round the number up. Thus, the conductor in the example would be eligible for reinstatement in 8 days.

convening of the hearing. If the information that led to the suspension of a conductor's certificate pursuant to § 242.407(b)(1) was provided through statements of an employee of the convening railroad, the railroad would have to make that employee available for examination during the hearing. Examination may be telephonic where it is impractical to provide the witness at the hearing.

The provisions in paragraph (b)(4) of this section were added to address the concerns of some members of the Working Group that engineers were not being provided with information and/or witnesses necessary to defend themselves at the hearing under part 240. Interested parties should note that even if a railroad conducts a hearing pursuant to the procedures in an applicable collective bargaining agreement pursuant to paragraph (d) of this section, the railroad would still have to comply with the provisions of paragraph (b)(4). It is FRA's understanding that, except for an employee of the convening railroad whose statements led to a suspension under § 242.407(b)(1), a railroad would not, in fact, be required to call to testify every witness that it includes on the list provided pursuant to paragraph (b)(4). If, for example, a railroad believes that it has provided sufficient evidence during a hearing to prove its case and that calling a witness on its list to testify would be unduly repetitive, then the railroad would not be obligated to call that witness. Of course, the opposing party could request that the witness be produced to testify but the hearing officer would have the authority pursuant to § 242.407(c)(6) to determine whether the witness' testimony would be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding. FRA welcomes comments on its understanding of paragraph (b)(4).

Paragraph (g) would require a railroad to revoke an employee's conductor certification if it discovers that another railroad has revoked that person's conductor certification. The hearing requirement in this proposed rule is satisfied when any single railroad holds a revocation hearing.

Paragraph (h) would credit the period of certificate suspension prior to the commencement of a hearing required under this section towards satisfying any applicable revocation period imposed in accordance with the provisions of proposed § 242.405.

Paragraph (i) proposes two specific defenses for railroad supervisors and hearing officers to consider when deciding whether to suspend or revoke a person's certificate due to an alleged revocable event. Pursuant to paragraph (i), either defense would have to be proven by sufficient evidence.

Paragraph (i)(1) of this section proposes that a person's certificate would not be revoked when there is sufficient evidence of an intervening cause that prevented or materially impaired the person's ability to comply. For example, a railroad should consider assertions that a conductor in the operating cab failed to take appropriate action to prevent the engineer from failing to control the locomotive in accordance with a signal indication that requires a complete stop before passing it because of defective equipment. Similar to the defense of defective equipment, the actions of other people could sometimes be an intervening cause. For instance, a dispatcher or a train crew member could relay incorrect information to the conductor who reasonably relied on it in making a prohibited train movement.

Conductors and railroad managers need to note that not all equipment failures or errors caused by others would serve to absolve the person from certification action under this proposed rule. The factual issues of each circumstance would have to be analyzed on a case-by-case basis. For example, a broken speedometer would not be an intervening factor in a violation of § 242.403(e)(3) (failure to perform certain required brake tests).

Paragraph (i)(2) of this section proposes to provide a railroad with the discretion necessary to decide not to revoke a conductor's certification for an event that violates § 242.403(e)(1) through (e)(11) under certain limited circumstances. However, that subparagraph does not permit a railroad to use its discretion to dismiss violations indiscriminately. That is, FRA would only permit railroads to excuse violations when two criteria are met. First, the violation would have to be of a minimal nature; for example, on high speed track at the bottom of a steep grade, the engineer makes clear to the conductor, who is in the cab, that the engineer knows the correct speed limit without the conductor saying anything about speed, but the front of the lead unit in a four unit consist hauling 100 cars enters a speed restriction at 10 miles per hour over speed while the third unit and the balance of the train enters the speed restriction at the proper speed, and maintains that speed for the remainder of the train. If more of the locomotive or train consist enters the speed restriction in violation, a railroad that is willing to consider mitigating circumstances would need to consider whether the violation was truly of a minimal nature.

In contrast, a violation could not be considered of a minimal nature if a conductor fundamentally violated the operating rules. For example, if a conductor failed to perform or have knowledge that a required brake test was performed, even if the train was only traveling a short distance, then the event could not be considered of a minimal nature. In situations where the proposed rule had been fundamentally violated, a railroad would not have the discretion to excuse the violation.

Second, for paragraph (i)(2) to apply, sufficient evidence would have to be presented to prove that the violation did not have either a direct or potential effect on rail safety. That defense would certainly not apply to a violation that actually caused a collision or injury because that would be a direct effect on rail safety. It would also not apply to a violation that, given the factual circumstances surrounding the violation, could have resulted in a collision or injury because that would be a potential effect on rail safety. For instance, an example used to illustrate the term "minimal nature" described a situation involving a train that had the first two locomotives enter a speed restriction too fast, yet the balance of the train was in compliance with the speed restriction; since the train in that example would not be endangering other trains because it had the authority to travel on that track at a particular speed, there would be no direct or potential effect on rail safety caused by that violation.

In contrast, if a train failed to stop short of a banner, which was acting as a signal requiring a complete stop before passing it, during a locomotive engineer efficiency test, that striking of a banner might have no direct effect on rail safety but it has a potential effect since a banner would be simulating a railroad car or another train. Meanwhile, there would be a difference between passing a banner versus making an incidental touching of the banner. If a locomotive or train barely touched a banner so that the locomotive or train did not run over the banner, break the banner, or cause the banner to fall down, that incidental touching could be considered a minimal nature violation that did not have any direct or potential effect on rail safety. This is because such an incidental touching is not likely to cause damage to equipment or injuries to crew members even if the banner were another train. Although it is arguable that if the banner were a person the touching could be fatal, FRA is willing

to allow railroads the discretion to consider this type of scenario in the context of excusing a violation pursuant to paragraph (i)(2); of course, if the banner was in fact a person in the manner described in the example, the railroad would not have the discretion to apply paragraph (i)(2).

Similarly, if a train has received oral and written authority to occupy a segment of main track, the oral authority refers to the correct train number but refers to the wrong locomotive because someone transposed the numbers, the conductor's violation in not catching this error before entering the track without proper authority could be considered of a minimal nature with no direct or potential effect on rail safety. Since the railroad would be aware of the whereabouts of this train, the additional risk to safety of this paperwork mistake may practically be zero. Under the same scenario, where there are no other trains or equipment operating within the designated limits, there may be no potential effect on rail safety as well as no direct effect.

Paragraph (j) of this section proposes to require railroads to keep records of those violations in which they must not or elect not to revoke a conductor's certificate pursuant to paragraph (i) of this section. Paragraph (j)(1) would require railroads to keep records even when they decide not to suspend a conductor's certificate due to a determination pursuant to paragraph (i). Paragraph (j)(2) would require railroads to keep records even when they make their determination prior to the convening of the hearing held pursuant to § 242.407.

Paragraph (k) addresses concerns that problems could arise if FRA disagrees with a railroad's decision not to suspend a conductor's certificate for an alleged misconduct event pursuant to § 242.403(e). As long as a railroad makes a good faith determination after a reasonable inquiry, the railroad should have a defense to civil enforcement for making what the agency believes to be an incorrect determination. However, railroads should note that if they do not conduct a reasonable inquiry or act in good faith, they would be subject to civil penalty enforcement under this proposed rule. In addition, even if a railroad does not take what FRA considers appropriate revocation action, FRA could still take enforcement action against a person responsible for the non-compliance by assessing a civil penalty pursuant to § 242.403 of this proposed rule or issuing an order prohibiting an individual from performing safety-sensitive functions in the rail industry for a specified period pursuant to 49 CFR part 209, subpart D.

*Subpart F—Dispute Resolution Procedures*

This subpart details the opportunities and procedures for a person to appeal a decision by a railroad to deny certification or recertification or to revoke a conductor's certification. As stated in the RSAC Task Statement, one of the issues requiring specific report from the Working Group was "[s]tarting with the locomotive engineer certification model, what opportunities are available for simplifying appeals from decertification decisions of the railroads?" Since its first meeting in July of 2009, the Working Group devoted a considerable amount of time to researching, discussing and proposing ideas to simplify the appeals process. While the appeals process proposed in this subpart, which received unanimous consent by the Working Group and was recommended by the full RSAC, essentially follows the appeals process in part 240, some important modifications are proposed. Those proposed modifications are discussed below.

Section 242.501 Review Board Established

This section, derived from 49 CFR 240.401, provides that a person who has been denied certification or recertification or has had his or her conductor certification revoked could petition FRA to review the railroad's decision. Pursuant to this section, FRA proposes to delegate initial responsibility for adjudicating such disputes to an Operating Crew Review Board (OCRB). Although creation of the OCRB would require issuance of an internal FRA order, FRA expects that the OCRB would mirror the make-up of the Locomotive Engineer Review Board (LERB), which is currently used by FRA to adjudicate disputes under part 240.[17] As mentioned above, FRA expects that, if and when conforming changes are made to part 240, all references to the LERB in part 240 would be changed to the OCRB and the OCRB would handle both conductor and locomotive engineer disputes.

Section 242.503 Petition Requirements

This section, derived from 49 CFR 240.403, provides the proposed requirements for obtaining FRA review of a railroad's decision to deny certification, deny recertification, or revoke certification. Those requirements contained in paragraphs (a)–(c) include the need to seek review in a timely fashion once the adverse decision is rendered by the railroad. Interested parties should note that the "petitioner" referred to in paragraph (b) of this section is the person who had his or her certificate revoked, not an employee representative who may respond on the petitioner's behalf. If the petitioner is represented by someone, the petitioner is encouraged to also provide the representative's name, mailing address, daytime telephone number, and e-mail address (if available) in the petition.

As currently proposed, paragraph (b)(5) of this section would require a petitioner to supplement his or her petition with "a copy of all written documents in the petitioner's possession or reasonably available to the petitioner that document" the railroad's decision. In an effort to clarify that requirement with respect to petitions seeking review of a railroad decision which is based on a failure to comply with any drug or alcohol related rules or a return-to-service agreement, FRA is considering adding a provision to paragraph (b) of this section which would provide that: "If the petitioner is requesting review of a railroad decision which is based on a failure to comply with any drug or alcohol related rules or a return-to-service agreement, then the petitioner shall supplement his or her petition with all relevant written documents, including the information under 49 CFR 40.329 that laboratories, medical review officers, and other service agents are required to release to employees. The petitioner should provide written explanation in the petition if written documents that should be reasonably available to the petitioner are not supplied." FRA welcomes comments on that proposed provision.

Paragraph (c) of this section proposes to give the OCRB discretion to grant a request for additional time that is made prior to the expiration of the period originally prescribed. As the OCRB could exercise its discretion under this proposed rule only for "cause shown," a party would have to demonstrate some justification for the Board to grant an extension of time. Similarly, if the deadline in paragraph (c) is completely missed, the movant, under paragraph (c)(2), would have to allege facts constituting "excusable neglect" and the mere assertion of excusable neglect, unsupported by facts, would be insufficient. Excusable neglect would require a demonstration of good faith on

[17] In a modification to the regulatory text considered by the Working Group and the full RSAC, FRA has removed a reference to a minimum number of OCRB members in paragraph (c) of this section. The number of board members will be provided by FRA order.

the part of the party seeking an extension of time and some reasonable basis for noncompliance within the time specified in the rules. Absent a showing along these lines, relief would be denied.

Paragraph (d) of this section explains that a decision by the OCRB to deny a petition for untimeliness or lack of compliance with the requirements of § 242.503 could be appealed directly to the Administrator. Ordinarily, an appeal to the Administrator could occur only after a case has been heard by FRA's hearing officer.

One difference between this proposed section and § 240.403 is the time by which a petition seeking review of a railroad's decision would have to be filed. Part 240 contains different times depending on whether a person is seeking review of a revocation decision (120 days) or a denial decision (180 days). This proposed section, however, provides that a petition seeking review of a revocation or denial decision would have to be filed with FRA within 120 days of the date the decision was served on the petitioner. Another difference between this proposed section and § 240.403 is that, under this section, the OCRB's discretion to consider untimely filed petitions would now be extended to petitions seeking review of a railroad's decision to deny certification or recertification.

Section 242.505 Processing Certification Review Petitions

This proposed section, derived from 49 CFR 240.405, details how petitions for review would be handled by FRA. Upon receipt of the petition, FRA proposes to provide the person written acknowledgement of the filing and provide a copy of the filing to the railroad. The railroad would then have 60 days from its date of receipt to respond, if it desires to comment on the matter. If the railroad commented on the matter, any material would have to be submitted in writing and a copy served on the petitioner and petitioner's representative, if any.[18]

Based on the written record, FRA staff would analyze the railroad decision and make a recommendation to the OCRB. The OCRB would determine whether the denial or revocation of certification was improper under the regulation. As indicated in paragraph (a), it would be FRA's goal to issue OCRB decisions within 180 days from the date FRA has received all the information from the parties. FRA's ability to achieve that goal would depend on the number of petitions filed and agency resources available to handle those petitions in any given period. Further, that goal will depend on whether FRA receives all available evidence. If the petition and/or railroad's response do not contain all available evidence, including but not limited to, the complete hearing transcript with exhibits and color copies of all photographic evidence (if available), then it is FRA's intention that the OCRB will render a decision within 180 days from the date that all available evidence is received.

While the handling of petitions by FRA would be the same under § 240.405 and this proposed section, this section, unlike § 240.405, includes, in paragraphs (f)–(j), the proposed process and standards of review that the OCRB would utilize when considering a petition. Those standards are the same standards used by the LERB to review locomotive engineer petitions.[19] The standards were added to this proposed rule to address a concern of some members of the Working Group that railroads and petitioners would not know what standard of review the OCRB would use in considering petitions.

Like the LERB, the OCRB would only determine whether a railroad's decision was based on an incorrect determination. If a railroad conducted hearing was so unfair that it caused a petitioner substantial harm, the OCRB could grant the petition; however, the OCRB's review would not be intended to correct all procedural wrongs committed by the railroad. Also like the LERB, the decision-making power of the OCRB would be limited to approving the railroad decision, overturning the railroad decision, or returning the case to the railroad for additional fact finding. The OCRB would not be empowered to mitigate the consequences of a railroad decision, if that decision was valid under this proposed regulation. The OCRB would only be empowered to make determinations concerning qualifications under this regulation. The contractual consequences, if any, of those determinations would have to be resolved under dispute resolution mechanisms that do not directly involve FRA. For example, FRA could not order a railroad to alter its seniority rosters or make an award of back pay to accommodate a finding that a railroad wrongfully denied certification.

Interested parties should note that promulgation of this proposed rule, as currently written, would necessarily require the OCRB and LERB to determine whether a railroad revoked the correct certificate of a person who holds both an engineer and conductor certification. For example, in a case in which a railroad found that a person who holds both a conductor and engineer certification violated a railroad rule involving a failure to comply with the provisions of 49 CFR 218.99 (*i.e.,* a part 218, subpart F violation) but revoked that person's engineer certification, the OCRB, if petitioned, would have to find that the revocation decision was improper because, currently, an engineer cannot have his or her part 240 certification revoked for violations of part 218, subpart F.

Paragraph (l) of this section would require the OCRB's written decision to be served on the petitioner, including the petitioner's representative, if any, and the railroad. That paragraph has been modified from the paragraph considered by the Working Group and the full RSAC to require that the decision be served on the parties, not just provided to them. Moreover, the modified paragraph does not contain a requirement that every decision include findings of fact which may not be appropriate or relevant to some decisions.

Section 242.507 Request for a Hearing

This section, which parallels 49 CFR 240.407, provides that a party who has been adversely affected by an OCRB decision would have the opportunity to request an administrative proceeding as prescribed in proposed § 242.509. In addition, this section details the proposed requirements for requesting such a proceeding.

Paragraph (c) of this section provides that a party who fails to request an administrative hearing in a timely fashion would lose the right to further administrative review since the OCRB's decision would constitute final agency action.

As noted in paragraph (e) of this section, FRA would not schedule hearings or set an agenda for the proceeding. FRA would merely arrange for the appointment of a presiding officer and it would be the presiding officer's duty to schedule a hearing for the earliest practicable date.

[18] The proposed rule considered by the Working Group and full RSAC would have required the railroad to "provide" a copy of the information to the petitioner. To clarify the obligation of the railroad, FRA has changed the word "provide" to "serve" and added that petitioner's representative, if any, also be served.

[19] FRA has made some modifications to paragraphs (f)–(j) from the draft recommended by the Working Group and full RSAC. The modifications are necessary to clarify the authority of the OCRB and the standards of review the OCRB would utilize.

Section 242.509 Hearings

This section, which parallels 49 CFR 240.409, describes the proposed authority of the presiding officer to conduct an administrative hearing and the procedures by which the administrative hearing would be governed. Like § 240.409, the proceeding provided by this section would afford an aggrieved party a *de novo* hearing at which the relevant facts would be adduced and the correct application of this proposed part would be applied.

In instances when the issues are purely legal, or when only limited factual matters are necessary to determine issues, paragraph (c) of this section proposes that the presiding officer could determine the issues following an evidentiary hearing only on the disputed factual issues, if any. The presiding officer could therefore grant full or partial summary judgment.

Paragraph (d) of this section proposes that the presiding officer may authorize discovery. It also proposes to authorize the presiding officer to sanction willful noncompliance with permissible discovery requests. Paragraph (e) would require that documents in the nature of pleadings be signed. This signature would constitute a certification of factual and legal good faith. Paragraph (f) proposes a requirement for service and for certificates of service. The presiding officer's authority to address noncompliance with a law or directive is expressed in paragraph (g). This provision is intended to ensure that the presiding officer would have the authority to control the proceeding so that an efficient and fair hearing would result.

Paragraph (h) states the right of each party to appear and be represented. Paragraph (i) would protect witnesses by ensuring their right of representation and their right to have their representative question them. Paragraph (j) would allow any party to request consolidation or separation of hearings of two or more petitions when to do so would be appropriate under established jurisprudential standards. This option is intended to allow more efficient determination of petitions in cases where a joint hearing would be advantageous.

Under paragraph (k), the presiding officer could, with certain exceptions, extend periods for action required in the proceedings, provided substantial prejudice would not result to a party. The proposed authority to deny a request for extension submitted after the expiration of the period involved shows the preference for use of this authority as a tool to alleviate unforeseen or unnecessary burdens, and not as a remedy for inexcusable neglect.

Paragraph (l) would establish a motion as the appropriate method for requesting action by the presiding officer. That paragraph would also provide the form of motions and the response period for written motions.

Paragraph (m) would provide rules for the mode of hearing and record maintenance, including requirements for sworn testimony, verbatim record (including oral testimony and argument), and inclusion of evidence or substitutes therefor in the record. Paragraph (n) would direct the presiding officer to employ specific rules of evidence as guidelines for the introduction of evidence and permits the presiding officer to determine what evidence may be received. Further, paragraph (o) proposes additional powers the presiding officer may exercise during the proceedings.

Paragraph (p) would provide that the petitioner before the OCRB, the railroad that took the certification action at issue, and the FRA are mandatory parties to the administrative proceeding. Paragraph (q) would require the party requesting the hearing to carry the burden of proof. The actions of the conductor and the railroad would be at issue in the hearing—not the actions of the OCRB. Thus, it is appropriate that the conductor and the railroad fill the roles of petitioner and respondent for the hearing. In addition, the burden each party would have if they were the hearing petitioner is articulated in paragraph (q).

Paragraph (r) would provide that FRA would be a mandatory party in the proceeding. In all proceedings, FRA would initially be considered a respondent. If, based on evidence acquired after the filing of a petition for hearing, FRA were to conclude that the public interest in safety was more closely aligned with the position of the petitioner than the respondent, FRA could request that the hearing officer exercise his or her inherent authority to realign parties for good cause shown. However, FRA anticipates that such a situation would occur rarely, if ever. Since FRA could realign itself, FRA wants to caution future parties that FRA represents the interests of the government; hence, parties and their representatives would have to be careful to avoid ethical dilemmas that might arise due to FRA's ability to realign itself.

Paragraphs (s)–(u) would provide the providing officer with authority to close the record and issue a decision.

Section 242.511 Appeals

This section, derived from 49 CFR 240.411, proposes to permit any party aggrieved by the presiding officer's decision to file an appeal with the FRA Administrator. Paragraph (a) proposes that if no appeal is timely filed, the presiding officer's decision would constitute final agency action.

Paragraphs (b)–(f) would allow for a reply to the appeal and described the Administrator's authority to conduct the proceedings. Interested parties should note that the phrase "except where the terms of the Administrator's decision (for example, remanding a case to the presiding officer) show that the parties' administrative remedies have not been exhausted" in paragraph (e) of this section is included in this proposed rule so that parties would understand that a remand, or other intermediate decision, would not constitute final agency action. The inclusion of this phrase is made in deference to those parties that are not represented by an attorney or who might otherwise be confused as to whether any action taken by the Administrator should be considered final agency action.

Appendices

FRA proposes to include at least four appendices to this rule. In the final rule, Appendix A will contain a penalty schedule similar to that FRA has issued for all of its existing rules. Because such penalty schedules are statements of policy, notice and comment are not required prior to their issuance. *See* 5 U.S.C. 553(b)(3)(A). Nevertheless interested parties are welcome to submit their views on what penalties may be appropriate.

Proposed Appendix B provides both the organizational requirements and a narrative description of the submission required under §§ 242.101 and 242.103. FRA is not proposing to require that railroad submissions be made on a Federally mandated form. Instead, FRA is prescribing only minimal constraints on the organization and manner of presenting information. FRA would require that the submission be divided into six sections. FRA would require that each section deal with a different subject matter and that the railroad identify the appropriate person to be contacted in the event FRA needs to discuss some aspect of the railroad's program. While proposed Appendix B is derived from Appendix B to part 240, one major difference is that proposed Appendix B proposes to require that, pursuant to § 242.103, a railroad must serve a copy of its submission on the president of each labor organization that

represents the railroad's employees subject to part 242.

Interested parties should note that FRA is considering the possibility of requiring each railroad to provide its submission electronically. Such a requirement would likely allow FRA to review submissions more efficiently and eliminate the need to store hardcopies of the numerous submissions. FRA welcomes comments on this consideration.

Proposed Appendix C, derived from Appendix C to part 240, provides a narrative discussion of the procedures that a person seeking certification or recertification would have to follow to furnish a railroad with information concerning his or her motor vehicle driving record.

Proposed Appendix D, derived from Appendix F to part 240, provides a narrative discussion of the procedures that a railroad would be required to employ in administering the vision and hearing requirements of § 242.117. The main issue addressed in this proposed Appendix is the acceptable test methods for determining whether a person has the ability to recognize and distinguish among the colors used as signals in the railroad industry.

Subsequent to the July–December Working Group meetings, FRA was notified that an additional color vision test (Richmond—HRR (4th edition)) could be added to the list of acceptable tests contained in Appendix F to part 240 and that some of the listed tests are no longer in print. While updating the list would appear to fall within the purview of the medical standards working group, FRA would welcome comments on which vision color tests should be included both in Appendix F to part 240 and in Appendix C to this proposed rule.

Proposed Appendix E provides a table describing the application of revocable events. The table lists: The revocation periods; whether a person would be eligible for a reduction of the revocation period; and whether a person who is certified as both a conductor and an engineer could work in either position following a certification revocation.

## V. Regulatory Impact and Notices

### *1. Executive Order 12866 and DOT Regulatory Policies and Procedures*

This proposed rule has been evaluated in accordance with existing policies and procedures, and determined to be non-significant under both Executive Order 12866 and DOT policies and procedures. *See* 44 FR 11034 (February 26, 1979). FRA has prepared and placed in Docket No. FRA–2009–0035 a regulatory evaluation addressing the economic impact of this proposed rule. Document inspection and copying facilities are available at the DOT Central Docket Management Facility located in Room W12–140 on the Ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590. Docket material is also available for inspection electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at the Office of Chief Counsel, RCC–10, Mail Stop 10, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590; please refer to Docket No. FRA–2009–0035.

As part of the regulatory impact analysis, FRA has assessed quantitative measurements of the cost streams expected to result from the adoption of this proposed rule. For the twenty-year period analyzed, the estimated quantified cost that would be imposed on industry totals $83.5 million with a present value (PV, 7%) of $42.2 million. In addition, FRA would incur administrative costs totaling about $15.2 million, with a PV of $7.6 million. Although there are numerous costs or burdens in this proposed rule, the requirements that are expected to impose the largest burdens relate to the initial and periodic training, knowledge testing, and operational testing. In addition, the dispute resolution process associated with the denial and revocation of conductor certification would be a new requirement that would impose burdens on the railroad industry and FRA.

As part of the regulatory impact analysis, FRA has explained what the likely benefits for this proposed rule would be, and provided numerical assessments of the potential value of such benefits. The proposed rulemaking is expected to improve railroad safety by ensuring that all trains have certified and trained conductors. Thus, in general, the proposed rule should decrease train accidents and incidents and associated casualties and damages. FRA also anticipates that this proposed regulation will decrease switching operation casualties and human factor-caused train crew injuries. FRA believes the value of the anticipated safety benefits will meet or exceed the cost of implementing the proposed rule.

The table below presents the cost associated with implementation of the proposed rule.

| Costs for Proposed Rule | |
|---|---|
| [Note dollars are discounted (7 %)] | |
| **Subpart B: Program and Eligibility Requirements** | |
| Development of Programs | $884,676 |
| Prior Conduct of Employee | $2,571,461 |
| Vision and Hearing Acuity | $495,929 |
| Training | $13,849,944 |
| Knowledge Testing | $3,755,303 |
| Operational Tests | $3,911,774 |
| Miscellaneous Subpart B costs | $370,025 |
| **Subpart C: Administration of the Certificate Program** | |
| Certificates | $1,010,397 |
| Sections 242.203 - 242.213 | $2,135,625 |
| Railroad Oversight Responsibilities | $699,711 |
| **Subpart D: Territorial Qualifications & Joint Operations** | |
| Section 242.301 | $8,345,170 |
| **Subpart E: Denial and Revocation of Certification** | |
| Sections 242.401 & 242.407 | $1,971,943 |
| **Subpart F: Dispute Resolution Procedures** | |
| Petitions to FRA Review Board | $1,813,783 |
| Requests for Administrative Hearings | $321,000 |
| Appeals to FRA Administrator | $48,000 |
| **Total Non-Government Cost** | **$42,184,739** |
| | |
| **Government Costs: Subpart F** | |
| Sections 242.501-511 | $7,572,000 |

*2. Regulatory Flexibility Act and Executive Order 13272; Initial Regulatory Flexibility Assessment*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and Executive Order 13272 require a review of proposed and final rules to assess their impacts on small entities. An agency must prepare an initial regulatory flexibility analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant impact on a substantial number of small entities. FRA has not determined whether this proposed rule would have a significant economic impact on a substantial number of small entities. Therefore, FRA is publishing this IRFA to aid the public in commenting on the potential small business impacts of the requirements in this NPRM. FRA invites all interested parties to submit data and information regarding the potential economic impact that would result from adoption of the proposals in this NPRM. FRA will consider all comments received in the public comment process when making a determination.

Based on information currently available, FRA estimates that about 8 percent of the total railroad cost associated with implementing the proposed rule would be borne by small entities. Based on very conservative assumptions, FRA estimates that the cost for this proposed regulation could be as high as $83.5 million for the railroad industry. In addition, also based on conservative assumptions, FRA would incur costs that could total as much as $15.2 million. FRA also estimates that small railroads comprise over 90 percent of the number of entities impacted directly by this proposed regulation. Small railroads generally have fewer conductors and operate over smaller territories allowing them to meet the proposed requirements at lower overall cost as well as lower cost per conductor. Thus, although a substantial number of small entities would likely be impacted, the economic impact on them would likely not be significant. This IRFA is not intended to be a stand-alone document. In order to get a better understanding of the total costs for the railroad industry, which forms the base for the estimates in this IRFA, or more cost detail on any specific requirement, please see the Regulatory Impact Analysis (RIA) that FRA has placed in the docket for this rulemaking.

In accordance with the Regulatory Flexibility Act, an IRFA must contain:

(1) A description of the reasons why action by the agency is being considered;

(2) A succinct statement of the objectives of, and the legal basis for, the proposed rule;

(3) A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply;

(4) A description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(5) An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule; and

(6) A description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. 5 U.S.C. 603(b), (c).

1. Reasons for Considering Agency Action

The purpose of this rulemaking is to enhance the safety of railroad operations by ensuring that only those persons who meet minimum Federal safety standards serve as conductors, to reduce the rate and number of accidents and incidents, and to improve railroad safety.

2. A Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

FRA's proposed regulation for conductor certification is intended, *inter alia,* to ensure that only those persons who meet minimum Federal safety standards serve as train conductors, and it accomplishes this by establishing Federal requirements for railroads to have conductor certification programs. These programs must meet or exceed FRA's minimum standards for the eligibility, training, testing, certification, and monitoring of persons who serve as conductors. Included in the eligibility determination for new or recertifying conductors are vision and hearing acuity tests. In addition, a railroad must consider prior conduct as a motor vehicle operator; substance abuse, alcohol, and drug rules compliance; and prior safety conduct at a different railroad, if applicable. FRA's proposed regulation would also prescribe minimum standards for the revocation of certification and the dispute resolution procedures for appealing certification denial or revocation.

As discussed in Section IV of the Supplementary Information portion to the preamble, the proposed rule would require railroads to have a formal program for certifying conductors. FRA is proposing this regulation to ensure that only those persons who meet minimum Federal safety standards serve as conductors, to reduce the rate and number of accidents and incidents, and to improve railroad safety. FRA is also issuing this proposed rule to promulgate minimum training and certification standards for train conductors as mandated by RSIA Section 402, Public Law 110–432 (October 16, 2008) (codified at 9 U.S.C. 20157).

3. A Description of, and Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Would Apply

The "universe" of the entities to be considered generally includes only those small entities that are reasonably expected to be directly regulated by this action. For this proposed rulemaking there is one type of small entity that is potentially affected by this rulemaking: Small railroads.

FRA estimates that approximately 5 contractors will be developing conductor certification programs and contracting conductors to railroads. The cost associated with certifying conductors is a cost that these contractors will pass on to the railroads contracting their services.

"Small entity" is defined in 5 U.S.C. 601 as having the same meaning as "small business concern" under Section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not dominant in its field of operation. Section 601(4) includes nonprofit enterprises that are independently owned and operated, and are not dominant in their field of operations within the definition of "small entities." Additionally, 5 U.S.C. 601(5) defines "small entities" as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

The U.S. Small Business Administration (SBA) stipulates "size standards" for small entities. It provides that the largest a for-profit railroad business firm may be (and still classify as a "small entity") is 1,500 employees for "line-haul operating" railroads, and 500 employees for "shortline operating" railroads.[20]

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Pursuant to the authority provided to it by SBA, FRA has published a final policy, which formally establishes small entities as railroads that meet the line haulage revenue requirements of a Class III railroad.[21] Currently, the revenue requirements are $20 million or less in annual operating revenue, adjusted annually for inflation. The $20 million limit (adjusted annually for inflation) is based on the Surface Transportation Board's threshold of a Class III railroad carrier, which is adjusted by applying the railroad revenue deflator adjustment.[22] The same dollar limit on revenues is established to determine whether a railroad shipper or contractor is a small entity. Governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000 are also considered small entities under FRA's policy. FRA is proposing to use this definition for this rulemaking. Any comments received pertinent to its use will be addressed in the final rule.

*Small Railroads:*

There are approximately 682 railroads meeting the definition of "small entity" as described above. FRA estimates that approximately 627 of these small entities would be impacted by this proposed rule. FRA estimates that approximately 55 of the 682 small railroads would not be impacted because they would be exempt from the proposed rule. Note, however, that approximately 125 of the small railroads that would be impacted are subsidiaries of large shortline holding companies with the expertise and resources comparable to larger railroads. Many small railroads that would be impacted by this rulemaking are members of the American Shortline and Regional Railroad Association (ASLRRA), which actively participated in the development of this regulatory proposal. It is very likely that the ASLRRA will develop a generic conductor certification program for their members to use. FRA would assist with this effort.

Small railroads would be required to have written programs for certifying conductors in accordance with the proposed regulation. Given the nature of how most small railroads operate and the fact that they operate fewer types and numbers of trains than larger railroads this proposed regulation should be less burdensome. Thus, given the more limited territory, equipment types, number of conductors and/or the commodities transported by small railroads relative to Class II and Class I railroads, implementing and maintaining a program for the certification of conductors would be significantly less burdensome for small railroads both overall and on a per conductor basis. While FRA does

[20] "Table of Size Standards," U.S. Small Business Administration, January 31, 1996, Title 13 CFR Part 121. *See also* NAICS Codes 482111 and 482112.

[21] *See* 68 FR 24891 (May 9, 2003).

[22] For further information on the calculation of the specific dollar limit, *please see* 49 CFR part 1201.

recognize that some small railroads do not currently have formal conductor training and certification programs, FRA believes that most small railroads currently have informal programs with the necessary elements of a formal program. FRA requests information regarding the number and type of Class III railroads that do not have formal conductor training and certification programs as well as the number of conductors employed by such railroads.

In general, the proposed rule would likely burden all small railroads that are not exempt from its scope or application. However, it would not significantly burden many, if any, of these entities. More details on the cost burdens for small railroads are provided below. FRA invites commenters to submit information that might assist us in assessing the cost impacts on small railroads of the proposals during the comment process of the NPRM.

4. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

The impact of this rulemaking would come from its numerous proposed requirements. However, many of the estimated burdens are for small paperwork burdens or for processes and procedures that would not impact small railroads and their conductors as frequently or significantly as Class I and II railroads and the conductors they employ. As discussed above, in general the burdens on small railroads should be lower per train mile than those on Class I and II railroads both for overall programs and per conductor.

Small railroads employ less than 10 percent of the employees in the railroad industry. In fact the percentage of employees is probably closer to 7 or 8 percent. Thus, since most of the requirements in this proposed regulation are assessed per conductor, the burden for each railroad would be driven mainly by the number of conductors it employs. In general, small railroads have fewer conductors and would not train or certify as many conductors as the large railroads. Small railroads would also not need to certify any conductors for remote control locomotives (RCL) purposes, since they do not use RCLs. In addition, the size of the territory and level of joint operations is likely to be less for smaller railroads making the burden per conductor lower.

This proposed regulation has many requirements which are organized by subparts. There are numerous burdens from this proposed regulation that are noted in the RIA for railroads. This IRFA will discuss a majority of these burdens and their pertinence to small railroads below.

FRA's RIA estimates the total burden for this proposed rule to be $83.5 million (non-discounted) for the first 20 years of the rule. As detailed in the assessments below, FRA estimates that $6.7 million of this burden would be borne by small railroads.

(a) *Subpart A—General:*

The requirements in Subpart A do not impose any direct burdens on small railroads.

(b) *Subpart B—Program and Eligibility Requirements:*

This subpart of the proposed rule contains the basic elements of the proposed conductor certification program that would impose the majority of the new burden for creating and implementing such programs. The ASLRRA has indicated that it plans to develop a generic program and template to facilitate compliance with this federal regulation and FRA would gladly collaborate in this effort. FRA anticipates that almost all of the small railroads in need of a program will take the shortline generic plan and tailor it for their operations. As more fully discussed in the RIA, FRA estimates that these programs can be developed at an average cost of $700 per small railroad.[23] FRA estimates, that in total, small railroads will be burdened with approximately $473,000 to develop conductor certification programs. FRA estimates that it would cost the entire railroad industry about $918,000 to develop programs.

The proposed requirements for a training program and periodic training for recertification, *i.e.,* Section 242.119, are among the most significant costs for the entire railroad industry imposed by this proposal. Railroads generally already have formal or informal training programs and many offer some degree of periodic training. FRA estimates that further developing the training programs and providing the periodic training would cost the railroad industry approximately $28 million (not discounted) over the 20-year analysis in FRA's RIA. Based on experience and discussions at RSAC working group meetings, FRA knows that most small railroads are currently providing training to their conductors and that most of that training is on-the-job training. FRA estimates that more formalized training will have to be added to the training programs for small railroads. FRA estimates that the small railroads will incur almost $2.5 million of this cost, making the per railroad average approximately $4,000.

Proposed Section 242.121 requires railroads provide initial and periodic testing of conductors. That testing would have to effectively examine and measure a conductor's knowledge of five subject areas: Safety and operating rules; timetable instructions; compliance with all applicable Federal regulations; the physical characteristics of the territory on which a person will be or is currently serving as a conductor; and the use of any job aid that a railroad may provide a conductor. FRA's RIA has estimated that this would cost the industry $7.4 million (not discounted) over the 20-year analysis for the entire industry. Since small railroads represent approximately 7 to 8 percent of the employees in the railroad industry, FRA estimates that small railroads will incur approximately $554,000 of this cost.

Proposed Section 242.123 requires railroads to conduct unannounced compliance tests and inspections. The proposed rule would require each railroad to have a program to monitor the conduct of its conductors by performing unannounced operating rules compliance tests. FRA's RIA has estimated that this would cost the industry $7.7 million (not discounted) over the 20-year analysis. Since small railroads represent approximately 7 to 8 percent of the employees in the railroad industry, FRA estimates that small railroads will incur approximately $577,000 of this cost.

Other proposed requirements in this subpart that would impact small railroads include: Prior safety conduct as a motor vehicle operator, Section 242.111; substance abuse disorders and alcohol drug rules compliance, Section 242.115; vision and hearing acuity testing, Section 242.117; and certification determinations made by other railroads, Section 242.125.

The total (non-discounted) cost for this subpart is $50.6 million. FRA estimates the estimated cost for small railroads is about $4.6 million (not discounted) over the first twenty-years.

(c) *Subpart C—Administration of the Certificate Program:*

This subpart of the proposed rule covers the requirements for administering a certification program. Most of the requirements in this subpart are basic requirements necessary for having the certificate program, except the proposed requirements in Section 242.215. That section proposes to

[23] Calculation: (1 small RR) * [(1 exec hours) * ($125) + (2 admin hours) * ($21) + (12 RR staff hours) * ($42.05) + (0.5 Senior RR staff hours) * ($75)] = $709.

require only Class I, Class II and all passenger railroads to conduct an annual review and analysis of their programs. Thus, small railroads will incur no burden from that proposed requirement.

The total (non-discounted) cost for this Subpart C is $7.4 million. However, FRA estimates that less 6 percent of this will be borne by small railroads given that they would not be subject to the annual review and analysis requirements. Thus, the estimated cost for small railroads is about $448,000 (non-discounted) over the first twenty-years.

(d) *Subpart D—Territorial Qualification and Joint Operations:*

This subpart of the proposed rule covers the requirements for territorial qualification and joint operations. FRA estimates that approximately 320 railroads operate over joint territory. FRA further estimates that approximately 2 percent of all of the conductors industry-wide will be qualified for joint territory. However, the primary burden from this subpart is related to the qualification of new conductors. In general, small railroads do not have as high a turnover rate for employees and therefore should not have as many new conductors each year. The total (non-discounted) cost for this subpart is $17.1 million. Since small railroads represent approximately 7 to 8 percent of the employees in the railroad industry, FRA estimates that the cost for small railroads is about $1,281,000 over the first twenty-years.

(e) *Subpart E—Denial and Revocation of Certification:*

This subpart of the proposed rule covers the denial and revocation of conductor certifications. The estimated burdens in this subpart are related to the paperwork involved in the denial of certification, which often occurs when hearing, vision or knowledge tests are failed. The majority of the burdens for this subpart are associated with the process for revocation (Section 242.407). The total (non-discounted) cost for this subpart is $4.1 million. Since small railroads represent approximately 7 to 8 percent of the employees in the railroad industry, FRA estimates the cost for small railroads is about $303,000 (not discounted) over the first twenty-years.

(f) *Subpart F—Dispute Resolution Procedures:*

This subpart of the proposed rule primarily deals with the dispute resolution procedures, and the procedures for a person to appeal a decision by a railroad to deny certification or recertification or to revoke a conductor's certification. The estimated burdens in this subpart are related to appeals to FRA's Review Board, requests for administrative hearings, and appeals to FRA's Administrator. Based on past experience with locomotive engineer appeals, administrative hearings, *etc.,* FRA does not anticipate many of the cases related to this subpart to be from employees of small railroads. The total (non-discounted) cost for this subpart is $19.4 million. However, most of the costs for the requirements in this section are for government resources. FRA estimates that the non-government share of this Subpart's cost is $4.4 million. FRA estimates that less than 2 percent of the non-government cost will be borne by small railroads. Thus, the estimated cost for small railroads is about $88,000 (non-discounted) over the first twenty-years.

5. An Identification, to the Extent Practicable, of All Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

FRA is not aware of any relevant federal rules that may duplicate, overlap, or conflict with the proposed rule. Some of the requirements proposed in this NPRM are identical or very similar to the requirements in 49 CFR Part 240 for the certification of locomotive engineers, however actions taken to comply with requirements in Part 240 that are identical or very similar to those in Part 242 could be used to fulfill the requirements in Part 242, or vice versa, without incurring any additional burden.

6. A Description of Any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

FRA formed an RSAC working group to develop recommendations for conductor certification regulations in December 2008. The RSAC Working Group met for six, multi-day meetings over a period of several months. After a series of detailed discussions, the RSAC Working Group achieved consensus on a draft proposed rule in January 2010. The full RSAC approved and recommended its consensus on March 18, 2010.

In Section 242.3 of the proposed regulation there is an exclusion for operations that occur on track that is not part of the general railroad system, which generally encompasses operations commonly described as tourist, scenic or excursion service to the extent that they occur on track that is not part of the general railroad system. FRA estimates that this would exclude approximately 55 small and very small railroads from the requirements of this proposed regulation.

FRA's proposal would minimize the impact to small railroads by delaying the implementation of the recertification process for the Class III railroads by 12 months. Thus, small railroads will have more time to implement most of the requirements of this proposed regulation than Class I and Class II freight railroads and passenger railroads.

FRA is not aware of any significant alternatives to the proposed rule that would accomplish the stated objectives of RSIA that would minimize the economic impact of the proposed rule on small entities.

The process by which this proposed rule was developed provided outreach to small entities. As noted above in this IRFA, this rule was developed in consultation with industry representatives via RSAC, which includes small railroad representatives. The RSAC Conductor Certification Working Group came to consensus on a majority of this proposed regulation in January 2010 and the Full RSAC approved the draft proposed rule in March 2010. Small railroad representatives participated in all meetings of the Working Group and raised issues of concern to small railroads. If requested, FRA may hold a public hearing. After the comment period for this NPRM closes, FRA expects to reconvene the Working Group to review the comments to the docket. At that meeting FRA expects that comments will be reviewed and considered by the Working Group, including any raised concerning impacts on small entities and this IRFA.

*3. Paperwork Reduction Act*

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the new information collection requirements are duly designated, and the estimated time to fulfill each requirement is as follows:

| CFR Section/Subject | Respondent universe | Total annual responses | Average time per response | Total annual burden hours |
|---|---|---|---|---|
| 242.9—Waivers—Petitions | 677 railroads | 10 petitions | 3 hours | 30 |
| 242.101/103—Certification Program: Written Program for Certifying Conductors. | 677 railroads | 678 programs | 160 hrs./581 hrs./ 15.5 hrs. | 16,799 |
| Approval of Design of Programs | | | | |
| —Certification Programs for New RRs | 6 railroads | 6 new prog | 15.5 hours | 93 |
| —Conductor Certification Submission Copies to Rail Labor Organizations. | 677 railroads | 200 copies | 15 minutes | 50 |
| —Affirmative Statements that Copies of Submissions Sent to RLOs. | 677 railroads | 200 statements | 15 minutes | 50 |
| —Certified Comments on Submissions | 677 railroads | 35 comments | 4 hours | 140 |
| —Certification Programs Disapproved by FRA and then Revised. | 677 railroads | 10 programs | 4 hours | 40 |
| —Revised Certification Programs Still Not Conforming and then Resubmitted. | 677 railroads | 3 programs | 2 hours | 6 |
| —Certification Programs Materially Modified After Initial FRA Approval. | 677 railroads | 50 programs | 2 hours | 100 |
| —Materially Modified Programs Disapproved by FRA & Then Revised. | 677 railroads | 3 programs | 2 hours | 6 |
| —Revised programs Disapproved and Then Resubmitted. | 677 railroads | 1 program | 2 hours | 2 |
| 242.105—Implementation Schedule | | | | |
| —Designation of Certified Conductors (Class I Railroads). | 677 railroads | 48,600 designations | 5 minutes | 4,050 |
| —Issued Certificates (⅓ each year) | 677 railroads | 16,200 certif | 1 hour | 16,200 |
| —Designation of Certified Conductors (Class II and III Railroads). | 677 railroads | 5,400 design | 5 minutes | 450 |
| —Issued Certificates (⅓ each year) | 677 railroads | 1,800 certif | 1 hour | 1,800 |
| —Requests for Delayed Certification | 677 railroads | 5,000 request | 30 minutes | 2,500 |
| —Testing/Evaluation to Certify Persons | 677 railroads | 1,000 tests | 560 hours | 560,000 |
| —Testing/Evaluation to Certify Conductors (Class III). | 627 railroads | 100 tests | 400 hours | 40,000 |
| 242.107—Types of Service | | | | |
| —Reclassification to Diff. Type of Cert. | 677 railroads | 25 conductor Tests/Evaluations. | 8 hours | 200 |
| 242.109—Opportunity by RRs for Certification Candidates to Review and Comment on Prior Safety Record. | 677 Railroads | 50 comments | 1 hour | 50 |
| 242.111—Prior Safety Conduct As Motor Vehicle Operator | | | | |
| —Eligibility Determinations | 677 Railroads | 1,100 dtrmin | 10 minutes | 183 |
| —Initial Certification for 60 Days | 677 Railroads | 75 certific | 10 minutes | 13 |
| —Recertification for 60 Days | 677 Railroads | 125 recertif | 10 minutes | 21 |
| —Driver Info. Not Provided and Request for Waiver by Persons/RR. | 677 Railroads | 25 requests | 2 hours | 50 |
| —Request to Obtain Driver's License Information From Licensing Agency. | 54,000 Conductors/Persons | 18,000 req | 15 minutes | 4,500 |
| —Requests for Additional Information From Licensing Agency. | 54,000 Conductors/Persons | 25 requests | 10 minutes | 4 |
| —Notification to RR by Persons of Never Having a License. | 54,000 Conductors/Persons | 2 notification | 10 minutes | .33 |
| —Report of Motor Vehicle Incidents | 54,000 Conductors | 200 reports | 10 minutes | 33 |
| —Evaluation of Driving Record | 54,000 Conductors | 18,000 eval | 10 minutes | 3,000 |
| —SAP Referral by RR After Report of Driving Drug/Alcohol Incident. | 677 Railroads | 180 referrals | 5 minutes | 15 |
| —SAP Request and Supply by Persons of Prior Counseling or Treatment. | 677 Railroads | 5 requests/Records | 30 minutes | 3 |
| —Conditional Certifications Recommended by SAP. | 677 Railroads | 50 certificat | 4 hours | 200 |
| 242.113—Prior Safety Conduct As Employee of a Different Railroad. | 54,000 conductors | 360 requests/360 records | 15 minutes + 30 minutes. | 270 |
| 242.115—Substance Abuse Disorders and Alcohol Drug Rules Compliance | | | | |
| —Meeting Section's Eligibility Reqmnt | 54,000 conductors | 18,000 determinations | 2 minutes | 600 |
| —Written Documents from SAP Person Not Affected by a Disorder. | 677 railroads | 400 docs | 30 minutes | 200 |
| —Self-Referral by Conductors for Substance Abuse Counseling. | 54,000 conductors | 10 self-referrals | 10 minutes | 2 |
| —Certification Reviews for Occurrence/ Documentation of Prior Alcohol/Drug Conduct by Persons/Conductors. | 677 railroads | 18,000 reviews | 10 minutes | 3,000 |

| CFR Section/Subject | Respondent universe | Total annual responses | Average time per response | Total annual burden hours |
|---|---|---|---|---|
| —Written Determination That Most Recent Incident Has Occurred. | 677 railroads | 150 determin | 60 minutes | 150 |
| —Notification to Person That Recertification Has Been Denied. | 677 railroads | 150 notific | 10 minutes | 25 |
| —Persons/Conductors Waiving Investigation. | 54,000 conductors | 100 waivers | 10 minutes | 17 |
| 242.117— Vision and Hearing Acuity | | | | |
| —Determination Vision Standards Met | 677 railroads | 18,000 deter | 20 minutes | 6,000 |
| —Determination Hearing Stds. Met | 677 railroads | 18,000 deter | 20 minutes | 6,000 |
| —Medical Examiner Certificate That Person Has Been Examined/Passed test. | 677 railroads | 18,000 certif | 2 hours | 36,000 |
| —Document Standards Met with Conditions. | 677 railroads | 50 document | 30 minutes | 25 |
| —Document Standards Not Met | 677 railroads | 25 document | 30 minutes | 13 |
| —Notation Person Needs Corrective Device (Glasses/Hearing Aid). | 677 railroads | 10,000 notes | 10 minutes | 1,667 |
| —Request for Further Medical Evaluation for New Determination. | 677 railroads | 100 requests + 100 Evals | 60 minutes + 2 hours. | 300 |
| —Request for Second Retest and Another Medical Evaluation. | 677 railroads | 25 requests + 25 Evals | 60 minutes + 2 hours. | 75 |
| —Copies of Part 242 Provided to RR Medical Examiners. | 677 railroads | 677 copies | 60 minutes | 677 |
| —Consultations by Medical Examiners with Railroad Officer and Issue of Conditional Certification. | 677 railroads | 100 consults + 100 certif | 2 hours + 10 minutes. | 217 |
| —Notification by Certified Conductor of Deterioration of Vision/Hearing. | 677 railroads | 10 notific | 10 minutes | 2 |
| 242.119—Training | | | | |
| —Completion of Training Program | 677 railroads | 678 Programs | 37 hours/70 hrs/3 hrs. | 3,801 |
| —Completion of Training Program by Conductors/Persons + Documents. | 54,000 Conductors | 18,000 Docs/18,000 Cond | 1 hour/560 hours | 10,098,000 |
| —Training Task Analysis for RRs Training Persons Previously Untrained. | 677 railroads | 677 analyses | 12 hours/20 hrs./20 min. | 829 |
| —Modification of Training Program Due to New Laws/Regulations. | 677 railroads | 30 programs | 4 hours | 120 |
| —Consultation with Supervisory Employee During Written Test. | 677 railroads | 1,000 consult | 15 minutes | 250 |
| —Familiarization Training Upon Transfer of RR Ownership. | 677 railroads | 10 trained Conductors | 8 hours | 80 |
| —Instructional Briefings on Federal RR Safety Laws/Regulations. | 677 railroads | 54,000 briefs | 8 hours | 432,000 |
| —Records of Instructional Briefings | 677 railroads | 54,000 record | 10 minutes | 9,000 |
| —Continuing Education of Conductors | 677 railroads | 18,000 cont. trained cond | 8 hours | 144,000 |
| 242.121—Knowledge Testing | | | | |
| —Determining Eligibility | 677 railroads | 18,000 deter | 30 minutes | 9,000 |
| —Retests/Re-Examinations | 677 railroads | 500 Retests | 8 hours | 4,000 |
| 242.123—Monitoring Operational Performance | | | | |
| —Unannounced Compliance Tests and Records. | 677 railroads | 18,000 tests + 18,000 recd | 2 hours + 10 minutes. | 39,000 |
| —Return to Service That Requires Unannounced Compliance Test/Record. | 677 railroads | 1,000 tests + 1,000 records | 2 hours + 10 minutes. | 2,167 |
| 242.125/127—Certificate Determination by Other Railroads/Other Country | | | | |
| —Determination Made by RR Relying on Another RR's Certification. | 677 railroads | 100 determin | 8.5 hours | 850 |
| —Determination by Another Country | 677 railroads | 200 determin | 1 hour | 200 |
| 242.203—Retaining Information Supporting Determination—Records. | 677 railroads | 18,000 recds | 5 minutes | 1,500 |
| —Amended Electronic Records | 677 railroads | 20 records | 60 minutes | 20 |
| 242.205—List of Certified Conductors Working in Joint Territory. | 677 railroads | 625 lists | 60 minutes | 625 |
| 242.209— Maintenance of Certificates | | | | |
| —Request to Display Certificate | 677 railroads | 2,000 request/displays | 2 minutes | 67 |
| —Notification That Request to Serve Exceeds Certification. | 677 railroads | 1,000 notif | 10 minutes | 167 |
| 242.211—Replacement of Certificates | 677 railroads | 500 certific | 5 minutes | 42 |
| 242.213—Multiple Certificates | | | | |
| —Notification to Engineer That No Conductor Is On Train. | 677 railroads | 5 notification | 10 minutes | 1 |

| CFR Section/Subject | Respondent universe | Total annual responses | Average time per response | Total annual burden hours |
|---|---|---|---|---|
| —Notification of Denial of Certification by Individuals Holding Multiple Certifications. | 677 railroads | 10 notific | 10 minutes | 2 |
| 242.215—RR Oversight Responsibility | | | | |
| —RR Review and Analysis of Administration of Certification Program. | 677 railroads | 44 reviews/Analyses | 40 hours/1 hour | 1,760 |
| —Report of Findings by RR to FRA | 677 railroads | 36 reports | 4 hours | 144 |
| 242.301—Determinations—Territorial Qualification and Joint Operations. | 320 railroads | 1,080 Deter | 15 minutes | 270 |
| —Notification by Persons Who Do Not Meet Territorial Qualification. | 320 railroads | 500 Notific | 10 minutes | 83 |
| 242.401—Notification to Candidate of Information That Forms Basis for Denying Certification and Candidate Response. | 677 railroads | 40 notific. + 30 responses | 60 minutes/60 minutes. | 70 |
| —Written Notification of Denial of Certification. | 677 railroads | 40 notific. | 60 minutes | 40 |
| 242.403/405—Criteria for Revoking Certification; Periods of Ineligibility | | | | |
| —Review of Compliance Conduct | 677 railroads | 950 reviews | 10 minutes | 158 |
| —Written Determination That the Most Recent Incident Has Occurred. | 677 railroads | 950 determin | 60 minutes | 950 |
| 242.407—Process for Revoking Certification | | | | |
| —Revocation for Violations of Section 242.115(e). | 677 railroads | 950 Revoked Certificates | 8 hours | 7,600 |
| —Immediate Suspension of Certificate | 677 railroads | 950 suspend Certificate | 1 hour | 950 |
| —Determinations Based on RR Hearing Record. | 677 railroads | 950 determin | 1 hour | 950 |
| —Hearing Record | 677 railroads | 950 records | 30 minutes | 475 |
| —Written Decisions by RR Official | 677 railroads | 950 decisions | 1 hour | 950 |
| —Written Waiver of Right to Hearing | 54,000 Conductors | 425 waivers | 10 minutes | 71 |
| —Revocation of Certification Based on Information That Another Railroad Has Done So. | 677 railroads | 15 revoked Certifications | 10 minutes | 3 |
| —Placing Relevant Information in Record Prior to Suspending Certification/Convening Hearing. | 677 railroads | 100 updated records | 1 hour | 100 |

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: Whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Information Clearance Officer, at 202–493–6292, or Ms. Nakia Jackson at 202–493–6073.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan or Ms. Nakia Jackson, Federal Railroad Administration, 1200 New Jersey Avenue, SE., 3rd Floor, Washington, DC 20590. Comments may also be submitted via e-mail to Mr. Brogan or Ms. Jackson at the following address: *robert.brogan@dot.gov; nakia.jackson@dot.gov.*

OMB is required to make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

*4. Federalism Implications*

Executive Order 13132, "Federalism" (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds

necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. This proposed rule would not have a substantial effect on the States or their political subdivisions; it would not impose any compliance costs; and it would not affect the relationships between the Federal government and the States or their political subdivisions, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

However, this proposed rule could have preemptive effect by operation of law under certain provisions of the Federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970, repealed and recodified at 49 U.S.C. 20106. Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the "essentially local safety or security hazard" exception to section 20106.

In sum, FRA has analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this proposed rule has no federalism implications, other than the possible preemption of State laws under Federal railroad safety statutes, specifically 49 U.S.C. 20106. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this proposed rule is not required.

*5. 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 proposed 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.

*6. Environmental Impact*

FRA has evaluated this rule in accordance with its "Procedures for Considering Environmental Impacts" (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this proposed rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. *See* 64 FR 28547 (May 26, 1999).

In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this proposed rule is not a major Federal action significantly affecting the quality of the human environment.

*7. Unfunded Mandates Reform Act of 1995*

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency "shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." Section 202 of the Act (2 U.S.C. 1532) further requires that "before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $140,800,000 or more in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement" detailing the effect on State, local, and tribal governments and the private sector. The proposed rule will not result in the expenditure, in the aggregate, of $140,800,000 or more in any one year, and thus preparation of such a statement is not required.

*8. Energy Impact*

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any "significant energy action." 66 FR 28355 (May 22, 2001). Under the Executive Order, a "significant energy action" is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this NPRM in accordance with Executive Order 13211. FRA has determined that this NPRM is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this NPRM is not a "significant energy action" within the meaning of Executive Order 13211.

*9. Privacy Act*

FRA wishes to inform all potential commenters that anyone is able to search the electronic form of all comments received into any agency docket by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://www.regulations.gov/search/footer/privacyanduse.jsp.*

**List of Subjects in 49 CFR Part 242**

Administrative practice and procedure, Conductor, Penalties, Railroad employees, Railroad operating procedures, Railroad safety, Reporting and recordkeeping requirements.

**The Proposed Rule**

For the reasons discussed in the preamble, FRA proposes to amend chapter II, subtitle B of title 49 of the Code of Federal Regulations as follows:

1. Add a new part 242 to read as follows:

## PART 242—QUALIFICATION AND CERTIFICATION OF CONDUCTORS

### Subpart A—General

Sec.
242.1 Purpose and scope.
242.3 Application and responsibility for compliance.
242.5 Effect and construction.
242.7 Definitions.
242.9 Waivers.
242.11 Penalties and consequences for noncompliance.
242.13 Information collection requirements.

### Subpart B—Program and Eligibility Requirements

242.101 Certification program required.
242.103 Approval of design of individual railroad programs by FRA.
242.105 Schedule for implementation.
242.107 Types of service.
242.109 Determinations required for certification and recertification.
242.111 Prior safety conduct as motor vehicle operator.
242.113 Prior safety conduct as an employee of a different railroad.
242.115 Substance abuse disorders and alcohol drug rules compliance.
242.117 Vision and hearing acuity.
242.119 Training.
242.121 Knowledge testing.
242.123 Monitoring operational performance.
242.125 Certification determinations made by other railroads.
242.127 Reliance on qualification requirements of other countries.

### Subpart C—Administration of the Certification Program

242.201 Time limitations for certification.
242.203 Retaining information supporting determinations.
242.205 Identification of certified persons and record keeping.
242.207 Certificate components.
242.209 Maintenance of the certificate.
242.211 Replacement of certificates.
242.213 Multiple certifications.
242.215 Railroad oversight responsibilities.

### Subpart D—Territorial Qualification and Joint Operations

242.301 Requirements for territorial qualification.

### Subpart E—Denial and Revocation of Certification

242.401 Denial of certification.
242.403 Criteria for revoking certification.
242.405 Periods of ineligibility.
242.407 Process for revoking certification.

### Subpart F—Dispute Resolution Procedures

242.501 Review board established.
242.503 Petition requirements.
242.505 Processing certification review petitions.
242.507 Request for a hearing.
242.509 Hearings.
242.511 Appeals.
APPENDIX A TO PART 242—SCHEDULE OF CIVIL PENALTIES
APPENDIX B TO PART 242—PROCEDURES FOR SUBMISSION AND APPROVAL OF CONDUCTOR CERTIFICATION PROGRAMS
APPENDIX C TO PART 242—PROCEDURES FOR OBTAINING AND EVALUATING MOTOR VEHICLE DRIVING RECORD DATA
APPENDIX D TO PART 242—MEDICAL STANDARDS GUIDELINES
APPENDIX E TO PART 242—APPLICATION OF REVOCABLE EVENTS

**Authority:** 49 U.S.C. 20103, 20107, 20135, 20138, 20162, 20163, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49.

### Subpart A—General

#### § 242.1 Purpose and scope.

(a) The purpose of this part is to ensure that only those persons who meet minimum Federal safety standards serve as conductors, to reduce the rate and number of accidents and incidents and to improve railroad safety.

(b) This part prescribes minimum Federal safety standards for the eligibility, training, testing, certification and monitoring of all conductors to whom it applies. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements consistent with this part.

(c) The conductor certification requirements prescribed in this part apply to any person who meets the definition of conductor contained in § 242.7, regardless of the fact that the person may have a job classification title other than that of conductor.

#### § 242.3 Application and responsibility for compliance.

(a) This part applies to all railroads, except:

(1) A railroad that operates only on track inside an installation that is not part of the general railroad system of transportation; or

(2) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(b) Although the duties imposed by this part are generally stated in terms of the duty of a railroad, each person, including a contractor for a railroad, who performs any function covered by this part, must perform that function in accordance with this part.

#### § 242.5 Effect and construction.

(a) FRA does not intend, by use of the term conductor in this part, to alter the terms, conditions, or interpretation of existing collective bargaining agreements that employ other job classification titles when identifying a person who is the crew member in charge of a movement that requires a locomotive engineer.

(b) FRA does not intend by issuance of these regulations to alter the authority of a railroad to initiate disciplinary sanctions against its employees, including managers and supervisors, in the normal and customary manner, including those contained in its collective bargaining agreements.

(c) Except as provided in § 242.213, nothing in this part shall be construed to create or prohibit an eligibility or entitlement to employment in other service for the railroad as a result of denial, suspension, or revocation of certification under this part.

(d) Nothing in this part shall be deemed to abridge any additional procedural rights or remedies not inconsistent with this part that are available to the employee under a collective bargaining agreement, the Railway Labor Act, or (with respect to employment at will) at common law with respect to removal from service or other adverse action taken as a consequence of this part.

#### § 242.7 Definitions.

As used in this part—

*Administrator* means the Administrator of the FRA or the Administrator's delegate.

*Alcohol* means ethyl alcohol (ethanol) and includes use or possession of any beverage, mixture, or preparation containing ethyl alcohol.

*Conductor* means the crewmember in charge of a "train or yard crew" as defined in part 218 of this chapter. *See also* the definition of "passenger conductor" in this section.

*Controlled substance* has the meaning assigned by 21 U.S.C. 802 and includes all substances listed on Schedules I through V as they may be revised from time to time (21 CFR parts 1301–1316).

*Drug* means any substance (other than alcohol) that has known mind or function-altering effects on a human subject, specifically including any psychoactive substance and including, but not limited to, controlled substances.

*Dual purpose vehicle* means a piece of on-track equipment that is capable of moving railroad rolling stock and may also function as roadway maintenance equipment.

*File, filed* and *filing* mean submission of a document under this part on the date when the Docket Clerk receives it, or if sent by mail, the date mailing was completed.

*FRA* means the Federal Railroad Administration.

*FRA representative* means the FRA Associate Administrator for Railroad

Safety/Chief Safety Officer and the Associate Administrator's delegate, including any safety inspector employed by the Federal Railroad Administration and any qualified state railroad safety inspector acting under part 212 of this chapter.

*Ineligible* or *ineligibility* means that a person is legally disqualified from serving as a certified conductor. The term covers a number of circumstances in which a person may not serve as a certified conductor. Revocation of certification pursuant to § 242.407 and denial of certification pursuant to § 242.401 are two examples in which a person would be ineligible to serve as a conductor. A period of ineligibility may end when a condition or conditions are met. For example, when a person meets the conditions to serve as a conductor following a alcohol or drug violation pursuant to § 242.115.

*Job aid* means information regarding *other than main track physical characteristics* that supplements the operating instructions of the territory over which the locomotive or train movement will occur. *See* definitions of "main track" and "physical characteristics" in this section. A *job aid* may consist of training on the territory pursuant to § 242.119, maps, charts or visual aids of the territory, or a person or persons to contact who are qualified on the territory and who can describe the physical characteristics of the territory. At a minimum, a *job aid* must cover characteristics of a territory including: Permanent close clearances, location of permanent derails and switches, assigned radio frequencies in use and special instructions required for movement, if any, and railroad-identified unique operating conditions.

*Joint operations* means rail operations conducted by more than one railroad on the same track regardless of whether such operations are the result of—

(1) Contractual arrangement between the railroads,

(2) Order of a governmental agency or a court of law, or

(3) Any other legally binding directive.

*Knowingly* means having actual knowledge of the facts giving rise to the violation or that a reasonable person acting in the circumstances, exercising due care, would have had such knowledge.

*Locomotive* means a piece of on-track equipment (other than specialized roadway maintenance equipment or a dual purpose vehicle operating in accordance with § 240.104(a)(2) of this chapter):

(1) With one or more propelling motors designed for moving other equipment;

(2) With one or more propelling motors designed to carry freight or passenger traffic or both; or

(3) Without propelling motors but with one or more control stands.

*Locomotive engineer* means any person who moves a locomotive or group of locomotives regardless of whether they are coupled to other rolling equipment except:

(1) A person who moves a locomotive or group of locomotives within the confines of a locomotive repair or servicing area as provided for in §§ 218.5 and 218.29(a)(1) of this chapter; or

(2) A person who moves a locomotive or group of locomotives for distances of less than 100 feet and this incidental movement of a locomotive or locomotives is for inspection or maintenance purposes.

*Locomotive engineer certificate* means a certificate issued pursuant to part 240 of this chapter.

*Main track* means a track upon which the operation of trains is governed by one or more of the following methods of operation: Timetable; mandatory directive; signal indication; positive train control as defined in part 236 of this chapter; or any form of absolute or manual block system.

*Medical examiner* means a person licensed as a doctor of medicine or doctor of osteopathy. A medical examiner can be a qualified full-time salaried employee of a railroad, a qualified practitioner who contracts with the railroad on a fee-for-service or other basis, or a qualified practitioner designated by the railroad to perform functions in connection with medical evaluations of employees. As used in this rule, the medical examiner owes a duty to make an honest and fully informed evaluation of the condition of an employee.

*On-the-job training* means job training that occurs in the work place (*i.e.,* the employee learns the job while doing the job). In the context of this part, the *on-the-job training* portion of the training program must be based on a model generally accepted by the educational community, and must consist of the following three key components:

(1) A brief statement describing the tasks and related steps the employee must be able to perform;

(2) A statement of the conditions (*i.e.,* tools, equipment, documentation, briefings, demonstrations, and practice) necessary for learning transfer; and

(3) A statement of the standards by which proficiency can be measured through a combination of task/step accuracy, completeness, and repetition.

*Passenger conductor* means a conductor who has also received emergency preparedness training under part 239 of this chapter. *See also* the definition of "conductor" in this section.

*Person* means an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: A railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor.

*Physical characteristics* means the actual track profile of and physical location for points within a specific yard or route that affect the movement of a locomotive or train. *Physical characteristics* includes both *main track physical characteristics* (see definition of "main track" in this section) and other than main track physical characteristics.

*Qualified* means a person who has successfully completed all instruction, training and examination programs required by the employer, and the applicable parts of this chapter and that the person therefore may reasonably be expected to be proficient on all safety related tasks the person is assigned to perform.

*Qualified instructor* means a person who has demonstrated, pursuant to the railroad's written program, an adequate knowledge of the subjects under instruction and, where applicable, has the necessary operating experience to effectively instruct in the field, and has the following qualifications:

(1) Is a certified conductor under this part; and

(2) Has been selected as such by a designated railroad officer, in concurrence with the designated employee representative, where present; or

(3) In absence of concurrence provided in paragraph (2) of this definition, has a minimum of 12 months service working as a train service employee. If a railroad does not have designated employee representation, then a person employed by the railroad need not comply with paragraphs (2) or (3) of this definition to be a *qualified instructor.*

*Railroad* means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways and any entity providing such transportation, including:

(1) Commuter or other short-haul railroad passenger service in a

metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(2) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

*Railroad officer* means any supervisory employee of a railroad.

*Railroad rolling stock* is on-track equipment that is either a freight car (as defined in § 215.5 of this chapter) or a passenger car (as defined in § 238.5 of this chapter).

*Remote control operator* (RCO) means a certified locomotive engineer, as defined in § 240.7 of this chapter, certified by a railroad to operate remote control locomotives pursuant to § 240.107 of this chapter.

*Roadway maintenance equipment* is on-track equipment powered by any means of energy other than hand power which is used in conjunction with maintenance, repair, construction or inspection of track, bridges, roadway, signal, communications, or electric traction systems.

*Serve* or *service,* in the context of serving documents, has the meaning given in Rule 5 of the Federal Rules of Civil Procedure as amended. Similarly, the computation of time provisions in Rule 6 of the Federal Rules of Civil Procedure as amended are also applicable in this part. *See also* the definition of "filing" in this section.

*Specialized roadway maintenance equipment* is roadway maintenance equipment that does not have the capability to move railroad rolling stock. Any alteration of such equipment that enables it to move railroad rolling stock will require that the equipment be treated as a dual purpose vehicle.

*Substance abuse disorder* refers to a psychological or physical dependence on alcohol or a drug, or another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation. A substance abuse disorder is "active" within the meaning of this part if the person is currently using alcohol or other drugs, except under medical supervision consistent with the restrictions described in § 219.103 of this chapter or has failed to successfully complete primary treatment or successfully participate in aftercare as directed by a SAP.

*Substance Abuse Professional (SAP)* means a person who meets the qualifications of a substance abuse professional, as provided in part 40 of this title. As used in this rule, the SAP owes a duty to the railroad to make an honest and fully informed evaluation of the condition and progress of an employee.

*Territorial qualifications* means possessing the necessary knowledge concerning a railroad's operating rules and timetable special instructions including familiarity with applicable *main track and other than main track physical characteristics* of the territory over which the locomotive or train movement will occur.

**§ 242.9 Waivers.**

(a) A person subject to a requirement of this part may petition the Administrator for a waiver of compliance with such requirement. The filing of such a petition does not affect that person's responsibility for compliance with that requirement while the petition is being considered.

(b) Each petition for a waiver under this section must be filed in the manner and contain the information required by part 211 of this chapter.

(c) If the Administrator finds that a waiver of compliance is in the public interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any conditions the Administrator deems necessary.

**§ 242.11 Penalties and consequences for noncompliance.**

(a) A person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $650 and not more than $25,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $100,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. *See* Appendix A to this part for a statement of agency civil penalty policy.

(b) A person who violates any requirement of this part or causes the violation of any such requirement may be subject to disqualification from all safety-sensitive service in accordance with part 209 of this chapter.

(c) A person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311.

(d) In addition to the enforcement methods referred to in paragraphs (a), (b), and (c) of this section, FRA may also address violations of this part by use of the emergency order, compliance order, and/or injunctive provisions of the Federal rail safety laws.

**§ 242.13 Information collection requirements.**

(a) The information collection requirements of this Part were reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and are assigned OMB control number _____.

(b) The information collection requirements are found in the following sections: (TO BE INSERTED IN FINAL RULE).

## Subpart B—Program and Eligibility Requirements

**§ 242.101 Certification program required.**

(a) After the pertinent date specified in § 242.105(d) or (e), each railroad shall have a certification program approved in accordance with § 242.103 that includes:

(1) A designation of the types of service that it determines will be used in compliance with the criteria established in § 242.107;

(2) A procedure for evaluating prior safety conduct that complies with the criteria established in § 242.109;

(3) A procedure for evaluating visual and hearing acuity that complies with the criteria established in § 242.117;

(4) A procedure for training that complies with the criteria established in § 242.119;

(5) A procedure for knowledge testing that complies with the criteria established in § 242.121; and

(6) A procedure for monitoring operational performance that complies with the criteria established in § 242.123.

(b) Reserved.

**§ 242.103 Approval of design of individual railroad programs by FRA.**

(a) Each railroad shall submit its written certification program and request for approval in accordance with the procedures contained in appendix B of this part according to the following schedule:

(1) A Class I railroad (including the National Railroad Passenger Corporation), Class II railroad, or railroad providing commuter service shall submit a program no later than March 30, 2012; and

(2) A Class III railroad (including a switching and terminal or other railroad

not otherwise classified) shall submit a program no later than July 30, 2012.

(b) A railroad commencing operations after the pertinent date specified in paragraph (a) of this section shall submit its written certification program and request for approval in accordance with the procedures contained in appendix B to this part at least 60 days prior to commencing operations.

(c) Each railroad shall:

(1) Simultaneous with its filing with the FRA, serve a copy of the submission filed pursuant to paragraph (a) or (b) of this section, a resubmission filed pursuant to paragraph (h) of this section, or a material modification filed pursuant to paragraph (i) of this section on the president of each labor organization that represents the railroad's employees subject to this part; and

(2) Include in their submission filed pursuant to paragraph (a) or (b) of this section, a resubmission filed pursuant to paragraph (h) of this section, or a material modification filed pursuant to paragraph (i) of this section a statement affirming that the railroad has served a copy on the president of each labor organization that represents the railroad's employees subject to this part, together with a list of the names and addresses of persons served.

(d) Not later than 45 days from the date of filing a submission pursuant to paragraph (a) or (b) of this section, a resubmission pursuant to paragraph (h) of this section, or a material modification pursuant to paragraph (i) of this section, any designated representative of railroad employees subject to this part may comment on the submission, resubmission, or material modification:

(1) Each comment shall set forth specifically the basis upon which it is made, and contain a concise statement of the interest of the commenter in the proceeding;

(2) Each comment shall be submitted to the Associate Administrator for Railroad Safety/Chief Safety Officer, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20590; and

(3) The commenter shall certify that a copy of the comment was served on the railroad.

(e) The submission required by paragraph (a) or (b) of this section shall state the railroad's election either:

(1) To accept responsibility for the training of conductors and thereby obtain authority for that railroad to initially certify a person as a conductor in an appropriate type of service; or

(2) To recertify only conductors previously certified by other railroads.

(f) A railroad that elects to accept responsibility for the training of conductors shall state in its submission whether it will conduct the training program or employ a training program conducted by some other entity on its behalf but adopted and ratified by that railroad.

(g) A railroad's program is considered approved and may be implemented 30 days after the required filing date (or the actual filing date) unless the Administrator notifies the railroad in writing that the program does not conform to the criteria set forth in this part.

(1) If the Administrator determines that the program does not conform, the Administrator will inform the railroad of the specific deficiencies.

(2) If the Administrator informs the railroad of deficiencies more than 30 days after the initial filing date, the original program may remain in effect until 30 days after approval of the revised program is received.

(h) A railroad shall resubmit its program within 30 days after the date of such notice of deficiencies. A failure to resubmit the program with the necessary revisions will be considered a failure to implement a program under this part.

(1) The Administrator will inform the railroad in writing whether its revised program conforms to this part.

(2) If the program does not conform, the railroad shall resubmit its program.

(i) A railroad that intends to materially modify its program after receiving initial FRA approval shall submit a description of how it intends to modify the program in conformity with the specific requirements of this part at least 60 days prior to implementing such a change.

(1) A modification is material if it would affect the program's conformance with this part.

(2) The modification submission shall contain a description that conforms to the pertinent portion of the procedures contained in appendix B of this part.

(3) The modification submission will be handled in accordance with the procedures of paragraphs (g) and (h) of this section as though it were a new program.

**§ 242.105 Schedule for implementation.**

(a) By March 1, 2012, each railroad shall:

(1) In writing, designate as certified conductors all persons authorized by the railroad to perform the duties of a conductor as of January 1, 2012; and

(2) Issue a certificate that complies with § 242.207 to each person that it designates.

(b) After March 1, 2012, each railroad shall:

(1) In writing, designate as a certified conductor any person who has been authorized by the railroad to perform the duties of a conductor between January 1, 2012 and the pertinent date in paragraph (d) or (e) of this section; and

(2) Issue a certificate that complies with § 242.207 to each person that it designates.

(c) No railroad shall permit or require a person, designated as a certified conductor under the provisions of paragraph (a) or (b) of this section, to perform service as a certified conductor for more than a 36-month period beginning on the pertinent date for compliance with the mandatory procedures for testing and evaluation set forth in the applicable provisions of paragraph (d) or (e) of this section unless that person has been certified in accordance with procedures that comply with subpart B of this part.

(1) Except as provided in paragraph (c)(3) of this section, a person who has been designated as a certified conductor under the provisions of paragraph (a) or (b) of this section and who is eligible to receive a retirement pension in accordance with the terms of an applicable agreement or in accordance with the terms of the Railroad Retirement Act (45 U.S.C. 231) within 36 months from the pertinent date for compliance with the mandatory procedures for testing and evaluation set forth in the applicable provisions of paragraph (d) or (e) of this section, may request, in writing, that a railroad not recertify that person, pursuant to subpart B of this part, until 36 months from the pertinent date for compliance with the mandatory procedures for testing and evaluation set forth in the applicable provisions of paragraph (d) or (e) of this section.

(2) Upon receipt of a written request pursuant to paragraph (c)(1) of this section, a railroad may wait to recertify the person making the request until the end of the 36-month period described in paragraph (c) of this section. If a railroad grants any request, it must grant the request of all eligible persons to every extent possible.

(3) A person who is subject to recertification under part 240 of this chapter may not make a request pursuant to paragraph (c)(1) of this section.

(d) After June 1, 2012, no Class I railroad (including the National Railroad Passenger Corporation), Class II railroad, or railroad providing commuter service shall initially certify or recertify a person as a conductor

unless that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part and issued a certificate that complies with § 242.207.

(e) After September 1, 2012, no Class III railroad (including a switching and terminal or other railroad not otherwise classified) shall initially certify or recertify a person as a conductor unless that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part and issued a certificate that complies with § 242.207.

(f) After the applicable dates specified in paragraphs (d) and (e) of this section, no person shall serve as a conductor in any type of service and no railroad shall require or permit any person to serve as a conductor in any type of service unless that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part and issued a certificate that complies with § 242.207.

**§ 242.107 Types of service.**

(a) Each railroad's program shall state which of the two types of service (conductor and passenger conductor), provided for in paragraph (b) of this section, that it will cover.

(b) A railroad may issue certificates for either of the following types of service:

(1) Conductor; and

(2) Passenger conductor.

(c) A railroad shall not reclassify the certification of any type of certified conductor to a different type of conductor certification during the period in which the certification is otherwise valid except when a conductor completes the emergency training identified in part 239 of this chapter and is certified as a passenger conductor.

(d) Each railroad is authorized to impose additional conditions or operational restrictions on the service a conductor may perform beyond those identified in this section provided those conditions or restrictions are not inconsistent with this part.

**§ 242.109 Determinations required for certification and recertification.**

(a) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor, shall, in accordance with its FRA-approved program, determine in writing that:

(1) The individual meets the eligibility requirements of §§ 242.111, 242.113, 242.115 and 242.403; and

(2) The individual meets the vision and hearing acuity standards of § 242.117 ("Vision and hearing acuity");

(3) The individual has the necessary knowledge, as demonstrated by successfully completing a test that meets the requirements of § 242.121 ("Knowledge testing"); and

(4) Where a person has not previously been certified, that the person has completed a training program that meets the requirements of § 242.119 ("Training").

(b) When evaluating a person's railroad employment record, a railroad shall not consider information concerning prior railroad safety conduct that:

(1) Occurred prior to the effective date of this rule; or

(2) Occurred at a time other than that specifically provided for in §§ 242.111, 242.115 or 242.403.

(c) In order to make the determination required under paragraph (a) of this section, a railroad shall have on file documents pertinent to those determinations.

(d) A railroad's program shall provide a candidate for certification or recertification a reasonable opportunity to review and comment in writing on any record which contains information concerning the person's prior safety conduct, including information pertinent to determinations required under § 242.115, if the railroad believes the record contains information that could be sufficient to render the person ineligible for certification under this subpart.

(e) The opportunity for comment shall be afforded to the person prior to the railroad's rendering its eligibility decision based on that information. Any responsive comment furnished shall be retained by the railroad in accordance with § 242.203.

(f) The program shall include a method for a person to advise the railroad that he or she has never been a railroad employee or obtained a license to drive a motor vehicle. Nothing in this section shall be construed as imposing a duty or requirement that a person have prior railroad employment experience or obtain a motor vehicle driver's license in order to become a certified conductor.

(g) Nothing in this section, §§ 242.111 or 242.113 shall be construed to prevent persons subject to this part from entering into an agreement that results in a railroad's obtaining the information needed for compliance with this subpart in a different manner than that prescribed in §§ 242.111 or 242.113.

**§ 242.111 Prior safety conduct as motor vehicle operator.**

(a) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) Except as provided in paragraphs (c), (d), (e) and (f) of this section, after the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor for any type of service, shall determine that the person meets the eligibility requirements of this section involving prior conduct as a motor vehicle operator.

(c) A railroad shall initially certify a person as a conductor for 60 days if the person:

(1) Requested the information required by paragraph (h) of this section at least 60 days prior to the date of the decision to certify that person; and

(2) Otherwise meets the eligibility requirements provided in § 242.109.

(d) A railroad shall recertify a person as a conductor for 60 days from the expiration date of that person's certification if the person:

(1) Requested the information required by paragraph (h) of this section at least 60 days prior to the date of the decision to recertify that person; and

(2) Otherwise meets the eligibility requirements provided in § 242.109.

(e) Except as provided in paragraph (f) of this section, if a railroad who certified or recertified a person pursuant to paragraph (c) or (d) of this section does not obtain and evaluate the information required pursuant to paragraph (h) within 60 days of the pertinent dates identified in paragraph (c) or (d) of this section, that person will be ineligible to perform as a conductor until the information can be evaluated.

(f) If a person requests the information required pursuant to paragraph (h) of this section but is unable to obtain it, that person or the railroad certifying or recertifying that person may petition for a waiver of the requirements of paragraph (b) of this section in accordance with the provisions of part 211 of this chapter. A railroad shall certify or recertify a person during the pendency of the waiver request if the person otherwise meets the eligibility requirements provided in § 242.109.

(g) *Individual's duty.* Except for persons designated as conductors under § 242.105 (a) or (b) or for persons

covered by § 242.109(f), each person seeking certification or recertification under this part shall, within 366 days preceding the date of the railroad's decision on certification or recertification:

(1) Take the actions required by paragraphs (h) through (j) of this section to make information concerning his or her driving record available to the railroad that is considering such certification or recertification; and

(2) Take any additional actions, including providing any necessary consent required by State, Federal, or foreign law to make information concerning his or her driving record available to that railroad.

(h) Each person seeking certification or recertification under this part shall request, in writing, that the chief of each driver licensing agency identified in paragraph (i) of this section provide a copy of that agency's available information concerning his or her driving record to the railroad that is considering such certification or recertification.

(i) Each person shall request the information required under paragraph (h) of this section from:

(1) The chief of the driver licensing agency of any jurisdiction, including a state or foreign country, which last issued that person a driver's license; and

(2) The chief of the driver licensing agency of any other jurisdiction, including states or foreign countries, that issued or reissued the person a driver's license within the preceding five years.

(j) If advised by the railroad that a driver licensing agency has informed the railroad that additional information concerning that person's driving history may exist in the files of a state agency or foreign country not previously contacted in accordance with this section, such person shall:

(1) Request in writing that the chief of the driver licensing agency which compiled the information provide a copy of the available information to the prospective certifying railroad; and

(2) Take any additional action required by State, Federal, or foreign law to obtain that additional information.

(k) Any person who has never obtained a motor vehicle driving license is not required to comply with the provisions of paragraph (h) of this section but shall notify the railroad of that fact in accordance with procedures of the railroad that comply with § 242.109(f).

(l) Each certified conductor or person seeking initial certification shall report motor vehicle incidents described in paragraphs (n)(1) and (2) of this section to the employing railroad within 48 hours of being convicted for, or completed state action to cancel, revoke, suspend, or deny a motor vehicle drivers license for, such violations. For purposes of this paragraph and paragraph (n) of this section, "state action" means action of the jurisdiction that has issued the motor vehicle driver's license, including a foreign country. For the purposes of conductor certification, no railroad shall require reporting earlier than 48 hours after the conviction, or completed state action to cancel, revoke, or deny a motor vehicle drivers license.

(m) *Evaluation of record.* When evaluating a person's motor vehicle driving record, a railroad shall not consider information concerning motor vehicle driving incidents that occurred:

(1) Prior to the effective date of this rule;

(2) More than 36 months before the month in which the railroad is making its certification decision; or

(3) At a time other than that specifically provided for in §§ 242.111, 242.115, or 242.403.

(n) A railroad shall only consider information concerning the following types of motor vehicle incidents:

(1) A conviction for, or completed state action to cancel, revoke, suspend, or deny a motor vehicle drivers license for, operating a motor vehicle while under the influence of or impaired by alcohol or a controlled substance; or

(2) A conviction for, or completed state action to cancel, revoke, suspend, or deny a motor vehicle driver's license for, refusal to undergo such testing as is required by State or foreign law when a law enforcement official seeks to determine whether a person is operating a vehicle while under the influence of alcohol or a controlled substance.

(o) If such an incident is identified:

(1) The railroad shall provide the data to the railroad's SAP, together with any information concerning the person's railroad service record, and shall refer the person for evaluation to determine if the person has an active substance abuse disorder;

(2) The person shall cooperate in the evaluation and shall provide any requested records of prior counseling or treatment for review exclusively by the SAP in the context of such evaluation; and

(3) If the person is evaluated as not currently affected by an active substance abuse disorder, the subject data shall not be considered further with respect to certification. However, the railroad shall, on recommendation of the SAP, condition certification upon participation in any needed aftercare and/or follow-up testing for alcohol or drugs deemed necessary by the SAP consistent with the technical standards specified in § 242.115(f)(3).

(4) If the person is evaluated as currently affected by an active substance abuse disorder, the provisions of § 242.115(d) will apply.

**§ 242.113 Prior safety conduct as an employee of a different railroad.**

(a) Each railroad shall adopt and comply with a program which complies with the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor for any type of service, shall determine that the person meets the eligibility requirements of this section.

(c) Except for persons designated as conductors under § 242.105(a) or (b) or for persons covered by § 242.109(f), each person seeking certification or recertification under this part shall, within 366 days preceding the date of the railroad's decision on certification or recertification:

(1) Request, in writing, that the chief operating officer or other appropriate person of the former employing railroad provide a copy of that railroad's available information concerning his or her service record pertaining to compliance or non-compliance with §§ 242.111, 242.115 and 242.403 to the railroad that is considering such certification or recertification; and

(2) Take any additional actions, including providing any necessary consent required by State or Federal law to make information concerning his or her service record available to that railroad.

**§ 242.115 Substance abuse disorders and alcohol drug rules compliance.**

(a) Each railroad shall adopt and comply with a program which complies with the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor for any type of service, shall determine that the person meets the eligibility requirements of this section.

(c) In order to make the determination required under paragraph (d) of this section, a railroad shall have on file documents pertinent to that determination, including a written document from its SAP which states his or her professional opinion that the person has been evaluated as not currently affected by a substance abuse disorder or that the person has been evaluated as affected by an active substance abuse disorder.

(d) *Fitness requirement.*

(1) A person who has an active substance abuse disorder shall be denied certification or recertification as a conductor.

(2) Except as provided in paragraph (g) of this section, a certified conductor who is determined to have an active substance abuse disorder shall be ineligible to hold certification. Consistent with other provisions of this part, certification may be reinstated as provided in paragraph (f) of this section.

(3) In the case of a current employee of the railroad evaluated as having an active substance abuse disorder (including a person identified under the procedures of § 242.111), the employee may, if otherwise eligible, voluntarily self-refer for substance abuse counseling or treatment under the policy required by § 219.403 of this chapter; and the railroad shall then treat the substance abuse evaluation as confidential except with respect to ineligibility for certification.

(e) *Prior alcohol/drug conduct; Federal rule compliance.*

(1) In determining whether a person may be or remain certified as a conductor, a railroad shall consider conduct described in paragraph (e)(2) of this section that occurred within a period of 60 consecutive months prior to the review. A review of certification shall be initiated promptly upon the occurrence and documentation of any incident of conduct described in this paragraph.

(2) A railroad shall consider any violation of §§ 219.101 or 219.102 of this chapter and any refusal or failure to provide a breath or body fluid sample for testing under the requirements of part 219 of this chapter when instructed to do so by a railroad representative.

(3) A period of ineligibility described in this section shall begin:

(i) For a person not currently certified, on the date of the railroad's written determination that the most recent incident has occurred; or

(ii) For a person currently certified, on the date of the railroad's notification to the person that recertification has been denied or certification has been revoked; and

(4) The period of ineligibility described in this section shall be determined in accordance with the following standards:

(i) In the case of a single violation of § 219.102 of this chapter, the person shall be ineligible to hold a certificate during evaluation and any required primary treatment as described in paragraph (f) of this section. In the case of two violations of § 219.102 of this chapter, the person shall be ineligible to hold a certificate for a period of two years. In the case of more than two such violations, the person shall be ineligible to hold a certificate for a period of five years.

(ii) In the case of one violation of § 219.102 of this chapter and one violation of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of three years.

(iii) In the case of one violation of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of 9 months (unless identification of the violation was through a qualifying "co-worker report" as described in § 219.405 of this chapter and the conductor waives investigation, in which case the certificate shall be deemed suspended during evaluation and any required primary treatment as described in paragraph (f)). In the case of two or more violations of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of five years.

(iv) A refusal or failure to provide a breath or body fluid sample for testing under the requirements of part 219 of this chapter when instructed to do so by a railroad representative shall be treated, for purposes of ineligibility under this paragraph, in the same manner as a violation of:

(A) Section 219.102 of this chapter, in the case of a refusal or failure to provide a urine specimen for testing; or

(B) Section 219.101 of this chapter, in the case of a refusal or failure to provide a breath sample (part 219, subpart D), or a blood specimen for mandatory post-accident toxicological testing (part 219, subpart C)).

(f) *Future eligibility to hold certificate following alcohol/drug violation.* The following requirements apply to a person who has been denied certification or who has had certification suspended or revoked as a result of conduct described in paragraph (e) of this section:

(1) The person shall not be eligible for grant or reinstatement of the certificate unless and until the person has:

(i) Been evaluated by a SAP to determine if the person currently has an active substance abuse disorder;

(ii) Successfully completed any program of counseling or treatment determined to be necessary by the SAP prior to return to service; and

(iii) Presented a urine sample for testing under subpart H of part 219 of this chapter that tested negative for controlled substances assayed and has tested negative for alcohol.

(2) A conductor placed in service or returned to service under the above-stated conditions shall continue in any program of counseling or treatment deemed necessary by the SAP and shall be subject to a reasonable program of follow-up alcohol and drug testing without prior notice for a period of not more than 60 months following return to service. Follow-up tests shall include not fewer than 6 alcohol tests and 6 drug tests during the first 12 months following return to service.

(3) Return-to-service and follow-up alcohol and drug tests shall be performed consistent with the requirements of subpart H of part 219 of this chapter.

(4) This paragraph does not create an entitlement to utilize the services of a railroad SAP, to be afforded leave from employment for counseling or treatment, or to employment as a conductor. Nor does it restrict any discretion available to the railroad to take disciplinary action based on conduct described herein.

(g) *Confidentiality protected.* Nothing in this part shall affect the responsibility of the railroad under § 219.403 of this chapter ("Voluntary referral policy") to treat voluntary referrals for substance abuse counseling and treatment as confidential; and the certification status of a conductor who is successfully assisted under the procedures of that section shall not be adversely affected. However, the railroad shall include in its voluntary referral policy required to be issued pursuant to § 219.403 of this chapter a provision that, at least with respect to a certified conductor or a candidate for certification, the policy of confidentiality is waived (to the extent that the railroad shall receive from the SAP official notice of the substance abuse disorder and shall suspend or revoke the certification, as appropriate) if the person at any time refuses to cooperate in a recommended course of counseling or treatment.

**§ 242.117 Vision and hearing acuity.**

(a) Each railroad shall adopt and comply with a program which complies with the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor for any class of service, shall determine that the person meets the standards for visual acuity and hearing acuity prescribed in this section.

(c) In order to make the determination required under paragraph (b) of this section, a railroad shall have on file either:

(1) A medical examiner's certificate that the individual has been medically examined and meets these acuity standards; or

(2) A written document from its medical examiner documenting his or her professional opinion that the person does not meet one or both acuity standards and stating the basis for his or her determination that:

(i) The person can nevertheless be certified under certain conditions; or

(ii) The person's acuity is such that he or she cannot safely perform as a conductor even with conditions attached.

(d) Any examination required for compliance with this section shall be performed by or under the supervision of a medical examiner or a licensed physician's assistant such that:

(1) A licensed optometrist or a technician responsible to that person may perform the portion of the examination that pertains to visual acuity; and

(2) A licensed or certified audiologist or a technician responsible to that person may perform the portion of the examination that pertains to hearing acuity.

(e) If the examination required under this section discloses that the person needs corrective lenses or a hearing aid, or both, either to meet the threshold acuity levels established in this section or to meet a lower threshold determined by the railroad's medical examiner to be sufficient to perform as a conductor, that fact shall be noted on the certificate issued in accordance with the provisions of this part.

(f) Any person with such a certificate notation shall use the relevant corrective device(s) while performing as a conductor unless the railroad's medical examiner subsequently determines in writing that the person can safely perform without using the device.

(g) *Fitness requirement.* In order to be currently certified as a conductor, except as permitted by paragraph (j) of this section, a person's vision and hearing shall meet or exceed the standards prescribed in this section and Appendix D to this part. It is recommended that each test conducted pursuant to this section should be performed according to any directions supplied by the manufacturer of such test and any American National Standards Institute (ANSI) standards that are applicable.

(h) Except as provided in paragraph (j) of this section, each person shall have visual acuity that meets or exceeds the following thresholds:

(1) For distant viewing, either:

(i) Distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses; or

(ii) Distant visual acuity separately corrected to at least 20/40 (Snellen) with corrective lenses and distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses;

(2) A field of vision of at least 70 degrees in the horizontal meridian in each eye; and

(3) The ability to recognize and distinguish between the colors of railroad signals as demonstrated by successfully completing one of the tests in Appendix E to this part.

(i) Except as provided in paragraph (j) of this section, each person shall have a hearing test or audiogram that shows the person's hearing acuity meets or exceeds the following thresholds: the person does not have an average hearing loss in the better ear greater than 40 decibels with or without use of a hearing aid, at 500 Hz, 1,000 Hz, and 2,000 Hz. The hearing test or audiogram shall meet the requirements of one of the following:

(1) As required in 29 CFR 1910.95(h) (OSHA);

(2) As required in § 227.111 of this chapter; or

(3) Conducted using an audiometer that meets the specifications of and are maintained and used in accordance with ANSI S3.6–2004 "Specifications for Audiometers."

(j) A person not meeting the thresholds in paragraphs (h) and (i) of this section shall, upon request, be subject to further medical evaluation by a railroad's medical examiner to determine that person's ability to safely perform as a conductor. In accordance with the guidance prescribed in Appendix D to this part, a person is entitled to one retest without making any showing and to another retest if the person provides evidence substantiating that circumstances have changed since the last test to the extent that the person could now safely perform as a conductor. The railroad shall provide its medical examiner with a copy of this part, including all appendices. If, after consultation with a railroad officer, the medical examiner concludes that, despite not meeting the threshold(s) in paragraphs (h) and (i) of this section, the person has the ability to safely perform as a conductor, the person may be certified as a conductor and such certification conditioned on any special restrictions the medical examiner determines in writing to be necessary.

(k) As a condition of maintaining certification, each certified conductor shall notify his or her employing railroad's medical department or, if no such department exists, an appropriate railroad official if the person's best correctable vision or hearing has deteriorated to the extent that the person no longer meets one or more of the prescribed vision or hearing standards or requirements of this section. This notification is required prior to any subsequent performance as a conductor.

**§ 242.119 Training.**

(a) Each railroad shall adopt and comply with a program that meets the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to the initial issuance of a certificate to any person as a conductor, shall determine that the person has, in accordance with the requirements of this section, the knowledge to safely perform as a conductor in each type of service that the person will be permitted to perform.

(c) In making this determination, a railroad shall have written documentation showing that:

(1) The person completed a training program that complies with paragraph (d) of this section;

(2) The person demonstrated his or her knowledge by achieving a passing grade under the testing and evaluation procedures of that training program; and

(3) The person demonstrated that he or she is qualified on the physical

characteristics of the railroad, or its pertinent segments, over which that person will perform service.

(d) A railroad that elects to train a previously untrained person to be a conductor shall develop an initial training program which, at a minimum, includes the following:

(1) Perform a task analysis or otherwise demonstrate that a task analysis has been performed to identify safety-related tasks and steps that must be performed proficiently. The demonstration of a task analysis for an existing program (*i.e.,* a program implemented prior to the effective date of this part) can be based on the production of an existing program with defined standards of sufficient detail to indicate that an effective task analysis was performed. When new safety-related railroad laws, regulations, orders, technologies, procedures, or equipment are introduced into the workplace, the railroad must review its training program and modify its training plan accordingly.

(2) Determine how training must be structured, developed, and delivered, including on-the-job training and any combination of classroom, simulator, computer-based, or other formally structured training designed to impart the knowledge, skills, and abilities identified as necessary to perform each task. The curriculum shall include knowledge of, and ability to comply with, Federal railroad safety laws, regulations, and orders, as well as any railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders. This training shall document a person's knowledge of, and ability to comply with, Federal railroad safety laws, regulations, and orders, as well as railroad rules and procedures.

(e) Prior to a previously untrained person being certified as a conductor, a railroad shall require the person to:

(1) Successfully complete the formal initial training program developed pursuant to paragraph (d) of this section and any associated examinations covering the skills and knowledge the person will need to possess in order to perform the tasks necessary to be a conductor; and

(2) Demonstrate, to the satisfaction of the railroad with input from a qualified instructor, on-the-job proficiency by successfully completing the tasks necessary to be a conductor. However, a person may perform such tasks under the direct onsite supervision of a person, who has the necessary operating experience, as part of the on-the-job training process prior to completing such training and passing the field evaluation; and

(3) Demonstrate knowledge of the physical characteristics of any assigned territory by successfully completing a test created by a person qualified on the physical characteristics of the territory.

(f) If a railroad uses a written test for purposes of paragraph (e)(3) of this section, the railroad must provide the person(s) being tested with an opportunity to consult with a supervisory employee, who possesses territorial qualifications for the territory, to explain a question.

(g) A person may acquire familiarity with the physical characteristics of a territory through the following methods:

(1) The methods used by a railroad for familiarizing its conductors with new territory while starting up a new railroad;

(2) The methods used by a railroad for starting operations over newly acquired rail lines; or

(3) The methods used by a railroad for reopening of a long unused route.

(h) The methods listed in paragraph (g) of this section shall be described in the railroad's conductor qualification program required under this part and submitted according to the procedures described in Appendix B to this part.

(i) If ownership of a railroad is being transferred from one company to another, the conductor(s) of the acquiring company may receive familiarization training from the selling company prior to the acquiring railroad commencing operation.

(j) A railroad shall designate in its program required by this section the time period in which a conductor must be absent from a territory or yard, before requalification on physical characteristics is required.

(k) A railroad's program shall include the procedures used to qualify or requalify a person on the physical characteristics.

(l) Except as provided by paragraph (n) of this section, each railroad shall, no later than (DATE 365 DAYS AFTER THE DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER), perform initial instructional briefings to ensure that each of its conductors have knowledge of the Federal railroad safety laws that relate to the safety-related tasks the employees are assigned to perform.

(m) Initial instructional briefings required by this section must:

(1) Be delivered in a manner conducive to ensure learning transfer;

(2) Include in the briefing a written or electronic check-off list containing the title and section or subpart of each applicable railroad safety law, including, but limited to, regulations and orders, that the conductor must comply with; and

(3) Require each conductor to complete an identical check-off list during the instructional briefing, and to sign or electronically validate the list at the conclusion of the briefing.

(n) Any railroad that has previously informed, briefed, or instructed any of its existing conductors on the relevant Federal railroad safety laws may choose not to perform the initial instructional briefing required by paragraph (l) of this section, as long as the railroad has retained a record containing the following information concerning each such person:

(1) The name of the person;

(2) The name or a description of the training during which this information was delivered;

(3) The date the training was completed; and

(4) The name of the railroad officer certifying the record(s).

(o) A railroad shall provide for the continuing education of certified conductors to ensure that each conductor maintains the necessary knowledge concerning railroad safety and operating rules and compliance with all applicable Federal regulations, including, but not limited to, hazardous materials, passenger train emergency preparedness, brake system safety standards, pre-departure inspection procedures, and passenger equipment safety standards, and physical characteristics of a territory.

**§ 242.121 Knowledge testing.**

(a) Each railroad shall adopt and comply with a program that meets the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor for any type of service, shall determine that the person has, in accordance with the requirements of this section, demonstrated sufficient knowledge of the railroad's rules and practices for the safe movement of trains.

(c) In order to make the knowledge determination required by paragraph (b) of this section, a railroad shall have procedures for testing a person being evaluated for certification as a conductor that shall be:

(1) Designed to examine a person's knowledge of the railroad's operating rules and practices for the safe movement of trains;

(2) Objective in nature;

(3) Administered in written or electronic form;

(4) Cover the following subjects:

(i) Safety and operating rules;

(ii) Timetable instructions;

(iii) Compliance with all applicable Federal regulations;

(iv) Physical characteristics of the territory on which a person will be or is currently serving as a conductor; and

(v) Use of any job aid that a railroad may provide a conductor;

(5) Sufficient to accurately measure the person's knowledge of the covered subjects; and

(6) Conducted without open reference books or other materials except to the degree the person is being tested on his or her ability to use such reference books or materials.

(d) The conduct of the test shall be documented in writing and the documentation shall contain sufficient information to identify the relevant facts relied on for evaluation purposes.

(e) For purposes of paragraph (c) of this section, the railroad must provide the person(s) being tested with an opportunity to consult with a supervisory employee, who possesses territorial qualifications for the territory, to explain a question.

(f) The documentation shall indicate whether the person passed or failed the test.

(g) If a person fails to pass the test, no railroad shall permit or require that person to function as a conductor prior to that person's achieving a passing score during a reexamination of his or her knowledge.

**§ 242.123 Monitoring operational performance.**

(a) Each railroad shall adopt and comply with a program that meets the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) Each railroad shall have a program to monitor the conduct of its certified conductors by performing unannounced operating rules compliance tests. The program shall include procedures to address the testing of certified conductors who are not given an unannounced compliance test in a calendar year pursuant to paragraph (f) of this section. At a minimum, the procedures shall include the following:

(1) A requirement that an unannounced compliance test must be conducted within 30 days of a return to conductor service; and

(2) The railroad must retain a written record indicating the date that the conductor stopped performing service that requires certification pursuant to this part, the date that the conductor returned to performing service that requires certification pursuant to this part, and the date that the unannounced compliance test was performed.

(c) Except as provided in paragraph (f) of this section, each conductor shall be given at least one unannounced compliance test in each calendar year by a railroad officer who meets the requirements of § 217.9(b)(1) of this chapter.

(d) The unannounced test program shall:

(1) Test those persons certified as a conductor pursuant to § 242.107(b)(1) for compliance with one or more operational tests in accordance with the provisions of § 217.9 of this chapter; and one or more provisions of §§ 218.99 through 218.109 of this chapter; and

(2) Test those persons certified as a passenger conductor pursuant to § 242.107(b)(2) for compliance with one or more operational tests in accordance with the provisions of § 217.9 of this chapter.

(i) For persons certified as passenger conductors pursuant to § 242.107(b)(2) who do not require compliance with part 218, subpart F of this chapter except under emergency circumstances, the requirement for an annual, unannounced test may be satisfied by annual training.

(ii) [Reserved]

(e) Each railroad's program shall indicate the action the railroad will take in the event that it finds deficiencies with a conductor's performance during an unannounced compliance test administered in accordance with this section.

(f) A certified conductor who is not performing a service that requires certification pursuant to this part need not be given an unannounced compliance test. However, when the certified conductor returns to a service that requires certification pursuant to this part, that certified conductor must be tested pursuant to this section within 30 days of his or her return.

**§ 242.125 Certification determinations made by other railroads.**

(a) A railroad that is considering certification of a person as a conductor may rely on determinations made by another railroad concerning that person's certification. The railroad's certification program shall address how the railroad will administer the training of previously uncertified conductors with extensive operating experience or previously certified conductors who have had their certification expire. If a railroad's certification program fails to specify how it will train a previously certified conductor hired from another railroad, then the railroad shall require the newly hired conductor to take the hiring railroad's entire training program.

(b) A railroad relying on another railroad's certification shall determine that:

(1) The prior certification is still valid in accordance with the provisions of §§ 242.201 and 242.407;

(2) The prior certification was for the same type of service as the certification being issued under this section;

(3) The person has received training on the physical characteristics of the new territory in accordance with § 242.119; and

(4) The person has demonstrated the necessary knowledge concerning the railroad's operating rules in accordance with § 242.121.

**§ 242.127 Reliance on qualification requirements of other countries.**

(a) A Canadian railroad that is required to comply with this regulation or a railroad that conducts joint operations with a Canadian railroad may certify that a person is eligible to be a conductor provided it determines that:

(1) The person is employed by the Canadian railroad; and

(2) The person meets or exceeds the qualifications standards issued by Transport Canada for such service.

## Subpart C—Administration of the Certification Program

**§ 242.201 Time limitations for certification.**

(a) After the pertinent date in § 242.105(d) or (e), a railroad shall not certify or recertify a person as a conductor in any type of service, if the railroad is making:

(1) A determination concerning eligibility under §§ 242.111, 242.113, 242.115 and 242.403 and the eligibility data being relied on was furnished more than 366 days before the date of the railroad's certification decision;

(2) A determination concerning visual and hearing acuity and the medical examination being relied on was conducted more than 450 days before the date of the railroad's certification decision;

(3) A determination concerning demonstrated knowledge and the

knowledge examination being relied on was conducted more than 366 days before the date of the railroad's certification decision; or

(4) A determination concerning demonstrated knowledge and the knowledge examination being relied on was conducted more than 24 months before the date of the railroad's recertification decision if the railroad administers a knowledge testing program pursuant to § 242.121 at intervals that do not exceed 24 months.

(b) The time limitations of paragraph (a) of this section do not apply to a railroad that is making a certification decision in reliance on determinations made by another railroad in accordance with paragraph (c)(3) of this section, § 242.125, or § 242.127.

(c) No railroad shall:

(1) Permit or require a person, designated under § 242.105(a) or (b), to perform service as a certified conductor for more than the 36-month period beginning on the pertinent date for compliance with the mandatory procedures for testing and evaluation set forth in the applicable provisions of § 242.105(d) or (e) unless that person has been determined to be eligible in accordance with procedures that comply with subpart B of this part.

(2) Certify a person as a conductor for an interval of more than 36 months; or

(3) Rely on a certification issued by another railroad that is more than 36 months old.

(d) Except as provided for in § 242.105 concerning initial implementation of the program, a railroad shall issue each person designated as a certified conductor a certificate that complies with § 242.207 no later than 30 days from the date of its decision to certify or recertify that person.

**§ 242.203 Retaining information supporting determinations.**

(a) After the pertinent date in § 242.105(d) or (e), a railroad that issues, denies, or revokes a certificate after making the determinations required under § 242.109 shall maintain a record for each certified conductor or applicant for certification that contains the information the railroad relied on in making the determinations.

(b) A railroad shall retain the following information:

(1) Relevant data from the railroad's records concerning the person's prior safety conduct;

(2) Relevant data furnished by another railroad;

(3) Relevant data furnished by a governmental agency concerning the person's motor vehicle driving record;

(4) Relevant data furnished by the person seeking certification concerning his or her eligibility;

(5) The relevant test results data concerning hearing and vision acuity;

(6) If applicable, the relevant data concerning the professional opinion of the railroad's medical examiner on the adequacy of the person's hearing or vision acuity;

(7) Relevant data from the railroad's records concerning the person's success or failure of the passage of knowledge test(s) under § 242.121;

(8) A sample copy of the written knowledge test or tests administered; and

(9) The relevant data from the railroad's records concerning the person's success or failure on unannounced operating rules compliance tests the railroad performed to monitor the conductor's performance in accordance with § 242.123.

(c) If a railroad is relying on successful completion of an approved training program conducted by another entity, the relying railroad shall maintain a record for each certified conductor that contains the relevant data furnished by the training entity concerning the person's demonstration of knowledge and relied on by the railroad in making its determinations.

(d) If a railroad is relying on a certification decision initially made by another railroad, the relying railroad shall maintain a record for each certified conductor that contains the relevant data furnished by the other railroad which it relied on in making its determinations.

(e) All records required under this section shall be retained for a period of six years from the date of the certification, recertification, denial or revocation decision and shall be made available to FRA representatives upon request during normal business hours.

(f) It shall be unlawful for any railroad to knowingly or any individual to willfully:

(1) Make, cause to be made, or participate in the making of a false entry on the record(s) required by this section; or

(2) Otherwise falsify such records through material misstatement, omission, or mutilation.

(g) Nothing in this section precludes a railroad from maintaining the information required to be retained under this section in an electronic format provided that:

(1) The railroad maintains an information technology security program adequate to ensure the integrity of the electronic data storage system, including the prevention of unauthorized access to the program logic or individual records;

(2) The program and data storage system must be protected by a security system that utilizes an employee identification number and password, or a comparable method, to establish appropriate levels of program access meeting all of the following standards:

(i) No two individuals have the same electronic identity; and

(ii) A record cannot be deleted or altered by any individual after the record is certified by the employee who created the record;

(3) Any amendment to a record is either:

(i) Electronically stored apart from the record that it amends; or

(ii) Electronically attached to the record as information without changing the original record;

(4) Each amendment to a record uniquely identifies the person making the amendment;

(5) The system employed by the railroad for data storage permits reasonable access and retrieval of the information in usable format when requested to furnish data by FRA representatives; and

(6) Information retrieved from the system can be easily produced in a printed format which can be readily provided to FRA representatives in a timely manner and authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by FRA representatives.

**§ 242.205 Identification of certified persons and record keeping.**

(a) After March 1, 2012, a railroad shall maintain a list identifying each person designated as a certified conductor. That list shall indicate the types of service the railroad determines each person is authorized to perform and date of the railroad's certification decision.

(b) If a railroad employs conductors working in joint operations territory, the list shall include person(s) determined by that railroad to be certified as conductor(s) and possessing the necessary territorial qualifications for the applicable territory in accordance with § 242.301.

(c) The list required by paragraphs (a) and (b) of this section shall:

(1) Be updated at least annually;

(2) Be available at the divisional or regional headquarters of the railroad; and

(3) Be available for inspection or copying by FRA during regular business hours.

(d) It shall be unlawful for any railroad to knowingly or any individual to willfully:

(1) Make, cause to be made, or participate in the making of a false entry on the list required by this section; or

(2) Otherwise falsify such list through material misstatement, omission, or mutilation.

(e) Nothing in this section precludes a railroad from maintaining the list required by this section in an electronic format provided that:

(1) The railroad maintains an information technology security program adequate to ensure the integrity of the electronic data storage system, including the prevention of unauthorized access to the program logic or the list;

(2) The program and data storage system must be protected by a security system that utilizes an employee identification number and password, or a comparable method, to establish appropriate levels of program access meeting all of the following standards:

(i) No two individuals have the same electronic identity; and

(ii) An entry on the list cannot be deleted or altered by any individual after the entry is certified by the employee who created the entry;

(3) Any amendment to the list is either:

(i) Electronically stored apart from the entry on the list that it amends; or

(ii) Electronically attached to the entry on the list as information without changing the original entry;

(4) Each amendment to the list uniquely identifies the person making the amendment;

(5) The system employed by the railroad for data storage permits reasonable access and retrieval of the information in usable format when requested to furnish data by FRA representatives; and

(6) Information retrieved from the system can be easily produced in a printed format which can be readily provided to FRA representatives in a timely manner and authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by FRA representatives.

### § 242.207 Certificate components.

(a) At a minimum, each certificate issued in compliance with this part shall:

(1) Identify the railroad or parent company that is issuing it;

(2) Indicate that the railroad, acting in conformity with this part, has determined that the person to whom it is being issued has been determined to be eligible to perform as a conductor or as a passenger conductor;

(3) Identify the person to whom it is being issued (including the person's name, employee identification number, and either the year of birth or photograph of the person);

(4) Identify any conditions or limitations, including the type of service or conditions to ameliorate vision or hearing acuity deficiencies, that restrict the person's operational authority;

(5) Show the effective date of each certification held;

(6) Be signed by an individual designated in accordance with paragraph (b) of this section; and

(7) Be of sufficiently small size to permit being carried in an ordinary pocket wallet.

(b) Each railroad shall designate in writing any person that it authorizes to sign the certificates described in this section. The designation shall identify such persons by name or job title.

(c) Nothing in paragraph (a) of this section shall prohibit any railroad from including additional information on the certificate or supplementing the certificate through other documents.

(d) It shall be unlawful for any railroad to knowingly or any individual to willfully:

(1) Make, cause to be made, or participate in the making of a false entry on that certificate; or

(2) Otherwise falsify that certificate through material misstatement, omission, or mutilation.

### § 242.209 Maintenance of the certificate.

(a) Each conductor who has received a certificate required under this part shall:

(1) Have that certificate in his or her possession while on duty as a conductor; and

(2) Display that certificate upon the receipt of a request to do so from:

(i) A representative of the Federal Railroad Administration,

(ii) A State inspector authorized under part 212 of this chapter,

(iii) An officer of the issuing railroad, or

(iv) An officer of another railroad when serving as a conductor in joint operations territory.

(b) Any conductor who is notified or called to serve as a conductor and such service would cause the conductor to exceed certificate limitations, set forth in accordance with subpart B of this part, shall immediately notify the railroad that he or she is not authorized to perform that anticipated service and it shall be unlawful for the railroad to require such service.

(c) Nothing in this section shall be deemed to alter a certified conductor's duty to comply with other provisions of this chapter concerning railroad safety.

### § 242.211 Replacement of certificates.

(a) A railroad shall have a system for the prompt replacement of lost, stolen or mutilated certificates at no cost to conductors. That system shall be reasonably accessible to certified conductors in need of a replacement certificate or temporary replacement certificate.

(b) At a minimum, a temporary replacement certificate must identify the person to whom it is being issued (including the person's name, identification number and year of birth); indicate the date of issuance; and be authorized by a designated supervisor. Temporary replacement certificates may be delivered electronically and are valid for a period no greater than 30 days.

### § 242.213 Multiple certifications.

(a) A person may hold certification for multiple types of conductor service.

(b) A person may hold both conductor and locomotive engineer certification.

(c) A railroad that issues multiple certificates to a person, shall, to the extent possible, coordinate the expiration date of those certificates.

(d) Except as provided in paragraph (e) of this section, a locomotive engineer, including a remote control operator, who is operating a locomotive without an assigned certified conductor must either be (i) certified as both a locomotive engineer under part 240 of this chapter and as a conductor under this part or (ii) accompanied by a person certified as a conductor under this part but who will be attached to the crew in a manner similar to that of an independent assignment.

(e) *Passenger Railroad Operations.* If the conductor is removed from a train for a medical, police or other such emergency after the train departs from an initial terminal, the train may proceed to the first location where the conductor can be replaced without incurring undue delay without the locomotive engineer being a certified conductor. However, an assistant conductor or brakeman must be on the train and the locomotive engineer must be informed that there is no certified conductor on the train prior to any movement.

(f) During the duration of any certification interval, a person who holds a current conductor and/or locomotive engineer certificate from more than one railroad shall immediately notify the other certifying railroad(s) if he or she is denied conductor or locomotive engineer recertification under § 242.401 or

§ 240.219 of this chapter or has his or her conductor or locomotive engineer certification revoked under § 242.407 or § 240.307 of this chapter by another railroad.

(g) A person who is certified to perform multiple types of conductor service and who has had any of those certifications revoked under § 242.407 may not perform any type of conductor service during the period of revocation.

(h) A person who holds a current conductor and locomotive engineer certificate and who has had his or her conductor certification revoked under § 242.407 for a violation of § 242.403(e)(1) through (e)(5) or (e)(12) may not work as a locomotive engineer during the period of revocation. However, a person who holds a current conductor and locomotive engineer certificate and who has had his or her conductor certification revoked under § 242.407 for a violation of § 242.403(e)(6) through (e)(11) may work as a locomotive engineer during the period of revocation.

(1) For purposes of determining the period for which a person may not work as a certified locomotive engineer due to a revocation of his or her conductor certification, only violations of § 242.403(e)(1) through (e)(5) or (e)(12) will be counted. Thus, a person who holds a current conductor and locomotive engineer certificate and who has had his or her conductor certification revoked three times in less than 36 months for two violations of § 242.403(e)(6) and one violation of § 242.403(e)(1) would have his or her conductor certificate revoked for 1 year, but would not be permitted to work as a locomotive engineer for one month (*i.e.,* the period of revocation for one violation of § 242.403(e)(1)).

(i) A person who holds a current conductor and locomotive engineer certificate and who has had his or her locomotive engineer certification revoked under § 240.307 of this chapter may not work as a conductor during the period of revocation.

(j) A person who has had his or her locomotive engineer certification revoked under § 240.307 of this chapter may not obtain a conductor certificate pursuant to this part during the period of revocation.

(k) A person who had his or her conductor certification revoked under § 242.407 for violations of § 242.403(e)(1) through (e)(5) or (e)(12) may not obtain a locomotive engineer certificate pursuant to part 240 of this chapter during the period of revocation.

(l) A railroad that denies a person conductor certification or recertification under § 242.401 shall not, solely on the basis of that denial, deny or revoke that person's locomotive engineer certification or recertification.

(m) A railroad that denies a person locomotive engineer certification or recertification under § 240.219 of this chapter shall not, solely on the basis of that denial, deny or revoke that person's conductor certification or recertification.

(n) In lieu of issuing multiple certificates, a railroad may issue one certificate to a person who is certified to perform multiple types of conductor service or is certified as a conductor and a locomotive engineer. The certificate must comply with § 240.223 of this chapter and § 242.207.

**§ 242.215 Railroad oversight responsibilities.**

(a) No later than March 31 of each year (beginning in calendar year (TO BE INSERTED IN FINAL RULE)), each Class I railroad (including the National Railroad Passenger Corporation and a railroad providing commuter service) and each Class II railroad shall conduct a formal annual review and analysis concerning the administration of its program for responding to detected instances of poor safety conduct by certified conductors during the prior calendar year.

(b) Each review and analysis shall involve:

(1) The number and nature of the instances of detected poor safety conduct including the nature of the remedial action taken in response thereto;

(2) The number and nature of FRA reported train accidents attributed to poor safety performance by conductors;

(3) The number and type of operational monitoring test failures recorded by railroad officers who meet the requirements of § 217.9(b)(1) of this chapter; and

(4) If the railroad conducts joint operations with another railroad, the number of conductors employed by the other railroad(s) which: were involved in events described in this paragraph and were determined to be certified and to have possessed the necessary territorial qualifications for joint operations purposes by the controlling railroad.

(c) Based on that review and analysis, each railroad shall determine what action(s) it will take to improve the safety of railroad operations to reduce or eliminate future incidents of that nature.

(d) If requested in writing by FRA, the railroad shall provide a report of the findings and conclusions reached during such annual review and analysis effort.

(e) For reporting purposes, information about the nature of detected poor safety conduct shall be capable of segregation for study and evaluation purposes into the following categories:

(1) Incidents involving noncompliance with part 218 of this chapter;

(2) Incidents involving noncompliance with part 219 of this chapter;

(3) Incidents involving noncompliance with the procedures for the safe use of train or engine brakes when the procedures are required for compliance with the Class I, Class IA, Class II, Class III, or transfer train brake test provisions of part 232 of this chapter or when the procedures are required for compliance with the Class 1, Class 1A, Class II, or running brake test provisions of part 238 of this chapter;

(4) Incidents involving noncompliance with the railroad's operating rules involving operation of a locomotive or train to operate at a speed that exceeds the maximum authorized limit;

(5) Incidents involving noncompliance with the railroad's operating rules resulting in operation of a locomotive or train past any signal, excluding a hand or a radio signal indication or a switch, that requires a complete stop before passing it;

(6) Incidents involving noncompliance with the provisions of restricted speed, and the operational equivalent thereof, that must be reported under the provisions of part 225 of this chapter;

(7) Incidents involving occupying main track or a segment of main track without proper authority or permission; and

(8) Incidents involving the failure to comply with prohibitions against tampering with locomotive mounted safety devices, or knowingly operating or permitting to be operated a train with an unauthorized or disabled safety device in the controlling locomotive.

(f) For reporting purposes, an instance of poor safety conduct involving a person who holds both conductor certification pursuant to this part and locomotive engineer certification pursuant to part 240 of this chapter need only be reported once (either under 49 CFR 240.309 of this chapter or this section). The determination as to where to report the instance of poor safety conduct should be based on the work the person was performing at the time the conduct occurred.

(g) For reporting purposes each category of detected poor safety conduct identified in paragraph (b) of this

section shall be capable of being annotated to reflect the following:

(1) The nature of the remedial action taken and the number of events subdivided so as to reflect which of the following actions was selected:

(i) Imposition of informal discipline;

(ii) Imposition of formal discipline;

(iii) Provision of informal training; or

(iv) Provision of formal training; and

(2) If the nature of the remedial action taken was formal discipline, the number of events further subdivided so as to reflect which of the following punishments was imposed by the hearing officer:

(i) The person was withheld from service;

(ii) The person was dismissed from employment or

(iii) The person was issued demerits. If more than one form of punishment was imposed only that punishment deemed the most severe shall be shown.

(h) For reporting purposes each category of detected poor safety conduct identified in paragraph (b) of this section which resulted in the imposition of formal or informal discipline shall be annotated to reflect the following:

(1) The number of instances in which the railroad's internal appeals process reduced the punishment initially imposed at the conclusion of its hearing; and

(2) The number of instances in which the punishment imposed by the railroad was reduced by any of the following entities: The National Railroad Adjustment Board, a Public Law Board, a Special Board of Adjustment or other body for the resolution of disputes duly constituted under the provisions of the Railway Labor Act.

(i) For reporting purposes, each category of detected poor safety conduct identified in paragraph (b) of this section shall be capable of being annotated to reflect the following:

(1) The total number of incidents in that category;

(2) The number of incidents within that total which reflect incidents requiring an FRA accident/incident report; and

(3) The number of incidents within that total which were detected as a result of a scheduled operational monitoring effort.

(ii) [Reserved]

## Subpart D—Territorial Qualification and Joint Operations

### § 242.301 Requirements for territorial qualification.

(a) Except as provided in paragraph (c) or (d) of this section, a railroad, including a railroad that employs conductors working in joint operations territory, shall not permit or require a person to serve as a conductor unless that railroad determines that the person is certified as a conductor and possesses the necessary territorial qualifications for the applicable territory pursuant to § 242.119.

(b) Each person who is called to serve as a conductor shall:

(1) Meet the territorial qualification requirements on the segment of track upon which he or she will serve as a conductor; and

(2) Immediately notify the railroad upon which he or she is employed if he or she does not meet the required territorial qualifications.

(c) If a conductor lacks territorial qualification on main track physical characteristics required by paragraph (a) of this section, he or she shall be assisted by a person who is a certified conductor or certified locomotive engineer and meets the territorial qualification requirements for the main track physical characteristics.

(d) If a conductor lacks territorial qualification on other than main track physical characteristics required by paragraph (a) of this section, where practicable, he or she shall be assisted by a person who is a certified conductor and meets the territorial qualification requirements for other than main track physical characteristics. Where not practicable, the conductor should be provided an appropriate up-to-date job aid.

## Subpart E—Denial and Revocation of Certification

### § 242.401 Denial of certification.

(a) A railroad shall notify a candidate for certification or recertification of information known to the railroad that forms the basis for denying the person certification and provide the person a reasonable opportunity to explain or rebut that adverse information in writing prior to denying certification.

(b) This section does not require further opportunity to comment if the railroad's denial is based solely on factors addressed by §§ 242.111, 242.115, or 242.403 and the opportunity to comment afforded by § 242.109 has been provided.

(c) If a railroad denies a person certification or recertification, it shall notify the person of the adverse decision and explain, in writing, the basis for its denial decision. The document explaining the basis for the denial shall be served on the person within 10 days after the railroad's decision and shall give the date of the decision.

(d) A railroad shall not determine that a person failed to meet the eligibility requirements of this part and shall not deny the person's certification if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the conductor's ability to comply with the railroad operating rule or practice which constitutes a violation under § 242.403(e)(1) through (e)(11) of this part.

### § 242.403 Criteria for revoking certification.

(a) Each railroad shall adopt and comply with a program which meets the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) It shall be unlawful to fail to comply with any of the railroad rules and practices described in paragraph (e) of this section.

(c)(1) A certified conductor who has demonstrated a failure to comply with railroad rules and practices described in paragraph (e) of this section shall have his or her certification revoked.

(2) A certified conductor who is monitoring, piloting, or instructing a conductor and fails to take appropriate action to prevent a violation of paragraph (e) of this section shall have his or her certification revoked. Appropriate action does not mean that a supervisor, pilot, or instructor must prevent a violation from occurring at all costs; the duty may be met by warning the conductor or the engineer, as appropriate, of a potential or foreseeable violation.

(3) A certified conductor who is called by a railroad to perform the duty of a train crew member other than that of conductor or locomotive engineer shall not have his or her certification revoked based on actions taken or not taken while performing that duty.

(d) *Limitations on consideration of prior operating rule compliance data.* In determining whether a person may be or remain certified as a conductor, a railroad shall consider as operating rule compliance data only conduct described in paragraphs (e)(1) through (e)(11) of this section that occurred within a period of 36 consecutive months prior to the determination. A review of an existing certification shall be initiated promptly upon the occurrence and documentation of any conduct described in this section.

(e) A railroad shall only consider violations of its operating rules and practices that involve:

(1) Failure to take appropriate action to prevent the locomotive engineer of the train the conductor is assigned to from failing to control a locomotive or train in accordance with a signal indication, excluding a hand or a radio signal indication or a switch, that requires a complete stop before passing it, when the conductor is located in the operating cab, or otherwise has knowledge of the signal indication. Appropriate action does not mean that a conductor must prevent a violation from occurring at all costs; the duty may be met by warning an engineer of a potential or foreseeable violation.

(2) Failure to take appropriate action to prevent the locomotive engineer of the train the conductor is assigned to from failing to adhere to limitations concerning train speed:

(i) When the conductor is located in the operating cab and the speed at which the train was operated exceeds the maximum authorized limit by at least 10 miles per hour. Where restricted speed is in effect, railroads shall consider only those violations of the conditional clause of restricted speed rules (*i.e.,* the clause that requires stopping within one half of the locomotive engineer's range of vision), or the operational equivalent thereof, which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter. Appropriate action does not mean that a conductor must prevent a violation from occurring at all costs; the duty may be met by warning an engineer of a potential or foreseeable violation.

(ii) When not in the operating cab, the conductor is deemed to have taken appropriate action when in compliance with all applicable Railroad Operating Rules and Special Instructions.

(3) Failure to perform or have knowledge that a required brake test was performed pursuant to the Class I, Class IA, Class II, Class III, or transfer train brake test provisions of part 232 of this chapter or the Class 1, Class 1A, Class II, or running brake test provisions of part 238 of this chapter.

(4) Occupying main track or a segment of main track without proper authority or permission.

(5) Failure to comply with prohibitions against tampering with locomotive mounted safety devices; knowingly fail to take appropriate action to prevent the locomotive engineer of the train the conductor is assigned to from failing to comply with prohibitions against tampering with locomotive mounted safety devices; or knowingly fail to take appropriate action to prevent the locomotive engineer of the train the conductor is assigned to from operating or permitting to be operated a train with an unauthorized disabled safety device in the controlling locomotive. (*See* 49 CFR part 218, subpart D and appendix C to part 218);

(6) Failure to comply with the provisions of § 218.99 of this chapter (Shoving or pushing movements). Railroads shall only consider those violations of § 218.99 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter.

(7) Failure to comply with the provisions of § 218.101 of this chapter (Leaving rolling and on-track maintenance-of-way equipment in the clear). Railroads shall only consider those violations of § 218.101 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter.

(8) Failure to comply with the provisions of § 218.103 of this chapter (Hand-operated switches, including crossover switches). Railroads shall only consider those violations of § 218.103 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter.

(9) Failure to comply with the provisions of § 218.105 of this chapter (Additional operational requirements for hand-operated main track switches). Railroads shall only consider those violations of § 218.105 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter.

(10) Failure to comply with the provisions of § 218.107 of this chapter (Additional operational requirements for hand-operated crossover switches). Railroads shall only consider those violations of § 218.107 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter.

(11) Failure to comply with the provisions of § 218.109 of this chapter (Hand-operated fixed derails). Railroads shall only consider those violations of § 218.109 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter.

(12) Failure to comply with § 219.101 of this chapter; however such incidents shall be considered as a violation only for the purposes of § 242.405(a)(2) and (3).

(13) A railroad shall not be permitted to deny or revoke an employee's certification based upon additional conditions or operational restrictions imposed pursuant to § 242.107(d).

(f)(1) If in any single incident the person's conduct contravened more than one operating rule or practice, that event shall be treated as a single violation for the purposes of this section.

(2) A violation of one or more operating rules or practices described in paragraphs (e)(1) through (e)(11) of this section that occurs during a properly conducted operational compliance test subject to the provisions of this chapter shall be counted in determining the periods of ineligibility described in § 242.405.

(3) An operational test that is not conducted in compliance with this part, a railroad's operating rules, or a railroad's program under § 217.9 of this chapter, will not be considered a legitimate test of operational skill or knowledge, and will not be considered for certification, recertification or revocation purposes.

**§ 242.405 Periods of ineligibility.**

(a) A period of ineligibility described in this paragraph shall:

(1) Begin, for a person not currently certified, on the date of the railroad's written determination that the most recent incident has occurred; or

(2) Begin, for a person currently certified, on the date of the railroad's notification to the person that recertification has been denied or certification has been revoked; and

(3) Be determined according to the following standards:

(i) On other than main track where restricted speed or the operational equivalent thereof is in effect, the period of revocation for a violation of § 242.403(e)(6) through (e)(8), (e)(10), or (e)(11) shall be reduced by one half provided that another revocable event has not occurred within the previous 12 months.

(ii) In the case of a single incident involving violation of one or more of the operating rules or practices described in § 242.403(e)(1) through (e)(11), the person shall have his or her certificate

revoked for a period of 30 calendar days.

(iii) In the case of two separate incidents involving a violation of one or more of the operating rules or practices described in § 242.403(e)(1) through (e)(11), that occurred within 24 months of each other, the person shall have his or her certificate revoked for a period of six months.

(iv) In the case of three separate incidents involving violations of one or more of the operating rules or practices, described in § 242.403(e)(1) through (e)(12), that occurred within 36 months of each other, the person shall have his or her certificate revoked for a period of one year.

(v) In the case of four separate incidents involving violations of one or more of the operating rules or practices, described in § 242.403(e)(1) through (e)(12), that occurred within 36 months of each other, the person shall have his or her certificate revoked for a period of three years.

(vi) Where, based on the occurrence of violations described in § 242.403(e)(12), different periods of ineligibility may result under the provisions of this section and § 242.115, the longest period of revocation shall control.

(b) Any or all periods of revocation provided in paragraph (a) of this section may consist of training.

(c) *Reduction in period of ineligibility.* A person whose certification is denied or revoked shall be eligible for grant or reinstatement of the certificate prior to the expiration of the initial period of ineligibility only if:

(1) The denial or revocation of certification in accordance with the provisions of paragraph (a)(3) of this section is for a period of one year or less;

(2) Certification is denied or revoked for reasons other than noncompliance with § 219.101 of this chapter;

(3) The person is evaluated by a railroad officer and determined to have received adequate remedial training;

(4) The person successfully completes any mandatory program of training or retraining, if that is determined to be necessary by the railroad prior to return to service; and

(5) At least one half the pertinent period of ineligibility specified in paragraph (a)(3) of this section has elapsed.

**§ 242.407 Process for revoking certification.**

(a) Except as provided for in § 242.115(g), a railroad that certifies or recertifies a person as a conductor and, during the period that certification is valid, acquires reliable information regarding violation(s) of § 242.403(e) or § 242.115(e) of this chapter shall revoke the person's conductor certificate.

(b) Pending a revocation determination under this section, the railroad shall:

(1) Upon receipt of reliable information regarding violation(s) of § 242.403(e) or § 242.115(e) of this chapter, immediately suspend the person's certificate;

(2) Prior to or upon suspending the person's certificate, provide notice of the reason for the suspension, the pending revocation, and an opportunity for a hearing before a presiding officer other than the investigating officer. The notice may initially be given either orally or in writing. If given orally, it must be confirmed in writing and the written confirmation must be made promptly. Written confirmation which conforms to the notification provisions of an applicable collective bargaining agreement shall be deemed to satisfy the written confirmation requirements of this section. In the absence of an applicable collective bargaining agreement provision, the written confirmation must be made within 96 hours.

(3) Convene the hearing within the deadline prescribed by either paragraph (c)(1) of this section or the applicable collective bargaining agreement as permitted under paragraph (d) of this section;

(4) No later than the convening of the hearing and notwithstanding the terms of an applicable collective bargaining agreement, the railroad convening the hearing shall provide the person with a copy of the written information and list of witnesses the railroad will present at the hearing. If requested, a recess to the start of the hearing will be granted if that information is not provided until just prior to the convening of the hearing. If the information was provided through statements of an employee of the convening railroad, the railroad will make that employee available for examination during the hearing required by paragraph (b)(3) of this section. Examination may be telephonic where it is impractical to provide the witness at the hearing.

(5) Determine, on the record of the hearing, whether the person no longer meets the certification requirements of this part stating explicitly the basis for the conclusion reached;

(6) When appropriate, impose the pertinent period of revocation provided for in § 242.405 or § 242.115; and

(7) Retain the record of the hearing for 3 years after the date the decision is rendered.

(c) Except as provided for in paragraphs (d), (f), (i) and (j) of this section, a hearing required by this section shall be conducted in accordance with the following procedures:

(1) The hearing shall be convened within 10 days of the date the certificate is suspended unless the conductor requests or consents to delay in the start of the hearing.

(2) The hearing shall be conducted by a presiding officer, who can be any proficient person authorized by the railroad other than the investigating officer.

(3) The presiding officer will exercise the powers necessary to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in controversy.

(4) The presiding officer shall convene and preside over the hearing.

(5) Testimony by witnesses at the hearing shall be recorded verbatim.

(6) All relevant and probative evidence shall be received unless the presiding officer determines the evidence to be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

(7) The presiding officer may:

(i) Adopt any needed procedures for the submission of evidence in written form;

(ii) Examine witnesses at the hearing;

(iii) Convene, recess, adjourn or otherwise regulate the course of the hearing; and

(iv) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of the proceeding.

(8) Parties may appear and be heard on their own behalf or through designated representatives. Parties may offer relevant evidence including testimony and may conduct such examination of witnesses as may be required for a full disclosure of the relevant facts.

(9) The record in the proceeding shall be closed at conclusion of the hearing unless the presiding officer allows additional time for the submission of information. In such instances the record shall be left open for such time as the presiding officer grants for that purpose.

(10) No later than 10 days after the close of the record, a railroad official, other than the investigating officer, shall prepare and sign a written decision in the proceeding.

(11) The decision shall:

(i) Contain the findings of fact as well as the basis therefor, concerning all material issues of fact presented on the record; and

(ii) Be served on the employee.

(12) The railroad shall have the burden of proving that the conductor's conduct was not in compliance with the applicable railroad operating rule or practice or part 219 of this chapter.

(d) A hearing required by this section which is conducted in a manner that conforms procedurally to the applicable collective bargaining agreement shall be deemed to satisfy the procedural requirements of this section.

(e) A hearing required under this section may be consolidated with any disciplinary or other hearing arising from the same facts, but in all instances a railroad official, other than the investigating officer, shall make separate findings as to the revocation required under this section.

(f) A person may waive the right to the hearing provided under this section. That waiver shall:

(1) Be made in writing;

(2) Reflect the fact that the person has knowledge and understanding of these rights and voluntarily surrenders them; and

(3) Be signed by the person making the waiver.

(g) A railroad that has relied on the certification by another railroad under the provisions of § 242.127 or § 242.301, shall revoke its certification if, during the period that certification is valid, the railroad acquires information which convinces it that another railroad has revoked its certification in accordance with the provisions of this section. The requirement to provide a hearing under this section is satisfied when any single railroad holds a hearing and no additional hearing is required prior to a revocation by more than one railroad arising from the same facts.

(h) The period of certificate suspension prior to the commencement of a hearing required under this section shall be credited towards satisfying any applicable revocation period imposed in accordance with the provisions of § 242.405.

(i) A railroad:

(1) Shall not revoke the person's certification as provided for in paragraph (a) of this section if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the conductor's ability to comply with the railroad operating rule or practice which constitutes a violation under § 242.403(e)(1) through (e)(11); or

(2) May decide not to revoke the person's certification as provided for in paragraph (a) of this section if sufficient evidence exists to establish that the violation of § 242.403(e)(1) through (e)(11) was of a minimal nature and had no direct or potential effect on rail safety.

(j) The railroad shall place the relevant information in the records maintained in compliance with § 242.215 for Class I (including the National Railroad Passenger Corporation) and Class II railroads, and § 242.203 for Class III railroads if sufficient evidence meeting the criteria provided in paragraph (i) of this section, becomes available either:

(1) Prior to a railroad's action to suspend the certificate as provided for in paragraph (b)(1) of this section; or

(2) Prior to the convening of the hearing provided for in this section;

(k) Provided that the railroad makes a good faith determination after a reasonable inquiry that the course of conduct provided for in paragraph (i) of this section is appropriate, the railroad which does not suspend a conductor's certification, as provided for in paragraph (b) of this section, is not in violation of paragraph (a) of this section.

## Subpart F—Dispute Resolution Procedures

### § 242.501 Review board established.

(a) Any person who has been denied certification, denied recertification, or has had his or her certification revoked and believes that a railroad incorrectly determined that he or she failed to meet the certification requirements of this regulation when making the decision to deny or revoke certification, may petition the Federal Railroad Administrator to review the railroad's decision.

(b) The Administrator has delegated initial responsibility for adjudicating such disputes to the Operating Crew Review Board.

(c) The Operating Crew Review Board shall be composed of employees of the Federal Railroad Administration selected by the Administrator.

### § 242.503 Petition requirements.

(a) To obtain review of a railroad's decision to deny certification, deny recertification, or revoke certification, a person shall file a petition for review that complies with this section.

(b) Each petition shall:

(1) Be in writing;

(2) Be submitted in triplicate to the Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590;

(3) Contain all available information that the person thinks supports the person's belief that the railroad acted improperly, including:

(i) The petitioner's full name;

(ii) The petitioner's current mailing address;

(iii) The petitioner's daytime telephone number;

(iv) The petitioner's e-mail address (if available);

(v) The name and address of the railroad; and

(vi) The facts that the petitioner believes constitute the improper action by the railroad, specifying the locations, dates, and identities of all persons who were present or involved in the railroad's actions (to the degree known by the petitioner);

(4) Explain the nature of the remedial action sought;

(5) Be supplemented by a copy of all written documents in the petitioner's possession or reasonably available to the petitioner that document that railroad's decision; and

(6) Be filed in a timely manner.

(c) A petition seeking review of a railroad's decision to deny certification or recertification or revoke certification in accordance with the procedures required by § 242.407 filed with FRA more than 120 days after the date the railroad's denial or revocation decision was served on the petitioner will be denied as untimely except that the Operating Crew Review Board for cause shown may extend the petition filing period at any time in its discretion:

(1) Provided the request for extension is filed before the expiration of the period provided in this paragraph; or

(2) Provided that the failure to timely file was the result of excusable neglect.

(d) A party aggrieved by a Board decision to deny a petition as untimely or not in compliance with the requirements of this section may file an appeal with the Administrator in accordance with § 242.511.

### § 242.505 Processing certification review petitions.

(a) Each petition shall be acknowledged in writing by FRA. The acknowledgment shall contain the docket number assigned to the petition and a statement of FRA's intention that the Board will render a decision on this petition within 180 days from the date that the railroad's response is received or from the date upon which the railroad's response period has lapsed pursuant to paragraph (c) of this section.

(b) Upon receipt of the petition, FRA will notify the railroad that it has received the petition and provide the railroad with a copy of the petition.

(c) Within 60 days from the date of the notification provided in paragraph

(b) of this section, the railroad may submit to FRA any information that the railroad considers pertinent to the petition. Late filings will only be considered to the extent practicable.

(d) A railroad that submits such information shall:

(1) Identify the petitioner by name and the docket number of the review proceeding;

(2) Serve copy of the information being submitted to FRA to the petitioner and petitioner's representative, if any; and

(3) Submit the information in triplicate to the Docket Clerk, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590.

(e) Each petition will then be referred to the Operating Crew Review Board for a decision.

(f) Based on the record, the Board shall have the authority to grant, deny, dismiss or remand the petition.

(g) If the Board finds that there is insufficient basis for granting or denying the petition, the Board shall issue an order affording the parties an opportunity to provide additional information or argument consistent with its findings.

(h) *Standard of review for factual issues.* When considering factual issues, the Board will determine whether there is substantial evidence to support the railroad's decision, and a negative finding is grounds for granting the petition.

(i) *Standard of review for procedural issues.* When considering procedural issues, the Board will determine whether substantial harm was caused the petitioner by virtue of the failure to adhere to the dictated procedures for making the railroad's decision. A finding of substantial harm is grounds for reversing the railroad's decision. To establish grounds upon which the Board may grant relief, Petitioner must show:

(1) that procedural error occurred, and

(2) the procedural error caused substantial harm.

(j) *Standard of review for legal issues.* Pursuant to its reviewing role, the Board will consider whether the railroad's legal interpretations are correct based on a *de novo* review.

(k) The Board will determine whether the denial or revocation of certification or recertification was improper under this regulation (*i.e.,* based on an incorrect determination that the person failed to meet the certification requirements of this regulation) and grant or deny the petition accordingly. The Board will not otherwise consider the propriety of a railroad's decision, *i.e.,* it will not consider whether the railroad properly applied its own more stringent requirements.

(l) The Board's written decision shall be served on the petitioner, including the petitioner's representative, if any, and the railroad.

**§ 242.507 Request for a hearing.**

(a) If adversely affected by the Operating Crew Review Board's decision, either the petitioner before the Board or the railroad involved shall have a right to an administrative proceeding as prescribed by § 242.509.

(b) To exercise that right, the adversely affected party shall, within 20 days of service of the Board's decision on that party, file a written request with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M–30), West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. The form of such request may be in written or electronic form consistent with the standards and requirements established by the Federal Docket Management System and posted on its Web site at *http://www.regulations.gov.*

(c) If a party fails to request a hearing within the period provided in paragraph (b) of this section, the Operating Crew Review Board's decision will constitute final agency action.

(d) If a party elects to request a hearing, that person shall submit a written request to the Docket Clerk containing the following:

(1) The name, address, telephone number, and email address (if available) of the respondent and the requesting party's designated representative, if any;

(2) The specific factual issues, industry rules, regulations, or laws that the requesting party alleges need to be examined in connection with the certification decision in question; and

(3) The signature of the requesting party or the requesting party's representative, if any.

(e) Upon receipt of a hearing request complying with paragraph (d) of this section, FRA shall arrange for the appointment of a presiding officer who shall schedule the hearing for the earliest practicable date.

**§ 242.509 Hearings.**

(a) An administrative hearing for a conductor certification petition shall be conducted by a presiding officer, who can be any person authorized by the Administrator, including an administrative law judge.

(b) The presiding officer may exercise the powers of the Administrator to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in controversy.

(c) The presiding officer shall convene and preside over the hearing. The hearing shall be a de novo hearing to find the relevant facts and determine the correct application of this part to those facts. The presiding officer may determine that there is no genuine issue covering some or all material facts and limit evidentiary proceedings to any issues of material fact as to which there is a genuine dispute.

(d) The presiding officer may authorize discovery of the types and quantities which in the presiding officer's discretion will contribute to a fair hearing without unduly burdening the parties. The presiding officer may impose appropriate non-monetary sanctions, including limitations as to the presentation of evidence and issues, for any party's willful failure or refusal to comply with approved discovery requests.

(e) Every petition, motion, response, or other authorized or required document shall be signed by the party filing the same, or by a duly authorized officer or representative of record, or by any other person. If signed by such other person, the reason therefor must be stated and the power of attorney or other authority authorizing such other person to subscribe the document must be filed with the document. The signature of the person subscribing any document constitutes a certification that he or she has read the document; that to the best of his or her knowledge, information and belief every statement contained in the document is true and no such statements are misleading; and that it is not interposed for delay or to be vexatious.

(f) After the request for a hearing is filed, all documents filed or served upon one party must be served upon all parties. Each party may designate a person upon whom service is to be made when not specified by law, regulation, or directive of the presiding officer. If a party does not designate a person upon whom service is to be made, then service may be made upon any person having subscribed to a submission of the party being served, unless otherwise specified by law, regulation, or directive of the presiding officer. Proof of service shall accompany all documents when they are tendered for filing.

(g) If any document initiating, filed, or served in, a proceeding is not in substantial compliance with the applicable law, regulation, or directive of the presiding officer, the presiding officer may strike or dismiss all or part of such document, or require its amendment.

(h) Any party to a proceeding may appear and be heard in person or by an authorized representative.

(i) Any person testifying at a hearing or deposition may be accompanied, represented, and advised by an attorney or other representative, and may be examined by that person.

(j) Any party may request to consolidate or separate the hearing of two or more petitions by motion to the presiding officer, when they arise from the same or similar facts or when the matters are for any reason deemed more efficiently heard together.

(k) Except as provided in § 242.507(c) and paragraph (u)(4) of this section, whenever a party has the right or is required to take action within a period prescribed by this part, or by law, regulation, or directive of the presiding officer, the presiding officer may extend such period, with or without notice, for good cause, provided another party is not substantially prejudiced by such extension. A request to extend a period which has already expired may be denied as untimely.

(l) An application to the presiding officer for an order or ruling not otherwise specifically provided for in this part shall be by motion. The motion shall be filed with the presiding officer and, if written, served upon all parties. All motions, unless made during the hearing, shall be written. Motions made during hearings may be made orally on the record, except that the presiding officer may direct that any oral motion be reduced to writing. Any motion shall state with particularity the grounds therefor and the relief or order sought, and shall be accompanied by any affidavits or other evidence desired to be relied upon which is not already part of the record. Any matter submitted in response to a written motion must be filed and served within fourteen (14) days of the motion, or within such other period as directed by the presiding officer.

(m) Testimony by witnesses at the hearing shall be given under oath and the hearing shall be recorded verbatim. The presiding officer shall give the parties to the proceeding adequate opportunity during the course of the hearing for the presentation of arguments in support of or in opposition to motions, and objections and exceptions to rulings of the presiding officer. The presiding officer may permit oral argument on any issues for which the presiding officer deems it appropriate and beneficial. Any evidence or argument received or proffered orally shall be transcribed and made a part of the record. Any physical evidence or written argument received or proffered shall be made a part of the record, except that the presiding officer may authorize the substitution of copies, photographs, or descriptions, when deemed to be appropriate.

(n) The presiding officer shall employ the Federal Rules of Evidence for United States Courts and Magistrates as general guidelines for the introduction of evidence. Notwithstanding paragraph (m) of this section, all relevant and probative evidence shall be received unless the presiding officer determines the evidence to be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

(o) The presiding officer may:

(1) Administer oaths and affirmations;

(2) Issue subpoenas as provided for in § 209.7 of this chapter;

(3) Adopt any needed procedures for the submission of evidence in written form;

(4) Examine witnesses at the hearing;

(5) Convene, recess, adjourn or otherwise regulate the course of the hearing; and

(6) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of the proceeding.

(p) The petitioner before the Operating Crew Review Board, the railroad involved in taking the certification action, and FRA shall be parties at the hearing. All parties may participate in the hearing and may appear and be heard on their own behalf or through designated representatives. All parties may offer relevant evidence, including testimony, and may conduct such cross-examination of witnesses as may be required to make a record of the relevant facts.

(q) The party requesting the administrative hearing shall be the "hearing petitioner." The hearing petitioner shall have the burden of proving its case by a preponderance of the evidence. Hence, if the hearing petitioner is the railroad involved in taking the certification action, that railroad will have the burden of proving that its decision to deny certification, deny recertification, or revoke certification was correct. Conversely, if the petitioner before the Operating Crew Review Board is the hearing petitioner, that person will have the burden of proving that the railroad's decision to deny certification, deny recertification, or revoke certification was incorrect. The party who is not the hearing petitioner will be a respondent.

(r) FRA will be a mandatory party to the administrative hearing. At the start of each proceeding, FRA will be a respondent.

(s) The record in the proceeding shall be closed at the conclusion of the evidentiary hearing unless the presiding officer allows additional time for the submission of additional evidence. In such instances the record shall be left open for such time as the presiding officer grants for that purpose.

(t) At the close of the record, the presiding officer shall prepare a written decision in the proceeding.

(u) The decision:

(1) Shall contain the findings of fact and conclusions of law, as well as the basis for each concerning all material issues of fact or law presented on the record;

(2) Shall be served on the hearing petitioner and all other parties to the proceeding;

(3) Shall not become final for 35 days after issuance;

(4) Constitutes final agency action unless an aggrieved party files an appeal within 35 days after issuance; and

(5) Is not precedential.

**§ 242.511 Appeals.**

(a) Any party aggrieved by the presiding officer's decision may file an appeal. The appeal must be filed within 35 days of issuance of the decision with the Federal Railroad Administrator, 1200 New Jersey Avenue, SE., Washington, DC 20590 and with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M–30), West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. A copy of the appeal shall be served on each party. The appeal shall set forth objections to the presiding officer's decision, supported by reference to applicable laws and regulations and with specific reference to the record. If no appeal is timely filed, the presiding officer's decision constitutes final agency action.

(b) A party may file a reply to the appeal within 25 days of service of the appeal. The reply shall be supported by reference to applicable laws and regulations and with specific reference to the record, if the party relies on evidence contained in the record.

(c) The Administrator may extend the period for filing an appeal or a response for good cause shown, provided that the written request for extension is served before expiration of the applicable period provided in this section.

(d) The Administrator has sole discretion to permit oral argument on the appeal. On the Administrator's own initiative or written motion by any party, the Administrator may grant the

parties an opportunity for oral argument.

(e) The Administrator may remand, vacate, affirm, reverse, alter or modify the decision of the presiding officer and the Administrator's decision constitutes final agency action except where the terms of the Administrator's decision (for example, remanding a case to the presiding officer) show that the parties' administrative remedies have not been exhausted.

(f) An appeal from an Operating Crew Review Board decision pursuant to § 242.503(d) must be filed within 35 days of issuance of the decision with the Federal Railroad Administrator, 1200 New Jersey Avenue, SE., Washington, DC 20590 and with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M–30), West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. A copy of the appeal shall be served on each party. The Administrator may affirm or vacate the Board's decision, and may remand the petition to the Board for further proceedings. An Administrator's decision to affirm the Board's decision constitutes final agency action.

## APPENDIX A TO PART 242—SCHEDULE OF CIVIL PENALTIES

A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to $100,000 for any violation where circumstances warrant. *See* 49 CFR part 209, Appendix A.

(Penalty Schedule to be included in Final Rule).

## APPENDIX B TO PART 242—PROCEDURES FOR SUBMISSION AND APPROVAL OF CONDUCTOR CERTIFICATION PROGRAMS

This appendix establishes procedures for the submission and approval of a railroad's program concerning the training, testing, and evaluating of persons seeking certification or recertification as a conductor in accordance with the requirements of this part. It also contains guidance on how FRA will exercise its review and approval responsibilities.

*Submission by a Railroad*

As provided for in § 242.101, each railroad must have a program for determining the certification of each person it permits or requires to perform as a conductor or as a passenger conductor. Each railroad must submit its individual program to FRA for approval as provided for in § 242.103. Each program must be accompanied by a request for approval organized in accordance with this appendix. Requests for approval must contain appropriate references to the relevant portion of the program being discussed. Requests should be submitted in writing on standard sized paper (8½ x 11) and can be in letter or narrative format. The railroad's submission shall be sent to the Associate Administrator for Railroad Safety/Chief Safety Officer, FRA. The mailing address for FRA is 1200 New Jersey Avenue, SE., Washington, DC 20590. Simultaneous with its filing with the FRA, each railroad must serve a copy of its submission on the president of each labor organization that represents the railroad's employees subject to this part.

*Organization of the Submission*

Each request should be organized to present the required information in the following standardized manner. Each section must begin by giving the name, title, telephone number, and mailing address of the person to be contacted concerning the matters addressed by that section. If a person is identified in a prior section, it is sufficient to merely repeat the person's name in a subsequent section.

*Section 1 of the Submission: General Information and Elections*

The first section of the request must contain the name of the railroad, the person to be contacted concerning the request (including the person's name, title, telephone number, and mailing address) and a statement electing either to accept responsibility for educating previously untrained persons to be certified conductors or recertify only conductors previously certified by other railroads. *See* § 242.103(b).

If a railroad elects not to conduct the training of persons not previously trained to be a conductor, the railroad is not obligated to submit information on how the previously untrained will be trained. A railroad that makes this election will be limited to recertifying persons initially certified by another railroad. A railroad that initially elects not to accept responsibility for training its own conductors can rescind its initial election by obtaining FRA approval of a modification of its program. *See* § 242.103(f).

If a railroad elects to accept responsibility for training persons not previously trained to be conductors, the railroad is obligated to submit information on how such persons will be trained but has no duty to actually conduct such training. A railroad that elects to accept the responsibility for the training of such persons may authorize another railroad or a non-railroad entity to perform the actual training effort. The electing railroad remains responsible for assuring that such other training providers adhere to the training program the railroad submits. This section must also state which types of service the railroad will employ. *See* § 242.107.

*Section 2 of the Submission: Training Persons Previously Certified*

The second section of the request must contain information concerning the railroad's program for training previously certified conductors. As provided for in § 242.119(o) each railroad must have a program for the ongoing education of its conductors to assure that they maintain the necessary knowledge concerning operating rules and practices, familiarity with physical characteristics, and relevant Federal safety rules.

Section 242.119(o) provides a railroad latitude to select the specific subject matter to be covered, duration of the training, method of presenting the information, and the frequency with which the training will be provided. The railroad must describe in this section how it will use that latitude to assure that its conductors remain knowledgeable concerning the safe discharge of their responsibilities so as to comply with the performance standard set forth in § 242.119(o). This section must contain sufficient detail to permit effective evaluation of the railroad's training program in terms of the subject matter covered, the frequency and duration of the training sessions, the training environment employed (for example, and use of classroom, use of computer based training, use of film or slide presentations, use of on-job-training) and which aspects of the program are voluntary or mandatory.

Time and circumstances have the capacity to diminish both abstract knowledge and the proper application of that knowledge to discrete events. Time and circumstances also have the capacity to alter the value of previously obtained knowledge and the application of that knowledge. In formulating how it will use the discretion being afforded, each railroad must design its program to address both loss of retention of knowledge and changed circumstances, and this section of the submission to FRA must address these matters.

For example, conductors need to have their fundamental knowledge of operating rules and procedures refreshed periodically. Each railroad needs to advise FRA how that need is satisfied in terms of the interval between attendance at such training, the nature of the training being provided, and methods for conducting the training. A matter of particular concern to FRA is how each railroad acts to assure that conductors remain knowledgeable about the territory over which a conductor is authorized to perform but from which the conductor has been absent. The railroad must have a plan for the familiarization training that addresses the question of how long a person can be absent before needing more education and, once that threshold is reached, how the person will acquire the needed education. Similarly, the program must address how the railroad responds to changes such as the introduction of new technology, new operating rule books, or significant changes in operations including alteration in the territory conductors are authorized to work over.

*Section 3 of the Submission: Testing and Evaluating Persons Previously Certified*

The third section of the request must contain information concerning the railroad's program for testing and evaluating previously certified conductors. As provided for in § 242.121, each railroad must have a program for the ongoing testing and evaluating of its conductors to assure that they have the necessary knowledge and skills concerning operating rules and practices, familiarity with physical characteristics of the territory, and relevant Federal safety rules. Similarly, each railroad must have a program for ongoing testing and evaluating to assure that its conductors have the necessary vision and hearing acuity as provided for in § 242.117.

Section 242.121 requires that a railroad rely on written procedures for determining that each person can demonstrate his or her knowledge of the railroad's rules and practices and skill at applying those rules and practices for the safe performance as a conductor. Section 242.121 directs that, when seeking a demonstration of the person's knowledge, a railroad must employ a written test that contains objective questions and answers and covers the following subject matters: (i) Safety and operating rules; (ii) timetable instructions; (iii) physical characteristics of the territory; and (iv) compliance with all applicable Federal regulations. The test must accurately measure the person's knowledge of all of these areas.

Section 242.121 provides a railroad latitude in selecting the design of its own testing policies (including the number of questions each test will contain, how each required subject matter will be covered, weighting (if any) to be given to particular subject matter responses, selection of passing scores, and the manner of presenting the test information). The railroad must describe in this section how it will use that latitude to assure that its conductors will demonstrate their knowledge concerning the safe discharge of their responsibilities so as to comply with the performance standard set forth in § 242.121.

Section 242.117 provides a railroad latitude to rely on the professional medical opinion of the railroad's medical examiner concerning the ability of a person with substandard acuity to safely perform as a conductor. The railroad must describe in this section how it will assure that its medical examiner has sufficient information concerning the railroad's operations to effectively form appropriate conclusions about the ability of a particular individual to safely perform as a conductor.

*Section 4 of the Submission: Training, Testing, and Evaluating Persons Not Previously Certified*

Unless a railroad has made an election not to accept responsibility for conducting the initial training of persons to be conductors, the fourth section of the request must contain information concerning the railroad's program for educating, testing, and evaluating persons not previously trained as conductors. As provided for in § 242.119(d), a railroad that is issuing an initial certification to a person to be a conductor must have a program for the training, testing, and evaluating of its conductors to assure that they acquire the necessary knowledge and skills concerning operating rules and practices, familiarity with physical characteristics of the territory, and relevant Federal safety rules.

Section 242.119 establishes a performance standard and gives a railroad latitude in selecting how it will meet that standard. A railroad must describe in this section how it will use that latitude to assure that its conductors will acquire sufficient knowledge and skill and demonstrate their knowledge and skills concerning the safe discharge of their responsibilities. This section must contain the same level of detail concerning initial training programs as that described for each of the components of the overall program contained in sections 2 through 4 of this appendix. A railroad that plans to accept responsibility for the initial training of conductors may authorize another railroad or a non-railroad entity to perform the actual training effort. The authorizing railroad may submit a training program developed by that authorized trainer but the authorizing railroad remains responsible for assuring that such other training providers adhere to the training program submitted. Railroads that elect to rely on other entities, to conduct training away from the railroad's own territory, must indicate how the student will be provided with the required familiarization with the physical characteristics for its territory.

*Section 5 of the Submission: Monitoring Operational Performance by Certified Conductors*

The fifth section of the request must contain information concerning the railroad's program for monitoring the operation of its certified conductors. As provided for in § 242.123, each railroad must have a program for the ongoing monitoring of its conductors to assure that they perform in conformity with the railroad's operating rules and practices and relevant Federal safety rules.

*Section 6 of the Submission: Procedures for Routine Administration of the Conductor Certification Program*

The final section of the request must contain a summary of how the railroad's program and procedures will implement the various specific aspects of the regulatory provisions that relate to routine administration of its certification program for conductors. At a minimum this section needs to address the procedural aspects of the rule's provisions identified in the following paragraph.

Section 242.109 provides that each railroad must have procedures for review and comment on adverse prior safety conduct, but allows the railroad to devise its own system within generalized parameters. Sections 242.111, 242.115 and 242.403 require a railroad to have procedures for evaluating data concerning prior safety conduct as a motor vehicle operator and as railroad workers, yet leave selection of many details to the railroad. Sections 242.109, 242.201, and 242.401 place a duty on the railroad to make a series of determinations but allow the railroad to select what procedures it will employ to assure that all of the necessary determinations have been made in a timely fashion; who will be authorized to conclude that person will or will be not certified; and how it will communicate adverse decisions. Documentation of the factual basis the railroad relied on in making determinations under §§ 242.109, 242.117, 242.119 and 242.121 is required, but these sections permit the railroad to select the procedures it will employ to accomplish compliance with these provisions. Sections 242.125 and 242.127 permit reliance on certification/qualification determinations made by other entities and permit a railroad latitude in selecting the procedures it will employ to assure compliance with these provisions. Similarly, § 242.301 permits the use of railroad selected procedures to meet the requirements for certification of conductors performing service in joint operations territory. Sections 242.211 and 242.407 allow a railroad a certain degree of discretion in complying with the requirements for replacing lost certificates or the conduct of certification revocation proceedings.

This section of the request should outline in summary fashion the manner in which the railroad will implement its program so as to comply with the specific aspects of each of the rule's provisions described in the preceding paragraph.

*FRA Review*

The submissions made in conformity with this appendix will be deemed approved within 30 days after the required filing date or the actual filing date whichever is later. No formal approval document will be issued by FRA. FRA has taken the responsibility for notifying a railroad when it detects problems with the railroad's program. FRA retains the right to disapprove a program that has obtained approval due to the passage of time as provided for in section § 242.103.

Rather than establish rigid requirements for each element of the program, FRA has given railroads discretion to select the design of their individual programs within a specified context for each element. The rule, however, provides a good guide to the considerations that should be addressed in designing a program that will meet the performance standards of this rule.

In reviewing program submissions, FRA will focus on the degree to which a particular program deviates from the norms identified in its rule. To the degree that a particular program submission materially deviates from the norms set out in its rule, FRA's review and approval process will be focused on determining the validity of the reasoning relied on by a railroad for selecting its alternative approach and the degree to which the alternative approach is likely to be effective in producing conductors who have the knowledge and ability to safely perform as conductors.

## APPENDIX C TO PART 242—PROCEDURES FOR OBTAINING AND EVALUATING MOTOR VEHICLE DRIVING RECORD DATA

The purpose of this appendix is to outline the procedures available to individuals and railroads for complying with the requirements of §§ 242.109 and 242.111 of this part. Those provisions require that railroads consider the motor vehicle driving record of each person prior to issuing him or her certification or recertification as a conductor.

To fulfill that obligation, a railroad must review a certification candidate's recent motor vehicle driving record. Generally, that will be a single record on file with the state agency that issued the candidate's current license. However, it can include multiple records if the candidate has been issued a motor vehicle driving license by more than one state agency or foreign country.

*Access to State Motor Vehicle Driving Record Data*

The right of railroad workers, their employers, or prospective employers to have access to a state motor vehicle licensing agency's data concerning an individual's driving record is controlled by state law. Although many states have mechanisms through which employers and prospective employers such as railroads can obtain such data, there are some states in which privacy concerns make such access very difficult or impossible. Since individuals generally are entitled to obtain access to driving record data that will be relied on by a state motor vehicle licensing agency when that agency is taking action concerning their driving privileges, FRA places responsibility on individuals, who want to serve as conductors to request that their current state drivers licensing agency or agencies furnish such data directly to the railroad considering certifying them as a conductor. Depending on the procedures adopted by a particular state agency, this will involve the candidate's either sending the state agency a brief letter requesting such action or executing a state agency form that accomplishes the same effect. It will normally involve payment of a nominal fee established by the state agency for such a records check. In rare instances, when a certification candidate has been issued multiple licenses, it may require more than a single request.

Once the railroad has obtained the motor vehicle driving record(s), the railroad must afford the prospective conductor an opportunity to review that record and respond in writing to its contents in accordance with the provisions of § 242.401. The review opportunity must occur before the railroad evaluates that record. The railroad's required evaluation and subsequent decision making must be done in compliance with the provisions of this part.

## APPENDIX D TO PART 242—MEDICAL STANDARDS GUIDELINES

(1) The purpose of this appendix is to provide greater guidance on the procedures that should be employed in administering the vision and hearing requirements of § 242.117.

(2) In determining whether a person has the visual acuity that meets or exceeds the requirements of this part, the following testing protocols are deemed acceptable testing methods for determining whether a person has the ability to recognize and distinguish among the colors used as signals in the railroad industry. The acceptable test methods are shown in the left hand column and the criteria that should be employed to determine whether a person has failed the particular testing protocol are shown in the right hand column.

| Accepted tests | Failure criteria |
|---|---|
| **Pseudoisochromatic Plate Tests** | |
| American Optical Company 1965 | 5 or more errors on plates 1–15. |
| AOC—Hardy-Rand-Ritter plates-second edition | Any error on plates 1–6 (plates 1–4 are for demonstration—test plate 1 is actually plate 5 in book). |
| Dvorine—Second edition | 3 or more errors on plates 1–15. |
| Ishihara (14 plate) | 2 or more errors on plates 1–11. |
| Ishihara (16 plate) | 2 or more errors on plates 1–8. |
| Ishihara (24 plate) | 3 or more errors on plates 1–15. |
| Ishihara (38 plate) | 4 or more errors on plates 1–21. |
| Richmond Plates 1983 | 5 or more errors on plates 1–15. |
| **Multifunction Vision Tester** | |
| Keystone Orthoscope | Any error. |
| OPTEC 2000 | Any error. |
| Titmus Vision Tester | Any error. |
| Titmus II Vision Tester | Any error. |

(3) In administering any of these protocols, the person conducting the examination should be aware that railroad signals do not always occur in the same sequence and that "yellow signals" do not always appear to be the same. It is not acceptable to use "yarn" or other materials to conduct a simple test to determine whether the certification candidate has the requisite vision. No person shall be allowed to wear chromatic lenses during an initial test of the person's color vision; the initial test is one conducted in accordance with one of the accepted tests in the chart and § 242.117(h)(3).

(4) An examinee who fails to meet the criteria in the chart, may be further evaluated as determined by the railroad's medical examiner. Ophthalmologic referral, field testing, or other practical color testing may be utilized depending on the experience of the examinee. The railroad's medical examiner will review all pertinent information and, under some circumstances, may restrict an examinee who does not meet the criteria for serving as a conductor at night, during adverse weather conditions or under other circumstances. The intent of § 242.117(j) is not to provide an examinee with the right to make an infinite number of requests for further evaluation, but to provide an examinee with at least one opportunity to prove that a hearing or vision test failure does not mean the examinee cannot safely perform as a conductor. Appropriate further medical evaluation could include providing another approved scientific screening test or a field test. All railroads should retain the discretion to limit the number of retests that an examinee can request but any cap placed on the number of retests should not limit retesting when changed circumstances would make such retesting appropriate. Changed circumstances would most likely occur if the examinee's medical condition has improved in some way or if technology has advanced to the extent that it arguably could compensate for a hearing or vision deficiency.

(5) Conductors who wear contact lenses should have good tolerance to the lenses and should be instructed to have a pair of corrective glasses available when on duty.

# APPENDIX E TO PART 242—APPLICATION OF REVOCABLE EVENTS

| Revocable Event | | Application of Revocable Events | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | Periods of Revocation | | | | | Employees with Multiple Certifications | |
| | | Main Track | | | | Other than Main Track Where Restricted Speed or the Operational Equivalent Is in Effect | Main Track or Other than Main Track | |
| | | 1st Offense | 2nd Offense Within 24 Months | 3rd Offense Within 36 Months | 4th Offense Within 36 Months | No Offense Within Previous 12 Months | Offense (as a Conductor) | Offense (as an Engineer) |
| 1 | Signal requiring complete stop before passing | 30 Days | 6 Months | 1 Year | 3 Years | Not Applicable | Employee May Not Work as an Engineer During the Period of Revocation | Employee May Not Work as a Conductor During the Period of Revocation |
| 2 | Restricted Speed & Speed; 10 mph over | | | | | | | |
| 3 | Required Air Brake Test | | | | | | | |
| 4 | Occupying Main Track without Authority | | | | | | | |
| 5 | Disabling a Safety Device | | | | | | | |
| 6 | Shoving Movements | | | | | Half Revocation Period | Employee May Work as an Engineer During the Period of Revocation | Not applicable |
| 7 | Equipment Fouling Adjacent Tracks | | | | | | | |
| 8 | Hand Operated Switches (Crossovers) | | | | | | | |
| 9 | Hand Operated Switches Connected to Main Track | | | | | Not Applicable | | |
| 10 | Hand Operated Crossover Switches (before & after movement) | | | | | Half Revocation Period | | |
| 11 | Hand Operated Derails | | | | | | | |
| 12 | Drug & Alcohol | Different periods of revocation may be applied (see 242.403 & 242.115) | | | | Not Applicable | Employee May Not Work as an Engineer During the Period of Revocation | Employee May Not Work as a Conductor During the Period of Revocation |

Issued in Washington, DC, on October 8, 2010.

**Karen J. Rae,**

*Deputy Administrator.*

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# Part III

# Department of the Interior

## Fish and Wildlife Service

## 50 CFR Part 17

## Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions; Proposed Rule

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**[Docket No. FWS–R9–ES–2010–0065; MO–9221050083–B2]**

## Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions

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

**ACTION:** Notice of review.

**SUMMARY:** In this Candidate Notice of Review (CNOR), we, the U.S. Fish and Wildlife Service (Service), present an updated list of plant and animal species native to the United States that we regard as candidates for or have proposed for addition to the Lists of Endangered and Threatened Wildlife and Plants under the Endangered Species Act of 1973, as amended. Identification of candidate species can assist environmental planning efforts by providing advance notice of potential listings, allowing landowners and resource managers to alleviate threats and thereby possibly remove the need to list species as endangered or threatened. Even if we subsequently list a candidate species, the early notice provided here could result in more options for species management and recovery by prompting candidate conservation measures to alleviate threats to the species.

The CNOR summarizes the status and threats that we evaluated in order to determine that species qualify as candidates and to assign a listing priority number (LPN) to each species or to determine that species should be removed from candidate status. Additional material that we relied on is available in the Species Assessment and Listing Priority Assignment Forms (species assessment forms, previously called candidate forms) for each candidate species.

Overall, this CNOR recognizes five new candidates, changes the LPN for four candidates, and removes one species from candidate status. Combined with other decisions for individual species that were published separately from this CNOR in the past year, the current number of species that are candidates for listing is 251.

This document also includes our findings on resubmitted petitions and describes our progress in revising the Lists of Endangered and Threatened Wildlife and Plants during the period October 1, 2009, through September 30, 2010.

We request additional status information that may be available for the 251 candidate species identified in this CNOR.

**DATES:** We will accept information on any of the species in this Candidate Notice of Review at any time.

**ADDRESSES:** This notice is available on the Internet at *http://www.regulations.gov* and *http://www.fws.gov/endangered/what-we-do/cnor.html.* Species assessment forms with information and references on a particular candidate species' range, status, habitat needs, and listing priority assignment are available for review at the appropriate Regional Office listed below in **SUPPLEMENTARY INFORMATION** or at the Branch of Candidate Conservation, Arlington, VA (*see* address below), or on our Web site (*http://ecos.fws.gov/tess_public/pub/SpeciesReport.do?listingType=C&mapstatus=1*). Please submit any new information, materials, comments, or questions of a general nature on this notice to the Arlington, VA, address listed below. Please submit any new information, materials, comments, or questions pertaining to a particular species to the address of the Endangered Species Coordinator in the appropriate Regional Office listed in **SUPPLEMENTARY INFORMATION.**

**FOR FURTHER INFORMATION CONTACT:** The Endangered Species Coordinator(s) in the appropriate Regional Office(s), or Chief, Branch of Candidate Conservation, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Room 420, Arlington, VA 22203 (telephone 703–358–2171; facsimile 703–358–1735). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

**SUPPLEMENTARY INFORMATION:** We request additional status information that may be available for any of the candidate species identified in this CNOR. We will consider this information to monitor changes in the status or LPN of candidate species and to manage candidates as we prepare listing documents and future revisions to the notice of review. We also request information on additional species to consider including as candidates as we prepare future updates of this notice.

You may submit your information concerning this notice in general or for any of the species included in this notice by one of the methods listed in the **ADDRESSES** section.

Species-specific information and materials we receive will be available for public inspection by appointment, during normal business hours, at the appropriate Regional Office listed below under **Request for Information** in **SUPPLEMENTARY INFORMATION**. General information we receive will be available at the Branch of Candidate Conservation, Arlington, VA (*see* address above).

### Candidate Notice of Review

*Background*

The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), requires that we identify species of wildlife and plants that are endangered or threatened, based on the best available scientific and commercial information. As defined in section 3 of the Act, an endangered species is any species which is in danger of extinction throughout all or a significant portion of its range, and a threatened species is any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. Through the Federal rulemaking process, we add species that meet these definitions to the List of Endangered and Threatened Wildlife at 50 CFR 17.11 or the List of Endangered and Threatened Plants at 50 CFR 17.12. As part of this program, we maintain a list of species that we regard as candidates for listing. A candidate species is one for which we have on file sufficient information on biological vulnerability and threats to support a proposal to list as endangered or threatened, but for which preparation and publication of a proposal is precluded by higher priority listing actions. We may identify a species as a candidate for listing after we have conducted an evaluation of its status on our own initiative, or after we have made a positive finding on a petition to list a species, in particular we have found that listing is warranted but precluded by other higher priority listing action (*see* the Petition Findings section, below).

We maintain this list of candidates for a variety of reasons: To notify the public that these species are facing threats to their survival; to provide advance knowledge of potential listings that could affect decisions of environmental planners and developers; to provide information that may stimulate and guide conservation efforts that will remove or reduce threats to these species and possibly make listing unnecessary; to request input from interested parties to help us identify those candidate species that may not

require protection under the Act or additional species that may require the Act's protections; and to request necessary information for setting priorities for preparing listing proposals. We strongly encourage collaborative conservation efforts for candidate species, and offer technical and financial assistance to facilitate such efforts. For additional information regarding such assistance, please contact the appropriate Regional Office listed under **Request for Information** or visit our Web site, *http://www.fws.gov/endangered/what-we-do/cca.html.*

*Previous Notices of Review*

We have been publishing candidate notices of review (CNOR) since 1975. The most recent CNOR (prior to this CNOR) was published on November 9, 2009 (74 FR 57804). CNORs published since 1994 are available on our Web site, *http://www.fws.gov/endangered/what-we-do/cnor.html.* For copies of CNORs published prior to 1994, please contact the Branch of Candidate Conservation (*see* **ADDRESSES** section above).

On September 21, 1983, we published guidance for assigning an LPN for each candidate species (48 FR 43098). Using this guidance, we assign each candidate an LPN of 1 to 12, depending on the magnitude of threats, immediacy of threats, and taxonomic status; the lower the LPN, the higher the listing priority (that is, a species with an LPN of 1 would have the highest listing priority). Section 4(h)(3) of the Act (15 U.S.C. 1533(h)(3)) requires the Secretary to establish guidelines for such a priority-ranking guidance system. As explained below, in using this system we first categorize based on the magnitude of the threat(s), then by the immediacy of the threat(s), and finally by taxonomic status.

Under this priority-ranking system, magnitude of threat can be either "high" or "moderate to low." This criterion helps ensure that the species facing the greatest threats to their continued existence receive the highest listing priority. It is important to recognize that all candidate species face threats to their continued existence, so the magnitude of threats is in relative terms. For all candidate species, the threats are of sufficiently high magnitude to put them in danger of extinction, or make them likely to become in danger of extinction in the foreseeable future. But for species with higher magnitude threats, the threats have a greater likelihood of bringing about extinction or are expected to bring about extinction on a shorter time scale (once the threats are imminent) than for species with lower magnitude threats. Since we do not routinely quantify how likely or how soon extinction would be expected to occur absent listing, we must evaluate factors that contribute to the likelihood and time scale for extinction. We therefore consider information such as: The number of populations and/or extent of range of the species affected by the threat(s); the biological significance of the affected population(s), taking into consideration the life-history characteristics of the species and its current abundance and distribution; whether the threats affect the species in only a portion of its range, and if so the likelihood of persistence of the species in the unaffected portions; the severity of the effects and the rapidity with which they have caused or are likely to cause mortality to individuals and accompanying declines in population levels; whether the effects are likely to be permanent; and the extent to which any ongoing conservation efforts reduce the severity of the threat.

As used in our priority-ranking system, immediacy of threat is categorized as either "imminent" or "nonimminent" and is not a measure of how quickly the species is likely to become extinct if the threats are not addressed; rather, immediacy is based on when the threats will begin. If a threat is currently occurring or likely to occur in the very near future, we classify the threat as imminent. Determining the immediacy of threats helps ensure that species facing actual, identifiable threats are given priority for listing proposals over those for which threats are only potential or species that are intrinsically vulnerable to certain types of threats but are not known to be presently facing such threats.

Our priority ranking system has three categories for taxonomic status: Species that are the sole members of a genus; full species (in genera that have more than one species); and subspecies and distinct population segments of vertebrate species (DPS). We also apply this last category to species that are threatened or endangered in only significant portions of their ranges rather than their entire ranges.

The result of the ranking system is that we assign each candidate a listing priority number of 1 to 12. For example, if the threat(s) is of high magnitude, with immediacy classified as imminent, the listable entity is assigned an LPN of 1, 2, or 3 based on its taxonomic status (*i.e.,* a species that is the only member of its genus would be assigned to the LPN 1 category, a full species to LPN 2, and a subspecies, DPS, or a species that is threatened or endangered in only a significant portion of its range would be assigned to LPN 3). In summary, the LPN ranking system provides a basis for making decisions about the relative priority for preparing a proposed rule to list a given species. No matter which LPN we assign to a species, each species included in this notice as a candidate is one for which we have sufficient information to prepare a proposed rule to list it because it is in danger of extinction or likely to become endangered within the foreseeable future throughout all or a significant portion of its range.

For more information on the process and standards used in assigning LPNs, a copy of the 1983 guidance is available on our Web site at: *http://www.fws.gov/endangered/esa-library/pdf/48fr43098-43105.pdf.* For more information on the LPN assigned to a particular species, the species assessment for each candidate contains the LPN chart and a rationale for the determination of the magnitude and immediacy of threat(s) and assignment of the LPN; that information is summarized in this CNOR.

This revised notice supersedes all previous animal, plant, and combined candidate notices of review.

*Summary of This CNOR*

Since publication of the previous CNOR on November 9, 2009 (74 FR 57804), we reviewed the available information on candidate species to ensure that a proposed listing is justified for each species, and reevaluated the relative LPN assigned to each species. We also evaluated the need to emergency-list any of these species, particularly species with high priorities *(i.e.,* species with LPNs of 1, 2, or 3). This review and reevaluation ensures that we focus conservation efforts on those species at greatest risk first.

In addition to reviewing candidate species since publication of the last CNOR, we have worked on numerous findings in response to petitions to list species, and on proposed and final determinations for rules to list species under the Act. Some of these findings and determinations have been completed and published in the **Federal Register**, while work on others is still under way (*see Preclusion and Expeditious Progress,* below, for details).

Based on our review of the best available scientific and commercial information, with this CNOR we identify five new candidate species (*see New Candidates,* below), change the LPN for four candidates (*see Listing Priority Changes in Candidates,* below) and determine that a listing proposal is not warranted for one species and thus remove it from candidate status (*see*

*Candidate Removals,* below). Combined with the other decisions published separately from this CNOR for individual species that previously were candidates, a total of 251 species (including 110 plant and 141 animal species) are now candidates awaiting preparation of rules proposing their listing. These 251 species, along with the 18 species currently proposed for listing (includes 1 species proposed for listing due to similarity in appearance), are included in Table 1.

Table 2 lists the changes from the previous CNOR, and includes 55 species identified in the previous CNOR as either proposed for listing or classified as candidates that are no longer in those categories. This includes 54 species for which we published a final rule to list, plus the 1 species that we have determined does not meet the definition of endangered or threatened and therefore does not warrant listing. We have removed this species from candidate status in this CNOR.

**New Candidates**

Below we present a brief summary of one new fish, one new snail, one new crustacean, and two new plant candidates, which we are recognizing in this CNOR. Complete information, including references, can be found in the species assessment forms. You may obtain a copy of these forms from the Regional Office having the lead for the species, or from our Web site (*http://ecos.fws.gov/tess_public/pub/SpeciesReport.do?listingType=C&mapstatus=1*). For these species, we find that we have on file sufficient information on biological vulnerability and threats to support a proposal to list as endangered or threatened, but that preparation and publication of a proposal is precluded by higher priority listing actions (*i.e.,* it met our definition of a candidate species). We also note below that nine other species—Sprague's pipit, greater sage-grouse, Bi-State DPS of greater sage-grouse, Gunnison sage-grouse, least chub, upper Missouri River DPS of Arctic grayling, Tucson shovel-nosed snake, Jemez Mountains salamander, and *Agave eggersiana*—were identified as candidates earlier this year as a result of separate petition findings published in the **Federal Register.**

*Birds*

Sprague's pipit (*Anthus spragueii*)—We previously announced candidate status for this species, and described the reasons and data on which the finding was based, in a separate warranted-but-precluded 12-month petition finding published on September 14, 2010 (75 FR 56028).

Greater sage-grouse (*Centrocercus urophasianus*)—We previously announced candidate status for this species, and described the reasons and data on which the finding was based, in a separate warranted-but-precluded 12-month petition finding published on March 23, 2010 (75 FR 13910).

Greater sage-grouse, Bi-State DPS (*Centrocercus urophasianus)*—We previously announced candidate status for this species, and described the reasons and data on which the finding was based, in a separate warranted-but-precluded 12-month petition finding published on March 23, 2010 (75 FR 13910).

Gunnison sage-grouse (*Centrocercus minimus*)—We previously announced candidate status for this species, and described the reasons and data on which the finding was based, in a separate warranted-but-precluded 12-month petition finding published on September 28, 2010 (75 FR 59803).

*Reptiles*

Tucson Shovel-Nosed Snake (*Chionactis occipitalis klauberi*)—We previously announced candidate status for this species, and described the reasons and data on which the finding was based, in a separate warranted-but-precluded 12-month petition finding published on March 31, 2010 (75 FR 16050).

*Amphibians*

Jemez Mountains salamander (*Plethodon neomexicanus*)—We previously announced candidate status for this species, and described the reasons and data on which the finding was based, in a separate warranted-but-precluded 12-month petition finding published on September 9, 2010 (75 FR 54822).

*Fish*

Least chub (*Iotichthys phlegethontis*)—We previously announced candidate status for this species, and described the reasons and data on which the finding was based, in a separate warranted-but-precluded 12-month petition finding published on June 22, 2010 (75 FR 35398).

Kentucky arrow darter (*Etheostoma sagitta spilotum*)—The following summary is based on information in our files. The Kentucky arrow darter is a rather large (total length of 4.6 inches (116 millimeters)), brightly colored darter that is restricted to the upper Kentucky River basin in eastern Kentucky. The species' preferred habitat consists of pools or transitional areas between riffles and pools (runs and glides) in moderate to high gradient streams with bedrock, boulder, and cobble substrates. In most recent surveys, the Kentucky arrow darter has been observed in streams ranging in size from first to third order, with most individuals occurring in second order streams in watersheds encompassing 7.7 square miles (20 square kilometers) or less. Kentucky arrow darters feed on a variety of aquatic invertebrates, but adults feed predominantly on larval mayflies (order Ephemeroptera), specifically the families Heptageniidae and Baetidae. Rangewide surveys from 2007 to 2009 revealed that the Kentucky arrow darter has disappeared from portions of its range. During these surveys, the species was observed at only 33 of 68 historical streams and 45 of 100 historical sites.

The subspecies' habitat and range have been severely degraded and limited by water pollution from surface coal mining and gas-exploration activities; removal of riparian vegetation; stream channelization; increased siltation associated with poor mining, logging, and agricultural practices; and deforestation of watersheds. The threats are high in magnitude because they are widespread across the subspecies' range. In addition, the magnitude (severity or intensity) of these threats, especially impacts from mining and gas-exploration activities, is high because these activities have the potential to alter stream water quality permanently throughout the range by contributing sediment, dissolved metals, and other solids to streams supporting Kentucky arrow darters, resulting in direct mortality or reduced reproductive capacity. The threats are imminent because the effects are manifested immediately and will continue for the foreseeable future. Consequently, we assigned an LPN of 3 to this subspecies.

Arctic grayling, Missouri River DPS (*Thymallus arcticus*)—We previously announced candidate status for this species, and described the reasons and data on which the finding was based, in a separate warranted-but-precluded 12-month petition finding published on September 8, 2010 (75 FR 54707).

*Snails*

Rosemont talussnail (*Sonorella rosemontensis*)—the following summary is based on information in our files. The petition we received on June 24, 2010, provided no new information beyond what we had already included in our assessment of this species. The Rosemont talussnail, a land snail in the family Helminthoglyptidae, is known

from three talus slopes in the Santa Rita Mountains, Pima County, Arizona. The primary threat to Rosemont talussnail is hard rock mining. The entire range of the species is located on patented mining claims and can reasonably be expected to be subjected to mining activities in the foreseeable future. Hard rock mining typically involves the blasting of hillsides and the crushing of ore-laden rock. Such activities would kill talussnails and render their habitats unsuitable for occupation. Since mining may occur across the entire range of the species within the foreseeable future, potentially resulting in rangewide habitat destruction and population losses, the threats are of a high magnitude. However, mining on patented mining claims, although a reasonably anticipated action, is neither currently ongoing nor imminent. Although the Rosemont Copper Mine is scheduled to commence as soon as 2011, there exists uncertainty regarding its scope, and therefore its potential effect on habitat of the Rosemont talussnail. Accordingly, we find that overall threats to the Rosemont talussnail are nonimminent and we assign an LPN of 5 to this species.

*Crustaceans*

Kenk's amphipod (*Stygobromus kenki*)—Amphipods of the genus *Stygobromus,* occur in groundwater and groundwater-related habitats. In the case of Kenk's amphipod, these include seeps, small springs, and possibly wells. Kenk's amphipod is a small, eyeless, unpigmented crustacean adapted for survival in subterranean habitats. It can be found in dead leaves or fine sediment submerged in the waters of its spring/seep outflows. The species is currently known only from five spring or seep sites in Washington, DC, and Montgomery County, Maryland. Four of these sites are within the Rock Creek drainage, and the fifth is within the Northwest Branch drainage.

Within the limited area encompassing the current range of this species, the vast majority of potential expanses of habitat large enough to support this species have been significantly impacted or completely destroyed by urban and suburban development. Kenk's amphipod is now vulnerable because of its limited geographic distribution and infringement of urban development on its habitat. Degradation of water quality and modifications of hydrology are among the principal threats to this species' spring or seep habitats. Specific threats include toxic spills, non-point source pollution, sanitary sewer leaks, excessive stormwater flows, and additional land disturbance. In addition, climate change has the potential to adversely affect the species, particularly if it results in a significant change in the amount of precipitation in the Washington, DC, area.

Although all five known sites of occurrence face threats to the hydrology and water quality of their springs, these threats are chronic in nature and appear to be increasing only gradually and are not currently resulting in major mortality events or impairment of reproduction. Thus, the threats are moderate in magnitude. Several threats are imminent because they are ongoing and expected to continue. Therefore, we assigned this species LPN of 8.

*Flowering Plants*

*Agave eggersiana* (no common name)—We previously announced candidate status for this species, and described the reasons and data on which the finding was based, in a separate warranted-but-precluded 12-month petition finding published on September 22, 2010 (75 FR 57720).

*Astragalus cusickii var. packardiae* (Packard's milkvetch)—The following summary is based on information contained in our files. This plant is a narrow endemic located in northeastern Payette County, Idaho. Its entire known range is only approximately 10 square miles (26 square kilometers). The light-colored, sparsely vegetated sedimentary outcrops to which this species is restricted are found scattered throughout the landscape, but are limited in extent. The size of occupied outcrops ranges from less than 0.04 hectares (0.1 acre) to approximately 1.2 hectares (3 acres). The entire population of *A. cusickii var. packardiae* is currently estimated at 5,000 plants located within 26 occurrences (17 on Bureau of Land Management, 4 on State, and 5 on private land).

The primary threats to *Astragalus cusickii var. packardiae* include wildfire, nonnative invasive plant species, and more recently, off-road vehicle (ORV) use. Vegetation within the range of *A. cusickii var. packardiae* was originally sagebrush-steppe habitat; however, due to habitat impacts from a century of wildfires, livestock use, and invasive nonnative plant species, much of the area has been converted to annual grassland dominated by two nonnative grass species, *Bromus tectorum* (cheatgrass) and *Taeniatherum caput-medusae* (medusahead). Invasive nonnative plants affect *A. cusickii var. packardiae* directly through competition and indirectly by providing continuous fine fuels that contribute to the increased frequency and extent of wildfires.

ORV use, which is currently considered the most immediate threat to *Astragalus cusickii var. packardiae* and its habitat, was not identified as a threat during the original 1999 surveys for this species, but monitoring conducted in 2008 and 2009 indicate it has since become a widespread activity, occurring throughout the limited range of *A. cusickii var. packardiae.* ORVs are traveling directly through outcrops occupied by *A. cusickii var. packardiae,* as well as along the rims, spur ridges, and slope bases that form the margins of the occupied outcrops, with tracks ranging from single passage treads to major hill climbing runways. Based on monitoring data, this use appears to be increasing in scope and has resulted in the crushing of *A. cusickii var. packardiae* plants, as well as accelerated erosion of the fine, loose substrate occupied by this species.

Based on this information, the magnitude of the primary threats to *Astragalus cusickii var. packardiae* and its habitat is high because ORV use, wildfires, and nonnative invasive species affect the species throughout its range, appear to be increasing in extent, and result in severe and direct impacts to individuals and population levels., Because these threats are ongoing throughout *A. cusickii var. packardiae's* limited range, these threats are imminent. Thus, we assign an LPN of 3 to this plant variety.

*Mimulus fremontii var. vandenbergensis* (Vandenberg monkeyflower)—*Mimulus fremontii var. vandenbergensis* is a small, short-lived annual herb in the Phrymaceae family (no common family name). It ranges from 0.5 to 10 inches (1 to 20 centimeters) tall and produces flowers that are bright yellow with reddish brown markings near the mouth. The seeds are small and numerous, and seed is likely dispersed by the wind as the seed pods open. As with other annual species that are sensitive to annual levels of rainfall, germination of resident seed banks may be low or nonexistent in unfavorable years, with little or no aboveground expression of the species visible.

*Mimulus fremontii var. vandenbergensis* occurs only in western Santa Barbara County, California, at lower elevations and closer to the coast, in sandy openings of coastal scrub, chaparral, and woodlands on an old dune sheet known as Burton Mesa. Seven populations occur across the mesa over a distance of approximately 6 miles, generally in alignment with the prevailing winds. Two populations

occur on Vandenberg Air Force Base, two occur on State Park lands at La Purisima State Historic Park, two occur primarily on Department of Fish and Game lands on Burton Mesa Ecological Reserve, and one occurs primarily on private lands.

The threats currently facing *Mimulus fremontii var. vandenbergensis* include alteration and destruction of habitat from development and associated secondary impacts, including increased fragmentation, alteration of hydrology, competition with nonnative species, and alteration of fire regimes. The taxon is also threatened with stochastic extinction due to small population size: Of the 7 populations, 3 have supported fewer than 100 individuals based on at least 2 years of observations. We consider competition with nonnative plant species to be the largest and most immediate threat: Veldt grass, pampas grass, bromes, Sahara mustard, star thistle, Italian thistle, and bull thistle are present at various sites where *Mimulus fremontii var. vandenbergensis* occurs. Habitat for one population on private land was graded in 2007 in preparation for construction of a housing development. Construction has been stalled, and in the meantime, veldt grass has become established in the graded lot and has increased the rate at which this species is spreading in adjacent habitat for *Mimulus fremontii var. vandenbergensis,* including the Burton Mesa Ecological Reserve. Veldt grass is also present and rapidly spreading at population sites on Vandenberg Air Force Base and La Purisima State Historic Park.

The threats are of a high magnitude because all three of the largest populations are at risk of being lost from the invasion of nonnative species. The third largest population is also threatened by secondary impacts from a planned development and firefighting activities. Losses of some or all of the three largest populations will increase the risk of extinction of the taxon as a whole because the remaining populations are smaller and more vulnerable to stochastic extirpation, which compounds the other threats these small populations face. The threats are ongoing and, therefore, imminent. Consequently, we have assigned a LPN of 3 to this plant variety.

**Listing Priority Changes in Candidates**

We reviewed the LPN for all candidate species and are changing the numbers for the following species discussed below. Some of the changes reflect actual changes in either the magnitude or immediacy of the threats. For some species, the LPN change reflects efforts to ensure national consistency as well as closer adherence to the 1983 guidelines in assigning these numbers, rather than an actual change in the nature of the threats.

*Snails*

Page springsnail (*Pyrgulopsis morrisoni*)—The following summary is based on information contained in our files. The Page springsnail is known to exist only within a complex of springs located within an approximately 0.93-mi (1.5-km) stretch along the west side of Oak Creek around the community of Page Springs, and within springs located along Spring Creek, tributary to Oak Creek, Yavapai County, Arizona.

The primary threat to the Page springsnail is modification of habitat by domestic, agricultural, ranching, fish hatchery, and recreational activities. Many of the springs where the species occurs have been subjected to some level of such modification. Based on recent survey data, it appears that the Page springsnail is abundant within natural habitats and persists in modified habitats, albeit at reduced densities. Arizona Game and Fish Department (AGFD) management plans for the Bubbling Ponds and Page Springs fish hatcheries include commitments to replace lost habitat and to monitor remaining populations of invertebrates such as the Page springsnail. The AGFD and the Service recently entered into a Candidate Conservation Agreement with Assurances that calls for evaluating the restoration and creation of natural springhead integrity, including springs on AGFD properties. In fact, several conservation measures have already been implemented. Also, the National Park Service recently acquired Shea Springs, a site that the Page springsnail occupied historically, and has expressed an interest in restoring natural springhead integrity to that site. Accordingly, implementation of the CCAA reduces the magnitude of threats to a moderate level and greatly reduces the chances of extirpation or extinction. The immediacy of the threat of groundwater withdrawal is uncertain, due to conflicting information regarding imminence. However, overall, the threats are imminent, because modification of the species' habitat by threats other than groundwater withdrawal is currently occurring. Therefore, we are changing the LPN for the Page springsnail from a 2 to an 8.

*Flowering Plants*

*Hibiscus dasycalyx* (Neches River rose-mallow)—The following summary is based on information contained in our files. This species, found in eastern Texas, appears to be restricted to those portions of wetlands that are exposed to open sun and normally hold standing water early in the growing season, with water levels dropping during late summer and fall. This habitat has been affected by drainage or filling of floodplain depressions and oxbows, stream channelization, road construction, timber harvesting, agricultural activities (primarily mowing and grazing), and herbicide use. Threats that continue to affect the species include wetland alteration, herbicide use, grazing, mowing during the species' growing and flowering period, and genetic swamping by other *Hibiscus* species.

A 1995 status survey of 10 counties resulted in confirmation of the species at only three sites, but in three separate counties and three different watersheds, suggesting a relatively wide historical range. These three populations were all within highway rights-of-way and vulnerable to herbicides and adjacent agricultural activities. As of 2005, only 20 plants remained at one of these sites. Additional surveys for *Hibiscus dasycalyx* discovered new populations. About 300 plants were found on land owned by Temple-Inland Corporation in east Trinity County. Smaller plant numbers have been seen at this site and in 2005 no plants were observed. This site may be too dry to support this species, possibly due to changes in the wetland's hydrology. Another site discovered on land previously owned by Champion International Corporation (near White Rock Creek in west Trinity County) once supported 300–400 plants. This site was modified in 2007. In west Houston County, a population of 300 to 400 plants discovered on private land has been purchased by the Natural Area Preservation Association in order to protect this land in perpetuity. In east Houston County, a population discovered in Compartment 55 in Davy Crockett National Forest numbered over 1,000 in 2006. In 2000, nearly 800 plants were introduced into Compartments 16 and 20 of Davy Crockett National Forest as part of a reintroduction effort. One population retained high numbers (350 in 2006), but was subjected to high water conditions in 2007 and may have been adversely affected. The second site was affected by a change in hydrology and had declined to 50 plants in 2006. In 2004, 200 plants were placed in a wetland in Compartment 11 of Davy Crockett National Forest, but only 10 plants were seen in 2006. High water from heavy spring and summer rains

prevented further assessment of these rose-mallow sites.

The threats to the species continue to be of a high magnitude because all of the populations are severely affected by some combination of the threats, and the effectiveness of the re-introduction and preservation efforts has not been established. After evaluating the current conditions of the species' habitat, we now find that threats are imminent overall. Threats are currently occurring and ongoing for nearly all of the populations (herbicides and adjacent agricultural activities for the 3 populations identified in 1995, and hydrology alteration and other modifications for the 2 populations in east Trinity County and the 3 populations reintroduced in Davy Crockett National Forest). Thus, in light of this information and to ensure consistency in the application of our listing priority process we have changed the LPN from a 5 to a 2 for the Neches River rose-mallow to reflect imminent threats of high magnitude.

*Linum arenicola* (Sand flax)—The following summary is based on information contained in our files. Sand flax is found in pine rockland and marl prairie habitats, which require periodic wildfires in order to maintain an open, shrub-free subcanopy and reduce leaf-litter levels. Based upon available data, there are 11 extant occurrences of sand flax; 11 others have been extirpated or destroyed. For the most part, only small and isolated occurrences remain in low lying areas in a restricted range of southern Florida and the Florida Keys. In general, viability is uncertain for 9 of 11 occurrences.

Sand flax is threatened by habitat loss and degradation due to development; climatic changes and sea-level rise, which ultimately are likely to substantially reduce the extent of available habitat; fire suppression and difficulty in applying prescribed fire; road maintenance activities; exotic species; illegal dumping; natural disturbances, such as hurricanes, tropical storms, and storm surges; and the small and fragmented nature of the current population. Reduced pollinator activity and suppression of pollinator populations from pesticides used in mosquito control and decreased seed production due to increased seed predation in a fragmented wildland urban interface may also affect sand flax; however, not enough information is known on this species' reproductive biology or life history to assess these potential threats. Some of the threats to the species—including fire suppression, difficulty in applying prescribed fire, road maintenance activities, exotic species, and illegal dumping—threaten nearly all remaining populations. However, some efforts are under way to use prescribed fire to control exotics on conservation lands where this species occurs.

There are some circumstances that may mitigate the impacts of the threats upon the species. For example, a survey conducted in 2009 showed approximately 74,000 plants on a non-conservation, public site in Miami-Dade County; this is far more plants than was previously known. Although a portion of the plants will be affected by development, approximately 60,000 are anticipated to be protected and managed through a Conservation Easement. Consequently, the majority of the largest occurrence in Miami-Dade County is expected to be conserved and managed. In addition, much of the pine rockland on Big Pine Key, the location of the largest occurrence in the Keys, is protected from development.

Nevertheless, due to the small and fragmented nature of the current population, stochastic events, disease, or genetic bottlenecks may strongly affect this species in the Keys. One example is Hurricane Wilma, which inundated most of the species' habitat on Big Pine Key in 2005, and plants were not found 8–9 weeks post-storm; the density of sand flax declined to zero in all management units at The Nature Conservancy's preserve in 2006. In a 2007 post-hurricane assessment, sand flax was found in northern plots, but not in any of the southern plots on Big Pine Key. More current data are not available.

Overall, the magnitude of threats is high, because the threats affect all 11 known occurrences of the species, and can result in a precipitous decline to the population levels, particularly when combined with the potential impacts from hurricanes or other natural disasters. Because development is not immediate for the majority of the largest population in Miami-Dade County and another population in the Keys is also largely protected from development since much of it is within public and private conservation lands, the threat of habitat loss is now nonimminent. In addition, sea level rise is a long-term threat since we do not have evidence that it is currently affecting any population of sand flax. Therefore, based upon new information (new survey date showing a much larger population of plants), and reduced immediacy of threats, we changed the LPN of this species from a 2 to a 5.

*Penstemon scariosus* var. *albifluvis* (White River beardtongue)—The following summary is based on information contained in our files and the petition we received on October 27, 1983. This species is restricted to calcareous soils derived from oil shale barrens of the Green River Formation in the Uinta Basin of northeastern Utah and adjacent Colorado. There are 14 occurrences known in Utah and 1 in Colorado. Most of the occupied habitat of the White River beardtongue is within developed and expanding oil and gas fields. The location of the species' habitat exposes it to destruction from road, pipeline, and well site construction in connection with oil and gas development. Recreational off-road vehicle use, heavy grazing by livestock, and wildlife and livestock trampling are additional threats. A future threat (and potentially the greatest threat) to the species is oil shale development.

In the 2009 CNOR, we found the threats were nonimminent and high magnitude. However, traditional oil and gas energy development in the area has expanded into habitat for this species, and therefore the threat is now imminent. In addition, BLM has adopted a Special Status Species policy and has included in its current Resource Management Plan commitments to protect this species. These protections lessen the extent of traditional oil and gas development impacts to this species, so that the threat is now of moderate magnitude. The threat from off-road vehicles is also moderate because BLM limited all vehicles to designated routes, thus avoiding beardtongue habitat. Based on current information, we are changing the LPN from a 6 to a 9 for this plant variety.

**Candidate Removals**

As summarized below, we have evaluated the threats to the following species and considered factors that, individually and in combination, currently or potentially could pose a risk to this species and its habitat. After a review of the best available scientific and commercial data, we conclude that listing this species under the Endangered Species Act is not warranted because the species is not likely to become an endangered species within the foreseeable future throughout all or a significant portion of its' range. Therefore, we find that proposing a rule to list it is not warranted, and we no longer consider it to be a candidate species for listing. We will continue to monitor the status of this species and to accept additional information and comments concerning this finding. We will reconsider our determination in the event that new information indicates that the threats to the species is of a considerably greater magnitude or imminence than identified through

assessments of information contained in our files, as summarized here.

*Mammals*

Palm Springs round-tailed ground squirrel (*Xerospermophilus tereticaudus chlorus*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The Palm Springs round-tailed ground squirrel was believed to be limited in range to the Coachella Valley region of Riverside County, California. The primary habitat in the Coachella Valley for round-tailed ground squirrel is the dunes and mesquite hummocks associated with *Prosopis glandulosa* var. *torreyana* (honey mesquite) and to a lesser extent those dunes and hummocks associated with *Larrea tridentata* (creosote), or other vegetation. The primary threat to *X. t. chlorus* in the Coachella Valley was from habitat loss due to urban development and drops in the groundwater table, which eliminated much of the honey mesquite in the Coachella Valley and fragmented habitat occupied by this subspecies. The Coachella Valley Association of Governments (CVAG) developed a Multiple Species Habitat Conservation Plan (MSHCP) that was reviewed and approved by the Service in 2008. Habitat conservation and monitoring actions that have been implemented since 2008 specifically for *X. t. chlorus* have significantly eliminated the threat of urban development to the taxon. To date, conservation for *X. t. chlorus* includes protection of 244 acres of mesquite hummocks as a result of the MSHCP, in addition to 104 acres of mesquite hummocks on conservation lands in existence prior to permitting the MSHCP. Protection of additional habitat (desert shrub communities and other sandy areas with appropriate vegetation known to harbor the subspecies at lower densities) is also anticipated in other portions of the plan area. Although we do not rely upon future implementation of the additional habitat protections anticipated in the MSHCP, we do expect conservation actions specific to *X. t. chlorus* to continue as a result of the commitment by CVAG and the MSHCP.

More significant than the ongoing conservation measures is the fact that recent results of both morphological and genetic studies indicate its range is substantially larger than previously believed. Analysis of experimental samples show *X. t. chlorus* is found in Hinkley Valley and Death Valley, expanding the range at minimum 150 miles northward. Because *X. t. chlorus* is more widespread in its range than was previously understood, and based on our review of the best available information, we no longer conclude that threats across this newly expanded range put the taxon in danger of extinction. Moreover, this subspecies is not endangered or threatened in a significant portion of the range because the conservation actions and current protections provided in Death Valley make it so it is not endangered or threatened in any portion of the range. In summary, the existing conservation provided by MSHCP in the Coachella Valley, along with the data showing the subspecies has an expanded range over which the threats are nonsignificant to the taxon as a whole, we find listing of the Palm Springs round-tailed ground squirrel (*X. t. chlorus*) throughout all or a significant portion of its range is no longer warranted. The subspecies no longer meets our definition of a candidate, and we have removed it from candidate status.

**Petition Findings**

The Act provides two mechanisms for considering species for listing. One method allows the Secretary, on his own initiative, to identify species for listing under the standards of section 4(a)(1). We implement this through the candidate program, discussed above. The second method for listing a species provides a mechanism for the public to petition us to add a species to the Lists. The CNOR serves several purposes as part of the petition process: (1) In some instances (in particular, for petitions to list species that the Service has already identified as candidates on its own initiative), it serves as the petition finding; (2) it serves as a "resubmitted" petition finding that the Act requires the Service to make each year; and (3) it documents the Service's compliance with the statutory requirement to monitor the status of species for which listing is warranted-but-precluded to ascertain if they need emergency listing.

First, the CNOR serves as a petition finding in some instances. Under section 4(b)(3)(A), when we receive a listing petition, we must determine within 90 days, to the maximum extent practicable, whether the petition presents substantial information indicating that listing may be warranted (a "90-day finding"). If we make a positive 90-day finding, we must promptly commence a status review of the species under section 4(b)(3)(A); we must then make and publish one of three possible findings within 12 months of the receipt of the petition (a "12-month finding"):

1. The petitioned action is not warranted;

2. The petitioned action is warranted (in which case we are required to promptly publish a proposed regulation to implement the petitioned action; once we publish a proposed rule for a species, section 4(b)(5) and 4(b)(6) govern further procedures regardless of whether we issued the proposal in response to a petition); or

3. The petitioned action is warranted but (a) the immediate proposal of a regulation and final promulgation of a regulation implementing the petitioned action is precluded by pending proposals to determine whether any species is endangered or threatened, and (b) expeditious progress is being made to add qualified species to the lists of endangered or threatened species. (We refer to this third option as a "warranted-but-precluded finding.")

We define "candidate species" to mean those species for which the Service has on file sufficient information on biological vulnerability and threat(s) to support issuance of a proposed rule to list, but for which issuance of the proposed rule is precluded (61 FR 64481; December 6, 1996). This standard for making a species a candidate through our own initiative is identical to the standard for making a warranted-but-precluded 12-month petition finding on a petition to list, and we add all petitioned species for which we have made a warranted-but-precluded 12-month finding to the candidate list.

Therefore all candidate species identified through our own initiative already have received the equivalent of substantial 90-day and warranted-but-precluded 12-month findings. Nevertheless, we review the status of the newly petitioned candidate species and through this CNOR publish specific section 4(b)(3) findings (*i.e.,* substantial 90-day and warranted-but-precluded 12-month findings) in response to the petitions to list these candidate species. We publish these findings as part of the first CNOR following receipt of the petition. Since publication of the CNOR in 2009, we received petitions to list three candidate species, the Florida bonneted bat, headwater chub, and Rosemont talussnail (we received this petition after we initiated our assessment of this species for candidate status). We are making substantial 90-day findings and warranted-but-precluded 12-month findings for these species as part of this notice. We have identified the candidate species for which we received petitions by the code "C*" in the category column on the left side of Table 1.

Second, the CNOR serves as a "resubmitted" petition finding. Section 4(b)(3)(C)(i) of the Act requires that when we make a warranted-but-precluded finding on a petition, we are to treat such a petition as one that is resubmitted on the date of such a finding. Thus, we must make a 12-month petition finding in compliance with section 4(b)(3)(B) of the Act at least once a year, until we publish a proposal to list the species or make a final not-warranted finding. We make these annual findings for petitioned candidate species through the CNOR.

Third, through undertaking the analysis requires to complete the CNOR, the Service determines if any candidate species needs emergency listing. Section 4(b)(3)(C)(iii) of the Act requires us to "implement a system to monitor effectively the status of all species" for which we have made a warranted-but-precluded 12-month finding, and to "make prompt use of the [emergency listing] authority [under section 4(b)(7)] to prevent a significant risk to the well being of any such species." The CNOR plays a crucial role in the monitoring system that we have implemented for all candidate species by providing notice that we are actively seeking information regarding the status of those species. We review all new information on candidate species as it becomes available, prepare an annual species assessment form that reflects monitoring results and other new information, and identify any species for which emergency listing may be appropriate. If we determine that emergency listing is appropriate for any candidate we will make prompt use of the emergency listing authority under section 4(b)(7). We have been reviewing and will continue to review, at least annually, the status of every candidate, whether or not we have received a petition to list it. Thus, the CNOR and accompanying species assessment forms constitute the Service's annual finding on the status of petitioned species pursuant to section 4(b)(3)(C)(i).

A number of court decisions have elaborated on the nature and specificity of information that must be considered in making and describing the findings in the CNOR. The previous CNOR, which was published on November 9, 2009 (74 FR 57804), describes these court decisions in further detail. As with previous CNORs, we continue to incorporate information of the nature and specificity required by the courts. For example, we include a description of the reasons why the listing of every petitioned candidate species is both warranted and precluded at this time. We make our determinations of preclusion on a nationwide basis to ensure that the species most in need of listing will be addressed first and also because we allocate our listing budget on a nationwide basis (see below). Regional priorities can also be discerned from Table 1, which includes the lead region and the LPN for each species. Our preclusion determinations are further based upon our budget for listing activities for unlisted species only, and we explain the priority system and why the work we have accomplished does preclude action on listing candidate species.

Pursuant to section 4(b)(3)(C)(ii) and the Administrative Procedure Act (5 U.S.C. 551 et seq.), any party with standing may challenge the merits of any not-warranted or warranted-but-precluded petition finding incorporated in this CNOR. The analysis included herein, together with the administrative record for the decision at issue (particularly the supporting species assessment form), will provide an adequate basis for a court to review the petition finding.

Nothing in this document or any of our policies should be construed as in any way modifying the Act's requirement that we make a resubmitted 12-month petition finding for each petitioned candidate within 1 year of the date of publication of this CNOR. If we fail to make any such finding on a timely basis, whether through publication of a new CNOR or some other form of notice, any party with standing may seek judicial review.

In this CNOR, we continue to address the concerns of the courts by including specific information in our discussion on preclusion (*see* below). In preparing this CNOR, we reviewed the current status of, and threats to, the 166 candidates and 5 listed species for which we have received a petition and for which we have found listing or reclassification from threatened to endangered to be warranted but precluded. We also reviewed the current status of, and threats to, the Canada lynx in New Mexico for which we received a petition to add that State to the listed range. We find that the immediate issuance of a proposed rule and timely promulgation of a final rule for each of these species has been, for the preceding months, and continues to be, precluded by higher priority listing actions. Additional information that is the basis for this finding is found in the species assessments and our administrative record for each species.

Our review included updating the status of, and threats to, petitioned candidate or listed species for which we published findings, pursuant to section 4(b)(3)(B), in the previous CNOR. We have incorporated new information we gathered since the prior finding and, as a result of this review, we are making continued warranted-but-precluded 12-month findings on the petitions for these species.

The immediate publication of proposed rules to list these species was precluded by our work on higher priority listing actions, listed below, during the period from October 1, 2009, through September 30, 2010. We will continue to monitor the status of all candidate species, including petitioned species, as new information becomes available to determine if a change in status is warranted, including the need to emergency-list a species under section 4(b)(7) of the Act.

In addition to identifying petitioned candidate species in Table 1 below, we also present brief summaries of why each of these candidates warrants listing. More complete information, including references, is found in the species assessment forms. You may obtain a copy of these forms from the Regional Office having the lead for the species, or from the Fish and Wildlife Service's Internet Web site: *http://ecos.fws.gov/tess_public/pub/SpeciesReport.do?listingType=C&mapstatus=1.* As described above, under section 4 of the Act we may identify and propose species for listing based on the factors identified in section 4(a)(1), and section 4 also provides a mechanism for the public to petition us to add a species to the lists of threatened species or endangered species under the Act. Below we describe the actions that continue to preclude the immediate proposal and final promulgation of a regulation implementing each of the petitioned actions for which we have made a warranted-but-precluded finding, and we describe the expeditious progress we are making to add qualified species to, and remove species from, the lists of endangered or threatened species.

**Preclusion and Expeditious Progress**

Preclusion is a function of the listing priority of a species in relation to the resources that are available and the cost and relative priority of competing demands for those resources. Thus, in any given fiscal year (FY), multiple factors dictate whether it will be possible to undertake work on a listing proposal regulation or whether promulgation of such a proposal is precluded by higher priority listing actions.

The resources available for listing actions are determined through the annual Congressional appropriations

process. The appropriation for the Listing Program is available to support work involving the following listing actions: Proposed and final listing rules; 90-day and 12-month findings on petitions to add species to the Lists of Endangered and Threatened Wildlife and Plants (Lists) or to change the status of a species from threatened to endangered; annual "resubmitted" petition findings on prior warranted-but-precluded petition findings as required under section 4(b)(3)(C)(i) of the Act; critical habitat petition findings; proposed and final rules designating critical habitat; and litigation-related, administrative, and program-management functions (including preparing and allocating budgets, responding to Congressional and public inquiries, and conducting public outreach regarding listing and critical habitat). The work involved in preparing various listing documents can be extensive, and may include, but is not limited to: Gathering and assessing the best scientific and commercial data available and conducting analyses used as the basis for our decisions; writing and publishing documents; and obtaining, reviewing, and evaluating public comments and peer-review comments on proposed rules and incorporating relevant information into final rules. The number of listing actions that we can undertake in a given year also is influenced by the complexity of those listing actions; that is, more complex actions generally are more costly. The median cost for preparing and publishing a 90-day finding is $39,276; for a 12-month finding, $100,690; for a proposed rule with critical habitat, $345,000; and for a final listing rule with critical habitat, the median cost is $305,000.

We cannot spend more than is appropriated for the Listing Program without violating the Anti-Deficiency Act (*see* 31 U.S.C. 1341(a)(1)(A)). In addition, in FY 1998 and for each fiscal year since then, Congress has placed a statutory cap on funds which may be expended for the Listing Program, equal to the amount expressly appropriated for that purpose in that fiscal year. This cap was designed to prevent funds appropriated for other functions under the Act (for example, recovery funds for removing species from the Lists), or for other Service programs, from being used for Listing Program actions (see House Report 105–163, 105th Congress, 1st Session, July 1, 1997).

Since FY 2002, the Service's budget has included a critical habitat subcap to ensure that some funds are available for other work in the Listing Program ("The critical habitat designation subcap will ensure that some funding is available to address other listing activities" (H.R. No. 107–103, 107th Congress, 1st Session, June 19, 2001)). In FY 2002 and each year until FY 2006, the Service has had to use virtually the entire critical habitat subcap to address court-mandated designations of critical habitat, and consequently none of the critical habitat subcap funds have been available for other listing activities. In FY 2007, we were able to use some of the critical habitat subcap funds to fund proposed listing determinations for high-priority candidate species. In FY 2009, while we were unable to use any of the critical habitat subcap funds to fund proposed listing determinations, we did use some of this money to fund the critical habitat portion of some proposed listing determinations so that the proposed listing determination and proposed critical habitat designation could be combined into one rule, thereby being more efficient in our work. In FY 2010, we are using some of the critical habitat subcap funds to fund listing actions with statutory deadlines.

We make our determinations of preclusion on a nationwide basis to ensure that the species most in need of listing will be addressed first and also because we allocate our listing budget on a nationwide basis. Through the listing cap, the critical habitat subcap, and the amount of funds needed to address court-mandated critical habitat designations, Congress and the courts have in effect determined the amount of money available for other listing activities nationwide. Therefore, the funds in the listing cap, other than those needed to address court-mandated critical habitat for already listed species, represent the resources we must take into consideration when we make our determinations of preclusion and expeditious progress.

Congress identified the availability of resources as the only basis for deferring the initiation of a rulemaking that is warranted. The Conference Report accompanying Public Law 97–304, which established the current statutory deadlines and the warranted-but-precluded finding, states that the amendments were "not intended to allow the Secretary to delay commencing the rulemaking process for any reason other than that the existence of pending or imminent proposals to list species subject to a greater degree of threat would make allocation of resources to such a petition [that is, for a lower-ranking species] unwise." Although that statement appeared to refer specifically to the "to the maximum extent practicable" limitation on the 90-day deadline for making a "substantial information" finding, that finding is made at the point when the Service is deciding whether or not to commence a status review that will determine the degree of threats facing the species, and therefore the analysis underlying the statement is more relevant to the use of the warranted-but-precluded finding, which is made when the Service has already determined the degree of threats facing the species and is deciding whether or not to commence a rulemaking.

In FY 2010, $10,471,000 is the amount of money that Congress appropriated for the Listing Program (that is, the portion of the Listing Program funding not related to critical habitat designations for species that are already listed). Therefore, a proposed listing is precluded if pending proposals with higher priority will require expenditure of at least $10,471,000, and expeditious progress is the amount of work that can be achieved with $10,471,000. Since court orders requiring critical habitat work will not require use of all of the funds within the critical habitat subcap, we are using $1,114,417 of our critical habitat subcap funds in order to work on as many of our required petition findings and listing determinations as possible. This brings the total amount of funds we have for listing action in FY 2010 to $11,585,417.

The $11,585,417 is being used to fund work in the following categories: Compliance with court orders and court-approved settlement agreements requiring that petition findings or listing determinations be completed by a specific date; section 4 (of the Act) listing actions with absolute statutory deadlines; essential litigation-related, administrative, and listing program-management functions; and high-priority listing actions for some of our candidate species. In 2009, the responsibility for listing foreign species under the Act was transferred from the Division of Scientific Authority, International Affairs Program, to the Endangered Species Program. Therefore, starting in FY 2010, a portion of our funding is being used to work on the actions described above as they apply to listing actions for foreign species. This has the potential to further reduce funding available for domestic listing actions. Although there are currently no foreign species issues included in our high-priority listing actions at this time, many actions have statutory or court-approved settlement deadlines, thus increasing their priority. The budget allocations for each specific listing action are identified in the Service's FY

2010 Allocation Table (part of our administrative record).

Based on our September 21, 1983, guidance for assigning an LPN for each candidate species (48 FR 43098), we have a significant number of species with an LPN of 2. Under this guidance, we assign each candidate an LPN of 1 to 12, depending on the magnitude of threats (high or moderate to low), immediacy of threats (imminent or nonimminent), and taxonomic status of the species (in order of priority: Monotypic genus (a species that is the sole member of a genus), species, or part of a species (subspecies, distinct population segment, or significant portion of the range)). The lower the listing priority number, the higher the listing priority (that is, a species with an LPN of 1 would have the highest listing priority).

Because of the large number of high-priority species, we have further ranked the candidate species with an LPN of 2 by using the following extinction-risk type criteria: International Union for the Conservation of Nature and Natural Resources (IUCN) Red list status/rank, Heritage rank (provided by NatureServe), Heritage threat rank (provided by NatureServe), and species currently with fewer than 50 individuals, or 4 or fewer populations. Those species with the highest IUCN rank (critically endangered), the highest Heritage rank (G1), the highest Heritage threat rank (substantial, imminent threats), and currently with fewer than 50 individuals, or fewer than 4 populations, originally comprised a group of approximately 40 candidate species ("Top 40"). These 40 candidate species have had the highest priority to receive funding to work on a proposed listing determination. As we work through proposed and final listing rules for those 40 candidates, we apply the ranking criteria to the next group of candidates with LPNs of 2 and 3 to determine the next set of highest priority candidate species. Finally, proposed rules for reclassification of threatened species to endangered are lower priority, since as listed species, they are already afforded the protection of the Act and implementing regulations. However, for efficiency reasons, we may choose to work on a proposed rule to reclassify a species to endangered if we can combine this with work that is subject to a court-determined deadline.

With our workload so much bigger than the amount of funds we have to accomplish it, it is important that we be as efficient as possible in our listing process. Therefore, as we work on proposed rules for the highest priority species in the next several years, we are preparing multi-species proposals when appropriate, and these may include species with lower priority if they overlap geographically or have the same threats as a species with an LPN of 2. In addition, we take into consideration the availability of staff resources when we determine which high-priority species will receive funding to minimize the amount of time and resources required to complete each listing action.

Based on these prioritization factors, we continue to find that proposals to list the petitioned candidate species included in Table 1 are all warranted but precluded.

As explained above, a determination that listing is warranted but precluded must also demonstrate that expeditious progress is being made to add and remove qualified species to and from the Lists of Endangered and Threatened Wildlife and Plants. As with our "precluded" finding, the evaluation of whether progress in adding qualified species to the Lists has been expeditious is a function of the resources available for listing and the competing demands for those funds. Given the limited resources available for listing, we find that we made expeditious progress in FY 2010 in the Listing Program. (Although we do not discuss it in detail here, we are making expeditious progress in removing species from the list under the Recovery program in light of the resource available for delisting, which is funded by a separate line item in the budget of the Endangered Species Program. During FY 2010, we have completed two proposed delisting rules and two final delisting rules.) Progress in adding qualified species to the list included preparing and publishing the following determinations:

FY 2010 Completed Listing Actions

| Publication date | Title | Actions | FR pages |
|---|---|---|---|
| 10/08/2009 | Listing *Lepidium papilliferum* (Slickspot Peppergrass) as a Threatened Species Throughout Its Range. | Final Listing Threatened | 74 FR 52013–52064. |
| 10/27/2009 | 90-day Finding on a Petition To List the American Dipper in the Black Hills of South Dakota as Threatened or Endangered. | Notice of 90-day Petition Finding, Not substantial. | 74 FR 55177–55180. |
| 10/28/2009 | Status Review of Arctic Grayling (*Thymallus arcticus*) in the Upper Missouri River System. | Notice of Intent to Conduct Status Review for Listing Decision. | 74 FR 55524–55525. |
| 11/03/2009 | Listing the British Columbia Distinct Population Segment of the Queen Charlotte Goshawk Under the Endangered Species Act: Proposed rule. | Proposed Listing Threatened | 74 FR 56757–56770. |
| 11/03/2009 | Listing the Salmon-Crested Cockatoo as Threatened Throughout Its Range with Special Rule. | Proposed Listing Threatened | 74 FR 56770–56791. |
| 11/23/2009 | Status Review of Gunnison sage-grouse (*Centrocercus minimus*). | Notice of Intent to Conduct Status Review for Listing Decision. | 74 FR 61100–61102. |
| 12/03/2009 | 12-Month Finding on a Petition to List the Black-tailed Prairie Dog as Threatened or Endangered. | Notice of 12-month petition finding, Not warranted. | 74 FR 63343–63366. |
| 12/03/2009 | 90-Day Finding on a Petition to List Sprague's Pipit as Threatened or Endangered. | Notice of 90-day Petition Finding, Substantial. | 74 FR 63337–63343. |
| 12/15/2009 | 90-Day Finding on Petitions To List Nine Species of Mussels From Texas as Threatened or Endangered With Critical Habitat. | Notice of 90-day Petition Finding, Substantial. | 74 FR 66260–66271. |
| 12/16/2009 | Partial 90-Day Finding on a Petition to List 475 Species in the Southwestern United States as Threatened or Endangered With Critical Habitat Critical Habitat. | Notice of 90-day Petition Finding, Not substantial and Substantial. | 74 FR 66865–66905. |

FY 2010 COMPLETED LISTING ACTIONS—Continued

| Publication date | Title | Actions | FR pages |
|---|---|---|---|
| 12/17/2009 | 12-month Finding on a Petition To Change the Final Listing of the Distinct Population Segment of the Canada Lynx To Include New Mexico. | Notice of 12-month petition finding, Warranted but precluded. | 74 FR 66937–66950. |
| 1/05/2010 | Listing Foreign Bird Species in Peru and Bolivia as Endangered Throughout Their Range. | Proposed Listing Endangered | 75 FR 605–649. |
| 1/05/2010 | Listing Six Foreign Birds as Endangered Throughout Their Range. | Proposed Listing Endangered | 75 FR 286–310. |
| 1/05/2010 | Withdrawal of Proposed Rule to List Cook's Petrel | Proposed rule, withdrawal | 75 FR 310–316. |
| 1/05/2010 | Final Rule to List the Galapagos Petrel and Heinroth's Shearwater as Threatened Throughout Their Ranges. | Final Listing Threatened | 75 FR 235–250. |
| 1/20/2010 | Initiation of Status Review for *Agave eggersiana* and *Solanum conocarpum*. | Notice of Intent to Conduct Status Review for Listing Decision. | 75 FR 3190–3191. |
| 2/09/2010 | 12-month Finding on a Petition to List the American Pika as Threatened or Endangered. | Notice of 12-month petition finding, Not warranted. | 75 FR 6437–6471. |
| 2/25/2010 | 12-Month Finding on a Petition To List the Sonoran Desert Population of the Bald Eagle as a Threatened or Endangered Distinct Population Segment. | Notice of 12-month petition finding, Not warranted. | 75 FR 8601–8621. |
| 2/25/2010 | Withdrawal of Proposed Rule To List the Southwestern Washington/Columbia River Distinct Population Segment of Coastal Cutthroat Trout (*Oncorhynchus clarki clarki*) as Threatened. | Withdrawal of Proposed Rule to List | 75 FR 8621–8644. |
| 3/18/2010 | 90-Day Finding on a Petition to List the Berry Cave salamander as Endangered. | Notice of 90-day Petition Finding, Substantial. | 75 FR 13068–13071. |
| 3/23/2010 | 90-Day Finding on a Petition to List the Southern Hickorynut Mussel (*Obovaria jacksoniana*) as Endangered or Threatened. | Notice of 90-day Petition Finding, Not substantial. | 75 FR 13717–13720. |
| 3/23/2010 | 90-Day Finding on a Petition to List the Striped Newt as Threatened. | Notice of 90-day Petition Finding, Substantial. | 75 FR 13720–13726. |
| 3/23/2010 | 12-Month Findings for Petitions to List the Greater Sage-Grouse (*Centrocercus urophasianus*) as Threatened or Endangered. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 13910–14014. |
| 3/31/2010 | 12-Month Finding on a Petition to List the Tucson Shovel-Nosed Snake (*Chionactis occipitalis klauberi)* as Threatened or Endangered with Critical Habitat. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 16050–16065. |
| 4/5/2010 | 90-Day Finding on a Petition To List Thorne's Hairstreak Butterfly as threatened or Endangered. | Notice of 90-day Petition Finding, Substantial. | 75 FR 17062–17070. |
| 4/6/2010 | 12-month Finding on a Petition To List the Mountain Whitefish in the Big Lost River, Idaho, as Endangered or Threatened. | Notice of 12-month petition finding, Not warranted. | 75 FR 17352–17363. |
| 4/6/2010 | 90-Day Finding on a Petition to List a Stonefly (*Isoperla jewetti*) and a Mayfly (*Fallceon eatoni*) as Threatened or Endangered with Critical Habitat. | Notice of 90-day Petition Finding, Not substantial. | 75 FR 17363–17367. |
| 4/7/2010 | 12-Month Finding on a Petition to Reclassify the Delta Smelt From Threatened to Endangered Throughout Its Range. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 17667–17680. |
| 4/13/2010 | Determination of Endangered Status for 48 Species on Kauai and Designation of Critical Habitat. | Final Listing Endangered | 75 FR 18959–19165. |
| 4/15/2010 | Initiation of Status Review of the North American Wolverine in the Contiguous United States. | Notice of Initiation of Status Review for Listing Decision. | 75 FR 19591–19592. |
| 4/15/2010 | 12-Month Finding on a Petition to List the Wyoming Pocket Gopher as Endangered or Threatened with Critical Habitat. | Notice of 12-month petition finding, Not warranted. | 75 FR 19592–19607. |
| 4/16/2010 | 90-Day Finding on a Petition to List a Distinct Population Segment of the Fisher in Its United States Northern Rocky Mountain Range as Endangered or Threatened with Critical Habitat. | Notice of 90-day Petition Finding, Substantial. | 75 FR 19925–19935. |
| 4/20/2010 | Initiation of Status Review for Sacramento splittail (*Pogonichthys macrolepidotus*). | Notice of Initiation of Status Review for Listing Decision. | 75 FR 20547–20548. |
| 4/26/2010 | 90-Day Finding on a Petition to List the Harlequin Butterfly as Endangered. | Notice of 90-day Petition Finding, Substantial. | 75 FR 21568–21571. |
| 4/27/2010 | 12-Month Finding on a Petition to List Susan's Purse-making Caddisfly (*Ochrotrichia susanae*) as Threatened or Endangered. | Notice of 12-month petition finding, Not warranted. | 75 FR 22012–22025. |
| 4/27/2010 | 90-day Finding on a Petition to List the Mohave Ground Squirrel as Endangered with Critical Habitat. | Notice of 90-day Petition Finding, Substantial. | 75 FR 22063–22070. |
| 5/4/2010 | 90-Day Finding on a Petition to List Hermes Copper Butterfly as Threatened or Endangered. | Notice of 90-day Petition Finding, Substantial. | 75 FR 23654–23663. |
| 6/1/2010 | 90-Day Finding on a Petition To List *Castanea pumila* var. *ozarkensis*. | Notice of 90-day Petition Finding, Substantial. | 75 FR 30313–30318. |

FY 2010 COMPLETED LISTING ACTIONS—Continued

| Publication date | Title | Actions | FR pages |
|---|---|---|---|
| 6/1/2010 | 12-month Finding on a Petition to List the White-tailed Prairie Dog as Endangered or Threatened. | Notice of 12-month petition finding, Not warranted. | 75 FR 30338–30363. |
| 6/9/2010 | 90-Day Finding on a Petition To List van Rossem's Gull-billed Tern as Endangered or Threatened. | Notice of 90-day Petition Finding, Substantial. | 75 FR 32728–32734. |
| 6/16/2010 | 90-Day Finding on Five Petitions to List Seven Species of Hawaiian Yellow-faced Bees as Endangered. | Notice of 90-day Petition Finding, Substantial. | 75 FR 34077–34088. |
| 6/22/2010 | 12-Month Finding on a Petition to List the Least Chub as Threatened or Endangered. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 35398–35424. |
| 6/23/2010 | 90-Day Finding on a Petition to List the Honduran Emerald Hummingbird as Endangered. | Notice of 90-day Petition Finding, Substantial. | 75 FR 35746–35751. |
| 6/23/2010 | Listing *Ipomopsis polyantha* (Pagosa Skyrocket) as Endangered Throughout Its Range, and Listing *Penstemon debilis* (Parachute Beardtongue) and *Phacelia submutica* (DeBeque Phacelia) as Threatened Throughout Their Range. | Proposed Listing Endangered ..... Proposed Listing Threatened | 75 FR 35721–35746. |
| 6/24/2010 | Listing the Flying Earwig Hawaiian Damselfly and Pacific Hawaiian Damselfly As Endangered Throughout Their Ranges. | Final Listing Endangered ..... | 75 FR 35990–36012. |
| 6/24/2010 | Listing the Cumberland Darter, Rush Darter, Yellowcheek Darter, Chucky Madtom, and Laurel Dace as Endangered Throughout Their Ranges. | Proposed Listing Endangered ..... | 75 FR 36035–36057. |
| 6/29/2010 | Listing the Mountain Plover as Threatened ..... | Reinstatement of Proposed Listing Threatened. | 75 FR 37353–37358. |
| 7/20/2010 | 90-Day Finding on a Petition to List *Pinus albicaulis* (Whitebark Pine) as Endangered or Threatened with Critical Habitat. | Notice of 90-day Petition Finding, Substantial. | 75 FR 42033–42040. |
| 7/20/2010 | 12-Month Finding on a Petition to List the Amargosa Toad as Threatened or Endangered. | Notice of 12-month petition finding, Not warranted. | 75 FR 42040–42054. |
| 7/20/2010 | 90-Day Finding on a Petition to List the Giant Palouse Earthworm (*Driloleirus americanus*) as Threatened or Endangered. | Notice of 90-day Petition Finding, Substantial. | 75 FR 42059–42066. |
| 7/27/2010 | Determination on Listing the Black-Breasted Puffleg as Endangered Throughout its Range; Final Rule. | Final Listing Endangered ..... | 75 FR 43844–43853. |
| 7/27/2010 | Final Rule to List the Medium Tree-Finch (*Camarhynchus pauper*) as Endangered Throughout Its Range. | Final Listing Endangered ..... | 75 FR 43853–43864. |
| 8/3/2010 | Determination of Threatened Status for Five Penguin Species. | Final Listing Threatened ..... | 75 FR 45497–45527. |
| 8/4/2010 | 90-Day Finding on a Petition To List the Mexican Gray Wolf as an Endangered Subspecies With Critical Habitat. | Notice of 90-day Petition Finding, Substantial. | 75 FR 46894–46898. |
| 8/10/2010 | 90-Day Finding on a Petition to List *Arctostaphylos franciscana* as Endangered with Critical Habitat. | Notice of 90-day Petition Finding, Substantial. | 75 FR 48294–48298. |
| 8/17/2010 | Listing Three Foreign Bird Species from Latin America and the Caribbean as Endangered Throughout Their Range. | Final Listing Endangered ..... | 75 FR 50813–50842. |
| 8/17/2010 | 90-Day Finding on a Petition to List Brian Head Mountainsnail as Endangered or Threatened with Critical Habitat. | Notice of 90-day Petition Finding, Not substantial. | 75 FR 50739–50742. |
| 8/24/2010 | 90-Day Finding on a Petition to List the Oklahoma Grass Pink Orchid as Endangered or Threatened. | Notice of 90-day Petition Finding, Substantial. | 75 FR 51969–51974. |
| 9/1/2010 | 12-Month Finding on a Petition to List the White-Sided Jackrabbit as Threatened or Endangered. | Notice of 12-month petition finding, Not warranted. | 75 FR 53615–53629. |
| 9/8/2010 | Proposed Rule To List the Ozark Hellbender Salamander as Endangered. | Proposed Listing Endangered ..... | 75 FR 54561–54579. |
| 9/8/2010 | Revised 12-Month Finding to List the Upper Missouri River Distinct Population Segment of Arctic Grayling as Endangered or Threatened. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 54707–54753. |
| 9/9/2010 | 12-Month Finding on a Petition to List the Jemez Mountains Salamander (*Plethodon neomexicanus)* as Endangered or Threatened with Critical Habitat. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 54822–54845. |
| 9/15/2010 | 12-Month Finding on a Petition to List Sprague's Pipit as Endangered or Threatened Throughout Its Range. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 56028–56050. |
| 9/22/2010 | 12-Month Finding on a Petition to List *Agave eggersiana* (no common name) as Endangered. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 57720–57734. |
| 9/28/2010 | Determination of Endangered Status for the African Penguin. | Final Listing Endangered ..... | 75 FR 59645–59656. |
| 9/28/2010 | Determination for the Gunnison Sage-grouse as a Threatened or Endangered Species. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 59803–59863. |

FY 2010 COMPLETED LISTING ACTIONS—Continued

| Publication date | Title | Actions | FR pages |
|---|---|---|---|
| 9/30/2010 | 12-Month Finding on a Petition to List the Pygmy Rabbit as Endangered or Threatened. | Notice of 12-month petition finding, Not warranted. | 75 FR 60515–60561. |

Our expeditious progress also included work on listing actions that we funded in FY 2010 but have not yet been completed to date. These actions are listed below. Actions in the top section of the table are being conducted under a deadline set by a court. Actions in the middle section of the table are being conducted to meet statutory timelines, that is, timelines required under the Act. Actions in the bottom section of the table are high-priority listing actions. These actions include work primarily on species with an LPN of 2, and, as discussed above, selection of these species is partially based on available staff resources, and when appropriate, include species with a lower priority if they overlap geographically or have the same threats as the species with the high priority. Including these species together in the same proposed rule results in considerable savings in time and funding, compared to preparing separate proposed rules for each of them in the future.

ACTIONS FUNDED IN FY 2010 BUT NOT YET COMPLETED

| Species | Action |
|---|---|
| **Actions Subject to Court Order/Settlement Agreement** | |
| 6 Birds from Eurasia | Final listing determination. |
| Flat-tailed horned lizard | Final listing determination. |
| Mountain plover [3] | Final listing determination. |
| 6 Birds from Peru | Proposed listing determination. |
| Sacramento splittail | 12-month petition finding. |
| Pacific walrus | 12-month petition finding. |
| Wolverine | 12-month petition finding. |
| *Solanum conocarpum* | 12-month petition finding. |
| Desert tortoise—Sonoran population | 12-month petition finding. |
| Thorne's Hairstreak butterfly [3] | 12-month petition finding. |
| Hermes copper butterfly [3] | 12-month petition finding. |
| **Actions with Statutory Deadlines** | |
| Casey's june beetle | Final listing determination. |
| Georgia pigtoe, interrupted rocksnail, and rough hornsnail | Final listing determination. |
| 7 Bird species from Brazil | Final listing determination. |
| Southern rockhopper penguin—Campbell Plateau population | Final listing determination. |
| 5 Bird species from Colombia and Ecuador | Final listing determination. |
| Queen Charlotte goshawk | Final listing determination. |
| 5 species southeast fish (Cumberland darter, rush darter, yellowcheek darter, chucky madtom, and laurel dace). | Final listing determination. |
| Salmon crested cockatoo | Proposed listing determination. |
| CA golden trout | 12-month petition finding. |
| Black-footed albatross | 12-month petition finding. |
| Mount Charleston blue butterfly | 12-month petition finding. |
| Mojave fringe-toed lizard [1] | 12-month petition finding. |
| Kokanee—Lake Sammamish population [1] | 12-month petition finding. |
| Cactus ferruginous pygmy-owl [1] | 12-month petition finding. |
| Northern leopard frog | 12-month petition finding. |
| Tehachapi slender salamander | 12-month petition finding. |
| Coqui Llanero | 12-month petition finding. |
| Dusky tree vole | 12-month petition finding. |
| 3 MT invertebrates (mist forestfly (*Lednia tumana*), *Oreohelix* sp. 3, *Oreohelix* sp. 31) from 206 species petition. | 12-month petition finding. |
| 5 UT plants (*Astragalus hamiltonii, Eriogonum soredium, Lepidium ostleri, Penstemon flowersii, Trifolium friscanum*) from 206 species petition. | 12-month petition finding. |
| 2 CO plants (*Astragalus microcymbus, Astragalus schmolliae*) from 206 species petition | 12-month petition finding. |
| 5 WY plants (*Abronia ammophila, Agrostis rossiae, Astragalus proimanthus, Boechere* (*Arabis*) *pusilla, Penstemon gibbensii*) from 206 species petition. | 12-month petition finding. |
| Leatherside chub (from 206 species petition) | 12-month petition finding. |
| Frigid ambersnail (from 206 species petition) | 12-month petition finding. |
| Gopher tortoise—eastern population | 12-month petition finding. |
| Wrights marsh thistle | 12-month petition finding. |
| 67 of 475 southwest species | 12-month petition finding. |
| Grand Canyon scorpion (from 475 species petition) | 12-month petition finding. |
| *Anacroneuria wipukupa* (a stonefly from 475 species petition) | 12-month petition finding. |
| Rattlesnake-master borer moth (from 475 species petition) | 12-month petition finding. |
| 3 Texas moths (*Ursia furtiva, Sphingicampa blanchardi, Agapema galbina*) (from 475 species petition). | 12-month petition finding. |
| *2 Texas* shiners (*Cyprinella* sp., *Cyprinella lepida*) (from 475 species petition) | 12-month petition finding. |
| 3 South Arizona plants (*Erigeron piscaticus, Astragalus hypoxylus, Amoreuxia gonzalezii*) (from 475 species petition). | 12-month petition finding. |

ACTIONS FUNDED IN FY 2010 BUT NOT YET COMPLETED—Continued

| Species | Action |
|---|---|
| 5 Central Texas mussel species (3 from 475 species petition) | 12-month petition finding. |
| 14 parrots (foreign species) | 12-month petition finding. |
| Berry Cave salamander [1] | 12-month petition finding. |
| Striped Newt [1] | 12-month petition finding. |
| Fisher—Northern Rocky Mountain Range [1] | 12-month petition finding. |
| Mohave Ground Squirrel [1] | 12-month petition finding. |
| Puerto Rico Harlequin Butterfly | 12-month petition finding. |
| Western gull-billed tern | 12-month petition finding. |
| Ozark chinquapin (*Castanea pumila* var. ozarkensis) | 12-month petition finding. |
| HI yellow-faced bees | 12-month petition finding. |
| Giant Palouse earthworm | 12-month petition finding. |
| Whitebark pine | 12-month petition finding. |
| OK grass pink (*Calopogon oklahomensis*) [1] | 12-month petition finding. |
| Southeastern pop snowy plover & wintering pop. of piping plover [1] | 90-day petition finding. |
| Eagle Lake trout [1] | 90-day petition finding. |
| Smooth-billed ani [1] | 90-day petition finding. |
| Bay Springs salamander [1] | 90-day petition finding. |
| 32 species of snails and slugs [1] | 90-day petition finding. |
| 42 snail species (Nevada & Utah) | 90-day petition finding. |
| Red knot *roselaari* subspecies | 90-day petition finding. |
| Peary caribou | 90-day petition finding. |
| Plains bison | 90-day petition finding. |
| Spring Mountains checkerspot butterfly | 90-day petition finding. |
| Spring pygmy sunfish | 90-day petition finding. |
| Bay skipper | 90-day petition finding. |
| Unsilvered fritillary | 90-day petition finding. |
| Texas kangaroo rat | 90-day petition finding. |
| Spot-tailed earless lizard | 90-day petition finding. |
| Eastern small-footed bat | 90-day petition finding. |
| Northern long-eared bat | 90-day petition finding. |
| Prairie chub | 90-day petition finding. |
| 10 species of Great Basin butterfly | 90-day petition finding. |
| 6 sand dune (scarab) beetles | 90-day petition finding. |
| Golden-winged warbler | 90-day petition finding. |
| Sand-verbena moth | 90-day petition finding. |
| 404 Southeast species | 90-day petition finding. |
| **High-Priority Listing Actions** [3] | |
| 19 Oahu candidate species [2] (16 plants, 3 damselflies) (15 with LPN = 2, 3 with LPN = 3, 1 with LPN =9). | Proposed listing. |
| 19 Maui-Nui candidate species [2] (16 plants, 3 tree snails) (14 with LPN = 2, 2 with LPN = 3, 3 with LPN = 8). | Proposed listing. |
| Dune sagebrush lizard (formerly Sand dune lizard) [3] (LPN = 2) | Proposed listing. |
| 2 Arizona springsnails [2] (*Pyrgulopsis bernadina* (LPN = 2), *Pyrgulopsis trivialis* (LPN = 2)) | Proposed listing. |
| New Mexico springsnail [2] (*Pyrgulopsis chupaderae* (LPN = 2)) | Proposed listing. |
| 2 mussels [2] (rayed bean (LPN = 2), snuffbox No LPN) | Proposed listing. |
| 2 mussels [2] (sheepnose (LPN = 2), spectaclecase (LPN = 4)). | Proposed listing. |
| Altamaha spinymussel [2] (LPN = 2) | Proposed listing. |
| 8 southeast mussels (southern kidneyshell (LPN = 2), round ebonyshell (LPN = 2), Alabama pearlshell (LPN = 2), southern sandshell (LPN = 5), fuzzy pigtoe (LPN = 5), Choctaw bean (LPN = 5), narrow pigtoe (LPN = 5), and tapered pigtoe (LPN = 11)). | Proposed listing. |

[1] Funds for listing actions for these species were provided in previous FYs.
[2] Although funds for these high-priority listing actions were provided in FY 2008 or 2009, due to the complexity of these actions and competing priorities, these actions are still being developed.
[3] Partially funded with FY 2010 funds; also will be funded with FY 2011 funds.

We also funded work on resubmitted petitions findings for 162 candidate species (species petitioned prior to the last CNOR). We did not include new information in our resubmitted petition finding for the Columbia Basin population of the greater sage-grouse in this notice, as the significance of the Columbia Basin DPS to the greater sage-grouse will require further review and we will update our finding at a later date (*see* 75 FR 13909; March 23, 2010). We also did not include new information in our resubmitted petition findings for the 43 candidate species for which we are preparing proposed listing determinations; *see* summaries below regarding publication of these determinations (these species will remain on the candidate list until a proposed listing rule is published). We also funded a revised 12-month petition finding for the candidate species that we are removing from candidate status, which is being published as part of this CNOR (*see Candidate Removals*). Because the majority of these species were already candidate species prior to our receipt of a petition to list them, we had already assessed their status using funds from our Candidate Conservation Program. We also continue to monitor the status of these species through our Candidate Conservation Program. The cost of updating the species assessment forms and publishing the joint publication of the CNOR and resubmitted petition findings is shared

between the Listing Program and the Candidate Conservation Program.

During FY 2010, we also funded work on resubmitted petition findings for uplisting six listed species, for which petitions were previously received.

We have endeavored to make our listing actions as efficient and timely as possible, given the requirements of the relevant law and regulations, and constraints relating to workload and personnel. We are continually considering ways to streamline processes or achieve economies of scale, such as by batching related actions together. Given our limited budget for implementing section 4 of the Act, the actions described above collectively constitute expeditious progress.

Although we have not been able to resolve the listing status of many of the candidates, several programs in the Service contribute to the conservation of these species. In particular, the Candidate Conservation program, which is separately budgeted, focuses on providing technical expertise for developing conservation strategies and agreements to guide voluntary on-the-ground conservation work for candidate and other at-risk species. The main goal of this program is to address the threats facing candidate species. Through this program, we work with our partners (other Federal agencies, State agencies, Tribes, local governments, private landowners, and private conservation organizations) to address the threats to candidate species and other species at-risk. We are currently working with our partners to implement voluntary conservation agreements for more than 140 species covering 5 million acres of habitat. In some instances, the sustained implementation of strategically designed conservation efforts culminates in making listing unnecessary for species that are candidates for listing or for which listing has been proposed.

**Findings for Petitioned Candidate Species**

Below are updated summaries for petitioned candidates for which we published findings, pursuant to section 4(b)(3)(B). We are making continued warranted-but-precluded 12-month findings on the petitions for these species (for our revised 12-month petition findings for species we are removing from candidate status, *see* summaries above under "**Candidate Removals**").

*Mammals*

Florida bonneted bat (*Eumops floridanus*)—The following summary is based on information in our files. No new information was presented in the petition received on January 29, 2010. Endemic to south Florida, this species has been found at 12 locations, 5 on private land and 7 on public land. The entire population may number less than a few hundred individuals. Results from a rangewide acoustical survey found a small number of locations where calls were recorded, and low numbers of calls were recorded at each location. Few active roost sites are known; all are artificial (*i.e.,* bat houses). Prolonged cold temperatures in January and February 2010 affected one active roost; it is not clear what effect the prolonged cold had on the species. Efforts are under way to confirm presence at all previously documented sites.

Occurrences are threatened by loss and conversion of habitat to other uses and habitat alteration (*e.g.,* removal of old trees with cavities, removal of manmade structures with suitable roosting sites); this threat is expected to continue and increase. Although occurrences on conservation lands are inherently more protected than those on private lands, habitat alteration during management practices may affect natural roosting sites even on conservation lands if Florida bonneted bats are present but undetected. Therefore, occupied and potential habitat on forested or wooded lands, both private and public, continues to be at risk. The species is vulnerable to a wide array of natural and human factors: Low population size, restricted range, low fecundity, large distances between occupied locations, and small number of occupied locations. Such factors may make recolonization unlikely if any site is extirpated and may make the species vulnerable to extinction due to genetic drift, inbreeding depression, extreme weather events, and random or chance changes to the environment. Where the species occurs in or near human dwellings or structures, it is at risk to persecution, removal, and disturbance. Disturbance from humans, either intentional or inadvertent, can occur at any of the occurrences of this bat on either private or conservation lands. Disturbance of maternity roosts is of particular concern due to this species' low fecundity and small population. Pesticide applications may be affecting its foraging base, especially in coastal areas.

Due to its overall vulnerability, intense hurricanes are a significant threat; this threat is expected to continue or increase in the future. Intense storms can cause mortality during the storm, exposure to predation immediately following the storm, loss of roost sites, impacts on foraging areas and insect abundance, and disruption of the maternal period. Prolonged periods of cold temperatures may have severe impacts on the population and increase risks from other threats by weakening individuals, extirpating colonies, or further reducing colony sizes. Although disease is a significant threat for other bat species, it is not known to be a threat for the Florida bonneted bat at this time. The protection currently afforded the Florida bonneted bat is limited, provides little protection to the species' occupied habitat, and includes no provisions to protect suitable but unoccupied habitat within the vicinity of known colony sites. Overall, we find the magnitude of threats is high due to the severity of the threats on this species. We find that most of the threats are currently occurring and, consequently, overall, threats are imminent. Therefore, we assigned an LPN of 2 to this species.

Pacific Sheath-tailed Bat, American Samoa DPS (*Emballonura semicaudata semicaudata*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. This small bat is a member of the Emballonuridae, an Old World bat family that has an extensive distribution, primarily in the tropics. The Pacific sheath-tailed bat was once common and widespread in Polynesia and Micronesia and it is the only insectivorous bat recorded from a large part of this area. The species as a whole (*E. semicaudata*) occurred on several of the Caroline Islands (Palau, Chuuk, and Pohnpei), Samoa (Independent and American), the Mariana Islands (Guam and the CNMI), Tonga, Fiji, and Vanuatu. While populations appear to be healthy in some locations, mainly in the Caroline Islands, they have declined substantially in other areas, including Independent and American Samoa, the Mariana Islands, Fiji, and possibly Tonga. Scientists recognize four subspecies: *E. s. rotensis,* endemic to the Mariana Islands (Guam and the Commonwealth of the Northern Mariana Islands (CNMI)); *E. s. sulcata,* occurring in Chuuk and Pohnpei; *E. s. palauensis,* found in Palau; and *E. s. semicaudata,* occurring in American and Independent Samoa, Tonga, Fiji, and Vanuatu. The candidate assessment form addresses the distinct population segment (DPS) of *E. s. semicaudata* that occurs in American Samoa.

*E. s. semicaudata* historically occurred in American and Independent Samoa, Tonga, Fiji, and Vanuatu. It is extant in Fiji and Tonga, but may be extirpated from Vanuatu and Independent Samoa. There is some

concern that it is also extirpated from American Samoa, the location of this DPS, where surveys are currently ongoing to ascertain its status. The factors that led to the decline of this subspecies and the DPS are poorly understood; however, current threats to this subspecies and the DPS include habitat loss, predation by introduced species, and its small population size and distribution, which make the taxon extremely vulnerable to extinction due to typhoons and similar natural catastrophes. Thus, the threats are high in magnitude. The Pacific sheath-tailed bat may also by susceptible to disturbance to roosting caves. The LPN for *E. s. semicaudata* is 3 because the magnitude of the threats is high, the threats are ongoing, and therefore, imminent, and the taxon is a distinct population segment of a subspecies.

Pacific Sheath-tailed Bat (*Emballonura semicaudata rotensis*), Guam and the Commonwealth of the Northern Mariana Islands—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. This small bat is a member of the Emballonuridae, an Old World bat family that has an extensive distribution, primarily in the tropics. The Pacific sheath-tailed bat was once common and widespread in Polynesia and Micronesia and it is the only insectivorous bat recorded from a large part of this area. *E. s. rotensis* is historically known from the Mariana Islands and formerly occurred on Guam and in the CNMI on Rota, Aguiguan, Tinian (known from prehistoric records only), Saipan, and possibly Anatahan and Maug. Currently, *E. s. rotensis* appears to be extirpated from all but one island in the Mariana archipelago. The single remaining population of this subspecies occurs on Aguiguan, CNMI.

Threats to this subspecies have not changed over the past year. The primary threats to the subspecies are ongoing habitat loss and degradation as a result of feral goat (*Capra hircus*) activity on the island of Aguiguan and the taxon's small population size and limited distribution. Predation by nonnative species and human disturbance are also potential threats to the subspecies. The subspecies is believed near the point where stochastic events, such as typhoons, are increasingly likely to affect its continued survival. The disappearance of the remaining population on Aguiguan would result in the extinction of the subspecies. Thus, the threats are high in magnitude. The LPN for *E. s. rotensis* remains at 3 because the magnitude of the threats is high, the threats are ongoing, and therefore, imminent, and the taxon is a subspecies.

New England cottontail (*Sylvilagus transitionalis*)—The following summary is based on information contained in our files and information received in response to our notice published on June 30, 2004, when we announced our 90-day petition finding and initiation of a status review (69 FR 39395). We received the petition on August 30, 2000. The New England cottontail (NEC) is a medium-to-large sized cottontail rabbit that may reach 1,000 grams in weight, and is one of two species within the genus *Sylvilagus* occurring in New England. New England cottontails are considered habitat specialists, in so far as they are dependent upon early-successional habitats typically described as thickets. The species is the only endemic cottontail in New England. Historically, the NEC occurred in seven States and ranged from southeastern New York (east of the Hudson River) north through the Champlain Valley, southern Vermont, the southern half of New Hampshire, southern Maine, and south throughout Massachusetts, Connecticut and Rhode Island. The current range of the NEC has declined substantially and occurrences have become increasingly separated. The species' distribution is fragmented into five apparently isolated metapopulations. The area occupied by the cottontail has contracted from approximately 90,000 sq km to 12,180 sq km. Recent surveys indicate that the longterm decline in NEC continues. For example, surveys for the species in early 2008 documented the presence of NEC in 7 of the 23 New Hampshire locations that were known to be occupied in 2002 and 2003. Similarly, surveys in Maine found the species present in 12 of 57 sites identified in an extensive survey that spanned the years 2000 to 2004. Unlike the New Hampshire study, several new sites were documented in Maine during 2008. Some have suggested that the decline in NEC occurrences in 2008 may be attributed to persistent snow cover throughout northern New England during the winter of 2007–2008. Similar surveys were conducted during the winter of 2009 in Maine, New Hampshire, Rhode Island, and New York. The results are pending further analysis. It is estimated that less than one-third of the occupied sites occur on lands in conservation status and fewer than 10 percent are being managed for early-successional forest species.

The primary threat to the New England cottontail is loss of habitat through succession and alteration. Isolation of occupied patches by areas of unsuitable habitat and high predation rates are resulting in local extirpation of New England cottontails from small patches. The range of the New England cottontail has contracted by 75 percent or more since 1960 and current land uses in the region indicate that the rate of change, about 2 percent range loss per year, will continue. Additional threats include competition for food and habitat with introduced eastern cottontails and large numbers of native white-tailed deer; inadequate regulatory mechanisms to protect habitat; and mortality from predation. The magnitude of the threats continues to be high, because they occur rangewide, and have a severe negative effect on the survival of the species. They are imminent because they are ongoing. Thus, we retained an LPN of 2 for this species. Conservation measures that address the threats to the species are being developed.

Fisher, West Coast DPS (*Martes pennanti*)—The following summary is based on information contained in our files and in the Service's initial warranted-but-precluded finding published in the **Federal Register** on April 8, 2004 (68 FR 18770). The fisher is a carnivore in the family Mustelidae and is the largest member of the genus Martes. Historically, the West Coast population of the fisher extended south from British Columbia into western Washington and Oregon, and in the North Coast Ranges, Klamath-Siskiyou Mountains, and Sierra Nevada in California. Because of a lack of detections with standardized survey efforts over much of the fisher's historical range, the fisher is believed to be extirpated or reduced to scattered individuals from the lower mainland of British Columbia through Washington and northern Oregon and in the central and northern Sierra Nevada in California. Native extant populations of fisher are isolated to the North Coast of California, the Klamath-Siskiyou Mountains of northern California and southern Oregon, and the southern Sierra Nevada in California. Descendents of a fisher reintroduction effort also occur in the southern Cascades in Oregon. The Washington Department of Fish and Wildlife in conjunction with the Olympic National Park has completed the third year of a reintroduction effort as the State's first step in implementing their recover goals for fisher. The California Department of Fish and Game and other collaborators began the first year of their translocation efforts into the northern Sierra Nevada during the winter of 2009–2010.

Estimates of fisher numbers in native populations of the West Coast DPS vary

widely. A rigorous monitoring program is lacking for the northern California southern Oregon and southern Oregon Cascades populations, making estimates of fisher numbers for these two populations difficult. The fisher monitoring program in the southern Sierra Nevada population has provided preliminary estimates indicating no decline in the index of abundance within the monitored portion of the population. There is a high degree of genetic relatedness within some populations. The two populations of native fisher in the northern California southern Oregon and southern Sierra Nevada are separated by four times the species' maximum dispersal distance. The extant fisher populations are either small (southern Sierra Nevada and southern Oregon Cascades) and are isolated from one another or both.

Major threats that fragment or remove key elements of fisher habitat include various forest vegetation management practices such as timber harvest and fuels-reduction treatments. Other potential major threats in portions of the range include: Large stand-replacing wildfires, changes in forest composition and structure related to climate change effects, forest and fuels management, and urban and rural development. Threats to fishers that lead to direct mortality and injury include: Collisions with vehicles; predation; and viral borne diseases such as rabies, parvovirus, and canine distemper. Existing regulatory mechanisms on Federal, State, and private lands do not provide sufficient protection for the key elements of fisher habitat, or the certainty that conservation efforts will be effective or implemented. The magnitude of threats is high as they occur across the range of the DPS resulting in a negative impact on fisher distribution and abundance. However, the threats are nonimminent as the greatest long-term risks to the fisher in its west coast range are the subsequent ramifications of the isolation of small populations and their interactions with the listed threats. The three remaining areas containing fisher populations appear to be stable or not rapidly declining based on recent survey and monitoring efforts. Therefore, we assigned an LPN of 6 to this DPS.

New Mexico meadow jumping mouse (*Zapus hudsonius luteus*)—The following summary is based on information contained in our files and the petition we received October 15, 2008. The New Mexico meadow jumping mouse (jumping mouse) is endemic to New Mexico, Arizona, and a small area of southern Colorado. The jumping mouse nests in dry soils but uses moist, streamside, dense riparian/wetland vegetation. Recent genetic studies confirm that the New Mexico meadow jumping mouse is a distinct subspecies from other *Zapus hudsonius* subspecies, confirming the currently accepted subspecies designation.

The threats that have been identified are excessive grazing pressure, water use and management, highway reconstruction, development, recreation, and beaver removal.

Since the early to mid-1990s over 100 historical localities have been surveyed. Currently only 24 are extant, 11 in New Mexico (including one that is contiguous with the Colorado locality) and 13 in Arizona. Moreover, the highly fragmented nature of its distribution is also a major contributor to the vulnerability of this species and increases the likelihood of very small, isolated populations being extirpated. The insufficient number of secure populations, and the destruction, modification, or curtailment of its habitat, continue to pose the most immediate threats to this species. Because the threats affect the jumping mouse in all but two of the extant localities, the threats are of a high magnitude. These threats are currently occurring and, therefore, are imminent. Thus, we continue to assign an LPN of 3 to this subspecies.

Mazama pocket gopher (*Thomomys mazama* ssp. *couchi, douglasii, glacialis, louiei, melanops, pugetensis, tacomensis, tumuli, yelmensis*)—The following summary is based on information contained in our files. No new information was provided in the petition received December 11, 2002. Seven of the nine subspecies of pocket gopher are associated with glacial outwash prairies in western Washington (*T. m. melanops* is found on alpine meadows in Olympic National Park, and *T. m. oregonus* is found in extreme southwest Washington). Of these seven subspecies, five are likely still extant (*couchi, glacialis, pugetensis, tumuli,* and *yelmensis*). Few of these glacial outwash prairies remain in Washington today. Historically, such prairies were patchily distributed, but the area they occupied totaled approximately 170,000 acres (Stinson 2005). Now, residential and commercial development and in-growth of woody and/or nonnative vegetation have further reduced their numbers. In addition, development in or adjacent to these prairies has likely increased predation on Mazama pocket gophers by dogs and cats.

The magnitude of threat is high due to populations with patchy and isolated distributions in habitats highly desirable for development and subject to a wide variety of human activities that permanently alter the habitat. The threat of invasive plant species to the quality of a highly specific habitat requirement is high and constant. There are few known populations of each subspecies. A limited dispersal capability, and the loss and degradation of additional patches of appropriate habitat will further isolate populations and increase their vulnerability to extinction. Loss of any of the subspecies will reduce the genetic diversity and the likelihood of continued existence of the *T. mazama* subspecies complex in Washington.

The threats are imminent. Two of the subspecies (Cathlamet and Tacoma) are likely extinct. The status of *T. m. douglasii* is unknown, but its location in a matrix of towns means it's threatened by encroaching development. Two gravel pits are operating on part of the remaining Roy Prairie pocket gopher habitat, and another one occurs in the area of the Tenino pocket gopher. The largest populations of two other subspecies (Shelton and Olympia) are located on airports with planned development. Yelm pocket gophers are also threatened by proposed development. Due to its low genetic diversity, isolation, and potential for natural habitat alterations in the future, *T. m. melanops* (Olympic pocket gopher) is susceptible to stochastic events and small population effects such as genetic drift and founder effects. Thus, we assign an LPN of 3 to these subspecies.

Gunnison's prairie dog (*Cynomys gunnisoni*)—This species occurs in Arizona, Colorado, New Mexico, and Utah. However, only the significant portion of the range in the montane portions of central and south central Colorado and north central New Mexico is included on our list of candidates. Within this portion of the range, plague has significantly reduced the number and size of populations, resulting in considerable effects to the species. Populations within montane habitat have distinct disadvantages in resisting the effects of plague due to a high abundance of fleas that spread plague, small populations that cannot recover in numbers from plague epizootics, and isolated populations that limit the ability to recolonize. Poisoning and shooting continue to be threats to the Gunnison's prairie dog within the montane portion of its range and contribute to the decline of the species when combined with the effects of disease. Agriculture, urbanization, roads, and oil and gas development each currently affect a small percentage of Gunnison's prairie dog habitat. Plague is significantly affecting the remaining

small, isolated populations. Plague epizootics can extirpate populations there within a short timeframe (3 to 10 years). We have assigned an LPN of 3 to this species due to imminent threats of a high magnitude in a significant portion of its range.

Southern Idaho ground squirrel (*Spermophilus brunneus endemicus*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The southern Idaho ground squirrel is endemic to four counties in southwest Idaho; its total known range is approximately 425,630 hectares (1,051,752 acres). Threats to southern Idaho ground squirrels include: Habitat degradation and fragmentation; direct killing from shooting, trapping, or poisoning; predation; competition with Columbian ground squirrels; and inadequacy of existing regulatory mechanisms. Habitat degradation and fragmentation appear to be the primary threats to the species. Nonnative annuals now dominate much of this species' range, have changed the species composition of vegetation used as forage for the southern Idaho ground squirrel, and have altered the fire regime by accelerating the frequency of wildfire. Habitat deterioration, destruction, and fragmentation contribute to the current patchy distribution of southern Idaho ground squirrels. Based on recent genetic work, southern Idaho ground squirrels are subject to more genetic drift and inbreeding than expected.

Two Candidate Conservation Agreements with Assurances (CCAAs) have been completed for this species in recent years. Both CCAAs include conservation measures that provide additional protection to southern Idaho ground squirrels from recreational shooting and other direct killing on enrolled lands, and also allow the State of Idaho, the Service, and BLM to investigate ways of restoring currently degraded habitat. At this time, the acreage enrolled through these two CCAAs is 38,756 ha (95,767 ac), or 9 percent of the known range approximately. While the ongoing conservation efforts have helped to reduce the magnitude of threats to moderate, habitat degradation remains the primary threat to the species throughout most of its range. This threat is imminent due to the ongoing and increasing prevalence and dominance of nonnative vegetation, and the current patchy distribution of the species. Thus, we assign an LPN of 9 to this subspecies.

Washington ground squirrel (*Spermophilus washingtoni*)—The following summary is based on information contained in our files and in the petition we received on March 2, 2000. The Washington ground squirrel is endemic to the Deschutes–Columbia Plateau sagebrush-steppe and grassland communities in eastern Oregon and south-central Washington. Although widely abundant historically, recent surveys suggest that its current range has contracted toward the center of its historical range. Approximately two-thirds of the Washington ground squirrel's total historical range has been converted to agricultural and residential uses. The most contiguous, least-disturbed expanse of suitable habitat within the species' range occurs on a site owned by Boeing, Inc. and on the Naval Weapons Systems Training Facility near Boardman, Oregon. In Washington, the largest expanse of known suitable habitat occurs on State and Federal lands.

Agricultural, residential, and windpower development, among other forms of development, continue to eliminate Washington ground squirrel habitat in portions of its range. Throughout much of its range, Washington ground squirrels are threatened by the establishment and spread of invasive plant species, particularly cheatgrass, which alter available cover and food quantity and quality, and increase fire intervals. Additional threats include habitat fragmentation, recreational shooting, genetic isolation and drift, and predation. Potential threats include disease, drought, and possible competition with related species in disturbed habitat at the periphery of their range. In Oregon, some threats are being addressed as a result of the State listing of this species, and by implementation of the Threemile Canyon Farms Multi-Species Candidate Conservation Agreement with Assurances (CCAA). In Washington, there are currently no formal agreements with private landowners or with State or Federal agencies to protect the Washington ground squirrel. Additionally, no State or Federal management plans have been developed that specifically address the needs of the species or its habitat. Since current and potential threats are widespread and, in some cases, severe, we conclude the magnitude of threats remains high. The Washington ground squirrel has both imminent and nonimminent threats. At a range-wide scale, we conclude the threats are nonimminent based largely on the following: The CCAA addressed the imminent loss of a large portion of habitat to agriculture, there are no other large-scale efforts to convert suitable habitat to agriculture, and windpower project impacts can be minimized through compliance with the Oregon State Endangered Species Act (OESA) and/or the Columbia Basin Ecoregion wind energy siting and permitting guidelines. We also consider the potential development of shooting ranges on the Naval Weapons Systems Training Facility as nonimminent because the proposed action is still being developed, making us unable to assess its timing and impact, which could be minimized through compliance with the OESA. We, therefore, have retained an LPN of 5 for this species.

*Birds*

Spotless crake, American Samoa DPS (*Porzana tabuensis*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Porzana tabuensis* is a small, dark, cryptic rail found in wetlands and rank scrub or forest in the Philippines, Australia, Fiji, Tonga, Society Islands, Marquesas, Independent Samoa, and American Samoa (Ofu, Tau). The genus *Porzana* is widespread in the Pacific, where it is represented by numerous island-endemic and flightless species (many of which are extinct as a result of anthropogenic disturbances) as well as several more cosmopolitan species, including *P. tabuensis*. No subspecies of *P. tabuensis* are recognized.

The American Samoa population is the only population of spotless crakes under U.S. jurisdiction. The available information indicates that distinct populations of the spotless crake, a species not noted for long-distance dispersal, are definable. The population of spotless crakes in American Samoa is discrete in relation to the remainder of the species as a whole, which is distributed in widely separated locations. Although the spotless crake (and other rails) have dispersed widely in the Pacific, island rails have tended to reduce or lose their power of flight over evolutionary time and so become isolated (and vulnerable to terrestrial predators such as rats). The population of this species in American Samoa is therefore distinct based on geographic and distributional isolation from spotless crake populations on other islands in the oceanic Pacific, the Philippines, and Australia. The American Samoa population of the spotless crake links the Central and Eastern Pacific portions of the species' range. The loss of this population would result in an increase of roughly 500

miles (805 kilometers) in the distance between the central and eastern Polynesian portions of the spotless crake's range, and could result in the isolation of the Marquesas and Society Islands populations by further limiting the potential for even rare genetic exchange. Based on the discreteness and significance of the American Samoa population of the spotless crake, we consider this population to be a distinct vertebrate population segment.

Threats to this population have not changed over the past year. The population in American Samoa is threatened by small population size, limited distribution, predation by nonnative mammals, continued development of wetland habitat, and natural catastrophes such as hurricanes. The co-occurrence of a known predator of ground-nesting birds, the Norway rat (*Rattus norvegicus*), along with the extremely restricted observed distribution and low numbers, indicate that the magnitude of the threats to the American Samoa DPS of the spotless crake continues to be high, because the threats significantly affect the species survival. The threats are ongoing, and therefore imminent. Based on this assessment of existing information about the imminence and high magnitude of these threats, we assigned the spotless crake an LPN of 3.

Yellow-billed cuckoo, western U.S. DPS (*Coccyzus americanus*)—The following summary is based on information contained in our files and the petition we received on February 9, 1998. See also our 12-month petition finding published on July 25, 2001 (66 FR 38611). The yellow-billed cuckoo is a medium-sized bird of about 12 inches (30 centimeters) in length with a slender, long-tailed profile and a fairly stout and slightly down-curved bill. Plumage is grayish-brown above and white below, with rufous primary flight feathers with the tail feathers boldly patterned with black and white below. Western cuckoos breed in large blocks of riparian habitats (particularly woodlands with cottonwoods (*Populus fremontii*) and willows (*Salix* sp.). Dense understory foliage appears to be an important factor in nest-site selection, while cottonwood trees are an important foraging habitat in areas where the species has been studied in California. We consider the yellow-billed cuckoos that occur in the western United States as a distinct population segment (DPS). The area for this DPS is west of the crest of the Rocky Mountains.

The threats currently facing the yellow-billed cuckoo include habitat loss, over-grazing, and pesticide application. Principal causes of riparian habitat losses are conversion to agricultural and other uses, dams and river-flow management, stream channelization and stabilization, and livestock grazing. Available breeding habitats for cuckoos have also been substantially reduced in area and quality by groundwater pumping and the replacement of native riparian habitats by invasive nonnative plants, particularly tamarisk. Overuse by livestock has been a major factor in the degradation and modification of riparian habitats in the western United States. The effects include changes in plant community structure and species composition and in relative abundance of species and plant density. These changes are often linked to more widespread changes in watershed hydrology. Livestock grazing in riparian habitats typically results in reduction of plant species diversity and density, especially of palatable broadleaf plants like willows and cottonwood saplings, and is one of the most common causes of riparian degradation. In addition to destruction and degradation of riparian habitats, pesticides may affect cuckoo populations. In areas where riparian habitat borders agricultural lands— e.g., in California's Central Valley—pesticide use may indirectly affect cuckoos by reducing prey numbers, or by poisoning nestlings if sprayed directly in areas where the birds are nesting. A group comprised of Federal, State, and nongovernmental agencies organized by the Service (Region 8, Sacramento Fish and Wildlife Office) is in the process of completing a rangewide conservation assessment and strategy for the Western yellow-billed cuckoo. The assessment is in early stages of development, with work beginning on a conservation strategy expected in 2011. The LPN for the yellow-billed cuckoo remains a 3, with imminent threats of high magnitude.

Friendly ground-dove, American Samoa DPS (*Gallicolumba stairi*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The genus *Gallicolumba* is distributed throughout the Pacific and Southeast Asia. The genus is represented in the oceanic Pacific by six species: Three are endemic to Micronesian islands or archipelagos, two are endemic to island groups in French Polynesia, and *G. stairi* is endemic to Samoa, Tonga, and Fiji. Some authors recognize two subspecies of the friendly ground-dove, one, slightly smaller, in the Samoan archipelago (*G. s. stairi*), and one in Tonga and Fiji (*G. s. vitiensis*), but because morphological differences between the two are minimal, we are not recognizing separate subspecies at this time.

In American Samoa, the friendly ground-dove has been found on the islands of Ofu and Olosega (Manua Group). Threats to this subspecies have not changed over the past year. Predation by nonnative species and natural catastrophes such as hurricanes are the primary threats to the subspecies. Of these, predation by nonnative species is thought to be occurring now and likely has been occurring for several decades. This predation may be an important impediment to increasing the population. Predation by introduced species has played a significant role in reducing, limiting, and extirpating populations of island birds, especially ground-nesters like the friendly ground-dove, in the Pacific and other locations worldwide. Nonnative predators known or thought to occur in the range of the friendly ground-dove in American Samoa are feral cats (*Felis catus*), Polynesian rats (*Rattus exulans*), black rats (*R. rattus*), and Norway rats (*R. norvegicus*).

In January 2004 and February of 2005, hurricanes virtually destroyed the habitat of *G. stairi* in the area on Olosega Island that the species had been most frequently recorded. Although this species has coexisted with severe storms for millennia, this example illustrates the potential for natural disturbance to exacerbate the effect of anthropogenic disturbance on small populations. Consistent monitoring using a variety of methods over the last 5 years yielded few observations and no change in the relative abundance of this taxon in American Samoa. The total population size is poorly known, but is unlikely to number more than a few hundred pairs. The distribution of the friendly ground-dove is limited to steep, forested slopes with an open understory and a substrate of fine scree or exposed earth; this habitat is not common in American Samoa. The threats are ongoing and, therefore, imminent and the magnitude is moderate because the relative abundance has remained the same for several years. Thus, we assign this subspecies an LPN of 9.

Streaked horned lark (*Eremophila alpestris strigata*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on December 11, 2002. The streaked horned lark occurs in Washington and Oregon, and is thought to be extirpated in British

Columbia, Canada. The streaked horned lark nests on bare ground in sparsely vegetated sites in short-grass dominated habitats, such as native prairies, coastal dunes, fallow and active agricultural fields, seasonal wetlands, moderately- to heavily-grazed pastures, seasonal mudflats, airports, and dredge-deposition sites in and along the tidal reach of the Columbia River. In Washington, surveys show that there are approximately 330 remaining breeding birds. In Oregon, the breeding population is estimated to be over 500 birds.

The streaked horned lark's breeding habitat continues to be threatened by loss and degradation due to conversion of native grasslands to other uses (such as agriculture, homes, recreational areas, and industry), encroachment of woody vegetation, invasion of nonnative plant species (*e.g.,* Scot's broom, sod-forming grasses, and beachgrasses), and dredging-related activities. Native prairies have been nearly eliminated throughout the range of the species. It is estimated that less than 1 to 3 percent of the native grassland and savanna remains. And those that remain have been invaded by nonnative sod-forming grasses. Coastal nesting areas have suffered the same fate. A recent purchase of prairie lands in Washington has secured habitat that would have been developed. Its status as suitable lark nesting habitat is unknown.

Wintering habitats are seemingly few, and are susceptible to unpredictable conversion to unsuitable over-wintering habitat, plant succession, and invasion by nonnative plants. Where larks inhabit manmade habitats similar in structure to native prairies (such as airports, military reservations, agricultural fields, and dredge-formed islands), or where they occur adjacent to human habitation, they are subjected to a variety of unintentional human disturbances. These include mowing, recreational and military activities, plowing, flooding, and dredge-material deposition during the nesting season, as well as intentional disturbances such as at the Joint Base Lewis–McChord Field where falcons and a dog are used to haze birds in order to avoid aircraft collisions, and the biennial (but opposite year) RODEO and Air Expo events that occur on or adjacent to lark nesting habitat. In some areas, landowners have taken steps to improve streaked horned lark nesting habitat.

The magnitude of threat is high due to small populations with low genetic diversity, rapidly declining populations, and patchy and isolated habitats in areas desirable for development, many of which remain unsecured. The threat of invasive plant species is high and constant, aside from a few restoration sites. The numbers of individuals are low and the numbers of populations are few. In addition, estimates of lambda using data from all Washington sites suggest a rapidly declining population. Over-wintering birds are concentrated in larger flocks and subject to unpredictable wintering habitat loss (especially in Oregon), potentially affecting a large portion of the population at one time. In Washington, known populations occur on airports, military bases, coastal beaches, and Columbia River islands, where management, training activities, recreation, and dredge-material deposition continue to negatively impact streaked horned lark breeding and wintering (although current work being conducted by TNC may ultimately lessen this last threat). In Oregon, breeding and wintering sites occur on Columbia River islands, in cultivated grass fields, grazed pastures, fallow fields, roadside shoulders, Christmas tree farms, seasonal wetlands, restored wet prairie, and wetland mudflats. Such areas continue to be subject to negative impacts such as dredge material deposition, development, plowing, mowing, pesticide and herbicide applications, trampling, vehicle traffic, and recreation.

The threats are imminent, as a result of continued loss of suitable lark habitat, high nest-predation rates, low adult survival, and low fecundity. Low adult survival and fecundity rates in the Puget lowlands are of particular concern. Loss of habitat is being caused by development on and adjacent to several of its nesting areas, including continued expansions of the Fort Lewis Gray Army Airfield West Ramp and the Olympia Airport. Wintering populations are at risk in Oregon due to the manner in which larks gather in large flocks that are vulnerable to stochastic events, and also due to the fact that their wintering habitat occurs on privately owned agricultural lands that are subject to unpredictable conversion. Other ongoing threats include those occurring on the Joint Base Lewis-McChord Field (hazing birds off the airfields, RODEO, and Air Expo). Based on imminent threats of a high magnitude, we continue to assign an LPN of 3 to this subspecies.

Red knot (*Calidris canutus rufa*)—The following summary is based on information contained in our files and information provided by petitioners. Four petitions to emergency list the red knot have been received: One on August 9, 2004, two others on August 5, 2005, and the most recent on February 27, 2008. The *rufa* subspecies is one of six recognized subspecies of red knot, and one of three subspecies occurring in North America. This subspecies makes one of the longest-distance migrations known in the animal kingdom, as it travels between breeding areas in the central Canadian Arctic and wintering areas that are primarily in southern South America along the coast of Chile and Argentina. They migrate along the Atlantic coast of the United States, where they may be found from Maine to Florida.

The Delaware Bay area (in Delaware and New Jersey) is the largest known spring migration stopover area, with far fewer migrants congregating elsewhere along the Atlantic coast. The concentration in the Delaware Bay area occurs from the middle of May to early June, corresponding to the spawning season of horseshoe crabs. The knots feed on horseshoe crab eggs, rebuilding energy reserves needed to complete migrations to the Arctic and arrive on the breeding grounds in good condition. In the past, horseshoe crab eggs at Delaware Bay were so numerous that a knot could dependably eat enough in two to three weeks to double its weight.

Surveys at wintering areas and at Delaware Bay during spring migration indicate a substantial decline in the red knot in recent years. At the Delaware Bay area, peak counts between 1982 and 1998 were as high as 95,360 individuals. Counts may vary considerably between years. Some of the fluctuations can be attributed to predator-prey cycles in the breeding grounds, and counts show that knots rebound from such reductions. Peak counts of red knots observed during aerial surveys flown in Delaware Bay from 2004 to 2008 were consistently below 16,000 birds, with an alltime low of only 12,375 red knots found in 2007. In recent years, the highest concentrations of red knots at the Delaware Bay stopover have been within Mispillion Harbor, Delaware, an area that has likely been undercounted during past aerial surveys. Beginning in 2009, a new survey methodology was implemented for the Delaware Bay stopover area to include ground counts that more accurately reflect concentrations of red knots using Mispillion Harbor and to include aerial surveys of red knots using Atlantic coastal marshes near Stone Harbor, New Jersey. The highest count using the new methodology showed 27,187 red knots in Delaware and 900 in New Jersey, for a total count of 28,087 birds. Poor weather conditions in 2009 prevented aerial surveys during the period when red knots were thought to be at a peak, so no comparison with the past aerial

survey peak count method was possible. While the number of red knots using Delaware Bay likely increased in 2009, much of the increase is attributed to improved survey methods and an expanded area of coverage.

Counts in recent years in South America also are substantially lower than in the past. In the mid-1980s, an estimated 67,500 red knots were observed from Tierra del Fuego, Chile and along the coast of Argentina to northern Patagonia. Since 2003, the largest concentrations of red knots have occurred at the principal wintering areas in Bahia Lomas and other portions of Tierra del Fuego and southern Patagonia, with few birds found further north along the coast of Argentina. More than 50,000 red knots were counted in the principal winter areas in 1985 and 2000. Since 2005, fewer than 18,000 have been counted within the same area, with only 16,260 red knots observed in 2010.

The primary threat to the red knot has been attributed to destruction and modification of its habitat, particularly the reduction in key food resources resulting from reductions in horseshoe crabs, which are harvested primarily for use as bait and secondarily to support a biomedical industry. Commercial harvest increased substantially in the 1990s. Research shows that since 1998, a high proportion of red knots leaving the Delaware Bay failed to achieve threshold departure masses needed to fly to breeding grounds and survive an initial few days of snow cover, and this corresponded to reduced annual survival rates and reduced reproductive success. Since 1999, to protect the Atlantic coast population of the horseshoe crab and to increase availability of horseshoe crab eggs in Delaware Bay for hemispheric migratory shorebird populations, a series of timing restrictions and substantially lower harvest quotas have been adopted by the Atlantic States Marine Fisheries Commission, as well as by the States of New Jersey, Delaware, and Maryland. In March 2008, New Jersey passed legislation imposing a moratorium on horseshoe crab harvest or landing within the State until such time as the red knot has fully recovered.

The reductions in commercial horseshoe crab harvest by Atlantic coastal States since 1999 are substantial. From 2004 to 2009, annual landings of horseshoe crabs have been reduced by over 70 percent from the reference period landings of the mid- to late-1990s. For Delaware and New Jersey, the decline in horseshoe crab landings for bait has decreased from 726,660 reported in 1999 to a preliminary number of 102,659 crabs landed in Delaware in 2009 and no crabs harvested in New Jersey. No horseshoe crabs have been landed for bait in New Jersey since 2007 as a result of the State-imposed harvest moratorium. In the Delaware Bay area, continued recruitment of small horseshoe crabs has been observed, with a substantial increase in numbers of the smallest sizes of immature males and females in 2009 over previous years. The continued increase in immature males and females would be expected in a recovering population and suggests recent harvest restrictions may be having the desired effect, but it may be several more years until this increase is realized in spawning age adults, as horseshoe crabs need 8 to10 years to reach sexual maturity.

Other identified threat factors include habitat destruction due to beach erosion and various shoreline protection and stabilization projects that are affecting areas used by migrating knots for foraging, the inadequacy of existing regulatory mechanisms, human disturbance, and competition with other species for limited food resources. Also, the concentration of red knots in the Delaware Bay areas and at a relatively small number of wintering areas makes the species vulnerable to potential large-scale events such as oil spills or severe weather. Overall, we conclude that the threats, in particular the modification of habitat through harvesting of horseshoe crabs, are severe enough to put the viability of the knot at substantial risk and is therefore of a high magnitude. The threats are currently occurring, and therefore imminent because of continuing suppressed horseshoe-crab-egg forage conditions for red knot within the Delaware Bay stopover. Based on imminent threats of a high magnitude, we retain an LPN of 3 for this subspecies.

Yellow-billed loon (*Gavia adamsii*)—The following summary is based on information contained in our files and the petition we received on April 5, 2004. The yellow-billed loon is a migratory bird. Solitary pairs breed on lakes in the arctic tundra of the United States, Russia, and Canada from June to September. During the remainder of the year, the species winters in more southern coastal waters of the Pacific Ocean and the Norway and North Seas. During most of the year, individual yellow-billed loons are so widely dispersed that high adult mortality from any single factor is unlikely. However, during migration, yellow-billed loons are more concentrated and are subject to subsistence harvest that at current levels appears to be unsustainable, based on the best available information; the population could decline substantially if such harvest continues. Future subsistence harvests in Alaska, by themselves, constitute a threat to the species rangewide. This subsistence harvest is occurring despite the species being closed to hunting under the Migratory Bird Treaty Act. In addition, up to several hundred yellow-billed loons may be taken annually on Russian breeding grounds, and small numbers of yellow-billed loons are reported in harvests in other areas in Alaska outside of the subsistence harvest area and in Canada.

Other risk factors evaluated, including oil and gas development (*i.e.,* disturbance, changes in freshwater chemistry and pollutant loads, and changes in freshwater hydrology); pollution; overfishing; climate change; vessel traffic; commercial- and subsistence-fishery bycatch; and contaminants other than those associated with oil and gas, were not found to be threats to the species. Although these other risk factors may not rise to the level of a threat individually, when taken collectively with the effects of subsistence hunting in other areas, they may reduce the rangewide population even further. One or more of the threats discussed above is occurring throughout the range of the yellow-billed loon, either in its breeding or wintering grounds, or during migration; therefore, the threats are imminent. The magnitude of the primary threat to the species, subsistence harvest, is moderate. Although subsistence harvest is ongoing, the numbers taken have varied substantially between years. In addition, we have concerns about the precision of the numbers reported. Thus, we assigned the yellow-billed loon an LPN of 8.

Kittlitz's murrelet (*Brachyramphus brevirostris*)—The following summary is based on information contained in our files and the petition we received on May 9, 2001. Kittlitz's murrelet is a small diving seabird whose entire North American population, and a majority of the world's population, inhabits Alaskan coastal waters discontinuously from Point Lay south to northern portions of Southeast Alaska. Most Kittlitz's murrelets are associated with tidewater glaciers, but some occur in areas not currently influenced by glaciers. Genetic analyses suggest very low rates of immigration and emigration between Kittlitz's murrelets in the western Aleutian Islands, where there are no extant glaciers, and birds occupying mainland fjords, where there are glaciers today. For 2010, we estimate

the world-wide abundance of Kittlitz's murrelets to be between 30,900 and 56,800 individuals. In some regions of Alaska, Kittlitz's murrelets have declined at a rate of up to 20 percent between two decadal periods (1988–1999 and 2004–2007).

Threats to Kittlitz's murrelets include large-scale processes such as global climate change and marine regime shifts. These large-scale processes may influence Kittlitz's murrelet survival and reproduction. Glacial retreat is a global phenomenon that affects many of the glaciers with which Kittlitz's murrelets are associated. This glacial retreat may be changing forage fish availability, and may contribute to loss of nesting habitat and increased predation on Kittlitz's murrelets. Other threats include oil spills, bycatch in commercial gillnet fisheries, and disturbance by tour boats. Catastrophic events such as oil spills could have a significant negative effect on the population of this already diminished species. Kittlitz's murrelets are believed to have been negatively affected by the *Exxon Valdez* oil spill in Prince William Sound in 1989. Mortality as bycatch in commercial fishing may be a significant factor in their population decline. Tour boat visitation to glacial fjords is a growing industry, and this activity may increasingly disrupt Kittlitz's murrelet feeding behavior; tour boats may also provide artificial perch sites for avian predators.

Based on the observed population trajectory and the severity of ongoing threats (rapid glacial retreat, acute and chronic oil spills, commercial gillnet fishing, and human disturbance from tour boats), the threats to this species are high in magnitude and imminent. Therefore, we assigned an LPN of 2 to this species.

Xantus's murrelet (*Synthliboramphus hypoleucus*)—The following summary is based on information contained in our files and the petition we received on April 16, 2002. The Xantus's murrelet is a small seabird in the family Alcidae that occurs along the west coast of North America in the United States, Mexico, and Canada. The species has a limited breeding distribution, only nesting on the Channel Islands in southern California and on islands off the west coast of Baja California, Mexico. Although data on population trends are scarce, the population is suspected to have declined greatly over the last century, mainly due to introduced predators such as rats (*Rattus* sp.) and feral cats (*Felis catus*) to nesting islands, with possible extirpations on three islands in Mexico. A dramatic decline (up to 70 percent) from 1977 to 1991 was detected at the largest nesting colony in southern California, possibly due to high levels of predation on eggs by the endemic deer mouse (*Peromyscus maniculatus elusus*). Identified threats include introduced predators at nesting colonies, oil spills and oil pollution, reduced prey availability, human disturbance, and artificial light pollution.

Although substantial declines in the Xantus's murrelet population likely occurred over the last century, some of the largest threats are being addressed, and, to some degree, ameliorated. Declines and possible extirpations at several nesting colonies were thought to have been caused by nonnative predators, which have been removed from many of the islands where they once occurred. Most notably, since 1994, Island Conservation and Ecology Group has systematically removed rats, cats, and dogs from every murrelet nesting colony in Mexico, with the exception of cats and dogs on Guadalupe Island. In 2002, rats were eradicated from Anacapa Island in southern California, which has resulted in improvements in reproductive success at that island. In southern California, efforts to restore nesting habitat on Santa Barbara Island through the Montrose Settlements Restoration Project may benefit the Xantus's murrelet population at that island.

Artificial lighting from squid fishing and other vessels, or lights on islands, remains a potential threat to the species. Bright lights make Xantus's murrelets more susceptible to predation, and they can also become disoriented and exhausted from continual attraction to bright lights. Chicks can become disoriented and separated from their parents at sea, which could result in death of the dependent chicks. High-wattage lights on commercial market squid (*Loligo opalescens*) fishing vessels used at night to attract squid to the surface of the water in the Channel Islands was the suspected cause of unusually high predation on Xantus's murrelets by western gulls (*Larus occidentalis*) and barn owls (*Tyto alba*) at Santa Barbara Island in 1999. To address this threat, in 2000, the California Fish and Game Commission required light shields and a limit of 30,000 watts per boat; it is unknown if this is sufficient to reduce impacts. Since 1999, no significant squid fishing has occurred near any of the colonies in the Channel Islands; however, this remains a potential future threat.

A proposal to build three liquid natural gas facilities near the Channel Islands could affect the nesting colonies due to bright lights at night from the facility and visiting tanker vessels, noise from the facilities or from helicopters visiting the facilities, and the threat of oil spills associated with visiting tanker vessels. However, these facilities are early in the complex and long-term planning processes, and it is possible that none of these facilities will be built. In addition, none of them are directly adjacent to nesting colonies, where their impacts would be expected to be more significant. The remaining threats to the species are of a high magnitude but nonimminent. Therefore, we retained an LPN of 5 for this species.

Lesser prairie-chicken (*Tympanuchus pallidicinctus*)—The following summary is based on information contained in our files and the petition received on October 5, 1995. Additional information can be found in the 12-month finding published on June 7, 1998 (63 FR 31400). Biologists estimate that the occupied range has declined by 92 percent since the 1800s. The most serious threats to the lesser prairie-chicken are loss of habitat from conversion of native rangelands to introduced forages and cultivated crops; conversion of suitable restored habitat in the Conservation Reserve Program to cropland; cumulative habitat degradation caused by severe grazing; and energy development, including transmission, and wind, oil, and gas development. Additional threats are woody plant invasion of open prairies due to fire suppression, herbicide use (including resumption of herbicide use in shinnery oak habitat), and habitat fragmentation caused by structural and transportation developments. Many of these threats may exacerbate the normal effects of periodic drought on lesser prairie-chicken populations. In many cases, the remaining suitable habitat has become fragmented by the spatial arrangement of these individual threats. Habitat fragmentation can be a threat to the species through several mechanisms: Remaining habitat patches may become smaller than necessary to meet the requirements of individuals and populations, necessary habitat heterogeneity may be lost to areas of homogeneous habitat structure, and the probability of recolonization decreases as the distance between suitable habitat patches expands. We have determined that the overall magnitude of threats to the lesser prairie-chicken throughout its range is high, and that the threats are ongoing, and thus imminent. Consequently, we have retained an LPN of 2 for this species.

Greater sage-grouse (*Centrocercus urophasianus*), Columbia Basin DPS—The following summary is based on information in our files and a petition,

dated May 14, 1999, requesting the listing of the Washington population of the western sage-grouse (*C. u. phaios*). On May 7, 2001, we concluded that listing the Columbia Basin DPS of the western sage-grouse was warranted, but precluded by higher-priority listing actions (66 FR 22984); this population was historically found in northern Oregon and central Washington. Following our May 7, 2001, finding, the Service received additional petitions requesting listing actions for various other greater sage-grouse populations, including one for the nominal western subspecies, dated January 24, 2002, and three for the entire species, dated June 18, 2002, and March 19 and December 22, 2003. The Service subsequently found that the petition for the western subspecies did not present substantial information (68 FR 6500), and that listing the greater sage-grouse throughout its historical range was not warranted (70 FR 2244). These latter findings were remanded to the Service for further consideration. In response, we initiated a new range-wide status review for the entire species (73 FR 10218). On March 5, 2010, we found that listing of the greater sage-grouse was warranted but precluded by higher priority listing actions (75 FR 13909; March 23, 2010), and it was added to the list of candidates. We also found that the western subspecies of the greater sage-grouse, the taxonomic entity we relied on in our DPS analysis for the Columbia Basin population, was no longer considered a valid subspecies. In light of our conclusions regarding the invalidity of the western sage-grouse subspecies, the significance of the Columbia Basin DPS to the greater sage-grouse will require further review. As priorities allow the Service intends to complete an analysis to determine if this population continues to warrant recognition as a DPS in accordance with our Policy Regarding the Recognition of Distinct Population (61 FR 4722; February 7, 1996). Until that time, the Columbia Basin DPS will remain a candidate for listing as a separate population of greater sage-grouse. Even if this population does not meet our DPS policy, the greater sage-grouse population in the Columbia Basin will remain a candidate for listing as part of the greater sage-grouse entity.

Band-rumped storm-petrel, Hawaii DPS (*Oceanodroma castro*)—The following summary is based on information contained in our files and the petition we received on May 8, 1989. No new information was provided in the second petition received on May 11, 2004. The band-rumped storm-petrel is a small seabird that is found in several areas of the subtropical Pacific and Atlantic Oceans. In the Pacific, there are three widely separated breeding populations—one in Japan, one in Hawaii, and one in the Galapagos. Populations in Japan and the Galapagos are comparatively large and number in the thousands, while the Hawaiian birds represent a small, remnant population of possibly only a few hundred pairs. Band-rumped storm-petrels are most commonly found in close proximity to breeding islands. The three populations in the Pacific are separated by long distances across the ocean where birds are not found. Extensive at-sea surveys of the Pacific have revealed a broad gap in distribution of the band-rumped storm-petrel to the east and west of the Hawaiian Islands, indicating that the distribution of birds in the central Pacific around Hawaii is disjunct from other nesting areas. The available information indicates that distinct populations of band-rumped storm-petrels are definable and that the Hawaiian population is distinct based on geographic and distributional isolation from other band-rumped storm-petrel populations in Japan, the Galapagos, and the Atlantic Ocean. A population also can be considered discrete if it is delimited by international boundaries that have differences in management control of the species. The Hawaiian population of the band-rumped storm-petrel is the only population within U.S. borders or under U.S. jurisdiction. Loss of the Hawaiian population would cause a significant gap in the distribution of the band-rumped storm-petrel in the Pacific, and could result in the complete isolation of the Galapagos and Japan populations without even occasional genetic exchanges. Therefore, the population is both discrete and significant, and constitutes a DPS.

The band-rumped storm-petrel probably was common on all of the main Hawaiian Islands when Polynesians arrived about 1,500 years ago, based on storm-petrel bones found in middens on the island of Hawaii and in excavation sites on Oahu and Molokai. Nesting colonies of this species in the Hawaiian Islands currently are restricted to remote cliffs on Kauai and Lehua Island and high-elevation lava fields on Hawaii. Vocalizations of the species were heard in Haleakala Crater on Maui as recently as 2006; however, no nesting sites have been located on the island to date. The significant reduction in numbers and range of the band-rumped storm-petrel is due primarily to predation by nonnative predators introduced by humans, including the domestic cat (*Felis catus*), small Indian mongoose (*Herpestes auropunctatus*), common barn owl (*Tyto alba*), black rat (*R. rattus*), Polynesian rat (*R. exulans*), and Norway rat (*R. norvegicus*), which occur throughout the main Hawaiian Islands, with the exception of the mongoose, which is not established on Kauai. Attraction of fledglings to artificial lights, which disrupts their night-time navigation, resulting in collisions with building and other objects, and collisions with artificial structures such as communication towers and utility lines are also threats. Erosion of nest sites caused by the actions of nonnative ungulates is a potential threat in some locations. Efforts are under way in some areas to reduce light pollution and mitigate the threat of collisions, but there are no large-scale efforts to control nonnative predators in the Hawaiian Islands. The threats are imminent because they are ongoing, and they are of a high magnitude because they can severely affect the survival of this DPS leading to a relatively high likelihood of extinction. Therefore, we assign this distinct population segment an LPN of 3.

Elfin-woods warbler (*Dendroica angelae*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Dendroica angelae,* or elfin-woods warbler, is a small entirely black and white warbler, distinguished by its white eyebrow stripe, white patches on ear covers and neck, incomplete eye ring, and black crown. The elfin-woods warbler was at first thought to occur only in the high elevation dwarf or elfin forests, but has since been found at lower elevations including shade coffee plantations and secondary forests. This species builds a compact cup nest, usually close to the trunk and well hidden among the epiphytes of a small tree, and its breeding season extends from March to June. It forages in the middle part of trees, gleaning insects from leaves in the outer portion of the tree crown. The elfin-woods warbler has been documented from four locations in Puerto Rico: Luquillo Mountains (El Yunque National Forest), Sierra de Cayey, and the Commonwealth forests of Maricao and Toro Negro. However, it has not been recorded again in Toro Negro and Cayey, following the passing of Hurricane Hugo in 1989. In 2003 and 2004, surveys were conducted for the elfin-woods warbler in the Carite Commonwealth Forest, Toro Negro

Forest, Guilarte Forest, Bosque del Pueblo, Maricao Forest and the El Yunque National Forest, but only detected the species in the latter two. In the Maricao Commonwealth Forest, 778 elfin woods warblers were recorded, and in the El Yunque National Forest, 196 elfin-woods warblers were recorded.

The elfin-woods warbler is currently threatened by habitat modification. Destruction of elfin forest and *Podocarpus* forest by the installation of infrastructure (*e.g.,* telecommunication towers, recreational facilities) threatens the long-term survival of this species. Loss of this type of habitat has been curtailed but potential for loss still exists due to Commonwealth agencies other than DNER. Furthermore, restoration of this habitat would take decades to complete. Present regulatory processes, both Commonwealth and Federal, promote the protection of these areas. Conversion of elfin-woods warbler habitat of better quality (*e.g.,* mature secondary forests, young secondary forests, and shaded-coffee plantations) along the periphery of the Maricao Commonwealth Forest to marginal habitat (*e.g.,* pastures, dry slope forests, residential rural forests, gallery forests, and un-shaded coffee plantations) may result in ineffective corridors for dispersal and expansion of elfin-woods warbler populations. While there is an effort to restore sun-coffee plantations to shade-coffee habitat, other habitats adjacent to the Maricao Forest may still be affected by residential development.

The listing priority number was originally assessed as a 5 (high magnitude, non-imminent threats). This was changed during the 2009 CNOR. Our analysis of the five listing factors revealed that only factors A and D applied to the species. Although habitat modification is occurring, it is limited, as the species is found mostly on protected lands managed by the Commonwealth and Federal agencies. We found no indication that the two populations of elfin-woods warbler are declining in numbers. We also found that it can thrive in disturbed and plantation habitats, and rebounds and recovers well, in a relatively short time, from the damaging effects of hurricanes to the forest structure. Therefore, the magnitude of threats is moderate to low. These threats are not imminent, because most of the range of the elfin-woods warbler is within protected lands. As a result, we assigned an LPN of 11 to this species.

*Reptiles*

Northern Mexican Gartersnake (*Thamnophis eques megalops*)—The following summary is based on information contained in our files. The northern Mexican gartersnake generally occurs in three types of habitat: (1) Ponds and cienegas; (2) lowland river riparian forests and woodlands; and (3) upland stream gallery forests. Within the United States, the distribution of the northern Mexican gartersnake has been reduced by close to 90 percent and it occurs in fragmented populations within the middle/upper Verde River drainage, middle/lower Tonto Creek, and the upper Santa Cruz River, as well as in a small number of isolated wetland habitats in southeastern Arizona; its status in New Mexico is uncertain. Within Mexico, the northern Mexican gartersnake is distributed along the Sierra Madre Occidental and the Mexican Plateau in the Mexican states of Sonora, Chihuahua, Durango, Coahila, Zacatecas, Guanajuato, Nayarit, Hidalgo, Jalisco, San Luis Potosí, Aguascalientes, Tlaxacala, Puebla, México, Michoacán, Oaxaca, Veracruz, and Querétaro. The primary threat to the northern Mexican gartersnake is competition and predation from nonnative species such as sportfish, bullfrogs, and crayfish. Degradation and elimination of its habitat and native prey base are also significant threats, most notably in areas where nonnative species co-occur. Threats, particularly competition and predation by nonnative species, are high in magnitude since they result in direct mortality or reduced reproductive capacity and may be irreversible in complex habitat resulting in a relatively high likelihood of extinction. The threats are ongoing and, therefore, imminent. Thus, we retained an LPN of 3 for this subspecies.

Sand dune lizard (*Sceloporus arenicolus*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

Eastern massasauga rattlesnake (*Sistrurus catenatus catenatus*)—The following summary is based on information contained in our files. No new information was provided in the petition received on May 11, 2004. The eastern massasauga is one of three recognized subspecies of massasauga. It is a small, thick-bodied rattlesnake that occupies shallow wetlands and adjacent upland habitat in portions of Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, New York, Ohio, Pennsylvania, Wisconsin, and Ontario.

Although the current range of *S. c. catenatus* resembles the subspecies' historical range, the geographic distribution has been restricted by the loss of the subspecies from much of the area within the boundaries of that range. Approximately 40 percent of the counties that were historically occupied by *S. c. catenatus* no longer support the subspecies. *S. c. catenatus* is currently listed as endangered in every State and province in which it occurs, except for Michigan where it is designated as a species of special concern. Each State and Canadian province across the range of *S. c. catenatus* has lost more than 30 percent, and for the majority more than 50 percent, of their historical populations. Furthermore, less than 35 percent of the remaining populations are considered secure. Approximately 59 percent of the remaining *S. c. catenatus* populations occur wholly or in part on public land, and Statewide and/or site-specific Candidate Conservation Agreements with Assurances (CCAAs) are currently being developed for many of these areas in Iowa, Illinois, Michigan, and Wisconsin. In 2004, a Candidate Conservation Agreement (CCA) with the Lake County Forest Preserve District in Illinois was completed. In 2005, a CCA with the Forest Preserve District of Cook County in Illinois was completed. In 2006, a CCAA with the Ohio Department of Natural Resources Division of Natural Areas and Preserves was completed for Rome State Nature Preserve in Ashtabula County. The magnitude of threats is moderate at this time. However, populations soon to be under CCAs and CCAAs have a low to moderate likelihood of persisting and remaining viable. Other populations are likely to suffer additional losses in abundance and genetic diversity and some will likely be extirpated unless threats are removed in the near future. Declines have continued or may be accelerating in several states. Thus, we are monitoring the status of this species to determine if a change in listing priority is warranted. Furthermore, we are working with several experts and partners in the development of an extinction risk model for the subspecies, and the results of this work may indicate that a change in listing priority number is appropriate. Threats of habitat modification, habitat succession, incompatible land management practices, illegal collection for the pet trade, and human persecution are ongoing and imminent threats to many

remaining populations, particularly those inhabiting private lands. We conclude that emergency listing is not warranted and have kept the LPN at 9 for this subspecies.

Black pine snake (*Pituophis melanoleucus lodingi*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. There are historical records for the black pine snake from one parish in Louisiana, 14 counties in Mississippi, and 3 counties in Alabama west of the Mobile River Delta. Black pine snake surveys and trapping indicate that this species has been extirpated from Louisiana and from four counties in Mississippi. Moreover, the distribution of remaining populations has become highly restricted due to the destruction and fragmentation of the remaining longleaf pine habitat within the range of the subspecies. Most of the known Mississippi populations are concentrated on the DeSoto National Forest. Populations occurring on properties managed by State and other governmental agencies as gopher tortoise mitigation banks or wildlife sanctuaries represent the best opportunities for long-term survival of the subspecies in Alabama. Other factors affecting the black pine snake include vehicular mortality and low reproductive rates, which magnify the threats from destruction and fragmentation of longleaf pine habitat and increase the likelihood of local extinctions. Due to the imminent threats of high magnitude caused by the past destruction of most of the longleaf pine habitat of the black pine snake, and the continuing persistent degradation of what remains, we assigned an LPN of 3 to this subspecies.

Louisiana pine snake (*Pituophis ruthveni*)—The following summary is based on information contained in our files and the petition we received on July 19, 2000. The Louisiana pine snake historically occurred in the fire-maintained longleaf pine ecosystem within west-central Louisiana and extreme east-central Texas. Most of the historical longleaf pine habitat of the Louisiana pine snake has been destroyed or degraded due to logging, fire suppression, roadways, short-rotation silviculture, and grazing. In the absence of recurrent fire, suitable habitat conditions for the Louisiana pine snake and its primary prey, the Baird's pocket gopher (*Geomys breviceps*), are lost due to vegetative succession. The loss and fragmentation of the longleaf pine ecosystem has resulted in extant Louisiana pine snake populations that are isolated and small. Trapping and occurrence data indicate the Louisiana pine snake is currently restricted to seven disjunct populations; five of the populations occur on federal lands and two occur mainly on private industrial timberlands. Currently occupied habitat in Louisiana and Texas is estimated to be approximately 163,000 acres, with 53 percent occurring on public lands and 47 percent in private ownership.

All remnant Louisiana pine snake populations have been affected by habitat loss and all require active habitat management. A Candidate Conservation Agreement (CCA) was completed in 2003 to maintain and enhance occupied and potential habitat on public lands, and to protect known Louisiana pine snake populations. On Federal lands, signatories of the Louisiana pine snake CCA currently conduct habitat management (i.e., prescribed burning and thinning) that is beneficial to the Louisiana pine snake. This proactive habitat management has likely slowed or reversed the rate of Louisiana pine snake habitat degradation on many portions of federal lands. The largest extant Louisiana pine snake population exists on private industrial timberlands. Although two conservation areas are managed to benefit Louisiana pine snakes on this property, the majority of the intervening occupied habitat is threatened by land management activities (habitat conversion to short-rotation pine plantations) that decrease habitat quality.

Three of the remnant Louisiana pine snake populations may be vulnerable to decreased demographic viability or other factors associated with low population sizes and demographic isolation. Although these remnant Louisiana pine snake populations are intrinsically vulnerable and thus threatened by these factors, it is not known if they are presently actually facing these threats. Because all extant populations are currently isolated and fragmented by habitat loss in the matrix between populations, there is little potential for dispersal among remnant populations or for the natural re-colonization of vacant habitat patches. Thus, the loss of any remnant population is likely to be permanent. Other factors affecting the Louisiana pine snake throughout its range include low fecundity, which magnifies other threats and increases the likelihood of local extirpations, and vehicular mortality, which may significantly affect Louisiana pine snake populations.

While the extent of Louisiana pine snake habitat loss has been great in the past and much of the remaining habitat has been degraded, habitat loss does not represent an imminent threat, primarily because the rate of habitat loss appears to be declining on public lands. However, all populations require active habitat management, and the lack of adequate habitat remains a threat for several populations. The potential threats to a large percentage of extant Louisiana pine snake populations, coupled with the likely permanence of these effects and the species' low fecundity and low population sizes (based on capture rates and occurrence data), lead us to conclude that the threats have significant effect on the survival of the species and therefore remain high in magnitude. Thus, based on nonimminent, high-magnitude threats, we assign a listing priority number of 5 to this species.

Sonoyta mud turtle (*Kinosternon sonoriense longifemorale*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The Sonoyta mud turtle occurs in a spring and pond at Quitobaquito Springs on Organ Pipe Cactus National Monument in Arizona, and in the Rio Sonoyta and Quitovac Spring of Sonora, Mexico. Loss and degradation of stream habitat from water diversion and groundwater pumping, along with its very limited distribution, is the primary threat to the Sonoyta mud turtle. Sonoyta mud turtles are highly aquatic and depend on permanent water for survival. The area of southwest Arizona and northern Sonora where the Sonoyta mud turtle occurs is one of the driest regions of the southwest. Continuing drought, irrigated agriculture, and development in the region, is expected to cause surface water in the Rio Sonoyta to dwindle further and therefore have a significant impact on the survival of this subspecies, which may also be vulnerable to aerial spraying of pesticides on nearby agricultural fields. We retained an LPN of 3 for this subspecies because threats are of a high magnitude and continue to date, and therefore are imminent.

*Amphibians*

Columbia spotted frog, Great Basin DPS (*Rana luteiventris*)—The following summary is based on information contained in our files and the petition we received on May 1, 1989. Currently, Columbia spotted frogs appear to be widely distributed throughout southwestern Idaho, southeastern Oregon, northeastern and central Nevada, but local populations within this general area appear to be small and isolated from each other. Recent work

by researchers in Idaho and Nevada have documented the loss of historically known sites, reduced numbers of individuals within local populations, and declines in the reproduction of those individuals. Small, highly fragmented populations, characteristic of the majority of existing populations of Columbia spotted frogs in the Great Basin, are highly susceptible to extinction processes.

Poor management of Columbia spotted frog habitat—including water development, improper grazing, mining activities, and nonnative species—has and continues to contribute to the degradation and fragmentation of habitat. Emerging fungal diseases such as chytridiomycosis and the spread of parasites may be contributing factors to Columbia spotted frog population declines throughout portions of its range. Effects of climate change, such as drought, and stochastic events such as fire often have detrimental effects to small isolated populations and can often exacerbate existing threats. A 10-year Conservation Agreement and Strategy was signed in September 2003 for both the Northeast and the Toiyabe subpopulations in Nevada. The goals of the conservation agreements are to reduce threats to Columbia spotted frogs and their habitat to the extent necessary to prevent populations from becoming extirpated throughout all or a portion of their historical range and to maintain, enhance, and restore a sufficient number of populations of Columbia spotted frogs and their habitat to ensure their continued existence throughout their historical range. Additionally, a Candidate Conservation Agreement with Assurances was completed in 2006 for the Owyhee subpopulation at Sam Noble Springs, Idaho. Several habitat enhancement projects have been conducted throughout their range which have benefitted these populations. Based on imminent threats of moderate magnitude, we assigned a listing priority number of 9 to this DPS of the Columbia spotted frog.

Mountain yellow-legged frog, Sierra Nevada DPS (*Rana muscosa*)—The following summary is based on information contained in our files and the petition received on February 8, 2000. Also see our 12-month petition finding published on January 16, 2003 (68 FR 2283) and our amended 12-month petition finding published on June 25, 2007 (72 FR 34657). The mountain yellow-legged frog inhabits the high-elevation lakes, ponds, and streams in the Sierra Nevada Mountains of California, from near 4,500 feet (ft) (1,370 meters (m)) to 12,000 ft (3,650 m). The distribution of the mountain yellow-legged frog is from Butte and Plumas Counties in the north to Tulare and Inyo Counties in the south. A separate population in southern California is already listed as endangered (67 FR 44382). Based on mitochondrial DNA, morphological, and acoustic studies, Vredenburg *et al.* recently recognized two distinct species of mountain yellow-legged frog in the Sierra Nevada, *R. muscosa* and *R. sierrae.* This taxonomic distinction has been recently adopted by the American Society of Ichthyologists and Herpetologists, the Herpetologists' League, and the Society for the Study of Amphibians and Reptiles. The Vredenburg study determined that two species exist, as described by Camp, but have different geographical ranges than first described. Camp described *R. muscosa* as only occurring in southern California. A recent study determined that *R. muscosa* also occurs in the southern portion of the Sierra Nevada, and *R. sierrae* occurs both in the southern and northern portions of the Sierra Nevada, with no range overlap. At this time, we have not adopted this taxonomic distinction of two species and continue to recognize mountain yellow-legged frogs in the Sierra Nevada Mountains of California as *R. muscosa* and as the candidate entity.

Predation by introduced trout is the best-documented cause of the decline of the Sierra Nevada mountain yellow-legged frog, because it has been repeatedly observed that fishes and mountain yellow-legged frogs rarely co-exist. Mountain yellow-legged frogs and trout (native and nonnative) do co-occur at some sites, but these co-occurrences probably are mountain yellow-legged frog populations with negative population growth rates in the absence of immigration. To help reverse the decline of the mountain yellow-legged frog, the Sequoia and Kings Canyon National Parks have been removing introduced trout since 2001. Over 18,000 introduced trout have been removed from 11 lakes since the project started in 2001. The lakes are completely-to-mostly fish-free and substantial mountain yellow-legged frog population increases have resulted. The California Department of Fish and Game has also removed or is in the process of removing nonnative trout from a total of between 10 and 20 water bodies in the Inyo, Humboldt-Toiyabe, Sierra, and El Dorado National Forests. In the El Dorado National Forest golden trout were removed from Leland Lakes, and attempts have been made to remove trout from two sites near Gertrude Lake, three lakes in the Pyramid Creek watershed, and a tributary of Cole Creek; no data showing increase in mountain yellow-legged frogs at these sites is available.

In California, chytridiomycosis, more commonly known as chytrid fungus (*Batrachochytrium dendrobatidis*) or Bd, has been detected in many amphibian species, including the mountain yellow-legged frog within the Sierra Nevada. Recent research has shown that this pathogenic fungus has become widely distributed throughout the Sierra Nevada, and that infected mountain yellow-legged frogs often die soon after metamorphosis. Several infected and uninfected populations were monitored in Sequoia and Kings Canyon National Parks over multiple years, documenting dramatic declines and extirpations in infected but not in uninfected populations. In the summer of 2005, 39 of 43 populations assayed in Yosemite National Park were positive for chytrid fungus.

The current distribution of the Sierra Nevada mountain yellow-legged frog is restricted primarily to public lands at high elevations, including streams, lakes, ponds, and meadow wetlands located on national forests, including wilderness and non-wilderness on the forests, and national parks. In several areas where detailed studies of the effects of chytrid fungus on the mountain yellow-legged frog are on-going, substantial declines have been observed over the past several years. For example, in 2007 surveys in Yosemite National Park, mountain yellow-legged frogs were not detectable at 37 percent of 285 sites where they had been observed in 2000–2002; in 2005 in Sequoia and Kings Canyon National Parks, mountain yellow-legged frogs were not detected at 54 percent of sites where they had been recorded 3 to 8 years earlier. A compounding effect of disease-caused extinctions of mountain yellow-legged frogs is that recolonization may never occur, because streams connecting extirpated sites to extant populations now contain introduced fishes, which act as barriers to frog movement within metapopulations. The most recent assessment of the species status in the Sierra Nevada indicates that mountain-yellow legged frogs occur at less than 8 percent of the sites from which they were historically observed. A group of prominent scientists further suggest a 10 percent decline per year in the number of remaining *Rana mucosa* populations is likely. Based on threats that are imminent (because they are ongoing) and high-magnitude (because they significantly affect the survival of the DPS throughout its range), we continue

to assign the population of mountain yellow-legged frog in the Sierra Nevada an LPN of 3.

Oregon spotted frog (*Rana pretiosa*)—The following summary is based on information contained in our files and the petition we received on May 4, 1989. Historically, the Oregon spotted frog ranged from British Columbia to the Pit River drainage in northeastern California. Based on surveys of historical sites, the Oregon spotted frog is now absent from at least 76 percent of its former range. The majority of the remaining Oregon spotted frog populations are small and isolated.

The threats to the species' habitat include development, livestock grazing, introduction of nonnative plant species, vegetation succession, changes in hydrology due to construction of dams and alterations to seasonal flooding, lack of management of exotic vegetation, predators, and poor water quality. Additional threats to the species are predation by nonnative fish and introduced bullfrogs; competition with bullfrogs and nonnative fish for habitat; and diseases, such as oomycete water mold *Saprolegnia* and chytrid fungus infections. The magnitude of threat is high for this species because this wide range of threats to both individuals and their habitats could seriously reduce or eliminate any of these isolated populations and further reduce the species' range and potential survival. Habitat restoration and management actions have not prevented population declines. The threats are imminent because each population is faced with multiple ongoing and potential threats as identified above. Therefore, we retain an LPN of 2 for the Oregon spotted frog.

Relict leopard frog (*Lithobates onca*)—The following summary is based on information contained in our files and the petition we received on May 9, 2002. Natural relict leopard frog populations are currently only known to occur in two general areas in Nevada: Near the Overton Arm area of Lake Mead and Black Canyon below Lake Mead. These two areas comprise a small fraction of the historical distribution of the species, which included: springs, streams, and wetlands found within the Virgin River drainage downstream from the vicinity of Hurricane, Utah; along the Muddy River, Nevada; and along the Colorado River from its confluence with the Virgin River downstream to Black Canyon below Lake Mead, Nevada and Arizona.

Suggested factors contributing to the decline of the species include alteration of aquatic habitat due to agriculture and water development, including regulation of the Colorado River, and the introduction of exotic predators and competitors. In 2005, the National Park Service, in cooperation with the Service and various other Federal, State, and local partners, developed a conservation agreement and strategy intended to improve the status of the species through prescribed management actions and protection. Conservation actions identified for implementation in the agreement and strategy include captive rearing of tadpoles for translocation and refugium populations, habitat and natural history studies, habitat enhancement, population and habitat monitoring, and translocation. New sites within the historical range of the species have been successfully established with captive-reared frogs. Conservation is proceeding under the agreement and strategy; however, additional time is needed to determine whether or not the agreement and strategy will be effective in eliminating or reducing the threats to the point that the relict leopard frog can be removed from candidate status. However, because of these conservation efforts, the magnitude of existing threats is low to moderate. These threats remain nonimminent since there are no pending projects or actions that would adversely affect frog populations or threaten surface water associated with known sites occupied by the frog. Therefore, we assigned an LPN of 11 to this species.

Austin blind salamander (*Eurycea waterlooensis*)—The following summary is based on information contained in our files. No new information was provided in the petition received on May 11, 2004. The Austin blind salamander is known to occur in and around three of the four spring sites that comprise the Barton Springs complex in the City of Austin, Travis County, Texas. Primary threats to this species are degradation of water quality due to expanding urbanization. The Austin blind salamander depends on a constant supply of clean water in the Edwards Aquifer discharging from Barton Springs for its survival. Urbanization dramatically alters the normal hydrologic regime and water quality of an area. Increased impervious cover caused by development increases the quantity and velocity of runoff that leads to erosion and greater pollution transport. Pollutants and contaminants that enter the Edwards Aquifer are discharged in salamander habitat at Barton Springs and could have serious morphological and physiological effects to the salamander.

The Texas Commission on Environmental Quality adopted the Edwards Rules in 1995 and 1997, which require a number of water quality protection measures for new development occurring in the recharge and contributing zones of the Edwards Aquifer. However, Chapter 245 of the Texas Local Government Code permits "grandfathering" of State regulations. Grandfathering allows developments to be exempted from any new local or State requirements for water quality controls and impervious cover limits if the developments were planned prior to the implementation of such regulations. As a result of the grandfathering law, very few developments have followed the Edwards Rules. New developments are still obligated to comply with regulations that were applicable at the time when project applications for development were first filed. In addition, it is significant that even if they were followed with every new development, the Edwards Rules do not span the entire watershed for Barton Springs. Consequently, development occurring outside these jurisdictions can have negative consequences on water quality and thus have an impact on the species.

Water-quality impacts threaten the continued existence of the Austin blind salamander by altering physical aquatic habitats and the food sources of the salamander. We consider the threats to be imminent because urbanization is ongoing and continues to expand over the Barton Springs Segment of the Edwards Aquifer and water quality continues to degrade. While the City of Austin and many other partners are actively working on conservation of the Barton Springs salamander, and the Austin blind salamander benefits from all of the ongoing conservation actions that are being conducted for the Barton Springs salamander, these efforts have not yet been successful in improving water quality. In addition, the existence of the species continues to be threatened by hazardous chemical spills within the Barton Springs Segment of the Edwards Aquifer, which could result in direct mortality. Because the Austin blind salamander is known from only three clustered spring sites and must rely on clear, clean spring discharges from the Edwards Aquifer for its survival, degraded water quality poses a severe threat to the entire population, and is therefore a high-magnitude threat. Thus, we maintained the LPN of 2 for this species.

Georgetown salamander (*Eurycea naufragia*)—The following summary is based on information contained in our files. No new information was provided in the petition received on May 11, 2004. The Georgetown salamander is known from spring outlets along five tributaries to the San Gabriel River and

one cave in the City of Georgetown, Williamson County, Texas. The Georgetown salamander has a very limited distribution and depends on a constant supply of clean water from the Northern Segment of the Edwards Aquifer for its survival.

Primary threats to this species are degradation of water quality due to expanding urbanization. Increased impervious cover by development increases the quantity and velocity of runoff that leads to erosion and greater pollution transport. Pollutants and contaminants that enter the Edwards Aquifer are discharged from spring outlets in salamander habitat and have serious morphological and physiological effects to individuals of the species.

The Texas Commission on Environmental Quality adopted the Edwards Rules in 1995 and 1997, which require a number of water quality protection measures for new development occurring in the recharge and contributing zones of the Edwards Aquifer. New developments are still obligated to comply with regulations that were applicable at the time when project applications were first filed. However, Chapter 245 of the Texas Local Government Code permits "grandfathering" of state regulations. Grandfathering allows developments to be exempted from any new local or state requirements for water quality controls and impervious cover limits if the developments were planned prior to the implementation of such regulations. As a result of the grandfathering law, very few developments have followed the Edwards Rules. In addition, it is significant that even if they were followed with every new development, the Edwards Rules do not span the entire watershed for the Edwards Aquifer. The TCEQ has developed voluntary water-quality protection measures for development in the Edwards Aquifer region of Texas; however, it is unknown if these measures will be implemented throughout a large portion of the watershed or if they will be effective in maintaining or improving water quality.

Development occurring outside the TCEQ's jurisdiction can have negative consequences on water quality and thus affect the species. Water-quality impacts threaten the continued existence of the Georgetown salamander by altering physical aquatic habitats and the food sources of the salamander. The threats are imminent because urbanization is ongoing and continues to expand over the Northern Segment of the Edwards Aquifer. However, Williamson County and the Williamson County Conservation Foundation are actively working to protect habitat and acquire land within the contributing watershed for the Georgetown salamander. Also, they are conducting monitoring and data collecting activities in an effort that is expected to lead to the development of a conservation strategy for this species. These conservation actions reduce the magnitude of the threat to the Georgetown salamander to a moderate level by reducing the amount of development occurring in the portion of the watershed that affects the species. Thus, we maintained the LPN of 8 for this species.

Jollyville Plateau salamander (*Eurycea tonkawae*)—The following summary is based on information gathered during a status review of this species (72 FR 71039, December 13, 2007). The Jollyville Plateau salamander occurs in the Jollyville Plateau and Brushy Creek areas of the Edwards Plateau in Travis and WilliamsonCounties, Texas. This species has a limited distribution and depends on a constant supply of clean water from the Northern Segment of the Edwards Aquifer for its survival. The primary threat to this species is degradation of water quality due to expanding urbanization. Increased impervious cover by development increases the quantity and velocity of runoff that leads to erosion and greater pollution transport. Pollutants and contaminants that enter the Edwards Aquifer are discharged from spring outlets in salamander habitat and have serious morphological and physiological effects on individual of the species.

The Texas Commission on Environmental Quality adopted the Edwards Rules in 1995 and 1997, which require a number of water quality protection measures for new development occurring in the recharge and contributing zones of the Edwards Aquifer. However, Chapter 245 of the Texas Local Government Code permits "grandfathering" of state regulations. Grandfathering allows developments to be exempted from any new local or state requirements for water quality controls and impervious cover limits if the developments were planned prior to the implementation of such regulations. As a result of the grandfathering law, very few developments have followed the Edwards Rules. New developments are still obligated to comply with regulations that were applicable at the time when project applications for development were first filed. In addition, it is significant that even if they were followed with every new development, the Edwards Rules do not span the entire watershed for the Edwards Aquifer. The TCEQ has developed voluntary water quality protection measures for development in the Edwards Aquifer region of Texas; however, it is unknown if these measures will be implemented throughout a large portion of the watershed or if they will be effective in maintaining or improving water quality.

Water-quality impacts threaten the continued existence of the Jollyville Plateau salamander by altering physical aquatic habitats and the food sources of the salamander, producing negative population responses. Such responses have been documented at both the individual level (mortalities and deformities) and the population level (significant declines in abundance over the last 10 years and extirpation at one site). We find the overall negative response by the salamander to be at a moderate level because deformities and deaths of salamanders have been limited in scope to a few localities and only one location may have experienced an extirpation. Otherwise, the current range of the salamander changed little from the known historical range. Thus, we maintained the LPN of 8 for this species.

Salado salamander (*Eurycea chisholmensis*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The Salado salamander is historically known from two spring sites, Big Boiling Springs and Robertson Springs, near Salado, Bell County, Texas. We have received only one anecdotal report of a salamander sighting in Big Boiling Springs in 2008; prior to that, the salamander had not been sighted there since 1991. Texas Parks and Wildlife Department has been conducting regular surveys at Robertson Springs since June 2009 and has rediscovered the Salado salamander at this site.

Primary threats to this species are habitat modification and degradation of water quality due to expanding urbanization. The Salado salamander depends on a constant supply of clean water from the Northern Segment of the Edwards Aquifer for its survival. Pollutants and contaminants that enter the Edwards Aquifer discharge in salamander habitat and have morphological and physiological effects on the salamander. We do not know how likely spills are to occur within the contributing watersheds of the springs that support this species. However, several groundwater incidents have occurred within Salado salamander habitat in recent years. The salamander is reasonably expected to be vulnerable to catastrophic hazardous materials spills, groundwater contamination from

the Northern Segment of the Edwards Aquifer, and impacts to its surface habitat. In addition, Big Boiling Springs is located near Interstate Highway 35 and in the center of the Village of Salado. Traffic and urbanization is likely to increase the threat of contamination of spills, higher levels of impervious cover, and subsequent impacts to groundwater. These threats significantly affect the survival of this species, and groundwater contamination and impacts to surface habitat are ongoing. Moreover, we do not have information that the magnitude or imminence of the threats to the species has changed since our previous assessment when we concluded there are ongoing, and therefore, imminent threats of a high magnitude. Therefore, we maintained the LPN of 2 for this species.

Yosemite toad (*Bufo canorus*)—The following summary is based on information contained in our files and the petition we received on April 3, 2000. See also our 12-month petition finding published on December 10, 2002 (67 FR 75834). Yosemite toads are moderately sized toads, with females having black spots edged with white or cream that are set against a grey, tan, or brown background. Males have a nearly uniform coloration of yellow-green to olive drab to greenish brown. Yosemite toads are most likely to be found in areas with thick meadow vegetation or patches of low willows near or in water, and use rodent burrows for overwintering and temporary refuge during the summer. Breeding habitat includes the edges of wet meadows, slow-flowing streams, shallow ponds, and shallow areas of lakes. The historical range of Yosemite toads in the Sierra Nevada occurs from the Blue Lakes region north of Ebbetts Pass (Alpine County) to south of Kaiser Pass in the Evolution Lake/Darwin Canyon area (Fresno County). The historical elevational range of Yosemite toads is 1,460 to 3,630 m (4,790 to 11,910 ft).

The threats currently facing the Yosemite toad include cattle grazing, timber harvesting, recreation, disease, and climate change. Inappropriate grazing has been shown to cause loss in vegetative cover and destroys peat layers in meadows, which lowers the groundwater table and summer flows. This may increase the stranding and mortality of tadpoles, or make these areas completely unsuitable for Yosemite toads. Grazing can also degrade or destroy moist upland areas used as non-breeding habitat by Yosemite toads and collapse rodent burrows used by Yosemite toads as cover and hibernation sites. Timber harvesting and associated road development can severely alter the terrestrial environment and result in the reduction and occasional extirpation of amphibian populations in the Sierra Nevada. They also create habitat gaps that may act as dispersal barriers and contribute to the fragmentation of Yosemite toad habitat and populations. Trails (foot, horse, bicycle, or off-highway motor vehicle) compact soil in riparian habitat, which increases erosion, displaces vegetation, and can lower the water table. Trampling or the collapsing of rodent burrows by recreationists, pets, and vehicles could lead to direct mortality of all life stages of the Yosemite toad and disrupt their behavior. Various diseases have been confirmed in Yosemite toads. Mass die-offs of amphibians have been attributed to: chytrid fungal infections of metamorphs and adults; Saprolegnia fungal infections of eggs; iridovirus infection of larvae, metamorphs, or adults; and bacterial infections. Yosemite toads probably are exposed to a variety of pesticides and other chemicals throughout their range. Environmental contaminants could negatively affect the species by causing direct mortality; suppressing the immune system; disrupting breeding behavior, fertilization, growth or development of young; and disrupting the ability to avoid predation.

There is no indication that any of these threats are ongoing or planned and the threats are therefore nonimminent. In addition, since there are a number of substantial populations and these threats tend to have localized effects, the threats are moderate to low in magnitude. In addition, almost all of the species' range occurs on Federal land, which protects the species from private development and facilitates management of the species by Federal agencies. We therefore retained an LPN of 11 for the Yosemite toad.

Black Warrior waterdog (*Necturus alabamensis*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The Black Warrior waterdog is a salamander that inhabits streams above the Fall Line within the Black Warrior River Basin in Alabama. There is very little specific locality information available on the historical distribution of the Black Warrior waterdog since little attention was given to this species between its description in 1937 and the 1980s. At that time, there were a total of only 11 known historical records from 4 Alabama counties. Two of these sites have now been inundated by impoundments. Extensive survey work was conducted in the 1990s to look for additional populations. As a result of that work, the species was documented at 14 sites in 5 counties.

Water-quality degradation is the biggest threat to the continued existence of the Black Warrior waterdog. Most streams that have been surveyed for the waterdog showed evidence of pollution and many appeared biologically depauperate. Sources of point and nonpoint pollution in the Black Warrior River Basin have been numerous and widespread. Pollution is generated from inadequately treated effluent from industrial plants, sanitary landfills, sewage treatment plants, poultry operations, and cattle feedlots. Surface mining represents another threat to the biological integrity of waterdog habitat. Runoff from old, abandoned coal mines generates pollution through acidification, increased mineralization, and sediment loading. The North River, Locust Fork, and Mulberry Fork, all streams that this species inhabits, are on the Environmental Protection Agency's list of impaired waters. An additional threat to the Black Warrior waterdog is the creation of large impoundments that have flooded thousands of square hectares of its habitat. These impoundments are likely marginal or unsuitable habitat for the salamander. Suitable habitat for the Black Warrior waterdog is limited and available data indicate extant populations are small and their viability is questionable. This situation is pervasive and problematic; water quality issues are persistent and regulatory mechanisms are not ameliorating these threats, though we have no indication of population declines, at present. We hope additional surveys may clarify the status of populations in face of existing threats. Therefore, the overall magnitude of the threat is moderate. Water quality degradation in the Black Warrior basin is ongoing; therefore, the threats are imminent. We assigned an LPN of 8 to this species.

*Fishes*

Headwater chub (*Gila nigra*)—The following summary is based on information contained in our files, the 12-month finding published in the **Federal Register** on May 3, 2006 (71 FR 26007), and in the petition received November 9, 2009. The headwater chub is a moderate-sized cyprinid fish. The range of the headwater chub has been reduced by approximately 60 percent. Seventeen streams (125 miles (200 kilometers) of stream) are thought to be occupied out of 27 streams (312 miles (500 kilometers) of stream) formerly

occupied in the Gila River Basin in Arizona and New Mexico. All remaining populations are fragmented and isolated and threatened by a combination of factors.

Headwater chub are threatened by introduced nonnative fish that prey on them and compete with them for food. Habitat destruction and modification have occurred and continue to occur as a result of dewatering, impoundment, channelization, and channel changes caused by alteration of riparian vegetation and watershed degradation from mining, grazing, roads, water pollution, urban and suburban development, groundwater pumping, and other human actions. Existing regulatory mechanisms do not appear to be adequate for addressing the impact of nonnative fish and also have not removed or eliminated the threats that continue to be posed through habitat destruction or modification. The fragmented nature and rarity of existing populations makes them vulnerable to other natural or manmade factors, such as drought and wildfire. Climate change is predicted to worsen these threats though increased aridity of the region, thus reducing stream flows and warming aquatic habitats, which makes them more suitable to nonnative species.

The Arizona Game and Fish Department has finalized the Arizona Statewide Conservation Agreement for Roundtail Chub (*G. robusta*), Headwater Chub, Flannelmouth Sucker (*Catostomus latipinnis*), Little Colorado River Sucker (*Catostomus* spp.), Bluehead Sucker (*C. discobolus*), and Zuni Bluehead Sucker (*C. discobolus yarrowi*). The New Mexico Department of Game and Fish recently listed the headwater chub as endangered and created a recovery plan for the species: Colorado River Basin Chubs (Roundtail Chub, Gila Chub (*G. intermedia*), and Headwater Chub) Recovery Plan, which was approved by the New Mexico State Game Commission on November 16, 2006. Both the Arizona Agreement and the New Mexico Recovery Plan recommend preservation and enhancement of extant populations and restoration of historical headwater-chub populations. The recovery and conservation actions prescribed by Arizona and New Mexico plans, which we predict will reduce and remove threats to this species, will require further discussions and authorizations before they can be implemented, although some actions have been completed and several are planned for the immediate future. Although threats are ongoing, existing information indicates long-term persistence and stability of existing populations. Currently 10 of the 17 extant stream populations are considered stable based on abundance and evidence of recruitment. Based on our assessment, threats (nonnative species, habitat loss from land uses) remain imminent and are of a moderate magnitude. Thus, we have retained an LPN of 8 for this species.

Roundtail Chub (*Gila robusta*) Lower Colorado River Distinct Population Segment—The following summary is based on information contained in our files and the 12-month finding published in the **Federal Register** on July 7, 2009 (74 FR 32352). The roundtail chub is a moderate to large cyprinid fish. The range of the roundtail chub has been reduced by approximately 68 to 82 percent. Thirty-three streams are currently occupied, representing approximately 18 to 32 percent of the species' former range, or 800 km (500 miles) to 1350 km (840 mi) of 3050 km (1895 mi) of formerly occupied streams in the Gila River Basin in Arizona and New Mexico. Most of the remaining populations are fragmented and isolated, and all are threatened by a combination of factors.

Roundtail chub are threatened by introduced nonnative fish that prey on them and compete with them for food. Habitat destruction and modification have occurred and continue to occur as a result of dewatering, impoundment, channelization, and channel changes caused by alteration of riparian vegetation and watershed degradation from mining, grazing, roads, water pollution, urban and suburban development, groundwater pumping, and other human actions. Existing regulatory mechanisms do not appear to be adequate for addressing the impact of nonnative fish and also have not removed or eliminated the threats that continue to be posed through habitat destruction or modification. The fragmented nature and rarity of existing populations makes them vulnerable to other natural or manmade factors, such as drought and wildfire. Climate change is predicted to worsen these threats though increased aridity of the region, thus reducing stream flows and warming aquatic habitats, which makes them more suitable to nonnative species.

The Arizona Game and Fish Department has finalized the Arizona Statewide Conservation Agreement for Roundtail Chub, Headwater Chub (*G. nigra*), Flannelmouth Sucker (*Catostomus latipinnis*), Little Colorado River Sucker (*Catostomus* spp.), Bluehead Sucker (*C. discobolus*), and Zuni Bluehead Sucker (*C. discobolus yarrowi*). The New Mexico Department of Game and Fish lists the roundtail chub as endangered and has created a recovery plan for the species: Colorado River Basin Chubs (Roundtail Chub, Gila Chub (*G. intermedia*), and Headwater Chub) Recovery Plan, which was approved by the New Mexico State Game Commission on November 16, 2006. Both the Arizona Agreement and the New Mexico Recovery Plan recommend preservation and enhancement of extant populations and restoration of historical roundtail-chub populations. The recovery and conservation actions prescribed by Arizona and New Mexico plans, which we predict will reduce and remove threats to this species, will require further discussions and authorizations before they can be implemented, although some actions have been completed and several are planned for the immediate future. Although threats are ongoing, existing information indicates long-term persistence and stability of existing populations. Currently 9 of the 33 extant stream populations are considered stable based on abundance and evidence of recruitment. Based on our assessment, threats (nonnative species, habitat loss from land uses) remain imminent and are of a moderate magnitude. Thus, we have retained an LPN of 9 for this distinct population segment.

Arkansas darter (*Etheostoma cragini*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. This fish species occurs in Arkansas, Colorado, Kansas, Missouri, and Oklahoma. The species is found most often in sand- or pebble-bottomed pools of small, spring-fed streams and marshes, with cool water and broad-leaved aquatic vegetation. Its current distribution is indicative of a species that once was widely dispersed throughout its range, but has been relegated to isolated areas surrounded by unsuitable habitat that prevents dispersal. Factors influencing the current distribution include: Surface and groundwater irrigation resulting in decreased flows or stream dewatering; the dewatering of long reaches of riverine habitat necessary for species movement when surface flows do occur; conversion of prairie to cropland which influences groundwater recharge and spring flows; water quality degradation from a variety of sources; and the construction of dams which act as barriers preventing emigration upstream and downstream through the reservoir pool. The magnitude of threats facing

this species is moderate to low, given the number of different locations where the species occurs and the fact that no single threat or combination of threats affects more than a portion of the widespread population occurrences. Overall, the threats are nonimminent since groundwater pumping is declining and development, spills, and runoff are not currently affecting the species rangewide. Thus, we are retaining an LPN of 11 for the Arkansas darter.

Pearl darter (*Percina aurora*)—The following summary is based on information contained in our files. Little is known about the specific habitat requirements or natural history of the Pearl darter, a small fish in the Percidae family. Pearl darters have been collected from a variety of river/stream attributes, mainly over gravel bottom substrate. This species is historically known only from localized sites within the Pascagoula and Pearl River drainages in two states. Currently, the Pearl darter is considered extirpated from the Pearl River drainage and rare in the Pascagoula River drainage. Since 1983, the range of the Pearl darter has decreased by 55 percent.

The Pearl darter is vulnerable to non-point-source pollution caused by urbanization and other land use activities; gravel mining and resultant changes in river geomorphology, especially head cutting; and the possibility of water quantity decline from the proposed Department of Energy Strategic Petroleum Reserve project and a proposed dam on the Bouie River. Additional threats are posed by the apparent lack of adequate State and Federal water quality regulations due to the continuing degradation of water quality within the species' habitat. The Pearl darter's localized distribution and apparent low population numbers may indicate a species with lower genetic diversity which would also make this species more vulnerable to catastrophic events. Threats affecting the Pearl darter are localized in nature, affecting portions of the population within the drainage, thus, we assigned a threat magnitude of moderate to low for this species. In addition, the threats are imminent since the identified threats are currently impacting this species in some portions of its range. Therefore, we have assigned a listing priority number of 8 for this species.

Grotto sculpin (*Cottus* sp., sp. nov.)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The Grotto sculpin, a small fish, is restricted to two karst areas (limestone regions characterized by sink holes, abrupt ridges, caves, and underground streams), the Central Perryville Karst and Mystery-Rimstone Karst in Perry County, southeast Missouri. Grotto sculpins have been documented in only five cave systems (Burr et al. 2001, p. 284). The current overall range of the grotto sculpin has been estimated to encompass approximately 260 square kilometers (100 square miles).

The small population size and endemism of the grotto sculpin make it vulnerable to extinction due to genetic drift, inbreeding depression, and random or chance changes to the environment (Smith 1974, p. 350). The species' karst habitat is located down-gradient of the city of Perryville, Missouri, which poses a potential threat if contaminants from this urban area enter cave streams occupied by grotto sculpins. Various agricultural chemicals, such as ammonia, nitrite/nitrate, acetochlor, dieldrin, and atrazine have been detected at levels high enough to be detrimental to aquatic life within the Perryville Karst area. Many of the sinkholes in Perry County contain anthropogenic refuse, ranging from household cleansers and sewage to used pesticide and herbicide containers. As a result, potential water contamination from various sources of point and non-point pollution poses a significant threat to the grotto sculpin. Of the five cave systems documented to have grotto sculpins, populations in two cave systems have had fish kills in recent times. Predatory fish such as common carp, fat-head minnow, yellow bullhead, green sunfish, bluegill, and channel catfish occur in all of the caves occupied by grotto sculpin. These potential predators may escape surface farm ponds that unexpectedly drain through sinkholes into the underground cave systems and enter Grotto sculpin habitat. No regulatory mechanisms are in place that would provide protection to the grotto sculpin. Current threats to the habitat of the grotto sculpin may exacerbate potential problems associated with its low population numbers and increase the likelihood of extinction. Due to the high magnitude of ongoing, and thus imminent, threats we assigned this species an LPN of 2.

Sharpnose shiner (*Notropis oxyrhynchus*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The sharpnose shiner is a small, slender minnow, endemic to the Brazos River Basin in Texas. Historically, the sharpnose shiner existed throughout the Brazos River and several of its major tributaries. It has also been found in the Wichita River (within the Red River Basin), where it may have once naturally occurred but has since been extirpated. Current information indicates that the population upstream of Possum Kingdom Reservoir is apparently stable, while the population downstream of the reservoir may be extirpated, representing a reduction of approximately 69 percent of its historical range.

The most significant threat to the existence of the sharpnose shiner is potential reservoir development within its current range. The current water plan for Texas provides several reservoir options that could be implemented within the Brazos River drainage. Additional threats include irrigation and water diversion, sedimentation, desalination, industrial and municipal discharges, agricultural activities, in-stream sand and gravel mining, and the spread of invasive saltcedar. The current limited distribution of the sharpnose shiner within the Upper Brazos River Basin makes it vulnerable to catastrophic events such as the introduction of competitive species or prolonged drought. State law does not provide protection for the sharpnose shiner. The magnitude of threat is considered high since reservoir development within the species' current range may render remaining habitat unsuitable. The threats are nonimminent because the most significant threat—major reservoir projects—is not likely to occur in the near future, and there is potential for implementing other water-supply options that could preclude reservoir development. For these reasons, we assigned an LPN of 5 to this species.

Smalleye shiner (*Notropis buccula*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The smalleye shiner is a small, pallid minnow endemic to the Brazos River Basin in Texas. The population of smalleye shiners within the Upper Brazos River drainage (upstream of Possum Kingdom Reservoir) is apparently stable. However, the shiner may be extirpated downstream from the reservoir, representing a reduction of approximately 54 percent of its historical range.

The most significant threat to the existence of the smalleye shiner is potential reservoir development within its current range. The current water plan for Texas provides several reservoir options that could be implemented within the Brazos River drainage. Additional threats include irrigation

and water diversion, sedimentation, desalination, industrial and municipal discharges, agricultural activities, in-stream sand and gravel mining, and the spread of invasive saltcedar. The current limited distribution of the smalleye shiner within the Upper Brazos River drainage makes it vulnerable to catastrophic events such as the introduction of competitive species or prolonged drought. State law does not provide protection for the smalleye shiner. The magnitude of threat is high since the major threat of reservoir development within the species' current range may render its remaining habitat unsuitable. The threats are nonimminent because major reservoir projects are not likely to occur in the near future and there is potential for implementing other water-supply options that could preclude reservoir development. For these reasons, we assigned a LPN of 5 to this species.

Zuni bluehead sucker (*Catostomus discobolus yarrowi*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The Zuni bluehead sucker is a colorful fish less than 8 inches long. The range of the Zuni bluehead sucker has been reduced by over 95 percent. The Zuni bluehead sucker currently occupies 3 river miles (4.8 kilometers) in three headwater streams of the Rio Nutria in New Mexico, and potentially occurs in 27.5 miles in (44 kilometers) the Kinlichee drainage of Arizona. However, the number of occupied miles in Arizona is unknown and the genetic composition of these fish is still under investigation.

Zuni bluehead sucker range reduction and fragmentation is caused by discontinuous surface-water flow, introduced species, and habitat degradation from fine sediment deposition. Zuni bluehead sucker persist in very small creeks that are subject to very low flows and drying during periods of drought. Because of climate change (warmer air temperatures), stream flow is predicted to decrease in the Southwest, even if precipitation were to increase moderately. Warmer winter and spring temperatures cause an increased fraction of precipitation to fall as rain, resulting in a reduced snow pack, an earlier snow melt, and a longer dry season leading to decreased stream flow in the summer and a longer fire season. These changes would have a negative effect on Zuni bluehead sucker. Another major impact to populations of Zuni bluehead sucker was the application of fish toxicants through at least two dozen treatments in the Nutria and Pescado rivers between 1960 and 1975. Large numbers of Zuni bluehead suckers were killed during these treatments. The Zuni bluehead sucker is most likely extirpated from Rio Pescado as none have been collected from that river since 1993.

The New Mexico Department of Game and Fish developed a recovery plan for Zuni bluehead sucker which was approved by the New Mexico State Game Commission on December 15, 2004. The recovery plan recommends preservation and enhancement of extant populations and restoration of historical Zuni bluehead sucker populations. We predict that the recovery actions prescribed by the recovery plan will reduce and remove threats to this subspecies, but they will require further discussions and authorizations before they can be implemented and threats are reduced. Because of the ongoing threats of high magnitude, including loss of habitat (historical and current from beaver activity), degradation of remaining habitat (nonnative species and land development), drought, fire, and climate change, we maintained an LPN of 3 for this subspecies.

Rio Grande cutthroat trout (*Oncorhynchus clarki virginalis*)—The following summary is based on information contained in our files and our status review published on May 14, 2008 (73 FR 27900). Rio Grande cutthroat trout is one of 14 subspecies of cutthroat trout found in the western United States. Populations of this subspecies are in New Mexico and Colorado in drainages of the Rio Grande, Pecos, and Canadian Rivers. Although once widely distributed in connected stream networks, Rio Grande cutthroat trout populations now occupy about 10 percent of historical habitat, and the populations are fragmented and isolated from one another. The majority of populations occur in high elevation streams.

Major threats include the loss of suitable habitat that has occurred and is likely to continue occurring due to water diversions, dams, stream drying, habitat quality degradation, and changes in hydrology, introduction of nonnative trout and ensuing competition, predation, and hybridization, and whirling disease. In addition, average air temperatures in the southwest have increased about 1 °C (2.5 °F) in the past 30 years, and they are projected to increase by another 1.2 to 2.8 °C (3 to 7 °F) by 2050. Because trout require cold water, and water temperatures depend in large part on air temperature, there is concern that the habitat of Rio Grande cutthroat trout will further decrease in response to warmer water temperatures caused by climate change. Wildfire and drought (stream drying) are additional threats to Rio Grande cutthroat trout populations that are likely to increase in magnitude in response to climate change. Research is occurring to assess the effects of climate change on this subspecies, and agencies are working to restore historically occupied streams. The threats are of moderate magnitude because there is good distribution and a comparatively large number of populations across the landscape, some populations have few threats present, and in other areas management actions are being taken to help control the threat of nonnative trout. Overall, the threats are ongoing and, therefore, imminent. Based on imminent threats of moderate magnitude, we assigned an LPN of 9 to this subspecies.

*Clams*

Texas hornshell (*Popenaias popei*)—The following summary is based on information contained in our files and information provided by the New Mexico Department of Game and Fish and Texas Parks and Wildlife Department. No new information was provided in the petition received on May 11, 2004. The Texas hornshell is a freshwater mussel found in the Black River in New Mexico, and the Rio Grande and the Devils River in Texas. Until March 2008, the only known extant populations were in New Mexico's Black River and one locality in the Rio Grande near Laredo, Texas. In March 2008, two new localities were confirmed in Texas—one in the Devils River and one in the mainstem Rio Grande in the Rio Grande Wild and Scenic River segment downstream of Big Bend National Park.

The primary threats to this species are habitat alterations such as stream bank channelization, impoundments, and diversions for agriculture and flood control; contamination of water by oil and gas activity; alterations in the natural riverine hydrology; and increased sedimentation and flood pulses from prolonged overgrazing and loss of native vegetation. Although riverine habitats throughout the species' known occupied range are under constant threat from these ongoing or potential activities, numerous conservation actions that will benefit the species are under way in New Mexico, including the completion of a State recovery plan for the species and the drafting of a Candidate Conservation Agreement with Assurances, and are beginning in Texas on the Big Bend reach of the Rio Grande. Due to these ongoing conservation efforts, the

magnitude of the threats is moderate. However, the threats to the species are ongoing, and remain imminent. Thus, we maintained the LPN of 8 for this species.

Fluted kidneyshell (*Ptychobranchus subtentum*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The fluted kidneyshell is a freshwater mussel (Unionidae) endemic to the Cumberland and Tennessee River systems (Cumberlandian Region) in Alabama, Kentucky, Tennessee, and Virginia. It requires shoal habitats in free-flowing rivers to survive and successfully recruit new individuals into its populations.

This species has been extirpated from numerous regional streams and is no longer found in the State of Alabama. Habitat destruction and alteration (*e.g.,* impoundments, sedimentation, and pollutants) are the chief factors that contributed to its decline. The fluted kidneyshell was historically known from at least 37 streams but is currently restricted to no more than 12 isolated populations. Current status information for most of the 12 populations deemed to be extant is available from recent periodic sampling efforts (sometimes annually) and other field studies, particularly in the upper Tennessee River system. Some populations in the Cumberland River system have had recent surveys as well (*e.g.,* Wolf, Little Rivers; Little South Fork; Horse Lick, Buck Creeks). Populations in Buck Creek, Little South Fork, Horse Lick Creek, Powell River, and North Fork Holston River have clearly declined over the past two decades. Based on recent information, the overall population of the fluted kidneyshell is declining rangewide. At this time, the species remains in large numbers and is viable in just the Clinch River/Copper Creek, although smaller, viable populations remain (*e.g.,* Wolf, Little, North Fork Holston Rivers; Rock Creek). Most other populations are of questionable or limited viability, with some on the verge of extirpation (*e.g.,* Powell River; Little South Fork; Horse Lick, Buck, Indian Creeks). We hope that newly reintroduced populations in the Little Tennessee, Nolichucky, and Duck Rivers will begin to reverse the downward population trend of this species. The threats are high in magnitude, since the majority of populations of this species are severely affected by numerous threats (impoundments, sedimentation, small population size, isolation of populations, gravel mining, municipal pollutants, agricultural runoff, nutrient enrichment, and coal processing pollution) which result in mortality or reduced reproductive output. Since the threats are ongoing, they are imminent. We assigned an LPN of 2 to this mussel species.

Neosho mucket (*Lampsilis rafinesqueana*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The Neosho mucket is a freshwater mussel native to Arkansas, Kansas, Missouri, and Oklahoma. The species has been extirpated from approximately 62 percent (835 river miles (1,334 river kilometers)) of its range. Most of this decline has occurred in Kansas and Oklahoma. The Neosho mucket survives in four river drainages; however, only one of these, the Spring River, currently supports a relatively large population.

Significant portions of the historic range have been inundated by the construction of at least 11 dams. Channel instability downstream of these dams has further reduced suitable habitat and mussel distribution. Range restriction and population declines have occurred due to habitat degradation attributed to urbanization, impoundments, mining, sedimentation, and agricultural pollutants. Rapid development and urbanization in the Illinois River watershed will likely continue to increase channel instability, sedimentation, and eutrophication. The recent rapid decline of the entire mussel community in the Arkansas portion of the Illinois River, including Neosho mucket, is alarming, and it is possible the species will be extirpated from approximately 30 river miles (48 river kilometers) in the very near future. The Illinois River once represented one of the two viable populations, but continued viability of this stream population is doubtful and extirpation is imminent. The remaining extant populations are vulnerable to random catastrophic events (*e.g.,* flood scour, drought, toxic spills), land use changes within the limited range, and genetic isolation and the deleterious effects of inbreeding. These threats have led to the species being intrinsically vulnerable to extirpation. Although state regulations limit harvest of this species, there is little protection for habitat. The threats are high in magnitude as they occur throughout the range of this species, and the majority of these threats are ongoing and imminent. Thus, we assigned a listing priority number of 2 to this species.

Alabama pearlshell (*Margaritifera marrianae*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

Slabside pearlymussel (*Lexingtonia dolabelloides*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The slabside pearlymussel is a freshwater mussel (Unionidae) endemic to the Cumberland and Tennessee River systems (Cumberlandian Region) in Alabama, Kentucky, Tennessee, and Virginia. It requires shoal habitats in free-flowing rivers to survive and successfully recruit new individuals into its populations.

Habitat destruction and alteration (*e.g.,* impoundments, sedimentation, and pollutants) are the chief factors contributing to the decline of this species, which has been extirpated from numerous regional streams and is no longer found in Kentucky. The slabside pearlymussel was historically known from at least 32 streams, but is currently restricted to no more than 10 isolated stream segments. Current status information for most of the 10 populations deemed to be extant is available from recent periodic sampling efforts (sometimes annually) and other field studies. Comprehensive surveys have taken place in the Middle and North Forks Holston River, Paint Rock River, and Duck River in the past several years. Based on recent information, the overall population of the slabside pearlymussel is declining rangewide. Of the five streams in which the species remains in good numbers (*e.g.,* Clinch, North and Middle Forks Holston, Paint Rock, Duck Rivers), the Middle and upper North Fork Holston Rivers have undergone drastic recent declines, while the Clinch population has been in a longer-term decline. Most of the remaining five populations (*e.g.,* Powell River, Big Moccasin Creek, Hiwassee River, Elk River, Bear Creek) have doubtful viability, and several if not all of them may be on the verge of extirpation.

The threats remain high in magnitude, since all populations of this species are severely affected in numerous ways (impoundments, sedimentation, small population size, isolation of populations, gravel mining, municipal pollutants, agricultural runoff, nutrient enrichment, and coal processing pollution) which result in mortality or reduced reproductive output leading to a relatively high likelihood of extinction. We assigned an LPN of 2 to this mussel species.

*Snails*

Phantom Cave snail (*Cochliopa texana*) and Phantom springsnail (*Tryonia cheatumi*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. Phantom Cave snail and Phantom springsnail are small aquatic snails that occur in three spring outflows in the Toyah Basin in Reeves and Jeff Davis Counties, Texas.

The primary threat to both species is the loss of surface flows due to declining groundwater levels from drought, pumping for agricultural production, and potentially climate change. Much of the land immediately surrounding their spring habitat is owned and managed by The Nature Conservancy, Bureau of Reclamation, and Texas Parks and Wildlife Department. However, the water needed to maintain their habitat has declined due to a reduction in spring flows, possibly as a result of private groundwater pumping in areas beyond that controlled by these landowners. As an example, Phantom Lake Spring, one of the sites of occurrence, has already ceased flowing and aquatic habitat is artificially supported only by a pumping system. The magnitude of the threats is high because spring flow loss would result in complete habitat destruction and permanent elimination of all populations of the species. The immediacy of the threats is imminent, as evidenced by the drastic decline in spring flow at Phantom Lake Spring that is currently happening and may extirpate these populations in the near future. Declining spring flows in San Solomon Spring are also becoming evident and will affect that spring site as well within the foreseeable future. Thus, we maintained the LPN of 2 for both species.

Sisi snail (*Ostodes strigatus*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The sisi snail is a ground-dwelling species in the Potaridae family, and is endemic to American Samoa. The species is now known from a single population on the island of Tutuila, American Samoa.

This species is currently threatened by habitat loss and modification and by predation from nonnative predatory snails. The decline of the sisi in American Samoa has resulted, in part, from loss of habitat to forestry and agriculture and loss of forest structure to hurricanes and alien weeds that establish after these storms. All live sisi snails have been found in the leaf litter beneath remaining intact forest canopy. No snails were found in areas bordering agricultural plots or in forest areas that were severely damaged by three hurricanes (1987, 1990, and 1991). Under natural historical conditions, loss of forest canopy to storms did not pose a great threat to the long-term survival of these snails; enough intact forest with healthy populations of snails would support dispersal back into newly regrown canopy forest. However, the presence of alien weeds such as mile-a-minute vine (*Mikania micrantha*) may reduce the likelihood that native forest will re-establish in areas damaged by the hurricanes. This loss of habitat to storms is greatly exacerbated by expanding agriculture. Agricultural plots on Tutuila have spread from low elevation up to middle and some high elevations, greatly reducing the forest area and thus reducing the resilience of native forests and its populations of native snails. These reductions also increase the likelihood that future storms will lead to the extinction of populations or species that rely on the remaining canopy forest. In an effort to eradicate the giant African snail (*Achatina fulica*), the alien rosy carnivore snail (*Euglandia rosea*) was introduced in 1980. The rosy carnivore snail has spread throughout the main island of Tutuila. Numerous studies show that the rosy carnivore snail feeds on endemic island snails including the sisi, and is a major agent in their declines and extirpations. At present, the major threat to long-term survival of the native snail fauna in American Samoa is predation by nonnative predatory snails. These threats are ongoing and are therefore imminent. Since the threats occur throughout the entire range of the species, have a severe effect on the survival of the snails, leading to a relatively high likelihood of extinction, they are of a high magnitude. Therefore we assigned this species an LPN of 2.

Diamond Y Spring snail (*Pseudotryonia adamantina*) and Gonzales springsnail (*Tryonia circumstriata*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. Diamond Y Spring snail and Gonzales springsnail are small aquatic snails endemic to Diamond Y Spring in Pecos County, Texas. The land surrounding the spring and its outflow channels are owned and managed by The Nature Conservancy.

These snails are primarily threatened with habitat loss due to springflow declines from drought, pumping of groundwater, and potentially of climate change. Additional threats include water contamination from accidental releases of petroleum products, as their habitat is in an active oil and gas field. Also, a nonnative aquatic snail (*Melanoides* sp.) was introduced into the native snails' habitat and may compete with endemic snails for space and resources. The magnitude of threats is high because limited distribution of these narrow endemics makes any impact from increasing threats (*e.g.,* loss of springflow, contaminants, and nonnative species) likely to result in the extinction of the species. These species occur in one location in an arid region currently plagued by drought and ongoing aquifer withdrawals, making the eventual loss of spring flow an imminent threat of total habitat loss. Thus, we maintained the LPN of 2 for both species.

Fragile tree snail (*Samoana fragilis*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. A tree-dwelling species, the fragile tree snail is a member of the Partulidae family of snails, and is endemic to the islands of Guam and Rota (Mariana Islands). Requiring cool and shaded native forest habitat, the species is now known from one population on Guam and from one population on Rota.

This species is currently threatened by habitat loss and modification and by predation from nonnative predatory snails and flatworms. Large numbers of Philippine deer (*Cervus mariannus*) (Guam and Rota), pigs (*Sus scrofra*) (Guam), water buffalo (*Bubalus bubalis*) (Guam), and cattle (*Bos taurus*) (Rota) directly alter the understory plant community and overall forest microclimate, making it unsuitable for snails. Predation by the alien rosy carnivore snail (*Euglandina rosea*) and the Manokwar flatworm (*Platydemus manokwari*) is a serious threat to the survival of the fragile tree snail. Field observations have established that the rosy carnivore snail and the Manokwar flatworm will readily feed on native Pacific island tree snails, including the Partulidae, such as those of the Mariana Islands. The rosy carnivore snail has caused the extirpation of many populations and species of native snails throughout the Pacific islands. The Manokwar flatworm has also contributed to the decline of native tree snails, in part due to its ability to ascend into trees and bushes that support native snails. Areas with populations of the flatworm usually lack partulid tree snails or have declining numbers of

snails. Because all of the threats occur rangewide, have a significant effect on the survival of this snail species, leading to a relatively high likelihood of extinction, they are high in magnitude. The threats are also ongoing and thus are imminent. Therefore, we assigned this species an LPN of 2.

Guam tree snail (*Partula radiolata*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. A tree-dwelling species, the Guam tree snail is a member of the Partulidae family of snails and is endemic to the island of Guam. Requiring cool and shaded native forest habitat, the species is now known from 22 populations on Guam.

This species is primarily threatened by predation from nonnative predatory snails and flatworms. In addition, the species is also threatened by habitat loss and degradation. Predation by the alien rosy carnivore snail (*Euglandina rosea*) and the alien Manokwar flatworm (*Platydemus manokwari*) is a serious threat to the survival of the Guam tree snail (see summary for the fragile tree snail, above). On Guam, open agricultural fields and other areas prone to erosion were seeded with tangantangan (*Leucaena leucocephala*) by the U.S. Military. Tangantangan grows as a single species stand with no substantial understory. The microclimatic condition is dry with little accumulation of leaf litter humus and is particularly unsuitable as Guam tree snail habitat. In addition, native forest cannot reestablish and grow where this alien weed has become established. Because all of the threats occur rangewide, have a significant effect on the survival of this snail species, leading to a relatively high likelihood of extinction, they are high in magnitude. The threats are also ongoing and thus are imminent. Therefore, we assigned this species an LPN of 2.

Humped tree snail (*Partula gibba*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. A tree-dwelling species, the humped tree snail is a member of the Partulidae family of snails, and was originally known from the island of Guam and the Commonwealth of the Northern Mariana Islands (islands of Rota, Aguiguan, Tinian, Saipan, Anatahan, Sarigan, Alamagan, and Pagan). Most recent surveys revealed a total of 13 populations on the islands of Guam, Rota, Aguiguan, Sarigan, Saipan, Alamagan, and Pagan. Although still the most widely distributed tree snail endemic in the Mariana Islands, remaining population sizes are often small.

This species is currently threatened by habitat loss and modification and by predation from nonnative predatory snails and flat worms. Throughout the Mariana Islands, feral ungulates (pigs (*Sus scrofa*), Philippine deer (*Cervus mariannus*), cattle (*Bos taurus*), water buffalo (*Bubalus bubalis*), and goats (*Capra hircus*)) have caused severe damage to native forest vegetation by browsing directly on plants, causing erosion, and retarding forest growth and regeneration. This in turn reduces the quantity and quality of forested habitat for the humped tree snail. Currently, populations of feral ungulates are found on the islands of Guam (deer, pigs, and water buffalo), Rota (deer and cattle), Aguiguan (goats), Saipan (deer, pigs, and cattle), Alamagan (goats, pigs, and cattle), and Pagan (cattle, goats, and pigs). Goats were eradicated from Sarigan in 1998 and the humped tree snail has increased in abundance on that island, likely in response to the removal of all the goats. However, the population of humped tree snails on Anatahan is likely extirpated due to the massive volcanic explosions of the island beginning in 2003 and still continuing, and the resulting loss of up to 95 percent of the vegetation on the island. Predation by the alien rosy carnivore snail (*Euglandina rosea*) and the alien Manokwar flatworm (*Platydemus manokwari*) is a serious threat to the survival of the humped tree snail (see summary for the fragile tree snail, above). The magnitude of threats is high because these alien predators cause significant population declines to the humped tree snail rangewide. These threats are ongoing and thus are imminent. Therefore, we assigned this species an LPN of 2.

Lanai tree snail (*Partulina semicarinata*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted petition 12-month finding.

Lanai tree snail (*Partulina variabilis*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted petition 12-month finding.

Langford's tree snail (*Partula langfordi*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. A tree-dwelling species, Langford's tree snail is a member of the Partulidae family of snails, and is known from one population on the island of Aguiguan.

This species is currently threatened by habitat loss and modification and by predation from nonnative predatory snails. In the 1930s, the island of Aguiguan was mostly cleared of native forest to support sugar cane and pineapple production. The abandoned fields and airstrip are now overgrown with alien weeds. The remaining native forest understory has greatly suffered from large and uncontrolled populations of alien goats and the invasion of weeds. Goats (*Capra hircus*) have caused severe damage to native forest vegetation by browsing directly on plants, causing erosion, and retarding forest growth and regeneration. This in turn reduces the quantity and quality of forested habitat for Langford's tree snail. Predation by the alien rosy carnivore snail (*Euglandina rosea*) and by the Manokwar flatworm (*Platydemus manokwari*) (see summary for the fragile tree snail, above) is also a serious threat to the survival of Langford's tree snail. All of the threats are occurring rangewide and no efforts to control or eradicate the nonnative predatory snail species or to reduce habitat loss are being undertaken. The magnitude of threats is high because they result in direct mortality or significant population declines to Langford's tree snail rangewide. A survey of Aguiguan in November 2006 failed to find any live Langford's tree snails. These threats are also ongoing and thus are imminent. Therefore, we assigned this species an LPN of 2.

Newcomb's tree snail (*Newcombia cumingi*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted petition 12-month finding.

Tutuila tree snail (*Eua zebrina*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. A tree-dwelling species, the Tutuila tree snail is a member of the Partulidae family of snails, and is endemic to American Samoa. The species is known from 32 populations on the islands of Tutuila, Nuusetoga, and Ofu.

This species is currently threatened by habitat loss and modification and by predation from nonnative predatory

snails and rats. All live Tutuila tree snails were found on understory vegetation beneath remaining intact forest canopy. No snails were found in areas bordering agricultural plots or in forest areas that were severely damaged by three hurricanes (1987, 1990, and 1991). (See summary for the sisi snail, above, regarding impacts of alien weeds and of the rosy carnivore snail.) Rats (*Rattus* spp) have also been shown to devastate snail populations, and rat-chewed snail shells have been found at sites where the Tutuila snail occurs. At present, the major threat to the long-term survival of the native snail fauna in American Samoa is predation by nonnative predatory snails and rats. The magnitude of threats is high because they result in direct mortality or significant population declines to the Tutuila tree snail rangewide. The threats are also ongoing and thus are imminent. Therefore, we assigned this species an LPN of 2.

Chupadera springsnail (*Pyrgulopsis chupaderae*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted petition 12-month finding.

Elongate mud meadows springsnail (*Pyrgulopsis notidicola*)—The following summary is based on information contained in our files. No new information was provided in the petition received on May 11, 2004. *Pyrgulopsis notidicola* is endemic to Soldier Meadow, which is located at the northern extreme of the western arm of the Black Rock Desert in the transition zone between the Basin and Range Physiographic Province and the Columbia Plateau Province, Humboldt County, Nevada. The type locality, and the only known location of the species, occurs in four separate stretches of thermal (between 45° and 32° Celsius, 113° and 90° Fahrenheit) aquatic habitat. The first stretch is the largest at approximately 600 m (1,968 ft) long and 2 m (6.7 ft) wide. The other stretches where *P. notidicola* occurs are less than 6 m (19.7 ft) long and 0.5 m (1.6 ft) wide. *Pyrgulopsis notidicola* occurs only in shallow, flowing water on gravel substrate. The species does not occur in deep water (*i.e.,* impoundments) where water velocity is low, gravel substrate is absent, and sediment levels are high.

The species and its habitat are threatened by recreational use in the areas where it occurs as well as the ongoing impacts of past water diversions and livestock grazing and current off-highway vehicle travel. Conservation measures implemented by the Bureau of Land Management include the installation of fencing to exclude livestock, wild horses, burros and other large mammals; closing of access roads to spring, riparian, and wetland areas and the limiting of vehicles to designated routes; the establishment of a designated campground away from the habitats of sensitive species; the installation of educational signage; and, increased staff presence, including law enforcement and a volunteer site steward during the 6-month period of peak visitor use. These conservation measures have reduced the magnitude of threat to the species to moderate to low; all remaining threats are nonimminent and involve long-term changes to the habitat for the species resulting from past impacts. Until a monitoring program is in place that allows us to assess the long-term trend of the species, we have assigned an LPN of 11.

Gila springsnail (*Pyrgulopsis gilae*)—The following summary is based on information contained in our files and the petition we received on November 20, 1985. Also see our 12-month petition finding published in the **Federal Register** on October 4, 1988 (53 FR 38969). The Gila springsnail is an aquatic species known from 13 populations in New Mexico. Surveys conducted in 2008 and 2009 located 14 additional populations bringing the total known to 27. Given the new population information, as well as new information on threats, we are currently assessing the status of this species.

The long-term persistence of the Gila springsnail is contingent upon protection of the riparian corridor and maintenance of flow to ensure continuous, oxygenated flowing water within the species' required thermal range. Occupied Gila springsnail localities on Federal lands surveyed in 2008 and 2009 are subject to light levels of recreational use only at the thermal springs, and overall, recreational activities do not appear to be affecting springsnail populations. The level of recreational impacts at thermal springs on private lands is unknown. Sites visited in 2008 were excluded from grazing. Although elk use at some of the springs was evident, the level of impact was low. Of greatest concern are the very small size of the isolated occupied habitats and the potential effects of climate change. Although the effect climate change will have on the springs of the Southwest is unpredictable, mean annual temperature in New Mexico has increased by 0.6 degrees per decade since 1970. Higher temperatures lead to higher evaporation rates, increased evapotranspiration, and decreased soil moisture which may reduce the amount of groundwater recharge. Widespread, long-term drought could affect spring flow quantity and quality, negatively affecting the springsnail populations. Based on these nonimminent threats that are currently of a low magnitude, we retained a listing priority number of 11 for this species.

Gonzales springsnail (*Tryonia circumstriata*)—See summary above under Diamond Y Spring snail (*Pseudotryonia adamantina*).

Huachuca springsnail (*Pyrgulopsis thompsoni*)—The following is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The Huachuca springsnail inhabits approximately 16 springs and cienegas at elevations of 4,500 to 7,200 feet in southeastern Arizona (14 sites) and adjacent portions of Sonora, Mexico (2 sites). The springsnail is typically found in the shallower areas of springs or cienegas, often in rocky seeps at the spring source. Ongoing threats include habitat modification and destruction through catastrophic wildfire; drought; streamflow alteration; and, potentially, grazing, recreation, military activities, and timber harvest. Overall, the threats are moderate in magnitude because threats are not occurring throughout the range of the species uniformly and not all populations would likely be affected simultaneously by any of the known threats. In addition, multiple landowners (U.S. Forest Service, Fort Huachuca, and The Nature Conservancy) are including consideration for the springsnail or other co-occurring listed species in their activities (reducing fuel loads, avoiding occupied sites during military operations). The threats are ongoing and, thus, imminent. Therefore, we have assigned an LPN of 8 to this species.

New Mexico springsnail (*Pyrgulopsis thermalis*)—The following summary is based on information contained in our files and the petition received on November 20, 1985. Also see our 12-month petition finding published on October 4, 1988 (53 FR 38969). In addition, we have received new information on populations and threats to the species, which we are currently assessing. The New Mexico springsnail is an aquatic species known from twelve separate populations associated with a series of spring-brook systems along the Gila River in the Gila National Forest in Grant County, New Mexico.

The long-term persistence of the New Mexico springsnail is contingent upon protection of the riparian corridor immediately adjacent to springhead and

springrun habitats. Although the New Mexico springsnail populations may be stable, the sites inhabited by the species are subject to levels of recreational use and livestock grazing that can negatively affect this species. If these uses remain at the current or lower levels, they will not pose an imminent threat to the species. Of greater concern is drought, which could affect spring discharge and increases the potential for fire. Although the effect global climate change may have on streams and forests of the Southwest is unpredictable, mean annual temperature in New Mexico has increased by 0.6 degrees per decade since 1970. Higher temperatures lead to higher evaporation rates which may reduce the amount of runoff and groundwater recharge. Increased temperatures may also increase the extent of area influenced by drought and fire. Large fires have occurred in the Gila National Forest and subsequent floods and ash flows have severely affected aquatic life in streams. If the drought continues or worsens, the imminence of threats from decreased discharge and fire will increase. Based on these nonimminent threats of a low magnitude, we retain an LPN of 11 for this springsnail.

Page springsnail (*Pyrgulopsis morrisoni*)—See above in "*Listing Priority Changes in Candidates*." The above summary is based on information contained in our files.

Phantom springsnail (*Tyronia cheatumi*)—See summary above under Phantom Cave snail (*Cochliopa texana*).

Three Forks springsnail (*Pyrgulopsis trivialis*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted petition 12-month finding.

*Insects*

Wekiu bug (*Nysius wekiuicola*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The wekiu bug belongs to the true bug family, Lygaeidae, and is endemic to the island of Hawaii. This species only occurs on the summit of Mauna Kea and feeds upon other insect species which are blown to the summit of this large volcano. The wekiu bug is primarily threatened by the loss of its habitat from astronomy development. In 2004 and early 2005, surveys found multiple new locations of the wekiu bug on cinder cones on the Mauna Kea summit. Several of these cinder cones within the Mauna Kea Science Reserve, as well as two cinder cones located in the State Ice Age Natural Area Reserve, are not currently undergoing development nor are they the site of any planned development. Thus, the threats, although ongoing, do not occur across the entire range of the wekiu bug. Because there are occupied locations that are not subject to the primary threat of astronomy development, the overall magnitude of the threat is moderate. The immediacy of the threats is imminent because there are still significant parts of the wekiu bug's range where development is occurring. Therefore, we assigned this species an LPN of 8.

Mariana eight spot butterfly (*Hypolimnas octucula mariannensis*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The Mariana eight spot butterfly is a nymphalid butterfly species that feeds upon two host plants, *Procris pedunculata* and *Elatostema calcareum.* Endemic to the islands of Guam and Saipan, the species is now known from ten populations on Guam. This species is currently threatened by predation and parasitism. The Mariana eight spot butterfly has extremely high mortality of eggs and larvae due to predation by alien ants and wasps. Because the threat of parasitism and predation by nonnative insects occurs rangewide and can cause significant population declines to this species, they are high in magnitude. The threats are imminent because they are ongoing. Therefore, we assigned an LPN of 3 for this subspecies.

Mariana wandering butterfly (*Vagrans egestina*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The Mariana wandering butterfly is a nymphalid butterfly species which feeds upon a single host plant species, *Maytenus thompsonii.* Originally known from and endemic to the islands of Guam and Rota, the species is now known from one population on Rota. This species is currently threatened by alien predation and parasitism. The Mariana wandering butterfly is likely predated by alien ants and parasitized by native and nonnative parasitoids. Because the threats of parasitism and predation by nonnative insects occur rangewide and can cause significant population declines to this species, leading to a relatively high likelihood of extinction, they are high in magnitude. These threats are imminent because they are ongoing. Therefore, we assigned an LPN of 2 for this species.

Miami blue butterfly (*Cyclargus thomasi bethunebakeri*)—The following summary is based on information contained in our files and in the petition we received on June 15, 2000. Historically, the Miami blue was most common on the south Florida mainland and the Florida Keys, with a range extending north to Hillsborough and Volusia Counties. It is presently located at two sites in the Keys. In 1999, a metapopulation was discovered at Bahia Honda State Park (BHSP) on Bahia Honda Key, and in 2006 a second metapopulation was discovered on the outer islands of Key West National Wildlife Refuge (KWNWR). The BHSP metapopulation appears restricted to a couple hundred individuals at most; the KWNWR metapopulation was believed to be several hundred in 2006–2007, but appears to be lower in abundance now. Capacity to expand at either site or successfully emigrate from either site appears to be very low due to the sedentary nature of the butterfly and isolation of habitats. Reintroduction efforts have not been successful. The Miami blue is predominantly a coastal species, occurring in disturbed and early successional habitats such as the edges of tropical hardwood hammock, coastal berm forest, coastal prairie, and along trails and other open sunny areas, and historically in pine rockland. These habitats provide hostplants for larvae and nectar sources for adults in close proximity, as the species requires.

Major threats to the butterfly include few occurrences, limited population size and range, hurricanes, mosquito control activities, and herbivory of hostplants by iguanas. Damage to host plants from iguanas at BHSP is an ongoing and significant threat; although active steps are being taken by the State and partners to reduce this threat, this metapopulation is now at risk. Climatic changes and sea level rise are long-term threats that will reduce the extent of habitat. Accidental harm or habitat destruction and illegal collection may also pose threats to the survival due to small population sizes. Loss of genetic diversity within the small and isolated populations may be occurring. The survival of the Miami blue depends on protecting the species' currently occupied habitat from further degradation and fragmentation; restoring potentially suitable habitat within its historical range; avoiding or removing threats from fire suppression, iguanas, mosquito control, accidental harm from humans; increasing the current population in size; and establishing populations at other locations. Exotic predatory ants and

parasitoids may also be potential threats, given the species' small population size and few occurrences. Most threats are high in magnitude, because they constitute a significant risk to the subspecies, leading to a relatively high likelihood of extinction; most threats are imminent. As a result, we retained an LPN of 3 for this subspecies.

Sequatchie caddisfly (*Glyphopsyche sequatchie*)—The following summary is based on information in our files. No new information was provided in the petition we received on May 11, 2004. The Sequatchie caddisfly is known from two spring runs that emerge from caves in Marion County, Tennessee—Owen Spring Branch (the type locality) and Martin Spring run in the Battle Creek system. In 1998, biologists estimated population sizes at 500 to 5,000 individuals for Owen Spring Branch and 2 to 10 times higher at Martin Spring, due to the greater amount of apparently suitable habitat. In spite of greater amounts of suitable habitat at the Martin Spring run, Sequatchie caddisflies are more difficult to find at this site, and in 2001 (the most recent survey) the Sequatchie caddisfly was "abundant" at the Owen Spring Branch location, while only two individuals were observed at the Martin Spring. Threats to the Sequatchie caddisfly include siltation, point and nonpoint discharges from municipal and industrial activities, and introduction of toxicants during episodic events. These threats, coupled with the extremely limited distribution of the species, its apparent small population size, the limited amount of occupied habitat, ease of accessibility, and the annual life cycle of the species, are all factors that leave the Sequatchie caddisfly vulnerable to extirpation. Therefore, the magnitude of the threat is high. These threats are gradual and not necessarily imminent. Based on high-magnitude, nonimminent threats, we assigned this species a listing priority number of 5.

Clifton Cave beetle (*Pseudanophthalmus caecus*)—The following summary is based upon information contained in our files. No new information was provided in the petition we received on May 11, 2004. Clifton Cave beetle is a small, eyeless, reddish-brown predatory insect that feeds upon small cave invertebrates. It is cave dependent, and is not found outside the cave environment. Clifton Cave beetle is only known from two privately owned Kentucky caves. Soon after the species was first collected in 1963 in one cave, the cave entrance was enclosed due to road construction. We do not know whether the species still occurs at the original location or if it has been extirpated from the site by the closure of the cave entrance. Other caves in the vicinity of this cave were surveyed for the species during 1995 to 1996 and only one additional site was found to support the Clifton Cave beetle. The limestone caves in which the Clifton Cave beetle is found provide a unique and fragile environment that supports a variety of species that have evolved to survive and reproduce under the demanding conditions found in cave ecosystems. The limited distribution of the species makes it vulnerable to isolated events that would only have a minimal effect on the more wide-ranging insects. Events such as toxic chemical spills, discharges of large amounts of polluted water or indirect impacts from off-site construction activities, closure of entrances, alteration of entrances, or the creation of new entrances could have serious adverse impacts on this species. Therefore, the magnitude of threat is high for this species. The threats are nonimminent because there are no known projects planned that would affect the species in the near future. We therefore have assigned a listing priority number of 5 to this species.

Icebox Cave beetle (*Pseudanophthalmus frigidus*)—The following summary is based upon information contained in our files. No new information was provided in the petition we received on May 11, 2004. Icebox Cave beetle is a small, eyeless, reddish-brown predatory insect that feeds upon small cave invertebrates. It is not found outside the cave environment, and is only known from one privately owned Kentucky cave. The limestone cave in which this species is found provides a unique and fragile environment that supports a variety of species that have evolved to survive and reproduce under the demanding conditions found in cave ecosystems. The species has not been observed since it was originally collected, but species experts believe that it may still exist in the cave in low numbers. The limited distribution of the species makes it vulnerable to isolated events that would only have a minimal effect on the more wide-ranging insects. Events such as toxic chemical spills or discharges of large amounts of polluted water, or indirect impacts from off-site construction activities, closure of entrances, alteration of entrances, or the creation of new entrances, could have serious adverse impacts on this species. Therefore, the magnitude of threat is high for this species because it is limited in distribution and the threats would result in a high level of mortality or reduced reproductive capacity. The threats are nonimminent because there are no known projects planned that would affect the species in the near future. We therefore have assigned an LPN of 5 to this species.

Inquirer Cave beetle (*Pseudanophthalmus inquisitor*)—The following summary is based upon information contained in our files. No new information was provided in the petition we received on May 11, 2004. The Inquirer Cave beetle is a fairly small, eyeless, reddish-brown predatory insect that feeds upon small cave invertebrates. It is not found outside the cave environment, and is only known from one privately owned Tennessee cave. The limestone cave in which this species is found provides a unique and fragile environment that supports a variety of species that have evolved to survive and reproduce under the demanding conditions found in cave ecosystems. The species was last observed in 2006. The limited distribution of the species makes it vulnerable to isolated events that would only have a minimal effect on the more wide-ranging insects. The area around the only known site for the species is in a rapidly expanding urban area. The entrance to the cave is protected by the landowner through a cooperative management agreement with the Service, The Nature Conservancy and Tennessee Wildlife Resources Agency; however, a sinkhole that drains into the cave system is located away from the protected entrance and is near a highway. Events such as toxic chemical spills, discharges of large amounts of polluted water, or indirect impacts from off-site construction activities, could severely affect the species and the cave habitat. The magnitude of threat is high for this species because it is limited in distribution and the threats would have severe impacts on its continued existence. The threats are nonimminent because there are no known projects planned that would affect the species in the near future and it receives some protection under a cooperative management agreement. We therefore have assigned a listing priority number of 5 to this species.

Louisville Cave beetle (*Pseudanophthalmus troglodytes*)—The following summary is based upon information contained in our files. No new information was provided in the petition we received on May 11, 2004. The Louisville Cave beetle is a small, eyeless, reddish-brown predatory insect that feeds upon cave invertebrates. It is not found outside the cave environment, and is only known from two privately owned Kentucky caves. The limestone

caves in which this species is found provide a unique and fragile environment that supports a variety of species that have evolved to survive and reproduce under the demanding conditions found in cave ecosystems. The limited distribution of the species makes it vulnerable to isolated events that would only have a minimal effect on the more wide-ranging insects. Events such as toxic chemical spills, discharges of large amounts of polluted water or indirect impacts from off-site construction activities, closure of entrances, alteration of entrances, or the creation of new entrances could have serious adverse impacts on this species. The magnitude of threat is high for this species, because it is limited in distribution and the threats would have severe negative impacts on the species. The threats are nonimminent because there are no known projects planned that would affect the species in the near future. We therefore have assigned an LPN of 5 to this species.

Tatum Cave beetle (*Pseudanophthalmus parvus*)—The following summary is based upon information contained in our files. No new information was provided in the petition we received on May 11, 2004. Tatum Cave beetle is a small, eyeless, reddish-brown predatory insect that feeds upon cave invertebrates. It is not found outside the cave environment, and is only known from one privately owned Kentucky cave. The limestone cave in which this species is found provides a unique and fragile environment that supports a variety of species that have evolved to survive and reproduce under the demanding conditions found in cave ecosystems. The species has not been observed since 1965, but species experts believe that it still exists in low numbers. The limited distribution of the species makes it vulnerable to isolated events that would only have a minimal effect on the more wide-ranging insects. Events such as toxic chemical spills or discharges of large amounts of polluted water, or indirect impacts from off-site construction activities, closure of entrances, alteration of entrances, or the creation of new entrances could have serious adverse impacts on this species. The magnitude of threat is high for this species, because its limited numbers mean that any threats could severely affect its continued existence. The threats are nonimminent because there are no known projects planned that would affect the species in the near future. We therefore have assigned an LPN of 5 to this species.

Taylor's (Whulge, Edith's) checkerspot butterfly (*Euphydryas editha taylori*)—The following summary is based on information contained in our files and in the petition received on December 11, 2002. Historically, the Taylor's checkerspot butterfly was known from 70 locations: 23 in British Columbia, 34 in Washington, and 13 in Oregon. Based on the results of surveys during the 2009 flight period, butterflies were detected at just 9 populations. No reports were received for the Canada sites. The total number of Taylor's checkerspot butterflies was considerably reduced in current surveys with approximately 2,500 individuals observed rangewide. The latest decline observed was from the Joint Base Lewis McChord population where fewer than 200 butterflies were counted in 2008; only 77 adult butterflies were detected during 2009 surveys. Currently, just seven populations had adult butterflies flying in Washington, two in the Willamette Valley of Oregon, and one on Denman Island, British Columbia, Canada. A new population (meta-population) was observed on the Olympic National Forest. During 2009, six additional locations have been found on suitable habitat on Olympic National Forest land; at one location 69 butterflies were detected and the remainder had up to 40 butterflies with several of the sites having fewer than 5 adult butterflies.

Threats include degradation and destruction of native grasslands due to agriculture; residential and commercial development; encroachment by nonnative plants; succession from grasslands to native shrubs and trees; and fire. The threat of military training has greatly increased during this last assessment period and the site where Taylor's checkerspot were known to thrive on Fort Lewis was severely affected by Armored Vehicle training. The result of that training on the population at the site will not be determined until after this year's monitoring has been completed.

The grassland ecosystem on which this subspecies depends requires annual management to maintain suitable grassland habitat for the species. *Bacillus thuringiensis* var. *kurstake* (Btk) was routinely applied for Asian gypsy moth control in Pierce County, Washington for many years. This pesticide is documented to have deleterious effects on non-target lepidopteron species, including all moths and butterflies. Because of the timing and close proximity of the Btk application to native prairies where Taylors' checkerspot adults, or their larvae, were historically known to occur, it is likely that the spraying contributed to the extirpation of the subspecies at three locations in Pierce County, Washington.

Threats also include the loss of prairies to development or the conversion of native grasslands to agriculture; the threat of vehicle and foot traffic that crushes larvae and larval host plants on roads where host plants have become established, thus acting as a mortality sink (this has occurred at several of the north Olympic Peninsula sites). Other important threats include changes to the structure and composition of prairie habitat brought on by the invasion of shrubs and trees (Scot's broom and Douglas-fir) or nonnative pasture grasses that quickly invade onto prairies when processes like fire, or its surrogate mowing, are not implemented.

These changes to prairie habitat threaten Taylor's checkerspot by degrading prairie habitat and making it unsuitable for the butterfly. The threats that lead to habitat degradation and loss are ubiquitous, occurring rangewide, and severely affect the survival of the subspecies, leading to a relatively high likelihood of extinction. Therefore, the threats are high in magnitude. The threats are imminent because they are ongoing and occur simultaneously at all of the known locations for the subspecies. Based on the high magnitude and the imminent nature of threats, we retain an LPN of 3 for the Taylor's checkerspot butterfly.

Blackline Hawaiian damselfly (*Megalagrion nigrohamatum nigrolineatum*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

Crimson Hawaiian damselfly (*Megalagrion leptodemas*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

Oceanic Hawaiian damselfly (*Megalagrion oceanicum*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

Orangeblack Hawaiian damselfly (*Megalagrion xanthomelas*)—The following summary is based on information contained in our files. No

new information was provided in the petition we received on May 11, 2004. The Orangeblack Hawaiian damselfly is a stream-dwelling species endemic to the Hawaiian Islands of Kauai, Oahu, Molokai, Maui, Lanai, and Hawaii. The species no longer is found on Kauai, and is now restricted to 16 populations on the islands of Oahu, Maui, Molokai, Lanai, and Hawaii. This species is threatened by predation from alien aquatic species such as fish and predacious insects, and habitat loss through dewatering of streams and invasion by nonnative plants. Nonnative fish and insects prey on the naiads of the damselfly, and loss of water reduces the amount of suitable naiad habitat available. Invasive plants (*e.g.,* California grass (*Brachiaria mutica*)) also contribute to loss of habitat by forming dense, monotypic stands that completely eliminate any open water. Nonnative fish and plants are found in all the streams the Orangeblack damselfly occur in, except the Oahu location, where there are no nonnative fish. We assigned this species an LPN of 8 because, although the threats are ongoing and therefore imminent, they affect the survival of the species in varying degrees throughout the range of the species and are of moderate magnitude.

Picture-wing fly (*Drosophila digressa*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004, but new information was provided by one *Drosophila* expert in 2006. This picture-wing fly, a member of the family Drosophilidae, feeds only upon species of *Charpentiera,* and is endemic to the Hawaiian Island of Hawaii. Never abundant in number of individuals observed, *D. digressa* was originally known from 5 population sites and may now be limited to as few as 1 or 2 sites. Due to the small population size of the species and its small known habitat area, *Drosophila* researchers believe this species and its habitat are particularly vulnerable to a myriad of threats. Feral ungulates (pigs, goats, and cattle) degrade and destroy *D. digressa* host plants and habitat by directly trampling plants, facilitating erosion, and spreading nonnative plant seeds. Nonnative plants degrade host plant habitat and compete for light, space, and nutrients. Direct predation of *D. digressa* by nonnative social insects, particularly yellow jacket wasps, is also a serious threat. Additionally, this species faces competition at the larval stage from nonnative tipulid flies, which feed within the same portion of the decomposing host plant area normally occupied by the *D. digressa* larvae during their development with a resulting reduction in available host plant material. Because the threats to the native forest habitat of *D. digressa,* and to individuals of this species, occur throughout its range and are expected to continue or increase unless efforts at control or eradication are undertaken, they are high in magnitude. In addition, because of the limited distribution and small population of the species, any of the threats would significantly impair survival of the species. The threats are also imminent, because they are ongoing. No known conservation measures have been taken to date to specifically address these threats, and we have therefore assigned this species an LPN of 2.

Stephan's riffle beetle (*Heterelmis stephani*)—The following summary is based on information contained in our files. No new information was provided in the petition received on May 11, 2004. The Stephan's riffle beetle is an endemic riffle beetle found in limited spring environments within the Santa Rita Mountains, Pima County, Arizona. The beetle is known from Sylvester Spring in Madera Canyon, within the Coronado National Forest. Threats to that spring are largely from habitat modification, from recreational activities in the springs, and potential changes in water quality and quantity due to catastrophic natural events and climate change. The threats are of low to moderate magnitude based on our current knowledge of the permanence of threats and the likelihood that the species will persist in areas that are unaffected by the threats. Although the threats from climate change are expected to occur over many years, the threats from recreational use are ongoing. Therefore, the threats are imminent. Thus, we retained an LPN of 8 for the Stephan's riffle beetle.

Dakota skipper (*Hesperia dacotae*)—The following summary is based on information contained in our files, including information from the petition received on May 12, 2003. The Dakota skipper is a small- to mid-sized butterfly that inhabits high-quality tallgrass and mixed-grass prairie in Minnesota, North Dakota, South Dakota, and the provinces of Manitoba and Saskatchewan in Canada. The species is presumed to be extirpated from Iowa and Illinois and from many sites within occupied States.

The Dakota skipper is threatened by degradation of its native prairie habitat by overgrazing, invasive species, gravel mining, and herbicide applications; inbreeding, population isolation, and prescribed fire threaten some populations. Prairie succeeds to shrubland or forest without periodic fire, grazing, or mowing; thus, the species is also threatened at sites where such disturbances are not applied. The Service and other Federal agencies, State agencies, the Sisseton-Wahpeton Sioux Tribe, and some private organizations (*e.g.,* The Nature Conservancy) protect and manage some Dakota skipper sites. Proper management is always necessary to ensure its persistence, even at protected sites. The species may be secure at a few sites where public and private landowners manage native prairie in ways that conserve Dakota skipper, but approximately half of the inhabited sites are privately owned with little or no protection. A few private sites are protected from conversion by easements, but these do not prevent adverse effects from overgrazing. Overall, the threats are moderate in magnitude because they are not occurring rangewide and have a moderate effect on the viability of the species. They are, however, ongoing and therefore imminent, particularly on private lands. Thus, we assigned an LPN of 8 to this species.

Mardon skipper (*Polites mardon*)—The following summary is based on information contained in our files and the petition we received on December 24, 2002. The Mardon skipper is a northwestern butterfly with a disjunct range. Currently this species is known from four widely separated regions: South Puget Sound region, southern Washington Cascades, Siskiyou Mountains of southern Oregon, and coastal northwestern California/southern Oregon. The number of documented locations for the species has increased from fewer than 10 in 1997 to more than 130 rangewide in 2010. New site locations have been documented in each year that targeted surveys have been conducted since 1999. In the past 9 years, significant local populations have been located in the Washington Cascades and in Southern Oregon, with a few local sites supporting populations of hundreds of Mardon skippers.

The Mardon skipper spends its entire life cycle in one location, often on the same grassland patch. The dispersal ability of Mardon skipper is restricted. The greatest threats currently posed to Mardon skippers are stochastic events such as a catastrophic wildfire or unseasonable weather events. Other threats to the Mardon skipper include direct impacts to individuals and local populations by livestock grazing, pesticide drift, and off-road-vehicle use. Habitat destruction or modification

through conifer encroachment, invasive nonnative plants, roadside maintenance, and grassland/meadow management activities such as prescribed burning and mowing are also threats. However, these threats have been substantially reduced due to protections provided by State and Federal special status species programs. The magnitude of the threats is moderate because current regulatory mechanisms associated with State and Federal special status species programs afford a relatively high level of protection from additional habitat loss or destruction across most of the species' range. Threats are imminent because all sites within the species' range currently have one or more identified threats that are resulting in direct impacts to individuals within the populations, or a gradual loss or degradation of the species' habitats. Mardon skippers face a variety of threats that may occur at any time at any of the locations. Low numbers of individuals have been found at most of the known locations. Only a few locations are known to harbor greater than 100 individuals, and specific locations could easily be lost by changes in vegetation composition or from the threat of wildfire. The great distances between the known locations for the species would not allow for dispersal of the species between populations; thus, loss of any population could lead to extirpation of the species at any of these locations. However, the discovery of new populations and the wide geographic range for the Mardon skipper provides a buffer against threats that could destroy all existing habitat simultaneously or jeopardize the continued existence of the species. Thus, based on imminent threats of moderate magnitude, we retain an LPN of 8 to this species.

Coral Pink Sand Dunes tiger beetle (*Cicindela limbata albissima*)—The following summary is based on information contained in our files, including information from the petition we received on April 21, 1994. This species of beetle occurs only at the Coral Pink Sand Dunes. This area is approximately 7 miles west of Kanab, Kane County, in south-central Utah. It is restricted to approximately 234 hectares (577 acres) of protected habitat within the dune field, situated at an elevation of about 1,820 meters (6,000 feet). Continuing drought is negatively affecting tiger beetle populations. Drought conditions have suppressed the beetle's reproductive capabilities. The continued survival of the beetle depends on the preservation of its habitat and favorable rainfall amounts. In addition, the beetle's habitat is being adversely affected by ongoing, recreational off-road-vehicle use that is limiting expansion of the species. The two agencies that manage the dune field, the Utah Department of Parks and Recreation and the BLM, have restricted recreational off-road vehicle use in some areas, which reduces impacts. However, continued drought may prevent the population from increasing in size. The beetle's population also is vulnerable to over-collecting by professional and hobby tiger beetle collectors. We retained an LPN of 2 due to the high magnitude and imminence of drought conditions.

Highlands tiger beetle (*Cicindela highlandensis*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The Highlands tiger beetle is narrowly distributed and restricted to areas of bare sand within scrub and sandhill on ancient sand dunes of the Lake Wales Ridge in Polk and Highlands Counties, Florida. Adult tiger beetles have been most recently found at 40 sites at the core of the Lake Wales Ridge. In 2004–2005 surveys, a total of 1,574 adults were found at 40 sites, compared with 643 adults at 31 sites in 1996, 928 adults at 31 sites in 1995, and 742 adults at 21 sites in 1993. Of the 40 sites in the 2004–2005 surveys with one or more adults, results ranged from 3 sites with large populations of over 100 adults, to 13 sites with fewer than 10 adults. Results from a limited removal study at four sites and similar studies suggest that the actual population size at some survey sites can be as much as two times as high as indicated by the visual index counts. If assumptions are correct and unsurveyed habitat is included, then the total number of adults at all survey sites might be 3,000 to 4,000.

Habitat loss and fragmentation and lack of fire and disturbances to create open habitat conditions are serious threats; remaining patches of suitable habitat are disjunct and isolated. Populations occupy relatively small patches of habitat and are small and isolated; individuals have difficulty dispersing between suitable habitats. These factors pose serious threats to the species. Although significant progress in implementing prescribed fire has occurred over the last ten years through collaborative partnerships and the Lake Wales Ridge Prescribed Fire Team, a backlog of long-unburned habitat within conservation areas remains. Overcollection and pesticide use are additional concerns. Because this species is narrowly distributed with specific habitat requirements and small populations, any of the threats could have a significant impact on the survival of the species, leading to a relatively high likelihood of extinction. Therefore, the magnitude of threats is high. Although the majority of its historical range has been lost, degraded, and fragmented, numerous sites are protected and land managers are implementing prescribed fire at some sites; these actions are expected to restore habitat and help reduce threats and have already helped stabilize and improve the populations. Overall, the threats are nonimminent. Therefore, we assigned the Highlands tiger beetle an LPN of 5.

*Arachnids*

Warton's cave meshweaver (*Cicurina wartoni*)—The following summary is based on information contained in our files. No new information was provided in the petition received on May 11, 2004. Warton's Cave meshweaver is an eyeless, cave-dwelling, unpigmented, 0.23-inch-long invertebrate known only from female specimens. This meshweaver is known to occur in only one cave (Pickle Pit) in Travis County, Texas. Primary threats to the species and its habitat are predation and competition from fire ants, surface and subsurface effects from runoff from an adjacent subdivision, unauthorized entry into the area surrounding the cave, modification of vegetation near the cave from human use, and trash dumping that may include toxic materials near the feature. The magnitude of threats is high because the single location for this species makes it highly vulnerable to extinction. The threats are imminent because fire ants are known to occur in the vicinity of the cave, and impacts to the cave from runoff and human activities are an imminent threat. Thus, we retain an LPN of 2 for this species.

*Crustaceans*

Anchialine pool shrimp (*Metabetaeus lohena*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Metabetaeus lohena* is an anchialine pool-inhabiting species of shrimp belonging to the family Alpheidae. This species is endemic to the Hawaiian Islands and is currently known from populations on the islands of Oahu, Maui, and Hawaii. The primary threats to this species are predation by fish (which do not naturally occur in the pools inhabited by this species) and habitat loss from degradation (primarily from illegal trash dumping). The pools where this species

occurs on the islands of Maui and Hawaii are located within State Natural Area Reserves (NAR) and in a National Park. Both the State NARs and the National Park prohibit the collection of the species and the disturbance of the pools. However, enforcement of collection and disturbance prohibitions is difficult, and the negative effects from the introduction of fish are extensive and happen quickly. On Oahu, one pool is located in a National Wildlife Refuge and is protected from collection and disturbance to the pool, however, on State-owned land where the species occurs, there is no protection from collection or disturbance of the pools. Therefore, threats to this species could have a significant adverse effect on the survival of the species, leading to a relatively high likelihood of extinction, and are of a high magnitude. However, the primary threats of predation from fish and loss of habitat due to degradation are nonimminent overall, because on the islands of Maui and Hawaii no fish were observed in any of the pools where this species occurs and there has been no documented trash dumping in these pools. Only one site on Oahu had a trash dumping instance, and in that case the trash was cleaned up immediately and the species subsequently observed. No additional dumping events are known to have occurred. Therefore, we assigned this species an LPN of 5.

Anchialine pool shrimp (*Palaemonella burnsi*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Palaemonella burnsi* is an anchialine pool-inhabiting species of shrimp belonging to the family Palaemonidae. This species is endemic to the Hawaiian Islands and is currently known from 3 pools on the island of Maui and 22 pools on the island of Hawaii. The primary threats to this species are predation by fish (which do not naturally occur in the pools inhabited by this species) and habitat loss due to degradation (primarily from illegal trash dumping). The pools where this species occurs on Maui are located within a State Natural Area Reserve (NAR). Hawaii's State statutes prohibit the collection of the species and the disturbance of the pools in State NARs. On the island of Hawaii, the species occurs within a State NAR and a National Park, and collection and disturbance are also prohibited. However, enforcement of these prohibitions is difficult, and the negative effects from the introduction of fish are extensive and happen quickly. Therefore, threats to this species could have a significant adverse effect on the survival of the species, leading to a relatively high likelihood of extinction, and are of a high magnitude. However, the threats are nonimminent, because surveys in 2004 and 2007 did not find fish in the pools where these shrimp occur on Maui or the island of Hawaii. Also, there was no evidence of recent habitat degradation at those pools. We assigned this species an LPN of 5.

Anchialine pool shrimp (*Procaris hawaiana*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Procaris hawaiana* is an anchialine pool-inhabiting species of shrimp belonging to the family Procarididae. This species is endemic to the Hawaiian Islands, and is currently known from two pools on the island of Maui and thirteen pools on the island of Hawaii. The primary threats to this species are predation from fish (which do not naturally occur in the pools inhabited by this species) and habitat loss due to degradation (primarily from illegal trash dumping). The pools where this species occurs on Maui are located within a State Natural Area Reserve (NAR). Hawaii's State statutes prohibit the collection of the species and the disturbance of the pools in State NARs. Twelve of the pools on the island of Hawaii are also located within a State NAR. However, enforcement of these prohibitions is difficult and the negative effects from the introduction of fish are extensive and happen quickly. In addition, there are no prohibitions for either removal of the species or disturbance to the pool for the one pool located outside a NAR on the island of Hawaii. Therefore, threats to this species could have a significant adverse effect on the survival of the species, leading to a relatively high likelihood of extinction, and thus remain at a high magnitude. However, the threats to the species are nonimminent because, during 2004 and 2007 surveys, no fish were observed in the pools where these shrimp occur on Maui, and no fish were observed in the one pool on the island of Hawaii during a site visit in 2005. In addition, there were no signs of trash dumping or fill in any of the pools where the species occurs. Therefore, we assigned this species an LPN of 5.

Anchialine pool shrimp (*Vetericaris chaceorum*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Vetericaris chaceorum* is an anchialine pool-inhabiting species of shrimp belonging to the family Procarididae; it is the only species in its genus. This species is endemic to the Hawaiian Islands, and is only known from one population in a single pool on the island of Hawaii. The primary threats to this species are predation from nonnative fish and habitat degradation (primarily by contamination from illegal trash dumping). This species would be highly vulnerable to predation by any intentionally or accidentally introduced fish, or contamination from illegal dumping into its single known location. This pool lies within lands administered by the State of Hawaii Department of Hawaiian Home Lands. The threats to *V. chaceorum* from habitat degradation and destruction, as well as from predation by nonnative fish are of high magnitude, because this species occurs in only one pool; thus, the threats could significantly impair the survival of the species, leading to a relatively high likelihood of extinction. All individuals of this species may be severely affected by a single dumping of trash or release of nonnative fish in the species' only known pool. However, the threats are nonimminent, as fish have not been introduced into the pool (nor is there any reason to believe that introduction is imminent) and a site visit in early 2005 showed there were no signs of dumping or fill. Therefore we assigned this species an LPN of 4 because the threats are of high magnitude but nonimminent, and the species is in a monotypic genus.

*Flowering Plants*

*Abronia alpina* (Ramshaw Meadows sand-verbena)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Abronia alpina* is known from one main population center in Ramshaw Meadow and a smaller population in adjacent Templeton Meadow on the Kern Plateau of the Sierra Nevada, Inyo National Forest, in Tulare County, California. The total estimated area occupied is approximately 6 hectares (15 acres). The population fluctuates from year to year without any clear trends. Population estimates from 1985–1994 range from a low of 69,652 plants in 1986 to 132,215 plants in 1987. Surveys conducted since 1994 indicate that no significant changes have occurred in population size or location, although, the 2003 survey showed population numbers to be at the low end of the range. The population was last monitored in 2009, and results from those studies are still being analyzed.

The factors currently threatening *Abronia alpina* include natural and human habitat alteration, hydrologic changes to the water table, and recreational use within meadow habitats. Lodgepole pine encroachment has altered the meadow, and trees are becoming established within *A. alpina* habitat. Lodgepole pine encroachment may alter soil characteristics by increasing organic matter levels, decreasing porosity, and moderating diurnal temperature fluctuations thus reducing the competitive ability of *A. alpina* to persist in an environment more hospitable to other plant species. The Ramshaw Meadow ecosystem is subject to potential alteration by lowering of the water table due to downcutting of the South Fork of the Kern River (SFKR). The SFKR flows through Ramshaw Meadow, at times coming within 15 m (50 ft) of *A. alpina* habitat, particularly in the vicinity of five subpopulations. The habitat occupied by *A. alpina* directly borders the meadow system supported by the SFKR. Drying out of the meadow system could potentially affect *A. alpina* pollinators and/or seed dispersal agents.

Established hiker, packstock, and cattle trails pass through *A. alpina* subpopulations. Two main hiker trails pass through Ramshaw Meadow, but were rerouted out of *A. alpina* subpopulations where feasible, in 1988 and 1997. Remnants of cattle trails that pass through subpopulations in several places receive occasional incidental use by horses and sometimes hikers. Cattle use, however, currently is not a threat due to the 2001 implementation of a 10-year moratorium on the Templeton allotment which prohibits cattle from all *A. alpina* locations. The Service is funding studies to determine appropriate conservation measures and working with the U.S. Forest Service on developing a conservation strategy for the species. The threats are of a low magnitude and nonimminent because of the conservation actions already implemented. The LPN for *A. alpina* remains an 11, with nonimminent threats of moderate to low magnitude.

*Arabis georgiana* (Georgia rockcress)—The following summary is based on information in our files. No new information was provided in the petition we received on May 11, 2004. The Georgia rockcress grows in a variety of dry situations, including shallow soil accumulations on rocky bluffs, ecotones of gently sloping rock outcrops, and in sandy loam along eroding river banks. It is occasionally found in adjacent mesic woods, but it will not persist in heavily shaded conditions. Currently, 17 populations are known from the Gulf Coastal Plain, Piedmont, and Ridge and Valley physiographic provinces of Alabama and Georgia. Populations of this species typically have a limited number of individuals over a small area.

Habitat degradation, more than outright habitat destruction, is the most serious threat to the continued existence of this species. Disturbance, associated with timber harvesting, road building, and grazing has created favorable conditions for the invasion of exotic weeds, especially Japanese honeysuckle (*Lonicera japonica*), in this species' habitat. A large number of the populations are currently or potentially threatened by the presence of exotics. The heritage programs in Alabama and Georgia have initiated plans for exotic control at several populations. The magnitude of threats to this species is moderate to low due to the number of populations (17) across multiple counties in two states and due to the fact that several sites are protected. However, since a number of the populations are currently being affected by nonnative plants, the threat is imminent. Thus, we assigned an LPN of 8 to this species.

*Argythamnia blodgettii* (Blodgett's silverbush)—The following summary is based on information in our files. No new information was provided in the petition we received on May 11, 2004. Blodgett's silverbush occurs in Florida and is found in open, sunny areas in pine rockland, edges of rockland hammock, edges of coastal berm, and sometimes in disturbed areas at the edges of natural areas. Plants can be found growing from crevices on limestone, or on sand. The pine-rockland habitat where the species occurs in Miami-Dade County and the Florida Keys requires periodic fires to maintain habitat with a minimum amount of hardwoods. There are approximately 22 extant occurrences, 12 in Monroe County and 10 in Miami-Dade County; many occurrences are on conservation lands. However, 4 to 5 sites are recently thought to be extirpated. The estimated population size of Blodgett's silverbush in the Florida Keys, excluding Big Pine Key, is roughly 11,000; the estimated population in Miami-Dade County is 375 to 13,650 plants.

Blodgett's silverbush is threatened by habitat loss, which is exacerbated by habitat degradation due to fire suppression, the difficulty of applying prescribed fire to pine rocklands, and threats from exotic plants. Remaining habitats are fragmented. Threats such as road maintenance and enhancement, infrastructure, and illegal dumping threaten some occurrences. Blodgett's silverbush is vulnerable to natural disturbances, such as hurricanes, tropical storms, and storm surges. Climatic change, particularly sea-level rise, is a long-term threat that is expected to continue to affect pine rocklands and ultimately substantially reduce the extent of available habitat, especially in the Keys. Overall, the magnitude of threats is moderate because not all of the occurrences are affected by the threats. In addition, land managers are aware of the threats from exotic plants and lack of fire, and are, to some extent, working to reduce these threats where possible. While a number of threats are occurring in some areas, the threat from development is nonimminent since most occurrences are on public land, and sea level rise is not currently affecting this species. Overall, the threats are nonimminent. Thus, we assigned an LPN of 11 to this species.

*Artemisia campestris* var. *wormskioldii* (Northern wormwood)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. Historically known from eight sites, northern wormwood is currently known from two populations in Klickitat and Grant Counties, Washington. This plant is restricted to exposed basalt, cobbly-sandy terraces, and sand habitat along the shore and on islands in the Columbia River. The two populations are separated by 200 miles (322 kilometers) of the Columbia River and three large hydroelectric dams. The Klickitat County population is declining; the status is unclear for the Grant County population; however, both are vulnerable to environmental variability. Surveys have not detected any additional plants.

Threats to northern wormwood include direct loss of habitat through regulation of water levels in the Columbia River and placement of riprap along the river bank; human trampling of plants from recreation; competition with nonnative invasive species; burial by wind- and water-borne sediments; small population sizes; susceptibility to genetic drift and inbreeding; and the potential for hybridization with two other species of *Artemisia.* Ongoing conservation actions have reduced trampling, but have not eliminated or reduced the other threats at the Grant County site. Active conservation measures are not currently in place at the Klickitat County site. The magnitude of threat is high for this subspecies because, although the two remaining populations are widely separated and distributed, one or both populations

could be eliminated by a single disturbance. The threats are imminent because recreational use is ongoing, invasive nonnative species occur at both sites, erosion of the substrate is ongoing at the Klickitat County site, and high water flows are random, naturally occurring events that may occur unpredictably in any year. Therefore, we have retained an LPN of 3 for this subspecies.

*Astragalus anserinus* (Goose Creek milkvetch)—The following summary is based on information in our files and in the petition received on February 3, 2004. The majority (over 80 percent) of *Astragalus anserinus* sites in Idaho, Utah, and Nevada occur on Federal lands managed by the BLM. The rest of the sites occur as small populations on private and State lands in Utah and on private land in Idaho and Nevada. *A. anserinus* occurs in a variety of habitats, but is typically associated with dry tuffaceous soils from the Salt Lake Formation. The species grows on steep or flat sites, with soil textures ranging from silty to sandy to somewhat gravelly. The species tolerates some level of disturbance, based on its occurrence on steep slopes where downhill movement of soil is common. Threats to remaining *A. anserinus* individuals include future habitat degradation and modifications to the ecosystem in which it occurs because of an altered wildfire regime. Approximately 98 percent of the individual plants that were previously documented in the areas burned by a 2007 wildfire were killed. Other factors that may threaten *A. anserinus* to a lesser extent include livestock use and the inadequacy of regulatory mechanisms. Climate change effects to Goose Creek drainage habitats are possible, but we are unable to predict the specific impacts of this change to *A. anserinus* at this time. Threats are high in magnitude since these threats have the potential to destroy whole populations. The threats are nonimminent since they may occur in the foreseeable future but not in the near future. Thus, we have assigned *A. anserinus* an LPN of 5.

*Astragalus tortipes* (Sleeping Ute milkvetch)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. Sleeping Ute milkvetch is a perennial plant that grows only on the Smokey Hills layer of the Mancos Shale Formation on the Ute Mountain Ute Indian Reservation in Montezuma County, Colorado. In 2000, 3,744 plants were recorded at 24 locations covering 500 acres within an overall range of 64,000 acres. Available information from 2000 indicates that the species remains stable. Previous and ongoing threats from borrow pit excavation, off-highway vehicles, irrigation canal construction, and a prairie dog colony have had minor impacts that reduced the range and number of plants by small amounts. Off-highway-vehicle use of the habitat has reportedly been controlled by fencing. Oil and gas development is active in the general area, but the Service has received no information to indicate whether there is development within plant habitat. The Tribe reported that the status of the species remains unchanged, the population is healthy, and that a management plan for the species is currently in draft form. Despite these positive indications, we have no documentation concerning the current status of the plants, condition of habitat, and terms of the species management plan being drafted by the Tribe. Thus, at this time, we cannot accurately assess whether populations are being adequately protected from previously existing threats. The threats are moderate in magnitude, since they have had minor impacts. Based on information we have, the population appears to be stable. Until the management plan is completed and made available, there are no regulatory mechanisms in place to protect the species. Overall, we conclude threats are nonimminent. Therefore, we assigned an LPN of 11 to this species.

*Bidens amplectens* (Kookoolau)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Bidens campylotheca* ssp. *pentamera* (Kookoolau)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Bidens campylotheca* ssp. *waihoiensis* (Kookoolau)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Bidens conjuncta* (Kookoolau)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Bidens micrantha* ssp. *ctenophylla* (Kookoolau)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Bidens micrantha* ssp. *ctenophylla* is a perennial herb found in open mixed shrubland to dry *Metrosideros* (ohia) forest, and in recently deposited a'a lava, on the island of Hawaii, Hawaii. This subspecies is known from 4 populations totaling approximately 360 individuals. *Bidens micrantha* ssp. *ctenophylla* is threatened by competition with nonnative plants, and is potentially threatened by habitat loss due to urban development and fire. One wild population of 5 individuals is protected by an exclosure, and three outplanted populations are protected by exclosures. The remaining natural populations are not protected or managed and are subject to development. The threats are high in magnitude because the largest population of this subspecies is highly threatened by urban development and all populations are threatened by fire and nonnative plants, leading to a relatively high likelihood of extinction. *Bidens micrantha* ssp. *ctenophylla* is represented in ex situ collections. Threats to this subspecies from competition with nonnative plants are imminent. Urban development and fire are potential threats and are non-imminent. Therefore, we retained an LPN of 3 for this subspecies.

*Brickellia mosieri* (Florida brickell-bush)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. This species is restricted to pine rocklands of Miami-Dade County, Florida. This habitat requires periodic prescribed fires to maintain the low understory and prevent encroachment by native tropical hardwoods and exotic plants, such as Brazilian pepper. Only one large occurrence is known to exist; 15 other occurrences contain less than 100 individuals. Eleven occurrences are on conservation lands, while the rest of the extant populations are on private land and are currently vulnerable to habitat loss and degradation.

Climatic changes and sea-level rise are long-term threats that will reduce the extent of habitat. This species is threatened by habitat loss, which is exacerbated by habitat degradation due to fire suppression, the difficulty of applying prescribed fire to pine rocklands, and threats from exotic plants. Remaining habitats are

fragmented. The species is vulnerable to natural disturbances, such as hurricanes, tropical storms, and storm surges. Due to its restricted range and the small sizes of most isolated occurrences, this species is vulnerable to environmental (catastrophic hurricanes), demographic (potential episodes of poor reproduction), and genetic (potential inbreeding depression) threats. Ongoing conservation efforts include projects aimed at facilitating restoration and management of public and private lands in Miami-Dade County and projects to reintroduce and establish new populations at suitable sites within the species' historical range. The Service is also pursuing additional habitat restoration projects, which could help further improve the status of the species. Because of these efforts, the overall magnitude of threats is moderate. The threats are ongoing and thus imminent. We assigned this species an LPN of 8.

*Calamagrostis expansa* (Maui reedgrass)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Calamagrostis expansa* is a perennial grass found in wet forest and bogs, and in bog margins, on the islands of Maui and Hawaii, Hawaii. This species is known from 13 populations totaling fewer than 750 individuals. *Calamagrostis expansa* is threatened by habitat degradation and loss by feral pigs, and by competition with nonnative plants. Predation by feral pigs is a potential threat to this species. All of the known populations of *C. expansa* on Maui occur in managed areas. Pig exclusion fences have been constructed and control of nonnative plants is ongoing within the exclosures. On the island of Hawaii, fencing is planned for the population in the Upper Waiakea Forest Reserve. This species is represented in an ex situ collection. Threats to this species from feral pigs and nonnative plants are ongoing, or imminent, and of high magnitude because they significantly affect the species throughout its range, leading to a relatively high likelihood of extinction. Predation is a nonimminent threat. Therefore, we retained an LPN of 2 for this species.

*Calamagrostis hillebrandii* (Hillebrand's reedgrass)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Calochortus persistens* (Siskiyou mariposa lily)—The following summary is based on information contained in our files and the petition we received on September 10, 2001. The Siskiyou mariposa lily is a narrow endemic that is restricted to three disjunct ridge tops in the Klamath-Siskiyou Range on the California-Oregon border. The southernmost occurrence of this species is composed of nine separate sites on approximately 10 hectares (ha) (24.7 acres (ac)) of Klamath National Forest and privately owned lands that stretch for 6 kilometers (km) (3.7 miles (mi)) along the Gunsight-Humbug Ridge, Siskiyou County, California. In 2007, a new occurrence was confirmed in the locality of Cottonwood Peak and Little Cottonwood Peak, Siskiyou County, where several populations are distributed over 164 ha (405 ac) on three individual mountain peaks in the Klamath National Forest and on private lands. The northernmost occurrence consists of not more than five Siskiyou mariposa lily plants that were discovered in 1998, on Bald Mountain, west of Ashland, Jackson County, Oregon.

Major threats include competition and shading by native and nonnative species fostered by suppression of wild fire; increased fuel loading and subsequent risk of wild fire; fragmentation by roads, fire breaks, tree plantations, and radio-tower facilities; maintenance and construction around radio towers and telephone relay stations located on Gunsight Peak and Mahogany Point; and soil disturbance, direct damage, and exotic weed and grass species introduction as a result of heavy recreational use and construction of fire breaks. Dyer's woad (*Isatis tinctoria*), an invasive, nonnative plant that may prevent germination of Siskiyou mariposa lily seedlings, is now found throughout the southernmost California occurrence, affecting 75 percent of the known lily habitat on Gunsight-Humbug Ridge. Forest Service staff and the Klamath-Siskiyou Wildlands Center cite competition with dyer's woad as a significant and chronic threat to the survival of Siskiyou mariposa lily.

The combination of restricted range, extremely low numbers (five plants) in one of three disjunct populations, poor competitive ability, short seed dispersal distance, slow growth rates, low seed production, apparently poor survival rates in some years, herbivory, habitat disturbance, and competition from exotic plants threaten the continued existence of this species. These threats are of high magnitude because of their potential to severely reduce the overall survival of the species. Because the threats of competition from exotic plants are being addressed, they are not anticipated to overwhelm a large portion of the species' range in the immediate future, and the threats from low seed production and survival are longer-term threats, overall the threats are nonimminent. Therefore, we assigned a listing priority number of 5 to this species.

*Canavalia pubescens* (Awikiwiki)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Canavalia pubescens* is a perennial climber found in open lava fields and lowland dryland forest in Hawaii on the island of Maui, last observed on the island of Lanai in 1998, and was last observed on the island of Niihau in 1949. This species is known from 5 populations totaling 360 to 500 individuals. *Canavalia pubescens* is threatened by development (Maui), goats (Maui) and axis deer (Maui and Lanai) that degrade and destroy habitat, and by nonnative plants that outcompete and displace native plants (both islands). Fire is a possible threat at the Keokea population on Maui. Ungulate exclosure fences protect 6 individuals of *C. pubescens* at Papaka Kai and 20 to 30 individuals at Ahihi-Kinau NAR, and weed control is ongoing at these locations on Maui. This species is represented in *ex situ* collections. Threats to this species from feral goats, axis deer, and nonnative plants are ongoing, or imminent, and of high magnitude because they severely affect the species throughout its range, leading to a relatively high likelihood of extinction. Fire is a nonimminent threat. Therefore, we retained an LPN of 2 for this species.

*Castilleja christii* (Christ's paintbrush)—The following summary is based on information contained in our files and the petition we received on January 2, 2001. *Castilleja christii* is found in one population covering approximately 85 ha (220 ac) on the summit of Mount Harrison in Cassia County, Idaho. This endemic species is considered a hemiparasite (dependent on the health of their surrounding native plant community), and it grows in association with subalpine-meadow and sagebrush habitats. The population may be large (greater than 10,000 individual plants); however, the species is considered to be subject to large variations in annual abundance and an accurate current population estimate is not available. Monitoring indicates that reproductive stems per plant and plant density declined between 1995 and 2007. Fluctuations have occurred since

2007, with slight increases in reproductive output and density in 2008 and decreases in 2009.

The primary threat to the species is the nonnative invasive plant smooth brome (*Bromus inermis*). Despite cooperative Forest Service and Service efforts to control smooth brome in 2007, 2008, and 2009, it still persists in *C. christii* habitats. Other threats to *C. christii* from recreational use and livestock trespass appear to be mostly seasonal and affect only a small portion of the population, and may not occur every year. The magnitude of the threats to this species is moderate at this time because, although the smooth brome control efforts have not eliminated the invasive plant, the Service and Forest Service are continuing their efforts in order to conserve this species. The threat from smooth brome is imminent because the threat still persists at a level that affects the native plant communities that provide habitat for *C. christii.* Thus, we assign an LPN of 8 to this species.

*Chamaecrista lineata* var. *keyensis* (Big Pine partridge pea)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. This pea is endemic to the lower Florida Keys, and restricted to pine rocklands, hardwood hammock edges, and roadsides and firebreaks within these ecosystems. Historically, it was known from Big Pine, Cudjoe, No Name, Ramrod, and Little Pine Keys (Monroe County, Florida). In 2005, a small population was detected on lower Sugarloaf Key, but this population was apparently extirpated later in 2005, due to the effects of Hurricane Wilma. It presently occurs on Big Pine Key, with a very small population on Cudjoe Key. It is fairly well distributed in Big Pine Key pine rocklands, which encompass approximately 580 hectares (1,433 acres), approximately 360 hectares (890 acres) of which are within the Service's National Key Deer Refuge (NKDR). Over 80 percent of the population probably exists on NKDR, with the remainder distributed among State, County, and private properties. Hurricane Wilma (October 2005) resulted in a storm surge that covered most of Big Pine Key with sea water. The surge reduced the population by as much as 95 percent in some areas.

Pine rockland communities are maintained by relatively frequent fires. In the absence of fire, shrubs and trees encroach on pine rockland and this subspecies is eventually shaded out. NKDR has a prescribed fire program, although with many constraints on implementation. Habitat loss due to development was historically the greatest threat to the pea. Much of the remaining habitat is now protected on public lands. Absence of fire now appears to be the greatest of the deterministic threats. Given the recent increase in hurricane activity, storm surges are the greatest of the stochastic threats. The small range and patchy distribution of the subspecies increase risk from stochastic events. Climatic changes and sea level rise are serious long-term threats. Models indicate that even under the best of circumstances, a significant proportion of upland habitat will be lost on Big Pine Key by 2100. Additional threats include restricted range, invasive exotic plants, roadside dumping, loss of pollinators, seed predators, and development.

We maintain the previous assessment that hurricane storm surges, lack of fire, and limited distribution results in a moderate magnitude of threat because a large part of the range is on conservation lands wherein threats are being controlled, although fire management is at much slower rate than is required. The immediacy of hurricane threats is difficult to characterize, but imminence is considered high given that hurricanes (and storm surges) of various magnitudes are frequent and recurrent events in the area. Sea-level rise remains uncontrolled, but overall, is nonimminent. Overall, the threats from limited distribution and inadequate fire management are imminent since they are ongoing. In addition, the most consequential threats (hurricanes, storm surges) are frequent, recurrent, and imminent. Therefore, we retained an LPN of 9 for Big Pine partridge pea.

*Chamaesyce deltoidea* ssp. *pinetorum* (Pineland sandmat)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The pineland sandmat in only known from Miami-Dade County, Florida. The largest occurrence, estimated at more than 10,000 plants, is located on Long Pine Key within Everglades National Park. All other occurrences are smaller and are in isolated pine rockland fragments in heavily urbanized Miami-Dade County.

Occurrences on private (non-conservation) lands and on one County-owned parcel are at risk from development and habitat degradation and fragmentation. Conditions related to climate change, particularly sea-level rise, will be a factor over the long term. All occurrences of the species are threatened by habitat loss and degradation due to fire suppression, the difficulty of applying prescribed fire, and exotic plants. These threats are severe within small and unmanaged fragments in urban areas. However, the threats of fire suppression and exotics are reduced on lands managed by the National Park Service. Hydrologic changes are considered to be another threat. Hydrology has been altered within Long Pine Key due to artificial drainage, which lowered ground water, and by the construction of roads, which either impounded or diverted water. Regional water management intended to restore the Everglades could negatively affect the pinelands of Long Pine Key in the future. At this time, we do not know whether the proposed restoration and associated hydrological modifications will have a positive or negative effect on pineland sandmat. This narrow endemic may be vulnerable to catastrophic events and natural disturbances, such as hurricanes. Overall, the magnitude of threats to this species is moderate; by applying regular prescribed fire, the National Park Service has kept Long Pine Key's pineland vegetation intact and relatively free of exotic plants, and partnerships are in place to help address the continuing threat of exotics on other pine rockland fragments. Overall, the threats are non-imminent since fire management at the largest occurrence is regularly conducted and sea-level rise and hurricanes are longer-term threats. Therefore, we assigned an LPN of 12 to this subspecies.

*Chamaesyce deltoidea* ssp. *serpyllum* (Wedge spurge)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. Systematic surveys of publicly owned pine rockland throughout this plant's range were conducted during 2005–2006 and 2007–2008 to determine population size and distribution. Wedge spurge is a small prostrate herb. It was historically, and remains, restricted to pine rocklands on Big Pine Key in Monroe County, Florida. Pine rocklands encompass approximately 580 hectares (1,433 acres) on Big Pine Key, approximately 360 hectares (890 acres) of which are within the Service's National Key Deer Refuge (NKDR). Most of the species' range falls within the NKDR, with the remainder on State, County, and private properties. It is not widely dispersed within the limited range. Occurrences are sparser in the southern portion of Big Pine Key, which contains smaller areas of NKDR lands than does the northern portion. Wedge spurge inhabits sites with low woody cover (*e.g.,* low palm and hardwood

densities) and usually, exposed rock or gravel.

Pine rockland communities are maintained by relatively frequent fires. In the absence of fire, shrubs and trees encroach on pine rockland and the subspecies is eventually shaded out. NKDR has a prescribed fire program, although with many constraints on implementation. Habitat loss due to development was historically the greatest threat to the wedge spurge. Much of the remaining habitat is now protected on public lands. Absence of fire now appears to be the greatest of the deterministic threats. Given the recent increase in hurricane activity, storm surges are the greatest of the stochastic threats. The small range and patchy distribution of the subspecies increases risk from stochastic events. Climatic changes and sea-level rise are serious long-term threats. Models indicate that even under the best of circumstances, a significant proportion of upland habitat will be lost on Big Pine Key by 2100. Additional threats include restricted range, invasive exotic plants, roadside dumping, loss of pollinators, seed predators, and development.

We maintain the previous assessment that low fire return intervals plus hurricane-related storm surges, in combination with a limited, fragmented distribution and threats from sea level rise, result in a moderate magnitude of threat, in part, because a large part of the range is on conservation lands, where some threats can be substantially controlled. The immediacy of hurricane threats is difficult to categorize, but in this case threats are imminent given that hurricanes (and storm surges) of various magnitudes are frequent and recurrent events in the area. Sea level rise remains uncontrolled, but over much of the range is nonimminent compared to other prominent threats. Threats resulting from limited fire occurrences are imminent. Since major threats are ongoing, overall, the threats are imminent. Therefore, we retained an LPN of 9 for this subspecies.

*Chorizanthe parryi* var. *fernandina* (San Fernando Valley spineflower)—The following summary is based on information contained in our files and the petition we received on December 14, 1999. *Chorizanthe parryi* var. *fernandina* is a low-growing herbaceous annual plant in the buckwheat family. Germination occurs following the onset of late-fall and winter rains and typically represents different cohorts from the seed bank. Flowering occurs in the spring, generally between April and June. The plant currently is known from two disjunct localities: The first is in the southeastern portion of Ventura County on a site within the Upper Las Virgenes Canyon Open Space Preserve, formerly known as Ahmanson Ranch, and the second is in an area of southwestern Los Angeles County known as Newhall Ranch. Investigations of historical locations and seemingly suitable habitat within the range of the species have not revealed any other occurrences.

The threats currently facing *Chorizanthe parryi* var. *fernandina* include threatened destruction, modification, or curtailment of its habitat or range, and other natural or manmade factors. The threats to *Chorizanthe parryi* var. *fernandina* from habitat destruction or modification are slightly less than they were 6 years ago. One of the two populations (Upper Las Virgenes Canyon Open Space Preserve) is in permanent, public ownership and is being managed by an agency that is working to conserve the plant; however, the use of adjacent habitat for filming movies was brought to our attention last year; while we are monitoring the situation, we have not yet completed our evaluation of the potential impacts to *Chorizanthe parryi* var. *fernandina.* We will be working with the landowners to manage the site for the benefit of *Chorizanthe parryi* var. *fernandina.* The other population (Newhall Ranch) is under the threat of development; however, a Candidate Conservation Agreement (CCA) is being developed with the landowner, and it is possible that the remaining plants can also be conserved. Until such an agreement is finalized, the threat of development and the potential damage to the Newhall Ranch population still exists, as shown by the destruction of some plants during installation of an agave farm. Furthermore, cattle grazing on Newhall Ranch may be current threat. Cattle grazing may harm *Chorizanthe parryi* var. *fernandina* by trampling and soil compaction. Grazing activity could also alter the nutrient content of the soils *Chorizanthe parryi* var. *fernandina* habitat through fecal inputs, which in turn may favor the growth of other plant species that would otherwise not grow so readily on the mineral-based soils. Over time, changes in species composition may render the sites less favorable for the persistence of *Chorizanthe parryi* var. *fernandina. Chorizanthe parryi* var. *fernandina* may be threatened by invasive nonnative plants, including grasses, which could potentially displace it from available habitat; compete for light, water, and nutrients; and reduce survival and establishment.

*Chorizanthe parryi* var. *fernandina* is particularly vulnerable to extinction due to its concentration in two isolated areas. The existence of only two areas of occurrence, and a relatively small range, makes the variety highly susceptible to extinction or extirpation from a significant portion of its range due to random events such as fire, drought, erosion, or other occurrences. We retained a listing priority number of 6 for *Chorizanthe parryi* var. *fernandina* due to high magnitude of nonimminent threats.

*Chromolaena frustrata* (Cape Sable thoroughwort)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. This species is found most commonly in open sun to partial shade at the edges of rockland tropical hammock and in coastal rock barrens. There are nine extant occurrences located on five islands in the Florida Keys and one small area in Everglades National Park (ENP). In the Keys, the plant has been extirpated from half of the islands where it occurred. Prior to Hurricane Wilma in 2005, the population was estimated at roughly 5,000 individuals, with all but 500 occurring on one privately owned island. An estimated 1,500 plants occur on the mainland within ENP.

This species is threatened by habitat loss and modification, even on public lands, and habitat loss and degradation due to threats from exotic plants at almost all sites. The species is vulnerable to natural disturbances, such as hurricanes, tropical storms, and storm surges. While these factors may also work to maintain coastal rock barren habitat in the long term, Hurricane Wilma affected occurrences and habitat, at least in the short term. Occurrences probably initially declined due to inundation of its coastal barren and rockland hammock habitats; long-term effects on this species are unknown. Cape Sable thoroughwort appears to be vulnerable to cold temperatures. It is not known to what extent cold temperatures in January 2010 may have affected the species at most locations, or what, if any, long-term effect this may have on the population. Sea level rise is considered a major threat over the long term. Potential effects from other changes in freshwater deliveries and the construction of the Buttonwood Canal are unknown. Problems associated with small population size and isolation are likely major factors, as occurrences may not be large enough to be viable; this narrowly endemic plant has uncertain viability at most locations. Thus, these factors constitute a high magnitude of threat. The threats of small population size, isolation, and uncertain viability

are imminent because they are ongoing. As a result, we assigned an LPN of 2 to this species.

*Consolea corallicola* (Florida semaphore cactus)—The following summary is based on information in our files. No new information was provided in the petition we received on May 11, 2004. The Florida semaphore cactus is endemic to the Florida Keys, and was discovered on Big Pine Key in 1919, but that population was extirpated as a result of road building and poaching. This cactus grows close to salt water on bare rock with a minimum of humus soil cover in or along the edges of hammocks near sea level. The species is known to occur naturally only in two areas, Swan Key within Biscayne National Park and Little Torch Key. Outplantings have been attempted in several locations in the upper and lower Keys; however, success has been low. Few plants remain in the population at The Nature Conservancy's Torchwood Hammock Preserve on Little Torch Key. During monitoring work conducted in 2005, a total of 655 plants were documented at the Swan Key population. In 2008 and 2009 the population was estimated by Biscayne National Park staff to consist of approximately 600 individuals. Asexual reproduction is the main life history strategy of this species. Recent genetic studies have shown no variation within populations and very limited variation between populations. Findings support the conclusion that the Swan Key (upper Keys) and Little Torch Key (lower Keys) populations and an individual plant from Big Pine Key (single plant in ex situ collection; lower Keys) are clonally derived. Studies examining the reproductive biology of the species indicate that all extant wild and cultivated plants are male.

The causes for the population decline of this species include destruction or modification of habitat, predation from nonnative *Cactoblastis cactorum* moths and disease, poaching and vandalism, sea level rise, and hurricanes. Sea level rise is considered a serious threat to the species and its habitat; all extant populations are located in low-lying areas. All remaining populations are under threat of predation from the exotic moth and are susceptible to root-rot disease. Competition from invasive exotic plants is a threat at Swan Key; however, efforts by Biscayne National Park are underway to address this threat. This species is inherently vulnerable to stochastic losses, especially at its smaller populations. A lack of variation and limited sexual reproduction makes the remaining small population even more susceptible to natural or manmade factors. Overall, the magnitude of threats is high. The numerous threats are ongoing and therefore, are imminent. Thus, we assigned this species an LPN of 2.

*Cordia rupicola* (no common name)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Cordia rupicola,* a small shrub, has been described from southwestern Puerto Rico, Vieques Island, and Anegada Island (British Virgin Islands). All sites lay within the subtropical dry forest life zone overlying a limestone substrate. *Cordia rupicola* has a restricted distribution. Currently, approximately 226 individuals are known from 3 locations in Puerto Rico: Peñuelas and Guánica Commonwealth Forests and Vieques National Wildlife Refuge. The species is reported as common in Anegada.

This species is threatened by maintenance of trails and power line right-of-ways in the Guánica Commonwealth Forest, residential development in Peñuelas, and residential and commercial development in Anegada Island. This species is also vulnerable to natural (*e.g.,* hurricanes) or manmade (*e.g.,* human-induced fires) threats. Approximately 68 percent of the currently known reproductive adults are located in the Guánica Commonwealth Forest where, due to the difficulty in identifying this species, it is threatened by management and maintenance activities; another 32 percent of the currently known reproductive adults in Puerto Rico are located on privately owned property currently threatened by habitat destruction or modification. For these reasons, we conclude that the magnitude of the current threats is high. The threats this species faces are ones that are likely to increase in the future if conservation measures are not implemented and long-term impacts are not averted. For these reasons, we conclude threats to the species as a whole are nonimminent, and therefore have assigned an LPN of 5.

*Cyanea asplenifolia* (Haha)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Cyanea calycina* (Haha)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Cyanea kunthiana* (Haha)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Cyanea lanceolata* (Haha)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Cyanea obtusa* (Haha)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Cyanea tritomantha* ('Aku)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Cyanea tritomantha* is a palm-like tree found in *Metrosideros-Cibotium* (ohia-hapuu) montane wet forest on the island of Hawaii, Hawaii. This species is known from 16 populations totaling fewer than 300 individuals. *Cyanea tritomantha* is threatened by feral pigs and cattle that degrade and destroy habitat, and nonnative plants that outcompete and displace it. Potential threats to this species include predation by feral pigs, cattle, rats, and slugs, and human trampling of plants located near trails. Feral pigs and cattle have been fenced out of three outplanted populations of *C. tritomantha,* and nonnative plants have been reduced in the fenced areas; however, there are no efforts to control the ongoing and imminent threats to the remaining populations. The threats continue to be of a high magnitude to *C. tritomantha* because they significantly affect the species resulting in direct mortality or reduced reproductive capacity, leading to a relatively high likelihood of extinction. They are ongoing and therefore imminent for more than 75 percent of the population where no control measures have been implemented. Because the threats continue to be of a high magnitude and are imminent for the unmanaged populations, we retained an LPN of 2 for this species.

*Cyrtandra filipes* (Haiwale)—We continue to find that listing this species is warranted but precluded as of the

date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Cyrtandra kaulantha* (Haiwale)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Cyrtandra oxybapha* (Haiwale)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Cyrtandra sessilis* (Haiwale)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Dalea carthagenensis* ssp. *floridana* (Florida prairie-clover)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Dalea carthagenensis* var. *floridana* occurs in Big Cypress National Preserve (BCNP) in Monroe and Collier Counties and at six locations within Miami-Dade County, Florida, albeit mostly in limited numbers. There are a total of nine extant occurrences, seven of which are on conservation lands.

Existing occurrences are extremely small and may not be viable, especially some of the occurrences in Miami-Dade County. Remaining habitats are fragmented. Climatic changes and sea-level rise are long-term threats that are expected to reduce the extent of habitat. This plant is threatened by habitat loss and degradation due to fire suppression, the difficulty of applying prescribed fire to pine rocklands, and threats from exotic plants. Damage to plants by off-road vehicles is a serious threat within the BCNP; damage attributed to illegal mountain biking at the R. Hardy Matheson Preserve has been reduced. One location within BCNP is threatened by changes in mowing practices; this threat is low in magnitude. This species is being parasitized by the introduced insect lobate lac scale (*Paratachardina pseudolobata*) at some localities (e.g., R. Hardy Matheson Preserve), but we do not know the extent of this threat. This plant is vulnerable to natural disturbances, such as hurricanes, tropical storms, and storm surges. Due to its restricted range and the small sizes of most isolated occurrences, this species is vulnerable to environmental (catastrophic hurricanes), demographic (potential episodes of poor reproduction), and genetic (potential inbreeding depression) threats. The magnitude of threats is high because of the limited number of occurrences and the small number of individual plants at each occurrence. The threats are imminent; even though many sites are on conservation lands, these plants still face significant ongoing threats. Therefore, we have assigned an LPN of 3 to this subspecies.

*Dichanthelium hirstii* (Hirsts' panic grass)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Dichanthelium hirstii* is a perennial grass that produces erect leafy flowering stems from May to October. *Dichanthelium hirstii* occurs in coastal plain intermittent ponds, usually in wet savanna or pine barren habitats and is found at only two sites in New Jersey, one site in Delaware, and one site in North Carolina. While all four extant *D. hirstii* populations are located on public land or privately owned conservation lands, natural threats to the species from encroaching vegetation and fluctuations in climatic conditions remain of concern and may be exacerbated by anthropomorphic factors occurring adjacent to the species' wetland habitat. Given the low numbers of plants found at each site, even minor changes in the species' habitat could result in local extirpation. Loss of any known sites could result in a serious contraction of the species' range. However, the most immediate and severe of the threats to this species (*i.e.,* ditching of the Labounsky Pond site, and encroachment of aggressive vegetative competitors) have been curtailed or are being actively managed by The Nature Conservancy at one New Jersey site and by the Delaware Division of Fish and Wildlife and Delaware Natural Heritage Program at the Assawoman Pond, Delaware site. Based on nonimminent threats of a high magnitude, we retain an LPN of 5 for this species.

*Digitaria pauciflora* (Florida pineland crabgrass)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. Pine rocklands in Miami-Dade County have largely been destroyed by residential, commercial, and urban development and agriculture. With most remaining habitat having been negatively altered, this species has been extirpated from much of its historical range, including extirpation from all areas outside of National Parks. Two large occurrences remain within Everglades National Park and Big Cypress National Preserve; plants on Federal lands are protected from the threat of habitat loss due to development. However, any unknown plants, indefinite occurrences, and suitable habitat remaining on private or non-conservation land are threatened by development. Continued development of suitable habitat diminishes the potential for reintroduction into its historical range. Extant occurrences are in low-lying areas and will be affected by climate change and rising sea level.

Fire suppression, the difficulty of applying prescribed fire to pine rocklands, and threats from exotic plants are ongoing threats. Since the only known remaining occurrences are on lands managed by the National Park Service, the threats of fire suppression and exotics are somewhat reduced. The presence of the exotic Old World climbing fern is of particular concern due to its ability to spread rapidly. In Big Cypress National Preserve, plants are threatened by off-road-vehicle use. Changes to hydrology are a potential threat. Hydrology has been altered within Long Pine Key due to artificial drainage, which lowered ground water, and construction of roads, which either impounded or diverted water. Regional water management intended to restore the Everglades has the potential to affect the pinelands of Long Pine Key, where a large population occurs. At this time, it is not known whether Everglades restoration will have a positive or negative effect. This narrow endemic may be vulnerable to catastrophic events and natural disturbances, such as hurricanes. Overall, the magnitude of threats is high. Only two known occurrences remain and the likelihood of establishing a sizable population on other lands is diminished due to continuing habitat loss. Impacts from climate change and sea level rise are currently low, but expected to be severe in the future. The majority of threats are nonimminent as they are long-term in nature (water management, hurricanes, and sea-level rise). Therefore, we assigned an LPN of 5 for this species.

*Echinomastus erectocentrus* var. *acunensis* (Acuna cactus)—The following summary is based on information contained in our files and the petition we received on October 30, 2002. The Acuna cactus is known from six sites on well-drained gravel ridges and knolls on granite soils in Sonoran Desert scrub association at 1,300 to 2,000 feet in elevation. Habitat

destruction has been a threat in the past and is a potential future threat to this species. New roads and illegal activities have not yet directly affected the cactus populations at Organ Pipe Cactus National Monument, but areas in close proximity to these known populations have been altered. Cactus populations located in the Florence area have not been monitored and these populations may be in danger of habitat loss due to recent urban growth in the area. Urban development near Ajo, Arizona, as well as that near Sonoyta, Mexico, is a significant threat to the Acuna cactus. Populations of the Acuna cactus within the Organ Pipe Cactus National Monument have shown a 50-percent mortality rate in recent years. The reason(s) for the mortality are not known, but continuing drought conditions are thought to play a role. The Arizona Plant Law and the Convention on International Trade in Endangered Species of Wild Fauna and Flora provide some protection for the Acuna cactus. However, illegal collection is a primary threat to this cactus variety and has been documented on the Organ Pipe Cactus National Monument in the past. The threats continue to be of a high magnitude because drought, as the main threat, severely affects the long-term viability of this variety. The threats are imminent, mainly due to the continued decline of the species, most likely from effects from the ongoing drought. Conditions in 2006 to 2008 worsened, and the drought is prevalent throughout the range of this variety. Therefore, we assigned an LPN of 3 to this cactus variety.

*Erigeron lemmonii* (Lemmon fleabane)—The following summary is based on information contained in our files and the petition we received in July 1975. The species is known from one site in a canyon in the Fort Huachuca Military Reservation (Fort Huachuca) of southeastern Arizona. In the 1990s, surveys found approximately 450 plants. A survey in 2006 found approximately 950 plants; occupied habitat encompasses about 1 square kilometer. The threats to this species are from catastrophic wildfire in the canyon and on-going drought conditions. We do not know if this species has any adaptations to fire. Due to its location on cliffs, we suspect that fires that may have occurred at more regular intervals and burned at low intensities may have had little to no effect on this species. Lack of fire and the accumulated fuel load that lead to high fire intensity and associated heat may now damage or kill plants on adjacent cliffs, especially near the ground. Plants that are much higher on the cliff face would probably not be affected. The magnitude of threats is moderate rather than high because it is likely that not all of the population would be adversely affected by a wildfire or drought. The threats are still imminent because the likelihood of a fire is high. The LPN for Lemmon fleabane remains an 8 due to moderate, imminent threats.

*Eriogonum codium* (Umtanum Desert buckwheat)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. This species is a long-lived, slow-growing, woody perennial plant that forms low dense mats. The species occupies a single location on the Hanford National Monument in Washington State. It is found only on an exposed basalt ridge; we do not know if this association is related to the chemical or physical characteristics of the bedrock or other factors. Individual plants may exceed 100 years of age, based on counts of annual growth rings. A count in 1997 reported 5,228 individuals; by 2005 the figure had dropped to 4,418, declining 15 percent over 8 years. In the summer of 2011, another full population census will likely be undertaken, providing a useful measure of change over the last 14 years.

A population viability analysis in 2006 based on 9 years of demographic data estimated that that there is a 72 percent chance of a decline of 50 percent within the next 100 years. Another analysis is expected in 2010, based on 12 years of demographic monitoring.

The major threats to the species are wildfire, firefighting activities, trampling, and invasive weeds. However, the relationship between the decline in population numbers and the known threats is not understood at this time. With the possible exception of wildfire, the observed decline in population numbers and recruitment since 1997 is not directly attributable to the currently known threats. Because the population is small, limited to a single site, and sensitive to fire and disturbance, the species remains vulnerable to the identified threats. The magnitude of threats is high because, given the limited range of the species, any of the threats could adversely affect its continued existence. The threats are ongoing and, therefore, imminent. Because the species continues to remain vulnerable to these threats, we retained an LPN of 2 for this species.

*Eriogonum corymbosum* var. *nilesii* (Las Vegas buckwheat)—The following summary is based on information contained in our files and the petition we received on April 23, 2008. *Eriogonum corymbosum* var. *nilesii* is a woody perennial shrub up to 4 feet high with a mounding shape. The flowers of this plant are numerous, small, and yellow with small bract-like leaves at the base of each flower. *Eriogonum corymbosum* var. *nilesii* is very conspicuous when flowering in late September and early October. It is restricted to gypsum soil outcroppings in Clark County, Nevada. In 2004, morphometrics (the study of variation and change in the form (size and shape) of organisms) were used to classify this plant as the unique variety *nilesii,* and its unique taxonomy was verified using molecular genetic analyses in 2007.

*Eriogonum corymbosum* var. *nilesii* was added to the candidate list in December 2007 due to continued loss of habitat from development of over 95 percent of its core historical range and potential habitat. In addition, off-highway vehicle activity and other public-land uses (casual public use, mining, and illegal dumping) directly threaten over 95 percent of the remaining habitat. It was petitioned for listing in April 2008 and a warranted-but-precluded determination was made in December 2008. To date, regulatory mechanisms to protect *E. corymbosum* var. *nilesii* are inadequate. Its designation as a Bureau of Land Management (BLM) special status species has not provided adequate protection on lands managed by BLM. *Eriogonum corymbosum* var. *nilesii* is not protected by the State of Nevada or any other regulatory mechanisms on other Federal lands. We have determined that candidate status is warranted for this variety as a result of threats to the remaining habitat and inadequate regulatory mechanisms. Conservation measures are being developed that could reduce the risks to occupied habitat, but these measures are not sufficiently complete as to remove these threats. The magnitude of threats is high since the more significant threats (urban development and surface mining) would result in direct mortality of the plants in over half of the known habitat. While both development and mining are very likely to occur in the future, they are not expected to happen in the immediate future, and thus, the threats are nonimminent. Accordingly, we assigned *E. corymbosum* var. *nilesii* an LPN of 6.

*Eriogonum kelloggii* (Red Mountain buckwheat)—The following summary is based on information contained in our files and information provided by the California Department of Fish and

Game. No new information was provided in the petition we received on May 11, 2004. Red Mountain buckwheat is a perennial herb endemic to serpentine habitat of lower montane forests found between 1,900 and 4,100 feet. Its distribution is limited to the Red Mountain and Little Red Mountain areas of Mendocino County, California, where it occupies in excess of 81 acres, and 900 square feet, respectively. Occupied habitat at Red Mountain is scattered over 4 square miles. Total population size has not been determined, but a preliminary estimate suggests the population may be in excess of 63,000 plants, occupying more than 44 discrete habitat polygons. Intensive monitoring of permanent plots on three study sites in Red Mountain suggests considerable annual variation in plant density and reproduction, but no discernable population trend was evident in two of three study sites. One study site showed a 65-percent decline in plant density over 11 years.

The primary threat to this species is the potential for surface mining for chromium and nickel. Virtually the entire distribution of Red Mountain buckwheat is either owned by mining interests, or is covered by existing mining claims, none of which are currently active. Surface mining would destroy habitat suitability for this species. The species is also believed threatened by tree and shrub encroachment into its habitat, due to the absence of fire. Some 42 percent of its known distribution occurred within the boundary of the Red Mountain Fire of June, 2008. However, the extent and manner in which *Eriogonum kelloggii* and its habitat were affected by that fire is not yet known. The single population located at Little Red Mountain appears to have been affected, and perhaps eliminated by fire-control efforts. The known species distribution by ownership is described as follows: Federal (Bureau of Land Management), 83 percent; private, 17 percent; State of California, less than 1 percent. Given the magnitude (high) and immediacy (nonimminent) of the threat to the small, scattered populations, and its taxonomy (species), we assigned a listing priority number of 5 to this species.

*Festuca hawaiiensis* (no common name)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. This species is a cespitose (growing in dense, low tufts) annual found in dry forest on the island of Hawaii, Hawaii. *Festuca hawaiiensis* is known from 4 populations totaling approximately 1,000 individuals in and around the Pohakuloa Training Area. Historically, this species was also found on Hualalai and Puu Huluhulu, but it no longer occurs at these sites.

*Festuca hawaiiensis* is threatened by pigs, goats, mouflon, and sheep that degrade and destroy habitat; fire; military training activities; and nonnative plants that outcompete and displace it. Feral pigs, goats, mouflon, and sheep have been fenced out of a portion of the populations of *F. hawaiiensis,* and nonnative plants have been reduced in the fenced area, but the majority of the populations are still affected by threats from ungulates. The threats are imminent because they are not controlled and are ongoing in the remaining, unfenced populations. Firebreaks have been established at two populations, but fire is an imminent threat to the remaining populations that have no firebreaks. The threats are of a high magnitude because they could adversely affect the majority of *F. hawaiiensis* populations resulting in direct mortality or reduced reproductive capacity, leading to a relatively high likelihood of extinction. Therefore, we retained an LPN of 2 for this species.

*Festuca ligulata* (Guadalupe fescue)—The following summary is based on information obtained from the original species petition, received in 1975, and from our files, on-line herbarium databases, and scientific publications. Six small populations of Guadalupe fescue, a member of the Poaceae (grass family), have been documented in mountains of the Chihuahuan desert in Texas and in Coahuila, Mexico. Only two extant populations have been confirmed in the last 5 years, in the Chisos Mountains, Big Bend National Park, Texas, and in the privately owned *Area de Protección de Flora y Fauna* (Protected Area for Flora and Fauna—APFF) Maderas del Carmen in northern Coahuila. Despite intensive searches, a population known from Guadalupe Mountains National Park in Texas has not been found since 1952 and is presumed extirpated. In 2009, Mexican botanists confirmed Guadalupe fescue at one site in APFF Maderas del Carmen, but could not find the species at the original site, known as Sierra El Jardín, which was first reported in 1973. Two additional Mexican populations, near Fraile in southern Coahuila, and the Sierra de la Madera in central Coahuila, have not been monitored since 1941 and 1977, respectively. A great amount of potentially suitable habitat in Coahuila has never been surveyed. The potential threats to Guadalupe fescue include changes in the wildfire cycle and vegetation structure, trampling from humans and pack animals, grazing, trail runoff, fungal infection of seeds, small sizes and isolation of populations, and limited genetic diversity. The Service and the National Park Service established a Candidate Conservation Agreement in 2008 to provide additional protection for the Chisos Mountains population, and to promote cooperative conservation efforts with U.S. and Mexican partners. The threats to Guadalupe fescue are of moderate magnitude, and are not imminent, due to the provisions of the Candidate Conservation Agreement and other conservation efforts, as well as the likelihood that other populations exist in mountains of Coahuila that have not been surveyed. Thus, we maintained the LPN of 11 for this species.

*Gardenia remyi* (Nanu)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Gardenia remyi* is a tree found in mesic to wet forest on the islands of Kauai, Molokai, Maui, and Hawaii, Hawaii. *Gardenia remyi* is known from 19 populations totaling between 85 and 87 individuals.

This species is threatened by pigs, goats, and deer that degrade and destroy habitat and possibly prey upon the species, and by nonnative plants that outcompete and displace it. *Gardenia remyi* is also threatened by landslides on the island of Hawaii. This species is represented in ex situ collections. Feral pigs have been fenced out of the west Maui populations of *G. remyi,* and nonnative plants have been reduced in those areas. However, these threats are not controlled and are ongoing in the remaining, unfenced populations, and are, therefore, imminent. In addition, the threat from goats and deer is ongoing and imminent throughout the range of the species, because no goat or deer control measures have been undertaken for any of the populations of *G. remyi.* All of the threats are of a high magnitude because habitat destruction, predation, and landslides could significantly affect the entire species, resulting in direct mortality or reduced reproductive capacity, leading to a relatively high likelihood of extinction. Therefore, we retained an LPN of 2 for this species.

*Geranium hanaense* (Nohoanu)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Geranium hillebrandii* (Nohoanu)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Gonocalyx concolor* (no common name)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Gonocalyx concolor* is a small evergreen epiphytic or terrestrial shrub. Currently, *G. concolor* is known from two populations in Puerto Rico: One at Cerro La Santa and the other at Charco Azul, both in the Carite Commonwealth Forest. The forest is located in the Sierra de Cayey and extends through the municipalities of Guayama, Cayey, Caguas, San Lorenzo, and Patillas in southeastern Puerto Rico. The population previously reported in the Caribbean National Forest is apparently no longer extant. In 1996, approximately 172 plants were reported at Cerro La Santa. However, in 2006 only 25 individuals were reported at Cerro La Santa and 4 individuals located at Charco Azul.

The species is currently threatened by habitat disturbance related to the maintenance of existing telecommunication facilities at Cerro La Santa, limited distribution (2 sites) and low population numbers (less than 30 individuals total), and hurricanes. Although the species is located in the Carite Commonwealth Forest, a public forest managed by DNER, applicable laws and regulations are not effectively enforced and Service personnel has documented damages to the population located adjacent to existing communication towers at the forest. Because of extremely low population numbers and the vulnerability to current threats (maintenance activities and hurricanes), the magnitude of current threats on the species is high. Overall, threats are nonimminent since *G. concolor* is only known from the Carite Commonwealth Forest, administered and managed by the DNER for conservation and recreation. Therefore, we have assigned a listing priority number of 5 for the *Gonocalyx concolor.*

*Hazardia orcuttii* (Orcutt's hazardia)—The following summary is based on information contained in our files and the petition we received on March 8, 2001. *Hazardia orcuttii* is an evergreen shrubby species in the Asteraceae (sunflower family). The erect shrubs are 50–100 centimeters (20–40 inches) high. The only known extant native occurrence of this species in the U.S. is in the Manchester Conservation Area in northwestern San Diego County, California. This site is managed by Center for Natural Lands Management (CNLM). Using material derived from the native population, the CNLM facilitated the establishment of test populations at five additional sites in northwest San Diego County, California, including a second site in the Manchester Conservation Area, Kelly Ranch Habitat Conservation Area, Rancho La Costa Habitat Conservation Area, San Elijo Lagoon, and San Diego Botanical Garden. *Hazardia orcuttii* also occurs at a few coastal sites in Mexico, where it has no conservation protections. The total number of plants at the only native site in the United States is approximately 668 native adult plants and 50 seedlings. The five additional test populations collectively support approximately 500 adult plants and 350 seedlings.

The population in Mexico is estimated to be 1300 plants. The occurrences in Mexico are threatened by coastal development from Tijuana to Ensenada. The native population in the U.S. is within an area that receives public use; however, management at this site has minimized impacts from trampling, dumping, and other unintentionally destructive impacts. This species has a very low reproductive output, although the causes are as-yet unknown. Competition from invasive nonnative plants may pose a threat to the reproductive potential of this species. In one study, 95 percent of the flowers examined were damaged by insects or fungal agents or aborted prematurely, and insects or fungal agents damaged 50 percent of the seeds produced. All of the populations in the U.S. are small and two of the test populations are declining. Small populations are considered subject to random events and reductions in fitness due to low genetic variability. Threats associated with small population size are further exacerbated by the limited range and low reproductive output of this species. However, if low seed production is because of ecosystem disruptions, such as loss of effective pollinators, there could be additional threats that need to be addressed. Overall, the threats to *Hazardia orcuttii* are of a high magnitude because they have the potential to significantly reduce the reproductive potential of this species. The threats are nonimminent overall because the most significant threats (invasive, nonnative plants and low reproductive output) are nonimminent and long-term in nature. This species faces high-magnitude nonimminent threats; therefore, we assigned this species a listing priority of 5.

*Hedyotis fluviatilis* (Kamapuaa)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Hedyotis fluviatilis* is a scandent shrub found in mixed shrubland to wet lowland forest on the islands of Oahu and Kauai, Hawaii. This species is known from 11 populations totaling between 400 and 900 individuals. *Hedyotis fluviatilis* is threatened by pigs and goats that degrade and destroy habitat, and by nonnative plants that outcompete and displace it. Landslides are a potential threat to populations on Kauai. Predation by pigs and goats is a likely threat. This species is represented in an ex situ collection; however, there are no other conservation actions implemented for this species. We retained an LPN of 2 because the severity of the threats to the species is high and the threats are ongoing and, therefore, imminent.

*Helianthus verticillatus* (Whorled sunflower)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The whorled sunflower is found in moist, prairie-like openings in woodlands and along adjacent creeks. Despite extensive surveys throughout its range, only five populations are known for this species. There are two populations documented for Cherokee County, Alabama; one population in Floyd County, Georgia; and one population each in Madison and McNairy Counties, Tennessee. This species appears to have restricted ecological requirements and is dependent upon the maintenance of prairie-like openings for its survival. Active management of habitat is needed to keep competition and shading under control. Much of its habitat has been degraded or destroyed for agricultural, silvicultural, and residential purposes. Populations near roadsides or powerlines are threatened by herbicide usage in association with right-of-way maintenance. The majority of the Georgia population is protected due to its location within a conservation easement; however, only 15 to 20 plants are estimated to occur at this site. The remaining four sites are not formally protected, but efforts have been taken to abate threats associated with highway right-of-way maintenance at one Alabama population; and, despite past concerns about threats from timber removal degrading *H. verticillatus*

habitat, the other Alabama population has responded favorably to canopy removal that took place circa 2001. Therefore, threats are of moderate magnitude, though imminent because they are ongoing. Thus, we assigned this species an LPN of 8.

*Hibiscus dasycalyx* (Neches River rose-mallow)—See above in "*Listing Priority Changes in Candidates*." The above summary is based on information contained in our files.

*Ivesia webberi* (Webber ivesia)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Ivesia webberi* is a low, spreading, perennial herb that occurs very infrequently in Lassen, Plumas, and Sierra Counties in California, and in Douglas and Washoe Counties, Nevada. The species is restricted to sites with sparse vegetation and shallow, rocky soils composed of volcanic ash or derived from andesitic rock (a gray, fine-grained volcanic rock). Occupied sites generally occur on mid-elevation flats, benches, or terraces on mountain slopes above large valleys along the transition zone between the eastern edge of the northern Sierra Nevada and the northwestern edge of the Great Basin. Currently, the global population is estimated at approximately 5 million individuals at 16 known sites. The Nevada sites support nearly 98 percent of the total number of individuals (4.9 million) on about 27 acres (11 hectares) of occupied habitat. The California sites are larger in area, totaling about 157 acres (63 hectares), but support fewer individuals (approximately 120,000).

The primary threats to *I. webberi* include urban development, authorized and unauthorized roads, off-road-vehicle activities and other dispersed recreation, livestock grazing and trampling, fire and fire suppression activities including fuels reduction and prescribed fires, and displacement by noxious weeds. Despite the high numbers of individuals, observations in 2002 and 2004 confirmed that direct and indirect impacts to the species and its habitat, specifically from urban development and off-highway-vehicle activity remain high and are likely to increase. However, the U.S. Forest Service has developed a conservation strategy that commits to management, monitoring, and research to protect this species on National Forest lands where most populations are found, and the State of Nevada has listed the species as critically endangered, which provides a mechanism to track future impacts on private lands. In addition, both the U.S. Forest Service and State of Nevada have agreed to coordinate closely with the Fish and Wildlife Service on all activities that may affect this species. In light of these conservation commitments, we have determined that the threats to *I. webberi* are nonimminent and are maintaining the LPN of 5.

*Joinvillea ascendens* ssp. *ascendens* (Ohe)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Joinvillea ascendens* ssp. *ascendens* is an erect herb found in wet to mesic *Metrosideros polymorpha-Acacia koa* (ohia-koa) lowland and montane forest on the islands of Kauai, Oahu, Molokai, Maui, and Hawaii, Hawaii. This subspecies is known from 43 widely scattered populations totaling fewer than 200 individuals. Plants are typically found as only one or two individuals, with miles between populations. This subspecies is threatened by destruction or modification of habitat by pigs, goats, and deer, and by nonnative plants that outcompete and displace native plants. Predation by pigs, goats, deer, and rats is a likely threat to this species. Landslides are a potential threat to populations on Kauai and Molokai. Seedlings have rarely been observed in the wild. Seeds germinate in cultivation, but most die soon thereafter. It is uncertain if this rarity of reproduction is typical of this subspecies, or if it is related to habitat disturbance. Feral pigs have been fenced out of a few of the populations of this subspecies, and nonnative plants have been reduced in those populations that are fenced. However, these threats are not controlled and are ongoing in the remaining, unfenced populations. This species is represented in ex situ collections. The threats are of high magnitude because habitat degradation, nonnative plants, and predation result in mortality or severely affect the reproductive capacity of the majority of populations of this species, leading to a relatively high probability of extinction. The threats are ongoing, and thus are imminent. Therefore, we retained an LPN of 3 for this subspecies.

*Korthalsella degeneri* (Hulumoa)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Leavenworthia crassa* (Gladecress)—The following information is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. This species of gladecress is a component of glade flora, occurring in association with limestone outcroppings. *Leavenworthia crassa* is endemic to a 13-mile radius area in north central Alabama in Lawrence and Morgan Counties, where only six populations of this species are documented. Glade habitats today have been reduced to remnants fragmented by agriculture and development. Populations of this species are now located in glade-like areas exhibiting various degrees of disturbance including pastureland, roadside rights-of-way, and cultivated or plowed fields. The most vigorous populations of this species are located in areas which receive full, or near full, sunlight with limited herbaceous competition. The magnitude of threat is high for this species, because with the limited number of populations, the threats could result in direct mortality or reduced reproductive capacity of the species, leading to a relatively high likelihood of extinction. This species appears to be able to adjust to periodic disturbances and the potential impacts to populations from competition, exotics, and herbicide use are nonimminent. Thus, we assigned an LPN of 5 to this species.

*Leavenworthia texana* (Texas golden gladecress)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Leavenworthia texana* occurs only on the Weches outcrops of east Texas in San Augustine and Sabine counties. The Weches geologic formation consists of a layer of calcareous sediment, lying above a layer of glauconite clay deposited up to 50 million years ago. Erosion of this complex has produced topography of steep, flat-topped hills and escarpments, as well as the unique ecology of Weches glades: Islands of thin, loamy, seepy, alkaline soils that support open-sun, herbaceous, and highly diverse and specialized plant communities.

*Leavenworthia texana* was historically recorded at eight sites, all in a narrow region along north San Augustine and Sabine Counties. All sites are on private land. Three sites have been lost to glauconite mining and two sites are currently closed to visitors. The Sabine County site supported 1,000 plants within 9 square meters (97 square feet) in 2007. The Tiger Creek site in San Augustine County (less than 0.1 hectare (.2 acre) in size) was found to have about 200 plants in 2007. The Kardell site (less than 9 square meters (97 square feet)) has supported 400–500 plants in past years, but none in 2005.

An introduced population in Nacogdoches County numbered about 1,000 within an area of about 18 square meters (194 square feet) in 2007.

Historical habitat has been affected by highway construction, residential development, conversion to pasture and cropland, widespread use of herbicide, overgrazing, and glauconite mining. However, the primary threat to existing *Leavenworthia texana* populations is the invasion of nonnative and weedy shrubs and vines (primarily Macartney rose (*Rosa bracteata*) and Japanese honeysuckle (*Lonicera japonica*). All known sites are undergoing severe degradation by the incursion of nonnative shrubs and vines, which restrict both growth and reproduction of the gladecress. Brushclearing carried out in 1995 resulted in the reappearance of *L. texana* after a 10-year absence at one site. However, nonnative shrubs have again invaded this area. More effective control measures, such as burning and selective herbicide use, need to be tested and monitored. The small number of known sites also makes *L. texana* vulnerable to extreme natural disturbance events. A severe drought in 1999 and 2000 had a pronounced adverse effect on *L. texana* reproduction. Since the threat from nonnative plants severely affects all known sites, the magnitude is high. The threats are imminent since they are ongoing. Therefore, we retain an LPN of 2 for *L. texana.*

*Lesquerella globosa* (Desvaux) Watson (Short's bladderpod)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. Short's bladderpod is a perennial member of the mustard family that occurs in Indiana (1 location), Kentucky (6 locations), and Tennessee (22 locations). It grows on steep, rocky, wooded slopes; on talus areas; along cliff tops and bases; and on cliff ledges. It is usually associated with south to west facing calcareous outcrops adjacent to rivers or streams. Road construction and road maintenance have played a significant role in the decline of *L. globosa.* Specific activities that have affected the species in the past and may continue to threaten it include bank stabilization, herbicide use, mowing during the growing season, grading of road shoulders, and road widening or repaving. Sediment deposition during road maintenance or from other activities also potentially threatens the species. Because the natural processes that maintained habitat suitability and competition from invasive nonnative vegetation have been interrupted at many locations, active habitat management is necessary at those sites. While threats associated with roadside maintenance activities and habitat alterations by invasive plant encroachment are imminent because they are ongoing, this threat is of moderate magnitude as they are not affecting all locations of this species at this time. Therefore, we assigned an LPN of 8 to this species.

*Linum arenicola* (Sand flax)—See above in "*Listing Priority Changes in Candidates.*" That summary is based on information contained in our files.

*Linum carteri* var. *carteri* (Carter's small-flowered flax)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. This plant occupies open and disturbed sites in pinelands of Miami-Dade County, Florida. Currently, there are nine known occurrences. Occurrences with fewer than 100 individuals are located on 3 county-owned preserves. A site with more than 100 plants is owned by the U.S. government, but the site is not managed for conservation.

Climatic changes and sea level rise are long-term threats that will likely reduce the extent of habitat. The nine existing occurrences are small and vulnerable to habitat loss, which is exacerbated by habitat degradation due to fire suppression, the difficulty of applying prescribed fire to pine rocklands, and threats from exotic plants. Remaining habitats are fragmented. Non-compatible management practices are also a threat at most protected sites; several sites are mowed during the flowering and fruiting season. In the absence of fire, periodic mowing can, in some cases, help maintain open, shrub-free understory and provide benefits to this plant. However, mowing can also eliminate reproduction entirely in very young plants, delay reproductive maturation, and kill adult plants. With flexibility in timing and proper management, threats from mowing practices can be reduced or negated. Carter's small-flowered flax is vulnerable to natural disturbances, such as hurricanes, tropical storms, and storm surges. This species exists in such small numbers at so few sites, that it may be difficult to develop and maintain viable occurrences on the available conservation lands. Although no population viability analysis has been conducted for this plant, indications are that existing occurrences are at best marginal, and it is possible that none are truly viable. As a result, the magnitude of threats is high. The threats are ongoing, and thus are imminent. Therefore, we assigned an LPN of 3 to this plant variety.

*Melicope christophersenii* (Alani)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Melicope hiiakae* (Alani)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Melicope makahae* (Alani)—We continue to find that listing this species is warranted-but-precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Myrsine fosbergii* (Kolea)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Myrsine fosbergii* is a branched shrub or small tree found in lowland mesic and wet forest, on watercourses or stream banks, on the islands of Kauai and Oahu, Hawaii. This species is currently known from 14 populations totaling a little more than 100 individuals. *Myrsine fosbergii* is threatened by feral pigs and goats that degrade and destroy habitat and may prey upon the plant, and by nonnative plants that compete for light and nutrients. This species is represented in an ex situ collection. Although there are plans to fence and remove ungulates from the Helemano area of Oahu, which may benefit this species, no conservation measures have been taken to date to alleviate these threats for this species. Feral pigs and goats are found throughout the known range of *M. fosbergii,* as are nonnative plants. The threats from feral pigs, goats, and nonnative plants are of a high magnitude because they pose a severe threat throughout the limited range of this species, and they are ongoing and therefore imminent. We retained an LPN of 2 for this species.

*Myrsine vaccinioides* (Kolea)—We continue to find that listing this species is warranted-but-precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Narthecium americanum* (Bog asphodel)—The following summary is

based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. Bog asphodel is a perennial herb that is found in savanna areas, usually with water moving through the substrate, as well as in sandy bogs along streams and rivers. The historical range of bog asphodel included New York, New Jersey, Delaware, North Carolina, and South Carolina, although the taxonomic identity of the historic North Carolina specimens is now in question. Extant populations of bog asphodel are now only found within the Pine Barrens region of New Jersey.

Curtailment of its historical range is a primary threat to bog asphodel, representing a loss of habitat and genetic diversity and leaving the species vulnerable to localized threats, natural disasters, and climate change. The Pine Barrens savannas that support bog asphodel provide a scarce, specialized habitat that has declined from several thousand acres around 1900 to only a thousand acres in recent decades. This species has been lost from at least 3 States, and now occurs on less than 80 acres of land confined to an area only about 30 miles in diameter. Of the 14 New Jersey watersheds that historically supported bog asphodel, the species is extirpated from six watersheds and persists in four additional watersheds only as a single occurrence. The 4 remaining watersheds are unevenly distributed among the 3 river systems supporting the species, with nearly 88 percent of bog asphodel (by area) concentrated in the greater Mullica River drainage.

Other significant threats include unauthorized use of off-road vehicles, future increases in water extraction for human use, natural succession possibly accelerated by fire suppression, and potentially climate change. Lesser threats include indirect effects of upland development, impacts from recreational activities, collection, herbivory, and beaver activity. Because the range of bog asphodel is currently limited to New Jersey's Pinelands Area and Coastal Zone, regulatory protections are generally adequate. More than 75 percent of bog asphodel occurs on protected lands, although enforcement of illegal activity can be lacking. Outright habitat destruction from wetland filling, draining, flooding, and conversion to commercial cranberry bogs likely contributed to the curtailment of this species' range, but these historical threats to bog asphodel are generally no longer occurring.

Current threats to bog asphodel are low to moderate in magnitude. Several threats are imminent because they are ongoing and expected to continue. Overall, based on these imminent, moderate threats, we retain a listing priority number of 8 for this species.

*Nothocestrum latifolium* ('Aiea)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Nothocestrum latifolium* is a small tree found in dry to mesic forest on the islands of Kauai, Oahu, Maui, Molokai, and Lanai, Hawaii. *Nothocestrum latifolium* is known from 17 steadily declining populations totaling fewer than 1,200 individuals.

This species is threatened by feral pigs, goats, and axis deer that degrade and destroy habitat and may prey upon it; by nonnative plants that compete for light and nutrients; and by the loss of pollinators that negatively affect the reproductive viability of the species. This species is represented in an ex situ collection. Ungulates have been fenced out of four areas where *N. latifolium* currently occurs, and nonnative plants have been reduced in some populations that are fenced. However, these ongoing conservation efforts for this species benefit only a few of the known populations. The threats are not controlled and are ongoing in the remaining unfenced populations. In addition, little regeneration is observed in this species. The threats are of a high magnitude, since they are severe enough to affect the continued existence of the species, leading to a relatively high likelihood of extinction. The threats are imminent, since they are ongoing. Therefore, we retained an LPN of 2 for this species.

*Ochrosia haleakalae* (Holei)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Ochrosia haleakalae* is a tree found in dry to mesic forest, often on lava, on the islands of Hawaii and Maui, Hawaii. This species is currently known from 8 populations totaling between 64 and 76 individuals.

*Ochrosia haleakalae* is threatened by fire; by feral pigs, goats, and cattle that degrade and destroy habitat and may directly prey upon it; and by nonnative plants that compete for light and nutrients. This species is represented in ex situ collections. Feral pigs, goats, and cattle have been fenced out of one wild and one outplanted population on private lands on the island of Maui and one outplanted population in Hawaii Volcanoes National Park on the island of Hawaii. Nonnative plants have been reduced in the fenced areas. The threat from fire is of a high magnitude and imminent because no control measures have been undertaken to address this threat that could adversely affect *O. haleakalae* as a whole. The threats from feral pigs, goats, and cattle are ongoing to the unfenced populations of *O. haleakalae.* The threat from nonnative plants is ongoing and imminent and of a high magnitude to the wild populations on both islands as this threat adversely affects the survival and reproductive capacity of the majority of the species, leading to a relatively high likelihood of extinction. Therefore, we retained an LPN of 2 for this species.

*Pediocactus peeblesianus* var.*fickeiseniae* (Fickeisen plains cactus)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Pediocactus peeblesianus* var. *fickeiseniae* is a small cactus known from the Gray Mountain vicinity to the Arizona strip in Coconino, Navajo, and Mohave Counties, Arizona. The cactus grows on exposed layers of Kaibab limestone on canyon margins and well-drained hills in Navajoan desert or grassland. In 1999, the Arizona Game and Fish Department noted 23 occurrences for the species, including historical ones. The species is located on Bureau of Land Management (BLM), U.S. Forest Service, tribal, and possibly State lands. Recent reports from the BLM and Navajo Nation describe populations of the species as being in decline. The main human-induced threats to this cactus are activities associated with road maintenance, off-road vehicles, and trampling associated with livestock grazing. Monitoring data has detected mortality associated with livestock grazing. Illegal collection of this species has been noted in the past, but we do not know if it is a continuing threat. The populations that have been monitored have been affected, in part, by the continuing drought. There has been very low recruitment, and rabbits and rodents have consumed adult plants because there is reduced forage available during these dry conditions. Given that there are only a few known populations, that the range of this taxon is limited, and that the majority of the known populations on BLM lands and the Navajo Nation are experiencing declines, we conclude that the threats are of a high magnitude. The threats are ongoing and, therefore, are imminent. Thus, we have retained an LPN of 3 for this plant variety.

*Penstemon scariosus* var. *albifluvis* (White River beardtongue)—See above in "*Listing Priority Changes in Candidates*." That summary is based on information contained in our files.

*Peperomia subpetiolata* ('Ala 'ala wai nui)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Phyllostegia bracteata* (no common name)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Phyllostegia floribunda* (no common name)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. This species is an erect subshrub found in mesic to wet forest on the island of Hawaii, Hawaii. This species is known from 7 populations totaling fewer than 25 individuals. *Phyllostegia floribunda* is threatened by feral pigs that degrade and destroy habitat, and by nonnative plants that compete for light and nutrients. This species is represented in ex situ collections. The National Park Service, The Nature Conservancy, and the State have fenced and outplanted more than 170 individuals at Olaa Forest Reserve, Kona Hema, and Waiakea Forest Reserve (more than 50, 20 individuals, and 100 individuals, respectively). Nonnative plants have been reduced in these fenced areas. However, no conservation efforts have been implemented for the unfenced populations. Overall, the threats are moderate because conservation efforts for over half of the populations reduce the severity of the threats. The threats are ongoing in the unfenced portions and must be constantly managed in the fenced portions. Therefore, the threats are imminent. We retained an LPN of 8 because the threats are of moderate magnitude and are imminent for the majority of the populations.

*Physaria douglasii* ssp. *tuplashensis* (White Bluffs bladder-pod)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. White Bluffs bladder-pod is a low-growing, herbaceous, short-lived, perennial plant in the Brassicaceae (mustard) family. Historically and currently, White Bluffs bladder-pod is only known from a single population that occurs along the White Bluffs of the Columbia River in Franklin County, Washington. The entire range of the species is a narrow band, approximately 33 feet (10 meters) wide by 10.6 miles (17 kilometers) long, at the upper edge of the bluffs. The species occurs only on cemented, highly alkaline, calcium carbonate paleosol (a "caliche" soil) and is believed to be a "calciphile."

Approximately 35 percent of the known range of the species has been moderately to severely affected by landslides, an apparently permanent destruction of the habitat. The entire population of the species is down-slope of irrigated agricultural land, the source of the water seepage causing the mass failures and landslides, but the southern portion of the population is the closest to the agricultural land and the most affected by landslides. Other significant threats include use of the habitat by recreational off-road vehicles which destroys plants, and the presence of invasive nonnative plants that compete with *P. douglasii tuplashensis* for resources (light, water, nutrients). Additionally, the increasing presence of invasive nonnative plants may alter fire regimes and potentially increase the threat of fire to the *P. douglasii tuplashensis* population. The threats to the population from landslides and the recreational off-road-vehicle use are currently occurring and will continue to occur in the future. In addition, invasion by nonnative plants is currently occurring, and with the 2007 fire that occurred in the area of the existing population, invasive plants will likely spread or increase throughout the burned area of the population. We have therefore determined that these threats are imminent. Although approximately 35 percent of the population is severely affected by landslides in the southern portion of the range, the likelihood of the persistence of the population in the unaffected northern portion appears to be fairly high. Currently, we know of no plans to expand or significantly modify the existing agriculture activities in areas adjacent to the population. In addition, deliberate modification of the species' immediate habitat is unlikely due to its location and ownership (85 percent federal). Intermittent use of off-road vehicles does occur on the Monument, although it is prohibited. These activities are mainly confined to the upper portion of the White Bluffs where few *P. douglasii tuplashensis* plants occur, so there is low to moderate threat to the species from these activities. Invasive plants are present in the vicinity, but have not yet been determined to be a significant problem. As a result of the 2007 fire, there is a higher probability that invasion of these nonnatives will occur. While *P. douglasii tuplashensis* is inherently vulnerable because it is a narrow endemic, the magnitude of the ongoing threats to the population is moderate; therefore we retain an LPN of 9 for this species.

*Platanthera integrilabia* (Correll) Leur (White fringeless orchid)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Platanthera integrilabia* is a perennial herb that grows in partially, but not fully, shaded, wet, boggy areas at the head of streams and on seepage slopes in Alabama, Georgia, Kentucky, Mississippi, South Carolina and Tennessee. Historically, there were at least 90 populations of *P. integrilabia.* It is presumed extirpated from North Carolina and Virginia. Currently there are about 50 extant sites supporting the species.

Several populations have been destroyed due to road, residential, and commercial construction, and to projects that altered soil and site hydrology such that suitability for the species was reduced. Several of the known populations are in or adjacent to powerline rights-of-way. Mechanical clearing of these areas may benefit the species by maintaining adequate light levels; however, the indiscriminant use of herbicides in these areas could pose a significant threat to the species. All-terrain vehicles have damaged several sites and pose a threat at most sites. Most of the known sites for the species occur in areas that are managed specifically for timber production. Timber management is not necessarily incompatible with the protection and management of the species, but care must be taken during timber management to ensure the hydrology of bogs supporting the species is not altered. Natural succession can result in decreased light levels. Because of the species dependence upon moderate-to-high light levels, some type of active management to prevent complete canopy closure is required at most locations. Collecting for commercial and other purposes is a potential threat. Herbivory (primarily deer) threatens the species at several sites. Due to the alteration of habitat and changes in natural conditions, protection and recovery of this species is dependent upon active management rather than just preservation of habitat. Invasive, nonnative plants such as Japanese honeysuckle and kudzu also threaten several sites. The threats are widespread; however, the impact of those threats on the species survival is moderate in magnitude. Several of the sites are protected to some degree from

the threats by being within State parks, national forests, wildlife management areas, or other protected land. The threats however are imminent since they are ongoing, and we have therefore assigned an LPN of 8 to this species.

*Platydesma cornuta* var. *cornuta* (no common name)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Platydesma cornuta* var. *decurrens* (no common name)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Platydesma remyi* (no common name)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Platydesma remyi* is a shrub or shrubby tree found in wet forests on old volcanic slopes on the island of Hawaii, Hawaii. This species is known from 2 populations totaling fewer than 50 individuals. *Platydesma remyi* is threatened by feral pigs and cattle that degrade and destroy habitat, nonnative plants that compete for light and nutrients, reduced reproductive vigor, and stochastic extinction due to naturally occurring events. This species is represented in an ex situ collection, and by one individual included in a rare plant exclosure in the Laupahoehoe Natural Area Reserve. The threats are ongoing and therefore imminent, and of a high magnitude because of their severity; the threats cause direct mortality or significantly reduce the reproductive capacity of the species throughout its limited range, leading to a relatively high likelihood of extinction. Therefore, we retained an LPN of 2 for this species.

*Pleomele forbesii* (Hala pepe)—We continue to find that listing this species is warranted-but-precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Potentilla basaltica* (Soldier Meadow cinquefoil or basalt cinquefoil)—The following summary is based on information contained in our files; the petition we received on May 11, 2004, provided no additional information on the species. *Potentilla basaltica* is a low growing, rhizomatous, herbaceous perennial that is associated with alkali meadows, seeps, and occasionally marsh habitats bordering perennial thermal springs, outflows, and meadow depressions. In Nevada, the species is known only from Soldier Meadow in Humboldt County. In northeastern California, a single population occurs in Lassen County. At Soldier Meadow, there are 11 discrete known occurrences within an area of about 24 acres (9.6 hectares) that support about 130,000 individuals. The California population occurs on private and public land and supports fewer than 1,000 plants. The public land has been designated as an Area of Critical Environmental Concern by the Bureau of Land Management.

The species and its habitat are threatened by recreational use in the areas where it occurs as well as the ongoing impacts of past water diversions, livestock grazing, and off-road-vehicle travel. Conservation measures implemented recently by the Bureau of Land Management in Nevada include the installation of fencing to exclude livestock, wild horses, burros, and other large mammals; the closure of access roads to spring, riparian, and wetland areas and the limiting of vehicles to designated routes; the establishment of a designated campground away from the habitats of sensitive species; the installation of educational signage; and, an increased staff presence, including law enforcement, a volunteer site steward during the 6-month period of peak visitor use, and noxious weed control. In California, public land management actions include not allowing livestock salting in the vicinity of springs, a proposed long-term monitoring plot, limitations on camping near springs, withdrawal from salable mineral leasing, recommendations to withdrawal the land from mineral entry, and noxious weed control treatments. These conservation measures have reduced the magnitude of threat to the species to moderate; all remaining threats are nonimminent and involve long-term changes to the habitat for the species resulting from past impacts. Until a monitoring program is in place that allows us to assess the long-term trend of the species, we have assigned an LPN of 11.

*Pseudognaphalium* (*Gnaphalium sandwicensium* var. *molokaiense* (Enaena)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Pseudognaphalium sandwicensium* var. *molokaiense* is a perennial herb found in strand vegetation in dry consolidated dunes on the islands of Molokai and Maui, Hawaii. This variety is known from 5 populations totaling approximately 200 to 20,000 individuals (depending upon rainfall) in the Moomomi area on the island of Molokai, and from 2 populations of a few individuals at Waiehu dunes and at Puu Kahulianapa on west Maui. *Pseudognaphalium sandwicensium* var. *molokaiense* is threatened by feral goats and axis deer that degrade and destroy habitat and possibly prey upon it, and by nonnative plants that compete for light and nutrients. Potential threats also include collection for lei-making, and off-road vehicles that directly damage plants and degrade habitat. Weed control protects one population on Molokai; however, no conservation efforts have been initiated to date for the other populations on Molokai or for the individuals on Maui. This species is represented in an ex situ collection. The ongoing threats from feral goats, axis deer, nonnative plants, collection, and off-road vehicles are of a high magnitude because no control measures have been undertaken for the Maui population or for the Molokai populations, and the threats result in direct mortality or significantly reduce reproductive capacity for the majority of the populations, leading to a relatively high likelihood of extinction. Therefore, we retained an LPN of 3 for this plant variety.

*Psychotria hexandra* ssp. *oahuensis* var. *oahuensis* (Kopiko)—We continue to find that listing this species is warranted-but-precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Pteralyxia macrocarpa* (Kaulu)—We continue to find that listing this species is warranted-but-precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Ranunculus hawaiensis* (Makou)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Ranunculus hawaiensis* is an erect or ascending perennial herb found in mesic to wet forest dominated by *Metrosideros polymorpha* (ohia) and *Acacia koa* (koa) with scree substrate (loose stones or rocky debris on a slope) on the islands of Maui and Hawaii, Hawaii. This species is currently known from 20 individuals in 5 populations on

the island of Hawaii. One population on Maui (Kukui planeze) was not relocated on a survey conducted in 2006. In addition, one wild population at Waikamoi (also on Maui) has not been observed since 1995. *Ranunculus hawaiensis* is threatened by direct predation by slugs, feral pigs, goats, cattle, mouflon, and sheep; by pigs, goats, cattle, mouflon, and sheep that degrade and destroy habitat; and by nonnative plants that compete for light and nutrients. Three populations have been outplanted into protected exclosures; however, feral ungulates and nonnative plants are not controlled in the remaining, unfenced populations. In addition, the threat from introduced slugs is of a high magnitude because slugs occur throughout the limited range of this species and no effective measures have been undertaken to control them or prevent them from causing significant adverse impacts to this species. Overall, the threats from pigs, goats, cattle, mouflon, sheep, slugs, and nonnative plants are of a high magnitude, and ongoing (imminent) for *R. hawaiensis*. We retained an LPN of 2 for this species.

*Ranunculus mauiensis* (Makou)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Ranunculus mauiensis* is an erect to weakly ascending perennial herb found in open sites in mesic to wet forest and along streams on the islands of Maui, Kauai, and Molokai, Hawaii. This species is currently known from 14 populations totaling 198 individuals. *Ranunculus mauiensis* is threatened by feral pigs, goats, mule deer, axis deer, and slugs that consume it; by habitat degradation and destruction by feral pigs, goats, and deer; and by nonnative plants that compete for light and nutrients. This species is represented in ex situ collections. Feral pigs have been fenced out of one Maui population of *R. mauiensis,* and nonnative plants have been reduced in the fenced area. One individual occurs in the Kamakou Preserve on Molokai, managed by The Nature Conservancy. However, ongoing conservation efforts benefit only two populations. The threats are of high magnitude and imminent because they are ongoing in the Kauai and the majority of the Maui populations. Therefore, we retained an LPN of 2 for this species.

*Rorippa subumbellata* (Tahoe yellow cress)—The following summary is based on information contained in our files and the petition we received on December 27, 2000. *Rorippa subumbellata* is a small perennial herb known only from the shores of Lake Tahoe in California and Nevada. Data collected over the last 25 years generally indicate that species occurrence fluctuates yearly as a function of both lake level and the amount of exposed habitat. Records kept since 1900 show a preponderance of years with high lake levels that would isolate and reduce *R. subumbellata* occurrences at higher beach elevations. From the standpoint of the species, less favorable peak years have occurred almost twice as often as more favorable low-level years. Annual surveys are conducted to determine population numbers, site occupancy, and general disturbance regime. During the 2003 and 2004 annual survey period, the lake level was approximately 6,224 feet (ft) (1,898 meters (m)); 2004 was the fourth consecutive year of low water. *Rorippa subumbellata* was present at 45 of the 72 sites surveyed (65 percent occupied), up from 15 sites (19 percent occupied) in 2000 when the lake level was high at 6,228 ft (1,898 m). Approximately 25,200 stems were counted or estimated in 2003, whereas during the 2000 annual survey, the estimated number of stems was 4,590. Lake levels began to rise again in 2005 and less habitat was available. Lake levels began to drop again in 2006 though 2008 leading to an increase in both occupied sites and estimated stem counts. During very low lake levels in 2009, an estimated 27,522 stems were observed at 47 sites, equal to the highest number of occupied sites previously recorded.

Many *Rorippa subumbellata* sites are intensively used for commercial and public purposes and are subject to various activities such as erosion control, marina developments, pier construction, and recreation. The U.S. Forest Service, California Tahoe Conservancy, and California Department of Parks and Recreation have management programs for *R. subumbellata* that include monitoring, fenced enclosures, and transplanting efforts when funds and staff are available. Public agencies (including the Service), private landowners, and environmental groups collaborated to develop a conservation strategy coupled with a Memorandum of Understanding-Conservation Agreement. The conservation strategy, completed in 2003, contains goals and objectives for recovery and survival, a research and monitoring agenda, and serves as the foundation for an adaptive management program. Because of the continued commitments to conservation demonstrated by regulatory and land management agencies participating in the conservation strategy, we have determined the threats to *R. subumbellata* from various land uses have been reduced to a moderate magnitude. In high-lake-level years such as 2005, however, recreational use is concentrated within *R. subumbellata* habitat, and we consider this threat in particular to be ongoing and imminent. Therefore, we are maintaining an LPN of 8 for this species.

*Schiedea pubescens* (Maolioli)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Schiedea pubescens* is a reclining or weakly climbing vine found in diverse mesic to wet forest on the islands of Maui, Molokai, and Hawaii, Hawaii. It is presumed extirpated from Lanai. Currently, this species is known from 8 populations totaling between 30 and 32 individuals on Maui, from 4 populations totaling between 21 and 22 individuals on Molokai, and from 1 population of 4 to 6 individuals on the island of Hawaii. *Schiedea pubescens* is threatened by feral pigs and goats that consume it and degrade and destroy habitat, and by nonnative plants that compete for light and nutrients. Feral ungulates have been fenced out of the population of *S. pubescens* on the island of Hawaii. Feral goats have been fenced out of a few of the west Maui populations of *S. pubescens*. Nonnative plants have been reduced in the populations that are fenced on Maui. However, the threats are not controlled and are ongoing in the remaining unfenced populations on Maui and the four populations on Molokai. Fire is a potential threat to the Hawaii Island population. In light of the extremely low number of individuals of this species, the threats from goats and nonnative plants are of a high magnitude because they result in mortality and reduced reproductive capacity for the majority of the populations, leading to a relatively high likelihood of extinction. The threats are imminent because they are ongoing with respect to most of the populations. Therefore, we retained an LPN of 2 for this species.

*Schiedea salicaria* (no common name)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Sedum eastwoodiae* (Red Mountain stonecrop)—The following summary is based on information contained in our files and information provided by the California Department of Fish and Game. The petition we received on May

11, 2004 provided no new information on the species. Red Mountain stonecrop is a perennial succulent which occupies relatively barren, rocky openings and cliffs in lower montane coniferous forests, between 1,900 and 4,000 feet elevation. Its distribution is limited to Red Mountain, Mendocino County, California, where it occupies in excess of 54 acres scattered over 4 square miles. Total population size has not been determined, but a preliminary estimate suggests the population may be in excess of 29,000 plants, occupying more than 27 discrete habitat polygons. Intensive monitoring suggests considerable annual variation in plant seedling success and inflorescence production.

The primary threat to the species is the potential for surface mining for chromium and nickel. The entire distribution Red Mountain stonecrop is either owned by mining interests, or is covered by mining claims, none of which are currently active. Surface mining would destroy habitat suitability for this species. The species is also believed threatened by tree and shrub encroachment into its habitat, in absence of fire. Some 25 percent of its known distribution occurred within the boundary of the Red Mountain Fire of June 2008. However, the extent and manner in which Red Mountain stonecrop and its habitat were affected by that fire is not yet known. The species distribution by ownership is described as follows: Federal (Bureau of Land Management), 95 percent; private, 5 percent. Given the magnitude (high) and immediacy (non-imminent) of the threat to the small, scattered populations, and its taxonomy (species), we assigned a listing priority number of 5 to this species.

*Sicyos macrophyllus* ('Anunu)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Sicyos macrophyllus* is a perennial vine found in wet *Metrosideros polymorpha* (ohia) forest and subalpine *Sophora chrysophylla-Myoporum sandwicense* (mamane-naio) forest. This species is known from 10 populations totaling between 24 and 26 individuals in the Kohala and Mauna Kea areas, and in Hawaii Volcanoes National Park (Puna area) on the island of Hawaii, Hawaii. It appears that a naturally occurring population at Kipuka Ki in Hawaii Volcanoes National Park is reproducing by seeds, but seeds have not been successfully germinated under nursery conditions.

This species is threatened by feral pigs, cattle, and mouflon sheep that degrade and destroy habitat, and by nonnative plants that compete for light and nutrients. This species is represented in ex situ collections. Feral pigs have been fenced out of some of the areas where *S. macrophyllus* currently occurs, but the fences do not exclude sheep. Nonnative plants have been reduced in the populations that are fenced. However, the threats are not controlled and are ongoing in the remaining, unfenced populations, and are, therefore, imminent. Similarly the threat from mouflon sheep is ongoing and imminent in all populations, because the current fences do not exclude sheep. In addition, all of the threats are of a high magnitude because habitat degradation and competition from nonnative plants present a risk to the species, resulting in direct mortality or significantly reducing the reproductive capacity, leading to a relatively high likelihood of extinction. Therefore, we retained an LPN of 2 for this species.

*Solanum nelsonii* (popolo)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Solanum nelsonii* is a sprawling or trailing shrub found in coral rubble or sand in coastal sites. This species is known from populations on Molokai (approximately 300 plants), the island of Hawaii (5 plants), and the northwestern Hawaiian Islands (NWHI), Hawaii. The current populations in the NWHI are found on Midway (approximately 260 plants), Laysan (approximately 490 plants), Pearl and Hermes (unknown number of individuals), and Nihoa (8,000 to 15,000 adult plants). On Molokai, *S. nelsonii* is moderately threatened by ungulates that degrade and destroy habitat, and may eat *S. nelsonii.* On Molokai and the NWHI, this species is threatened by nonnative plants that outcompete and displace it. *Solanum nelsonii* is threatened by predation by a nonnative grasshopper in the NWHI. This species is represented in ex situ collections. Ungulate exclusion fences, routine fence monitoring and maintenance, and weed control protect the population of *S. nelsonii* on Molokai. Limited weed control is conducted in the NWHI. These threats are of moderate magnitude because of the relatively large number of plants, and the fact that this species is found on more than one island. The threats are imminent for the majority of the populations because they are ongoing and are not being controlled. We therefore retained an LPN of 8 for this species.

*Sphaeralcea gierischii* (Gierisch mallow)—The following information is based on information contained in our files, including site visits by species experts. There are nine known populations of this species on a combined total of approximately 59.5 ac (24.12 ha) in Arizona and Utah. Seven populations are found on approximately 55 ac (22.3 ha) managed by the Bureau of Land Management in Arizona. One population occurs on approximately 2 ac (0.81 ha) on land managed by the Arizona State Land Department. One population occurs on approximately 2.5 ac (1.01 ha) in Utah. The primary threat to the species in Arizona is ongoing gypsum mining and associated activities. The primary threat to the species in Utah is potential impacts from off-road vehicle use. The threats are high in magnitude, since survival of the species is threatened throughout its entire range in Arizona by gypsum mining, with the two largest populations in active mining operations. Loss of those two populations would significantly reduce the total number of individuals throughout the range, threatening the long-term viability of this species. The threats are imminent, since they are ongoing in Arizona. Therefore, we assigned an LPN of 2 to this species.

*Stenogyne cranwelliae* (no common name)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Stenogyne cranwelliae* is a creeping vine found in wet forest dominated by *Metrosideros polymorpha* (ohia) on the island of Hawaii, Hawaii. *Stenogyne cranwelliae* is known from 10 populations totaling fewer than 110 individuals. This species is threatened by feral pigs that degrade and destroy habitat, and by nonnative plants that compete for light and nutrients. In addition, *S. cranwelliae* is potentially threatened by feral pigs and rats that may directly prey upon it, and by randomly occurring natural events such as hurricanes and landslides. This species is represented in an ex situ collection. All of the threats are ongoing rangewide, and no efforts for control or eradication are being undertaken for feral pigs, nonnative plants, or rats. These threats significantly affect the entire species particularly in light of its small population size. We retained an LPN of 2 because these imminent threats are of a high magnitude.

*Symphyotrichum georgianum* (Georgia aster)—The following summary is based on information contained in our files. No new information was provided in the petition we received on

May 11, 2004. Georgia aster is a relict species of post oak savanna/prairie communities that existed in the southeast prior to widespread fire suppression and extirpation of large native grazing animals. Georgia aster currently occurs in the States of Alabama, Georgia, North Carolina and South Carolina. The species is presumed extant in 8 counties in Alabama, 22 counties in Georgia, 9 counties in North Carolina, and 15 counties in South Carolina. The species appears to have been eliminated from Florida.

Most remaining populations survive adjacent to roads, utility rights-of-way and other openings where current land management mimics natural disturbance regimes. Most populations are small (10–100 stems), and since the species' main mode of reproduction is vegetative, each isolated population may represent only a few genotypes. Many populations are currently threatened by one or more of the following factors: Woody succession due to fire suppression, development, highway expansion or improvement, and herbicide application. However, the species is still relatively widely distributed, and recent information indicates the species is more abundant than when we initially identified it as a candidate for listing. Taking into account its distribution and abundance, the magnitude of threats is moderate. Thus we assigned an LPN of 8 for this species.

*Zanthoxylum oahuense* (Ae)—We continue to find that listing this species is warranted-but-precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Ferns and Allies*

*Christella boydiae* (no common name)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. This species is a small- to medium-sized fern found in mesic to wet forest along stream banks on the islands of Oahu and Maui, Hawaii. Historically, this species was also found on the island of Hawaii, but it has been extirpated there. Currently, this species is known from 7 populations totaling approximately 300 individuals. This species is threatened by feral pigs that degrade and destroy habitat and may eat this plant, and by nonnative plants that compete for light and nutrients. Feral pigs have been fenced out of the largest population on Maui, and nonnative plants have been reduced in the fenced area. No conservation efforts are under way to alleviate threats to the other two populations on Maui, or for the two populations on Oahu. This species is represented in an ex situ collection. The magnitude of the threats acting upon the currently extant populations is moderate because the largest population is protected from pigs, and nonnative plants have been reduced in this area. The threats are ongoing and therefore imminent. Therefore, we retained an LPN of 8 for this species.

*Doryopteris takeuchii* (no common name)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Huperzia stemmermanniae* (Waewaeiole)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. This species is an epiphytic pendant clubmoss found in mesic-to-wet *Metrosideros polymorpha-Acacia koa* (ohia-koa) forests on the islands of Maui and Hawaii, Hawaii. Only 3 populations are known, on Maui and Hawaii, totaling approximately 30 individuals. The Maui population has not been relocated since 1995. *Huperzia stemmermanniae* is threatened by feral pigs, goats, cattle, and axis deer that degrade and destroy habitat, and by nonnative plants that compete for light, space, and nutrients. *Huperzia stemmermanniae* is also threatened by randomly occurring natural events due to its small population size. One individual at Waikamoi Preserve may benefit from fencing for axis deer and pigs. This species is represented in ex situ collections. The threats from pigs, goats, cattle, axis deer, and nonnative plants are of a high magnitude because they are sufficiently severe to adversely affect the species throughout its limited range, resulting in direct mortality or significantly reducing reproductive capacity, leading to a relatively high likelihood of extinction. The threats are imminent because they are ongoing. Therefore, we retained an LPN of 2 for this species.

*Microlepia strigosa* var. *mauiensis* (Palapalai)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Microlepia strigosa* var. *mauiensis* is a terrestrial fern found in mesic-to-wet forests. It is currently found in Hawaii on the islands of Maui, Oahu, and Hawaii, from at least 9 populations totaling at least 50 individuals. There is a possibility that the range of this plant variety could be larger and include the other main Hawaiian Islands. *Microlepia strigosa* var. *mauiensis* is threatened by feral pigs that degrade and destroy habitat, and by nonnative plants that compete for light and nutrients. Pigs have been fenced out of some areas on east and west Maui, and on Hawaii, where *M. strigosa* var. *mauiensis* currently occurs, and nonnative plants have been reduced in the fenced areas. However, the threats are not controlled and are ongoing in the remaining unfenced populations on Maui, Oahu, and Hawaii. Therefore, the threats from feral pigs and nonnative plants are imminent. The threats are of a high magnitude because they are sufficiently severe to adversely affect the species throughout its range, resulting in direct mortality or significantly reducing reproductive capacity, leading to a relatively high likelihood of extinction. We therefore retained an LPN of 3 for *M. strigosa* var. *mauiensis.*

**Petitions To Reclassify Species Already Listed or Add to the Listed Range**

We previously made warranted-but-precluded findings on seven petitions seeking to reclassify threatened species to endangered status, and one petition seeking to add New Mexico to the listed range of the Canada lynx. The taxa involved in the reclassification petitions are three populations of the grizzly bear (*Ursus arctos horribilis*), delta smelt (*Hypomesus transpacificus*), the spikedace (*Meda fulgida*), the loach minnow (*Tiaroga cobitis*), and *Sclerocactus brevispinus* (Pariette cactus). Because these species are already listed under the Act, they are not candidates for listing and are not included in Table 1. However, this notice and associated species assessment forms also constitute the resubmitted petition findings for these species. For the three grizzly bear populations, we have not updated the information in our assessments through this notice as explained below. Although we are completing an ongoing review of the status of the grizzly bear in the lower 48 States outside of the Greater Yellowstone Areas (see below), we continue to find that reclassification to endangered for each of the three populations (described below) is warranted but precluded by work identified above (*see* "*Petition Findings for Candidate Species*"). We also have not updated the information in our assessments for the spikedace and loach minnow through this notice as explained below. For delta smelt, we

have not updated the information included in the 12-month finding (published April 7, 2010), which serves as our assessment; we are currently conducting a 5-year review, which will provide updated information when we complete it later this year. For *Sclerocactus brevispinus* and Canada lynx in New Mexico, our updated assessments are provided below. We find that reclassification to endangered status for the delta smelt, spikedace, loach minnow, and *Sclerocactus brevispinus* and adding New Mexico to the listed range of the Canada lynx are all currently warranted but precluded by work identified above (*see* "*Petition Findings for Candidate Species*"). One of the primary reasons that the work identified above is considered higher priority is that the grizzly bear populations, delta smelt, spikedace, loach minnow, and *Sclerocactus brevispinus* are currently listed as threatened, and therefore already receive certain protections under the Act. We promulgated regulations extending take prohibitions for endangered species under section 9 to threatened species (50 CFR 17.31). Prohibited actions under section 9 include, but are not limited to, take (*i.e.,* to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such activity). For plants, prohibited actions under section 9 include removing or reducing to possession any listed plant from an area under Federal jurisdiction (50 CFR 17.61). Other protections include those under section 7(a)(2) of the Act whereby Federal agencies must insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any endangered or threatened species.

Grizzly bear (*Ursus arctos horribilis*) North Cascades ecosystem, Cabinet-Yaak, and Selkirk populations (Region 6)—We have not updated the information in our uplisting findings with regard to the grizzly bear (*Ursus arctos horribilis*) populations in the North Cascade, the Cabinet-Yaak, or the Selkirk Ecosystems in this notice. Between 1991 and 1999, we issued warranted-but-precluded findings to reclassify grizzly bears as endangered in the North Cascades (56 FR 33892, July 24, 1991; 63 FR 30453, June 4, 1998), the Cabinet-Yaak (58 FR 8250, February 12, 1993; 64 FR 26725, May 17, 1999), and the Selkirk Ecosystems (64 FR 26725, May 17, 1999).

On April 18, 2007, We initiated a 5-year review to evaluate the current status of grizzly bears in the lower 48 States (72 FR 19549–19551). This status review will fully evaluate the biological conservation status of each population according to the 5 factors in Section 4 of the Act. Although there is sufficient evidence to support multiple DPSs within the lower 48 State listing, we do not intend to complete a DPS analysis of each of these populations individually within the 5-year review. Instead, any DPS analyses would be completed prior to or concurrent with any rulemakings. We expect this 5-year review to be completed in late 2010.

Delta smelt (*Hypomesus transpacificus*) (Region 8) (*see* 75 FR 17667; April 7, 2010, for additional information on why reclassification to endangered is warranted but precluded)—In March 2004, we completed a 5-year review for delta smelt in which we determined a change in status from threatened to endangered was not recommended. While none of the threats, other than apparent abundance, show significant differences from 2004, we now have strong evidence, not available at the time of our 5-year review, that at least some of those factors are endangering the species. The primary evidence is the continuing downward trend in delta smelt abundance indices since a significant decline that occurred in 2002. The most recent fall midwater trawl abundance index is the lowest ever recorded—less than one-tenth the level it was in 2003. In addition, a 2005 population viability analysis calculated a 50-percent likelihood that the species could reach effective extinction (8,000 individuals) within 20 years.

There are many primary threats to the species including: Direct entrainments by State and Federal water export facilities; summer and fall increases in salinity and water clarity, and effects from introduced species. Additional threats are predation by striped and largemouth bass and inland silversides, entrainment into power plants, contaminants, and small population size. Existing regulatory mechanisms have not proven adequate to halt the decline of delta smelt since the time of listing as a threatened species.

As a result of our analysis of the best available scientific and commercial information, we have assigned uplisting the delta smelt an LPN of 2, based on high magnitude and immediacy of threats. The magnitude of the threats is high, because they occur rangewide and result in mortality or significantly reduce the reproductive capacity of the species, leading to a relatively high likelihood of extinction. They are imminent because these threats are ongoing and, in some cases (*e.g.,* nonnative species), considered irreversible.

Spikedace (*Meda fulgida*) (Region 2)—We continue to find that uplisting this species to endangered is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed uplisting rule, in combination with a proposed designation of critical habitat, that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

Loach minnow (*Tiaroga cobitis*) (Region 2)—We continue to find that uplisting this species to endangered is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed uplisting rule, in combination with a proposed designation of critical habitat, that we expect to publish prior to making the next annual resubmitted 12-month petition finding.

*Sclerocactus brevispinus* (Pariette cactus) (Region 6) (*see* 72 FR 53211, September 18, 2007, and the species assessment form (*see* **ADDRESSES**) for additional information on why reclassification to endangered is warranted but precluded)—The Pariette cactus is restricted to clay badlands of the Wagon Hound member of the Uinta Formation in the Uinta Basin of northeastern Utah. The species is restricted to one population with an overall range of approximately 10 miles by 5 miles in extent. The species' entire population is within a developed and expanding oil and gas field. The location of the species' habitat exposes it to destruction from road, pipeline, and well-site construction in connection with oil and gas development. The species may be collected as a specimen plant for horticultural use. Recreational off-road vehicle use and livestock trampling are additional potential threats. The species is currently federally listed as threatened by its previous inclusion within the species *Sclerocactus glaucus.* Based on current information, we are assigning the Pariette cactus the LPN of 6 for uplisting to endangered. The threats are of a high magnitude since any one of the threats has the potential to severely affect this species because it is a narrow endemic species with a highly limited range and distribution, but the threats are not currently ongoing.

Canada lynx (*Lynx canadensis*) within the State of New Mexico—In our finding of December 17, 2009 (74 FR 66937), we determined that lynx in New Mexico were warranted for listing due to their presence in the state as a result of the Colorado reintroduction effort and we assigned an LPN of 12 to amending the listing of lynx to include New Mexico in the listing. We reconfirm that

assigning an LPN of 12 is appropriate based on nonimminent threats of a low magnitude to the lynx DPS. Human-caused mortality does not occur at a level such that it creates a significant threat to lynx in the contiguous United States. The magnitude of threats to the lynx DPS, inclusive of those lynx in New Mexico, is low. The threats occur infrequently and are nonimminent. We do not consider lynx in New Mexico to be essential to the survival or recovery of the DPS. Furthermore, the amount of suitable habitat for lynx in New Mexico is considered negligible relative to the amount of habitat within the listed range. Potential impacts to the habitat have not been documented to threaten lynx, either in New Mexico or outside of it. The areas outside the currently listed area are not essential to the conservation of the species. The majority of lynx habitats within the contiguous United States are already protected by the Act. Because lynx in the lower 48 are listed as a DPS, the appropriate LPN for this level of magnitude and immediacy of threats is 12.

**Current Notice of Review**

We gather data on plants and animals native to the United States that appear to merit consideration for addition to the Lists of Endangered and Threatened Wildlife and Plants. This notice identifies those species that we currently regard as candidates for addition to the Lists. These candidates include species and subspecies of fish, wildlife, or plants and DPSs of vertebrate animals. This compilation relies on information from status surveys conducted for candidate assessment and on information from State Natural Heritage Programs, other State and Federal agencies, knowledgeable scientists, public and private natural resource interests, and comments received in response to previous notices of review.

Tables 1 and 2 list animals arranged alphabetically by common names under the major group headings, and list plants alphabetically by names of genera, species, and relevant subspecies and varieties. Animals are grouped by class or order. Plants are subdivided into two groups: (1) Flowering plants and (2) ferns and their allies. Useful synonyms and subgeneric scientific names appear in parentheses with the synonyms preceded by an "equals" sign. Several species that have not yet been formally described in the scientific literature are included; such species are identified by a generic or specific name (in italics), followed by "sp." or "ssp." We incorporate standardized common names in these notices as they become available. We sort plants by scientific name due to the inconsistencies in common names, the inclusion of vernacular and composite subspecific names, and the fact that many plants still lack a standardized common name.

Table 1 lists all candidate species, plus species currently proposed for listing under the Act. We emphasize that in this notice we are not proposing to list any of the candidate species; rather, we will develop and publish proposed listing rules for these species in the future. We encourage State agencies, other Federal agencies, and other parties to give consideration to these species in environmental planning.

In Table 1, the "category" column on the left side of the table identifies the status of each species according to the following codes:

PE—Species proposed for listing as endangered. Proposed species are those species for which we have published a proposed rule to list as endangered or threatened in the **Federal Register**. This category does not include species for which we have withdrawn or finalized the proposed rule.

PT—Species proposed for listing as threatened.

PSAT—Species proposed for listing as threatened due to similarity of appearance.

C—Candidates: Species for which we have on file sufficient information on biological vulnerability and threats to support proposals to list them as endangered or threatened. Issuance of proposed rules for these species is precluded at present by other higher priority listing actions. This category includes species for which we made a 12-month warranted-but-precluded finding on a petition to list. We made new findings on all petitions for which we previously made "warranted-but-precluded" findings. We identify the species for which we made a continued warranted-but-precluded finding on a resubmitted petition by the code "C*" in the category column (see "Findings for Petitioned Candidate Species" section for additional information).

The "Priority" column indicates the LPN for each candidate species, which we use to determine the most appropriate use of our available resources. The lowest numbers have the highest priority. We assign LPNs based on the immediacy and magnitude of threats as well as on taxonomic status. We published a complete description of our listing priority system in the **Federal Register** (48 FR 43098, September 21, 1983).

The third column, "Lead Region," identifies the Regional Office to which you should direct information, comments, or questions (*see* addresses under Request for Information at the end of the **SUPPLEMENTARY INFORMATION** section).

Following the scientific name (fourth column) and the family designation (fifth column) is the common name (sixth column). The seventh column provides the known historical range for the species or vertebrate population (for vertebrate populations, this is the historical range for the entire species or subspecies and not just the historical range for the distinct population segment), indicated by postal code abbreviations for States and U.S. territories. Many species no longer occur in all of the areas listed.

Species in Table 2 of this notice are those we included either as proposed species or as candidates in the previous CNOR (published November 9, 2009) that are no longer proposed species or candidates for listing. Since November 9, 2009, we listed 54 species and removed 1 species from candidate status for the reason indicated by the code. The first column indicates the present status of each species, using the following codes (not all of these codes may have been used in this CNOR):

E—Species we listed as endangered.

T—Species we listed as threatened.

Rc—Species we removed from the candidate list because currently available information does not support a proposed listing.

Rp—Species we removed from the candidate list because we have withdrawn the proposed listing.

The second column indicates why we no longer regard the species as a candidate or proposed species using the following codes (not all of these codes may have been used in this CNOR):

A—Species that are more abundant or widespread than previously believed and species that are not subject to the degree of threats sufficient to warrant continuing candidate status, or issuing a proposed or final listing.

F—Species whose range no longer includes a U.S. territory.

I—Species for which we have insufficient information on biological vulnerability and threats to support issuance of a proposed rule to list.

L—Species we added to the Lists of Endangered and Threatened Wildlife and Plants.

M—Species we mistakenly included as candidates or proposed species in the last notice of review.

N—Species that are not listable entities based on the Act's definition of

"species" and current taxonomic understanding.

U—Species that are not subject to the degree of threats sufficient to warrant issuance of a proposed listing or continuance of candidate status due, in part or totally, to conservation efforts that remove or reduce the threats to the species.

X—Species we believe to be extinct.

The columns describing lead region, scientific name, family, common name, and historical range include information as previously described for Table 1.

**Request for Information**

We request you submit any further information on the species named in this notice as soon as possible or whenever it becomes available. We are particularly interested in any information:

(1) Indicating that we should add a species to the list of candidate species;

(2) Indicating that we should remove a species from candidate status;

(3) Recommending areas that we should designate as critical habitat for a species, or indicating that designation of critical habitat would not be prudent for a species;

(4) Documenting threats to any of the included species;

(5) Describing the immediacy or magnitude of threats facing candidate species;

(6) Pointing out taxonomic or nomenclature changes for any of the species;

(7) Suggesting appropriate common names; and

(8) Noting any mistakes, such as errors in the indicated historical ranges.

Submit information, materials, or comments regarding a particular species to the Regional Director of the Region identified as having the lead responsibility for that species. The regional addresses follow:

Region 1. Hawaii, Idaho, Oregon, Washington, American Samoa, Guam, and Commonwealth of the Northern Mariana Islands. Regional Director (TE), U.S. Fish and Wildlife Service, Eastside Federal Complex, 911 NE. 11th Avenue, Portland, OR 97232–4181 (503/231–6158).

Region 2. Arizona, New Mexico, Oklahoma, and Texas. Regional Director (TE), U.S. Fish and Wildlife Service, 500 Gold Avenue, SW., Room 4012, Albuquerque, NM 87102 (505/248–6920).

Region 3. Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin. Regional Director (TE), U.S. Fish and Wildlife Service, Bishop Henry Whipple Federal Building, One Federal Drive, Fort Snelling, MN 55111–4056 (612/713–5334).

Region 4. Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Puerto Rico, and the U.S. Virgin Islands. Regional Director (TE), U.S. Fish and Wildlife Service, 1875 Century Boulevard, Suite 200, Atlanta, GA 30345 (404/679–4156).

Region 5. Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, and West Virginia. Regional Director (TE), U.S. Fish and Wildlife Service, 300 Westgate Center Drive, Hadley, MA 01035–9589 (413/253–8615).

Region 6. Colorado, Kansas, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming. Regional Director (TE), U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225–0486 (303/236–7400).

Region 7. Alaska. Regional Director (TE), U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, AK 99503–6199 (907/786–3505).

Region 8. California and Nevada. Regional Director (TE), U.S. Fish and Wildlife Service, 2800 Cottage Way, Suite W2606, Sacramento, CA 95825 (916/414–6464).

We will provide information received in response to the previous CNOR to the Region having lead responsibility for each candidate species mentioned in the submission. We will likewise consider all information provided in response to this CNOR in deciding whether to propose species for listing and when to undertake necessary listing actions (including whether emergency listing pursuant to section 4(b)(7) of the Act is appropriate). Information and comments we receive will become part of the administrative record for the species, which we maintain at the appropriate Regional Office.

Before including your address, phone number, e-mail address, or other personal identifying information in your submission, be advised that your entire submission—including your personal identifying information—may be made publicly available at any time. Although you can ask us in your submission to withhold from public review your personal indentifying information, we cannot guarantee that we will be able to do so.

**Authority:** This notice is published under the authority of the Endangered Species Act (16 U.S.C. 1531 *et seq.*).

Dated: October 22, 2010.

**Rowan W. Gould,**

*Acting Director, Fish and Wildlife Service.*

TABLE 1—CANDIDATE NOTICE OF REVIEW (ANIMALS AND PLANTS)

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table.]

| Status | | Lead region | Scientific name | Family | Common name | Historical range |
|---|---|---|---|---|---|---|
| Category | Priority | | | | | |
| MAMMALS: | | | | | | |
| C* | 2 | R4 | *Eumops floridanus* | Molossidae | Bat, Florida bonneted | U.S.A. (FL). |
| C* | 3 | R1 | *Emballonura semicaudata rotensis.* | Emballonuridae | Bat, Pacific sheath-tailed (Mariana Islands subspecies). | U.S.A. (GU, CNMI). |
| C* | 3 | R1 | *Emballonura semicaudata semicaudata.* | Emballonuridae | Bat, Pacific sheath-tailed (American Samoa DPS). | U.S.A. (AS), Fiji, Independent Samoa, Tonga, Vanuatu. |
| C* | 2 | R5 | *Sylvilagus transitionalis.* | Leporidae | Cottontail, New England. | U.S.A. (CT, MA, ME, NH, NY, RI, VT). |

TABLE 1—CANDIDATE NOTICE OF REVIEW (ANIMALS AND PLANTS)—Continued

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table.]

| Status | | Lead region | Scientific name | Family | Common name | Historical range |
|---|---|---|---|---|---|---|
| Category | Priority | | | | | |
| C* | 6 | R8 | *Martes pennanti* | Mustelidae | Fisher (west coast DPS). | U.S.A. (CA, CT, IA, ID, IL, IN, KY, MA, MD, ME, MI, MN, MT, ND, NH, NJ, NY, OH, OR, PA, RI, TN, UT, VA, VT, WA, WI, WV, WY), Canada. |
| C* | 3 | R2 | *Zapus hudsonius luteus.* | Zapodidae | Mouse, New Mexico meadow jumping. | U.S.A. (AZ, CO, NM). |
| C* | 3 | R1 | *Thomomys mazama couchi.* | Geomyidae | Pocket gopher, Shelton. | U.S.A. (WA). |
| C | 3 | R1 | *Thomomys mazama douglasii.* | Geomyidae | Pocket gopher, Brush Prairie. | U.S.A. (WA). |
| C* | 3 | R1 | *Thomomys mazama glacialis.* | Geomyidae | Pocket gopher, Roy Prairie. | U.S.A. (WA). |
| C* | 3 | R1 | *Thomomys mazama louiei.* | Geomyidae | Pocket gopher, Cathlamet. | U.S.A. (WA). |
| C* | 3 | R1 | *Thomomys mazama melanops.* | Geomyidae | Pocket gopher, Olympic. | U.S.A. (WA). |
| C* | 3 | R1 | *Thomomys mazama pugetensis.* | Geomyidae | Pocket gopher, Olympia. | U.S.A. (WA). |
| C* | 3 | R1 | *Thomomys mazama tacomensis.* | Geomyidae | Pocket gopher, Tacoma. | U.S.A. (WA). |
| C* | 3 | R1 | *Thomomys mazama tumuli.* | Geomyidae | Pocket gopher, Tenino | U.S.A. (WA). |
| C* | 3 | R1 | *Thomomys mazama yelmensis.* | Geomyidae | Pocket gopher, Yelm | U.S.A. (WA). |
| C* | 3 | R6 | *Cynomys gunnisoni* | Sciuridae | Prairie dog, Gunnison's (central and south-central Colorado, north-central New Mexico SPR). | U.S.A. (CO, NM). |
| C* | 9 | R1 | *Spermophilus brunneus endemicus.* | Sciuridae | Squirrel, Southern Idaho ground. | U.S.A. (ID). |
| C* | 5 | R1 | *Spermophilus washingtoni.* | Sciuridae | Squirrel, Washington ground. | U.S.A. (WA, OR). |
| BIRDS: | | | | | | |
| C* | 3 | R1 | *Porzana tabuensis* | Rallidae | Crake, spotless (American Samoa DPS). | U.S.A. (AS), Australia, Fiji, Independent Samoa, Marquesas, Philippines, Society Islands, Tonga. |
| C* | 3 | R8 | *Coccyzus americanus* | Cuculidae | Cuckoo, yellow-billed (Western U.S. DPS). | U.S.A. (Lower 48 States), Canada, Mexico, Central and South America. |
| C* | 9 | R1 | *Gallicolumba stairi* | Columbidae | Ground-dove, friendly (American Samoa DPS). | U.S.A. (AS), Independent Samoa. |
| C* | 3 | R1 | *Eremophila alpestris strigata.* | Alaudidae | Horned lark, streaked | U.S.A. (OR, WA), Canada (BC). |
| C* | 3 | R5 | *Calidris canutus rufa* | Scolopacidae | Knot, red | U.S.A. (Atlantic coast), Canada, South America. |
| C* | 8 | R7 | *Gavia adamsii* | Gaviidae | Loon, yellow-billed | U.S.A. (AK), Canada, Norway, Russia, coastal waters of southern Pacific and North Sea. |
| C* | 2 | R7 | *Brachyramphus brevirostris.* | Alcidae | Murrelet, Kittlitz's | U.S.A. (AK), Russia. |
| C* | 5 | R8 | *Synthliboramphus hypoleucus.* | Alcidae | Murrelet, Xantus's | U.S.A. (CA), Mexico. |

TABLE 1—CANDIDATE NOTICE OF REVIEW (ANIMALS AND PLANTS)—Continued

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table.]

| Status | | Lead region | Scientific name | Family | Common name | Historical range |
|---|---|---|---|---|---|---|
| Category | Priority | | | | | |
| C* | 2 | R6 | *Anthus spragueii* | Motacillidae | Pipit, Sprauge's | U.S.A. (AL, AR, AZ, CA, GA, LA, MA, MI, MN, MS, MT, ND, OH, OK, SC, SD, TX), Canada, Mexico. |
| PT | — | R6 | *Charadrius montanus* | Charadriidae | Plover, mountain | U.S.A. (AZ, CA, CO, KS, MT, ND, NE, NM, NN, OK, SD, TX, UT, WY), Canada (AB, SK), Mexico. |
| C* | 2 | R2 | *Tympanuchus pallidicinctus*. | Phasianidae | Prairie-chicken, lesser | U.S.A. (CO, KA, NM, OK, TX). |
| C* | 8 | R6 | *Centrocercus urophasianus*. | Phasianidae | Sage-grouse, greater | U.S.A. (AZ, CA, CO, ID, MT, ND, NE, NV, OR, SD, UT, WA, WY), Canada (AB, BC, SK). |
| C* | 3 | R8 | *Centrocercus urophasianus*. | Phasianidae | Sage-grouse, greater (Bi-State DPS). | U.S.A. (AZ, CA, CO, ID, MT, ND, NE, NV, OR, SD, UT, WA, WY), Canada (AB, BC, SK). |
| C* | 6 | R1 | *Centrocercus urophasianus*. | Phasianidae | Sage-grouse, greater (Columbia Basin DPS). | U.S.A. (AZ, CA, CO, ID, MT, ND, NE, NV, OR, SD, UT, WA, WY), Canada (AB, BC, SK). |
| C* | 2 | R6 | *Centrocercus minimus* | Phasianidae | Sage-grouse, Gunnison. | U.S.A. (AZ, CO, NM, UT). |
| C* | 3 | R1 | *Oceanodroma castro* | Hydrobatidae | Storm-petrel, band-rumped (Hawaii DPS). | U.S.A. (HI), Atlantic Ocean, Ecuador (Galapagos Islands), Japan. |
| C* | 11 | R4 | *Dendroica angelae* | Emberizidae | Warbler, elfin-woods | U.S.A. (PR). |
| REPTILES: | | | | | | |
| C* | 3 | R2 | *Thamnophis eques megalops*. | Colubridae | Gartersnake, northern Mexican. | U.S.A. (AZ, NM, NV), Mexico. |
| C* | 2 | R2 | *Sceloporus arenicolus* | Iguanidae | Lizard, sand dune | U.S.A. (TX, NM). |
| C* | 9 | R3 | *Sistrurus catenatus catenatus*. | Viperidae | Massasauga (=rattlesnake), eastern. | U.S.A. (IA, IL, IN, MI, MO, MN, NY, OH, PA, WI), Canada. |
| C* | 3 | R4 | *Pituophis melanoleucus lodingi*. | Colubridae | Snake, black pine | U.S.A. (AL, LA, MS). |
| C* | 5 | R4 | *Pituophis ruthveni* | Colubridae | Snake, Louisiana pine | U.S.A. (LA, TX). |
| C* | 3 | R2 | *Chionactis occipitalis klauberi*. | Colubridae | Snake, Tucson shovel-nosed. | U.S.A. (AZ). |
| C* | 3 | R2 | *Kinosternon sonoriense longifemorale*. | Kinosternidae | Turtle, Sonoyta mud | U.S.A. (AZ), Mexico. |
| AMPHIBIANS: | | | | | | |
| C* | 9 | R8 | *Rana luteiventris* | Ranidae | Frog, Columbia spotted (Great Basin DPS). | U.S.A. (AK, ID, MT, NV, OR, UT, WA, WY), Canada (BC). |
| C* | 3 | R8 | *Rana muscosa* | Ranidae | Frog, mountain yellow-legged (Sierra Nevada DPS). | U.S.A. (CA, NV). |
| C* | 2 | R1 | *Rana pretiosa* | Ranidae | Frog, Oregon spotted | U.S.A. (CA, OR, WA), Canada (BC). |
| C* | 11 | R8 | *Lithobates onca* | Ranidae | Frog, relict leopard | U.S.A. (AZ, NV, UT). |
| PE | 3 | R3 | *Cryptobranchus alleganiensis bishopi*. | Crytobranchidae | Hellbender, Ozark | U.S.A. (AR, MO). |
| C* | 2 | R2 | *Eurycea waterlooensis* | Plethodontidae | Salamander, Austin blind. | U.S.A. (TX). |

TABLE 1—CANDIDATE NOTICE OF REVIEW (ANIMALS AND PLANTS)—Continued

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table.]

| Status | | Lead region | Scientific name | Family | Common name | Historical range |
|---|---|---|---|---|---|---|
| Category | Priority | | | | | |
| C* | 8 | R2 | *Eurycea naufragia* | Plethodontidae | Salamander, Georgetown. | U.S.A. (TX). |
| C* | 2 | R2 | *Plethodon neomexicanus*. | Plethodontidae | Salamander, Jemez Mountains. | U.S.A. (NM). |
| C* | 8 | R2 | *Eurycea tonkawae* | Plethodontidae | Salamander, Jollyville Plateau. | U.S.A. (TX). |
| C* | 2 | R2 | *Eurycea chisholmensis*. | Plethodontidae | Salamander, Salado | U.S.A. (TX). |
| C* | 11 | R8 | *Bufo canorus* | Bufonidae | Toad, Yosemite | U.S.A. (CA). |
| C | 3 | R2 | *Hyla wrightorum* | Hylidae | Treefrog, Arizona (Huachuca/Canelo DPS). | U.S.A. (AZ), Mexico (Sonora). |
| C* | 8 | R4 | *Necturus alabamensis* | Proteidae | Waterdog, black warrior (=Sipsey Fork). | U.S.A. (AL). |
| FISHES: | | | | | | |
| C* | 8 | R2 | *Gila nigra* | Cyprinidae | Chub, headwater | U.S.A. (AZ, NM). |
| C* | 7 | R6 | *Iotichthys phlegethontis*. | Cyprinidae | Chub, least | U.S.A. (UT). |
| C* | 9 | R2 | *Gila robusta* | Cyprinidae | Chub, roundtail (Lower Colorado River Basin DPS). | U.S.A. (AZ, CO, NM, UT, WY). |
| PE | 5 | R4 | *Phoxinus saylori* | Cyprinidae | Dace, laurel | U.S.A. (TN). |
| C* | 11 | R6 | *Etheostoma cragini* | Percidae | Darter, Arkansas | U.S.A. (AR, CO, KS, MO, OK). |
| PE | 5 | R4 | *Etheostoma susanae* | Percidae | Darter, Cumberland | U.S.A. (KY, TN). |
| C | 2 | R5 | *Crystallaria cincotta* | Percidae | Darter, diamond | U.S.A. (KY, OH, TN, WV). |
| C | 3 | R4 | *Etheostoma sagitta spilotum*. | Percidae | Darter, Kentucky arrow. | U.S.A. (KY). |
| C* | 8 | R4 | *Percina aurora* | Percidae | Darter, Pearl | U.S.A. (LA, MS). |
| PE | 2 | R4 | *Etheostoma phytophilum*. | Percidae | Darter, rush | U.S.A. (AL). |
| PE | 2 | R4 | *Etheostoma moorei* | Percidae | Darter, yellowcheek | U.S.A. (AR). |
| C* | 3 | R6 | *Thymallus arcticus* | Salmonidae | Grayling, Arctic (upper Missouri River DPS). | U.S.A. (AK, MI, MT, WY), Canada, northern Asia, northern Europe. |
| PE | 2 | R4 | *Noturus crypticus* | Ictaluridae | Madtom, chucky | U.S.A. (TN). |
| C | 5 | R4 | *Moxostoma* sp | Catostomidae | Redhorse, sicklefin | U.S.A. (GA, NC, TN). |
| C* | 2 | R3 | *Cottus* sp | Cottidae | Sculpin, grotto | U.S.A. (MO). |
| C* | 5 | R2 | *Notropis oxyrhynchus* | Cyprinidae | Shiner, sharpnose | U.S.A. (TX). |
| C* | 5 | R2 | *Notropis buccula* | Cyprinidae | Shiner, smalleye | U.S.A. (TX). |
| C* | 3 | R2 | *Catostomus discobolus yarrowi*. | Catostomidae | Sucker, Zuni bluehead | U.S.A. (AZ, NM). |
| PSAT | N/A | R1 | *Salvelinus malma* | Salmonidae | Trout, Dolly Varden | U.S.A. (AK, WA), Canada, East Asia. |
| C* | 9 | R2 | *Oncorhynchus clarki virginalis*. | Salmonidae | Trout, Rio Grande cutthroat. | U.S.A. (CO, NM). |
| CLAMS: | | | | | | |
| C | 5 | R4 | *Villosa choctawensis* | Unionidae | Bean, Choctaw | U.S.A. (AL, FL). |
| PE | 2 | R3 | *Villosa fabalis* | Unionidae | Bean, rayed | U.S.A. (IL, IN, KY, MI, NY, OH, TN, PA, VA, WV), Canada (ON). |
| C | 2 | R4 | *Fusconaia rotulata* | Unionidae | Ebonyshell, round | U.S.A. (AL, FL). |
| C* | 8 | R2 | *Popenaias popei* | Unionidae | Hornshell, Texas | U.S.A. (NM, TX), Mexico. |
| C* | 2 | R4 | *Ptychobranchus subtentum*. | Unionidae | Kidneyshell, fluted | U.S.A. (AL, KY, TN, VA). |
| C | 2 | R4 | *Ptychobranchus jonesi* | Unionidae | Kidneyshell, southern | U.S.A. (AL, FL). |
| C* | 2 | R4 | *Lampsilis rafinesqueana*. | Unionidae | Mucket, Neosho | U.S.A. (AR, KS, MO, OK). |
| C | 2 | R3 | *Plethobasus cyphyus* | Unionidae | Mussel, sheepnose | U.S.A. (AL, IA, IL, IN, KY, MN, MO, MS, OH, PA, TN, VA, WI, WV). |
| C* | 2 | R4 | *Margaritifera marrianae*. | Margaritiferidae | Pearlshell, Alabama | U.S.A. (AL). |

TABLE 1—CANDIDATE NOTICE OF REVIEW (ANIMALS AND PLANTS)—Continued

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table.]

| Status | | Lead region | Scientific name | Family | Common name | Historical range |
|---|---|---|---|---|---|---|
| Category | Priority | | | | | |
| C* | 2 | R4 | *Lexingtonia dolabelloides*. | Unionidae | Pearlymussel, slabside. | U.S.A. (AL, KY, TN, VA). |
| C | 5 | R4 | *Pleurobema strodeanum*. | Unionidae | Pigtoe, fuzzy | U.S.A. (AL, FL). |
| C | 5 | R4 | *Fusconaia escambia* .. | Unionidae | Pigtoe, narrow | U.S.A. (AL, FL). |
| C | 11 | R4 | *Fusconaia (=Quincuncina) burkei*. | Unionidae | Pigtoe, tapered | U.S.A. (AL, FL). |
| C | 9 | R4 | *Quadrula cylindrica cylindrica*. | Unionidae | Rabbitsfoot | U.S.A. (AL, AR, GA, IN, IL, KS, KY, LA, MS, MO, OK, OH, PA, TN, WV). |
| C | 5 | R4 | *Hamiota (=Lampsilis) australis*. | Unionidae | Sandshell, southern | U.S.A. (AL, FL). |
| PE | – | R3 | *Epioblasma triquetra* .. | Unionidae | Snuffbox | U.S.A. (IN, MI, NY, OH, PA, WV), Canada (ON). |
| C | 4 | R3 | *Cumberlandia monodonta*. | Margaritiferidae | Spectaclecase | U.S.A. (AL, AR, IA, IN, IL, KS, KY, MO, MN, NE, OH, TN, VA, WI, WV). |
| PE | 2 | R4 | *Elliptio spinosa* | Unionidae | Spinymussel, Altamaha. | U.S.A. (GA). |
| SNAILS: | | | | | | |
| C | 8 | R4 | *Elimia melanoides* | Pleuroceridae | Mudalia, black | U.S.A. (AL). |
| C* | 2 | R1 | *Ostodes strigatus* | Potaridae | Sisi snail | U.S.A. (AS). |
| C* | 2 | R2 | *Pseudotryonia adamantina*. | Hydrobiidae | Snail, Diamond Y Spring. | U.S.A. (TX). |
| C* | 2 | R1 | *Samoana fragilis* | Partulidae | Snail, fragile tree | U.S.A. (GU, MP). |
| C* | 2 | R1 | *Partula radiolata* | Partulidae | Snail, Guam tree | U.S.A. (GU). |
| C* | 2 | R1 | *Partula gibba* | Partulidae | Snail, Humped tree | U.S.A. (GU, MP). |
| C* | 2 | R1 | *Partulina semicarinata* | Achatinellidae | Snail, Lanai tree | U.S.A. (HI). |
| C* | 2 | R1 | *Partulina variabilis* | Achatinellidae | Snail, Lanai tree | U.S.A. (HI). |
| C* | 2 | R1 | *Partula langfordi* | Partulidae | Snail, Langford's tree | U.S.A. (MP). |
| C* | 2 | R2 | *Cochliopa texana* | Hydrobiidae | Snail, Phantom cave .. | U.S.A. (TX). |
| C* | 2 | R1 | *Newcombia cumingi* | Achatinellidae | Snail, Newcomb's tree | U.S.A. (HI). |
| C* | 2 | R1 | *Eua zebrina* | Partulidae | Snail, Tutuila tree | U.S.A. (AS). |
| C* | 2 | R2 | *Pyrgulopsis chupaderae*. | Hydrobiidae | Springsnail, Chupadera. | U.S.A. (NM). |
| C* | 11 | R8 | *Pyrgulopsis notidicola* | Hydrobiidae | Springsnail, elongate mud meadows. | U.S.A. (NV). |
| C* | 11 | R2 | *Pyrgulopsis gilae* | Hydrobiidae | Springsnail, Gila | U.S.A. (NM). |
| C* | 2 | R2 | *Tryonia circumstriata (=stocktonensis)*. | Hydrobiidae | Springsnail, Gonzales | U.S.A. (TX). |
| C* | 8 | R2 | *Pyrgulopsis thompsoni* | Hydrobiidae | Springsnail, Huachuca | U.S.A. (AZ), Mexico. |
| C* | 11 | R2 | *Pyrgulopsis thermalis* | Hydrobiidae | Springsnail, New Mexico. | U.S.A. (NM). |
| C* | 8 | R2 | *Pyrgulopsis morrisoni* | Hydrobiidae | Springsnail, Page | U.S.A. (AZ). |
| C* | 2 | R2 | *Tryonia cheatumi* | Hydrobiidae | Springsnail (=Tryonia), Phantom. | U.S.A. (TX). |
| C | 2 | R2 | *Pyrgulopsis bernardina*. | Hydrobiidae | Springsnail, San Bernardino. | U.S.A. (AZ), Mexico (Sonora). |
| C* | 2 | R2 | *Pyrgulopsis trivialis* | Hydrobiidae | Springsnail, Three Forks. | U.S.A. (AZ). |
| C* | 5 | R2 | *Sonorella rosemontensis*. | Helminthoglyptidae | Talussnail, Rosemont | U.S.A. (AZ). |
| INSECTS: | | | | | | |
| C* | 8 | R1 | *Nysius wekiuicola* | Lygaeidae | Bug, Wekiu | U.S.A. (HI). |
| C | 3 | R4 | *Strymon acis bartrami* | Lycaenidae | Butterfly, Bartram's hairstreak. | U.S.A. (FL). |
| C | 3 | R4 | *Anaea troglodyta floridalis*. | Nymphalidae | Butterfly, Florida leafwing. | U.S.A. (FL). |
| C* | 3 | R1 | *Hypolimnas octucula mariannensis*. | Nymphalidae | Butterfly, Mariana eight-spot. | U.S.A. (GU, MP). |
| C* | 2 | R1 | *Vagrans egistina* | Nymphalidae | Butterfly, Mariana wandering. | U.S.A. (GU, MP). |
| C* | 3 | R4 | *Cyclargus thomasi bethunebakeri*. | Lycaenidae | Butterfly, Miami blue .. | U.S.A. (FL), Bahamas. |

TABLE 1—CANDIDATE NOTICE OF REVIEW (ANIMALS AND PLANTS)—Continued

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table.]

| Status | | Lead region | Scientific name | Family | Common name | Historical range |
|---|---|---|---|---|---|---|
| Category | Priority | | | | | |
| C* | 5 | R4 | *Glyphopsyche sequatchie*. | Limnephilidae | Caddisfly, Sequatchie | U.S.A. (TN). |
| C | 5 | R4 | *Pseudanophthalmus insularis*. | Carabidae | Cave beetle, Baker Station (= insular). | U.S.A. (TN). |
| C* | 5 | R4 | *Pseudanophthalmus caecus*. | Carabidae | Cave beetle, Clifton | U.S.A. (KY). |
| C | 11 | R4 | *Pseudanophthalmus colemanensis*. | Carabidae | Cave beetle, Coleman | U.S.A. (TN). |
| C | 5 | R4 | *Pseudanophthalmus fowlerae*. | Carabidae | Cave beetle, Fowler's | U.S.A. (TN). |
| C* | 5 | R4 | *Pseudanophthalmus frigidus*. | Carabidae | Cave beetle, icebox | U.S.A. (KY). |
| C | 5 | R4 | *Pseudanophthalmus tiresias*. | Carabidae | Cave beetle, Indian Grave Point (= Soothsayer). | U.S.A. (TN). |
| C* | 5 | R4 | *Pseudanophthalmus inquisitor*. | Carabidae | Cave beetle, inquirer | U.S.A. (TN). |
| C* | 5 | R4 | *Pseudanophthalmus troglodytes*. | Carabidae | Cave beetle, Louisville | U.S.A. (KY). |
| C | 5 | R4 | *Pseudanophthalmus paulus*. | Carabidae | Cave beetle, Noblett's | U.S.A. (TN). |
| C* | 5 | R4 | *Pseudanophthalmus parvus*. | Carabidae | Cave beetle, Tatum | U.S.A. (KY). |
| C* | 3 | R1 | *Euphydryas editha taylori*. | Nymphalidae | Checkerspot butterfly, Taylor's (= Whulge). | U.S.A. (OR, WA), Canada (BC). |
| C* | 9 | R1 | *Megalagrion nigrohamatum nigrolineatum*. | Coenagrionidae | Damselfly, blackline Hawaiian. | U.S.A. (HI). |
| C* | 2 | R1 | *Megalagrion leptodemas*. | Coenagrionidae | Damselfly, crimson Hawaiian. | U.S.A. (HI). |
| C* | 2 | R1 | *Megalagrion oceanicum*. | Coenagrionidae | Damselfly, oceanic Hawaiian. | U.S.A. (HI). |
| C* | 8 | R1 | *Megalagrion xanthomelas*. | Coenagrionidae | Damselfly, orangeblack Hawaiian. | U.S.A. (HI). |
| PE | 2 | R8 | *Dinacoma caseyi* | Scarabidae | June beetle, Casey's | U.S.A. (CA). |
| C | 5 | R8 | *Ambrysus funebris* | Naucoridae | Naucorid bug (=Furnace Creek), Nevares Spring. | U.S.A. (CA). |
| C* | 2 | R1 | *Drosophila digressa* | Drosophilidae | fly, Hawaiian Picture-wing. | U.S.A. (HI). |
| C* | 8 | R2 | *Heterelmis stephani* | Elmidae | Riffle beetle, Stephan's. | U.S.A. (AZ). |
| C* | 8 | R3 | *Hesperia dacotae* | Hesperiidae | Skipper, Dakota | U.S.A. (MN, IA, SD, ND, IL), Canada. |
| C* | 8 | R1 | *Polites mardon* | Hesperiidae | Skipper, Mardon | U.S.A. (CA, OR, WA). |
| C* | 2 | R6 | *Cicindela albissima* | Cicindelidae | Tiger beetle, Coral Pink Sand Dunes. | U.S.A. (UT). |
| C* | 5 | R4 | *Cicindela highlandensis*. | Cicindelidae | Tiger beetle, highlands. | U.S.A. (FL). |
| ARACHNIDS: | | | | | | |
| C* | 2 | R2 | *Cicurina wartoni* | Dictynidae | Meshweaver, Warton's cave. | U.S.A. (TX). |
| CRUSTACEANS: | | | | | | |
| C | 2 | R2 | *Gammarus hyalleloides*. | Gammaridae | Amphipod, diminutive | U.S.A. (TX). |
| C | 8 | R5 | *Stygobromus kenki* | Crangonyctidae | Amphipod, Kenk's | U.S.A. (DC, MD). |
| C* | 5 | R1 | *Metabetaeus lohena* | Alpheidae | Shrimp, anchialine pool. | U.S.A. (HI). |
| C* | 5 | R1 | *Palaemonella burnsi* | Palaemonidae | Shrimp, anchialine pool. | U.S.A. (HI). |
| C* | 5 | R1 | *Procaris hawaiana* | Procarididae | Shrimp, anchialine pool. | U.S.A. (HI). |
| C* | 4 | R1 | *Vetericaris chaceorum* | Procaridae | Shrimp, anchialine pool. | U.S.A. (HI). |
| FLOWERING PLANTS: | | | | | | |
| C* | 11 | R8 | *Abronia alpina* | Nyctaginaceae | Sand-verbena, Ramshaw Meadows. | U.S.A. (CA). |

TABLE 1—CANDIDATE NOTICE OF REVIEW (ANIMALS AND PLANTS)—Continued

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table.]

| Status | | Lead region | Scientific name | Family | Common name | Historical range |
|---|---|---|---|---|---|---|
| Category | Priority | | | | | |
| C* | 8 | R4 | *Agave eggersiana* | Agavaceae | No common name | U.S.A. (VI). |
| C* | 8 | R4 | *Arabis georgiana* | Brassicaceae | Rockcress, Georgia | U.S.A. (AL, GA). |
| C* | 11 | R4 | *Argythamnia blodgettii* | Euphorbiaceae | Silverbush, Blodgett's | U.S.A. (FL). |
| C* | 3 | R1 | *Artemisia campestris* var. *wormskioldii*. | Asteraceae | Wormwood, northern | U.S.A. (OR, WA). |
| C* | 5 | R1 | *Astragalus anserinus* | Fabaceae | Milkvetch, Goose Creek. | U.S.A. (ID, NV, UT). |
| C | 3 | R1 | *Astragalus cusickii* var. *packardiae*. | Fabaceae | Milkvetch, Packard's | U.S.A. (ID). |
| C* | 11 | R6 | *Astragalus tortipes* | Fabaceae | Milkvetch, Sleeping Ute. | U.S.A. (CO). |
| C* | 2 | R1 | *Bidens amplectens* | Asteraceae | Ko'oko'olau | U.S.A. (HI). |
| C* | 3 | R1 | *Bidens campylotheca pentamera*. | Asteraceae | Ko'oko'olau | U.S.A. (HI). |
| C* | 3 | R1 | *Bidens campylotheca waihoiensis*. | Asteraceae | Ko'oko'olau | U.S.A. (HI). |
| C* | 8 | R1 | *Bidens conjuncta* | Asteraceae | Ko'oko'olau | U.S.A. (HI). |
| C* | 3 | R1 | *Bidens micrantha ctenophylla*. | Asteraceae | Ko'oko'olau | U.S.A. (HI). |
| C* | 8 | R4 | *Brickellia mosieri* | Asteraceae | Brickell-bush, Florida | U.S.A. (FL). |
| C* | 2 | R1 | *Calamagrostis expansa*. | Poaceae | Reedgrass, Maui | U.S.A. (HI). |
| C* | 2 | R1 | *Calamagrostis hillebrandii*. | Poaceae | Reedgrass, Hillebrand's. | U.S.A. (HI). |
| C* | 5 | R8 | *Calochortus persistens*. | Liliaceae | Mariposa lily, Siskiyou | U.S.A. (CA, OR). |
| C* | 2 | R1 | *Canavalia pubescens* | Fabaceae | 'Awikiwiki | U.S.A. (HI). |
| C* | 8 | R1 | *Castilleja christii* | Scrophulariaceae | Paintbrush, Christ's | U.S.A. (ID). |
| C* | 9 | R4 | *Chamaecrista lineata* var. *keyensis*. | Fabaceae | Pea, Big Pine partridge. | U.S.A. (FL). |
| C* | 12 | R4 | *Chamaesyce deltoidea pinetorum*. | Euphorbiaceae | Sandmat, pineland | U.S.A. (FL). |
| C* | 9 | R4 | *Chamaesyce deltoidea serpyllum*. | Euphorbiaceae | Spurge, wedge | U.S.A. (FL). |
| C* | 6 | R8 | *Chorizanthe parryi* var. *fernandina*. | Polygonaceae | Spineflower, San Fernando Valley. | U.S.A. (CA). |
| C* | 2 | R4 | *Chromolaena frustrata* | Asteraceae | Thoroughwort, Cape Sable. | U.S.A. (FL). |
| C* | 2 | R4 | *Consolea corallicola* | Cactaceae | Cactus, Florida semaphore. | U.S.A. (FL). |
| C* | 5 | R4 | *Cordia rupicola* | Boraginaceae | No common name | U.S.A. (PR), Anegada. |
| C* | 2 | R1 | *Cyanea asplenifolia* | Campanulaceae | Haha | U.S.A. (HI). |
| C* | 2 | R1 | *Cyanea calycina* | Campanulaceae | Haha | U.S.A. (HI). |
| C* | 2 | R1 | *Cyanea kunthiana* | Campanulaceae | Haha | U.S.A. (HI). |
| C* | 2 | R1 | *Cyanea lanceolata* | Campanulaceae | Haha | U.S.A. (HI). |
| C* | 2 | R1 | *Cyanea obtusa* | Campanulaceae | Haha | U.S.A. (HI). |
| C* | 2 | R1 | *Cyanea tritomantha* | Campanulaceae | 'Aku | U.S.A. (HI). |
| C* | 2 | R1 | *Cyrtandra filipes* | Gesneriaceae | Ha'iwale | U.S.A. (HI). |
| C* | 2 | R1 | *Cyrtandra kaulantha* | Gesneriaceae | Ha'iwale | U.S.A. (HI). |
| C* | 2 | R1 | *Cyrtandra oxybapha* | Gesneriaceae | Ha'iwale | U.S.A. (HI). |
| C* | 2 | R1 | *Cyrtandra sessilis* | Gesneriaceae | Ha'iwale | U.S.A. (HI). |
| C* | 3 | R4 | *Dalea carthagenensis* var. *floridana*. | Fabaceae | Prairie-clover, Florida | U.S.A. (FL). |
| C* | 5 | R5 | *Dichanthelium hirstii* | Poaceae | Panic grass, Hirsts' | U.S.A. (DE, GA, NC, NJ). |
| C* | 5 | R4 | *Digitaria pauciflora* | Poaceae | Crabgrass, Florida pineland. | U.S.A. (FL). |
| C* | 3 | R2 | *Echinomastus erectocentrus* var. *acunensis*. | Cactaceae | Cactus, Acuna | U.S.A. (AZ), Mexico. |
| C* | 8 | R2 | *Erigeron lemmonii* | Asteraceae | Fleabane, Lemmon | U.S.A. (AZ). |
| C* | 2 | R1 | *Eriogonum codium* | Polygonaceae | Buckwheat, Umtanum Desert. | U.S.A. (WA). |
| C* | 6 | R8 | *Eriogonum corymbosum* var. *nilesii*. | Polygonaceae | Buckwheat, Las Vegas. | U.S.A. (NV). |
| C | 5 | R8 | *Eriogonum diatomaceum*. | Polygonaceae | Buckwheat, Churchill Narrows. | U.S.A. (NV). |

TABLE 1—CANDIDATE NOTICE OF REVIEW (ANIMALS AND PLANTS)—Continued

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table.]

| Status | | Lead region | Scientific name | Family | Common name | Historical range |
|---|---|---|---|---|---|---|
| Category | Priority | | | | | |
| C* | 5 | R8 | *Eriogonum kelloggii* | Polygonaceae | Buckwheat, Red Mountain. | U.S.A. (CA). |
| C* | 2 | R1 | *Festuca hawaiiensis* | Poaceae | No common name | U.S.A. (HI). |
| C* | 11 | R2 | *Festuca ligulata* | Poaceae | Fescue, Guadalupe | U.S.A. (TX), Mexico. |
| C* | 2 | R1 | *Gardenia remyi* | Rubiaceae | Nanu | U.S.A. (HI). |
| C* | 8 | R1 | *Geranium hanaense* | Geraniaceae | Nohoanu | U.S.A. (HI). |
| C* | 8 | R1 | *Geranium hillebrandii* | Geraniaceae | Nohoanu | U.S.A. (HI). |
| C* | 5 | R4 | *Gonocalyx concolor* | Ericaceae | No common name | U.S.A. (PR). |
| C | 2 | R4 | *Harrisia aboriginum* | Cactaceae | Pricklyapple, aboriginal (shellmound applecactus). | U.S.A. (FL). |
| C* | 5 | R8 | *Hazardia orcuttii* | Asteraceae | Orcutt's hazardia | U.S.A. (CA), Mexico. |
| C* | 2 | R1 | *Hedyotis fluviatilis* | Rubiaceae | Kampua'a | U.S.A. (HI). |
| C* | 8 | R4 | *Helianthus verticillatus* | Asteraceae | Sunflower, whorled | U.S.A. (AL, GA, TN). |
| C* | 2 | R2 | *Hibiscus dasycalyx* | Malvaceae | Rose-mallow, Neches River. | U.S.A. (TX). |
| PE | 2 | R6 | *Ipomopsis polyantha* | Polemoniaceae | Skyrocket, Pagosa | U.S.A. (CO). |
| C* | 5 | R8 | *Ivesia webberi* | Rosaceae | Ivesia, Webber | U.S.A. (CA, NV). |
| C* | 3 | R1 | *Joinvillea ascendens ascendens*. | Joinvilleaceae | 'Ohe | U.S.A. (HI). |
| C* | 2 | R1 | *Korthalsella degeneri* | Viscaceae | Hulumoa | U.S.A. (HI). |
| C* | 5 | R4 | *Leavenworthia crassa* | Brassicaceae | Gladecress, unnamed | U.S.A. (AL). |
| C | 3 | R4 | *Leavenworthia exigua* var. *laciniata*. | Brassicaceae | Gladecress, Kentucky | U.S.A. (KY). |
| C* | 2 | R2 | *Leavenworthia texana* | Brassicaceae | Gladecress, Texas golden. | U.S.A. (TX). |
| C* | 8 | R4 | *Lesquerella globosa* | Brassicaceae | Bladderpod, Short's | U.S.A. (IN, KY, TN). |
| C* | 5 | R4 | *Linum arenicola* | Linaceae | Flax, sand | U.S.A. (FL). |
| C* | 3 | R4 | *Linum carteri* var. *carteri*. | Linaceae | Flax, Carter's small-flowered. | U.S.A. (FL). |
| C* | 2 | R1 | *Melicope christophersenii*. | Rutaceae | Alani | U.S.A. (HI). |
| C* | 2 | R1 | *Melicope hiiakae* | Rutaceae | Alani | U.S.A. (HI). |
| C* | 2 | R1 | *Melicope makahae* | Rutaceae | Alani | U.S.A. (HI). |
| C | 3 | R8 | *Mimulus fremontii* var. *vandenbergensis*. | Phrymaceae | Monkeyflower, Vandenberg. | U.S.A. (CA). |
| C* | 2 | R1 | *Myrsine fosbergii* | Myrsinaceae | Kolea | U.S.A. (HI). |
| C* | 2 | R1 | *Myrsine vaccinioides* | Myrsinaceae | Kolea | U.S.A. (HI). |
| C* | 8 | R5 | *Narthecium americanum*. | Liliaceae | Asphodel, bog | U.S.A. (DE, NC, NJ, NY, SC). |
| C* | 2 | R1 | *Nothocestrum latifolium*. | Solanaceae | 'Aiea | U.S.A. (HI). |
| C* | 2 | R1 | *Ochrosia haleakalae* | Apocynaceae | Holei | U.S.A. (HI). |
| C* | 3 | R2 | *Pediocactus peeblesianus* var. *fickeiseniae*. | Cactaceae | Cactus, Fickeisen plains. | U.S.A. (AZ). |
| PT | 2 | R6 | *Penstemon debilis* | Scrophulariaceae | Beardtongue, Parachute. | U.S.A. (CO). |
| C* | 9 | R6 | *Penstemon scariosus* var. *albifluvis*. | Scrophulariaceae | Beardtongue, White River. | U.S.A. (CO, UT). |
| C* | 2 | R1 | *Peperomia subpetiolata*. | Piperaceae | 'Ala 'ala wai nui | U.S.A. (HI). |
| C | 5 | R8 | *Phacelia stellaris* | Hydrophyllaceae | Phacelia, Brand's | U.S.A. (CA), Mexico. |
| PT | 8 | R6 | *Phacelia submutica* | Hydrophyllaceae | Phacelia, DeBeque | U.S.A. (CO). |
| C* | 2 | R1 | *Phyllostegia bracteata* | Lamiaceae | No common name | U.S.A. (HI). |
| C* | 8 | R1 | *Phyllostegia floribunda* | Lamiaceae | No common name | U.S.A. (HI). |
| C* | 9 | R1 | *Physaria douglasii tuplashensis*. | Brassicaceae | Bladderpod, White Bluffs. | U.S.A. (WA). |
| C* | 8 | R4 | *Platanthera integrilabia*. | Orchidaceae | Orchid, white fringeless. | U.S.A. (AL, GA, KY, MS, NC, SC, TN, VA). |
| C* | 3 | R1 | *Platydesma cornuta* var. *cornuta*. | Rutaceae | No common name | U.S.A. (HI). |
| C* | 3 | R1 | *Platydesma cornuta* var. *decurrens*. | Rutaceae | No common name | U.S.A. (HI). |
| C* | 2 | R1 | *Platydesma remyi* | Rutaceae | No common name | U.S.A. (HI). |
| C | 2 | R1 | *Pleomele fernaldii* | Agavaceae | Hala pepe | U.S.A. (HI). |
| C* | 2 | R1 | *Pleomele forbesii* | Agavaceae | Hala pepe | U.S.A. (HI). |

TABLE 1—CANDIDATE NOTICE OF REVIEW (ANIMALS AND PLANTS)—Continued

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table.]

| Status | | Lead region | Scientific name | Family | Common name | Historical range |
|---|---|---|---|---|---|---|
| Category | Priority | | | | | |
| C* | 11 | R8 | *Potentilla basaltica* | Rosaceae | Cinquefoil, Soldier Meadow. | U.S.A. (NV). |
| C* | 3 | R1 | *Pseudognaphalium (=Gnaphalium) sandwicensium* var. *molokaiense*. | Asteraceae | ‘Ena‘ena | U.S.A. (HI). |
| C* | 3 | R1 | *Psychotria hexandra* ssp. *oahuensis* var. *oahuensis*. | Rubiaceae | Kopiko | U.S.A. (HI). |
| C* | 2 | R1 | *Pteralyxia macrocarpa* | Apocynaceae | Kaulu | U.S.A. (HI). |
| C* | 2 | R1 | *Ranunculus hawaiensis*. | Ranunculaceae | Makou | U.S.A. (HI). |
| C* | 2 | R1 | *Ranunculus mauiensis* | Ranunculaceae | Makou | U.S.A. (HI). |
| C* | 8 | R8 | *Rorippa subumbellata* | Brassicaceae | Cress, Tahoe yellow | U.S.A. (CA, NV). |
| C* | 2 | R1 | *Schiedea pubescens* | Caryophyllaceae | Ma‘oli‘oli | U.S.A. (HI). |
| C* | 2 | R1 | *Schiedea salicaria* | Caryophyllaceae | No common name | U.S.A. (HI). |
| C* | 5 | R8 | *Sedum eastwoodiae* | Crassulaceae | Stonecrop, Red Mountain. | U.S.A. (CA). |
| C* | 2 | R1 | *Sicyos macrophyllus* | Cucurbitaceae | ‘Anunu | U.S.A. (HI). |
| C | 12 | R4 | *Sideroxylon reclinatum austrofloridense*. | Sapotaceae | Bully, Everglades | U.S.A. (FL). |
| C* | 8 | R1 | *Solanum nelsonii* | Solanaceae | Popolo | U.S.A. (HI). |
| C | 8 | R4 | *Solidago plumosa* | Asteraceae | Goldenrod, Yadkin River. | U.S.A. (NC). |
| C* | 2 | R2 | *Sphaeralcea gierischii* | Malvaceae | Mallow, Gierisch | U.S.A. (AZ, UT). |
| C* | 2 | R1 | *Stenogyne cranwelliae* | Lamiaceae | No common name | U.S.A. (HI). |
| C* | 8 | R4 | *Symphyotrichum georgianum*. | Asteraceae | Aster, Georgia | U.S.A. (AL, FL, GA, NC, SC). |
| C* | 2 | R1 | *Zanthoxylum oahuense*. | Rutaceae | A‘e | U.S.A. (HI). |
| FERNS AND ALLIES: | | | | | | |
| C* | 8 | R1 | *Christella boydiae (= Cyclosorus boydiae* var. *boydiae + Cyclosorus boydiae kipahuluensis)*. | Thelypteridaceae | No common name | U.S.A. (HI). |
| C* | 2 | R1 | *Doryopteris takeuchii* | Pteridaceae | No common name | U.S.A. (HI). |
| C* | 2 | R1 | *Huperzia (= Phlegmariurus) stemmermanniae*. | Lycopodiaceae | Wawae‘iole | U.S.A. (HI). |
| C* | 3 | R1 | *Microlepia strigosa* var. *mauiensis (= Microlepia mauiensis)*. | Dennstaedtiaceae | Palapalai | U.S.A. (HI). |
| C | 3 | R4 | *Trichomanes punctatum floridanum*. | Hymenophyllaceae | Florida bristle fern | U.S.A. (FL). |

TABLE 2—ANIMALS AND PLANTS FORMERLY CANDIDATES OR FORMERLY PROPOSED FOR LISTING

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table.]

| Status | | Lead region | Scientific name | Family | Common name | Historical range |
|---|---|---|---|---|---|---|
| Code | Expl. | | | | | |
| MAMMALS: | | | | | | |
| Rc | A, U | R8 | *Xerospermophilus tereticaudus chlorus*. | Sciuridae | Squirrel, Palm Springs (= Coachella Valley) round-tailed ground. | U.S.A. (CA). |
| BIRDS: | | | | | | |
| E | L | R1 | *Loxops caeruleirostris* | Fringillidae | Akekee (honeycreeper). | U.S.A. (HI). |
| E | L | R1 | *Oreomystis bairdi* | Fringillidae | Akikiki (Kauai creeper) | U.S.A. (HI). |
| CLAMS: | | | | | | |
| E | L | R4 | *Pleurobema hanleyianum*. | Unionidae | Pigtoe, Georgia | U.S.A. (AL, GA, TN). |
| SNAILS: | | | | | | |

TABLE 2—ANIMALS AND PLANTS FORMERLY CANDIDATES OR FORMERLY PROPOSED FOR LISTING—Continued

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table.]

| Status | | Lead region | Scientific name | Family | Common name | Historical range |
|---|---|---|---|---|---|---|
| Code | Expl. | | | | | |
| E | L | R4 | *Pleurocera foremani* | Pleuroceridae | Hornsnail, rough | U.S.A. (AL). |
| E | L | R4 | *Leptoxis foremani (= downei).* | Pleuroceridae | Rocksnail, Interrupted (= Georgia). | U.S.A. (GA, AL). |
| INSECTS: | | | | | | |
| E | L | R1 | *Megalagrion nesiotes* | Coenagrionidae | Damselfly, flying earwig Hawaiian. | U.S.A. (HI). |
| E | L | R1 | *Megalagrion pacificum* | Coenagrionidae | Damselfly, Pacific Hawaiian. | U.S.A. (HI). |
| E | L | R1 | *Drosophila attigua* | Drosophilidae | Fly, Hawaiian picture-wing. | U.S.A. (HI). |
| FLOWERING PLANTS: | | | | | | |
| E | L | R1 | *Astelia waialealae* | Liliaceae | Pa'iniu | U.S.A. (HI). |
| E | L | R1 | *Canavalia napaliensis* | Fabaceae | 'Awikiwiki | U.S.A. (HI). |
| E | L | R1 | *Chamaesyce eleanoriae.* | Euphorbiaceae | 'Akoko | U.S.A. (HI). |
| E | L | R1 | *Chamaesyce remyi var. kauaiensis.* | Euphorbiaceae | 'Akoko | U.S.A. (HI). |
| E | L | R1 | *Chamaesyce remyi var. remyi.* | Euphorbiaceae | 'Akoko | U.S.A. (HI). |
| E | L | R1 | *Charpentiera densiflora.* | Amaranthaceae | Papala | U.S.A. (HI). |
| E | L | R1 | *Cyanea dolichopoda* | Campanulaceae | Haha | U.S.A. (HI). |
| E | L | R1 | *Cyanea eleeleensis* | Campanulaceae | Haha | U.S.A. (HI). |
| E | L | R1 | *Cyanea kolekoleensis* | Campanulaceae | Haha | U.S.A. (HI). |
| E | L | R1 | *Cyanea kuhihewa* | Campanulaceae | Haha | U.S.A. (HI). |
| E | L | R1 | *Cyrtandra oenobarba* | Gesneriaceae | Ha'iwale | U.S.A. (HI). |
| E | L | R1 | *Cyrtandra paliku* | Gesneriaceae | Ha'iwale | U.S.A. (HI). |
| E | L | R1 | *Dubautia imbricata imbricata.* | Asteraceae | Na'ena'e | U.S.A. (HI). |
| E | L | R1 | *Dubautia kalalauensis* | Asteraceae | Na'ena'e | U.S.A. (HI). |
| E | L | R1 | *Dubautia kenwoodii* | Asteraceae | Na'ena'e | U.S.A. (HI). |
| E | L | R1 | *Dubautia plantaginea magnifolia.* | Asteraceae | Na'ena'e | U.S.A. (HI). |
| E | L | R1 | *Dubautia waialealae* | Asteraceae | Na'ena'e | U.S.A. (HI). |
| E | L | R1 | *Geranium kauaiense* | Geraniaceae | Nohoanu | U.S.A. (HI). |
| E | L | R1 | *Keysseria erici* | Asteraceae | No common name | U.S.A. (HI). |
| E | L | R1 | *Keysseria helenae* | Asteraceae | No common name | U.S.A. (HI). |
| E | L | R1 | *Labordia helleri* | Loganiaceae | Kamakahala | U.S.A. (HI). |
| E | L | R1 | *Labordia pumila* | Loganiaceae | Kamakahala | U.S.A. (HI). |
| T | L | R1 | *Lepidium papilliferum* | Brassicaceae | Peppergrass, slickspot | U.S.A. (ID). |
| E | L | R1 | *Lysimachia daphnoides.* | Myrsinaceae | Lehua makanoe | U.S.A. (HI). |
| E | L | R1 | *Lysimachia iniki* | Myrsinaceae | No common name | U.S.A. (HI). |
| E | L | R1 | *Lysimachia pendens* | Myrsinaceae | No common name | U.S.A. (HI). |
| E | L | R1 | *Lysimachia scopulensis.* | Myrsinaceae | No common name | U.S.A. (HI). |
| E | L | R1 | *Lysimachia venosa* | Myrsinaceae | No common name | U.S.A. (HI). |
| E | L | R1 | *Melicope degeneri* | Rutaceae | Alani | U.S.A. (HI). |
| E | L | R1 | *Melicope paniculata* | Rutaceae | Alani | U.S.A. (HI). |
| E | L | R1 | *Melicope puberula* | Rutaceae | Alani | U.S.A. (HI). |
| E | L | R1 | *Myrsine knudsenii* | Myrsinaceae | Kolea | U.S.A. (HI). |
| E | L | R1 | *Myrsine mezii* | Myrsinaceae | Kolea | U.S.A. (HI). |
| E | L | R1 | *Phyllostegia renovans* | Lamiaceae | No common name | U.S.A. (HI). |
| E | L | R1 | *Pittosporum napaliense.* | Pittosporaceae | Ho'awa | U.S.A. (HI). |
| E | L | R1 | *Platydesma rostrata* | Rutaceae | Pilo kea lau li'i | U.S.A. (HI). |
| E | L | R1 | *Pritchardia hardyi* | Asteraceae | Lo'ulu | U.S.A. (HI). |
| E | L | R1 | *Psychotria grandiflora* | Rubiaceae | Kopiko | U.S.A. (HI). |
| E | L | R1 | *Psychotria hobdyi* | Rubiaceae | Kopiko | U.S.A. (HI). |
| E | L | R1 | *Schiedea attenuata* | Caryophyllaceae | No common name | U.S.A. (HI). |
| E | L | R1 | *Stenogyne kealiae* | Lamiaceae | No common name | U.S.A. (HI). |
| E | L | R1 | *Tetraplasandra bisattenuata.* | Araliaceae | No common name | U.S.A. (HI). |
| E | L | R1 | *Tetraplasandra flynnii* | Araliaceae | No common name | U.S.A. (HI). |
| E | L | R1 | *Diellia mannii* | Aspleniaceae | No common name | U.S.A. (HI). |
| E | L | R1 | *Doryopteris angelica* | Pteridaceae | No common name | U.S.A. (HI). |

TABLE 2—ANIMALS AND PLANTS FORMERLY CANDIDATES OR FORMERLY PROPOSED FOR LISTING—Continued

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table.]

| Status | | Lead region | Scientific name | Family | Common name | Historical range |
|---|---|---|---|---|---|---|
| Code | Expl. | | | | | |
| E ..... | L | R1 | *Dryopteris crinalis* var. *podosorus*. | Dryopteridaceae ..... | Palapalai aumakua ..... | U.S.A. (HI). |

[FR Doc. 2010–27686 Filed 11–9–10; 8:45 am]

**BILLING CODE P**

Federal Register

**Wednesday,**
**November 10, 2010**

## Part IV

# Department of Commerce

**National Oceanic and Atmospheric Administration**

**50 CFR Part 218**

**Taking and Importing Marine Mammals; Navy Training Activities Conducted Within the Northwest Training Range Complex; Final Rule**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 218**

**[Docket No. 0906101030–0489–03]**

**RIN 0648–AX88**

## Taking and Importing Marine Mammals; Navy Training Activities Conducted Within the Northwest Training Range Complex

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

**ACTION:** Final rule.

**SUMMARY:** NMFS, upon application from the U.S. Navy (Navy), is issuing regulations to govern the unintentional taking of marine mammals incidental to activities conducted in the Northwest Training Range Complex (NWTRC), off the coasts of Washington, Oregon, and northern California, for the period of October 2010 through October 2015. The Navy's activities are considered military readiness activities pursuant to the Marine Mammal Protection Act (MMPA), as amended by the National Defense Authorization Act for Fiscal Year 2004 (NDAA). These regulations, which allow for the issuance of "Letters of Authorization" (LOAs) for the incidental take of marine mammals during the described activities and specified timeframes, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking.

**DATES:** Effective November 9, 2010 through November 9, 2015.

**ADDRESSES:** A copy of the Navy's application (which contains a list of the references used in this document), NMFS' Record of Decision (ROD), and other documents cited herein may be obtained by writing to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225 or by telephone via the contact listed here (*see* **FOR FURTHER INFORMATION CONTACT**).

**FOR FURTHER INFORMATION CONTACT:** Jolie Harrison, Office of Protected Resources, NMFS, (301) 713–2289, ext. 166.

**SUPPLEMENTARY INFORMATION:**

### Availability of Supporting Information

Extensive Supplementary Information was provided in the proposed rule for this activity, which was published in the **Federal Register** on Monday, July 13, 2009 (74 FR 33828). This information will not be reprinted here in its entirety; rather, all sections from the proposed rule will be represented herein and will contain either a summary of the material presented in the proposed rule or a note referencing the page(s) in the proposed rule where the information may be found.

### Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) during periods of not more than five consecutive years each if certain findings are made and regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth.

NMFS has defined "negligible impact" in 50 CFR 216.103 as:

> "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

The National Defense Authorization Act of 2004 (NDAA) (Pub. L. 108–136) modified the MMPA by removing the "small numbers" and "specified geographical region" limitations and amended the definition of "harassment" as it applies to a "military readiness activity" to read as follows (Section 3(18)(B) of the MMPA):

> (i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or
>
> (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

### Summary of Request

In September 2008, NMFS received an application from the Navy requesting authorization for the take of individuals of 26 species of marine mammals incidental to upcoming Navy training activities to be conducted within the NWTRC, which extends west to 250 nautical miles (nm) (463 kilometers [km]) beyond the coast of Northern California, Oregon, and Washington and east to Idaho and encompasses 122,400 $nm^2$ (420,163 $km^2$) of surface/subsurface ocean operating areas. These training activities are military readiness activities under the provisions of the NDAA. The Navy states, and NMFS concurs, that these military readiness activities may incidentally take marine mammals present within the NWTRC by exposing them to sound from mid-frequency or high-frequency active sonar (MFAS/HFAS) or underwater detonations. The Navy requested authorization to take individuals of 26 species of marine mammals by Level B Harassment and 13 individuals of 9 species by Level A Harassment. The Navy's model, which did not factor in any potential benefits of mitigation measures, predicted that 13 individual marine mammals would be exposed to levels of sound or pressure that would result in injury; thus, NMFS is authorizing the take of 13 individuals per year by Level A Harassment. However, NMFS and the Navy have determined that injury can most likely be avoided through the implementation of the required mitigation measures. No mortality of marine mammals is authorized incidental to naval exercises in the NWTRC.

### Background of Request

The proposed rule contains a description of the Navy's mission, their responsibilities pursuant to Title 10 of the United States Code, and the specific purpose and need for the activities for which they requested incidental take authorization. The description contained in the proposed rule has not changed (74 FR 33829).

### Overview of the NWTRC

The proposed rule contains a description of the NWTRC, including both the Inshore and Offshore areas. The description contained in the proposed rule has not changed (74 FR 33829).

### Description of Specified Activities

The proposed rule contains a complete description of the Navy's specified activities that are covered by these final regulations, and for which the associated incidental take of marine mammals will be authorized in the

related LOAs. The proposed rule describes the nature and number of anti-submarine warfare (ASW) exercises, anti-surface warfare (ASUW) exercises, and mine warfare training (MIW) exercises, involving both mid- and high-frequency active sonar (MFAS and HFAS), as well as explosive detonations. It also describes the sound sources and explosive types used (74 FR 33828, pages 33829–33838). The narrative description of the action contained in the proposed rule has not changed, with one exception and one clarification indicated below. Tables 1, 2, and 3 list the types of sonar sources and the estimated yearly use, summarize the characteristics of the exercise types, and list the explosive types used.

As a result of their Section 7 consultation with the U.S. Fish and Wildlife Service, the Navy agreed to make a small modification to their activity. They agreed to not conduct Explosive Ordnance Disposal (EOD) underwater demolition training at the Naval Magazine Indian Island site (1 event per year was previously included in the proposed rule). Instead, that training event will be conducted at the Hood Canal training site, so there will now be up to a total of two events per year in Hood Canal (instead of 1). The Navy further agreed that EOD will utilize charge sizes of 1.5 lbs or less at the Hood Canal site, instead of the 2.5 lbs or less identified in the proposed rule.

The Navy has carefully characterized the training activities planned for the NWTRC over the 5 years covered by these regulations; however, evolving real-world needs necessitate flexibility in annual activities. NMFS has attempted to bound this flexibility with new language in the regulatory text (see § 218.110(c)) which allows for flexibility in planned activities, provided it does not affect the take estimates and anticipated impacts in a manner that changes our analysis.

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| Sonar Sources | Frequency (kHz) | Source Level (dB) re 1 µPa @ 1 m | Emission Spacing (m)* | Vertical Directivity | Horizontal Directivity | Associated Platform | System Description | Estimated Annual Amount | Unit |
|---|---|---|---|---|---|---|---|---|---|
| AN/SQS-53C | 3.5 | 235 | 154 | Omni | 240° forward-looking | Cruiser (CG) and Destroyer (DDG) hull mounted sonar | ASW search, detection, & localization (approximately 120 pings per hour) | 43 | Hours |
| AN/SQS-56C | 7.5 | 225 | 129 | 13° | 30° | Frigate (FFG) hullmounted sonar | ASW search, detection, & localization (approximately 120 pings per hour) | 65 | Hours |
| AN/BQS-15 | Classifed (HF) | Classified | | | | Submarine (SSN) hullmounted sonar | Submarine navigation and mine detection sonar | 42 | Hours |
| AN/SSQ-62 DICASS (sonobuoy, tonal) | 8 | 201 | 450 | Omni | Omni | Helicopter and maritime patrol aircraft (P3 and P8 MPA) dropped sonobuoy | Remotely commanded expendable sonar-equipped buoy (approximately 12 pings per use, 30 secs between pings, 8 buoys per hour) | 886 | Buoys |
| MK-48 torpedo sonar | Classified (>10) | Classified | 144 | Omni | Omni | Submarine (SSN) launched torpedo (used during SINKEX) | Non-recoverable, explosive torpedo; sonar is active approximately 15 min per torpedo run | 2 | Torpedoes |
| AN/SSQ-110A (IEER) | Classified (impulsive, broadband) | Classified | n/a | Omni | Omni | MPA deployed | ASW system consists of explosive acoustic source buoy (contains two 4.1 lb charges) and expendable passive receiver sonobuoy | 149 | Buoys |
| AN/SSQ-125 (AEER) | MF | Classified | n/a | Omni | Omni | MPA deployed | ASW system consists of active sonobuoy and expendable passive receiver sonobuoy | Replaces SSQ-110A, same effects as SSQ-62 | |
| Range Pingers | 12.9 | 194 | | | | Ships, submarines, and ASW targets when ASW TRACKEX training is conducted on the PUTR | 1-3 pingers used in each ASW exercise, average of 3 hours each during PUTR operational days | 180 | Hours |
| PUTR Uplink | 8.8., 17, or 40 | 190 | | | 180 upward looking | Portable Undersea Tracking Range, deployed on ocean floor | Used 10 days per month June-Aug, 5 hours/day. Deployed in at least 3nm from shore in 300-12000 ft of water | 150 | Hours |

**Table 1.** Active sonar sources in the NWTRC and parameters used for modeling them. Many of the actual parameters and capabilities of these sonars are classified. Parameters used for modeling were derived to be as representative as possible. When, however, there were a wide range of potential modeling values, a nominal parameter likely to result in the most impact was used so that the model would err towards overestimation.

*Spacing means distance between pings at the nominal speed

CG – Guided Missile Cruiser; DDG – Guided Missile Destroyer; DICASS – Directional Command-Activated Sonobuoy System; FFG – Fast Frigate;

HF – High-Frequency; MF – Mid-Frequency.

| Exercise Type | ASW TRACKEX | Mine Avoidance | EER/IEER | MISSILEX (Air based) | GUNEX | BOMBEX | SINKEX | MIW |
|---|---|---|---|---|---|---|---|---|
| **Anticipated Takes** | Yes | Yes | Yes | No * | No * | Yes | Yes | No * |
| **Explosion in or on water** | No | No | Yes | No | No | Yes | Yes | Yes |
| **Length of Exercise** | 1.5 hours | 6 hours | 6 hours | 2-3 hours | 2-3 hours | 1 hour | 8-48 hours | 5 hours |
| **Sonar hours, sonobuoys, torpedoes, detonations, or rounds per year** | SQS-53 (Search Mode) = 43 hrs/year<br>SQS-56 = 65 hrs/year<br>SSQ-62 DICASS = 886 sonobuoys/year<br>MK-48 Torpedo = 2 torpedoes/yr | AN/BQS-15 Sonar = 42.hrs/year | SSQ-110A or AN/SSQ-125 = 149 sonobuoys/year | 13 AIM-7missiles<br>9 AIM-9 missiles<br>7 AIM-120 missiles<br>8 NATO Sea Sparrow<br>or<br>8 Rolling Airframe Missiles | 5 in gun<br>(2,463 rounds)<br>20 mm<br>(16,000 rounds)<br>25 mm<br>(31,500 rounds)<br>57 mm<br>(1,260 rounds)<br>76 mm<br>(720 rounds)<br>.50 caliber<br>(117,000 rounds) | 10 MK-82 Bombs (High Explosive)<br>110 BDU-45 Bombs (Inert) | See Narrative SINKEX section | 1.5 to 2.5.-lb NEW - 4/year |
| **Number Exercises per Year** | 65 | 7 | 12 | 28 | 340 | 30 | 2 | 4 |
| **Area Used** | Pacific Northwest Surface/ Subsurface OPAREA | Pacific Northwest Surface/ Subsurface OPAREA | Pacific Northwest Surface/ Subsurface OPAREA | Pacific Northwest Surface/ Subsurface OPAREA | Pacific Northwest Surface/ Subsurface OPAREA | Pacific Northwest Surface/ Subsurface OPAREA | Pacific Northwest Surface/ Subsurface OPAREA | EOD Crescent Harbor, EOD Floral Point |
| **Months of Year conducted** | Year Round | Year Round | Year Round | Year Round | Year Round | Year Round | Year Round | Year Round |

**Table 2**. Summary of exercise types in NWTRC noting duration, location, sources and explosives used, and time of year

* Though take is not anticipated to result from these exercises, they are included for information because they have been addressed in other rules

| | NEW | TTS | | Injury | | Mortality | Exclusion |
|---|---|---|---|---|---|---|---|
| | lbs | 182 SEL | 23 psi | 205 SEL | 13 psi-ms | 31 psi-ms | Zone Used (m) |
| 5" Naval gunfire | 9.5 | 247 | 273 | 46 | 44 | 24 | 548 |
| 76mm rounds | 1.6 | 102 | 151 | 21 | 25 | 13 | 548 |
| Demolition | 2.5 | 179 | 175 | 35 | 74 | 31 | 548 |
| Maverick | 78.5 | 959 | 554 | 182 | 191 | 107 | 1852 (SINKEX), 1645 (MISSILEX) |
| HARM | 41.6 | 689 | 448 | 133 | 156 | 86 | 1853 (SINKEX), 1645 (MISSILEX) |
| Hellfire | 16.4 | 424 | 327 | 84 | 112 | 59 | 1854 (SINKEX), 1645 (MISSILEX) |
| SLAM | 164.3 | 1406 | 726 | 262 | 237 | 137 | 1855 (SINKEX), 1645 (MISSILEX) |
| Harpoon | 448 | 1811 | 866 | 120 | 270 | 158 | 1852 (SINKEX), 1645 (MISSILEX) |
| MK-82 | 238 | 1723 | 835 | 315 | 263 | 153 | 1852 (SINKEX), 914 (BOMBEX) |
| MK-48 | 851 | 3469 | 1278 | 662 | 694 | 424 | 1852 (SINKEX), 914 (BOMBEX) |
| GBU-10 | 945 | 3626 | 1326 | 613 | 373 | 223 | 1853 (SINKEX), 914 (BOMBEX) |
| GBU-12 | 238 | 1712 | 832 | 315 | 262 | 153 | 1854 (SINKEX), 914 (BOMBEX) |
| GBU-16 | 445 | 2390 | 1054 | 428 | 310 | 183 | 1855 (SINKEX), 914 (BOMBEX) |
| AN/SSQ-110A (IEER) | 5 | 325 | 281 | 72 | 159 | 77 | 914 |

**Table 3.** Representative ordnance used in NWTRC Explosive Exercises for which take of marine mammals is anticipated.
Table also indicates range to indicated threshold and size of Navy exclusion zone used in mitigation. Units are meters.

**Description of Marine Mammals in the Area of the Specified Activities**

Twenty-seven marine mammal species have confirmed or possible occurrence within the NWTRC, including six species of baleen whales (mysticetes), 16 species of toothed whales (odontocetes), five species of seals and sea lions (pinnipeds), and the sea otter (mustelids). Sea otters are under the jurisdiction of the Department of the Interior and are not considered further.) Table 4 summarizes their abundance, Endangered Species Act (ESA) status, population trends, and occurrence in the area. Seven of the species are ESA-listed and considered depleted under the MMPA: Blue whale; fin whale; humpback whale; sei whale; sperm whale; southern resident killer whale; and Steller sea lion. The proposed rule contains a discussion of one species that is not considered further in the analysis (the North Pacific right whale) because of its rarity in the NWTRC. The proposed rule also contains a discussion of bottlenose dolphins, but due to their extralimitality, the impact analysis concluded that this species will not be taken by the Navy's activity. The proposed rule also contains a discussion of important areas, including southern resident killer whale and Steller sea lion critical habitat, and the gray whale migration corridor. The proposed rule also includes a discussion of marine mammal vocalizations. Last, the proposed rule includes a discussion of the methods used to estimate marine mammal density in the NWTRC. The Description of Marine Mammals in the Area of the Specified Activities section has not changed from what was in the proposed rule (74 FR 33828, pages 33838–33842).

| Common Name<br>*Species Name* | Abundance (CV) | Stock | Calculated Density (animals per km2) | Population Trend | Occurrence | Warm Season (May-Oct) | Cold Season (Nov-Apr) |
|---|---|---|---|---|---|---|---|
| **ESA Listed Baleen Whales** | | | | | | | |
| Blue whale[1,2,3]<br>*Balaenoptera musculus* | 1,186<br>(0.19) | Eastern North Pacific | 0.0005* | May be increasing | Common | Yes | No |
| Fin whale [1,2,3]<br>*Balaenoptera physalus* | 3454<br>(0.27) | California, Oregon, and Washington | 0.0014* | May be increasing | Common | Yes | Yes |
| Humpback whale[1,2,3]<br>*Megaptera novaeangliae* | 1,396<br>(0.15) | Eastern North Pacific | 0.0007* | Increasing | Common | Yes | No |
| Sei whale[1,2,3]<br>*Balaenoptera borealis* | 43<br>(0.61) | Eastern North Pacific | 0.000115[c]<br>0.000182[d] | May be increasing | Common | Yes | No |
| **ESA Listed Toothed Whales** | | | | | | | |
| Sperm whale[1,2,3]<br>*Physeter macrocephalus* | 2,265<br>(0.34) | California, Oregon, and Washington, Offshore | 0.0026* | Unknown | Common | Yes | Yes |
| Southern resident killer whale[1,2]<br>*Orcinus orca* | 89 | Eastern North Pacific, Southern Resident | 0.00055/.00162 | possibly decreasing | Common | Yes | Yes |
| **ESA Listed Pinniped** | | | | | | | |
| Steller sea lion[2,4]<br>*Eumetopias jubatus* | 48,519 | Eastern | 0.000011 / 0.011[b] | possibly increasing | Common | Yes | Yes |
| **Non-ESA Listed Baleen Whales** | | | | | | | |
| Gray whale<br>*Eschrichtius robustus* | 18,178 | Eastern North Pacific | -- | Increasing | Common | No | Yes |
| Minke whale<br>*Balaenoptera acutorostrata* | 898<br>(0. 65) | California, Oregon, and Washington | 0.000655[c]<br>0.000395[d] | No trends | Common | No | Yes |
| **Non-ESA Listed Toothed Whales** | | | | | | | |
| Baird's beaked whale<br>*Berardius bairdii* | 313<br>(0.55) | California, Oregon, and Washington | 0.001614[c]<br>0.000775[d] | Unknown | Common | Yes | Yes |
| Bottlenose dolphin offshore<br>*Tursiops truncatus* | 3,257<br>(0.43) | California, Oregon, Washington, Offshore | 0.000515[c] | No trend | Very Rare | Yes | Yes |
| Cuvier's beaked whale<br>*Ziphius cavirostris* | 2,171<br>(0.75) | California, Oregon, and Washington | 0.003038[c] | Unknown | Common | Yes | Unknown |
| Dall's porpoise<br>*Phocoenoides dalli* | 57,549<br>(0.34) | California, Oregon, and Washington | 0.0970* | Unknown | Common | No | Yes |
| Dwarf sperm whale<br>*Kogia sima* | unknown | California, Oregon, and Washington | -- | Unknown | Very Rare | Unknown | Yes |
| Harbor porpoise<br>*Phocoena phocoena* | 17,763<br>(0.39) | Northern California/ Southern Oregon | -- | Stable | Common | Yes | Yes |
| | 37,745<br>(0.38) | Washington/ Oregon Coastal | | Stable | | | |
| | 10,682<br>(0.38) | Washington Inland Waters | | Stable | | | |
| Killer whale offshore<br>*Orcinus orca* | 422 | Eastern North Pacific Offshore | .00055/.00162 | Unknown | Common | No | Yes |
| Killer whale transient<br>*Orcinus orca* | 346 | Eastern North Pacific Transient | .00055/.00162 | Unknown | Common | No | Yes |
| Mesoplodont beaked whales[a]<br>*Mesoplodon sp.* | 1,024<br>(0.77) | Washington, Oregon, and California | 0.00135[c]<br>0.001321[d] | Unknown | Rare | Unknown | Unknown |
| Northern right whale dolphin<br>*Lissodelphis borealis* | 15,305<br>(0.232) | California, Oregon, and Washington | 0.0014* | No trend | Common | Yes | Yes |
| Pacific white-sided dolphin<br>*Lagenorhynchus obliguidens* | 25,233<br>(0.25) | California, Oregon, and Washington | 0.0441* | No trend | Common | Yes | Yes |
| **Non-ESA Listed Toothed Whales (continued)** | | | | | | | |
| Pygmy sperm whale<br>*Kogia breviceps* | Unknown | California, Oregon, and Washington | 0.001232[c]<br>0.000504[d] | Unknown | Common | Unknown | Unknown |
| Risso's Dolphin<br>*Grampus griseus* | 12,093<br>(0.24) | California, Oregon, and Washington | 0.013222[c]<br>0.004014[d] | No trend | Common | Yes | Yes |
| Short-beaked common dolphin<br>*Delphinus delphis* | 487,622<br>(0.26) | California, Oregon, and Washington | 0.1570* | Varies by oceanographic | Common | Yes | Yes |
| Short-finned pilot whale<br>*Globicephala macrorhynchus* | 245<br>(0.97) | California, Oregon, and Washington | -- | Unknown | Rare | Unknown | Unknown |
| Striped dolphin<br>*Stenella coeruleoalba* | 23,883<br>(0.44) | California, Oregon, and Washington | 0.0000497[c]<br>0.015653[d] | No trend | Rare | No | Unknown |
| **Non-ESA Listed Pinnipeds** | | | | | | | |
| California sea lion<br>*Zalophus californianus* | 238,000 | U.S. | -- | Increasing | Common | Yes | Yes |
| Harbor seal | 34,233 | California | -- | Increasing | Common | Yes | Yes |
| | 24,732<br>(0.12) | Washington/ Oregon Coastal | | Stable | | | |
| | 14,612<br>(0.15) | Washington Inland | | Stable | | | |
| Northern elephant seal<br>*Mirounga angustirostris* | 124,000 | California Breeding | -- | Increasing | Common | Yes | Yes |
| Northern fur seal<br>*Callorhinus ursinus* | 721,935 | Eastern Pacific | -- | Increasing | Common | Yes | Yes |

**Table 4.** Marine mammals of known occurrence in the NWTRC.

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## Brief Background on Sound

The proposed rule contains a section that provides a brief background on the principles of sound that are frequently referred to in this rulemaking (74 FR 33828, pages 33845–33846). This section also includes a discussion of the functional hearing ranges of the different groups of marine mammals (by frequency) as well as a discussion of the two main sound metrics used in NMFS analysis (sound pressure level (SPL) and sound energy level (SEL)). The information contained in the proposed rule has not changed.

**Potential Effects of Specified Activities on Marine Mammals**

With respect to the MMPA, NMFS' effects assessment serves four primary purposes: (1) To prescribe the permissible methods of taking (*i.e.,* Level B Harassment (behavioral harassment), Level A Harassment (injury), or mortality, including an identification of the number and types of take that could occur by Level A or B Harassment or mortality) and to prescribe other means of effecting the least practicable adverse impact on such species or stock and its habitat (*i.e.,* mitigation); (2) to determine whether the specified activity will have a negligible impact on the affected species or stocks of marine mammals (based on the likelihood that the activity will adversely affect the species or stock through effects on annual rates of recruitment or survival); (3) to determine whether the specified activity will have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (however, there are no subsistence communities that would be affected in the NWTRC, so this determination is inapplicable for this rulemaking); and (4) to prescribe requirements pertaining to monitoring and reporting.

In the Potential Effects of Specified Activities on Marine Mammals section of the proposed rule NMFS included a qualitative discussion of the different ways that MFAS/HFAS and underwater explosive detonations may potentially affect marine mammals (some of which NMFS would not classify as harassment), as well as a discussion of the potential effects of vessel movement and collision (74 FR 33828, pages 33846–33862). Marine mammals may experience direct physiological effects (such as threshold shift), acoustic masking, impaired communications, stress responses, and behavioral disturbance. This section also included a discussion of some of the suggested explanations for the association between the use of MFAS and marine mammal strandings (such as behaviorally-mediated bubble growth) that have been observed a limited number of times in certain circumstances (the specific events are also described) (74 FR 33828, pages 33855–33860). The information contained in Potential Effects of Specified Activities on Marine Mammals section from the proposed rule has not changed.

Later, in the Estimated Take of Marine Mammals Section, NMFS relates and quantifies the potential effects to marine mammals from MFAS/HFAS and underwater detonation of explosives discussed here to the MMPA definitions of Level A and Level B Harassment.

**Mitigation**

In order to issue an incidental take authorization (ITA) under Section 101(a)(5)(A) of the MMPA, NMFS must set forth the "permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance." The NDAA of 2004 amended the MMPA as it relates to military-readiness activities and the ITA process such that "least practicable adverse impact" shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the "military readiness activity." The training activities described in the NWTRC application are considered military readiness activities.

NMFS reviewed the proposed NWTRC activities and the proposed NWTRC mitigation measures as described in the Navy's LOA application to determine if they would result in the least practicable adverse effect on marine mammals, which includes a careful balancing of the likely benefit of any particular measure to the marine mammals with the likely effect of that measure on personnel safety, practicality of implementation, and impact on the effectiveness of the "military-readiness activity." NMFS determined that further discussion was necessary regarding the use of MFAS/HFAS for training in the Inshore Area that contains the southern resident killer whale critical habitat.

To address the concerns above, the Navy clarified for NMFS that no training utilizing MFAS/HFAS had occurred in the Inshore Area of NWTRC for the last six years, that it is not being conducted now, and that there are no plans to utilize MFAS/HFAS for training in the Inshore Area (*i.e.,* it is not part of the Navy's specified activity). This information has been factored into NMFS' effects analysis. The Navy has indicated that should their plans change in the future they will request a new LOA, which would likely require new regulations, for the additional activities within the NWTRC. The Navy further explained that no explosive training occurs in the Inshore Area other than the annual detonation of four, up to 1.5–2.5lb charges, which are not anticipated to result in the take of marine mammals. For these reasons, no take of killer whales is anticipated to result from the Navy's activities in the Inshore area and none has been authorized.

NMFS' proposed rule includes a list of the Navy's proposed mitigation measures (74 FR 33828, pages 33863–33867), which have been included in the regulatory text of this document. The following mitigation measure has been added since the publication of the proposed rule:

"Naval vessels will maneuver to keep at least 1,500 ft (500 yds) away from any observed whale in the vessel's path and avoid approaching whales head-on. These requirements do not apply if a vessel's safety is threatened, such as when change of course will create an imminent and serious threat to a person, vessel, or aircraft, and to the extent vessels are restricted in their ability to maneuver. Restricted maneuverability includes, but is not limited to, situations when vessels are engaged in dredging, submerged activities, launching and recovering aircraft or landing craft, minesweeping activities, replenishment while underway and towing activities that severely restrict a vessel's ability to deviate course. Vessels will take reasonable steps to alert other vessels in the vicinity of the whale. Given rapid swimming speeds and maneuverability of many dolphin species, naval vessels would maintain normal course and speed on sighting dolphins unless some condition indicated a need for the vessel to maneuver."

Based on our evaluation of the proposed measures and other measures considered by NMFS or recommended by the public, NMFS has determined that the required mitigation measures (including the Adaptive Management (see Adaptive Management below) component) are adequate means of effecting the least practicable adverse impacts on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, while also considering personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity. The proposed rule contains further support for this finding in the Mitigation Conclusion section (74 FR 33828, pages 33867–33868). During the public comment period, a few mitigation measures not previously considered were recommended and NMFS' analysis of these measures is included in the Response to Public Comment section.

**Research**

The Navy provides a significant amount of funding and support to marine research. In the past five years

the agency provided over $100 million ($26 million in FY08 alone) to universities, research institutions, federal laboratories, private companies, and independent researchers around the world to study marine mammals. The U.S. Navy sponsors 70 percent of all U.S. research concerning the effects of human-generated sound on marine mammals and 50 percent of such research conducted worldwide. Major topics of Navy-supported research include the following:

- Better understanding of marine species distribution and important habitat areas,
- Developing methods to detect and monitor marine species before and during training,
- Understanding the effects of sound on marine mammals, sea turtles, fish, and birds, and
- Developing tools to model and estimate potential effects of sound.

This research is directly applicable to Fleet training activities, particularly with respect to the investigations of the potential effects of underwater noise sources on marine mammals and other protected species. Proposed training activities employ active sonar and underwater explosives, which introduce sound into the marine environment.

The Marine Life Sciences Division of the Office of Naval Research currently coordinates six programs that examine the marine environment and are devoted solely to studying the effects of noise and/or the implementation of technology tools that will assist the Navy in studying and tracking marine mammals. The six programs are as follows:

- Environmental Consequences of Underwater Sound,
- Non-Auditory Biological Effects of Sound on Marine Mammals,
- Effects of Sound on the Marine Environment,
- Sensors and Models for Marine Environmental Monitoring,
- Effects of Sound on Hearing of Marine Animals, and
- Passive Acoustic Detection, Classification, and Tracking of Marine Mammals.

The Navy has also developed the technical reports referenced within this document, which include the Marine Resource Assessments and the Navy OPAREA Density Estimates (NODE) reports. Furthermore, research cruises by NMFS and by academic institutions have received funding from the U.S. Navy.

The Navy has sponsored several workshops to evaluate the current state of knowledge and potential for future acoustic monitoring of marine mammals. The workshops brought together acoustic experts and marine biologists from the Navy and other research organizations to present data and information on current acoustic monitoring research efforts and to evaluate the potential for incorporating similar technology and methods on instrumented ranges. However, acoustic detection, identification, localization, and tracking of individual animals still requires a significant amount of research effort to be considered a reliable method for marine mammal monitoring. The Navy supports research efforts on acoustic monitoring and will continue to investigate the feasibility of passive acoustics as a potential mitigation and monitoring tool.

Overall, the Navy will continue to fund ongoing marine mammal research, and is planning to coordinate long term monitoring/studies of marine mammals on various established ranges and operating areas. The Navy will continue to research and contribute to university/external research to improve the state of the science regarding marine species biology and acoustic effects. These efforts include mitigation and monitoring programs; data sharing with NMFS and via the literature for research and development efforts; and future research as described previously.

**Long-Term Prospective Study**

Apart from this final rule, NMFS, with input and assistance from the Navy and several other agencies and entities, will perform a longitudinal observational study of marine mammal strandings to systematically observe for and record the types of any pathologies and diseases and investigate the relationship with potential causal factors (*e.g.,* active sonar, seismic, weather). The study will not be a true "cohort" study, because NMFS will be unable to quantify or estimate specific active sonar or other sound exposures for individual animals that strand. However, a cross-sectional or correlational analyses, a method of descriptive rather than analytical epidemiology, can be conducted to compare population characteristics, *e.g.,* frequency of strandings and types of specific pathologies between general periods of various anthropogenic activities and non-activities within a prescribed geographic space. In the long-term study, NMFS will more fully and consistently collect and analyze data on the demographics of strandings in specific locations and consider anthropogenic activities and physical, chemical, and biological environmental parameters. This approach in conjunction with true cohort studies (tagging animals, measuring received sounds, and evaluating behavior or injuries) in the presence of activities and non-activities will provide critical information needed to further define the impacts of active sonar training exercises and other anthropogenic and non-anthropogenic stressors. In coordination with the Navy and other Federal and non-federal partners, the comparative study will be designed and conducted for specific sites during intervals of both the presence and absence of anthropogenic activities such as active sonar transmission or other sound exposures to evaluate demographics of morbidity and mortality, presence of lesions, and cause of death or stranding. Additional data that will be collected and analyzed in an effort to control potential confounding factors includes factors such as average sea temperature (or just season), meteorological or other environmental variables (*e.g.,* seismic activity), fishing activities, etc. All efforts will be made to include appropriate controls (*i.e.,* no active sonar or no seismic); environmental variables may, however, complicate the interpretation of "control" measurements. The Navy and NMFS along with other partners are evaluating mechanisms for funding this study.

**Monitoring**

In order to issue an ITA for an activity, Section 101(a)(5)(A) of the MMPA states that NMFS must set forth "requirements pertaining to the monitoring and reporting of such taking." The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for LOAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present.

**Proposed Monitoring Plan for the NWTRC**

The Navy's final Monitoring Plan for the NWTRC may be viewed at NMFS' web site: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.* The Monitoring Plan for NWTRC has been designed as a collection of focused "studies" (described fully in the NWTRC draft Monitoring Plan) to gather data that will allow the Navy to address the following questions:

(a) Are marine mammals exposed to MFAS/HFAS, especially at levels associated with adverse effects (*i.e.,* based on NMFS' criteria for behavioral

harassment, TTS, or PTS)? If so, at what levels are they exposed?

(b) If marine mammals are exposed to MFAS/HFAS in the NWTRC Range Complex, do they redistribute geographically as a result of continued exposure? If so, how long does the redistribution last?

(c) If marine mammals are exposed to MFAS/HFAS, what are their behavioral responses to various levels?

(d) What are the behavioral responses of marine mammals that are exposed to explosives at specific levels?

(e) Is the Navy's suite of mitigation measures for MFAS/HFAS (e.g., measures agreed to by the Navy through permitting) effective at preventing TTS, injury, and mortality of marine mammals?

The extent of the training utilizing MFAS/HFAS in the NWTRC is comparatively less than several of the other training areas utilized by the Navy and not every one of these original five study questions will be addressed within NWTRC. Rather, data collected from NWTRC monitoring will be used to supplement a consolidated range complex marine mammal monitoring report incorporating data from the Navy's Hawaii Range Complex, Marianas Island Range Complex, NWTRC, and Southern California Range Complex. Monitoring methods proposed for the NWTRC include a combination of research elements designed to support both Range Complex specific monitoring, and contribute information to a larger Navy-wide program. These research elements include:

—Deployment of passive acoustic monitoring (PAM) devices, and,
—Marine mammal tagging.

The monitoring techniques selected for the NWTRC will be primarily focused on providing additional data for study questions (b), (c), and (d).

The amount of each type of monitoring may vary from the summary table or Monitoring Plan based on annual discussions between NMFS and the Navy regarding previous monitoring results and effectiveness and in accordance with the Adaptive Management component of this rule, however, the overall effort over the 5-year period will remain approximately equal to that laid out in the monitoring plan.

This monitoring plan has been designed to gather data on all species of marine mammals that are observed in the NWTRC; however, where appropriate, priority will be given to beaked whales, ESA-listed species, killer whales, and harbor porpoises. The Plan recognizes that deep-diving and cryptic species of marine mammals such as beaked whales have a low probability of detection (Barlow and Gisiner, 2006). Therefore, methods will be utilized to attempt to address this issue (*e.g.,* passive acoustic monitoring).

In addition to the Monitoring Plan for MIRC, the Navy has completed an Integrated Comprehensive Monitoring Program (ICMP) Plan.

The ICMP will be used both as: (1) A planning tool to focus Navy monitoring priorities (pursuant to ESA/MMPA requirements) across Navy Range Complexes and Exercises; and (2) an adaptive management tool, through the consolidation and analysis of the Navy's monitoring and watchstander data, as well as new information from other Navy programs (e.g., R&D), and other appropriate newly published information. The Navy finalized a 2009 ICMP Plan outlining the program on December 22, 2009, as required by the 2009 LOAs for the Hawaii Range Complex (HRC), the Southern California Range (SOCAL), and Atlantic Fleet Active Sonar Training (AFAST). The ICMP may be viewed at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.*

The ICMP is a developing program that will be in place for the length of this rule, and beyond, and NMFS and Navy will evaluate it annually to determine if it needs to be updated in order to keep pace with advances in science and technology and the collection of new data. In the 2009 ICMP Plan, the Navy outlines three areas of targeted development for 2010, including:

1. Identifying more specific monitoring sub-goals under the major goals that have been identified.

2. Characterizing Navy Range Complexes and Study Areas within the context of the prioritization guidelines described in the ICMP.

3. Continuing to Develop Data Management, Organization and Access Procedures.

The Navy shall comply with the 2009 ICMP Plan and continue to improve the program in consultation with NMFS. Changes and improvements to the program made during 2010 (as prescribed in the 2009 ICMP and otherwise deemed appropriate by the Navy and NMFS) will be described in an updated 2010 ICMP and submitted to NMFS by October 31, 2010 for review. An updated 2010 ICMP will be finalized by December 31, 2010. NMFS plans to solicit public comments on the updated ICMP in January, 2011 and the input will be used to inform the 2011 Monitoring Workshop, the further development of the ICMP, and, potentially, monitoring modifications in the Navy's 2012 monitoring plans.

**Monitoring Workshop**

The Navy, with guidance and support from NMFS, will convene a Monitoring Workshop, including marine mammal and acoustic experts as well as other interested parties, in 2011. The Monitoring Workshop participants will review the monitoring results from the previous monitoring pursuant to the NWTRC rule as well as monitoring results from other Navy rules and LOAs (*e.g.,* SOCAL, HRC, etc.). The Monitoring Workshop participants would provide their individual recommendations to the Navy and NMFS on the monitoring plan(s) after also considering the current science (including Navy research and development) and working within the framework of available resources and feasibility of implementation. NMFS and the Navy would then analyze the input from the Monitoring Workshop participants and determine the best way forward from a national perspective. Subsequent to the Monitoring Workshop, modifications would be applied to monitoring plans as appropriate.

**Adaptive Management**

Our understanding of the effects of MFAS/HFAS and explosives on marine mammals is still in its relative infancy, and yet the science in this field is evolving fairly quickly. These circumstances make the inclusion of an adaptive management component both valuable and necessary within the context of 5-year regulations for activities that have been associated with marine mammal mortality in certain circumstances and locations (though not in the NWTRC in the Navy's over 60 years of use of the area for testing and training). NMFS has included an adaptive management component in the regulations, which will allow NMFS to consider new data from different sources to determine (in coordination with the Navy) on an annual basis if mitigation or monitoring measures should be modified or added (or deleted) if new data suggests that such modifications are appropriate (or are not appropriate) for subsequent annual LOAs.

The following are some of the possible sources of applicable data:

- Results from the Navy's monitoring from the previous year (either from NWTRC or other locations).
- Findings of the Workshop that the Navy will convene in 2011 to analyze monitoring results to date, review current science, and recommend

modifications, as appropriate to the monitoring protocols to increase monitoring effectiveness.

- Compiled results of Navy funded research and development (R&D) studies (presented pursuant to the ICMP, which is discussed elsewhere in this document).
- Results from specific stranding investigations (either from NWTRC or other locations, and involving coincident MFAS/HFAS or explosives training or not involving coincident use).
- Results from the Long Term Prospective Study described above.
- Results from general marine mammal and sound research (funded by the Navy (described above) or other agencies or entities).
- Any information that reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent Letters of Authorization.

Mitigation measures could be modified or added (or deleted) if new data suggests that such modifications would have (or do not have) a reasonable likelihood of accomplishing the goals of mitigation laid out in this final rule and if the measures are practicable. NMFS would also coordinate with the Navy to modify or add to (or delete) the existing monitoring requirements if the new data suggest that the addition of (or deletion of) a particular measure would more effectively accomplish the goals of monitoring laid out in this final rule. The reporting requirements associated with this final rule are designed to provide NMFS with monitoring data from the previous year to allow NMFS to consider the data and issue annual LOAs. NMFS and the Navy will meet annually, prior to LOA issuance, to discuss the monitoring reports, Navy R&D developments, and current science and whether mitigation or monitoring modifications are appropriate.

**Reporting**

In order to issue an ITA for an activity, Section 101(a)(5)(A) of the MMPA states that NMFS must set forth ''requirements pertaining to the monitoring and reporting of such taking.'' Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring. The proposed rule contains the reporting requirements for the Navy (74 FR 33828, pages 33871–33872), and these requirements remain unchanged with the following exception. The requirements as written in the proposed rule include specific due dates for each of the reports. NMFS and the Navy are coordinating a workload plan to determine the best times during every year to submit all of the reports that the Navy is responsible for under final rules for multiple Range Complexes and training exercises. Although the reports described will always be submitted every year at a time that allows for adequate analysis by NMFS prior to the issuance of the subsequent LOA, we want to allow flexibility to change those dates yearly. Therefore, the regulatory text below will not specify the specific dates that the reports are due, as the due dates will be specified in the annual LOA.

**Comments and Responses**

On July 13, 2009 (74 FR 33828), NMFS published a proposed rule in response to the Navy's request to take marine mammals incidental to military readiness training in the NWTRC and requested comments, information and suggestions concerning the proposed rule. During the 30-day public comment period, NMFS received comments from the Marine Mammal Commission, the Washington Department of Fish and Wildlife, the Department of the Interior, the Natural Resources Defense Council (on behalf of the International Fund for Animal Welfare, the Center for Biological Diversity, Cetacean Society International, Friends of the San Juans, the Humane Society of the United States, the Ocean Futures Society, the Ocean Mammal Institute, People for Puget sound, Davis Bain, and Jean-Michel Cousteau), the Orca Network, The Whale Museum, Turtle Island Restoration Network (TIRN) and Center for Biological Diversity (CBD), as well as over two hundred members of the public. The NRDC gained support for their comments from over 54,000 members through form letters.

**Introduction**

As described elsewhere in this document, in order to issue an incidental take authorization (ITA) under Section 101(a)(5)(A) of the MMPA, NMFS must set forth the ''permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.'' NMFS' decisions regarding whether or not to require any particular mitigation measure must include a careful balancing of the likely benefit of any particular measure to marine mammals and the likely effectiveness of the measure, with the practicability of the measure, which (for military readiness activities) includes consideration of the likely effect of that measure on personnel safety, practicality of implementation, and impact on the effectiveness of the ''military-readiness activity.''

Because some of the comments received reflect an incomplete or inaccurate understanding of the nature and scope of the Navy's MFAS training exercises, we will summarize and clarify some issues up front that will support multiple responses below. For example, one commenter begins by stating that the Navy contemplates extensive sonar training. This is not the case. In the NWTRC, the annual amount of planned operation for the most powerful surface hull-mounted MFAS (which is responsible for the vast majority of the takes) is 108 hours annually. Comparatively, the annual sonar use in other areas that the Navy uses for training is far more extensive: 1670 hrs/yr in Hawaii, 2400 in the Mariana Islands, 2470 in SOCAL, and 5110 off the Atlantic Coast. Another significant difference is the fact that all of the sonar exercises in the NWTRC are approximately 1.5-hr exercises that utilize a single surface hull-mounted sonar, versus the major exercises within other training areas, which may last for several weeks, and use multiple (sometimes 10 or more) surface hull-mounted sonars simultaneously.

Another point that is germane to several of the comments raised is the typical way that the MFAS exercises utilizing surface hull-mounted sonar (TRACKEXs) are conducted, and the areas in which they are typically conducted. Approximately 10 percent of the surface hull-mounted MFAS is conducted in conjunction with the use of the Portable Undersea Training Range (PUTR), while the remaining 90 percent is conducted primarily in-transit as the vessel is moving from one point to another, most often south through the NWTRC towards the Southern California Range Complex. The majority of the in-transit MFAS use in the NWTRC has taken place and is projected to continue to take place at a distance of 50 nm or greater from shore, with infrequent training events occurring between 12 and 50 nm from shore. In-transit MFAS training is not anticipated to occur inside of 12 nm.

The PUTR has been developed to support ASW training in areas where the ocean depth is between 300 ft and 12,000 ft and at least 3 nm from land. The PUTR will not be utilized within the Olympic Coast National Marine Sanctuary (OCNMS).

In addition, the Navy provided funding to NMFS's Southwest Fisheries Science Center (SWFSC) in the fall of

2009, to update their newest spatial predictive habitat model with composite data from 1991 through 2008, the date of the last U.S. West Coast marine mammal survey. In the spring of 2010, SWFSC completed this analysis which provides finer scale (25-km) density resolution for 12 of the most commonly sighted species within the U.S. West Coast EEZ including NWTRC. Results of this effort will be published in a NMFS Technical Report.

From 2009 through 2010, marine mammal satellite tracking tag studies funded by the Navy in Southern California show that static plots of marine mammal occurrence do not provide the entire story on marine mammal life history. Tagged baleen whales and dolphins within Southern California quite frequently move significant distances. As part of the Navy's NWTRC Monitoring Plan, presence\absence data will be collected via offshore long-term passive acoustic monitoring devices from Scripps Institute of Oceanography, as well as marine mammal satellite tagging.

In summary, the Navy, as part of its NWTRC Monitoring Plan will continue to contribute valuable scientific data in collaborating with regional and national scientific academic partners as to marine mammal distributions within the NWTRC.

Last, for the second year in a row, the Navy is convening a workshop in October to which marine mammal experts have been invited. The Navy will review its monitoring results from the previous year and solicit recommendations on future plans. More formally, the Navy has been required by multiple LOAs to hold a Monitoring Workshop in 2011 that will include both marine mammal experts and non-governmental organizations. Here, again, the Navy will provide a review of previous monitoring results from multiple range complexes and solicit input. The goal of the 2011 workshop, as laid out in the Integrated Comprehensive Monitoring Program Plan, is to comprehensively consider the resources available in different ranges, the data needs, and the species and conditions present in different ranges in order to identify the most appropriate monitoring across range complexes that will provide the most efficient methodology and best results.

*Additional Mitigation Recommendations*

*Comment 1:* NRDC and other commenters recommended the establishment of a panel of marine mammal and oceanographic experts with regional expertise on marine mammal distribution, abundance, habitat, or population structure and ecology, or habitat suitability modeling to identify high-value habitat by reviewing and analyzing the published literature, survey data, and predictive models. The use of sonar in such habitat would be prohibited or subject to additional operational measures to ensure the greatest protection of animals in the area.

*Response:* In January 2009, the Administrator of the National Oceanic and Atmospheric Administration committed, in a letter to the Council on Environmental Quality, to convene a panel to identify important marine mammal habitat, as described above. This process has begun. Once the results of that effort are available (anticipated in 2011), NMFS will use them to inform decisions related to geographic mitigation requirements, both in upcoming rules, as well as in rules that have already been issued, through the adaptive management provision (described in the Adaptive Management section above).

*Comment 2:* NRDC and several other commenters recommended that NMFS establish a protection area for northwest harbor porpoise populations landward of the 100-m isobath. Further, they recommended that NMFS establish an adjacent buffer zone to ensure that exposure levels do not exceed 120dB within the 100-m isobath. NMFS should ask the Navy to prepare a nominal propogation analysis for the coast to determine what stand-off distances are necessary to reduce exposures below the 120dB threshold. The NRDC further notes that the vast majority of the takes in the NWTRC are harbor porpoises.

*Response:* The Navy conducts about 99 percent of their MFAS activities in the W–237 area, which extends out approximately 200 nm from the coast of the northern half of Washington state (*see* page 2–5 of the Navy's NWTRC FEIS). Within the W–237, the 100-m isobath extends out from the coast approximately 40 nm at some points, and up to 80 nm in the northern portion near the Strait of Juan de Fuca. As noted above in the introduction to this section, the Navy has conducted, and plans to conduct, the majority of their in-transit MFAS activities beyond 50 nm from shore, and has operated MFAS between 12 and 50 nm from shore infrequently in the past. As mentioned above, the PUTR (with which approximately 10 percent of the MFAS activities are associated) is designed to be used in depths of 300–1200 ft, so it is unlikely that it will be used within the 100-m isobath. Based on this general operational plan, there is only a relatively small area within the 100-m isobath in which the Navy would potentially operate MFAS, and this is only a very small percentage of the entire W–237 area that is available and in which the Navy typically operates MFAS. In order to adequately train, however, the Navy needs to train within a wide range of bathymetric conditions, environmental conditions, and operational conditions (*i.e.,* proximity to certain resources such as airfields), so it is unlikely that they would completely avoid the 100-m isobath.

In short, based on their general operating plans, the overall size of the area available for training and the fact that they only plan to operate 108 hours of surface hull-mounted sonar total annually (but need to operate in a variety of conditions, including depths other than within the 100-m isobath), it is likely that only a relatively small subset of the 108 hours of MFAS will be operated within the 100-m isobath, but these hours are needed for operational flexibility.

Regarding the establishment of an additional buffer to ensure that the area within the 100-m isobath is not ensonified above 120 dB, the Navy has done a propagation analysis and the distance at which sound from a surface hull-mounted sonar attenuates to 120 dB in the NWTRC is approximately 70 nm. A buffer of this nature would extend out approximately 110–150 nm from shore, rendering about 60–70 percent of the available MFAS training area inaccessible and reducing access to the vast majority of the bathymetric relief that is necessary for effective training. (NMFS notes that 120 dB is the minimum received level at which we have estimated that harbor porpoises may be taken by behavioral (Level B) harassment, and avoiding exposure above this level is akin to avoiding take completely, which would negate the need for an incidental take authorization.)

Last, NRDC notes that the vast majority of the total takes in the NWTRC are of harbor porpoises. This is correct; of the approximately 130,000 total annual authorized takes in the NWTRC, 119,000 are of harbor porpoises. This is because harbor porpoises are considered more sensitive to sound than many other marine mammals and any exposure above a received level of 120 dB is considered a take. However, of the total harbor porpoise takes, approximately 85 percent are anticipated to occur at a received level between 120 and 140 dB, from which we would expect a comparatively less severe response. Additionally, only approximately 0.5 percent of these takes

would result from exposures above a received level of 160 dB, which is still far below received levels associated with injurious takes. In short, there are more takes of harbor porpoises because they are more sensitive to sound. However, because we use a step function to define their predicted response, instead of a dose curve as we do for other marine mammal species, a large portion of the takes will likely consist of the minimum response that we would still consider a take.

*Comment 3:* NRDC and several other commenters recommended that NMFS provide additional protection for marine mammals from the use of sonar within the OCNMS, by specifically prohibiting sonar usage in the OCNMS, or at a minimum, limiting the exercises taking place with the OCNMS by requiring final approval from the Pacific Fleet command, or using other means to minimize sonar use. In support of this recommendation, NRDC notes the seasonal use of the area by migrating gray whales, summer resident gray whales that use the area for feeding, and Southern Resident killer whales (SRKW) that use the area for part of the year.

*Response:* The OCNMS is contained within the NWTRC and the delineation of the edge of the OCNMS essentially follows the 100-m isobath. The Navy will not deploy the PUTR within the OCNMS. Otherwise, please see NMFS' response to comment 2, above. Of additional note, because of the seasonal nature of the use of the area by some of the species that the commenters mention, those species' potential exposure to MFAS is likely an even smaller proportion of the total hours, as some of the hours of operation will occur in months that they are not present.

Although the comment addressed here mentions only sonar training, it is worth noting that the Navy does not do any live bombing in the OCNMS waters (*i.e.,* BOMBEX and SINKEXs are conducted outside the limits of the OCNMS). Additionally, in their DEIS, the Navy indicated their intent to create a small underwater minefield training range. Although they did not specify it in the DEIS, they have since clarified the fact that this small range will not be in OCNMS waters.

*Comment 4:* NRDC and several other commenters recommended that NMFS identify the Greater Puget Sound as a protection area (except for activities occurring as part of the Keyport EIS) as a condition of the proposed rule. They further recommended that if Puget Sound is not designated as a protected area, NMFS should make the following clarifications in its final rule:

- That any use of MFA sonar for training or maintenance in the Greater Puget Sound would first require the Navy to obtain an incidental take permit given the potential for serious injury or mortality to marine mammals in the area;
- That the Navy has agreed to conduct neither sonar training nor maintenance activities in the Greater Puget Sound without MMPA authorization;
- That the Navy has internal checks, in addition to the MMPA requirement, on non-RDT&E sonar use in the Greater Puget Sound (*e.g.,* requiring approval from Fleet Command).

*Response:* The Navy's action does not include the use of MFAS for training or in-transit maintenance in the Greater Puget Sound area, so it is not necessary to designate the Greater Puget Sound area as a Protection Area. The Navy does not currently plan to use MFAS for training or in-transit maintenance in the Greater Puget Sound area, and they have committed to obtaining a separate LOA (which would require a new rulemaking) if they plan to conduct those activities in the Greater Puget Sound area.

Additionally, the Navy has in place, and has since June 2003, an internal requirement wherein they must obtain permission from the Commander Pacific Fleet (CPF) before they may operate MFAS for training, maintenance or testing in Puget Sound. Since 2003, it has been CPF policy to not approve training, maintenance or testing use of sonar systems for vessels underway within Puget Sound. Pierside maintenance/testing of sonar systems within Puget Sound still requires CPF approval, and may be approved by CPF if it is not practical or feasible to conduct alternate maintenance/testing outside of Puget Sound. Since this requirement was put into place, every request to use MFAS underway for training, maintenance, or testing in Puget Sound has been denied, except on the Nanoose Range.

Separately, pier-side maintenance was not included as part of the proposed action, either for the MMPA authorization, or in the Navy's EIS. Pierside maintenance and testing of sonars rarely involves emission of sound. Most often the source is out of the water and might emit only one or a few low amplitude pings. The Navy is currently compiling detailed information on all pierside testing activity nationwide and that information will be included in the next phase of environmental assessments in 2014. At this time the Navy does not anticipate that there will be any additional risk to marine mammals from pierside testing due to the infrequency of sound emissions and the relative rarity of marine mammals in the vicinity of these sites.

*Comment 5:* NRDC and several other commenters recommended that NMFS establish a seasonal protection area in certain canyons and banks on the NWTRC that represent important foraging habitat, particularly for humpback whales. NRDC recommends seasonal protection areas for the "Prairie," Juan de Fuca Canyon, Swiftsure Bank, Barkley and Nitinat Canyons, and Heceta Bank, during the main humpback whale feeding season from June to October.

*Response:* With respect to some of these specific areas, the Swiftsure Bank is well within 50 nm of shore, and as described above, it is unlikely that the Navy will utilize in-transit MFAS there. Additionally, Swiftsure Bank is within the 100-m isobaths, which is not where the PUTR is designed to be used, and partially within the OCNMS, where the PUTR will not be used. Heceta Bank is located off the shore of Oregon, and 99 percent of the Navy's MFAS use in the NWTRC is conducted within the W–237 area, which is located off the coast of Washington, so MFAS use is not likely to occur there. Additionally, the Prairie is an area that is less than 100 m deep, so the PUTR is not likely to be deployed there.

The Navy plans to conduct approximately 108 hours of surface hull-mounted MFAS use in the NWTRC annually. Allowing for the fact that it is not all planned in the months of June-October, and not all planned in any one of the specific areas noted in the comment, only a small number of hours of sonar is likely to occur in any of the specific areas recommended for protection by the commentors.

Generally speaking, because of the small number of hours that the Navy may be conducting MFAS sonar training, the short duration of the exercises, the use of only one single hull-mounted sonar vessel, and the huge area over which training is conducted, the impracticability of designating additional protective areas identified by the commentors outweighs the likely benefits. It requires a considerable amount of planning, education, and subsequent attention by the Navy to establish and implement protective areas. Furthermore, the Navy only anticipates taking a small number of the species for which the protected areas would be established, by Level B Harassment (15 humpback whales, 14 killer whales, and 4 gray whales), with the exception of harbor porpoises

(discussed in comment response 2). Considering the density of marine mammals and the likelihood of encountering them in any location during the course of a 1.5 hour period, we cannot predict with sufficient certainty that avoiding these areas would necessarily result in a decrease of takes.

In addition, as mentioned previously, the Navy's NWTRC Monitoring Plan entails deploying long-term passive acoustic monitoring devices at two locations within the offshore NWTRC. One such Navy funded device has been in operation near Quinault Canyon since 2004. This will be supplemented with a second device which is currently forecast for deployment near the Juan de Fuca Canyon. Information from both passive acoustic devices will provide valuable scientific data on marine mammal vocalizations and anthropogenic sounds including commercial ship noise or transitory MFAS at these two locations. This analytical approach continues to be refined based on lessons learned from similar deployments and data review in Hawaii and Southern California. Summary data from these devices will be provided to NMFS and the public via annual Navy monitoring reports.

*Comment 6:* The NRDC and several other commenters recommended that NMFS require avoidance of, or a reduction of training activity within, areas between 500 and 2,000 meters depth with unusual bottom topography (such as canyons), to provide additional protection to beaked whales.

*Response:* The NRDC notes in their comments that there are no particular areas of known concentration for beaked whales in the NWTRC, but that most species appear to have a preference for areas of the lower continental slope. They may also be found in a wider range of conditions, from slopes to abyssal plain. First, NMFS may consider requiring a geographic limitation on an activity in a specific area of known concentration of particular species of animals, if the practicability analysis (which includes consideration of the nature of the activity, the likely benefits to the species, and the practicability of the measure) suggests that it will accomplish the least practicable adverse impact. However, we are less likely to recommend the avoidance of all of a type of area that an animal has a general preference for, especially in a case like this where the activity is comparatively limited, because it is unclear whether avoidance of all of the areas of this type will result in the reduction of impacts to the animals.

More specifically, in the case of beaked whales, we are only authorizing the Level B take of 38 animals, so there is only a very limited potential benefit to making a huge tract of area unavailable for training. Further, as noted above, beaked whales may prefer a wider variety of areas than previously thought. In summary, only a portion of the already few hours of planned MFAS use will occur in this habitat, and it is impracticable to completely prohibit the Navy's access to this particular depth when they need to train in a wide variety of circumstances.

*Comment 7:* The MMC recommended that the rule require suspension of the Navy's activities if a marine mammal is seriously injured or killed and the injury or death could be associated with those activities. The injury or death should be investigated to determine the cause, assess the full impact of the activity or activities and determine how activities should be modified to avoid future injuries or deaths.

*Response:* NMFS' regulations include a provision for "General notification of injured or dead marine mammals," under which Navy personnel shall ensure that NMFS is notified immediately (or as soon as clearance procedures allow) if an injured, stranded, or dead marine mammal is found during or shortly after, and in the vicinity of, any Navy training exercise utilizing MFAS, HFAS, or underwater explosive detonations. The provision further requires the Navy to provide NMFS with species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video of the animals (if available).

It can take months to years to complete the necessary tests and analyses required to determine, with a reasonable amount of certainty, the cause of a marine mammal death—and sometimes it is not possible to determine it. All but one of the small number of strandings that have occurred around the world associated with MFAS exercises have occurred concurrent to exercises that would be considered "major", which typically involve multiple surface vessels and last for a much longer duration than the non-major exercises that occur in the NWTRC (as described above in the Introduction to this section). Hence, NMFS (with input from the Navy) determined that it was beneficial and practicable to preemptively outline an explicit plan (that includes a shutdown requirement in certain circumstances) for how to deal with a stranding that occurs during a major exercise, and therefore Stranding Response Plans were developed for all of the areas in which major exercises are conducted. Alternatively, for non-major exercises (including all of the exercises in the NWTRC), the general notification provisions apply, which means that the Navy would contact NMFS as soon as clearance procedures allow and we would determine how best to proceed at that time.

Because so few strandings have been definitively associated with MFAS training in the 60+ years that the U.S. and other countries that share information have been conducting MFAS training; the exercises conducted in the NWTRC are of short duration and involve only one surface hull-mounted sonar; and investigations take a long time and are not always conclusive, it is not reasonable or practicable to require the Navy to shut down every time an injured or dead animal is found in the vicinity pending the results of an investigation that could take years to conduct.

*Comment 8:* One commenter recommended that MFAS not be utilized off the coast of California from June through October to protect seasonal migration of blue and humpback whales.

*Response:* The Navy plans to conduct 99 percent of their MFAS operation (which consists of 108 hours of surface hull-mounted sonar) within the W–237 area, which is located off the coast of Washington. This means that MFAS would be operated for only a few hours annually off the coast of California, at most.

*Comment 9:* One commenter recommended that the Navy avoid operating MFAS within 300 nm of the OCNMS.

*Response:* A three hundred mile buffer around the OCNMS would entirely encompass the NWTRC, thereby preventing the Navy from conducting the proposed activity, which is not a practicable option under the MMPA.

*Comment 10:* One commenter noted that there is no reference to the Navy going to the aid of stranded animals.

*Response:* NMFS, as the agency with authority over marine mammal health and stranding, does not want Navy personnel or other untrained and unpermitted individuals going to the aid of stranded animals. Rather, as described in the response to comment 7, above, the Navy is required to notify NMFS if they encounter an injured, stranded, or dead animal, and NMFS will respond as appropriate.

*Comment 11:* One commenter recommended that we correct the

statement "Southern resident killer whales spend the majority of their time in the Inshore Area from May/June through October/November, although they do make multi-day trips to the outer coast," to say "mid-June through September." The commenter further recommended that the Navy's sonar activity be limited to the summer period and when SRKWs have been located well within the Inshore Area (*e.g.* greater than ~30 nautical miles east of Cape Flattery for sonar activities lasting less than 6 hours) by the listening network (Salish Sea hydrophone network—*http://orcasound.net*) and/or sighting networks (The Whale Museum, whale watch operators, Orca Network, Center for Whale Research, etc.).

*Response:* The months originally indicated are taken from NMFS' Southern Resident Killer Whale Recovery Plan. The commenter did not offer a citation to support the alternate months suggested and, therefore, NMFS declines to make the suggested change. Killer whales are rarely seen outside of Puget Sound, and the Navy's model predicts that only 14 whales will be taken by Level B Harassment annually. Further, killer whales have a comparatively high probability of detection (Barlow, 2003a; Forney *et al.,* 1995) and there is little doubt that they will be detected and MFAS shutdown before they can be exposed to received levels that might be associated with more severe behavioral responses or hearing sensitivity loss.

Considering the low likelihood of impacts to killer whales from sonar in the absence of the additional limitations recommended by the commenter, combined with the resources and effort that would be necessary to maintain a running knowledge of the location of the killer whale pods, NMFS is not requiring that the Navy implement the recommended measure.

*Comment 12:* One commenter believes that the Navy should restrict its training operations to instrumented ranges with acoustic systems that allow real-time monitoring and mitigation for marine mammals, such as the one it operates off southern California. Acoustic ranges apparently work well for detecting baleen whales and may be the only effective way to detect and monitor beaked whales, but may not be as effective for species (*e.g.,* some porpoises) that vocalize at very high frequencies. The Navy should consider developing such a range in the Pacific Northwest.

*Response:* The Navy has several instrumented ranges (Bahamas, Southern California, and Hawaii) and plans to install another off of Jacksonville, Florida. These ranges are used regularly in Navy marine mammal research and monitoring, and have greatly contributed to marine mammal distribution and abundance data in these areas, as well as our understanding of behavioral responses to MFAS. However, they are not used for real-time implementation of mitigation (*see* Navy DEIS at 5–29).

Because of the need to train in a variety of operational situations (*i.e.,* proximity to different Navy resources) and bathymetric/oceanographic conditions, as well as the need to conduct a large volume of training, the Navy cannot limit its training to areas with instrumented ranges. Additionally, the conservation value of such a limitation is unclear, as it would focus a greater volume of MFAS use in areas that also have high densities of marine mammals and in some cases near areas considered particularly important to marine mammals.

Last, MFAS training occurs in relatively low amounts annually in the NWTRC and an instrumented range is not currently needed or being considered.

*Comment 13:* One commenter questioned why dolphins or porpoises that "deliberately" ride Navy ships' bow waves are not entitled to any protections.

*Response:* The mitigation measure indicates that "[i]f, after conducting an initial maneuver to avoid close quarters with dolphins or porpoises, the OOD concludes that dolphins or porpoises are deliberately closing to ride the vessel's bow wave, no further mitigation actions are necessary while the dolphins or porpoises continue to exhibit bow wave riding behavior." Navy personnel first try and avoid the bow-riding dolphins, and if that does not work, they may continue without further mitigation. Bow-riding is a common occurrence with certain species, and shutting down MFAS as frequently as these animals are encountered would seriously impact the Navy's mission effectiveness. The proposed rule described the potential impacts from this difference in mitigation (74 FR 33868), which is primarily that a temporary loss of hearing sensitivity is more likely to be incurred by these species than others, but still of a relatively brief and mild nature, and NMFS was still able to make its negligible impact determination for these species.

*Comment 14:* One commenter recommended that NOAA ensure that as noise levels are ramped up, cetaceans are not herded by the noise into progressively shallower and shallower water where they may strand as beaked whales did in the Bahamas (2000) during Navy exercises.

*Response:* Although the Navy does not utilize a ramp-up strategy for their sound sources, there is no scenario in the Navy's action under which animals would be herded into shallower water. The Navy is not conducting any MFAS training within the Greater Puget Sound area and MFAS use of the Washington Coast is primarily farther than 50 nm from shore, with infrequent occurrences between 12 and 50 nm from shore.

**Mitigation Effectiveness**

*Comment 15:* The MMC and several other commenters recommended that NMFS require the Navy to develop and implement a plan to validate the effectiveness of monitoring and mitigation measures before beginning, or in conjunction with, the proposed military readiness training operations. The MMC further notes that NMFS appears to have concurred with the Navy that the Navy's mitigation efforts will reduce Level A takes to 0 and that the proposed mitigation measures are sufficient.

*Response:* First, in response to the second sentence above, the Navy has estimated, through their modeling efforts, the numbers of animals that will be exposed to levels of sound or pressure that would be thought to result in Level A take (either through a permanent loss of hearing sensitivity from noise exposure, or tissue damage from exposure to explosives) in the absence of any mitigation. Those are the numbers of Level A takes that they have requested and NMFS is authorizing. Hence, although NMFS believes that the Navy's mitigation will most likely be effective at avoiding exposure to these levels (which, in the case of MFAS occur within 10m of the vessel), and that many animals will avoid noises at the levels necessary to incur a permanent hearing sensitivity loss, we are still authorizing the Level A take of 13 individuals of 9 species.

Marine mammal researchers have developed detection probabilities that estimate the likelihood of detecting individuals of different species of marine mammals from different platforms, in different environmental conditions, and at different distances. As part of their Monitoring Plans in other areas where training occurs, the Navy has developed studies to determine how well their watchstanders detect marine mammals as compared to experienced marine mammal observers. Four of these comparison studies have been conducted by the Navy this year pursuant to the requirements of their

LOAs for HRC, SOCAL, and AFAST and when the results of these studies have been fully analyzed, they will be included in NMFS analysis of the likelihood of Level A takes occurring. In the meantime, we have conservatively assumed that the mitigation is not effective and that animals will be taken by Level A Harassment as predicted by the model, which assumes that animals do not move away from a strong sound source and that exposure at a high level will never be avoided through detection and implementation of a shutdown (or non-startup).

If there are other studies that the MMC has in mind to quantify mitigation and monitoring effectiveness, we would welcome specific recommendations. Additionally, the Navy is required to hold a Monitoring Workshop in 2011 (at which MMC representatives will hopefully be present) and the discussions at that workshop are intended to inform potential modifications to the Navy's existing monitoring plans, if appropriate, as they pursue a more comprehensive plan that best utilizes the resources in each area to gather the data that is most needed and can most effectively be gathered in a particular geographic area.

*Comment 16:* Several commenters suggested that the Navy's primary method of reducing harm to marine mammals, powering down or securing sonar, is not effective. They indicated that it is hard to sight whales on fast-moving ships, especially beaked whales, and especially in certain conditions). They further suggested that time/area closures are a more effective form of mitigation.

*Response:* While few mitigation measures are 100 percent effective, the Navy's powerdown and shutdown strategy is likely effective at avoiding exposure to injurious levels of sound, and does succeed in reducing exposures of marine mammals (to varying degrees, depending on the species and environmental conditions) to higher levels of sound that might be associated with more severe behavioral responses. The Mitigation Conclusion section of the proposed rule describes our least practicable adverse impact analysis (74 FR 33867).

NMFS agrees that geographic mitigation can be an effective tool for reducing impacts to marine mammals in certain circumstances. However, we have evaluated the potential areas recommended for marine mammal protection in the NWTRC and the impracticability of the recommended measures outweighed the likely benefit to the species.

*Comment 17:* To protect the Southern Residents, NOAA should insist that the Navy not operate SONARs or set off explosions for any purposes short of war, unless they know that orcas are not within a distance where they would be killed, injured or caused to panic.

*Response:* The Navy is currently required to implement MFAS and explosive powerdown and shutdown requirements, which, considering the high probability of detection of killer whales, should ensure that killer whales do not approach within a distance where they would be injured or killed. It is hard to know exactly what might cause a killer whale to panic, but the circumstances in which this behavior has previously been observed in killer whales in response to MFAS in this area are no longer likely to occur in the NWTRC, as no MFAS is operated within the Greater Puget Sound area and sonar is predominantly operated over 50 nm off-shore.

*Comment 18:* NOAA should initiate studies independent of the Navy in order to determine if mitigation measures in other range complexes are working. If the measures are not working no future permits should be allowed until such time as alternative mitigation measures are proposed and tested. NOAA should also prepare to conduct studies, independent of Navy influence, in all Navy range complexes prior to issuing a permit for NWTRC.

*Response:* NOAA has a duty to use the best available data to conduct our analyses and make our determinations. To assess the likely success of monitoring and mitigation measures, we consider available literature and examples of previous mitigation implementation and monitoring reports. We also require that the Navy submit multiple monitoring and reporting results annually for each range complex and that the Navy compile this information in a comprehensive manner for an annual adaptive management meeting. This meeting is used in coordination with the adaptive management components of the Navy rules, which provide a mechanism for mitigation or monitoring measures to be modified, as appropriate, based on new information.

The MMPA does not require that NOAA initiate independent studies to determine if different mitigation measures are effective, nor do we always have the resources to do so, and nor is it necessary when information is available through other means. However, NOAA supports these efforts when feasible, and as noted in the introduction, in January 2009, NOAA committed to convene a workshop to identify cetacean hotspots and the information generated from that workshop will be used to inform management decisions, such as the development of geographic mitigation measures.

Finally, most of the Navy funded range complex monitoring is conducted by qualified academic and scientific organizations. Information from these researchers is presented to NMFS and the public in annual monitoring reports, and these researchers have a long history of unbiased, successful scientific publication based on these studies. This kind of peer-review presentation of scientific results will continue based on monitoring efforts in the NWTRC and other Navy range complexes.

**Impact Assessment**

*Comment 19:* The MMC recommended that NMFS require the Navy to conduct an external peer review of its marine mammal density estimates, the data upon which those estimates are based, and the manner in which those data are being used.

*Response:* Both NMFS and the Navy use peer-reviewed science whenever it is available and applicable, and NMFS has encouraged the Navy to get the models they use and data they gather peer-reviewed. However, neither the NEPA, the MMPA, nor the ESA require that data or calculations used in the analyses pursuant to these statutes be peer-reviewed prior to making a decision. Rather, NMFS and the Navy are required to use the best available science to inform our analyses.

In the context of the Navy's NWTRC EIS/OEIS and LOA application, the marine mammal densities used in the Navy's impact analysis were derived from estimates directly provided by NMFS's Southwest Fisheries Science Center (SWFSC). As mentioned in a previous comment response, SWFWC continues to refine and improve this density estimation process.

Also, while it is not the same as a peer review, both the NEPA and MMPA processes include a comment period in which the public can specifically recommend better ways to use the data to estimate density, and which the Navy and NMFS would need to address.

Further, the Navy is developing a new systematic framework (that includes a hierarchy of preferred methodologies based on the data available in an area) to estimate density in the analyses for the rule renewals that will follow the expiration of the MMPA rules for Navy training issued in 2009, 2010, and 2011 (*i.e.,* rules that would, if appropriate, be issued in 2014 and later). The Navy has indicated that they may pursue a peer

review of this framework and NMFS has encouraged them to do so.

*Comment 20:* NRDC included a copy of their comments on the Navy's EIS and suggested that some of those comments also pertained to the MMPA authorization. Other commenters mirrored several of the recommendations that NRDC made in these comments.

*Response:* NMFS has addressed the issues that apply to our issuance of the MMPA authorization below:

(1) Additional Mitigation—NRDC recommends a suite of additional mitigation measures for the Navy to consider to protect various resources, including marine mammals. NMFS and the Navy have previously discussed either the specific measures listed in NRDC's comments on the Navy's EIS, or the general class of mitigation contemplated and have developed a section for the EIS that discusses the benefits of the proposed measure to marine mammals, the likely effectiveness of the measure, and the practicability of the measure for Navy implementation. Section 5.2.1.5 (begin page 5–23) of the NWTRC EIS, entitled Alternative Mitigation Measures Considered But Eliminated, explains why these measures are not included in NMFS MMPA regulations and NMFS refers readers to that document.

(2) Dr. Bain's Critique of Risk Function—NRDC includes a comprehensive critique of the risk function that the Navy (and NMFS) uses to calculate takes. NMFS responded to Dr. Bain's comments in the Atlantic Fleet Active Sonar Training final rule (74 FR 4865) and refers readers to that document.

*Comment 21:* One commenter suggests that it would be premature for NMFS to issue a take permit to the Navy until NOAA conducts an independent review of the adequacy of the Navy's proposed mitigation for the use of sonar.

*Response:* Pursuant to Section 101(a)(5)(A) of the MMPA, NMFS has the responsibility of ensuring that any incidental take authorization regulations set forth the means of effecting the least practicable impact, which requires a review of the proposed mitigation measures in the context of the benefit to the species, the likely effectiveness of the measure, and the practicability of the measure for implementation. The rationale behind our finding of least practicable adverse impact was spelled out in the Mitigation Conclusion section of the proposed rule (74 FR 33868). The MMPA does not require that NOAA conduct an independent review. However, NMFS continues to monitor the Navy's mitigation and monitoring effectiveness by reviewing annual reports and using the adaptive management mechanism in the rule to inform decisions regarding whether mitigation or monitoring should be modified to increase their effectiveness.

*Comment 22:* One commenter questioned why the Navy was not required to have incidental take authorization for explosive ordinance activities in the in-shore region.

*Response:* As described in the proposed rule, (74 FR 33837), because of the more easily monitored inland location of the explosive ordnance disposal (EOD) ranges, the very limited use of explosives (4 individual explosions between 1.5 and 2.5 pounds) proposed annually for these Mine Countermeasure exercises, and the likely effectiveness of the mitigation (*e.g.,* marine mammal take would only be expected if a marine mammal were exposed within less than 200 m of the detonation, and the Navy does not detonate explosives if a marine mammal is seen within 700 m), take of marine mammals is not anticipated or authorized.

*Comment 23:* A few commenters noted that NMFS should conduct additional analysis and provide stronger protection for marine mammals from Navy training vessel operations including collisions, discharges of wastewater and garbage, and emissions of air pollution and greenhouse gases. Some commenters also objected to the Navy's use of depleted uranium in some of their ordnance.

*Response:* NMFS did analyze (74 FR 33862) the potential impacts from vessel strike in the proposed rule and added a mitigation measure in the final rule to minimize the likelihood of a strike (*see* § 218.114(a)(1)(ii)(I). Because of the relatively low density of Navy traffic in the NWTRC and the mitigation measures (and the fact that the Navy has not struck a whale there previously), NMFS does not believe that the vessel strike of a marine mammal is likely in the NWTRC.

The Effects on Marine Mammal Habitat section of the proposed rule considered the impacts of expendable materials and some of the chemicals associated with Navy training activities on marine mammal habitat (74 FR 33885) and determined that there would be no significant impacts to marine mammal habitat. Additionally, NMFS' Biological Opinion (page 192–195) covering the Navy's training activities in the NWTRC, as well as NMFS' issuance of an MMPA authorization, analyzed the effects of the chemicals expended by the Navy's ordnance and projectiles and found they were unlikely to adversely impact ESA-listed marine mammals.

The Navy's NWTRC EIS addresses discharges and emissions resulting from the Navy's training activities. The Navy complies with all state and Federal requirements related to water and air quality. Based on the Navy's analysis, NMFS does not believe that wastewater or garbage discharge or emissions will result in the take of marine mammals or significantly impact marine mammal habitat adversely.

Separately, none of the surface combatant ships stationed in the Pacific Northwest, which are the ships that do the preponderance of training at sea in the Pacific Northwest, have depleted uranium rounds onboard. Subsequent to public release of the Draft EIS/OEIS, Commander Pacific Fleet directed that all Pacific Fleet ships offload all depleted uranium rounds at the earliest opportunity. This change is reflected in the Final EIS/OEIS in Section 2.4.1.1, which indicates that depleted uranium use is no longer included in the Navy's Proposed Action.

*Comment 24:* One commenter suggested that the mitigation measures with regard to Navy vessels operating at "safe speeds" to avoid collisions with marine mammals are unrealistic. There is no such thing as a safe speed due to the fact that Navy vessels do not stop, turn or slow down like small speed boats or automobiles. Thus, avoiding a collision would be impossible because it takes thousands of yards to turn a vessel or slow it down. Marine mammals surface to breathe sporadically and are not seen on the surface often enough to give enough warning time to avoid collisions.

*Response:* Avoiding collisions is difficult for large ships. However, some Navy vessels are fairly maneuverable, even at speed, and the more vigilant the watchstanders are (*i.e.,* the earlier a whale is sighted), the more likely a collision can be avoided. Mitigation measures are intended to reduce the likelihood of ship strikes to the lowest level possible. In the case of the NWTRC, which has comparatively low Navy traffic and in which a Navy vessel has not previously struck a whale, NMFS believes that vessel strike is unlikely.

*Comment 25:* One commenter suggests that the Navy's assumption of a "uniform and stationary distribution of marine mammals," would result in gross underestimation of potential exposures in all areas, seasons, or circumstances involving aggregations of animals engaged in mating, birthing, feeding, migrating, and other common activities

that often concentrate large numbers of animals in one area.

*Response:* This statement is incorrect. Given the same total number of animals in an area (and the Navy used the best available survey information to inform their density estimates), over a long amount of time, you would encounter the same number of animals if they were evenly distributed as if they were clumped (unless you were selectively going to the places that they were clumped, which will not occur here). With a uniform distribution you would encounter marine mammals more often, but only one at a time, whereas with a clumped distribution, you would encounter them far less frequently, but in higher numbers at one time. Given a short amount of time (for example, the short duration of the MFAS activities in the NWTRC), a uniform distribution might be more likely to overestimate takes, because with a clumped distribution, you are far less likely to encounter groups of animals during the short duration of the actual exercises.

*Comment 26:* One commenter states that the proposed rule assumes that because effects were not detected over the last 60 years, they never occurred, while at the same time, the proposed rule acknowledges that no monitoring has occurred during this period.

*Response:* NMFS does not make this assumption (*see* 74 FR 33887–33888). The Navy has been conducting MFAS/HFAS training exercises in the NWTRC Range Complex for over 60 years. Although the Navy has not conducted monitoring specifically in conjunction with training exercises in the past, people have been collecting stranding data in the NWTRC Range Complex for approximately 30 years. We further state that although not all dead or injured animals are expected to end up on the shore (some may be eaten or float out to sea), one might expect that if marine mammals were being harmed by the Navy training exercises with any regularity, more evidence would have been detected over the 30-yr period.

*Comment 27:* If the whales do not reach Alaska because they are all disoriented from sonar, bombings, etc., does this not affect the traditional Alaskan Native hunting grounds?

*Response:* None of the species (or populations) of whales that Alaska natives currently hunt are present in the NWTRC (bowhead or beluga whales).

*Comment 28:* One commenter had the following comment: Mooney, *et al.* (2009) have just demonstrated hearing loss in porpoises exposed to U.S. Navy MFA sonar ping recordings. Loss of auditory sensitivity could be as catastrophic for SRKWs (porpoises) as stranding. Because Navy underwater noise pollution could—in a worst case scenario—exacerbate difficulties the SRKWs may already be experiencing hearing the echolocation reflections from their rare salmonid prey (Au, 2004) due to vessel noise, the commenter has serious concerns about the proposed rule, and particularly the Killer Whale section on page 33890.

*Response:* The proposed rule discusses both the likelihood of TTS occurring as a result of MFAS exposure (unlikely due to how close an animal would need to be to the source, the tendency of many marine mammals to avoid loud sounds at some distance, and the likely success of mitigation measures, especially for highly visible killer whales) and the likely overall impact of TTS if it should occur in these circumstances (minimal, short in duration and severity because of the short duration that an animal would likely be able to remain in close proximity to the source given the moving vessel and the continued likelihood of mitigation detection). Additionally, the Navy estimated that only 14 killer whales would be exposed to levels associated with Level B Harassment and that 0 would be exposed to levels associated with TTS, assuming no mitigation. In short, because of the low hours of total MFAS use, the short duration of each exercise, the fact that it is far from shore and does not take place in Puget Sound (where killer whales are known to concentrate in certain parts of the year, and where there are bathymetric conditions that have been associated with more severe responses to MFAS), killer whales are highly unlikely to incur TTS from the MFAS exercises in the NWTRC.

*Comment 29:* One commenter suggested that NMFS made an incorrect statement in the proposed rule: "Southern resident killer whales are very vocal, making calls during all types of behavioral states." They indicated that, on the contrary, it is well known that entire pods of SRKWs remain completely silent during the resting behavioral state.

*Response:* This is a valid correction. NMFS did not mean to imply that killer whales vocalized while they are resting. A corrected sentence would read "Southern resident killer whales are very vocal, making calls during almost all types of behavioral states."

*Comment 30:* Several comments made comments related to the analysis of cumulative impacts. One commenter specifically suggested that NMFS consider the cumulative impacts of several specific military activities that would likely occur in the area of the NWTRC (*e.g.,* the Keyport expansion, and the explosives handling wharf at Naval Base Kitsap Bangor). Other commenters suggested that the Navy fails to consider the cumulative impacts of toxic chemicals on marine mammals. Another commenter suggested that the Navy has not considered the cumulative and synergistic impacts of "taking" marine mammals by exposure to MFAS from all of the Navy's range complexes. Another commenter suggests that NMFS and the Navy assume that the entire batch of proposed Navy actions will take place in a pristine environment and do not take into account their contributions to or exacerbation of existing conditions such as global climate change, acidification of the oceans, rising ocean levels, global ocean and atmospheric pollution, warming ocean waters, increased storm activities, global extinctions, and other disasters.

*Response:* NMFS participated as a cooperating agency in the development of the Navy's NWTRC EIS and has adopted it to support our issuance of incidental take regulations and LOAs. NMFS discussed with the Navy the specific examples the commenter raised of activities that should be included in the cumulative impact analysis and they are included, as appropriate (*i.e.,* considering the location of the activity and the anticipated impacts) in the FEIS. The FEIS contains a thorough analysis of potential cumulative effects, including pollutants and toxic chemicals. Throughout the FEIS, within the separate resource sections, the Navy addresses different ways that they will minimize adverse effects. As an agency, NMFS understands the importance of cumulative effects, and we continually look for ways to both better understand and more effectively reduce cumulative effects/impacts on marine mammals and other marine resources through implementation of our statutory authorities (Endangered Species Act (ESA), NEPA, Magnuson-Stevens Fishery Conservation and Management Act, Coastal Zone Management Act, etc.) and more directly through policy and other actions, such as the implementation of the Right Whale Ship Strike Reduction rule or the convening of the Potential Application of Vessel-Quieting Technology on Large Commercial Vessels meeting in May 2007.

Regarding the consideration of the cumulative or synergistic effects of sonar conducted in all of the Navy's major range complexes the Navy has considered the cumulative impacts of sonar from different range complexes if they are adjacent or nearby. However, generally speaking (on the West Coast

especially), Navy range complexes are not in close proximity to one another and therefore the Navy has not considered the cumulative impacts of sonar use. Additionally, the vast majority of the impacts to marine mammals expected from sonar exposure are behavioral in nature, comparatively short in duration, and not of the type or severity that would be expected to be additive for the portion of marine mammals that might travel between range complexes.

Last, NMFS and the Navy have considered how the Navy's action interacts with global conditions, such as climate change. The NWTRC FEIS notes that recent observed changes due to global warming include shrinking glaciers, thawing permafrost, a lengthened growing season, and shifts in plant and animal ranges (Intergovernmental Panel on Climate Change 2007). Also, predictions of long-term environmental impacts due to global warming include sea level rise, changing weather patterns with increases in the severity of storms and droughts, changes to local and regional ecosystems including the potential loss of species, and a significant reduction in winter snow pack. The Cumulative Impacts chapter of the NWTRC FEIS includes a discussion of climate change, greenhouse gases and other pollutants, and how the Navy's action will contribute to these global issues. The FEIS also highlights several goals that the Secretary of the Navy has established for reducing the Navy's consumption of fossil fuels, including:

- Mandate that energy usage, efficiency, life-cycle costs and other such factors be part of the Navy's decision when acquiring new equipment or systems, as well as vendors' efficiency or energy policies.
- Cut petroleum use by half in the Navy's fleet of commercial vehicles by 2015, by phasing in new hybrid trucks to replace older ones.
- Procure half the power at Navy shore installations from alternative energy sources—including wind or solar—by 2020, and where possible, supply energy back to the grid, as the Navy does today at Naval Air Weapons Station China Lake, California.
- Reach the point that half the energy used throughout the Navy Department, including in ships, aircraft, vehicles and shore stations, comes from alternative fuel or alternative sources by 2020. Today that percentage is about 17 percent.

**Monitoring and Reporting**

*Comment 31:* One commenter suggested that it would be premature for NMFS to issue a take permit to the Navy until the public has had a chance to review the Monitoring Plan proposed for the NWTRC.

*Response:* NMFS made the draft Monitoring Plan available on its webpage for the public to review during the public comment period.

*Comment 32:* One commenter suggests that the Navy should assist in extending underwater monitoring for marine mammal sounds to the outer coast of Washington state.

*Response:* The Navy's Monitoring Plan (*http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*) includes the deployment, and subsequent monitoring, of two passive acoustic devises on the outer coast of Washington.

*Comment 33:* One commenter suggested that the Navy training DVD is inadequate for Navy observers.

*Response:* The primary duty of the watchstanders on Navy vessels is to detect objects in the water, estimate their distance from the ship, and identify them as any of a number of inanimate or animate objects that are significant to a Navy exercise or as a marine mammal so that the mitigation can be implemented. Navy watchstanders go through extensive training to learn these skills, and the Marine Species Awareness Training is used to augment it with some marine mammal specific information that will make them aware of some cues that they may not otherwise have learned and may contribute to their collection of slightly more accurate and descriptive information in their reports. However, watchstanders are not expected to identify marine mammals to species and they are not expected to provide in-depth behavioral or status information on marine mammals.

Alternatively, for the Monitoring Plans that the Navy develops and implements, professional biologists and scientists, with extensive marine mammal field experience, develop and conduct the data collection, and do the subsequent analysis.

*Comment 34:* NMFS has prioritized beaked whales in the Navy's proposed Monitoring Plan for the area (74 FR 33870). This prioritization should include a firm, multi-year commitment to sponsor fine-scale surveys with the aim of identifying important beaked whale habitat for avoidance.

*Response:* The Navy's current monitoring commitment includes the deployment of passive acoustic monitoring hydrophones off shore of Washington as well as tagging studies, both of which allow for a focus on beaked whales and will likely collect valuable information. In 2011, the Navy will hold a Monitoring Workshop, in which (with expert and public input) they will be comprehensively re-evaluating their monitoring priorities and plans (*see* Introduction to Monitoring section, above), and may modify this plan, as appropriate.

*Comments 35:* We recommend that NMFS increase its reporting requirements for the Navy to provide information on (1) its use of mid-frequency sonar (*e.g.,* times, locations), which would greatly assist in analyzing and understanding the impacts of this sonar on marine mammals, and (2) the locations of southern resident killer whales and other marine mammals detected during its various monitoring efforts along the west coast.

*Response:* For major MFAS training exercises (which do not occur in the NWTRC), the Navy is required to provide the times and locations of their MFAS use and the locations of the individual animals detected by their watchstanders. For non-major MFAS exercises (like those in the NWTRC), the Navy watchstanders implement the mitigation measures, but are not required to keep a written record of each animal seen because it is logistically difficult given the existing resources. Also for non-major exercises, the Navy is required to, to the extent practicable, develop and implement a method of annually reporting non-major training utilizing hull-mounted sonar that presents an annual (and seasonal, where practicable) depiction of non-major training exercises geographically across NWTRC.

The Navy also has a monitoring plan that includes the use of hydrophones to detect whale calls, and which will also utilize animal tagging. The results of the Navy's monitoring plan will be made available annually.

**Other**

*Comment 36:* Multiple commenters requested an extension on the 30-day public comment period on the MMPA proposed rule for the NWTRC. Another commenter suggested that in the future, NMFS allow 60 days for public comment on Navy training rules.

*Response:* NMFS extended the public comment period by 7 days. Of note, the public comment period for the Navy's NWTRC DEIS was extended three times and the total comment period was 105 days. NMFS is currently working with the Navy to develop scheduling plans for the next round of training activities for which the Navy plans to request incidental take authorization. NMFS intends to include 60 days for public comment on these proposed rules.

*Comment 37:* NMFS should hold back on approving marine mammal takes under the proposed MMPA rule for the NWTRC until the Presidential Ocean Policy Task Force process is complete.

*Response:* NOAA is committed to the goals of the Ocean Policy Task Force. However, the intent is not to cease conducting our required regulatory actions while the details of implementation are being worked out. Additionally, the Ocean Policy Task Force strategy does not yet contain a level of detailed information that could be applied to this specific action. The MMPA mandates that NOAA "shall issue" the incidental take authorization if we are able to make the necessary findings. When the Task Force has produced a plan containing a level of detail that is applicable to MMPA authorizations under 101(a)(5)(A), it will be applied to this program. In the interim, NOAA will continue to comply with the MMPA requirements in a timely manner.

*Comment 38:* Many commenters expressed general opposition to Navy activities and NMFS' issuance of an MMPA authorization, citing general concerns about the health and welfare of marine mammals.

*Response:* NMFS appreciates the commenters' concern for the marine mammals that live in the area of the Navy's training activities. The MMPA directs NMFS to issue an incidental take authorization if certain findings can be made. NMFS has determined that the Navy's NWTRC training activities will have a negligible impact on the affected species or stocks. Additionally, NMFS has worked with the Navy to develop mitigation measures that help minimize the impacts to marine mammals and a monitoring plan that will increase our understanding of the marine mammals in the area and their responses in the presence of marine mammals. Therefore, we are issuing the necessary governing regulations and plan to issue the requested MMPA authorization.

*Comment 39:* Several commenters recommended that the Navy share more of the information that they have access to with the public, for example:

- The Navy could make a significant contribution to the public's understanding of the whereabouts of killer whales by providing sighting data from their bases and ships as well as including hydrophones on the oceanographic buoys and tidal energy projects they are employing in the Sound.
- The Navy could utilize their existing infrastructure to provide the public (or at least independent scientists) with the ability to listen to the underwater soundscape on the outer coast of Washington.
- The Navy could share information about the locations of orcas with civilian agencies and organizations that seek to track the location of the orcas.

*Response:* Following are responses to the specific bullets above:

- The reporting of killer whale sightings from transitory Navy ships would be of little value, given the vast tracts of ocean traversed in which sightings would not be obtained, the logistic difficulties of getting such reports in a useable and timely manner from the ships to outside Navy organizations, and the lack of useable scientific detail in a generic report of "killer whale" (no way to know if inshore or other killer whale stock). The shore based infrastructure is not part the Navy's LOA authorization for the NWTRC, nor is the Navy seeking MMPA authorization within inshore Washington State waters. The Navy's offshore monitoring program which includes passive acoustic monitoring will provide more scientifically robust information as to specific killer whale stocks detected and the periodicity of those detections, a far stronger and more useful approach than individual ship sightings.
- The Navy has no real-time infrastructure in-place for offshore passive acoustic "listening". Under the NWTRC Monitoring Plan, the Navy is proposing to deploy two of Scripps Institute of Oceanography High-frequency acoustic recording packages (HARP) within this area (*http://cetus.ucsd.edu/*). Given the distance from shore, depths of deployment (800–1000 m), and current technology limitations, there is no real-time listening available. Scripps services these devices approximately every 4–5 months to retrieve hard drives. New hard drives are inserted and the HARP re-deployed back into the ocean. The retrieved hard drive is then returned to the laboratory for analysis which can take some time to complete. Results from these deployments will however be provided to the NMFS and the public in the Navy's annual monitoring report for the NWTRC.
- All of the Navy monitoring results and summaries for the NWTRC will be made available to the NMFS and the public via annual monitoring reports. If detected, presence/absence vocalizations from offshore stocks and inshore resident stocks of killer whales will be reported. As described in the Navy's draft Monitoring Plan for the NWTRC, some results from the Quinault HARP do contain killer whale detections (see Oleson, E.M., J. Calambokidis, Erin Falcone, and Greg Schorr and J.A. Hildebrand. 2009. Acoustic and visual monitoring for cetaceans along the outer Washington coast-Technical Report, July 2004–September 2008. Prepared for U.S. Navy. Naval Postgraduate School, Monterey, CA. NPS–OC–09–001. 45 pp.)

*Comment 40:* In considering the U.S. Navy's plans to use loud sonars and to set off underwater explosions, it is imperative that NOAA be just as careful with the Navy with its fleets of generators of potentially lethal noises as NOAA is being with respect to whale watch boats and kayaks.

*Response:* The Navy requested (pursuant to the MMPA) authorization to take marine mammals during their training exercises, which utilize sonar and explosives. In order to issue the authorization and comply with section 101(a)(5)(A) of the MMPA, NOAA must make certain findings and set forth appropriate mitigation and monitoring measures, which we have done. Additionally, where ESA-listed species are affected, and where NOAA proposes to authorize take, NOAA must evaluate those impacts pursuant to the ESA in a formal consultation, make certain findings, and issue an incidental take statement, which we have done.

Alternately, in the case of whale watching boats and kayaks, those entities have not engaged in formal consultation under the ESA, nor do they have authorization under the MMPA to take marine mammals. Rather, NOAA has developed regional guidance regarding avoidance distances that are intended to completely avoid the take of killer whales. Consequently (and because the activities are completely different), the protective measures are different—the Navy is allowed to take marine mammals, but still has minimizing measures, whereas whalewatchers and kayakers have required measures to ensure that they do not take killer whales at all.

*Comment 41:* Some comments addressed the protection of resources other than marine mammals (*e.g.,* turtles) or addressed activities other than the take authorization (*e.g.,* the designation of critical habitat). Some comments misrepresented the information contained in the proposed rule (*e.g.,* "NMFS should not allow the death of millions of marine mammals").

*Response:* NMFS considered these types of comments inapplicable and does not address them further here.

**Estimated Take of Marine Mammals**

As mentioned previously, one of the main purposes of NMFS' effects assessments is to identify the

permissible methods of taking, meaning: The nature of the take (*e.g.,* resulting from anthropogenic noise vs. from ship strike, etc.); the regulatory level of take (*i.e., mortality* vs. *Level A or Level B Harassment*) and the amount of take. In the Potential Effects of Exposure of Marine Mammals to MFAS/HFAS and Underwater Detonations section, NMFS identified the lethal responses, physical trauma, sensory impairment (permanent and temporary threshold shifts and acoustic masking), physiological responses (particular stress responses), and behavioral responses that could potentially result from exposure to MFAS/HFAS or underwater explosive detonations. In this section, we will relate the potential effects to marine mammals from MFAS/HFAS and underwater detonation of explosives to the MMPA statutory definitions of Level A and Level B Harassment and attempt to quantify the effects that might occur from the specific training activities that the Navy is proposing in the NWTRC.

In the Estimated Take of Marine Mammals section of the proposed rule, NMFS relates the potential effects to marine mammals from MFAS/HFAS and underwater detonations (discussed in the Potential Effects of Specified Activities on Marine Mammals Section) to the MMPA regulatory definitions of Level A and Level B Harassment and quantified (estimated) the effects on marine mammals that could result from the specific activities that the Navy intends to conduct. The subsections of that analysis are discussed individually below.

**Definition of Harassment**

The Definition of Harassment section of the proposed rule contains the definitions of Level A and Level B Harassment, and a discussion of which of the previously discussed potential effects of MFAS/HFAS or explosive detonations fall into the categories of Level A Harassment (permanent threshold shift (PTS), acoustically mediated bubble growth, behaviorally mediated bubble growth, and physical disruption of tissues resulting from explosive shock wave) or Level B Harassment (temporary threshold shift (TTS), acoustic masking and communication impairment, and behavioral disturbance rising to the level of harassment). *See* 74 FR 33828, pages 33872–33873. No changes have been made to the discussion contained in this section of the proposed rule.

**Acoustic Take Criteria**

In the Acoustic Take Criteria section of the proposed rule, NMFS described the development and application of the acoustic criteria for both MFAS/HFAS and explosive detonations (74 FR 33828, pages 33873–33880). No changes have been made to the discussion contained in this section of the proposed rule.

**Estimates of Potential Marine Mammal Exposure**

The proposed rule describes in detail how the Navy estimated the take that will result from their proposed activities (74 FR 33828, pages 33880–33881), which entails the following three general steps: (1) A propagation model estimates animals exposed to sources at different levels; (2) further modeling determines the number of exposures to levels indicated in criteria above (*i.e.,* number of takes); and (3) post-modeling corrections refine estimates to make them more accurate. More information regarding the models used, the assumptions used in the models, and the process of estimating take is available in Appendix D of the Navy's DEIS for NWTRC.

Table 5, which is identical to the Table 8 in the proposed rule with a few minor corrections (including the reduction from 1 to 0 of Level A Harassment takes of blue whales and Steller sea lions), indicates the number of takes that were modeled and that are being authorized yearly incidental to the Navy's activities, with the following allowances. The Navy has carefully characterized the training activities planned for the NWTRC over the 5 years covered by these regulations; however, evolving real-world needs necessitate flexibility in annual activities, which in turn is reflected in annual variation in the potential take of marine mammals. Where it was mentioned more generally in the proposed rule, NMFS has now included language bounding this flexibility in the regulatory text (*see* § 218.112(c)). These potential annual variations were considered in the negligible impact analysis and the analysis in the proposed rule remains applicable. The new language indicates that after-action modeled annual takes (*i.e.,* based on the activities that were actually conducted and which must be provided with annual LOA applications) of any individual species may vary but will not ultimately exceed the indicated 5-year total for that species by more than 10 percent and will not exceed the indicated annual total by more than 25 percent in any given year; and that modeled total yearly take of all species combined may vary but may not exceed the combined amount indicated below in any given year by more than 10 percent.

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| Species | Modeled Sonar Exposures to Indicated Thresholds | | | Modeled Explosive Exposures to Indicated Thresholds | | | | NMFS Final Annual Take Authorization | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Level B Exposures | | Level A Exposures | Level B Exposures | | Level A Exposures | Mortality | | | |
| | Risk Function | TTS | | Sub-TTS | TTS | | | Level B Harassment | Level A Harassment | Mortality |
| **ESA-listed / MMPA depleted Species** | | | | | | | | | | |
| Blue whale | 17 | 0 | 0 | 1 | 1 | 0 | 0 | 19 | 0 | 0 |
| Fin whale | 123 | 2 | 0 | 12 | 7 | 1 | 0 | 144 | 1 | 0 |
| Humpback whale | 15 | 0 | 0 | 0 | 0 | 0 | 0 | 15 | 0 | 0 |
| Killer Whale | 14 | 0 | 0 | 0 | 0 | 0 | 0 | 14 | 0 | 0 |
| Sei whale | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| Sperm whale | 102 | 2 | 0 | 13 | 10 | 1 | 0 | 127 | 1 | 0 |
| Steller Sea Lion | 114 | 0 | 0 | 3 | 3 | 0 | 0 | 120 | 0 | 0 |
| **Mysticetes** | | | | | | | | | | |
| Gray whale | 4 | 0 | 0 | 0 | 0 | 0 | 0 | 4 | 0 | 0 |
| Minke whale | 9 | 0 | 0 | 0 | 0 | 0 | 0 | 9 | 0 | 0 |
| **Odontocetes** | | | | | | | | | | |
| Baird's beaked whale | 12 | 0 | 0 | 1 | 0 | 0 | 0 | 13 | 0 | 0 |
| Bottlenose dolphin | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Cuvier's beaked whale | 12 | 0 | 0 | 1 | 1 | 0 | 0 | 14 | 0 | 0 |
| Dall's porpoise | 4,485 | 147 | 0 | 62 | 58 | 3 | 0 | 4752 | 3 | 0 |
| Dwarf / Pygmy sperm whale | 3 | 0 | 0 | 1 | 0 | 0 | 0 | 4 | 0 | 0 |
| Harbor porpoise* | 119,215 | 45 | 0 | 9 | 5 | 1 | 0 | 119274 | 1 | 0 |
| *Mesoplodon* spp. | 14 | 0 | 0 | 1 | 0 | 0 | 0 | 15 | 0 | 0 |
| Northern right whale dolphin | 705 | 18 | 0 | 11 | 7 | 1 | 0 | 741 | 1 | 0 |
| Pacific white-sided dolphin | 537 | 23 | 0 | 8 | 3 | 0 | 0 | 571 | 0 | 0 |
| Risso's dolphin | 85 | 2 | 0 | 9 | 4 | 0 | 0 | 100 | 0 | 0 |
| Short beaked common dolphin | 1,142 | 42 | 0 | 49 | 23 | 2 | 0 | 1256 | 2 | 0 |
| Short-finned pilot whale | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 |
| Striped dolphin | 38 | 1 | 0 | 0 | 1 | 0 | 0 | 40 | 0 | 0 |
| **Pinnipeds** | | | | | | | | | | |
| Northern elephant seal | 296 | 0 | 0 | 53 | 29 | 2 | 0 | 378 | 2 | 0 |
| Pacific harbor seal | 294 | 290 | 1 | 2 | 0 | 0 | 0 | 586 | 1 | 0 |
| California sea lion | 283 | 0 | 0 | 2 | 1 | 0 | 0 | 286 | 0 | 0 |
| Northern fur seal | 1,296 | 1 | 0 | 24 | 44 | 1 | 0 | 1365 | 1 | 0 |
| Total | 128,818 | 573 | 1 | 262 | 197 | 12 | 0 | 129,850 | 13 | 0 |

**Table 5.** Annual Navy take authorization (individual species takes may not vary by more than 25%, total takes of all species combined may not vary by more than 10%).

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## Mortality

Evidence from five beaked whale strandings, all of which have taken place outside the NWTRC and occurred over approximately a decade, suggests that the exposure of beaked whales to MFAS in the presence of certain conditions (*e.g.,* multiple units using active sonar, steep bathymetry, constricted channels, strong surface ducts, etc.) may result in strandings, potentially leading to mortality. Although these physical factors believed to have contributed to the likelihood of beaked whale strandings are not present, in their aggregate, in the NWTRC, scientific uncertainty exists regarding what other factors, or combination of factors, may contribute to beaked whale strandings. However, because none of the MFAS/HFAS ASW exercises conducted in the NWTRC are major exercises employing multiple surface vessels, the exercises last 1.5 hours or less, and only 65 exercises are planned (for a total of about 100 hours of surface vessel sonar operation), NMFS and the Navy believe it is highly unlikely that marine mammals would respond to these exercises in a manner that would result in a stranding. Therefore, NMFS is not authorizing mortality.

## Effects on Marine Mammal Habitat

NMFS' proposed rule includes a section that addresses the effects of the Navy's activities on Marine Mammal Habitat (74 FR 33828, pages 33883–33884). The analysis preliminarily concluded that the Navy's activities would have minimal effects on marine mammal habitat. No changes have been made to the discussion contained in this section of the proposed rule and NMFS has concluded there would be minimal effects on marine mammal habitat.

## Analysis and Negligible Impact Determination

Pursuant to NMFS' regulations implementing the MMPA, an applicant is required to estimate the number of animals that will be "taken" by the specified activities (*i.e.,* takes by harassment only, or takes by harassment, injury, and/or death). This estimate informs the analysis that NMFS must perform to determine whether the activity will have a "negligible impact" on the affected species or stock. Level B (behavioral) Harassment occurs at the level of the individual(s) and does not assume any resulting population-level consequences, though there are known avenues through which behavioral disturbance of individuals can result in population-level effects (for example: Pink-footed geese (*Anser brachyrhynchus*) in undisturbed habitat gained body mass and had about a 46-percent reproductive success compared with geese in disturbed habitat (being consistently scared off the fields on which they were foraging) which did not gain mass and had a 17-percent reproductive success). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of Level B Harassment takes, alone, is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be "taken" through behavioral harassment, NMFS must consider other factors, such as the likely nature of any responses (their intensity, duration, etc.), the context of any responses (critical reproductive time or location, migration, etc.), as well as the number and nature of estimated Level A takes, the number of estimated mortalities, and effects on habitat. Generally speaking, and especially with other factors being

equal, the Navy and NMFS anticipate more severe effects from takes resulting from exposure to higher received levels (though this is in no way a strictly linear relationship throughout species, individuals, or circumstances) and less severe effects from takes resulting from exposure to lower received levels.

In the Analysis and Negligible Impact Determination section of the proposed rule, NMFS addressed the issues identified in the preceding paragraph in combination with additional detailed analysis regarding the severity of the anticipated effects, and including species (or group)-specific discussions, to preliminarily determine that Navy training will have a negligible impact on the marine mammal species and stocks present in NWTRC. No changes have been made to the discussion contained in this section of the proposed rule (74 FR 33828, pages 33884–33892), with the following exception.

As mentioned previously in the Estimated Take section, NMFS has added language bounding the flexibility in annual variation of potential take of individual marine mammal species into the regulatory text (*see* § 218.112(c)). The new language indicates that modeled annual takes (which must be provided with the annual LOA application) of any individual species may vary but will not ultimately exceed the indicated 5-year total for that species (indicated by Table 6) by more than 10 percent and will not exceed the indicated annual total by more than 25 percent in any given year; and that modeled total yearly take of all species combined may vary but may not exceed the combined amount indicated below in any given year by more than 10 percent. NMFS has considered these limitations in our negligible impact determination and the findings described in the proposed rule remain applicable.

**Determination**

*Negligible Impact*

Based on the analysis contained here and in the proposed rule (and other related documents) of the likely effects of the specified activity on marine mammals and their habitat and dependent upon the implementation of the mitigation and monitoring measures, NMFS finds that the total taking from Navy training exercises utilizing MFAS/HFAS and underwater explosives in the NWTRC will have a negligible impact on the affected species or stocks. NMFS is issuing regulations for these exercises that prescribe the means of effecting the least practicable adverse impact on marine mammals and their habitat and set forth requirements pertaining to the monitoring and reporting of that taking.

*Subsistence Harvest of Marine Mammals*

NMFS has determined that the issuance of 5-year regulations and subsequent LOAs for Navy training exercises in the NWTRC would not have an unmitigable adverse impact on the availability of the affected species or stocks for subsistence use for any Alaska Natives or tribal member in the Northwest (*e.g.,* Oregon, Washington, and northern California). Specifically, the Navy's exercises would not affect any Alaskan Native because the activities will be limited to waters off the coast of Washington, Oregon, and northern California, areas outside of traditional Alaskan Native hunting grounds. Moreover, there are no cooperative agreements in force under the MMPA or Whaling Convention Act that would allow for the subsistence harvest of marine mammals in waters off the Northwest coast. Consequently, this action would not result in an unmitigable adverse impact on the availability of the affected species or stocks for taking for subsistence uses in the Northwest.

**ESA**

There are seven marine mammal species and one sea turtle species that are listed as endangered under the ESA with confirmed or possible occurrence in the study area: Humpback whale, sei whale, fin whale, blue whale, sperm whale, southern resident killer whale, Steller sea lion, and the leatherback sea turtle. Pursuant to Section 7 of the ESA, the Navy has consulted with NMFS on this action. NMFS has also consulted internally on the issuance of regulations under section 101(a)(5)(A) of the MMPA for this activity. In a Biological Opinion (BiOp) issued on June 15, 2010, NMFS concluded that the Navy's activities in the NWTRC and NMFS' issuance of these regulations are not likely to jeopardize the continued existence of threatened or endangered species or destroy or adversely modify any designated critical habitat.

NMFS (the Endangered Species Division) will also issue BiOps and associated incidental take statements (ITSs) to NMFS (the Permits, Conservation, and Recreation Division) to exempt the take (under the ESA) that NMFS authorizes in annual LOAs under the MMPA. Because of the difference between the statutes, it is possible that ESA analysis of the applicant's action could produce a take estimate that is different than the takes requested by the applicant (and analyzed for authorization by NMFS under the MMPA process), despite the fact that the same proposed action (*i.e.* number of sonar hours and explosive detonations) was being analyzed under each statute. When this occurs, NMFS staff coordinate to ensure that the appropriate number of takes are authorized. For the Navy's proposed NWTRC training, coordination with the Endangered Species Division indicates that they will likely allow for a lower level of take of ESA-listed marine mammals than were requested by the applicant (because NMFS' ESA analysis indicates that fewer will be taken than estimated by the applicant). Therefore, the number of authorized takes in NMFS' LOA(s) will reflect the lower take numbers from the ESA consultation, though the specified activities (*i.e.,* number of sonar hours, etc.) will remain the same. Alternately, these regulations indicate the maximum number of takes that may be authorized under the MMPA. The ITS(s) issued for each LOA will contain implementing terms and conditions to minimize the effect of the marine mammal take authorized through the 2010 LOA (and subsequent LOAs in 2011, 2012, 2013, and 2014). With respect to listed marine mammals, the terms and conditions of the ITSs will be incorporated into the LOAs.

**NEPA**

NMFS has participated as a cooperating agency on the Navy's Draft Environmental Impact Statement (DEIS) for the NWTRC, which was published on December 29, 2008. A Notice of Availability for the FEIS was published on September 10, 2010. NMFS subsequently adopted the Navy's EIS for the purpose of complying with the MMPA.

**Classification**

This action does not contain any collection of information requirements for purposes of the Paperwork Reduction Act.

The Office of Management and Budget has determined that this final rule is not significant for purposes of Executive Order 12866.

Pursuant to the Regulatory Flexibility Act, the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this final rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act requires Federal agencies to prepare an analysis of a rule's impact on small entities

whenever the agency is required to publish a notice of proposed rulemaking. However, a Federal agency may certify, pursuant to 5 U.S.C. 605 (b), that the action will not have a significant economic impact on a substantial number of small entities. The Navy is the sole entity that will be affected by this rulemaking, not a small governmental jurisdiction, small organization or small business, as defined by the Regulatory Flexibility Act (RFA). Any requirements imposed by a Letter of Authorization issued pursuant to these regulations, and any monitoring or reporting requirements imposed by these regulations, will be applicable only to the Navy. NMFS does not expect the issuance of these regulations or the associated LOAs to result in any impacts to small entities pursuant to the RFA. Because this action, if adopted, would directly affect the Navy and not a small entity, this action would not result in a significant economic impact on a substantial number of small entities.

The Assistant Administrator for Fisheries has determined that there is good cause under the Administrative Procedure Act (5 U.S.C. 553(d)(3)) to waive the 30-day delay in effective date of the measures contained in the final rule. Navy, as the authorized entity, has informed NMFS that any delay of enacting the final rule would result in either: (1) A suspension of ongoing or planned naval training, which would disrupt vital training essential to national security; or (2) the Navy's procedural non-compliance with the MMPA (should the Navy conduct training without an LOA), thereby resulting in the potential for unauthorized takes of marine mammals. Moreover, the Navy is ready to implement the rule immediately. Therefore, these measures will become effective upon publication.

**List of Subjects in 50 CFR Part 218**

Exports, Fish, Imports, Incidental take, Indians, Labeling, Marine mammals, Navy, Penalties, Reporting and recordkeeping requirements, Seafood, Sonar, Transportation.

Dated: October 25, 2010.

**John Oliver,**

*Deputy Assistant Administrator for Operations, National Marine Fisheries Service.*

■ For reasons set forth in the preamble, 50 CFR part 218 is amended as follows:

## PART 218—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 218 continues to read as follows:

**Authority:** 16 U.S.C. 1361 *et seq.*

■ 2. Subpart M is added to part 218 to read as follows:

**Subpart M—Taking and Importing Marine Mammals; U.S. Navy's Northwest Training Range Complex (NWTRC)**

Sec.

218.110 Specified activity and specified geographical area.
218.111 Effective dates.
218.112 Permissible methods of taking.
218.113 Prohibitions.
218.114 Mitigation.
218.115 Requirements for monitoring and reporting.
218.116 Applications for Letters of Authorization.
218.117 Letters of Authorization.
218.118 Renewal of Letters of Authorization and adaptive management.
218.119 Modifications to Letters of Authorization.

## Subpart M—Taking and Importing Marine Mammals; U.S. Navy's Northwest Training Range Complex (NWTRC)

### § 218.110 Specified activity and specified geographical area.

(a) Regulations in this subpart apply only to the U.S. Navy for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occur incidental to the activities described in paragraph (c) of this section.

(b) The taking of marine mammals by the Navy is only authorized if it occurs within the Offshore area of the Northwest Training Range Complex (NWTRC) (as depicted in Figure ES–1 in the Navy's Draft Environmental Impact Statement for NWTRC), which is bounded by 48°30′ N. lat.; 130°00′ W. long.; 40°00′ N. lat.; and on the east by 124°00′ W. long or by the shoreline where the shoreline extends west of 124°00′ W. long (excluding the Strait of Juan de Fuca (east of 124°40′ W. long), which is not included in the Offshore area).

(c) The taking of marine mammals by the Navy is only authorized if it occurs incidental to the following activities within the designated amounts of use:

(1) The use of the following mid-frequency active sonar (MFAS) sources, high frequency active sonar (HFAS) sources for U.S. Navy anti-submarine warfare (ASW) and mine warfare (MIW) training, in the amounts indicated below:

(i) AN/SQS–53 (hull-mounted active sonar)—up to 215 hours over the course of 5 years (an average of 43 hours per year);

(ii) AN/SQS–56 (hull-mounted active sonar)—up to 325 hours over the course of 5 years (an average of 65 hours per year);

(iii) SSQ–62 (Directional Command Activated Sonobuoy System (DICASS) sonobuoys)—up to 4430 sonobuoys over the course of 5 years (an average of 886 sonobuoys per year)

(iv) MK–48 (heavyweight torpedoes)—up to 10 torpedoes over the course of 5 years (an average of 2 torpedoes per year);

(v) AN/BQS–15 (mine detection and submarine navigational sonar)—up to 210 hours over the course of 5 years (an average of 42 hours per year);

(vi) AN/SSQ–125 (AEER)—up to 745 buoys deployed over the course of 5 years (total combined with the AN/SSQ–110A (IEER)) (an average of 149 per year);

(vii) Range Pingers—up to 900 hours over the course of 5 years (an average of 180 hours per year); and

(viii) PUTR Uplink—up to 750 hours over the course of 5 years (an average of 150 hours per year).

(2) The detonation of the underwater explosives indicated in paragraph (c)(2)(i) conducted as part of the training events indicated in paragraph (c)(2)(ii):

(i) Underwater Explosives:

(A) 5″ Naval Gunfire (9.5 lbs);

(B) 76 mm rounds (1.6 lbs);

(C) Maverick (78.5 lbs);

(D) Harpoon (448 lbs);

(E) MK–82 (238 lbs);

(F) MK–48 (851 lbs);

(G) Demolition Charges (2.5 lbs);

(H) AN/SSQ–110A (IEER explosive sonobuoy—5 lbs);

(I) HARM;

(J) Hellfire;

(K) SLAM; and

(L) GBU 10, 12, and 16.

(ii) Training Events:

(A) Surface-to-surface Gunnery Exercises (S–S GUNEX)—up to 1700 exercises over the course of 5 years (an average of 340 per year).

(B) Bombing Exercises (BOMBEX)—up to 150 exercises over the course of 5 years (an average of 30 per year).

(C) Sinking Exercises (SINKEX)—up to 10 exercises over the course of 5 years (an average of 2 per year).

(D) Extended Echo Ranging and Improved Extended Echo Ranging (EER/IEER) Systems—up to 60 exercises (total combined with the AN/SSQ–125A (AEER)) over the course of 5 years (an average of 12 per year).

(3) The taking of marine mammals may also be authorized in an LOA for

the activities and sources listed in § 218.110(c)(1) should the amounts (*i.e.,* hours, dips, number of exercises) vary from those estimated in § 218.110(c)(2), provided that the variation does not result in exceeding the amount of take indicated in § 218.112(c).

**§ 218.111 Effective dates.**

Regulations are effective November 9, 2010 through November 9, 2015.

**§ 218.112 Permissible methods of taking.**

(a) Under Letters of Authorization issued pursuant to §§ 216.106 and 218.117 of this chapter, the Holder of the Letter of Authorization (hereinafter "Navy") may incidentally, but not intentionally, take marine mammals within the area described in § 218.110(b), provided the activity is in compliance with all terms, conditions, and requirements of these regulations and the appropriate Letter of Authorization.

(b) [Reserved]

(c) The incidental take of marine mammals under the activities identified in § 218.110(c) is limited to the species listed in paragraphs (c)(4) and (5) of this section by the indicated method of take and the indicated number of times (estimated based on the authorized amounts of sound source operation), but with the following allowances for annual variation in sonar activities:

(1) In any given year, annual take, by harassment, of any species of marine mammal may not exceed the amount indentified in paragraph (c)(4) and (5) of this section, for that species by more than 25 percent (a post-calculation/estimation of which must be provided in the annual LOA application);

(2) In any given year, annual take by harassment of all marine mammal species combined may not exceed the estimated total of all species combined, indicated in paragraphs (c)(4) and (5), by more than 10 percent; and

(3) Over the course of the effective period of this subpart, total take, by harassment, of any species may not exceed the 5-year amounts indicated in paragraphs (c)(4) and (5) by more than 10 percent. A running calculation/estimation of takes of each species over the course of the years covered by the rule must be maintained.

(4) Level B Harassment:

(i) Mysticetes:

(A) Humpback whale (*Megaptera novaeangliae*)—75 (an average of 15 annually);

(B) Fin whale (*Balaenoptera physalus*)—720 (an average of 144 annually);

(C) Blue whale (*Balaenoptera musculus*)—95 (an average of 19 annually);

(D) Sei whale (*Balaenoptera borealis)*—5 (an average of 1 annually);

(E) Minke whale (*Balaenoptera acutorostrata*)—45 (an average of 9 annually); and

(F) Gray whale (*Eschrichtius robustus*)—20 (an average of 4 annually).

(ii) Odontocetes:

(A) Sperm whales (*Physeter macrocephalus*)—635 (an average of 127 annually);

(B) Killer whale (*Orcinus orca*)—70 (an average of 14 annually);

(C) Pygmy or dwarf sperm whales (*Kogia breviceps or Kogia sima*)—20 (an average of 4 annually);

(D) Mesoplodont beaked whales—75 (an average of 15 annually);

(E) Cuvier's beaked whales (*Ziphius cavirostris*)—70 (an average of 14 annually);

(F) Baird's beaked whales (*Berardius bairdii*)—65 (an average of 13 annually);

(G) Short-finned pilot whale (*Globicephala macrorynchus*)—10 (an average of 2 annually);

(H) Striped dolphin (*Stenella coeruleoalba*)—200 (an average of 40 annually);

(I) Short-beaked common dolphin (*Globicephala macrorhynchus*)—6280 (an average of 1256 annually);

(J) Risso's dolphin (*Grampus griseus*)—500 (an average of 100 annually);

(K) Northern right whale dolphin (*Lissodelphis borealis*)—3705 (an average of 741 annually);

(L) Pacific white-sided dolphin (*Lagenorhynchus obliquidens*)—2855 (an average of 571 annually);

(M) Dall's porpoise (*Phocoenoides dalli*)—23760 (an average of 4752 annually); and

(N) Harbor Porpoise (*Phocoena phocoena*)—596370 (an average of 119274 annually).

(ii) Pinnipeds:

(A) Northern elephant seal (*Mirounga angustirostris*)—1890 (an average of 378 annually);

(B) Pacific harbor seal (*Phoca vitulina*)—2930 (an average of 586 annually);

(C) California sea lion (*Zalophus californianus*)—1430 (an average of 286 annually);

(D) Northern fur seal (*Callorhinus ursinus*)—6825 (an average of 1365 annually); and

(E) Steller sea lion (*Eumetopias jubatus*)—600 (an average of 120 annually).

(5) Level A Harassment:

(i) Fin whale—5 (an average of 1 annually);

(ii) Sperm whale—5 (an average of 1 annually);

(iii) Dall's Porpoise—15 (an average of 3 annually);

(iv) Harbor Porpoise—5 (an average of 1 annually);

(v) Northern right whale dolphin—5 (an average of 1 annually);

(vi) Short-beaked common dolphin—10 (an average of 2 annually);

(vii) Northern elephant seal—10 (an average of 2 annually);

(viii) Pacific harbor seal—5 (an average of 1 annually); and

(ix) Northern fur seal—5 (an average of 1 annually).

**§ 218.113 Prohibitions.**

No person in connection with the activities described in § 218.110 may:

(a) Take any marine mammal not specified in § 218.112(c);

(b) Take any marine mammal specified in § 218.112(c) other than by incidental take as specified in §§ 218.112(c)(1) and (c)(2);

(c) Take a marine mammal specified in § 218.112(c) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of these regulations or a Letter of Authorization issued under §§ 216.106 and 218.117 of this chapter.

**§ 218.114 Mitigation.**

(a) When conducting training and utilizing the sound sources or explosives identified in § 218.110(c), the mitigation measures contained in the Letter of Authorization issued under §§ 216.106 and 218.117 of this chapter must be implemented. These mitigation measures include, but are not limited to:

(1) Navy's General Maritime Measures for All Training at Sea:

(i) Personnel Training (for all Training Types):

(A) All commanding officers (COs), executive officers (XOs), lookouts, Officers of the Deck (OODs), junior OODs (JOODs), maritime patrol aircraft aircrews, and Anti-submarine Warfare (ASW)/Mine Warfare (MIW) helicopter crews shall complete the NMFS-approved Marine Species Awareness Training (MSAT) by viewing the U.S. Navy MSAT digital versatile disk (DVD). All bridge lookouts shall complete both parts one and two of the MSAT; part two is optional for other personnel.

(B) Navy lookouts shall undertake extensive training in order to qualify as a watchstander in accordance with the Lookout Training Handbook (Naval Education and Training Command [NAVEDTRA] 12968–D) available at *https://portal.navfac.navy.mil/go/navytraining-env-docs.*

(C) Lookout training shall include on-the-job instruction under the supervision of a qualified, experienced lookout. Following successful completion of this supervised training period, lookouts shall complete the Personal Qualification Standard Program, certifying that they have demonstrated the necessary skills (such as detection and reporting of partially submerged objects). Personnel being trained as lookouts can be counted among required lookouts as long as supervisors monitor their progress and performance.

(D) Lookouts shall be trained in the most effective means to ensure quick and effective communication within the command structure in order to facilitate implementation of protective measures if marine species are spotted.

(ii) Operating Procedures and Collision Avoidance:

(A) Prior to major exercises, a Letter of Instruction, Mitigation Measures Message or Environmental Annex to the Operational Order shall be issued to further disseminate the personnel training requirement and general marine species protective measures.

(B) COs shall make use of marine species detection cues and information to limit interaction with marine species to the maximum extent possible consistent with safety of the ship.

(C) While underway, surface vessels shall have at least two lookouts with binoculars; surfaced submarines shall have at least one lookout with binoculars. Lookouts already posted for safety of navigation and man-overboard precautions may be used to fill this requirement. As part of their regular duties, lookouts will watch for and report to the OOD the presence of marine mammals.

(D) On surface vessels equipped with a multi-function active sensor, pedestal mounted "Big Eye" (20x110) binoculars shall be properly installed and in good working order to assist in the detection of marine mammals in the vicinity of the vessel.

(E) Personnel on lookout shall employ visual search procedures employing a scanning methodology in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(F) After sunset and prior to sunrise, lookouts shall employ Night Lookouts Techniques in accordance with the Lookout Training Handbook. (NAVEDTRA 12968–D).

(G) While in transit, naval vessels shall be alert at all times, use extreme caution, and proceed at a "safe speed" so that the vessel can take proper and effective action to avoid a collision with any marine animal and can be stopped within a distance appropriate to the prevailing circumstances and conditions.

(H) When marine mammals have been sighted in the area, Navy vessels shall increase vigilance and take reasonable and practicable actions to avoid collisions and activities that might result in close interaction of naval assets and marine mammals. Actions may include changing speed and/or direction and are dictated by environmental and other conditions (e.g., safety, weather).

(I) Naval vessels shall maneuver to keep at least 1,500 ft (500 yds) away from any observed whale in the vessel's path and avoid approaching whales head-on. These requirements do not apply if a vessel's safety is threatened, such as when change of course will create an imminent and serious threat to a person, vessel, or aircraft, and to the extent vessels are restricted in their ability to maneuver. Restricted maneuverability includes, but is not limited to, situations when vessels are engaged in dredging, submerged activities, launching and recovering aircraft or landing craft, minesweeping activities, replenishment while underway and towing activities that severely restrict a vessel's ability to deviate course. Vessels will take reasonable steps to alert other vessels in the vicinity of the whale. Given rapid swimming speeds and maneuverability of many dolphin species, naval vessels would maintain normal course and speed on sighting dolphins unless some condition indicated a need for the vessel to maneuver.

(J) Navy aircraft participating in exercises at sea shall conduct and maintain, when operationally feasible and safe, surveillance for marine mammals as long as it does not violate safety constraints or interfere with the accomplishment of primary operational duties. Marine mammal detections shall be immediately reported to assigned Aircraft Control Unit for further dissemination to ships in the vicinity of the marine species as appropriate when it is reasonable to conclude that the course of the ship will likely result in a closing of the distance to the detected marine mammal.

(K) All vessels shall maintain logs and records documenting training operations should they be required for event reconstruction purposes. Logs and records will be kept for a period of 30 days following completion of a major training exercise.

(2) Navy's Measures for MFAS Operations:

(i) Personnel Training (for MFAS Operations):

(A) All lookouts onboard platforms involved in ASW training events shall review the NMFS-approved Marine Species Awareness Training material prior to use of mid-frequency active sonar.

(B) All COs, XOs, and officers standing watch on the bridge shall have reviewed the Marine Species Awareness Training material prior to a training event employing the use of mid-frequency active sonar.

(C) Navy lookouts shall undertake extensive training in order to qualify as a watchstander in accordance with the Lookout Training Handbook (Naval Educational Training [NAVEDTRA], 12968–D).

(D) Lookout training shall include on-the-job instruction under the supervision of a qualified, experienced watchstander. Following successful completion of this supervised training period, lookouts shall complete the Personal Qualification Standard program, certifying that they have demonstrated the necessary skills (such as detection and reporting of partially submerged objects). This does not forbid personnel being trained as lookouts from being counted as those listed in previous measures so long as supervisors monitor their progress and performance.

(E) Lookouts shall be trained in the most effective means to ensure quick and effective communication within the command structure in order to facilitate implementation of mitigation measures if marine species are spotted.

(ii) Lookout and Watchstander Responsibilities:

(A) On the bridge of surface ships, there shall always be at least three people on watch whose duties include observing the water surface around the vessel.

(B) All surface ships participating in ASW training events shall, in addition to the three personnel on watch noted previously, have at all times during the exercise at least two additional personnel on watch as marine mammal lookouts.

(C) Personnel on lookout and officers on watch on the bridge shall have at least one set of binoculars available for each person to aid in the detection of marine mammals.

(D) On surface vessels equipped with mid-frequency active sonar, pedestal mounted "Big Eye" (20x110) binoculars shall be present and in good working order to assist in the detection of marine mammals in the vicinity of the vessel.

(E) Personnel on lookout shall employ visual search procedures employing a scanning methodology in accordance

with the Lookout Training Handbook (NAVEDTRA 12968–D).

(F) After sunset and prior to sunrise, lookouts shall employ Night Lookouts Techniques in accordance with the Lookout Training Handbook.

(G) Personnel on lookout shall be responsible for reporting all objects or anomalies sighted in the water (regardless of the distance from the vessel) to the Officer of the Deck, since any object or disturbance (*e.g.,* trash, periscope, surface disturbance, discoloration) in the water may be indicative of a threat to the vessel and its crew or indicative of a marine species that may need to be avoided as warranted.

(iii) Operating Procedures (for MFAS Operations):

(A) Navy will distribute final mitigation measures contained in the LOA and the Incidental take statement of NMFS' biological opinion to the Fleet.

(B) COs shall make use of marine species detection cues and information to limit interaction with marine species to the maximum extent possible consistent with safety of the ship.

(C) All personnel engaged in passive acoustic sonar operation (including aircraft, surface ships, or submarines) shall monitor for marine mammal vocalizations and report the detection of any marine mammal to the appropriate watch station for dissemination and appropriate action.

(D) During mid-frequency active sonar operations, personnel shall utilize all available sensor and optical systems (such as night vision goggles) to aid in the detection of marine mammals.

(E) Navy aircraft participating in exercises at sea shall conduct and maintain, when operationally feasible and safe, surveillance for marine species of concern as long as it does not violate safety constraints or interfere with the accomplishment of primary operational duties.

(F) Aircraft with deployed sonobuoys shall use only the passive capability of sonobuoys when marine mammals are detected within 200 yds (183 m) of the sonobuoy.

(G) Marine mammal detections shall be immediately reported to assigned Aircraft Control Unit for further dissemination to ships in the vicinity of the marine species as appropriate where it is reasonable to conclude that the course of the ship will likely result in a closing of the distance to the detected marine mammal.

(H) Safety Zones—When marine mammals are detected by any means (aircraft, shipboard lookout, or acoustically) the Navy shall ensure that sonar transmission levels are limited to at least 6 dB below normal operating levels if any detected marine mammals are within 1,000 yards (914 m) of the sonar dome (the bow).

(*1*) Ships and submarines shall continue to limit maximum transmission levels by this 6-dB factor until the animal has been seen to leave the 1,000-yd safety zone, has not been detected for 30 minutes, or the vessel has transited more than 2,000 yds (1829 m) beyond the location of the last detection.

(*2*). When marine mammals are detected by any means (aircraft, shipboard lookout, or acoustically) the Navy shall ensure that sonar transmission levels are limited to at least 10 dB below normal operating levels if any detected marine mammals are within 500 yards (497 m) of the sonar dome (the bow). Ships and submarines shall continue to limit maximum ping levels by this 10-dB factor until the animal has been seen to leave the 500-yd safety zone, has not been detected for 30 minutes, or the vessel has transited more than 2,000 yds (1829 m) beyond the location of the last detection.

(*3*). When marine mammals are detected by any means (aircraft, shipboard lookout, or acoustically) the Navy shall ensure that sonar transmission ceases if any detected marine mammals are within 200 yards (183 m) of the sonar dome (the bow). Sonar shall not resume until the animal has been seen to leave the the 200-yd safety zone, has not been detected for 30 minutes, or the vessel has transited more than 2,000 yds (1829 m) beyond the location of the last detection.

(*4*) Special conditions applicable for dolphins and porpoises only: If, after conducting an initial maneuver to avoid close quarters with dolphins or porpoises, the OOD concludes that dolphins or porpoises are deliberately closing to ride the vessel's bow wave, no further mitigation actions are necessary while the dolphins or porpoises continue to exhibit bow wave riding behavior.

(*5*) If the need for power-down should arise as detailed in "Safety Zones" above, the Navy shall follow the requirements as though they were operating at 235 dB—the normal operating level (*i.e.,* the first power-down will be to 229 dB, regardless of at what level above 235 dB active sonar was being operated).

(I) Prior to start up or restart of active sonar, operators will check that the Safety Zone radius around the sound source is clear of marine mammals.

(J) Active sonar levels (generally)—Navy shall operate active sonar at the lowest practicable level, not to exceed 235 dB, except as required to meet tactical training objectives.

(K) Helicopters shall observe/survey the vicinity of an ASW training event for 10 minutes before the first deployment of active (dipping) sonar in the water.

(L) Helicopters shall not dip their active sonar within 200 yds (183 m) of a marine mammal and shall cease pinging if a marine mammal closes within 200 yds of the sound source (183 m) after pinging has begun.

(M) Submarine sonar operators shall review detection indicators of close-aboard marine mammals prior to the commencement of ASW training events involving active mid-frequency sonar.

(N) Night vision goggles shall be available to all ships and air crews, for use as appropriate.

(3) Navy's Measures for Underwater Detonations:

(i) Surface-to-Surface Gunnery (non-explosive rounds)

(A) A 200-yd (183 m) radius buffer zone shall be established around the intended target.

(B) From the intended firing position, trained lookouts shall survey the buffer zone for marine mammals prior to commencement and during the exercise as long as practicable.

(C) If applicable, target towing vessels shall maintain a lookout. If a marine mammal is sighted in the vicinity of the exercise, the tow vessel shall immediately notify the firing vessel in order to secure gunnery firing until the area is clear.

(D) The exercise shall be conducted only when the buffer zone is visible and marine mammals are not detected within the target area and the buffer zone.

(ii) Surface-to-Air Gunnery (explosive and non-explosive rounds)

(A) Vessels shall orient the geometry of gunnery exercises in order to prevent debris from falling in the area of sighted marine mammals.

(B) Vessels will attempt to recover any parachute deploying aerial targets to the extent practicable (and their parachutes if feasible) to reduce the potential for entanglement of marine mammals.

(C) For exercises using targets towed by a vessel or aircraft, target towing vessel/aircraft shall maintain a lookout. If a marine mammal is sighted in the vicinity of the exercise, the tow aircraft shall immediately notify the firing vessel in order to secure gunnery firing until the area is clear.

(iii) Air-to-Surface At-sea Bombing Exercises (explosive and non-explosive):

(A) If surface vessels are involved, trained lookouts shall survey for floating kelp and marine mammals. Ordnance shall not be targeted to impact within 1,000 yds (914 m) of known or observed floating kelp or marine mammals.

(B) A 1,000 yd (914 m) radius buffer zone shall be established around the intended target.

(C) Aircraft shall visually survey the target and buffer zone for marine mammals prior to and during the exercise. The survey of the impact area shall be made by flying at 1,500 ft (457 m) or lower, if safe to do so, and at the slowest safe speed. Release of ordnance through cloud cover is prohibited: aircraft must be able to actually see ordnance impact areas. Survey aircraft should employ most effective search tactics and capabilities.

(D) The exercise will be conducted only if marine mammals are not visible within the buffer zone.

(iv) Air-to-Surface Missile Exercises (explosive and non-explosive):

(A) Ordnance shall not be targeted to impact within 1,800 yds (1646 m) of known or observed floating kelp.

(B) Aircraft shall visually survey the target area for marine mammals. Visual inspection of the target area shall be made by flying at 1,500 ft (457 m) or lower, if safe to do so, and at slowest safe speed. Firing or range clearance aircraft must be able to actually see ordnance impact areas. Explosive ordnance shall not be targeted to impact within 1,800 yds (1646 m) of sighted marine mammals.

(v) Demolitions, Mine Warfare, and Mine Countermeasures (up to a 2.5-lb charge):

(A) Exclusion Zones—All Mine Warfare and Mine Countermeasures Operations involving the use of explosive charges must include exclusion zones for marine mammals to prevent physical and/or acoustic effects to those species. These exclusion zones shall extend in a 700-yard arc radius around the detonation site.

(B) Pre-Exercise Surveys—For Demolition and Ship Mine Countermeasures Operations, pre-exercise surveys shall be conducted within 30 minutes prior to the commencement of the scheduled explosive event. The survey may be conducted from the surface, by divers, and/or from the air, and personnel shall be alert to the presence of any marine mammal. Should such an animal be present within the survey area, the explosive event shall not be started until the animal voluntarily leaves the area. The Navy will ensure the area is clear of marine mammals for a full 30 minutes prior to initiating the explosive event. Personnel will record any marine mammal observations during the exercise as well as measures taken if species are detected within the exclusion zone.

(C) Post-Exercise Surveys—Surveys within the same radius shall also be conducted within 30 minutes after the completion of the explosive event.

(D) Reporting—If there is evidence that a marine mammal may have been stranded, injured or killed by the action, Navy training activities shall be immediately suspended and the situation immediately reported by the participating unit to the Officer in Charge of the Exercise (OCE), who will follow Navy procedures for reporting the incident to Commander, Pacific Fleet, Commander, Navy Region Northwest, Environmental Director, and the chain-of-command. The situation shall also be reported to NMFS (see Stranding Plan for details).

(vi) Sink Exercise:

(A) All weapons firing shall be conducted during the period 1 hour after official sunrise to 30 minutes before official sunset.

(B) An exclusion zone with a radius of 1.5 nm shall be established around each target. This 1.5 nm zone includes a buffer of 0.5 nm to account for errors, target drift, and animal movement. In addition to the 1.5 nm exclusion zone, a further safety zone, which extends from the exclusion zone at 1.5 nm out an additional 0.5 nm, shall be surveyed. Together, the zones extend out 2 nm (3.7 km) from the target.

(C) A series of surveillance over-flights shall be conducted within the 2-nm zone around the target, prior to and during the exercise, when feasible. Survey protocol shall be as follows:

(*1*) Overflights within the 2-nm zone around the target shall be conducted in a manner that optimizes the surface area of the water observed. This may be accomplished through the use of the Navy's Search and Rescue Tactical Aid, which provides the best search altitude, ground speed, and track spacing for the discovery of small, possibly dark objects in the water based on the environmental conditions of the day. These environmental conditions include the angle of sun inclination, amount of daylight, cloud cover, visibility, and sea state.

(*2*) All visual surveillance activities shall be conducted by Navy personnel trained in visual surveillance. At least one member of the mitigation team is required to have completed the Navy's marine mammal training program for lookouts.

(*3*) In addition to the overflights, the 2-nm zone around the target shall be monitored by passive acoustic means, when assets are available. This passive acoustic monitoring would be maintained throughout the exercise. Potential assets include sonobuoys, which can be utilized to detect any vocalizing marine mammals (particularly sperm whales) in the vicinity of the exercise. The sonobuoys shall be re-seeded as necessary throughout the exercise. Additionally, if submarines are present, passive sonar onboard shall be utilized to detect any vocalizing marine mammals in the area. The OCE would be informed of any aural detection of marine mammals and would include this information in the determination of when it is safe to commence the exercise.

(*4*) On each day of the exercise, aerial surveillance of the 2-nm zone around the target shall commence 2 hours prior to the first firing.

(*5*) The results of all visual, aerial, and acoustic searches shall be reported immediately to the OCE. No weapons launches or firing may commence until the OCE declares the 2-nm zone around the target free of marine mammals.

(*6*) If a marine mammal observed within the 2-nm zone around the target is diving, firing would be delayed until the animal is re-sighted outside the 2-nm zone around the target, or 30 minutes have elapsed. After 30 minutes, if the animal has not been re-sighted it would be assumed to have left the exclusion zone. The OCE would determine if the identified marine mammal is in danger of being adversely affected by commencement of the exercise.

(*7*) During breaks in the exercise of 30 minutes or more, the 2-nm zone around the target shall again be surveyed for any marine mammal. If marine mammals are sighted within 2-nm zone around the target, the OCE shall be notified, and the procedure described in (vi)(c)(1)–(6) would be followed.

(*8*) Upon sinking of the vessel, a final surveillance of the 2-nm zone around the target shall be monitored for 2 hours, or until sunset, to verify that no marine mammals were injured.

(D) Aerial surveillance shall be conducted using helicopters or other aircraft based on necessity and availability.

(E) Where practicable, the Navy shall conduct the exercise in sea states that are ideal for marine mammal sighting, *i.e.,* Beaufort Sea State 3 or less. In the event of a Beaufort Sea State 4 or above, survey efforts shall be increased within the 2-nm zone around the target. This shall be accomplished through the use of an additional aircraft, if available, and conducting tight search patterns.

(F) The sink exercise shall not be conducted unless the 2-nm zone around the target could be adequately monitored visually.

(G) In the event that any marine mammals are observed to be harmed in the area, NMFS shall be notified as soon as feasible following the stranding communication protocol. A detailed description of the animal shall be taken, the location noted, and if possible, photos taken. This information shall be provided to NMFS as soon as practicable via the Navy's regional environmental coordinator for purposes of identification.

(H) An after action report detailing the exercise's time line, the time the surveys commenced and terminated, amount, and types of all ordnance expended, and the results of survey efforts for each event shall be submitted to NMFS.

(vii) Extended Echo Ranging/ Improved Extended Echo Ranging (EER/ IEER):

(A) Crews shall conduct visual reconnaissance of the drop area prior to laying their intended sonobuoy pattern. This search shall be conducted at an altitude below 457 m (500 yd) at a slow speed, if operationally feasible and weather conditions permit. In dual aircraft operations, crews are allowed to conduct area clearances utilizing more than one aircraft.

(B) For IEER (AN/SSQ–110A), crews shall conduct a minimum of 30 minutes of visual and aural monitoring of the search area prior to commanding the first post detonation. This 30-minute observation period may include pattern deployment time.

(C) For any part of the intended sonobuoy pattern where a post (source/ receiver sonobuoy pair) will be deployed within 914 m (1,000 yd) of observed marine mammal activity, the Navy shall deploy the receiver ONLY (*i.e.,* not the source) and monitor while conducting a visual search. When marine mammals are no longer detected within 914 m (1,000 yd) of the intended post position, the source sonobuoy (AN/ SSQ–110A/SSQ–125) will be co-located with the receiver.

(D) When operationally feasible, Navy crews shall conduct continuous visual and aural monitoring of marine mammal activity. This shall include monitoring of aircraft sensors from the time of the first sensor placement until the aircraft have left the area and are out of RF range of these sensors.

(E) Aural Detection—If the presence of marine mammals is detected aurally, then that shall cue the Navy aircrew to increase the vigilance of their visual surveillance. Subsequently, if no marine mammals are visually detected, then the crew may continue multi-static active search.

(F) Visual Detection—If marine mammals are visually detected within 914 m (1,000 yd) of the explosive source sonobuoy (AN/SSQ–110A) intended for use, then that payload shall not be detonated. Aircrews may utilize this post once the marine mammals have not been re-sighted for 30 minutes, or are observed to have moved outside the 914 m (1,000 yd) safety buffer. Aircrews may shift their multi-static active search to another post, where marine mammals are outside the 914 m (1,000 yd) safety buffer.

(G) For IEER (AN/SSQ–110A), aircrews shall make every attempt to manually detonate the unexploded charges at each post in the pattern prior to departing the operations area by using the "Payload 1 Release" command followed by the "Payload 2 Release" command. Aircrews shall refrain from using the "Scuttle" command when two payloads remain at a given post. Aircrews will ensure that a 914 m (1,000 yd) safety buffer, visually clear of marine mammals, is maintained around each post as is done during active search operations.

(H) Aircrews shall only leave posts with unexploded charges in the event of a sonobuoy malfunction, an aircraft system malfunction, or when an aircraft must immediately depart the area due to issues such as fuel constraints, inclement weather, or in-flight emergencies. In these cases, the sonobuoy will self-scuttle using the secondary or tertiary method.

(I) The Navy shall ensure all payloads are accounted for. Explosive source sonobuoys (AN/SSQ–110A) that cannot be scuttled shall be reported as unexploded ordnance via voice communications while airborne, then upon landing via naval message.

(J) Mammal monitoring shall continue until out of own-aircraft sensor range.

(b) [Reserved]

**§ 218.115 Requirements for monitoring and reporting.**

(a) *General Notification of Injured or Dead Marine Mammals*—Navy personnel shall ensure that NMFS is notified immediately ((see Communication Plan) or as soon as clearance procedures allow) if an injured, stranded, or dead marine mammal is found during or shortly after, and in the vicinity of, any Navy training exercise utilizing MFAS, HFAS, or underwater explosive detonations. The Navy will provide NMFS with the name of species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available). In the event that an injured, stranded, or dead marine mammal is found by the Navy that is not in the vicinity of, or during or shortly after, MFAS, HFAS, or underwater explosive detonations, the Navy will report the same information as listed above as soon as operationally feasible and clearance procedures allow.

(b) *General Notification of Ship Strike*—In the event of a ship strike by any Navy vessel, at any time or place, the Navy shall do the following:

(1) Immediately report to NMFS the species identification (if known), location (lat/long) of the animal (or the strike if the animal has disappeared), and whether the animal is alive or dead (or unknown).

(2) Report to NMFS as soon as operationally feasible the size and length of animal, an estimate of the injury status (ex., dead, injured but alive, injured and moving, unknown, etc.), vessel class/type and operational status.

(3) Report to NMFS the vessel length, speed, and heading as soon as feasible.

(4) Provide NMFS a photo or video, if equipment is available.

(c) *Event Communication Plan*—The Navy shall develop a communication plan that will include all of the communication protocols (phone trees, etc.) and associated contact information required for NMFS and the Navy to carry out the necessary expeditious communication required in the event of a stranding or ship strike, including as described in the proposed notification measures above.

(d) The Navy must conduct all monitoring and/or research required under the Letter of Authorization, including abiding by the annual NWTRC Monitoring Plan. (*http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*)

(e) The Navy shall comply with the 2009 Integrated Comprehensive Monitoring Program (ICMP) Plan and continue to improve the program in consultation with NMFS. Changes and improvements to the program made during 2010 (as prescribed in the 2009 ICMP and otherwise deemed appropriate by the Navy and NMFS) will be described in an updated 2010 ICMP and submitted to NMFS by October 31, 2010 for review. An updated 2010 ICMP will be finalized by December 31, 2010.

(f) *Report on Monitoring required in paragraph (e) of this section*—The Navy shall submit a report annually describing the implementation and results of the monitoring required in

paragraph (d) of this section. The required submission date will be identified each year in the LOA. The Navy will standardize data collection methods across ranges to allow for comparison in different geographic locations.

(g) *Annual NWTRC Report*—The Navy will submit an Annual NWTRC Report every year. The required submission date will be identified each year in the LOA. This report shall contain the subsections and information indicated below.

(1) ASW Summary—This section shall include the following information as summarized from non-major training exercises (unit-level exercises, such as TRACKEXs and MIW):

(i) *Total Hours*—Total annual hours of each type of sonar source (along with explanation of how hours are calculated for sources typically quantified in alternate way (buoys, torpedoes, etc.))

(ii) *Cumulative Impacts*—To the extent practicable, the Navy, in coordination with NMFS, shall develop and implement a method of annually reporting non-major training (i.e., ULT) utilizing hull-mounted sonar. The report shall present an annual (and seasonal, where practicable) depiction of non-major training exercises geographically across NWTRC. The Navy shall include (in the NWTRC annual report) a brief annual progress update on the status of the development of an effective and unclassified method to report this information until an agreed-upon (with NMFS) method has been developed and implemented.

(2) [Reserved]

(h) *Sinking Exercises (SINKEXs)*—This section shall include the following information for each SINKEX completed that year:

(1) Exercise Info:

(i) Location;

(ii) Date and time exercise began and ended;

(iii) Total hours of observation by watchstanders before, during, and after exercise;

(iv) Total number and types of rounds expended/explosives detonated;

(v) Number and types of passive acoustic sources used in exercise;

(vi) Total hours of passive acoustic search time;

(vii) Number and types of vessels, aircraft, etc., participating in exercise;

(viii) Wave height in feet (high, low and average during exercise); and

(ix) Narrative description of sensors and platforms utilized for marine mammal detection and timeline illustrating how marine mammal detection was conducted.

(2) Individual marine mammal observation during SINKEX (by Navy lookouts) information:

(i) Location of sighting;

(ii) Species (if not possible—indication of whale/dolphin/pinniped);

(iii) Number of individuals;

(iv) Calves observed (y/n);

(v) Initial detection sensor;

(vi) Length of time observers maintained visual contact with marine mammal;

(vii) Wave height;

(viii) Visibility;

(ix) Whether sighting was before, during, or after detonations/exercise, and how many minutes before or after;

(x) Distance of marine mammal from actual detonations (or target spot if not yet detonated)—use four categories to define distance:

(A) the modeled injury threshold radius for the largest explosive used in that exercise type in that OPAREA (662 m for SINKEX in NWTRC);

(B) the required exclusion zone (1 nm for SINKEX in NWTRC);

(C) the required observation distance (if different than the exclusion zone (2 nm for SINKEX in NWTRC)); and

(D) greater than the required observed distance. For example, in this case, the observer would indicate if < 662 m, from 738 m–1 nm, from 1 nm–2 nm, and > 2 nm.

(xi) Observed behavior—Watchstanders will report, in plain language and without trying to categorize in any way, the observed behavior of the animals (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming etc.), including speed and direction.

(xii) Resulting mitigation implementation—Indicate whether explosive detonations were delayed, ceased, modified, or not modified due to marine mammal presence and for how long.

(xiii) If observation occurs while explosives are detonating in the water, indicate munitions type in use at time of marine mammal detection.

(i) Improved Extended Echo-Ranging System (IEER) Summary

(1) Total number of IEER events conducted in NWTRC;

(2) Total expended/detonated rounds (buoys); and

(3) Total number of self-scuttled IEER rounds.

(j) *Explosives Summary*—The Navy is in the process of improving the methods used to track explosive use to provide increased granularity. To the extent practicable, the Navy shall provide the information described below for all of their explosive exercises. Until the Navy is able to report in full the information below, they will provide an annual update on the Navy's explosive tracking methods, including improvements from the previous year.

(k) Total annual number of each type of explosive exercise (of those identified as part of the "specified activity" in this final rule) conducted in NWTRC; and

(2) Total annual expended/detonated rounds (missiles, bombs, etc.) for each explosive type.

(l) *NWTRC 5-Yr Comprehensive Report*—The Navy shall submit to NMFS a draft report that analyzes and summarizes all of the multi-year marine mammal information gathered during ASW and explosive exercises for which annual reports are required (Annual NWTRC Exercise Reports and NWTRC Monitoring Plan Reports). This report will be submitted at the end of the fourth year of the rule (July 2014), covering activities that have occurred through February 1, 2014.

(m) *Comprehensive National ASW Report*—By June, 2014, the Navy shall submit a draft National Report that analyzes, compares, and summarizes the active sonar data gathered (through January 1, 2014) from the watchstanders and pursuant to the implementation of the Monitoring Plans for the Northwest Training Range Complex, the Southern California Range Complex, the Atlantic Fleet Active Sonar Training, the Hawaii Range Complex, the Marianas Islands Range Complex, and the Gulf of Alaska.

(n) The Navy shall respond to NMFS comments and requests for additional information or clarification on the NWTRC Comprehensive Report, the Comprehensive National ASW report, the Annual NWTRC Exercise Report, or the Annual NWTRC Monitoring Plan Report (or the multi-Range Complex Annual Monitoring Plan Report, if that is how the Navy chooses to submit the information) if submitted within 3 months of receipt. These reports will be considered final after the Navy has addressed NMFS' comments or provided the requested information, or three months after the submittal of the draft if NMFS does not comment by then.

(o) In 2011, the Navy shall convene a Monitoring Workshop in which the Monitoring Workshop participants will be asked to review the Navy's Monitoring Plans and monitoring results and make individual recommendations (to the Navy and NMFS) of ways of improving the Monitoring Plans. The recommendations shall be reviewed by the Navy, in consultation with NMFS, and modifications to the Monitoring Plan shall be made, as appropriate.

**§ 218.116 Applications for Letters of Authorization.**

To incidentally take marine mammals pursuant to these regulations, the U.S. Citizen (as defined by § 216.103) conducting the activity identified in § 218.110(c) (*i.e.,* the Navy) must apply for and obtain either an initial Letter of Authorization in accordance with § 218.117 or a renewal under § 218.118.

**§ 218.117 Letters of Authorization.**

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the period of validity of this subpart, but must be renewed annually subject to annual renewal conditions in § 218.118.

(b) Each Letter of Authorization shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (i.e., mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization shall be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

**§ 218.118 Renewal of Letters of Authorization and adaptive management.**

(a) A Letter of Authorization issued under § 216.106 and § 218.117 of this chapter for the activity identified in § 218.110(c) will be renewed annually upon:

(1) Notification to NMFS that the activity described in the application submitted under § 218.116 will be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) Receipt of the monitoring reports and notifications within the timeframes indicated in the previous LOA; and

(3) A determination by the NMFS that the mitigation, monitoring and reporting measures required under § 218.114 and the Letter of Authorization issued under §§ 216.106 and 218.117 of this chapter, were undertaken and will be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization.

(b) If a request for a renewal of a Letter of Authorization issued under §§ 216.106 and 216.118 indicates that a substantial modification, as determined by NMFS, to the described work, mitigation or monitoring undertaken during the upcoming season will occur, the NMFS will provide the public a period of 30 days for review and comment on the request.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the **Federal Register**.

(d) Adaptive Management—NMFS may modify or augment the existing mitigation or monitoring measures (after consulting with the Navy regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from the Navy's monitoring from the previous year (either from the NWTRC Study Area or other locations).

(2) Findings of the Monitoring Workshop that the Navy will convene in 2011.

(3) Compiled results of Navy funded research and development (R&D) studies (presented pursuant to the Integrated Comprehensive Monitoring Plan).

(4) Results from specific stranding investigations (either from the NWTRC Study Area or other locations, and involving coincident MFAS/HFAS or explosives training or not involving coincident use).

(5) Results from the Long Term Prospective Study described in the preamble to these regulations.

(6) Results from general marine mammal and sound research (funded by the Navy or otherwise).

(7) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent Letters of Authorization.

**§ 218.119 Modifications to Letters of Authorization.**

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to §§ 216.106 and 218.117 of this chapter and subject to the provisions of this subpart, shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 218.118, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 218.112(c), a Letter of Authorization issued pursuant to §§ 216.106 and 218.117 of this chapter may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the **Federal Register** within 30 days subsequent to the action.

[FR Doc. 2010–27540 Filed 11–9–10; 8:45 am]

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Federal Register

**Wednesday,**
**November 10, 2010**

## Part V

# The President

**Proclamation 8598—Veterans Day, 2010**

Federal Register
Vol. 75, No. 217
Wednesday, November 10, 2010

# Presidential Documents

**Title 3—**

**The President**

**Proclamation 8598 of November 5, 2010**

## Veterans Day, 2010

**By the President of the United States of America**

**A Proclamation**

On Veterans Day, we come together to pay tribute to the men and women who have worn the uniform of the United States Armed Forces. Americans across this land commemorate the patriots who have risked their lives to preserve the liberty of our Nation, the families who support them, and the heroes no longer with us. It is not our weapons or our technology that make us the most advanced military in the world; it is the unparalleled spirit, skill, and devotion of our troops. As we honor our veterans with ceremonies on this day, let our actions strengthen the bond between a Nation and her warriors.

In an unbroken line of valor stretching across more than two centuries, our veterans have charged into harm's way, sometimes making the ultimate sacrifice, to protect the freedoms that have blessed America. Whether Active Duty, Reserve, or National Guard, they are our Nation's finest citizens, and they have shown the heights to which Americans can rise when asked and inspired to do so. Our courageous troops in Iraq, Afghanistan, and around the globe have earned their place alongside previous generations of great Americans, serving selflessly, tour after tour, in conflicts spanning nearly a decade.

Long after leaving the uniform behind, many veterans continue to serve our country as public servants and mentors, parents and community leaders. They have added proud chapters to the story of America, not only on the battlefield, but also in communities from coast to coast. They have built and shaped our Nation, and it is our solemn promise to support our Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen as they return to their homes and families.

America's sons and daughters have not watched over her shores or her citizens for public recognition, fanfare, or parades. They have preserved our way of life with unwavering patriotism and quiet courage, and ours is a debt of honor to care for them and their families. These obligations do not end after their time of service, and we must fulfill our sacred trust to care for our veterans after they retire their uniforms.

As a grateful Nation, we are humbled by the sacrifices rendered by our service members and their families out of the deepest sense of service and love of country. On Veterans Day, let us remember our solemn obligations to our veterans, and recommit to upholding the enduring principles that our country lives for, and that our fellow citizens have fought and died for.

With respect for and in recognition of the contributions our service men and women have made to the cause of peace and freedom around the world, the Congress has provided (5 U.S.C. 6103(a)) that November 11 of each year shall be set aside as a legal public holiday to honor our Nation's veterans.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim November 11, 2010, as Veterans Day. I encourage all Americans to recognize the valor and sacrifice of our veterans

through appropriate public ceremonies and private prayers. I call upon Federal, State, and local officials to display the flag of the United States and to participate in patriotic activities in their communities. I call on all Americans, including civic and fraternal organizations, places of worship, schools, and communities to support this day with commemorative expressions and programs.

IN WITNESS WHEREOF, I have hereunto set my hand this fifth day of November, in the year of our Lord two thousand ten, and of the Independence of the United States of America the two hundred and thirty-fifth.

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