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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

### 9 CFR Parts 56, 145, 146, and 147

**[Docket No. APHIS–2009–0031]**

**RIN 0579–AD21**

## National Poultry Improvement Plan and Auxiliary Provisions

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

**ACTION:** Final rule.

**SUMMARY:** We are amending the National Poultry Improvement Plan (the Plan) and its auxiliary provisions by providing new or modified sampling and testing procedures for Plan participants and participating flocks. The changes were voted on and approved by the voting delegates at the Plan's 2008 National Plan Conference. These changes will keep the provisions of the Plan current with changes in the poultry industry and provide for the use of new sampling and testing procedures.

**DATES:** *Effective Date:* April 21, 2011.

**FOR FURTHER INFORMATION CONTACT:** Dr. C. Stephen Roney, DVM, Senior Staff Officer, NPIP, VS, APHIS, USDA, 1506 Klondike Road, Suite 300, Conyers, GA 30094–5104; (770) 922–3496.

**SUPPLEMENTARY INFORMATION:**

### Background

The National Poultry Improvement Plan (NPIP, also referred to below as "the Plan") is a cooperative Federal-State-industry mechanism for controlling certain poultry diseases. The Plan consists of a variety of programs intended to prevent and control poultry diseases. Participation in all Plan programs is voluntary, but breeding flocks, hatcheries, and dealers must first qualify as "U.S. Pullorum-Typhoid Clean" as a condition for participating in the other Plan programs.

The Plan identifies States, flocks, hatcheries, dealers, and slaughter plants that meet certain disease control standards specified in the Plan's various programs. As a result, customers can buy poultry that has tested clean of certain diseases or that has been produced under disease-prevention conditions.

The regulations in 9 CFR parts 145, 146, and 147 (referred to below as the regulations) contain the provisions of the Plan. The Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture (USDA) amends these provisions from time to time to incorporate new scientific information and technologies within the Plan.

On September 20, 2010, we published in the **Federal Register** (75 FR 57200–57215, Docket No. APHIS–2009–0031) a proposal [1] to amend the Plan and its auxiliary provisions by providing new or modified sampling and testing procedures for Plan participants and participating flocks. The proposed changes were voted on and approved by the voting delegates at the Plan's 2008 National Plan Conference. These changes were intended to keep the provisions of the Plan current with changes in the poultry industry and provide for the use of new sampling and testing procedures.

We solicited comments concerning our proposal for 60 days ending November 19, 2010. We received three comments by that date. They were from a producer and two citizens. One commenter supported the proposed rule, and one did not raise any issues related to the proposed rule.

One commenter generally objected to our proposed addition of provisions under which a flock could be designated "*Salmonella* negative" to the regulations in § 145.83(f) for the U.S. Salmonella Monitored classification for primary meat-type chicken breeding flocks. However, this commenter did not raise any specific concerns.

We continue to believe that the *Salmonella* negative designation will provide an effective means for flock owners to demonstrate their flocks' freedom from *Salmonella* based on regular testing. We are not making any changes to the proposed rule in response to this comment.

We are, however, amending the proposed provisions in paragraph (f) of § 145.83 to capitalize the word *Salmonella* each time it is used.

In addition, our proposed changes to paragraph (b) of § 145.14 indicated that the polymerase chain reaction (PCR)-based test is an official blood test for *Mycoplasma gallisepticum, M. meleagridis,* and *M. synoviae.* As the PCR-based test is not a blood test, we are changing proposed paragraph (b) to refer simply to official tests.

Finally, we are updating the footnote to the shoe cover sampling technique we proposed to add in § 147.12 to give the NPIP's current address. It has changed since the publication of the proposal. We are also updating the NPIP's address in the other footnotes to § 147.12 and the footnote to § 147.5.

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.

### 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. The analysis is summarized below. Copies of the full analysis are available on the Regulations.gov Web site (see footnote 1 in this document for a link to Regulations.gov) or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

This rule will introduce a set of minor changes to the NPIP and will not involve significant changes in program operations. These changes are in line with the industry's best practices and would likely involve no additional costs in order to meet these requirements. Additionally, the NPIP is a voluntary program established between the industry and State and Federal governments. Any person producing or dealing in products may participate in the NPIP when he or she has demonstrated that his or her facilities,

[1] To view the proposed rule and the comments we received, go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2009-0031.*

personnel, and practices are adequate for carrying out the applicable provisions of the NPIP. NPIP participation allows for greater ease in moving hatching eggs/live birds within a State, across State lines, and into other countries. Most countries will not accept hatching eggs/live birds and commercial poultry from a U.S. operation unless it can be shown to be a NPIP participant. The poultry industry plays a very important role in the U.S. economy, and these amendments will help to ensure the safety of the industry and benefit the economy.

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.

**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) Has no retroactive effect; and (2) 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**

*9 CFR Part 56*

Animal diseases, Indemnity payments, Low pathogenic avian influenza, Poultry.

*9 CFR Parts 145, 146, and 147*

Animal diseases, Poultry and poultry products, Reporting and recordkeeping requirements.

Accordingly, we are amending 9 CFR parts 56, 145, 146, and 147 as follows:

## PART 56—CONTROL OF H5/H7 LOW PATHOGENIC AVIAN INFLUENZA

■ 1. The authority citation for 9 CFR part 56 continues to read as follows:

**Authority:** 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

■ 2. Section 56.1 is amended as follows:

■ a. By removing the definitions of *commercial meat-type flock, commercial table-egg layer flock, commercial table-egg layer premises, meat-type chicken,* and *meat-type turkey.*

■ b. By adding a definition of *commercial flock or slaughter plant,* in alphabetical order, to read as set forth below.

**§ 56.1 Definitions.**

* * * * *

*Commercial flock or slaughter plant.* A commercial poultry flock or slaughter plant that is required because of its size to participate in the special provisions in part 146 of this chapter in order to participate in the Plan.

* * * * *

■ 3. Section 56.3 is amended as follows:

■ a. In paragraph (b) introductory text, by removing the word "(b)(7)" each time it occurs and adding the word "(b)(3)" in its place.

■ b. By revising paragraphs (b)(1) and (b)(2) to read as set forth below.

■ c. By removing paragraphs (b)(4) through (b)(6).

■ d. By redesignating paragraph (b)(7) as paragraph (b)(3).

**§ 56.3 Payment of indemnity.**

* * * * *

(b) * * *

(1) The poultry are from a breeding flock that participates in any Plan program in part 145 of this chapter but that does not participate in the U.S. Avian Influenza Clean or the U.S. H5/H7 Avian Influenza Clean program of the Plan available to the flock in part 145 of this chapter; or

(2) The poultry are from a commercial flock or slaughter plant, but the flock or slaughter plant does not participate in the U.S. Avian Influenza Monitored program available to the commercial flock or slaughter plant in part 146 of this chapter; or

* * * * *

## PART 145—NATIONAL POULTRY IMPROVEMENT PLAN FOR BREEDING POULTRY

■ 4. The authority citation for part 145 continues to read as follows:

**Authority:** 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

■ 5. Section 145.1 is amended by adding, in alphabetical order, a new definition of *avian influenza* to read as follows:

**§ 145.1 Definitions.**

* * * * *

*Avian influenza.* An infection or disease of poultry caused by viruses in the family *Orthomyxoviridae,* genus *Influenzavirus* A.

* * * * *

■ 6. Section 145.10 is amended as follows:

■ a. By revising the introductory text to read as set forth below.

■ b. In paragraph (r), by removing the words "and 145.53(e)" and adding the words "145.63(b), 145.73(f), and 145.83(g)" in their place.

■ c. In paragraph (t), by removing the citation "§ 145.43(g)" and adding the words "§§ 145.43(g), 145.53(e), and 145.93(b)" in its place.

**§ 145.10 Terminology and classification; flocks, products, and States.**

Participating flocks, products produced from them, and States that have met the requirements of a classification in this part may be designated by the corresponding illustrative design in this section.

* * * * *

■ 7. Section 145.14 is amended as follows:

■ a. In the introductory text, in the first sentence, by removing the word "blood" each time it occurs.

■ b. In the introductory text, in the second sentence, by removing the words "Blood samples" and adding the word "Samples" in its place; and by removing the word "drawn" and adding the word "collected" in its place.

■ c. By revising the heading of paragraph (b) and paragraph (b)(1) to read as set forth below.

■ d. In paragraph (b)(2), by adding the word "serological" before the word "tests"; and by adding the words ", *M. meleagridis,*" after the word "*gallisepticum*".

■ e. By revising paragraph (b)(5) to read as set forth below.

■ f. By removing and reserving paragraph (c).

**§ 145.14 Testing.**

* * * * *

(b) *For Mycoplasma gallisepticum, M. meleagridis, and M. synoviae.* (1) The official tests for *M. gallisepticum, M. meleagridis,* and *M. synoviae* shall be the serum plate agglutination test, the tube agglutination test, the hemagglutination inhibition (HI) test, the microhemagglutination inhibition test, the enzyme-linked immunosorbent assay (ELISA) test,[3] a polymerase chain

[3] Procedures for the enzyme-linked immunosorbent assay (ELISA) test are set forth in the following publications:

A.A. Ansari, R.F. Taylor, T.S. Chang, "Application of Enzyme-Linked Immunosorbent Assay for Detecting Antibody to Mycoplasma gallisepticum Infections in Poultry," *Avian Diseases,* Vol. 27, No. 1, pp. 21–35, January–March 1983; and

reaction (PCR)-based test, or a combination of two or more of these tests. The HI test or the microhemagglutination inhibition test shall be used to confirm the positive results of other serological tests. HI titers of 1:40 or more may be interpreted as suspicious, and final judgment must be based on further samplings and/or culture of reactors.

* * * * *

(5) The official molecular examination procedures for *M. gallisepticum* are the PCR test described in § 147.30 of this subchapter and the real-time PCR test described in § 147.31 of this subchapter. The official molecular examination procedure for *M. synoviae* is the PCR test described in § 147.30 of this subchapter.

* * * * *

■ 8. Section 145.23 is amended as follows:

■ a. In paragraph (b)(2)(iii), in the first sentence, by removing the words "either no poultry or", and by removing the word "were" and adding the word "was" in its place.

■ b. In paragraph (h) introductory text, by removing the words "serological" and "one of".

■ c. By adding a new paragraph (h)(1) and revising paragraph (h)(2) to read as set forth below.

**§ 145.23 Terminology and classification; flocks and products.**

* * * * *

(h) * * *

(1) It is a multiplier breeding flock in which a minimum of 30 birds have been tested negative for antibodies to avian influenza when more than 4 months of age. To retain this classification:

(i) A sample of at least 30 birds must be tested negative at intervals of 90 days; or

(ii) A sample of fewer than 30 birds may be tested, and found to be negative, at any one time if all pens are equally represented and a total of 30 birds is tested within each 90-day period; or

(iii) The flock is tested as provided in § 145.14(d) at intervals of 30 days or less and found to be negative, and a total of 30 samples are collected and tested within each 90-day period; and

(2) During each 90-day period, all multiplier spent fowl, up to a maximum of 30, must be tested and found negative within 21 days prior to movement to slaughter.

* * * * *

**§ 145.24 [Amended]**

■ 9. In § 145.24, paragraph (a)(1)(i) is amended by removing the word "and" and by adding the words ", and § 145.93(b)(3)(i) through (vii)" before the period at the end of the paragraph.

■ 10. Section 145.33 is amended as follows:

■ a. In paragraph (b)(2)(iii), in the first sentence, by removing the words "either no poultry or", and by removing the word "were" and adding the word "was" in its place.

■ b. In paragraph (l) introductory text, by removing the words "serological" and "one of".

■ c. By adding a new paragraph (l)(1) and revising paragraph (l)(2) to read as set forth below.

**§ 145.33 Terminology and classification; flocks and products.**

* * * * *

(l) * * *

(1) It is a multiplier breeding flock in which a minimum of 30 birds have been tested negative for antibodies to avian influenza when more than 4 months of age. To retain this classification:

(i) A sample of at least 15 birds must be tested negative at intervals of 90 days; or

(ii) A sample of fewer than 15 birds may be tested, and found to be negative, at any one time if all pens are equally represented and a total of 30 birds is tested within each 90-day period; or

(iii) The flock is tested as provided in § 145.14(d) at intervals of 30 days or less and found to be negative, and a total of 15 samples are collected and tested within each 90-day period; and

(2) During each 90-day period, all multiplier spent fowl, up to a maximum of 30, must be tested and found negative within 21 days prior to movement to slaughter.

* * * * *

**§ 145.34 [Amended]**

■ 11. In § 145.34, paragraph (a)(1)(i) is amended by removing the word "and" and by adding the words ", and § 145.93(b)(3)(i) through (vii)" before the period at the end of the paragraph.

■ 12. Section 145.43 is amended as follows:

■ a. In paragraph (b)(2)(iii), in the first sentence, by removing the words "either no poultry or", and by removing the word "were" and adding the word "was" in its place.

■ b. By removing and reserving paragraphs (d)(2) and (d)(3).

■ c. In paragraph (f)(5), by redesignating footnote 6 as footnote 5.

■ d. In paragraph (g) introductory text, by removing the words "H5 and H7" and adding the word "H5/H7" in their place each time they appear; and by removing the word "serological".

■ e. By revising paragraph (g)(1) introductory text and paragraph (g)(2) introductory text to read as set forth below.

■ f. In paragraphs (g)(1)(i) and (g)(2)(i), by removing the words "*Provided,* that primary spent fowl be tested within 30 days prior to movement to disposal;".

■ g. By redesignating paragraph (g)(3) as paragraph (g)(4).

■ h. By adding a new paragraph (g)(3) to read as set forth below.

**§ 145.43 Terminology and classification; flocks and products.**

* * * * *

(g) * * *

(1) It is a primary breeding flock in which a minimum of 30 birds have been tested negative to the H5/H7 subtypes of avian influenza as provided in § 145.14(d) when more than 4 months of age and prior to the onset of egg production. To retain this classification:

* * * * *

(2) It is a multiplier breeding flock in which a minimum of 30 birds have been tested negative to the H5/H7 subtypes of avian influenza as provided in § 145.14(d) when more than 4 months of age and prior to the onset of egg production. To retain this classification:

* * * * *

(3) During each 90-day period, all spent fowl, up to a maximum of 30, must be tested and found negative within 21 days prior to movement to slaughter.

* * * * *

**§ 145.44 [Amended]**

■ 13. In § 145.44, paragraph (a)(1)(i) is amended by removing the word "and"; and by adding the words ", § 145.73(b)(2)(i), § 145.83(b)(2)(i), and § 145.93(b)(3)(i) through (vii)" before the period at the end of the paragraph.

## Subpart E—Special Provisions for Hobbyist and Exhibition Waterfowl, Exhibition Poultry, and Game Bird Breeding Flocks and Products

■ 14. The heading for subpart E is revised to read as set forth above.

■ 15. In § 145.52, the introductory text is revised to read as follows:

**§ 145.52 Participation.**

Participating flocks of hobbyist and exhibition waterfowl, exhibition poultry, and game birds, and the eggs

H.M. Opitz, J.B. Duplessis, and M.J. Cyr, "Indirect Micro-Enzyme-Linked Immunosorbent Assay for the Detection of Antibodies to Mycoplasma synoviae and M. gallisepticum," *Avian Diseases,* Vol. 27, No. 3, pp. 773–786, July–September 1983; and

H.B. Ortmayer and R. Yamamoto, "Mycoplasma Meleagridis Antibody Detection by Enzyme-Linked Immunosorbent Assay (ELISA)," *Proceedings, 30th Western Poultry Disease Conference,* pp. 63–66, March 1981.

and baby poultry produced from them shall comply with the applicable general provisions of subpart A of this part and the special provisions of this subpart E. The special provisions that apply to meat-type waterfowl flocks are found in subpart I of this part.

■ 16. Section 145.53 is amended as follows:

■ a. In paragraph (b)(2)(iii), in the first sentence, by removing the words "either no poultry or", and by removing the word "were" and adding the word "was" in its place.

■ b. In paragraph (b)(5), by adding the words "hobbyist or exhibition" before the word "waterfowl".

■ c. In paragraph (e) in the introductory text, second sentence, by adding the words "hobbyist or exhibition" before the word "waterfowl"; and by removing the word "serological".

■ d. In the introductory text of paragraph (e)(1), by removing the words "for antibodies"; and by removing the words "by the agar gel immunodiffusion test specified in § 147.9 of this chapter" and adding the words "as provided in § 145.14(d)" in their place.

■ e. In the introductory text of paragraph (e)(2), by removing the words "for antibodies"; and by removing the words "by the agar gel immunodiffusion test specified in § 147.9 of this chapter" and adding the words "as provided in § 145.14(d)" in their place.

■ f. By adding a new paragraph (e)(3) to read as set forth below.

**§ 145.53 Terminology and classification; flocks and products.**

* * * * *

(e) * * *

(3) During each 90-day period, all spent fowl, up to a maximum of 30, must be tested and found negative within 21 days prior to movement to slaughter.

* * * * *

**§ 145.54 [Amended]**

■ 17. In § 145.54, paragraph (a)(1)(i) is amended by removing the word "and"; and by adding the words ", § 145.73(b)(2)(i), § 145.83(b)(2)(i), and § 145.93(b)(3)(i) through (vii)" before the period at the end of the paragraph.

■ 18. Section 145.73 is amended as follows:

■ a. In the introductory text of paragraph (f), second sentence, by removing the word "serological."

■ b. By revising paragraph (f)(1) and adding a new paragraph (f)(2) to read as set forth below.

**§ 145.73 Terminology and classification; flocks and products.**

* * * * *

(f) * * *

(1) It is a primary breeding flock in which a minimum of 30 birds have been tested negative for antibodies to avian influenza when more than 4 months of age. To retain this classification:

(i) A sample of at least 30 birds must be tested negative at intervals of 90 days; or

(ii) A sample of fewer than 30 birds may be tested, and found to be negative, at any one time if all pens are equally represented and a total of 30 birds is tested within each 90-day period; or

(iii) The flock is tested as provided in § 145.14(d) at intervals of 30 days or less and found to be negative, and a total of 30 samples are collected and tested within each 90-day period; and

(2) During each 90-day period, all primary spent fowl, up to a maximum of 30, must be tested serologically and found negative within 21 days prior to movement to slaughter.

■ 19. Section 145.83 is amended as follows:

■ a. In paragraph (f)(1)(vi), by removing the semicolon at the end of the paragraph and adding a period in its place; and by adding a new sentence at the end of the paragraph to read as set forth below.

■ b. In paragraph (f)(1)(vii), by adding the words "to allow for the serological testing required under paragraph (f)(1)(vi) of this section" after the word "age".

■ c. By adding a new paragraph (f)(1)(viii) to read as set forth below.

■ d. In paragraph (f)(3), by removing the words "this classification" and adding the words "paragraphs (f)(1)(i) through (f)(1)(vii) of this section" in their place.

■ e. In the introductory text of paragraph (g), second sentence, by removing the word "serological."

■ f. By revising paragraph (g)(1) and adding a new paragraph (g)(2) to read as set forth below.

**§ 145.83 Terminology and classification; flocks and products.**

* * * * *

(f) * * *

(1) * * *

(vi) * * * All *Salmonella* isolates from a flock shall be serogrouped and shall be reported to the Official State Agency on a monthly basis;

* * * * *

(viii) Any flock entering the production period that is in compliance with all the requirements of § 145.83(f) with no history of *Salmonella* isolations shall be considered "*Salmonella* negative" and may retain this definition as long as no environmental or bird *Salmonella* isolations are identified and confirmed from the flock or flock environment by sampling on 4 separate collection dates over a minimum of a 2-week period. Sampling and testing must be performed as described in paragraph (f)(1)(vi) of this section. An unconfirmed environmental *Salmonella* isolation shall not change this *Salmonella* negative status.

* * * * *

(g) * * *

(1) It is a primary breeding flock in which a minimum of 30 birds have been tested negative for antibodies to avian influenza when more than 4 months of age. To retain this classification:

(i) A sample of at least 30 birds must be tested negative at intervals of 90 days; or

(ii) A sample of fewer than 30 birds may be tested, and found to be negative, at any one time if all pens are equally represented and a total of 30 birds is tested within each 90-day period; or

(iii) The flock is tested as provided in § 145.14(d) at intervals of 30 days or less and found to be negative, and a total of 30 samples are collected and tested within each 90-day period; and

(2) During each 90-day period, all primary spent fowl, up to a maximum of 30, must be tested serologically and found negative within 21 days prior to movement to slaughter.

■ 20. A new subpart I, consisting of §§ 145.91 through 145.94, is added to read as follows:

**Subpart I—Special Provisions for Meat-Type Waterfowl Breeding Flocks and Products**

Sec.

145.91 Definitions.
145.92 Participation.
145.93 Terminology and classification; flocks and products.
145.94 Terminology and classification; States.

## Subpart I—Special Provisions for Meat-Type Waterfowl Breeding Flocks and Products

**§ 145.91 Definitions.**

Except where the context otherwise requires, for the purposes of this subpart the following term shall be construed to mean:

*Meat-type waterfowl breeding flocks.* Flocks of domesticated duck or goose that are composed of stock that has been developed and is maintained for the primary purpose of producing baby poultry that will be raised under confinement for the primary purpose of producing meat for human consumption.

**§ 145.92 Participation.**

Participating flocks of meat-type waterfowl and the eggs and baby poultry

produced from them shall comply with the applicable general provisions of subpart A of this part and the special provisions of this subpart I.

(a) Started poultry shall lose their identity under Plan terminology when not maintained by Plan participants under the conditions prescribed in § 145.5(a).

(b) Hatching eggs produced by primary breeding flocks shall be fumigated (see § 147.25 of this chapter) or otherwise sanitized.

(c) Any nutritive material provided to baby poultry must be free of the avian pathogens that are officially represented in the Plan disease classifications listed in § 145.10.

**§ 145.93 Terminology and classification; flocks and products.**

Participating flocks, and the eggs and baby poultry produced from them, that have met the respective requirements specified in this section may be designated by the following terms and the corresponding designs illustrated in § 145.10.

(a) [Reserved]

(b) *U.S. Pullorum-Typhoid Clean.* A flock in which freedom from pullorum and typhoid has been demonstrated to the Official State Agency under the criteria in one of the following paragraphs (b)(1) through (b)(5) of this section (*See* § 145.14 relating to the official blood test where applicable.):

(1) It has been officially blood tested within the past 12 months with no reactors.

(2) It is a multiplier breeding flock, or a breeding flock composed of progeny of a primary breeding flock which is intended solely for the production of multiplier breeding flocks, and meets the following specifications as determined by the Official State Agency and the Service:

(i) The flock is located in a State where all persons performing poultry disease diagnostic services within the State are required to report to the Official State Agency within 48 hours the source of all poultry specimens from which *S. pullorum* or *S. gallinarum* is isolated;

(ii) The flock is composed entirely of birds that originated from U.S. Pullorum-Typhoid Clean breeding flocks or from flocks that met equivalent requirements under official supervision; and

(iii) The flock is located on a premises where a flock not classified as U.S. Pullorum-Typhoid Clean was located the previous year; *Provided,* that an Authorized Testing Agent must blood test up to 300 birds per flock, as described in § 145.14, if the Official State Agency determines that the flock has been exposed to pullorum-typhoid. In making determinations of exposure and setting the number of birds to be blood tested, the Official State Agency shall evaluate the results of any blood tests, described in § 145.14(a)(1), that were performed on an unclassified flock located on the premises during the previous year; the origins of the unclassified flock; and the probability of contacts between the flock for which qualification is being sought and infected wild birds, contaminated feed or waste, or birds, equipment, supplies, or personnel from flocks infected with pullorum-typhoid.

(3) It is a multiplier breeding flock that originated from U.S. Pullorum-Typhoid Clean breeding flocks or from flocks that met equivalent requirements under official supervision, and is located in a State in which it has been determined by the Service that:

(i) All hatcheries within the State are qualified as "National Plan Hatcheries" or have met equivalent requirements for pullorum-typhoid control under official supervision;

(ii) All hatchery supply flocks within the State are qualified as U.S. Pullorum-Typhoid Clean or have met equivalent requirements for pullorum-typhoid control under official supervision: *Provided,* That if other domesticated fowl are maintained on the same premises as the participating flock, freedom from pullorum-typhoid infection shall be demonstrated by an official blood test of each of these fowl;

(iii) All shipments of products other than U.S. Pullorum-Typhoid Clean, or equivalent, into the State are prohibited;

(iv) All persons performing poultry disease diagnostic services within the State are required to report to the Official State Agency within 48 hours the source of all poultry specimens from which *S. pullorum* or *S. gallinarum* is isolated;

(v) All reports of any disease outbreak involving a disease covered under the Plan are promptly followed by an investigation by the Official State Agency to determine the origin of the infection; *Provided,* That if the origin of the infection involves another State, or if there is exposure to poultry in another State from the infected flock, then the National Poultry Improvement Plan will conduct an investigation;

(vi) All flocks found to be infected with pullorum or typhoid are quarantined until marketed or destroyed under the supervision of the Official State Agency, or until subsequently blood tested, following the procedure for reacting flocks as contained in § 145.14(a)(5), and all birds fail to demonstrate pullorum or typhoid infection;

(vii) All poultry, including exhibition, exotic, and game birds, but excluding waterfowl, going to public exhibition shall come from U.S. Pullorum-Typhoid Clean or equivalent flocks, or have had a negative pullorum-typhoid test within 90 days of going to public exhibition;

(viii) Discontinuation of any of the conditions or procedures described in paragraphs (a)(3)(i), (ii), (iii), (iv), (v), (vi), and (vii) of this section, or the occurrence of repeated outbreaks of pullorum or typhoid in poultry breeding flocks within or originating within the State shall be grounds for the Service to revoke its determination that such conditions and procedures have been met or complied with. Such action shall not be taken until a thorough investigation has been made by the Service and the Official State Agency has been given an opportunity to present its views.

(4) It is a multiplier breeding flock located in a State which has been determined by the Service to be in compliance with the provisions of paragraph (a)(3) of this section, and in which pullorum disease or fowl typhoid is not known to exist nor to have existed in hatchery supply flocks within the State during the preceding 24 months.

(5) It is a primary breeding flock located in a State determined to be in compliance with the provisions of paragraph (a)(4) of this section, and in which a sample of 300 birds from flocks of more than 300, and each bird in flocks of 300 or less, has been officially tested for pullorum-typhoid within the past 12 months with no reactors: *Provided,* That when a flock is a primary breeding flock located in a State which has been deemed to be a U.S. Pullorum-Typhoid Clean State for the past 3 years, and during which time no isolation of pullorum or typhoid has been made that can be traced to a source in that State, a bacteriological examination monitoring program or a serological examination monitoring program acceptable to the Official State Agency and approved by the Service may be used in lieu of annual blood testing.

(c) *U.S. H5/H7 Avian Influenza Clean.* This program is intended to be the basis from which the breeding-hatchery industry may conduct a program for the prevention and control of the H5/H7 subtypes of avian influenza. It is intended to determine the presence of the H5/H7 subtypes of avian influenza in meat-type waterfowl breeding flocks through routine surveillance of each participating breeding flock. A flock, and the hatching eggs and baby poultry

produced from it, will qualify for this classification when the Official State Agency determines that it has met one of the following requirements:

(1) It is a primary breeding flock in which a minimum of 30 birds have been tested negative to the H5/H7 subtypes of avian influenza as provided in § 145.14(d) when more than 4 months of age. To retain this classification:

(i) A sample of at least 30 birds must be tested and found to be negative at intervals of 90 days; or

(ii) A sample of fewer than 30 birds may be tested, and found to be negative, at any one time if all pens are equally represented and a total of 30 birds are tested within each 90-day period.

(2) It is a multiplier breeding flock in which a minimum of 30 birds have been tested negative to the H5/H7 subtypes of avian influenza as provided in § 145.14(d) when more than 4 months of age. To retain this classification:

(i) A sample of at least 30 birds must be tested negative at intervals of 180 days; or

(ii) A sample of fewer than 30 birds may be tested, and found to be negative, at any one time if all pens are equally represented and a total of 30 birds are tested within each 180-day period.

(3) During each 90-day period, all spent fowl, up to a maximum of 30, must be tested serologically and found negative within 21 days prior to movement to slaughter.

**§ 145.94 Terminology and classification; States.**

(a) *U.S. Pullorum-Typhoid Clean State.* (1) A State will be declared a U.S. Pullorum-Typhoid Clean State when it has been determined by the Service that:

(i) The State is in compliance with the provisions contained in §§ 145.23(b)(3)(i) through (vii), 145.33(b)(3)(i) through (vii), 145.43(b)(3)(i) through (vi), 145.53(b)(3)(i) through (vii), 145.73(b)(2)(i), 145.83(b)(2)(i), and 145.93(b)(3)(i) through (vii).

(ii) No pullorum disease or fowl typhoid is known to exist nor to have existed in hatchery supply flocks within the State during the preceding 12 months: *Provided,* That pullorum disease or fowl typhoid found within the preceding 24 months in waterfowl, exhibition poultry, and game bird breeding flocks will not prevent a State that is otherwise eligible from qualifying.

(2) Discontinuation of any of the conditions described in paragraph (a)(1)(i) of this section, or repeated outbreaks of pullorum or typhoid occur in hatchery supply flocks described in paragraph (a)(1)(ii) of this section, or if an infection spreads from the originating premises, the Service shall have grounds to revoke its determination that the State is entitled to this classification. Such action shall not be taken until a thorough investigation has been made by the Service and the Official State Agency has been given an opportunity for a hearing in accordance with rules of practice adopted by the Administrator.

(b) [Reserved]

## PART 146—NATIONAL POULTRY IMPROVEMENT PLAN FOR COMMERCIAL POULTRY

■ 21. The authority citation for part 146 continues to read as follows:

**Authority:** 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

■ 22. Section 146.1 is amended as follows:

■ a. By revising the definitions of *commercial table-egg layer flock* and *H5/H7 low pathogenic avian influenza (LPAI)* to read as set forth below.

■ b. By adding, in alphabetical order, a new definition of *commercial table-egg layer pullet flock* to read as set forth below.

**§ 146.1 Definitions.**

* * * * *

*Commercial table-egg layer flock.* All table-egg layers of common age or pullet source on one premises.

* * * * *

*Commercial table-egg layer pullet flock.* A table-egg layer flock prior to the onset of egg production.

* * * * *

*H5/H7 low pathogenic avian influenza (LPAI).* An infection of poultry caused by an influenza A virus of H5 or H7 subtype that has an intravenous pathogenicity index in 6-week-old chickens less than 1.2 or less than 75 percent mortality in 4- to 8-week-old chickens infected intravenously, or an infection with influenza A viruses of H5 or H7 subtype with a cleavage site that is not consistent with a previously identified highly pathogenic avian influenza virus.

* * * * *

■ 23. Section 146.9 is amended by revising the introductory text to read as follows:

**§ 146.9 Terminology and classification; flocks, products, and States.**

Participating flocks, products produced from them, and States that have met the requirements of a classification in this part may be designated by the corresponding illustrative design in this section.

* * * * *

■ 24. Section 146.21 is amended by adding a new definition of *table-egg layer pullet* in alphabetical order to read as follows:

**§ 146.21 Definitions.**

* * * * *

*Table-egg layer pullet.* A sexually immature domesticated chicken grown for the primary purpose of producing eggs for human consumption.

■ 25. In § 146.23, paragraph (a) is revised to read as follows:

**§ 146.23 Terminology and classification; flocks and products.**

* * * * *

(a) *U.S. H5/H7 Avian Influenza Monitored.* This program is intended to be the basis from which the table-egg layer industry may conduct a program to monitor for the H5/H7 subtypes of avian influenza. It is intended to determine the presence of the H5/H7 subtypes of avian influenza in table-egg layers and table-egg layer pullets through routine surveillance of each participating commercial table-egg layer and table-egg layer pullet flock. A flock will qualify for this classification when the Official State Agency determines that it has met one of the following requirements:

(1) *Table-egg layer pullet flocks.* (i) It is a commercial table-egg layer pullet flock in which a minimum of 11 birds have been tested negative to the H5/H7 subtypes of avian influenza as provided in § 146.13(b) within 30 days prior to movement; or

(ii) It is a commercial table-egg layer pullet flock that has an ongoing active and diagnostic surveillance program for the H5/H7 subtypes of avian influenza in which the number of birds tested is equivalent to the number required in paragraph (a)(1)(i) of this section and that is approved by the Official State Agency and the Service.

(2) *Table-egg layer flocks.* (i) It is a commercial table-egg layer flock in which a minimum of 11 birds have been tested negative to the H5/H7 subtypes of avian influenza as provided in § 146.13(b) within 30 days prior to disposal;

(ii) It is a commercial table-egg layer flock in which a minimum of 11 birds have been tested negative for the H5/H7 subtypes of avian influenza as provided in § 146.13(b) within a 12-month period; or

(iii) It is a commercial table-egg layer flock that has an ongoing active and diagnostic surveillance program for the H5/H7 subtypes of avian influenza in

which the number of birds tested is equivalent to the number required in paragraph (a)(2)(i) or paragraph (a)(2)(ii) of this section and that is approved by the Official State Agency and the Service.

* * * * *

**§ 146.24 [Amended]**

■ 26. Section 146.24 is amended as follows:

■ a. In paragraph (a)(1)(i), by adding the words "and all commercial table-egg layer pullet flocks that supply those flocks" after the word "flocks".

■ b. In paragraphs (a)(1)(iii) through (a)(1)(v), by adding the words "and table-egg layer pullet" after the word "layer" each time it occurs.

**§ 146.33 [Amended]**

■ 27. In § 146.33, paragraphs (a)(1) and (a)(2) are amended by adding the words ", as provided in § 146.13(b)," after the word "influenza," each time it occurs.

**§ 146.43 [Amended]**

■ 28. In § 146.43, paragraph (a)(1) is amended by adding the words ", as provided in § 146.13(b)," after the word "influenza" and by removing the word "virus".

**§ 146.53 [Amended]**

■ 29. Section 146.53 is amended as follows:

■ a. In paragraph (a)(1), by adding the words ", as provided in § 146.13(b)," after the word "influenza."

■ b. In paragraph (a)(2), by removing the words "antibodies to" and by adding the words ", as provided in § 146.13(b)," after the word "influenza."

■ c. In paragraph (b), in the last sentence, by adding the words ", as provided in § 146.13(b)," after the word "influenza."

## PART 147—AUXILIARY PROVISIONS ON NATIONAL POULTRY IMPROVEMENT PLAN

■ 30. The authority citation for part 147 continues to read as follows:

**Authority:** 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

**§ 147.5 [Amended]**

■ 31. In § 147.5, footnote 4 to paragraph (b) is amended by removing the words "1498 Klondike Road, Suite 200" and adding the words "1506 Klondike Road, Suite 300" in their place.

■ 32. Section 147.6 is amended as follows:

■ a. By revising the introductory text and paragraphs (a)(1) through (a)(4) to read as set forth below.

■ b. By removing paragraphs (a)(5) through (a)(15).

**§ 147.6 Procedures for determining the status of flocks reacting to test for Mycoplasma gallisepticum, Mycoplasma synoviae, and Mycoplasma melagridis.**

Procedures for isolation and identification of Mycoplasma may be found in Isolation and Identification of Avian Pathogens, published by the American Association of Avian Pathologists; Kleven, S.H., F.T.W. Jordan, and J.M. Bradbury, *Avian Mycoplasmosis* (*Mycoplasma gallisepticum*), Manual of Diagnostic Tests and Vaccines for Terrestrial Animals, Fifth Ed., Office International des Epizooties, pp 842–855, 2004; and §§ 147.15 and 147.16.

(a) * * *

(1) If the tube agglutination test, enzyme-labeled immunosorbent assay (ELISA), official molecular examination procedure, or serum plate test is negative, the flock qualifies for the classification for which it was tested.

(2) If the tube agglutination, ELISA, or serum plate test is positive, the hemaglutination inhibition (HI) test or a molecular examination procedure shall be conducted: *Provided,* for the HI test, that if more than 50 percent of the samples are positive for *M. gallisepticum, M. meleagridis,* or *M. synoviae,* the HI test shall be conducted on 10 percent of the positive samples or 25 positive samples, whichever is greater. HI titers of 1:40 or more may be interpreted as suspicious and appropriate antigen detection samples should be taken promptly (within 7 days of the original sampling) from 30 clinically affected birds and examined by an approved cultural technique individually, or pooled (up to 5 swabs per test) and used in a molecular examination procedure or in vivo bioassay.

(3) If the in vivo bioassay, molecular examination procedure, or culture procedure is negative, the Official State Agency may qualify the flock for the classification for which it was tested. In the event of contaminated cultures, the molecular examination technique must be used to make a final determination.

(4) If the in vivo bioassay, molecular examination procedure, or culture procedure is positive, the flock will be considered infected.

* * * * *

**§§ 147.12, 147.14, 147.15, 147.16, 147.30, and 147.31 [Amended]**

■ 33. In §§ 147.12, 147.14, 147.15, 147.16, 147.30, and 147.31, footnotes 9 through 21 are redesignated as footnotes 10 through 22, respectively.

■ 34. Section 147.12 is amended as follows:

■ a. In footnote 8 to paragraph (a)(3), by removing the words "1498 Klondike Road, Suite 200" and adding the words "1506 Klondike Road, Suite 300" in their place.

■ b. By adding a new paragraph (a)(6) and a new footnote 9 to read as set forth below.

■ c. In newly redesignated footnote 10 to paragraph (c)(3)(ii)(A), by removing the words "1498 Klondike Road, Suite 200" and adding the words "1506 Klondike Road, Suite 300" in their place.

**§ 147.12 Procedures for collection, isolation, and identification of Salmonella from environmental samples, cloacal swabs, chick box papers, and meconium samples.**

* * * * *

(a) * * *

(6) *Shoe cover sampling technique.* Absorbable fabric shoe covers involve the exposure of the bottom surface of shoe covers to the surface of floor litter and slat areas. Wearing clean latex gloves, place the shoe covers over footwear that is only worn inside the poultry house. This can be footwear dedicated to the facility or disposable overshoes. Each pair of shoe covers should be worn while walking at a normal pace over a distance of 305 meters (1,000 feet). For flocks with fewer than 500 breeders, at least 1 pair of shoe covers should be worn to sample the floor of the bird area. For flocks with 500 or more breeders, at least 2 pairs of shoe covers should be worn to sample the floor of the bird area. After sampling, place each shoe cover in a sterile container with 30 ml of double strength skim milk.[9] Seal the sterile containers and promptly refrigerate them at 2 to 4 °C or place in a cooler with ice or ice packs. Do not freeze. Samples should be stored at refrigerator temperatures of 2 to 4 °C no more than 5 days prior to culturing.

* * * * *

■ 35. In § 147.45, the first sentence is revised to read as follows:

**§ 147.45 Official delegates.**

Each cooperating State shall be entitled to one official delegate for each of the programs prescribed in parts 145 and 146 of this chapter in which it has one or more participants at the time of the Conference. * * *

[9] Obtain procedure for preparing double strength skim milk from USDA–APHIS "Recommended Sample Collection Methods for Environmental Samples," available from the National Poultry Improvement Plan, Veterinary Services, APHIS, USDA, 1506 Klondike Road, Suite 300, Conyers, GA 30094.

■ 36. In § 147.52, a new paragraph (c) is added to read as follows:

**§ 147.52 Approved tests.**

* * * * *

(c) The following diagnostic test kits that are not licensed by the Service (e.g., bacteriological culturing kits) are approved for use in the NPIP:

(1) Rapid Chek©Select TMSalmonella Test Kit, Strategic Diagnostics, Inc., Newark, DE 19713.

(2) ADIAFOOD Rapid Pathogen Detection System for *Salmonella* spp., AES Chemunex Canada. Laval, QC (Canada) H7L4S3.

(3) DuPont Qualicon BAX Polymerase Chain Reaction (PCR)-based assay for *Salmonella,* DuPont Qualicon, Wilmington, DE 19810.

Done in Washington, DC, this 16th day of March 2011.

**Kevin Shea,**

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

[FR Doc. 2011–6539 Filed 3–21–11; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 25

**[Docket No. NM428; Special Condition No. 25–417–SC]**

## Special Conditions: Boeing 747–468, Installation of a Medical Lift

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

**ACTION:** Final special conditions.

**SUMMARY:** These special conditions are issued for the Boeing 747–468 airplane. This airplane, as modified by Jet Aviation, will have a novel or unusual design feature associated with the installation of a medical lift. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

**DATES:** *Effective Date:* March 22, 2011.

**FOR FURTHER INFORMATION CONTACT:** Jayson Claar, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2194; fax (425) 227–1149; e-mail *jayson.claar@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

### Background

On March 2, 2007, Jet Aviation Engineering Services L.P. (JAES), of Teterboro, New Jersey, applied for a supplemental type certificate for a reconfiguration of an aircraft interior in a 747–468. The Boeing Model 747–468 airplane is FAA approved under Type Certificate A20WE as a large transport-category airplane that is limited to 660 passengers or fewer, depending on the interior configuration.

This modification includes the installation of a medical lift between the main deck and upper deck. The lift allows the transport of a single occupant between the decks during cruise or ramp operations. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature.

### Type Certification Basis

Under the provisions of Title 14, Code of Federal Regulations (14 CFR) 21.101, JAES must show that the 747–468, as changed, continues to meet the applicable provisions of the regulations incorporated by reference in Type Certificate A20WE, or of the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the "original type-certification basis." The regulations incorporated by reference in Type Certificate A20WE are as follows:

- Part 36, as amended by Amendments 36–1 through 36–15, and any later amendments in existence at the time of certification.
- Special Federal Aviation Regulation (SFAR) 27, as amended by Amendments 27–1 through 27–6 and any later amendments in existence at the time of type certification.
- Part 25, effective February 1, 1965, as amended by Amendments 25–1 through 25–59, and the part 25 section-number exceptions itemized in Type Certificate A20WE.

The following special conditions, exemptions, and equivalent safety findings, which are part of the Model 747–300 certification basis, are also part of the certification basis for the Model 747–400.

The special conditions include those enclosed with an FAA letter to The Boeing Company dated February 20, 1970, and the following:

1. Special Condition 4A, revised to apply to airplanes with the landing-gear load-evener system deleted, was recorded as an enclosure to an FAA letter to The Boeing Company dated May 12, 1971.

2. Special Condition No. 25–61–NW–1, for occupancy not to exceed 32 passengers on the upper deck of airplanes with a spiral staircase, was transmitted to The Boeing Company by FAA letter dated February 26, 1975.

3. Special Condition No. 25–71–NW–3, for occupancy not to exceed 45 passengers on the upper deck of airplanes with a straight-segmented stairway, was transmitted to The Boeing Company by FAA letter dated September 8, 1976.

4. Modification of Special Condition No. 25–71–NW–3, for occupancy not to exceed 110 passengers on the upper deck of airplanes with a straight-segmented stairway, was transmitted to The Boeing Company by FAA letter dated August 3, 1981.

5. Special Condition No. 25–77–NW–4, modification of the autopilot system to approve the airplane for use of the system under Category IIIb landing conditions, was transmitted to The Boeing Company by FAA letter dated July 8, 1977.

6. Special Condition No. 25–ANM–16, for use of an overhead crew-rest area, occupancy not to exceed ten crewmembers, was transmitted to The Boeing Company by FAA letter dated November 19, 1987. The FAA-approved procedures required for compliance with paragraph 13 of the special condition are located in Boeing Document D926U303, Appendix D.

7. Special Condition no. 25–ANM–24, applicable to flight-deck displays and propulsion-control systems, was provided to Boeing on December 22, 1988.

8. Special Condition No. 25–ANM–25, which established lightning- and radio-frequency-energy protection requirements, was provided to Boeing on December 22, 1988.

### Exemptions From Part 25

Exemption no. 1013A, dated December 24, 1969: Exemption from Section 25.471(b) to allow lateral displacement of the center of gravity from the airplane centerline.

The following optional requirements, which are part of the Model 747–300 certification basis, apply also to the 747–400:

TABLE 1—OPTIONAL REQUIREMENTS

| Requirement | Section |
|---|---|
| Ditching provisions ..... | 25.801 |
| Ice-protection provisions ..... | 25.1419 |

The following equivalent-safety findings, previously made for earlier models under the provisions of

§ 21.21(b)(1), are also applicable to the Model 747–400:

TABLE 2—EQUIVALENT-SAFETY FINDINGS

| Requirement | Section |
|---|---|
| Width of aisle | 25.815. |
| Pilot-compartment view | 25.773. |
| Use of 1-g stall speed (nonstructural items) | Several (747–400 only). |
| Use of 1-g stall speed (structural items) | Several (747–400 only). |
| Position-light distribution and intensities | 25.1389(b)(3) (747–400 only). |
| Fire-detection system | 25.1203.[1] |
| Pressure relief | 25.1103(d).[1] |
| Emergency-locator transmitter (ELT) | 25.1415(d). |
| Emergency-exit marking | 25.811(f). |

[1] Applies to RB211–524G/H series engine installations only.

If the Administrator finds that the applicable airworthiness regulations (*i.e.,* 14 CFR part 25) do not contain adequate or appropriate safety standards for the 747–468 because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to the applicable airworthiness regulations and special conditions, the 747–468 must comply with the fuel-vent and exhaust-emission requirements of 14 CFR part 34, and the noise certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type-certification basis under § 21.101.

Special conditions are initially applicable to the model for which they are issued. Should the applicant apply for a supplemental type certificate to modify any other model included on the same type certificate to incorporate the same or similar novel or unusual design feature, the special conditions would also apply to the other model under § 21.101.

**Novel or Unusual Design Features**

The original aircraft configuration included a straight stairway between the main deck and upper deck at Fuselage Station 870. The stairway is relocated in the new configuration, and the existing stairway is replaced with an electrically powered medical lift using the opening in the upper deck formerly occupied by the stairs. When the lift is not in operation, the upper-deck opening is covered by floor panels. These floor panels are opened up prior to operation of the lift and form a protective fencing around the upper-deck opening.

The purpose of the medical lift is to move an occupant between the master lounge in the upper deck and the medical room on the lower deck.

The lift platform is driven by two redundant electrical motors, mounted to the rear wall, between the struts. A lifting gear-drive with shafts and gear boxes is powered on the front and rear of the lift platform. The spindles are supported at the lifting gear on the lower support structure and with a strut support on the upper deck. The lift platform is guided in lateral directions with the guiding rails mounted on the struts.

**Discussion**

Due to the novel or unusual features associated with the installation of this medical lift, the following special conditions are considered necessary to provide a level of safety equal to that established by the airworthiness regulations incorporated by reference in the type-certificate.

**Discussion of Comments**

Notice of proposed special conditions no. 25–99–11–SC for the Boeing Model 747–468 airplane was published in the **Federal Register** on May 18, 2010 (75 FR 27662). No public comments were received and the special conditions are adopted as proposed.

After the public-comment deadline on June 17, 2010, the FAA added text referenced in Note 1 in Table 2, and added special conditions 14e and f, and additional text to special condition 15a. The FAA has determined that this additional information enhances, and does not compromise, safety; does not materially affect the intent of the special conditions upon which the pubic had opportunity to comment; and therefore does not warrant a second public-comment period.

**Applicability**

As discussed above, these special conditions are applicable to the 747–468. Should JAES apply at a later date for a supplemental type certificate to modify any other model included on Type Certificate A20WE, to incorporate the same novel or unusual design feature, the special conditions would apply to that model as well.

**Conclusion**

This action affects only certain novel or unusual design features on one model of airplanes. It is not a rule of general applicability and it affects only the applicant who applied to the FAA for approval of these features on the airplane.

**List of Subjects in 14 CFR Part 25**

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

**The Special Conditions**

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type-certification basis for Boeing 747–468 airplanes modified by JAES.

1. A functional verification must be conducted to ensure the adequacy of the lift design features that are supposed to prevent injury to the lift occupant, lift operator, and lift observer.

2. The occupied lift must be designed to withstand the non-emergency load conditions imposed by the aircraft according to loads report SIE–327–301, revision D.

3. Occupancy or operation of the lift must not be permitted during taxi, takeoff, landing (TTL), or turbulent conditions.

4. The lift must be stowed for TTL. The stowed position requires the lift platform positioned at the main-deck level with the floor panels closed.

5. A portable oxygen bottle must be present in the lift and easily accessible to the occupant.

6. Occupancy of the lift must be limited to a single occupant secured in one of two possible configurations:

a. The occupant must be secured to a medical stretcher that is attached to the lift platform. The occupied stretcher must be designed to withstand the non-emergency load conditions defined in loads report SIE–327–301, revision D.

b. The occupant must be secured to a wheelchair that is attached to the lift platform.

7. Control panels must be located on both main and upper decks, connected with full duplex audio communications. On both operator control units, an emergency shut-off switch must be installed. In an emergency, this switch must immediately interrupt the main power supply to the motors. Lift operation must be stopped until the emergency shut-off switch is reset. As soon as one of the operators commands operation in a direction, the "Up" and "Down" option buttons must be disabled and the stop button enabled. Before one of the operators is able to change the lift-travel direction again, the lift must first be stopped.

8. Lift operation must require a trained operator at the main-deck control panel and a trained observer at the upper-deck control panel.

9. Sensors must be installed to detect the following conditions, and to prevent the start or continuation of lift travel if any conditions are not met:

a. Upper-deck seat, located on the left side of the aircraft and just forward of the master-bath bulkhead, is in its most forward, outboard position.

b. Upper-deck master-bedroom/lavatory port bulkhead is opened and secured.

c. Upper-deck shower door is closed and secured.

d. Upper-deck master-lavatory door is opened and secured.

e. Upper-deck floor panels are opened and configured to form the protective fencing.

f. Main-deck inboard doors are closed and secured. The doors must be lockable only from the outside of the lift. This ensures that the operator has control of this area and that nobody is located under the lift.

g. Aircraft seat-belt-fasten signs must not be illuminated.

10. Sensors must be installed to detect the following conditions during operation, and to prevent continued lift travel if any of these conditions occur:

a. Over-temperature of lift motors and/or power-frequency converter.

b. Presence of smoke at motors and in electrical-control cabinet.

c. Over-current at the lift motors.

d. Asynchronous operation of the spindles.

11. A built-in fire extinguisher must be installed in the motor and electrical-control cabinet. This fire extinguisher must be designed to discharge automatically upon the occurrence of a fire.

12. The lift must have the provision for manual operation in the event of a malfunction such as a loss of power to the lift and/or associated systems.

13. A separate battery backup system must provide lighting for the lift-control system, lift control/sensors, communication system, and lift lights for a minimum of 10 minutes in the event of loss of power to the lift and/or associated systems.

14. Lift placards must be installed near or adjacent the control panels identified in special condition 7. The placards must be stated as follows:

a. THIS LIFT IS APPROVED FOR MOVING ONLY A SINGLE OCCUPANT BETWEEN THE MAIN AND UPPER DECKS AND ONLY WHEN SECURED TO EITHER AN APPROVED MEDICAL STRETCHER OR WHEELCHAIR. NO OTHER USES OF THIS LIFT ARE APPROVED.

b. DO NOT OPERATE LIFT DURING TAXI, TAKEOFF, LANDING, OR TURBULENCE.

c. AN APPROVED MEDICAL STRETCHER OR WHEELCHAIR MUST BE PROPERLY SECURED TO THE LIFT PLATFORM BEFORE OPERATING THIS LIFT.

d. THE LIFT MUST BE STOWED FOR TAXI, TAKEOFF, AND LANDING. THE STOWED POSITION REQUIRES THE LIFT PLATFORM POSITIONED AT THE MAIN–DECK LEVEL WITH THE FLOOR PANELS CLOSED.

e. DURING MEDICAL–STRETCHER TRANSPORT, ALL PERSONNEL, MATERIEL, AND PATIENT EXTREMETIES MUST BE POSITIONED BETWEEN THE HEAD AND FOOT OF THE STRETCHER.

f. LIFT MAXIMUM CAPACITY: X LBS (X KG)

15. Lift operational-instruction placards must be installed near the control panels and must describe how to:

a. Configure the lift for operation, including ensuring that the bottom of the lift is clear of personnel and materiel before lowering the lift from the upper deck.

b. Operate the lift.

c. Stow the lift for non-operation such as during TTL and turbulence.

d. Operate the mechanical-override features in the event of a malfunction such as a loss of power to the lift and/or associated systems.

16. Training and related manuals must include:

a. Limitations and procedures for normal lift operation.

b. Backup and override procedure for evacuating the lift and returning it to TTL configuration.

17. Special conditions nos. 3, 4, and 14 must be documented in the Limitations section of the airplane flight manual.

Issued in Renton, Washington, on February 3, 2011.

**Ali Bahrami,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2011–6618 Filed 3–21–11; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2010–1202; Directorate Identifier 2010–NM–167–AD; Amendment 39–16637; AD 2011–06–12]**

**RIN 2120–AA64**

## Airworthiness Directives; The Boeing Company Model MD–90–30 Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for the products listed above. This AD requires repetitive inspections for cracking of the left and right upper center skin panels of the horizontal stabilizer, and corrective action if necessary. This AD was prompted by a report of a crack found in the upper skin panel at the aft inboard corner of a right horizontal stabilizer. We are issuing this AD to detect and correct cracks in the upper center skin panels of the horizontal stabilizer. Uncorrected cracks might ultimately lead to the loss of overall structural integrity of the horizontal stabilizer.

**DATES:** This AD is effective April 26, 2011.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of April 26, 2011.

**ADDRESSES:** For service information identified in this AD, contact Boeing Commercial Airplanes, *Attention:* Data & Services Management, 3855 Lakewood Boulevard, MC D800–0019, Long Beach, California 90846–0001; *phone:* 206–544–5000, extension 2; *fax:* 206–766–5683; *e-mail: dse.boecom@boeing.com; Internet: https://www.myboeingfleet.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 Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (*phone:* 800–647–5527) is Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** Roger Durbin, Aerospace Engineer, Los Angeles ACO, Airframe Branch, ANM–120L, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; *phone:* 562–627–5233; *fax:* 562–627–5210; *e-mail: Roger.Durbin@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

**Discussion**

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to the specified products. That NPRM published in the **Federal Register** on December 23, 2010 (75 FR 80742). That NPRM proposed to require repetitive inspections for cracking of the left and right upper center skin panels of the horizontal stabilizer, and corrective action if necessary.

**Comments**

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

**Explanation of Change to Applicability**

We have revised the applicability of the existing AD to identify model designations as published in the most recent type certificate data sheet for the affected models.

**Conclusion**

We reviewed the relevant data, and determined that air safety and the public interest require adopting the AD with the change described previously. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

We also determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

**Costs of Compliance**

We estimate that this AD affects 19 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

| Action | Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|---|
| Inspection | 4 work-hours × $85 per hour = $340 per inspection cycle. | $0 | $340 per inspection cycle | $6,460 per inspection cycle. |

We estimate the following costs to do any necessary repairs that would be required based on the results of the inspection. We have no way of determining the number of aircraft that might need these repairs.

ON-CONDITION COSTS

| Action | Labor cost | Parts cost | Cost per product |
|---|---|---|---|
| Skin panel replacement | 648 work-hours × $85 per hour = $55,080 | $55,608 | $110,688 |

**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**

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

*For the reasons discussed above, I certify that this AD:*

(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),

(3) Will not affect intrastate aviation in Alaska, and

(4) 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.

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

**Adoption of the Amendment**

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 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 airworthiness directive (AD):

**2011–06–12 The Boeing Company:** Amendment 39–16637; Docket No. FAA–2010–1202; Directorate Identifier 2010–NM–167–AD.

**Effective Date**

(a) This AD is effective April 26, 2011.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to all The Boeing Company Model MD–90–30 airplanes, certificated in any category.

**Subject**

(d) Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 55, Stabilizers.

**Unsafe Condition**

(e) This AD was prompted by a report of a crack found in the upper center skin panel at the aft inboard corner of a right horizontal stabilizer. We are issuing this AD to detect and correct cracks in the upper center skin panel of the horizontal stabilizer. Uncorrected cracks might ultimately lead to the loss of overall structural integrity of the horizontal stabilizer.

**Compliance**

(f) Comply with this AD within the compliance times specified, unless already done.

**Inspections**

(g) Before the accumulation of 20,000 total flight cycles, or within 3,778 flight cycles after the effective date of this AD, whichever occurs later, do eddy current inspections to detect cracking of the left and right upper center skin panels of the horizontal stabilizer, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD90–55A015, dated July 16, 2010.

(1) If no crack is found during any inspection required by paragraph (g) of this AD, repeat the applicable inspections thereafter at the applicable times specified in paragraph 1.E., "Compliance," of Boeing Alert Service Bulletin MD90–55A015, dated July 16, 2010.

(2) If any crack is found during any inspection required by paragraph (g) of this AD, before further flight, replace the skin panel with a serviceable skin panel, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD90–55A015, dated July 16, 2010. Within 20,000 flight cycles after the replacement, do eddy current inspections as required by paragraph (g) of this AD.

**Alternative Methods of Compliance (AMOCs)**

(h)(1) The Manager, Los Angeles Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Los Angeles ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and 14 CFR 25.571, Amendment 45, and the approval must specifically refer to this AD.

**Related Information**

(i) For more information about this AD, contact Roger Durbin, Aerospace Engineer, Los Angeles ACO, Airframe Branch, ANM–120L, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; *phone:* 562–627–5233; *fax:* 562–627–5210; *e-mail: Roger.Durbin@faa.gov.*

**Material Incorporated by Reference**

(j) You must use Boeing Alert Service Bulletin MD90–55A015, dated July 16, 2010, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of Boeing Alert Service Bulletin MD90–55A015, dated July 16, 2010, under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, *Attention:* Data & Services Management, 3855 Lakewood Boulevard, MC D800–0019, Long Beach, California 90846–0001; *phone:* 206–544–5000, extension 2; *fax:* 206–766–5683; *e-mail: dse.boecom@boeing.com; Internet: https://www.myboeingfleet.com.*

(3) You may review copies of the 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.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at an NARA facility, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on March 9, 2011.

**Kalene C. Yanamura,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2011–6249 Filed 3–21–11; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2011–0212; Directorate Identifier 2010–SW–055–AD; Amendment 39–16632; AD 2011–06–07]**

**RIN 2120–AA64**

## Airworthiness Directives; Eurocopter France (Eurocopter) Model EC130 B4 Helicopters

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule; request for comments.

**SUMMARY:** This amendment adopts a new airworthiness directive (AD) for Eurocopter Model EC130 B4 helicopters. This action requires identifying and inspecting a certain emergency flotation gear unit "1G" (1G unit). This action also requires modification of certain affected 1G units. This amendment is prompted by an uncommanded in-flight deployment of the emergency flotation gear when it was not armed by the crew. The actions specified in this AD are intended to prevent an uncommanded in-flight deployment of the emergency flotation gear, unexpected deceleration and pitch down movement of the helicopter, and subsequent loss of control of the helicopter.

**DATES:** Effective April 6, 2011.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of April 6, 2011.

Comments for inclusion in the Rules Docket must be received on or before May 23, 2011.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–

30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

You may get the service information identified in this AD from American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, TX 75053–4005, telephone (800) 232–0323, fax (972) 641–3710, or at *http://www.eurocopter.com.*

**Examining the Docket**

You may examine the docket that contains the AD, any comments, and other information 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 Docket Operations office (telephone (800) 647–5527) is located in Room W12–140 on the ground floor of the West Building at the street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** George Schwab, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Safety Management Group, 2601 Meacham Blvd., Fort Worth, Texas 76137, telephone (817) 222–5114, fax (817) 222–5961.

**SUPPLEMENTARY INFORMATION:**

**Discussion**

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA AD No. 2010–0088–E, dated May 6, 2010, to correct an unsafe condition for the Model EC130 B4 helicopters. EASA advises that an uncontrolled in-flight deployment of the emergency flotation gear (not armed) on an EC130 B4 helicopter has been reported. The flight crew heard a detonation followed by heavy vibrations and noticed the emergency flotation gear floats were inflating. Investigations on the emergency flotation gear control system revealed that a wire was damaged inside the 1G unit. This wire was damaged, due to interference with the screw securing cable 1GR19E lug to the bus bar, causing a short circuit in the emergency flotation gear deployment activation circuit and the consequent deployment of the emergency flotation gear. EASA further states the possibility of interference of the 1G unit's internal wire harnesses with a fuselage metal structure member (stringer) has been identified, which could have the same consequences.

**Related Service Information**

Eurocopter has issued Emergency Alert Service Bulletin No. 25A037, dated April 27, 2010, for the Model EC130 B4 helicopters, which specifies inspecting 1G units without an "*" displayed on the 1G unit panel after the part number (P/N) and taking various corrective actions at various times pending installation of a conforming 1G unit. EASA classified this EASB as mandatory and issued AD No. 2010–0088–E, dated May 6, 2010, to ensure the continued airworthiness of these helicopters.

**FAA's Evaluation and Unsafe Condition Determination**

This helicopter has been approved by the aviation authority of France and is approved for operation in the United States. Pursuant to our bilateral agreement with France, EASA, their technical representative, has notified us of the unsafe condition described in the MCAI AD. We are issuing this AD because we evaluated all information provided by EASA and determined the unsafe condition exists and is likely to exist or develop on other helicopters of this same type design.

**Differences Between This AD and the EASA AD**

This AD does not require the actions to be completed at the compliance times of 3 months and 8 months, nor does it require the repetitive actions specified in the EASA AD. This AD requires the actions to be done within 15 hours time-in-service (TIS). Also, this AD refers to flight hours as hours TIS.

**FAA's Determination and Requirements of This AD**

This unsafe condition is likely to exist or develop on other helicopters of the same type design. Therefore, this AD is being issued to prevent an uncommanded in-flight deployment of the emergency flotation gear, unexpected deceleration and pitch down movement of the helicopter, and subsequent loss of control of the helicopter.

This AD requires determining if the 1G unit has an asterisk after the P/N displayed on the 1G unit panel. If an asterisk follows the P/N, the AD requires inspecting for a rubber extrusion installed on the stringer. If no rubber extrusion is installed on the stringer, the AD requires removing the 1G unit, bonding a rubber extrusion on the stringer, reinstalling the 1G unit, and functionally testing the emergency flotation gear control system. If no asterisk follows the P/N, the AD requires removing the 1G unit and inspecting the 1G unit for interference between the harness wires and the stringer and between internal parts. Also, the AD requires if no rubber extrusion is installed on the stringer, protecting the stringer by bonding a rubber extrusion on the stringer. The AD also requires inspecting for interference between the attachment screw and the wires of the nearby harness and for damage to the wires of the harness. The AD also requires modifying the 1G unit as necessary to protect the 1G unit from interference. Also, the AD requires identifying the modified 1G unit by marking an asterisk after the P/N. The AD also requires reinstalling and functionally testing the 1G unit. Installing a conforming 1G unit is terminating action for the requirements of this AD. Do the actions by following specified portions of the service bulletin described previously.

The short compliance time involved is required because the previously described critical unsafe condition can adversely affect the controllability of the helicopter. This AD requires, within 15 hours TIS, determining whether a conforming 1G unit is installed, and if not, modifying the 1G unit within 15 hours TIS. Fifteen hours TIS is a very short compliance time; therefore, this AD must be issued immediately.

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

**Costs of Compliance**

We estimate that this AD will affect about 119 helicopters of U.S. registry. Determining whether an asterisk is present on the 1G unit panel will require a minimal amount of time. We estimate that it will take about 8 work-hours per helicopter to remove, modify, and replace a 1G unit. The average labor rate is $85 per work-hour. Required parts will cost about $25 per helicopter. Based on these figures, we estimate the cost of this AD on U.S. operators is $8,460, assuming 12 helicopters will require modification of the 1G unit per this AD.

**Comments Invited**

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES**. Include "Docket No. FAA–2011–0212;

Directorate Identifier 2010–SW–055–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this AD. Using the search function of the docket Web site, you can find and read the comments to any of our dockets, including the name of the individual who sent the comment. You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

**Regulatory Findings**

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

*For the reasons discussed above, I certify that the 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 an economic evaluation of the estimated costs to comply with this AD. *See* the AD docket to examine the economic evaluation.

**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.

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

**Adoption of the Amendment**

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 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. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

**2011–06–07 Eurocopter France:** Amendment 39–16632; Docket No. FAA–2011–0212; Directorate Identifier 2010–SW–055–AD.

*Applicability:* Model EC130 B4 helicopters with a flotation gear unit "1G" (1G unit), part number (P/N) 350A63256300, installed, certificated in any category.

*Compliance:* Within 15 hours time-in-service, unless accomplished previously.

To prevent an uncommanded in-flight deployment of the emergency flotation gear, unexpected deceleration and pitch down movement of the helicopter, and subsequent loss of control of the helicopter, do the following:

(a) Determine whether the 1G unit has an asterisk (*) after the P/N displayed on the 1G unit panel as shown in Figure 4 of Eurocopter Emergency Alert Service Bulletin No. 25A037, dated April 27, 2010 (EASB).

(b) If there is an asterisk after the P/N displayed on the 1G unit panel, determine if there is a rubber extrusion installed on the stringer as shown in Figure 6 of the EASB.

(1) If no rubber extrusion is installed on the stringer, remove the 1G unit by following the Accomplishment Instructions, paragraph 2.B.2.a. of the EASB.

(2) Bond a rubber extrusion onto the stringer using Bostik 1400 or an equivalent adhesive. Bostik 1400 is ready for use; if using an equivalent adhesive, follow the manufacturer's directions for preparation and application.

(i) Thoroughly clean the bonding surfaces of the stringer; remove all traces of grease.

(ii) Apply a uniform adhesive film on the bonding surfaces.

(A) For Bostik 1400, allow to dry until tack free (about 15 minutes).

(B) For equivalent adhesive, follow the manufacturer's procedures.

(iii) After adhesive application, assemble the bonding faces and press firmly to eliminate air bubbles. Maintain the pressure throughout the hardening period as described for the adhesive being used. For Bostik 1400, the adhesive hardens in about 48 hours at room temperature.

(3) Reinstall the 1G unit by following the Accomplishment Instructions, paragraph 2.B.2.b., of the EASB. Functionally test the emergency flotation gear control system.

(c) If there is no asterisk displayed after the P/N on the 1G unit panel, remove the 1G unit by following the Accomplishment Instructions, paragraph 2.B.2.a., of the EASB.

(1) Inspect the 1G unit for interference:

(i) If you find interference between the harness wires and the stringer, install a sheath, P/N EN6049–006–08–5, on all the harnesses in the area of the interference, and secure the sheath with cable ties as depicted in Figure 5 of the EASB.

(ii) If you find interference between the harness wires and the inside surface of the 1G unit or with any of the 1G unit's internal components, remove the installed cable ties, P/N E0043–1A0P, and spacer(s), P/N E0688–01, as required, to allow repositioning or routing of the harness to eliminate interference. Secure repositioned harnesses using new cable ties, P/N E0043–1A0P, and new spacers, P/N E0688–01.

(iii) If you find interference between the harness and the helicopter structural stringer, install a sheath, P/N EN6049–006–08–5, on all the harnesses located at the stringer as depicted in Figures 5 and 6 of the EASB. Secure the sheath with cable ties, P/N E0043–1A0P, so that no interference between the sheathed harness and the structural stringer exists.

(iv) Bond a black rubber extrusion, P/N BT4, on the stringer as shown in Figure 6 by following the requirements of paragraph (b)(2) of this AD.

(2) Inspect the attachment screw of cable 1GR19E for orientation and arrangement that matches the Post EASB detail, as shown in insert D of Figure 5 of the EASB, and determine if it is covered with heat shrink, P/N VG95343T05E004A, or equivalent. If orientation and arrangement of the attachment screw cable 1GR19E are not as shown in insert D of Figure 5 or the attachment screw is not covered with heat shrink, modify the attachment screw by following the Accomplishment Instructions, paragraph 2.B.5.b., of the EASB.

**Note 1.** Figure 5 of the EASB does not show the heat shrink installed for clarity of screw head and lug detail.

(3) Inspect for damage to a wire of the harness inside the 1G unit as depicted in Figure 7 of the EASB. Replace any damaged wire using the correct wire and contact information listed in the Appendix, paragraph 4, of the EASB.

(4) Mark an asterisk "*" after P/N 350A63256300 on the 1G unit panel using indelible ink to indicate compliance with this AD.

(5) Reinstall the 1G unit by following the Accomplishment Instructions, paragraph 2.B.2.b., of the EASB, and functionally test the emergency flotation gear control system.

(d) Installing an airworthy 1G unit that has been modified and identified as required by

this AD is terminating action for the requirements of this AD.

(e) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Contact the Manager, Safety Management Group, FAA, *Attn:* George Schwab, Aviation Safety Engineer, Rotorcraft Directorate, 2601 Meacham Blvd., Fort Worth, Texas 76137, telephone (817) 222–5114, fax (817) 222–5961, for information about previously approved alternative methods of compliance.

(f) The Joint Aircraft System/Component (JASC) Code is 2497: Electrical Power System Wiring.

(g) Remove and install the 1G unit, determine the correct wire and contact information, and do the inspections by following the specified portions of Eurocopter Emergency Alert Service Bulletin No. 25A037, dated April 27, 2010. The Director of the Federal Register approved this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, TX 75053–4005, telephone (800) 232–0323, fax (972) 641–3710, or at *http://www.eurocopter.com.* Copies may be inspected at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(h) This amendment becomes effective on April 6, 2011.

**Note 2:** The subject of this AD is addressed in European Aviation Safety Agency No. 2010–0088–E, dated May 6, 2010.

Issued in Fort Worth, Texas, March 7, 2011.

**Lance T. Gant,**

*Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.*

[FR Doc. 2011–6212 Filed 3–21–11; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2010–1162; Directorate Identifier 2010–NM–099–AD; Amendment 39–16634; AD 2011–06–09]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus Model A310 Series Airplanes, and Airbus Model A300 B4–600, B4–600R, and F4–600R Series Airplanes, and Model C4–605R Variant F Airplanes (Collectively Called A300–600 Series Airplanes)

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

**ACTION:** Final rule.

**SUMMARY:** We are superseding an existing airworthiness directive (AD) that applies to the products listed above. This 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:

Prompted by a reported in-service event, EASA issued AD 2009–0084 to prevent unwanted movement of pilot- or co-pilot seat in the horizontal direction which is considered as potentially unsafe, especially during the takeoff phase when the speed of the aeroplane is greater than 100 knots and until landing gear retraction.

* * * * *

Uncommanded movement of the pilot and co-pilot seats during takeoff or landing could interfere with the operation of the airplane and, as a result, could cause loss of control of the airplane. We are issuing this AD to require actions to correct the unsafe condition on these products.

**DATES:** This AD becomes effective April 26, 2011.

The Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD as of April 26, 2011.

The Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD as of June 12, 2009 (74 FR 25399, May 28, 2009).

**ADDRESSES:** You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; phone: 425–227–2125; fax: 425–227–1149.

**SUPPLEMENTARY INFORMATION:**

### Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on December 1, 2010 (75 FR 74665), and proposed to supersede AD 2009–11–09, Amendment 39–15919 (74 FR 25399, May 28, 2009). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

Prompted by a reported in-service event, EASA issued AD 2009–0084 [which corresponds to FAA AD 2009–11–09] to prevent unwanted movement of pilot- or co-pilot seat in the horizontal direction which is considered as potentially unsafe, especially during the takeoff phase when the speed of the aeroplane is greater than 100 knots and until landing gear retraction.

AD 2009–0084 required the deactivation of the electrical power of SOGERMA pilot seats P/N 2510112 series and co-pilot seats P/N 2510113 series. Optional intermediate actions were also provided by AD 2009–0084 to allow partial or full restoration of seat adjustment functionality.

Since AD 2009–0084 was issued, a permanent solution has been developed that terminates the de-activation requirement and invalidates the intermediate actions.

Consequently, this AD retains requirements of EASA AD 2009–0084, which is superseded, and requires implementing the terminating action. In addition, this AD prohibits the (re)installation of unmodified pilot- and co-pilot seats on any aeroplane that has been modified in accordance with the requirements of this AD.

Uncommanded movement of the pilot and co-pilot seats during takeoff or landing could interfere with the operation of the airplane and, as a result, could cause loss of control of the airplane. You may obtain further information by examining the MCAI in the AD docket.

### Relevant Service Information

Since issuance of the NPRM, Airbus has issued Mandatory Service Bulletin A310–25–2205, Revision 01, dated November 19, 2010. This revision does not require any additional work. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI. We have updated this final rule to refer to Airbus Mandatory Service Bulletin A310–25–2205, Revision 01, dated November 19, 2010. We added a new paragraph (n) of this AD to provide credit for doing actions before the effective date of this AD in accordance with Airbus Mandatory Service Bulletin A310–25–2205, dated August 31, 2009, for Airbus Model A310 series airplanes.

### Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

### Conclusion

We reviewed the available data, and determined that air safety and the public interest require adopting the AD with the changes described previously.

We determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

**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 required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a NOTE within the AD.

**Costs of Compliance**

Based on the service information, we estimate that this AD affects about 132 products of U.S. registry.

The actions that are required by AD 2009–11–09 and retained in this AD take about 2 work-hours per product, at an average labor rate of $85 per work hour. Based on these figures, the estimated cost of the currently required actions is $170 per product.

We estimate that it would take about 2 work-hours per product to comply with the new basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts would cost about $5,000 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the AD on U.S. operators to be $704,880, or $5,340 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 AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

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 AD and placed it in the AD docket.

**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 the NPRM, 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.

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

**Adoption of the Amendment**

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

**§ 39.13 [Amended]**

■ 2. The FAA amends § 39.13 by removing Amendment 39–15919 (74 FR 25399, May 28, 2009) and adding the following new AD:

**2011–06–09 Airbus:** Amendment 39–16634. Docket No. FAA–2010–1162; Directorate Identifier 2010–NM–099–AD.

**Effective Date**

(a) This airworthiness directive (AD) becomes effective April 26, 2011.

**Affected ADs**

(b) This AD supersedes AD 2009–11–09, Amendment 39–15919.

**Applicability**

(c) This AD applies to the airplanes identified in paragraphs (c)(1) and (c)(2) of this AD, certificated in any category; all serial numbers having SOGERMA 2510112 series pilot electrical seats or SOGERMA 2510113 series co-pilot electrical seats installed.

(1) Airbus Model A300 B4–601, A300 B4–603, A300 B4–620, and A300 B4–622, A300 B4–605R and A300 B4–622R; A300 F4–605R and A300 F4–622R; and A300 C4–605R Variant F airplanes.

(2) Airbus Model A310–203, –204, –221, –222, –304, –322, –324, and –325 airplanes.

**Subject**

(d) Air Transport Association (ATA) of America Code 25: Equipment/Furnishings.

**Reason**

(e) The mandatory continuing airworthiness information (MCAI) states:

Prompted by a reported in-service event, EASA issued AD 2009–0084 to prevent unwanted movement of pilot or co-pilot seat in the horizontal direction which is considered as potentially unsafe, especially during the takeoff phase when the speed of the aeroplane is greater than 100 knots and until landing gear retraction.

* * * * *

Uncommanded movement of the pilot and co-pilot seats during takeoff or landing could interfere with the operation of the airplane and, as a result, could cause loss of control of the airplane.

**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.

**Restatement of Requirements of AD 2009–11–09, With No Changes**

(g) Within 15 days after June 12, 2009 (the effective date of AD 2009–11–09): Deactivate the electrical supply of SOGERMA 2510112 series pilot seats and SOGERMA 2510113 series co-pilot seats, in accordance with the instructions of Airbus All Operators Telex (AOT) A310–25A2203, Revision 02, dated March 2, 2009; or Airbus AOT A300–25A6215, Revision 02, dated March 2, 2009; as applicable.

(h) For optional intermediate action for restoration of the electrical adjustment of the vertical seat movement only: Deactivating the

electrical powered horizontal movement of SOGERMA 2510112 series pilot seats or SOGERMA 2510113 series co-pilot seats, in accordance with the instructions of EADS SOGERMA Alert Service Bulletin A2510112–25–764, Revision 1, dated February 17, 2009, allows restoration of the vertical adjustment only.

(i) For optional intermediate action for restoration of the electrical adjustment of the vertical seat and horizontal seat movement: Inspecting the position of switch 'S4' and the related shim of SOGERMA 2510112 series pilot seats or SOGERMA 2510113 series co-pilot seats, in accordance with EADS SOGERMA Inspection Service Bulletin 2510112–25–807, dated February 20, 2009, allows reactivation of both horizontal and vertical electrical movements, provided the measurement results of the inspection are within the acceptable value indicated in that service bulletin, and provided that the inspection is repeated thereafter at intervals not to exceed 2 months. If the measurement result of any inspection is not within the acceptable value indicated in EADS SOGERMA Inspection Service Bulletin 2510112–25–807, dated February 20, 2009, the horizontal movement must be deactivated before further flight.

(j) At the applicable time specified in paragraph (j)(1) or (j)(2) of this AD: Submit a report of the findings for the first inspection done in accordance with paragraph (i) of this AD to Airbus SAS–EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. The report must include a detailed fleet inspection report, including measurement values, and pin and serial numbers for each seat.

(1) If the inspection was done on or after June 12, 2009: Submit the report within 30 days after the inspection.

(2) If the inspection was accomplished prior to June 12, 2009: Submit the report within 30 days after June 12, 2009.

(k) Modifications made prior to June 12, 2009, in accordance with EADS SOGERMA Alert Service Bulletin A2510112–25–764, dated December 19, 2008, are considered acceptable for compliance with the applicable action specified in this AD.

**New Requirements of This AD**

(l) Within 12 months after the effective date of this AD: Install an enlarged shim for the horizontal switch actuation on each affected seat, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–25–6217, dated August 31, 2009 (for Model A300–600 series airplanes) or A310–25–2205, Revision 01, dated November 19, 2010 (for Model A310 series airplanes). Doing the installation required by paragraph (l) of this AD terminates the requirements of paragraphs (g), (h), and (i) of this AD.

(m) As of the effective date of this AD, no person may install any SOGERMA 2510112 series pilot seat or SOGERMA 2510113 series co-pilot seat, on any airplane, unless that seat has been modified in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–25–6217, dated August 31, 2009 (for Model A300–600 series airplanes) or A310–25–2205, Revision 01, dated November 19, 2010 (for Model A310 series airplanes).

(n) Actions accomplished before the effective date of this AD according to Airbus Mandatory Service Bulletin A310–25–2205, dated August 31, 2009 (for Model A310 airplanes), are considered acceptable for compliance with the corresponding actions required by paragraphs (l) and (m) of 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**

(o) The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the International Branch, send it to ATTN: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; phone: 425–227–2125; fax: 425–227–1149. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding 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: A Federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave., SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

**Related Information**

(p) Refer to MCAI European Aviation Safety Agency (EASA) Airworthiness Directive 2010–0070, dated April 14, 2010, and the service information specified in table 1 of this AD, for related information.

TABLE 1—RELATED SERVICE INFORMATION

| Document | Revision | Date |
|---|---|---|
| Airbus All Operators Telex A300–25A6215 | 02 | March 2, 2009. |
| Airbus All Operators Telex A310–25A2203 | 02 | March 2, 2009. |
| Airbus Mandatory Service Bulletin A300–25–6217 | Original | August 31, 2009. |
| Airbus Mandatory Service Bulletin A310–25–2205 | 01 | November 19, 2010. |
| EADS SOGERMA Alert Service Bulletin A2510112–25–764 | 1 | February 17, 2009. |
| EADS SOGERMA Inspection Service Bulletin 2510112–25–807 | Original | February 20, 2009. |

**Material Incorporated by Reference**

(q) You must use the service information contained in table 2 of this AD to do the actions required by this AD, unless the AD specifies otherwise. If you do the optional actions specified in this AD, you must use EADS SOGERMA Alert Service Bulletin A2510112–25–764, Revision 1, dated February 17, 2009; or EADS SOGERMA Inspection Service Bulletin 2510112–25–807, dated February 20, 2009; as applicable; to perform those actions, unless the AD specifies otherwise.

TABLE 2—ALL MATERIAL INCORPORATED BY REFERENCE FOR REQUIRED ACTIONS

| Document | Revision | Date |
|---|---|---|
| Airbus All Operators Telex A300–25A6215 | 02 | March 2, 2009. |
| Airbus All Operators Telex A310–25A2203 | 02 | March 2, 2009. |
| Airbus Mandatory Service Bulletin A300–25–6217 | Original | August 31, 2009. |
| Airbus Mandatory Service Bulletin A310–25–2205 | 01 | November 19, 2010. |

(1) The Director of the Federal Register approved the incorporation by reference of Airbus Mandatory Service Bulletin A300–25–6217, dated August 31, 2009; and Airbus Mandatory Service Bulletin A310–25–2205, Revision 01, dated November 19, 2010; under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) The Director of the Federal Register previously approved the incorporation by reference of the service information contained in table 3 of this AD on June 12, 2009 (74 FR 25399, May 28, 2009).

TABLE 3—MATERIAL PREVIOUSLY INCORPORATED BY REFERENCE

| Document | Revision | Date |
|---|---|---|
| Airbus All Operators Telex A300–25A6215 | 02 | March 2, 2009. |
| Airbus All Operators Telex A310–25A2203 | 02 | March 2, 2009. |
| EADS SOGERMA Alert Service Bulletin A2510112–25–764 | 1 | February 17, 2009. |
| EADS SOGERMA Inspection Service Bulletin 2510112–25–807 | Original | February 20, 2009. |

(3) For Airbus service information identified in this AD, contact Airbus SAS—EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; e-mail: *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.*

(4) For EADS SOGERMA service information identified in this AD, contact EADS SOGERMA, Zone Industrielle de l'Arsenal, BP 60109, 17303 Rochefort, Cedex France; phone: 33 5 49 82 84 84; fax: 33 5 46 82 88 13; e-mail: *SCOD1@sogerma.eads.net;* Internet: *http://www.sogerma.eads.net.*

(5) You may review copies of the 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.

(6) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on March 7, 2011.

**Kalene C. Yanamura,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2011–5938 Filed 3–21–11; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2009–1253; Directorate Identifier 2009–NM–080–AD; Amendment 39–16629; AD 2011–06–05]**

**RIN 2120–AA64**

## Airworthiness Directives; The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER Series Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** The FAA is superseding an existing airworthiness directive (AD), which applies to all Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes. That AD currently requires repetitive detailed inspections of the slat track downstop assemblies to verify that proper hardware is installed, one-time torquing of the nut and bolt, and corrective actions if necessary. This new AD also requires replacing the hardware of the downstop assembly with new hardware of the downstop assembly, doing a detailed inspection or a borescope inspection of the slat cans on each wing and the lower rail of the slat main tracks for debris, replacing the bolts of the aft side guide with new bolts, and removing any debris found in the slat can. This AD also removes airplanes from the applicability. This AD results from reports of parts coming off the main slat track downstop assemblies. We are issuing this AD to prevent loose or missing parts from the main slat track downstop assemblies from falling into the slat can and causing a puncture, which could result in a fuel leak and consequent fire.

**DATES:** This AD becomes effective April 26, 2011.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of April 26, 2011.

**ADDRESSES:** For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.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 Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone 800–647–5527) is the Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140,

1200 New Jersey Avenue, SE., Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** Nancy Marsh, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6440; fax (425) 917–6590.

**SUPPLEMENTARY INFORMATION:**

**Discussion**

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that supersedes AD 2007–18–52, Amendment 39–15197 (72 FR 53928, September 21, 2007). The existing AD applies to all Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes. That NPRM was published in the **Federal Register** on January 11, 2010 (75 FR 1297). That NPRM proposed to require repetitive detailed inspections of the slat track downstop assemblies to verify that proper hardware is installed, one-time torquing of the nut and bolt, and corrective actions if necessary. That NPRM also proposed to require replacing the hardware of the downstop assembly with new hardware of the downstop assembly, doing a detailed inspection or a borescope inspection of the slat cans on each wing and the lower rail of the slat main tracks for debris, replacing the bolts of the aft side guide with new bolts, and removing any debris found in the slat can. That NPRM proposed to remove airplanes from the applicability of the existing AD.

**Comments**

We provided the public the opportunity to participate in the development of this AD. We have considered the comments that have been received on the NPRM.

**Request To Use Revised Service Information**

Boeing requested that the NPRM refer to Boeing Service Bulletin 737–57A1302, Revision 1. Boeing stated that Revision 1 of this service bulletin will be forwarded to the FAA for approval.

We agree with Boeing's request to refer to Boeing Service Bulletin 737–57A1302, Revision 1, dated October 18, 2010. Revision 1 of this service bulletin has been published and made available to operators. There are no new actions in Boeing Service Bulletin 737–57A1302, Revision 1, dated October 18, 2010. We have revised paragraph (i) of this AD to add a reference to this service bulletin.

**Request To Allow Optional Parts for Installation**

Air Transport Association (ATA), on behalf of its member airline American Airlines (AAL), expressed concern about the lack of optional manufacturer part numbers, and/or optional specifications concerning the parts specified in the NPRM. AAL stated that part interchangeability is allowed for airplanes with the same design that are not affected by the NPRM. AAL gave four examples:

- The NPRM allows only bolt part number (P/N) BACB30NR7DK12, but bolt P/N BACB30NR7DK12 has an optional part P/N 114A4102–19, that can be used on airplanes unaffected by the NPRM.
- The NPRM specifies retaining pin P/N BACP18BC03A06P only, but per Boeing part data, P/N MS24665–300 is fully interchangeable with P/N BACP18BC03A06P.
- The NPRM specifies to use lockwire P/N MS20995NC32 only, but for airplanes unaffected by the AD, the use of cable assembly P/N BACC13AT4K6 is allowed.
- Boeing Drawing 65–88700 allows the use of P/N MS20995C32 and P/N MS20995N32 in lieu of P/N MS20995NC32.

AAL stated that the intent of the NPRM is not to restrict parts to specific manufacturer part numbers when optional parts are readily available. AAL stated that similar airplanes unaffected by the AD with the same design allow for greater part equivalent/substitution options. AAL requested that the FAA, in an effort to assist the operator for compliance, include optional parts in the NPRM, or provide a global AMOC for acceptable substitutes per Boeing Drawing 65–88700, which is an acceptable specification interchangeability, or part substitution per Boeing Drawing D–590.

We partially agree with AAL's request that optional parts be allowed for installation. The alternative lockwire part proposed by AAL has already been approved as an AMOC for those operators who have made the request to the FAA. Boeing has not requested approval of a global AMOC for all operators. We have revised paragraph (i) of this AD to specify that installation of stainless steel lockwire, P/N MS20995C32, is acceptable for compliance with this AD.

We disagree with AAL regarding use of the alternative bolt and cotter pin. The alternative bolt was never produced and could be removed from the Boeing drawing system in the future. The alternative cotter pin proposed by AAL may require the use of special tooling for installation on in-service airplanes. The cotter pin specified in Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008; and Boeing Service Bulletin 737–57A1302, Revision 1, dated October 18, 2010; requires the use of a special tool designed to facilitate the installation by the operators. Until an alternative cotter pin and tooling are validated for use in maintenance facilities (as opposed to the manufacturing environment), the proposed AMOC by AAL cannot be approved. If AAL obtains additional data to support such a request, it may apply for approval of an AMOC in accordance with the provisions specified in paragraph (j) of this AD.

We disagree with AAL's request to approve the use of substitutions provided in Boeing Drawing 65–88700 or Drawing D–590. Boeing did not provide us with information to ensure that these parts adequately address the unsafe condition. In addition, Boeing has not requested approval of a global AMOC for all operators. However, operators may apply for approval of an AMOC in accordance with the provisions specified in paragraph (j) of this AD.

**Request for AMOC Clarification for the Track Repair Requirements**

ATA, on behalf of its member airline AAL, expressed concern with requiring an AMOC for repair of a hole larger than 0.5005 inch in the slat main track as stated in the NPRM. AAL requested that the FAA clarify the boundaries of the AMOC track repair requirements and the method to identify the AMOC repaired tracks. AAL stated that the flap tracks are fully removable from the slat and are fully interchangeable with airplanes unaffected by the AD. AAL stated that the tracks do not have unique identifiers (*i.e.,* no serial numbers) marked on the track. AAL stated that the requirement may also be interpreted as, for Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008, listed aircraft, repairs to the downstop hole (when greater than 0.5005 inch) of a slat main track performed at any time during the life of the part would require an AMOC.

We provide the following clarifications.

For clarification of the AMOC track repair requirements, the AD requires that any time the fastener hole in an affected slat can is oversized to greater than 0.5005 inch, the track must be replaced in accordance with Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008; Boeing Service Bulletin 737–57A1302, Revision

1, dated October 18, 2010; or repaired in accordance with paragraph (j) of this AD. AMOCs can be approved for airplanes included in the AD applicability. AMOCs are not applicable to airplanes outside the AD even if AD-related parts are rotated onto them. We have not changed the AD in this regard.

For clarification, the method to identify the AMOC-repaired tracks, including the tracking of affected parts, is a requirement under Parts 39, 121, and 43 of the Federal Aviation Regulations (14 CFR 39, 121, and 43). Under these parts, each airline may develop its own unique methodology to accomplish this activity per the procedures approved in its operation specification. We have not changed the AD in this regard.

**Request for Re-Evaluation of Out-of-Spec Hole Issue**

ATA, on behalf of its member airline AAL, recommended re-evaluating the impact of an out-of-spec hole (hole larger than 0.5005 inch in the slat main track), and recommended the FAA gather additional information from operators concerning the out-of-spec hole issue.

We disagree with AAL's recommendation. The proposal to provide and gather operator data should be proposed to the manufacturer. Once additional data are evaluated by technical specialists, operators may request approval of an AMOC in accordance with the provisions specified in paragraph (j) of this AD based on the new recommendation.

**Request To Provide Reference in the Component Maintenance Manual (CMM)**

ATA, on behalf of its member airline AAL, expressed concern with the bushing repair of the slat main track in accordance with Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008. AAL stated that in an effort to ensure compliance with the NPRM, this repair may need to be referenced in the appropriate CMM section to provide the reference to the source of the repair data.

From these statements, we infer that AAL is requesting that the bushing repair provided in Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008; and Boeing Service Bulletin 737–57A1302, Revision 1, dated October 18, 2010; be referenced in the appropriate CMM. We do not agree with this request. CMMs are not regulated by the FAA, and Boeing does not provide us with information to ensure that these documents remain unchanged and thus adequately address the unsafe condition. We have not changed the AD in this regard.

**Request That the AD Clarify and Highlight Only Specific Sections of the Service Bulletin Affected by the AD**

ATA, on behalf of its member airline AAL, expressed concern regarding the requirements in Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008, as proposed in the NPRM. AAL stated that the NPRM may be misinterpreted in that "all steps" of that service bulletin must be complied with. AAL requested that the AD be clarified and highlighted to explain only those specific sections of that service bulletin that are affected by the NPRM.

AAL stated that panel open/close procedures and access procedures (slat extension/retraction) should not affect the compliance with the NPRM. AAL also stated that the actuator disconnection/reconnection and slat removal/installation also should not affect compliance with the NPRM. AAL stated that clarification may be made with the following statement: "Only the service bulletin procedures specified by the AD are affected by the AD. Other procedures described by the service bulletin not specified by the AD are not affected by FAA AD compliance requirements."

We partially agree with AAL's request to clarify and highlight only specific sections of Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008; and Boeing Service Bulletin 737–57A1302, Revision 1, dated October 18, 2010; that are affected by the AD. For clarification, the manufacturer revises service bulletins, not the FAA. When the words "refer to" are used in Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008; or Boeing Service Bulletin 737–57A1302, Revision 1, dated October 18, 2010; and the operator has an accepted alternative procedure, the accepted alternative procedure may be used. However, we have changed paragraph (i) of this AD to delete reference to the access and close sections of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008; this AD now requires that the actions be accomplished in accordance with Part 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008; or Boeing Service Bulletin 737–57A1302, Revision 1, dated October 18, 2010.

**Request To Provide a Global AMOC**

ATA, on behalf of its member airline AAL, stated that Boeing issued Service Bulletin Information Notice (IN) 737–57A1302 IN 01, dated February 25, 2009, to Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008. AAL stated that Boeing Service Bulletin IN 737–57A1302 IN 01 provides additional instructions to install the guide bolts and reassemble the track downstop hole. AAL stated that Boeing Service Bulletin IN 737–57A1302 IN 01 also provides additional instructions for access and panel reinstallation. AAL requested that Boeing Service Bulletin IN 737–57A1302 IN 01 be approved as a global AMOC, or be incorporated as an option into the AD requirements to allow the operator to use the best practices to accomplish the job.

We do not agree with this request. We note that a global AMOC already has been approved under FAA Letter 120S–09–528, dated September 16, 2009, for Boeing Service Bulletin IN 737–57A1302 IN 01, dated February 25, 2009, and paragraph (i) of this AD has been revised to include reference to Boeing Service Bulletin 737–57A1302, Revision 1, dated October 18, 2010, which includes the information provided in that information notice. AAL may request a copy of this global AMOC from Boeing.

**Request for Validation of the Service Bulletin Instructions To Be Accomplished**

ATA, on behalf of its member airline AAL, expressed concern that a validation program was not performed on Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008, to ensure that data, instructions, and processes specified in that service bulletin are correct, clear, appropriate, and understood by maintenance personnel performing the work.

From this statement we infer that AAL is requesting that validation of the instructions in Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008, be accomplished. We partially agree with AAL's request. We have confirmed that validation of Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008, was completed in December 2009. Operators may obtain further details of the validation from Boeing. We have not changed the AD in this regard.

**Request To Revise Service Information To Include Steps To Re-Install Slat Can Assembly and Access Panels (If Removed)**

ATA, on behalf of its member airline AAL, stated that there are no steps in Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008, to install the slat can, if removed, in

accordance with Part 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008. AAL requested that to ensure compliance with the AD, a step, "If removed, install slat, refer to AMM 27–81–21," be included in Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008, in the appropriate location.

AAL also stated that there is no procedure referenced in Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008, to reinstall the access panels removed from the lower leading edge of the wing. AAL stated that to ensure compliance with the AD, a step, "reinstall the panels that were removed from the lower leading edge of the wing, refer to AMM 27–81–21," be included in Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008, in the appropriate location.

We disagree with AAL's request. For clarification, the manufacturer, not the FAA, revises service bulletins. Part 3.B.3.b. of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008; and Boeing Service Bulletin 737–57A1302, Revision 1, dated October 18, 2010; specify that the airplane be returned "to a serviceable condition," and accomplishment of this step would require reinstallation of any components that were removed from the airplane. When the words "refer to" are used in Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008; and Boeing Service Bulletin 737–57A1302, Revision 1, dated October 18, 2010; and the operator has an accepted alternative procedure, the accepted alternative procedure can be used to accomplish reinstalling the slat can assembly and access panels. Boeing Service Bulletin 737–57A1302, Revision 1, dated October 18, 2010, does include new phrasing similar to that requested by AAL. We have not changed this AD in this regard.

**Request for an Optional Requirement to the AD**

ATA, on behalf of its member airline AAL, expressed concern with the measurement requirements of the slat track hole diameter. AAL requested that Boeing and/or the FAA provide an optional requirement to this AD, or a global AMOC, to allow use of a "no-go" type gauge or similar device and the associated procedure to establish hole size. AAL also requested providing an additional (initial) procedure consistent with using common maintenance measurement tools to better allow the operator to comply with these requirements. AAL stated that Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008, states that if the bolt has side-to-side play in the hole, then measure the hole. AAL stated that the allowable measurement is four decimal places of accuracy (0.XXXX). AAL stated that this dimension is in Boeing Assembly Drawing 114A7511 specification for the purpose of manufacturing the part in a machine shop setting. AAL also stated that since this task is intended to be accomplished on wing, or slat removed (on bench) in a dock maintenance setting, it is not practical and may not be feasible to require measurement within four decimal places. AAL stated that the methods to machine to four decimal place accuracy are different from the requirement to measure to four decimal place accuracy. AAL stated that typical tools used in a maintenance setting would be a ball/T gauge, micrometer, and a vernier caliper in certain situations (hole not near minimum/maximum limits). AAL also stated that using these tools on the wing could result in inaccuracy due to the difficulty of the measuring location and the access to the location.

We disagree with AAL's requests to provide an optional requirement to this AD or a global AMOC to allow the use of a "no-go" type gauge or similar device and the associated procedure to establish hole size. We also disagree with AAL to add a procedure using common maintenance measurement tools.

Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008; Boeing Service Bulletin 737–57A1302, Revision 1, dated October 18, 2010; nor this AD; specify which tools are to be used to measure the hole size. In the absence of specific instructions on how to perform a maintenance task, operators have the discretion of developing their own procedures to enable their maintenance personnel to meet the requirements of this AD. In addition, it is the intent of this AD that the operators develop their own procedures to perform a routine maintenance task, such as drilling the close ream hole. Operators are referred to the manufacturer's maintenance procedures, which are published in formats such as the structural repair manual, the standard overhaul practices manual, component maintenance manuals, and other available resources. For further instruction, these maintenance procedures are best obtained from these resources. We have not changed the AD in this regard.

**Explanation of Change to Applicability**

We have revised the applicability of the existing AD to identify model designations as published in the most recent type certificate data sheet for the affected models.

**Conclusion**

We have carefully reviewed the available data, including the comments that have been received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We have determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

**Explanation of Change to Costs of Compliance**

Since issuance of the NPRM, we have increased the labor rate used in the Costs of Compliance from $80 per work-hour to $85 per work-hour. The Costs of Compliance information, below, reflects this increase in the specified hourly labor rate.

**Costs of Compliance**

There are about 2,699 airplanes of the affected design in the worldwide fleet. The following table provides the estimated costs for U.S. operators to comply with this AD.

ESTIMATED COSTS

| Action | Work hours | Average labor rate per hour | Parts | Cost per airplane | Number of U.S.-registered airplanes | Fleet cost |
|---|---|---|---|---|---|---|
| Inspection and Torquing (required by AD 2007–18–52). | 8 | $85 | $0 | $680, per inspection cycle. | 853 | $580,040, per inspection cycle. |
| Inspection and Modification (new actions) ..... | 18 | 85 | 5,388 | $6,918 ..... | 853 | $5,901,054. |

**Authority for This Rulemaking**

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

**Regulatory Findings**

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(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) 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 AD and placed it in the AD docket. *See* the **ADDRESSES** section for a location to examine the regulatory evaluation.

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

**Adoption of the Amendment**

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

**§ 39.13 [Amended]**

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39–15197 (72 FR 53928, September 21, 2007) and by adding the following new airworthiness directive (AD):

**2011–06–05 The Boeing Company:** Amendment 39–16629. Docket No. FAA–2009–1253; Directorate Identifier 2009–NM–080–AD.

**Effective Date**

(a) This AD becomes effective April 26, 2011.

**Affected ADs**

(b) This AD supersedes AD 2007–18–52, Amendment 39–15197.

**Applicability**

(c) This AD applies to The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes, certificated in any category, as identified in Boeing Service Bulletin 737–57A1302, Revision 1, dated October 18, 2010.

**Subject**

(d) Air Transport Association (ATA) of America Code 57: Wings.

**Unsafe Condition**

(e) This AD results from reports of parts coming off the main slat track downstop assemblies. The Federal Aviation Administration is issuing this AD to prevent loose or missing parts from the main slat track downstop assemblies from falling into the slat can and causing a puncture, which could result in a fuel leak and consequent fire.

**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.

**Restatement of AD 2007–18–52, With No Changes**

**Note 1:** Paragraph (g) of this AD merely restates the requirements of paragraph (f)(1) of emergency AD 2007–18–51 (which was superseded by AD 2007–18–52). As allowed by the phrase, "unless the actions have already been done," if the applicable initial inspections required by paragraph (f)(1) of emergency AD 2007–18–51 have already been done, this AD does not require that those inspections be repeated until the repetitive interval of 3,000 flight cycles.

**Repetitive Detailed Inspections**

(g) Within 10 days after September 26, 2007 (the effective date of AD 2007–18–52): Do a detailed inspection or a borescope inspection of each main slat track downstop assembly to verify proper installation of the slat track hardware (*i.e.,* the bolt, washers, downstops, stop location, and nut shown in Figure 1 of Boeing Service Letter 737–SL–57–084–B, dated July 10, 2007, and in this AD). Proper installation of the sleeve need not be confirmed, and the stop location part may be installed on either the inboard or the outboard side of the slat track. If any part is missing or is installed improperly, before further flight, install a new or serviceable part using a method approved in accordance with the procedures specified in paragraph (j) of this AD; and do a detailed inspection of the inside of the slat can for foreign object debris (FOD) and damage. Before further flight, remove any FOD found and repair any damage found using a method approved in accordance with the procedures specified in paragraph (j) of this AD. Verify proper installation; install a new or serviceable part; and inspect for damage and FOD, and remove FOD and repair damage; in accordance with a method by approved by the Manager, Seattle Aircraft Certification Office, FAA; or in accordance with Boeing Multi Operator Message Number 1–523812011–1, issued August 25, 2007, or 1–527463441–1, issued August 28, 2007. Repeat the actions required by paragraph (g) of this AD thereafter at intervals not to exceed 3,000 flight cycles.

**Note 2:** Paragraph (h) of this AD merely restates the requirements of paragraph (f)(2) of emergency AD 2007–18–51. As allowed by the phrase, "unless the actions have already been done," if the torque application required by paragraph (f)(2) of AD emergency 2007–18–51 has already been done, this AD does not require that the torque application be repeated.

**One-Time Torquing**

(h) Within 24 days after receipt of emergency AD 2007–18–51: Apply a torque between 50 to 80 inch-pounds to the nut. The bolt head must be held with the torque applied to the nut.

**Note 3:** For the purposes of this AD, a detailed inspection is: "An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at an intensity deemed appropriate. Inspection aids such as mirror, magnifying lenses, *etc.,* may be necessary. Surface cleaning and elaborate procedures may be required."

BILLING CODE 4910–13–P

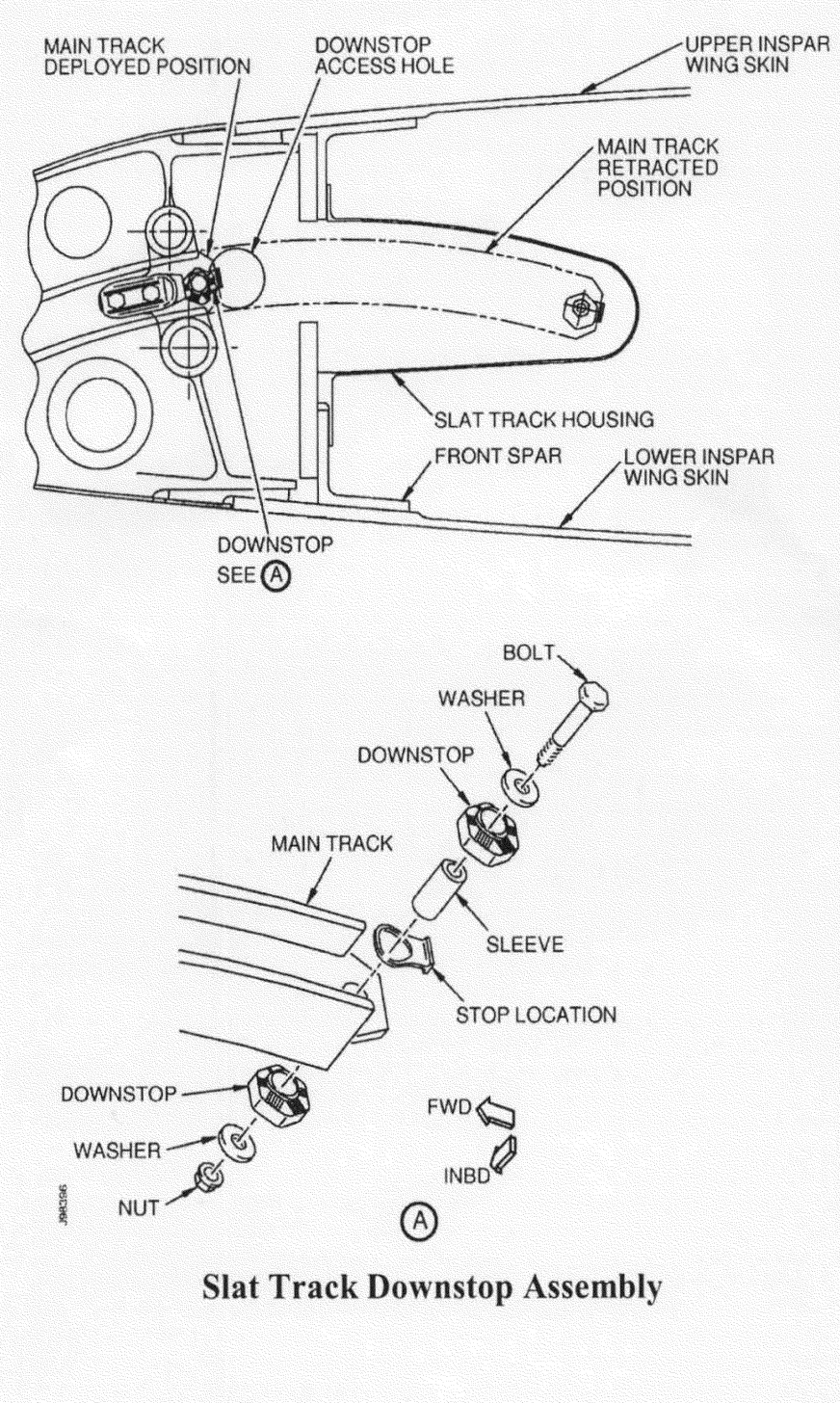



**Figure 1**

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**New Requirements of This AD**

*Modification and Inspection*

(i) Within 36 months after the effective date of this AD: Replace the hardware of the down stop assembly with new hardware, do a detailed inspection or a borescope inspection of the slat cans on each wing and the lower rail of the slat main tracks for debris, and replace the bolts of the aft side guide with new bolts, in accordance with Part 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008; or Boeing Service Bulletin 737–57A1302, Revision 1, dated October 18, 2010; except, where Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008, and Boeing Service Bulletin 737–57A1302, Revision 1, dated October 18, 2010, specify to replace the slat main track or to contact Boeing for further repair instructions if the hole diameter is greater than 0.5005 inch, before further flight, replace the slat main track in accordance with Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008, Boeing Service Bulletin 737–57A1302, Revision 1, dated October 18, 2010, or repair using a method approved in accordance with the

procedures specified in paragraph (j) of this AD. If debris is found during any inspection required by this AD, before further flight, remove the debris in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008; or Boeing Service Bulletin 737–57A1302, Revision 1, dated October 18, 2010. Doing the actions required by paragraph (i) of this AD terminates the actions required by paragraphs (g) and (h) of this AD. Installation of stainless steel lockwire having part number (P/N) MS20995C32 is acceptable for compliance in lieu of lockwire P/N MS20995NC32, as specified in Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008, for this AD.

**Alternative Methods of Compliance**

(j)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Or, e-mail information to *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov*.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD, if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) AMOCs approved previously in accordance with AD 2007–18–52 are approved as AMOCs for the corresponding provisions of this AD.

**Related Information**

(k) For more information about this AD, contact Nancy Marsh, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle ACO, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone: 425–917–6440; fax: 425–917–6590; e-mail: *nancy.marsh@faa.gov*.

**Material Incorporated by Reference**

(l) You must use Boeing Alert Service Bulletin 737–57A1302, dated December 15, 2008; or Boeing Service Bulletin 737–57A1302, Revision 1, dated October 18, 2010; to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com*.

(3) You may review copies of the 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.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on February 23, 2011.

**Kalene C. Yanamura,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2011–5301 Filed 3–21–11; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2008–0090; Directorate Identifier 2007–NM–312–AD; Amendment 39–16627; AD 2011–06–03]**

**RIN 2120–AA64**

## Airworthiness Directives; The Boeing Company Model 747 Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for the products listed above. This AD requires measuring the electrical bond resistance between the motor operated valve (MOV) actuators and airplane structure for the main, center, auxiliary, and horizontal stabilizer fuel tanks, as applicable, and corrective action if necessary; revising the maintenance program to incorporate airworthiness limitation (AWL) No. 28–AWL–21 or AWL No. 28–AWL–27, as applicable; and replacing production-installed laminate phenolic spacers with metallic spacers between the fuel jettison MOV and the airplane structure, as applicable. This AD was prompted by fuel system reviews conducted by the manufacturer. We are issuing this AD to prevent electrical current from flowing through an MOV actuator into a fuel tank, which could create a potential ignition source inside the fuel tank. This condition, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

**DATES:** This AD is effective April 26, 2011.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of April 26, 2011.

**ADDRESSES:** For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.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 Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** Tung Tran, Aerospace Engineer, Propulsion Branch, Seattle Aircraft Certification Office, ANM–140S, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; phone: 425–917–6505; fax: 425–917–6590; e-mail: *tung.tran@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

**Discussion**

We issued a supplemental notice of proposed rulemaking (SNPRM) to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to the specified products. That SNPRM published in the **Federal Register** on November 19, 2010 (75 FR 70863). That SNPRM proposed to require measuring the electrical bond resistance between the motor operated valve (MOV) actuators and airplane structure for the main, center, auxiliary, and horizontal stabilizer fuel tanks, as applicable, and corrective action if

necessary; revising the maintenance program to incorporate airworthiness limitation (AWL) No. 28–AWL–21 or AWL No. 28–AWL–27, as applicable; and replacing production-installed laminate phenolic spacers with metallic spacers between the fuel jettison MOV and the airplane structure, as applicable.

**Actions Since Supplemental NPRM Was Issued**

Since the supplemental NPRM was issued, Boeing issued Service Bulletin 747–28A2292, Revision 3, dated December 9, 2010. The changes described in this service bulletin are minor and editorial in nature. Paragraphs (c) and (g) of this AD have been revised to refer to Revision 3 of this service bulletin. In addition, credit for accomplishing the actions in Boeing Service Bulletin 747–28A2292, Revision 2, dated May 13, 2010, has been included in paragraph (o) of this AD.

**Comments**

We gave the public the opportunity to participate in developing this AD. We have considered the comment received. Boeing supports the NPRM.

**Conclusion**

We reviewed the relevant data, considered the comment received, and determined that air safety and the public interest require adopting the AD as proposed—except for the changes that were described above. We have determined that these changes:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

**Costs of Compliance**

We estimate that this AD affects 222 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

| Action | Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|---|
| Measurement | Up to 7 work-hours × $85 per hour = Up to $595 | Up to $350 | Up to $945 | Up to $209,790. |
| Replacement (Up to 60 airplanes). | Up to 4 work-hours × $85 per hour = Up to $340 | $1,305 | Up to $1,645 | Up to $98,700. |
| Maintenance program revision. | 1 work-hour × $85 per hour = $85 | $0 | $85 | $18,870. |

We estimate the following costs to do any necessary modification that would be required based on the results of the proposed inspection. We have no way of determining the number of aircraft that might need this modification.

ON-CONDITION COSTS

| Action | Labor cost | Parts cost | Cost per product |
|---|---|---|---|
| Change electrical bond and rework part contact surface. | 436 work-hours × $85 per hour = $37,060 | Up to $35,760 | Up to $72,820. |

**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**

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(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),

(3) Will not affect intrastate aviation in Alaska, and

(4) 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.

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

**Adoption of the Amendment**

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 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 airworthiness directive (AD):

**2011–06–03 The Boeing Company:** Amendment 39–16627; Docket No. FAA–2008–0090; Directorate Identifier 2007–NM–312–AD.

**Effective Date**

(a) This AD is effective April 26, 2011.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to The Boeing Company Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, 747SR, and 747SP series airplanes, certificated in any category; as identified in Boeing Service Bulletin 747–28A2292, Revision 3, dated December 9, 2010.

**Note 1:** This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance (AMOC) according to paragraph (q) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

**Subject**

(d) Air Transport Association (ATA) of America Code 28: Fuel.

**Unsafe Condition**

(e) This AD results from fuel system reviews conducted by the manufacturer. The Federal Aviation Administration is issuing this AD to prevent electrical current from flowing through a motor operated valve (MOV) actuator into a fuel tank, which could create a potential ignition source inside the fuel tank. This condition, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

**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.

**Measurement, Corrective Action, and Replacement**

(g) Within 60 months after the effective date of this AD, do the actions required by paragraphs (g)(1) and (g)(2) of this AD, as applicable.

(1) Measure the electrical bond resistance between the MOV actuators and the airplane structure for the main, center, and auxiliary fuel tanks, as applicable; and do all applicable corrective actions; by accomplishing all of the applicable actions in the Accomplishment Instructions of Boeing Service Bulletin 747–28A2292, Revision 3, dated December 9, 2010. The corrective actions must be accomplished before further flight.

(2) For airplanes in Groups 12, 16, 17, 18, and 19, as identified in Boeing Service Bulletin 747–28A2292, Revision 3, dated December 9, 2010: Within 60 months after the effective date of this AD, replace production-installed laminate phenolic spacers with metallic spacers, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 747–28A2292, Revision 3, dated December 9, 2010.

(h) For airplanes identified in Boeing Service Bulletin 747–28A2294, Revision 1, dated March 5, 2009: Within 60 months after the effective date of this AD, measure the electrical bond resistance between the MOV actuators and airplane structure for the horizontal stabilizer fuel tanks (HST), and do all the applicable corrective actions, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 747–28A2294, Revision 1, dated March 5, 2009. The corrective actions must be accomplished before further flight.

**Deactivation of the HST**

(i) For airplanes identified in Boeing Service Bulletin 747–28A2294, Revision 1, dated March 5, 2009: Deactivation of the HST, in accordance with the applicable Boeing service information specified in table 1 of this AD, terminates the requirements of paragraph (h) of this AD, except as provided by paragraph (j) of this AD. Deactivation of the HST before the effective date of this AD in accordance with the applicable service information specified in table 2 of this AD also terminates the requirements of paragraph (h) of this AD, except as provided by paragraph (j) of this AD.

TABLE 1—DEACTIVATION SERVICE INFORMATION

| Boeing— | Revision— | Dated— |
|---|---|---|
| Service Bulletin 747–28–2265 | Original | February 22, 2006. |
| Service Bulletin 747–28–2272 | Original | February 21, 2006. |
| Service Bulletin 747–28–2274 | 1 | May 21, 2008. |
| Service Bulletin 747–28–2275 | 4 | February 2, 2009. |
| Service Bulletin 747–28–2279 | 2 | October 16, 2007. |
| Service Bulletin 747–28–2285 | 3 | August 30, 2007. |
| Service Bulletin 747–28–2293 | 2 | March 4, 2008. |
| Service Bulletin 747–28–2295 | 2 | January 19, 2009. |
| Service Bulletin 747–28–2296 | Original | July 13, 2007. |
| Service Bulletin 747–28–2300 | 1 | June 2, 2008. |
| Service Bulletin 747–28–2314 | Original | December 9, 2008. |

TABLE 2—DEACTIVATION CREDIT SERVICE INFORMATION

| Boeing— | Revision— | Dated— |
|---|---|---|
| Service Bulletin 747–28–2274 | Original | March 13, 2006. |
| Service Bulletin 747–28–2275 | Original | June 12, 2006. |
| Service Bulletin 747–28–2275 | 1 | March 16, 2007. |
| Service Bulletin 747–28–2275 | 2 | July 2, 2007. |
| Service Bulletin 747–28–2275 | 3 | March 11, 2008. |
| Service Bulletin 747–28–2279 | Original | June 12, 2006. |
| Service Bulletin 747–28–2279 | 1 | May 25, 2007. |
| Service Bulletin 747–28–2285 | Original | January 23, 2007. |
| Service Bulletin 747–28–2285 | 1 | May 9, 2007. |
| Service Bulletin 747–28–2285 | 2 | August 3, 2007. |
| Service Bulletin 747–28–2293 | Original | May 9, 2007. |
| Service Bulletin 747–28–2293 | 1 | August 29, 2007. |
| Service Bulletin 747–28–2295 | Original | November 17, 2006. |
| Service Bulletin 747–28–2295 | 1 | March 20, 2008. |
| Service Bulletin 747–28–2300 | Original | January 16, 2008. |

**Reactivation of the HST**

(j) For airplanes identified in Boeing Service Bulletin 747–28A2294, Revision 1, dated March 5, 2009, on which the HST is reactivated, the HST must be reactivated in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA. For any airplane on which the HST is reactivated, the requirements of paragraphs (h) and (l) of this AD must be done before further flight following the reactivation, or within 60 months after the effective date of this AD, whichever occurs later. For a reactivation method to be approved, the reactivation method must meet the certification basis of the airplane, and the approval must specifically reference this AD.

**Maintenance Program Revision**

(k) For Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747SR, and 747SP series airplanes: Concurrently with accomplishing the actions required by paragraph (g)(1) of this AD, revise the maintenance program by incorporating airworthiness limitation (AWL) No. 28–AWL–21 of Section D of Boeing 747–100/200/300/SP Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), Document D6–13747–CMR, Revision March 2008.

(l) For Model 747–400, 747–400D, and 747–400F series airplanes: Concurrently with accomplishing the actions required by paragraph (g)(1) of this AD, revise the maintenance program by incorporating AWL No. 28–AWL–27 of Subsection D of Boeing 747–400 Maintenance Planning Data (MPD) Document, Section 9, D621U400–9, Revision December 2009.

**No Alternative Critical Design Configuration Control Limitations (CDCCLs)**

(m) After accomplishing the applicable action required in paragraph (k) or (l) of this AD, no alternative CDCCLs may be used unless the CDCCLs are approved as an AMOC in accordance with the procedures specified in paragraph (q) of this AD.

**Terminating Action for Maintenance Program Revision**

(n) For Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747SR, and 747SP series airplanes: Incorporating AWL No. 28–AWL–21 into the maintenance program in accordance with paragraph (g) of AD 2008–10–07, Amendment 39–15513; or AD 2008–10–07 R1, Amendment 39–16070; terminates the action required by paragraph (k) of this AD.

**Credit for Actions Accomplished in Accordance With Previous Service Information**

(o) Actions done before the effective date of this AD in accordance with Boeing Alert Service Bulletin 747–28A2294, dated September 21, 2007; and Boeing Service Bulletin 747–28A2292, Revision 2, dated May 13, 2010; are acceptable for compliance with the corresponding requirements of this AD.

**Incorporation of Previous Issues of Airworthiness Limitation (AWL)**

(p) Incorporation of AWL No. 28–AWL–21 of Section D of the Boeing 747–100/200/300/SP Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), Document D6–13747–CMR, Revision January 2007, September 2007, or January 2008, is acceptable for compliance with the corresponding requirements of this AD if done before the effective date of this AD.

**Alternative Methods of Compliance (AMOCs)**

(q)(1) The Manager, Seattle ACO, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be e-mailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov*.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

**Related Information**

(r) For more information about this AD, contact Tung Tran, Aerospace Engineer, Propulsion Branch, Seattle Aircraft Certification Office, ANM–140S, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; phone: 425–917–6505; fax: 425–917–6590; e-mail: *tung.tran@faa.gov*.

**Material Incorporated by Reference**

(s) You must use the applicable service information contained in table 3 of this AD to do the actions required by this AD, unless the AD specifies otherwise. If you accomplish the optional terminating action specified in this AD, you must use the applicable service information specified in table 4 of this AD, unless the AD specifies otherwise.

TABLE 3—MATERIAL INCORPORATED BY REFERENCE FOR REQUIRED ACTIONS

| Document | Revision | Date |
|---|---|---|
| Boeing Service Bulletin 747–28A2292 | 3 | December 9, 2010. |
| Boeing Service Bulletin 747–28A2294 | 1 | March 5, 2009. |
| Boeing 747–100/200/300/SP Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), Document D6–13747–CMR. | | March 2008. |
| Section 9 of Boeing 747–400 Maintenance Planning Data (MPD) Document, Section 9, D621U400–9 | | December 2009. |

TABLE 4—MATERIAL INCORPORATED BY REFERENCE FOR OPTIONAL TERMINATING ACTION

| Boeing— | Revision— | Dated— |
|---|---|---|
| Service Bulletin 747–28–2265 | Original | February 22, 2006. |
| Service Bulletin 747–28–2272 | Original | February 21, 2006. |
| Service Bulletin 747–28–2274 | 1 | May 21, 2008. |
| Service Bulletin 747–28–2275 | 4 | February 2, 2009. |
| Service Bulletin 747–28–2279 | 2 | October 16, 2007. |
| Service Bulletin 747–28–2285 | 3 | August 30, 2007. |
| Service Bulletin 747–28–2293 | 2 | March 4, 2008. |
| Service Bulletin 747–28–2295 | 2 | January 19, 2009. |
| Service Bulletin 747–28–2296 | Original | July 13, 2007. |
| Service Bulletin 747–28–2300 | 1 | June 2, 2008. |
| Service Bulletin 747–28–2314 | Original | December 9, 2008. |

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com*.

(3) You may review copies of the 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.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at an NARA facility, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on February 23, 2011.

**Kalene C. Yanamura,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2011–5172 Filed 3–21–11; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2011–0058; Directorate Identifier 2010–CE–071–AD; Amendment 39–16640; AD 2011–07–03]**

**RIN 2120–AA64**

## Airworthiness Directives; Reims Aviation S.A. Model F406 Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** We are superseding an existing airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) issued 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:

In early 2005, several reports had been received regarding discovery of cracks in rudder pulley brackets installed on Reims F406 aeroplanes. This pulley bracket, Part Number (P/N) 6015511–1, is installed on aeroplanes with the optional "Camera Hole" modification.

This condition, if not detected and corrected, could result in the loss of rudder control on the airplane.

We are issuing this AD to require actions to correct the unsafe condition on these products.

**DATES:** This AD becomes effective April 26, 2011.

On April 26, 2011, the Director of the Federal Register approved the incorporation by reference of REIMS AVIATION INDUSTRIES Service Bulletin No. F406–58, REV 2, dated July 27, 2010, listed in this AD.

As of February 13, 2007 (72 FR 3047, January 24, 2007), the Director of the Federal Register approved the incorporation by reference of REIMS AVIATION INDUSTRIES Service Bulletin No. F406–58, REV 1, dated October 27, 2006, listed in this AD.

**ADDRESSES:** You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the Docket Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

For service information identified in this AD, contact Reims Aviation Industries, Aérodrome de Reims Prunay, 51360 Prunay, France; telephone + 33 3 26 48 46 65; fax + 33 3 26 49 18 57; e-mail *Jn.sirot@reims-aviation.fr.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148.

**FOR FURTHER INFORMATION CONTACT:** Albert Mercado, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, ACE–112, Kansas City, Missouri 64106; *telephone:* (816) 329–4119; *fax:* (816) 329–4090.

**SUPPLEMENTARY INFORMATION:**

### Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on January 21, 2011 (76 FR 3854), and proposed to supersede AD 2007–02–12, Amendment 39–14899 (72 FR 3047, January 24, 2007). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states that:

In early 2005, several reports had been received regarding discovery of cracks in rudder pulley brackets installed on Reims F406 aeroplanes. This pulley bracket, Part Number (P/N) 6015511–1, is installed on aeroplanes with the optional "Camera Hole" modification.

This condition, if not detected and corrected, could result in the loss of rudder control on the airplane.

To address this unsafe condition, DGAC France issued Emergency (Urgent) AD UF–2005–080, followed by the final AD F–2005–080, requiring repetitive inspections of the P/N 6015511–1 rudder pulley bracket and replacement of the bracket with a modified bracket, P/N 4061–2701–1, as terminating action.

Recently, Reims discovered that aeroplane s/n F406–0091 had inadvertently not been included in the SB and this has been revised to correct the omission.

For the reasons described above, this AD retains the requirements of DGAC France AD F–2005–080, which is superseded, and adds aeroplane s/n F406–0091 to the Applicability of the AD, by referencing Revision 2 of the Reims Aviation Industries SB F406–58.

### Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

### Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

### 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 required 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 AD.

### Costs of Compliance

We estimate that this AD will affect 7 products of U.S. registry. We also estimate that it will take about 11 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts will cost about $750 per product.

Based on these figures, we estimate the cost of this AD to the U.S. operators to be $11,795 or $1,685 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 AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

*For the reasons discussed above, I certify this AD:*

(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) 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 AD and placed it in the AD Docket.

**Examining the AD Docket**

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

**Adoption of the Amendment**

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

**§ 39.13 [Amended]**

■ 2. The FAA amends § 39.13 by removing Amendment 39–14899 (72 FR 3047, January 24, 2007) and adding the following new AD:

**2011–07–03 Reims Aviation S.A.:** Amendment 39–16640; Docket No. FAA–2011–0058; Directorate Identifier 2010–CE–071–AD.

**Effective Date**

(a) This airworthiness directive (AD) becomes effective April 26, 2011.

**Affected ADs**

(b) This AD supersedes AD 2007–02–12, Amendment 39–14899.

**Applicability**

(c) This AD applies to REIMS AVIATION S.A. Model F406 airplanes, serial numbers (SNs) 0002, 0003, 0004, 0006, 0008, 0009, 0010, 0012, 0013, 0017, 0024, 0025, 0039, 0042, 0044, 0045, 0066, 0070, 0073, 0074, 0075, 0077, 0080 through 0092, certificated in any category.

**Subject**

(d) Air Transport Association of America (ATA) Code 27: Flight Controls.

**Reason**

(e) The mandatory continuing airworthiness information (MCAI) states:

In early 2005, several reports had been received regarding discovery of cracks in rudder pulley brackets installed on Reims F406 aeroplanes. This pulley bracket, Part Number (P/N) 6015511–1, is installed on aeroplanes with the optional "Camera Hole" modification.

This condition, if not detected and corrected, could result in the loss of rudder control on the airplane.

To address this unsafe condition, DGAC France issued Emergency (Urgent) AD UF–2005–080, followed by the final AD F–2005–080, requiring repetitive inspections of the P/N 6015511–1 rudder pulley bracket and replacement of the bracket with a modified bracket, P/N 4061–2701–1, as terminating action.

Recently, Reims discovered that aeroplane s/n F406–0091 had inadvertently not been included in the SB and this has been revised to correct the omission.

For the reasons described above, this AD retains the requirements of DGAC France AD F–2005–080, which is superseded, and adds aeroplane s/n F406- 0091 to the Applicability of the AD, by referencing Revision 2 of the Reims Aviation Industries SB F406–58.

**Actions and Compliance**

(f) Unless already done, do the following actions:

(1) For all affected SNs except F406–0091:

(i) Within the next 10 hours time-in-service (TIS) after February 13, 2007 (the effective date retained from AD 2007–02–12), perform the initial inspection as specified in REIMS AVIATION INDUSTRIES Service Bulletin No. F406–58, REV 1, dated October 27, 2006; or REIMS AVIATION INDUSTRIES Service Bulletin No. F406–58, REV 2, dated July 27, 2010.

(ii) If no cracking is found following the initial inspection required in paragraph (f)(1)(i) of this AD, repetitively thereafter inspect every 50 hours TIS or 1 month, whichever occurs first, until the installation of the modified pulley bracket specified in paragraphs (f)(1)(iii) or (f)(1)(iv) of this AD is done.

(iii) If any cracking is found during the inspections required in paragraphs (f)(1)(i) or (f)(1)(ii) of this AD, before further flight, install the modified pulley bracket as specified in REIMS AVIATION INDUSTRIES Service Bulletin No. F406–58, REV 1, dated October 27, 2006; or REIMS AVIATION INDUSTRIES Service Bulletin No. F406–58, REV 2, dated July 27, 2010. This installation terminates the repetitive inspections required in paragraph (f)(1)(ii) of this AD.

(iv) Within the next 100 hours TIS or 2 months after February 13, 2007 (the effective date retained from AD 2007–02–12), whichever occurs first, install the modified pulley bracket as specified in REIMS AVIATION INDUSTRIES Service Bulletin No. F406–58, REV 1, dated October 27, 2006; or REIMS AVIATION INDUSTRIES Service Bulletin No. F406–58, REV 2, dated July 27, 2010. This installation terminates the repetitive inspections required in paragraph (f)(1)(ii) of this AD.

(v) The modified pulley bracket specified in REIMS AVIATION INDUSTRIES Service Bulletin No. F406–58, REV 1, dated October 27, 2006; or REIMS AVIATION INDUSTRIES Service Bulletin No. F406–58, REV 2, dated July 27, 2010, may be installed at any time after the inspection required in paragraph (f)(1)(i) of this AD, as long as no cracking is found, but no later than the compliance time specified in paragraph (f)(1)(iv) of this AD. If cracking is found, it must be replaced before further flight as required in paragraph (f)(1)(iii) of this AD.

(2) For serial number F406–0091:

(i) Within the next 10 hours TIS after April 26, 2011 (the effective of this AD), perform the initial inspection as specified in REIMS AVIATION INDUSTRIES Service Bulletin No. F406–58, REV 2, dated July 27, 2010.

(ii) If no cracking is found following the initial inspection required in paragraph (f)(2)(i) of this AD, repetitively thereafter inspect every 50 hours TIS or 1 month, whichever occurs first, until the installation of the modified pulley bracket specified in paragraphs (f)(2)(iii) or (f)(2)(iv) of this AD is done.

(iii) If any cracking is found during the inspections required in paragraph (f)(2)(i) or (f)(2)(ii) of this AD, before further flight, install the modified pulley bracket as specified in REIMS AVIATION INDUSTRIES Service Bulletin No. F406–58, REV 2, dated July 27, 2010. This installation terminates the repetitive inspections required in paragraph (f)(2)(ii) of this AD.

(iv) Within the next 100 hours TIS or 2 months after April 26, 2011 (the effective date of this AD), whichever occurs first, install the modified pulley bracket as specified in REIMS AVIATION INDUSTRIES Service Bulletin No. F406–58, REV 2, dated July 27, 2010. This installation terminates the

repetitive inspections required in paragraph (f)(2)(ii) of this AD.

(v) The modified pulley bracket specified in REIMS AVIATION INDUSTRIES Service Bulletin No. F406–58, REV 2, dated July 27, 2010, may be installed at any time after the inspection required in paragraph (f)(2)(i) of this AD as long as no cracking is found, but no later than the compliance time specified in paragraph (f)(2)(iv) of this AD. If cracking is found, it must be replaced before further flight as required in paragraph (f)(2)(iii) of this AD.

**FAA AD Differences**

**Note:** This AD differs from the MCAI and/or service information as follows: No differences.

**Other FAA AD Provisions**

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to *Attn:* Albert Mercado, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; *telephone:* (816) 329–4119; *fax:* (816) 329–4090. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, a Federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave., SW., Washington, DC 20591, *Attn:* Information Collection Clearance Officer, AES–200.

**Related Information**

(h) Refer to MCAI European Aviation Safety Agency (EASA) AD 2010–0230, dated November 5, 2010; REIMS AVIATION INDUSTRIES Service Bulletin No. F406–58, REV 1, dated October 27, 2006; and REIMS AVIATION INDUSTRIES Service Bulletin No. F406–58, REV 2, dated July 27, 2010, for related information. For service information related to this AD, contact Reims Aviation Industries, Aérodrome de Reims Prunay, 51360 Prunay, France; telephone + 33 3 26 48 46 65; fax + 33 3 26 49 18 57; e-mail *Jn.sirot@reims-aviation.fr.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148.

**Material Incorporated by Reference**

(h) You must use REIMS AVIATION INDUSTRIES Service Bulletin No. F406–58, REV 1, dated October 27, 2006; and REIMS AVIATION INDUSTRIES Service Bulletin No. F406–58, REV 2, dated July 27, 2010, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of REIMS AVIATION INDUSTRIES Service Bulletin No. F406–58, REV 2, dated July 27, 2010, under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) On February 13, 2007 (72 FR 3047, January 24, 2007), the Director of the Federal Register previously approved the incorporation by reference of REIMS AVIATION INDUSTRIES Service Bulletin No. F406–58, REV 1, dated October 27, 2006.

(3) For service information identified in this AD, contact Reims Aviation Industries, Aérodrome de Reims Prunay, 51360 Prunay, France; telephone + 33 3 26 48 46 65; fax + 33 3 26 49 18 57; e-mail *Jn.sirot@reims-aviation.fr.*

(4) You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148.

(5) You may also review copies of the service information incorporated by reference for this AD at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Kansas City, Missouri, on March 14, 2011.

**Earl Lawrence,**

*Manager, Small Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2011–6371 Filed 3–21–11; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2010–1255 Directorate Identifier 2010–CE–059–AD; Amendment 39–16618; AD 2011–05–09]**

**RIN 2120–AA64**

## Airworthiness Directives; B–N Group Ltd. Model BN–2, BN–2A, BN–2A–2, BN–2A–3, BN–2A–6, BN–2A–8, BN–2A–9, BN–2A–20, BN–2A–21, BN–2A–26, BN–2A–27, BN–2B–20, BN–2B–21, BN–2B–26, BN–2B–27, BN–2T, and BN–2T–4R Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

An event has been reported where Glass Fibre Reinforced Plastic (GFRP) elevator tips have been found deformed on in-service aircraft. The outboard three inches of the elevator tip assembly profiles (top and bottom surfaces) had changed from being convex profiles to concave profiles. There is concern that this could potentially result in, or be caused by, internal structural delamination and/or failure. Such a failure could have a serious effect on the aircraft handling and could potentially result in loss of control of the aircraft.

We are issuing this AD to require actions to correct the unsafe condition on these products.

**DATES:** This AD becomes effective April 26, 2011.

On April 26, 2011, the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

**ADDRESSES:** You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

For service information identified in this AD, contact Airworthiness, Britten-Norman Aircraft Ltd., Bembridge Airport, Isle of Wight, PO35 5PR, United Kingdom; *telephone:* +44(0) 20 3371

4000; *fax:* +44(0) 20 3371 4001; *e-mail: jim.roberts@bnaircraft.com.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148.

**FOR FURTHER INFORMATION CONTACT:** Taylor Martin, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; *telephone:* (816) 329–4138; *fax:* (816) 329–4090.

**SUPPLEMENTARY INFORMATION:**

### Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on December 21, 2010 (75 FR 79990). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> An event has been reported where Glass Fibre Reinforced Plastic (GFRP) elevator tips have been found deformed on in-service aircraft. The outboard three inches of the elevator tip assembly profiles (top and bottom surfaces) had changed from being convex profiles to concave profiles. There is concern that this could potentially result in, or be caused by, internal structural delamination and/or failure. Such a failure could have a serious effect on the aircraft handling and could potentially result in loss of control of the aircraft.
>
> For the reasons stated above, the initial issue of this AD (AD 2009–0105) mandated inspection of the GFRP elevator tips and replacement of any deformed parts.
>
> Its Revision 1 (AD 2009–0105R1) extends the compliance time by three months.
>
> Its Revision 2 (AD 2009–0105R2) extends the compliance time by an additional three months.

### Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

### Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

### 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 required 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 AD.

### Costs of Compliance

We estimate that this AD will affect 135 products of U.S. registry. We also estimate that it will take about 2 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts will cost about $10,000 per product.

Based on these figures, we estimate the cost of this AD to the U.S. operators to be $1,372,950 or $10,170 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 AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

*For the reasons discussed above, I certify this AD:*

(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) 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 AD and placed it in the AD Docket.

### Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

### Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 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:

**2011–05–09 B–N Group Ltd.:** Amendment 39–16618; Docket No. FAA–2010–1255; Directorate Identifier 2010–CE–059–AD.

**Effective Date**

(a) This airworthiness directive (AD) becomes effective April 26, 2011.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to B–N Group Ltd. Models BN–2, BN–2A, BN–2A–2, BN–2A–3, BN–2A–6, BN–2A–8, BN–2A–9, BN–2A–20, BN–2A–21, BN–2A–26, BN–2A–27, BN–2B–20, BN–2B–21, BN–2B–26, BN–2B–27, BN–2T, and BN–2T–4R airplanes, all serial numbers, certificated in any category.

**Subject**

(d) Air Transport Association of America (ATA) Code 27: Flight Controls.

**Reason**

(e) The mandatory continuing airworthiness information (MCAI) states:

An event has been reported where Glass Fibre Reinforced Plastic (GFRP) elevator tips

have been found deformed on in-service aircraft. The outboard three inches of the elevator tip assembly profiles (top and bottom surfaces) had changed from being convex profiles to concave profiles. There is concern that this could potentially result in, or be caused by, internal structural delamination and/or failure. Such a failure could have a serious effect on the aircraft handling and could potentially result in loss of control of the aircraft.

For the reasons stated above, the initial issue of this AD (AD 2009–0105) mandated inspection of the GFRP elevator tips and replacement of any deformed parts.

Its Revision 1 (AD 2009–0105R1) extends the compliance time by three months.

Its Revision 2 (AD 2009–0105R2) extends the compliance time by an additional three months.

**Actions and Compliance**

(f) Unless already done, do the following actions:

(1) Before further flight after April 26, 2011 (the effective date of this AD), visually inspect for deformation of shape and signs of concavity the elevator tip assemblies (top and bottom surfaces) as instructed in paragraphs 6 and 9 of Britten-Norman Aircraft Limited Service Bulletin Number BN–2/SB 313, Issue 3, dated February 24, 2009. If no sign of deformity or concavity is found as a result of the inspection required by paragraph (f)(1) of this AD, no further action is required by this AD except for the requirements of paragraph (f)(3) of this AD.

(2) If signs of deformation or concavity are found, before further flight, inspect for delamination the elevator tip as instructed in paragraph 9 of Britten-Norman Aircraft Limited Service Bulletin Number BN–2/SB 313, Issue 3, dated February 24, 2009.

(i) If delamination is found as a result of any inspection required by this AD, before further flight, replace the elevator tip with a serviceable elevator tip following Britten-Norman Ltd. Drawing NB–31–235, Issue 13; Britten-Norman Ltd. Drawing NB–31–873, Issue 2; or Britten-Norman Ltd. Drawing NB–0906, Issue 3, as applicable to airplane models.

(ii) If no delamination is found as a result of any inspection required by this AD, at intervals not to exceed 50 hours time-in-service (TIS) and until accomplishment of paragraph (f)(2)(iii) of this AD, inspect for delamination the elevator tip as instructed in paragraph 9 of Britten-Norman Aircraft Limited Service Bulletin Number BN–2/SB 313, Issue 3, dated February 24, 2009.

(iii) Within 12 months after the effective date of this AD, unless already done as required by paragraph (f)(2)(i) of this AD, replace the elevator tip with a serviceable elevator tip following Britten-Norman Ltd. Drawing NB–31–235, Issue 13; Britten-Norman Ltd. Drawing NB–31–873, Issue 2; or Britten-Norman Ltd. Drawing NB–31–0906, Issue 3, as applicable to airplane models.

(3) After April 26, 2011 (the effective date of this AD), do not install elevator tips on any airplane, unless they have already been inspected in accordance with Britten-Norman Aircraft Limited Service Bulletin Number BN–2/SB 313, Issue 3, dated February 24, 2009, and determined to be free from concavity and delamination.

**FAA AD Differences**

**Note:** This AD differs from the MCAI and/or service information as follows: No differences.

**Other FAA AD Provisions**

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to *Attn:* Taylor Martin, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; *telephone:* (816) 329–4138; *fax:* (816) 329–4090. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, a federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave., SW., Washington, DC 20591, *Attn:* Information Collection Clearance Officer, AES–200.

**Related Information**

(h) Refer to MCAI EASA AD No.: 2009–0105R2, dated March 9, 2010; Britten-Norman Aircraft Limited Service Bulletin Number BN–2/SB 313, Issue 3, dated February 24, 2009, Britten-Norman Ltd. Drawing NB–31–235, Issue 13; Britten-Norman Ltd. Drawing NB–31–873, Issue 2; and Britten-Norman Ltd. Drawing NB–31–0906, Issue 3. For service information related to this AD, contact Airworthiness, Britten-Norman Aircraft Ltd., Bembridge Airport, Isle of Wight, PO35 5PR, United Kingdom; *telephone:* +44(0) 20 3371 4000; *fax:* +44(0) 20 3371 4001; *e-mail: jim.roberts@bnaircraft.com.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148.

**Material Incorporated by Reference**

(i) You must use Britten-Norman Aircraft Limited Service Bulletin Number BN–2/SB 313, Issue 3, dated February 24, 2009, Britten-Norman Ltd. Drawing NB–31–235, Issue 13, dated May 20, 2010; Britten-Norman Ltd. Drawing NB–31–873, Issue 2, dated October 9, 1996; and Britten-Norman Ltd. Drawing NB–31–0906, Issue 3, dated November 24, 2009, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Airworthiness, Britten-Norman Aircraft Ltd., Bembridge Airport, Isle of Wight, PO35 5PR, United Kingdom; *telephone:* +44(0) 20 3371 4000; *fax:* +44(0) 20 3371 4001; *e-mail: jim.roberts@bnaircraft.com.*

(3) You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148.

(4) You may also review copies of the service information incorporated by reference for this AD at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Kansas City, Missouri, on March 4, 2011.

**Earl Lawrence,**

*Manager, Small Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2011–5454 Filed 3–21–11; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. FAA–2010–0703; Directorate Identifier 2010–NM–040–AD; Amendment 39–16633; AD 2011–06–08]**

**RIN 2120–AA64**

## Airworthiness Directives; Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) Airplanes, CL–600–2C10 (Regional Jet Series 700, 701, & 702) Airplanes, CL–600–2D15 (Regional Jet Series 705) Airplanes, and CL–600–2D24 (Regional Jet Series 900) Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

There have been failures of the harness assembly (power feeder wires) connecting the Air-Driven Generator (ADG) to the aeroplane electrical system, in the area close to the ADG cannon plug. Several electrical wires were found cut as a combined result of corrosion and bending stress from the harness mounting to the ADG.

The ADG electrical wires are insulated with a silver-plating for corrosion protection. It has been determined that the silver-plating of wire strands in the area of tight bend is highly susceptible to breakdown. The plating layer may crack as a result of mechanical stress, and consequently lead to the onset of corrosion on all, or a majority, of the wire strands.

In the event of a damaged harness assembly, the ADG may not be able to provide emergency electrical power to the aeroplane. * * *

We are issuing this AD to require actions to correct the unsafe condition on these products.

**DATES:** This AD becomes effective April 26, 2011.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of April 26, 2011.

**ADDRESSES:** You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Assata Dessaline, Aerospace Engineer, Avionics and Flight Test Branch, ANE–172, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7301; fax (516) 794–5531.

**SUPPLEMENTARY INFORMATION:**

### Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on August 5, 2010 (75 FR 47249). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

There have been failures of the harness assembly (power feeder wires) connecting the Air-Driven Generator (ADG) to the aeroplane electrical system, in the area close to the ADG cannon plug. Several electrical wires were found cut as a combined result of corrosion and bending stress from the harness mounting to the ADG.

The ADG electrical wires are insulated with a silver-plating for corrosion protection. It has been determined that the silver-plating of wire strands in the area of tight bend is highly susceptible to breakdown. The plating layer may crack as a result of mechanical stress, and consequently lead to the onset of corrosion on all, or a majority, of the wire strands.

In the event of a damaged harness assembly, the ADG may not be able to provide emergency electrical power to the aeroplane. This directive is issued to correct the identified unsafe condition by requiring [the modification of the ADG, which includes] the replacement of the harness assembly with tin-plated electrical wires, [the replacement of the backshell,] and the re-orientation of the ADG cannon plug to reduce bending stress.

You may obtain further information by examining the MCAI in the AD docket.

### Updated Relevant Service Information

We have received Bombardier Service Bulletin 601R–24–128, Revision C, dated May 14, 2010. In the NPRM we referred to Bombardier Service Bulletin 601R–24–128, Revision A, dated November 27, 2009, as the source of service information for doing the required actions on certain models affected by this AD. Revision C of that service bulletin makes certain editorial changes. We have revised paragraph (g)(1) of this AD to specify Revision C of that service bulletin, and revised paragraph (h) of this AD to give credit for having done Bombardier Service Bulletin 601R–24–128, Revision A, dated November 27, 2009, and Revision B, dated April 16, 2010, prior to the effective date of this AD.

### Comments

We gave the public the opportunity to participate in developing this AD. We considered the comment received.

### Request To Shorten Compliance Time

Air Line Pilots Association, International (ALPA) requested that the compliance time of 72 months be reduced to 36 months, because the corrective action only requires 8 work-hours to complete and ALPA believes that 72 months is too long to comply with the AD based on the importance of this modification.

We do not agree with the request for a shorter compliance time. In developing the compliance time, we determined that the compliance time of 72 months or 6,000 flight hours, whichever occurs first, is appropriate in consideration of the safety implications, the average utilization rate of the affected fleet, the practical aspects of an orderly inspection of the fleet during regular maintenance periods, and the availability of required modification parts. In addition, our compliance time corresponds with the 72-month compliance time of the parallel AD issued by Transport Canada Civil Aviation (TCCA). We have not changed the AD in this regard.

### Change to Applicability in This Final Rule

We received notice from Bombardier, Inc. and TCCA that certain airplanes identified in the NPRM have had the actions specified by this AD already incorporated in production, and therefore are not affected by the identified unsafe condition. Specifically, Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, serial numbers 8108 through 8111 have had the actions incorporated. We have reduced the applicability in paragraph (c)(1) of this AD accordingly.

### Conclusion

We reviewed the available data, including the comment received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

**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 required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a NOTE within the AD.

**Costs of Compliance**

We estimate that this AD will affect 920 products of U.S. registry. We also estimate that it will take 8 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts will cost about $1,881 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $2,356,120, or $2,561 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 AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

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 AD and placed it in the AD docket.

**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 the NPRM, 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.

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

**Adoption of the Amendment**

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 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:

**2011–06–08 Bombardier, Inc.:** Amendment 39–16633. Docket No. FAA–2010–0703; Directorate Identifier 2010–NM–040–AD.

**Effective Date**

(a) This airworthiness directive (AD) becomes effective April 26, 2011.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to the airplanes identified in paragraphs (c)(1), (c)(2), and (c)(3) of this AD, certificated in any category.

(1) Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, serial numbers 7305 through 7990 inclusive, and 8000 through 8107 inclusive.

(2) Bombardier, Inc. Model CL–600–2C10 (Regional Jet Series 700, 701, & 702) airplanes, serial numbers 10003 through 10302 inclusive.

(3) Bombardier, Inc. Model CL–600–2D15 (Regional Jet Series 705) and CL–600–2D24 (Regional Jet Series 900) airplanes, serial numbers 15001 through 15259 inclusive.

**Subject**

(d) Air Transport Association (ATA) of America Code 24: Electrical power.

**Reason**

(e) The mandatory continuing airworthiness information (MCAI) states:

There have been failures of the harness assembly (power feeder wires) connecting the Air-Driven Generator (ADG) to the aeroplane electrical system, in the area close to the ADG cannon plug. Several electrical wires were found cut as a combined result of corrosion and bending stress from the harness mounting to the ADG.

The ADG electrical wires are insulated with a silver-plating for corrosion protection. It has been determined that the silver-plating of wire strands in the area of tight bend is highly susceptible to breakdown. The plating layer may crack as a result of mechanical stress, and consequently lead to the onset of corrosion on all, or a majority, of the wire strands.

In the event of a damaged harness assembly, the ADG may not be able to provide emergency electrical power to the aeroplane. * * *

**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.

**Actions**

(g) Within 6,000 flight hours or 72 months after the effective date of this AD, whichever occurs first, do the applicable actions specified in paragraph (g)(1) or (g)(2) of this AD.

(1) For Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes: Modify the air-driven generator (ADG) in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 601R–24–128, Revision C, dated May 14, 2010.

(2) For Model CL–600–2C10 (Regional Jet Series 700, 701, & 702), CL–600–2D15 (Regional Jet Series 705), and CL–600–2D24 (Regional Jet Series 900) airplanes: Modify the ADG in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 670BA–24–027, dated September 17, 2009.

**Credit for Actions Accomplished in Accordance With Previous Service Information**

(h) Actions accomplished before the effective date of this AD in accordance with the Bombardier service bulletins identified in Table 1 of this AD are considered acceptable for compliance with the corresponding action specified in this AD.

TABLE 1—CREDIT SERVICE BULLETINS

| Bombardier Service Bulletin— | Revision— | Dated— |
|---|---|---|
| 601R–24–128 | Original | September 17, 2009. |
| 601R–24–128 | A | November 27, 2009. |
| 601R–24–128 | B | April 16, 2010. |

**FAA AD Differences**

**Note 1:** This AD differs from the MCAI and/or service information as follows: The Canadian airworthiness directive includes Model CL–600–2B19 airplanes having serial numbers 8108 through 8111 in the applicability. This AD does not apply to those airplanes.

**Other FAA AD Provisions**

(i) 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, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding 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.

**Related Information**

(j) Refer to MCAI Canadian Airworthiness Directive CF–2009–47, dated December 14, 2009; Bombardier Service Bulletin 601R–24–128, Revision C, dated May 14, 2010; and Bombardier Service Bulletin 670BA–24–027, dated September 17, 2009; for related information.

**Material Incorporated by Reference**

(k) You must use Bombardier Service Bulletin 601R–24–128, Revision C, dated May 14, 2010; or Bombardier Service Bulletin 670BA–24–027, dated September 17, 2009; as applicable; to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this 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.*

(3) You may review copies of the 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.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on March 4, 2011.

**Kalene C. Yanamura,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2011–5771 Filed 3–21–11; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2010–1246; Airspace Docket No. 10–ANM–17]**

## Amendment of Class E Airspace; Pueblo, CO

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

**ACTION:** Final rule.

**SUMMARY:** This action will amend existing Class E airspace at Pueblo Memorial Airport, Pueblo, CO, to facilitate vectoring of Instrument Flight Rules (IFR) traffic from en route airspace to Pueblo Memorial Airport. The FAA is taking this action to enhance the safety and management of aircraft operations at the airport.

**DATES:** Effective date, 0901 UTC, June 30, 2011. The Director of the Federal Register approves this incorporation by reference action under 1 CFR Part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

**FOR FURTHER INFORMATION CONTACT:** Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue, SW., Renton, WA 98057; telephone (425) 203–4537.

**SUPPLEMENTARY INFORMATION:**

### History

On January 14, 2011, the FAA published in the **Federal Register** a notice of proposed rulemaking to amend Class E airspace at Pueblo, CO (76 FR 2609). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9U dated August 18, 2010, and effective September 15, 2010, which is incorporated by reference in 14 CFR Part 71.1. The Class E airspace designations listed in this document will be published subsequently in that Order.

### The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) Part 71 by amending Class E airspace extending upward from 700 feet above the surface, at Pueblo Memorial Airport, to accommodate en route IFR aircraft at Pueblo Memorial Airport. The southern boundary of the 13,700 foot mean sea level section has a small gap of airspace associated with V–83–210 leaving over a .5 nautical mile gap of unprotected airspace in that area. This action will add the additional controlled airspace area necessary for the safety and management of IFR operations at Pueblo Memorial Airport. With the exception of editorial changes, this rule is the same as that proposed in the NPRM.

The FAA has determined this regulation 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 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. The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106 discusses the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes additional controlled airspace at Pueblo Memorial Airport, Pueblo, CO.

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**Adoption of the Amendment**

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

## PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR Part 71 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.

**§ 71.1 [Amended]**

■ 2. The incorporation by reference in 14 CFR Part 71.1 of the Federal Aviation Administration Order 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, and effective September 15, 2010 is amended as follows:

*Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.*

* * * * *

**ANM CO E5 Pueblo, CO [Modified]**

Pueblo Memorial Airport, CO
(Lat. 38°17′21″ N., long. 104°29′47″ W.)

That airspace extending upward from 700 feet above the surface within 21.8-mile radius of the Pueblo Memorial Airport, and within the 28.8-mile radius of Pueblo Memorial Airport clockwise between the 070° and 133° bearing from the airport; that airspace extending upward from 1,200 feet above the surface bounded on the north by lat. 38°30′00″ N., on the east by V–169, on the south by V–210, on the west by a line from lat. 37°37′26″ N., long. 105°00′02″ W.; to lat. 38°09′25″ N., long. 105°08′06″ W.; to lat. 38°05′51″ N., long. 105°30′49″ W.; to lat. 38°10′00″ N., long. 105°33′02″ W.; to lat. 38°30′00″ N., long. 105°33′02″ W.; that airspace extending upward from 13,700 feet MSL bounded by a line beginning at lat. 38°09′25″ N., long. 105°08′06″ W.; to lat. 37°37′26″ N., long. 105°00′02″ W.; to lat. 37°33′30″ N., long. 105°11′44″ W.; to lat. 38°05′51″ N., long. 105°30′49″ W.; thence to point of beginning.

Issued in Seattle, Washington, on March 2, 2001.

**Christine Mellon,**

*Acting Manager, Operations Support Group, Western Service Center.*

[FR Doc. 2011–6627 Filed 3–21–11; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 15 CFR Part 902

## 50 CFR Part 679

**[Docket No. 0912021424–1182–03]**

**RIN 0648–AY42**

## Fisheries of the Exclusive Economic Zone Off Alaska; Gulf of Alaska License Limitation Program

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues regulations to implement Amendment 86 to the Fishery Management Plan for Groundfish of the Gulf of Alaska. This action adds a Pacific cod endorsement on licenses issued under the License Limitation Program (LLP) in specific management areas if those licenses have been used on vessels that met minimum recent landing requirements using non-trawl gear, commonly known as fixed gear. This action exempts vessels that use jig gear from the requirement to hold an LLP license, modifies the maximum length designation on a specific set of fixed gear licenses, and allows entities representing specific communities to receive a limited number of fixed-gear licenses with Pacific cod endorsements. This action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act, the Fishery Management Plan, and other applicable law.

**DATES:** Effective April 21, 2011.

**ADDRESSES:** Electronic copies of Amendment 86, the Environmental Assessment (EA), Regulatory Impact Review (RIR), and the Final Regulatory Flexibility Analysis (FRFA) for this action are available from *http://www.regulations.gov* or from the 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 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:** Glenn Merrill, 907–586–7228.

**SUPPLEMENTARY INFORMATION:**

**Background on the License Limitation Program**

The National Marine Fisheries Service (NMFS) manages the groundfish fisheries in the exclusive economic zone of the Bering Sea and Aleutian Islands Management Area (BSAI) and the Gulf of Alaska (GOA) under the fishery management plans (FMPs) for groundfish in the respective areas. The North Pacific Fishery Management Council (Council) recommended, and NMFS approved, the FMPs under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*). Regulations implementing the FMPs appear at 50 CFR part 679. General regulations governing U.S. fisheries also appear at 50 CFR part 600.

The Council and NMFS have long sought to control the amount of fishing in the North Pacific Ocean to ensure that fisheries are conservatively managed and do not exceed established biological thresholds. One of the measures used by the Council and

NMFS is the license limitation program (LLP), which limits access to the groundfish, crab, and scallop fisheries in the BSAI and GOA. The LLP is intended to limit entry into federally managed fisheries. For groundfish, the LLP requires that persons hold and assign a license for each vessel that is used to fish in federally managed fisheries, with some limited exemptions. The Council initially envisioned the LLP as an early step in a long-term plan to establish a comprehensive rationalization program for groundfish in the North Pacific.

The LLP for groundfish fisheries was recommended by the Council as Amendments 39 and 41 to the BSAI and GOA groundfish FMPs, respectively. The Council adopted the LLP for groundfish in June 1995, and NMFS approved Amendments 39 and 41 on September 12, 1997. NMFS published a final rule to implement the LLP on October 1, 1998 (63 FR 52642), and LLP licenses were required for Federal groundfish fisheries beginning on January 1, 2000. The preamble to the final rule implementing the groundfish LLP and the EA/RIR/FRFA prepared for this action describe the rationale and specific provisions of the LLP in greater detail (*see* **ADDRESSES**) and are not repeated here. The key components of the LLP are briefly summarized below.

The LLP for groundfish establishes specific criteria that must be met to allow a person to deploy a vessel to directed fish in most federally managed groundfish fisheries. An LLP license must be assigned to each vessel that is used to participate in directed fishing for most groundfish species. The term directed fishing and the specific groundfish species for which an LLP license is required are defined in regulations at § 679.2. Exceptions to the LLP license requirement apply if the vessel is less than 26 feet length overall (LOA) and fishing in the GOA; less than 32 feet LOA and fishing in the BSAI; or less than 60 feet LOA, using jig gear in the BSAI, and deploying no more than five jigging machines (*See* § 679.4(k)(2)).

Under the LLP, NMFS issues licenses that (1) endorse fishing activities in specific regulatory areas in the BSAI and GOA; (2) restrict the length of the vessel on which the LLP license may be used, known as the maximum length overall (MLOA); (3) designate the fishing gear that may be used on the vessel *(i.e.*, trawl or non-trawl gear designations); and (4) designate the type of vessel operation permitted (*i.e.*, LLP licenses designate whether the vessel to which the LLP is assigned may operate as a catcher vessel or as a catcher/processor). The endorsements for specific regulatory areas, gear designations, and vessel operational types are non-severable from the LLP license (*i.e.*, once an LLP license is issued, the components of the LLP license cannot be transferred independently). By creating LLP licenses with these characteristics, the Council and NMFS limited the ability of a person to assign an LLP license that was derived from the historic landing activity of a vessel in one area using a specific fishing gear, or operational type, to be used in other areas, with other gears, or with other operational types in a manner that could expand fishing capacity. The preamble to the final rule implementing the groundfish LLP provides a more detailed explanation of the rationale for specific provisions in the LLP (October 1, 1998; 63 FR 52642).

When the Council initially recommended the LLP, the Council intended that NMFS determine whether a vessel met a minimum number of landings to qualify the owner of that vessel to receive an LLP license with a specific gear, area, and operational type endorsement. However, the regulations that implemented the LLP used the phrase "documented harvest" instead of "landing." NMFS asserted that the phrase documented harvest was synonymous with the phrase landing, and that the phrase documented harvest provided additional clarity to the public that the phrase landing did not. NMFS' assertion that these two phrases were synonymous was subsequently challenged in court (*Trojan Partnership* v. *Gutierrez*, 425 F. 3d 620 (9th Cir. 2005)). The Court held that these phrases were not synonymous. In order to be consistent with Council intent when originally implementing the LLP, as well as the specific criteria recommended by the Council for this action, this action uses landings, and not documented harvests, as the basis for determining whether an LLP license holder will meet the regulatory requirements for Amendment 86.

The regulatory areas for which LLP licenses were issued include the Bering Sea (BS), Aleutian Islands (AI); Southeast Outside District (SEO); Central Gulf of Alaska (CG), which includes the West Yakutat District adjacent to the SEO; and Western Gulf of Alaska (WG). The documented harvest requirements established in the final rule implementing the LLP, for a specific area differed depending on the size of the vessel and the operational type of the vessel. The phrase "documented harvest" is used in this description of the qualifying criteria for the LLP as originally implemented to be consistent with the terminology used in that final rule (October 1, 1998; 63 FR 52642). For example, for a vessel owner to receive an endorsement for non-trawl gear in the CG with a catcher/processor designation, a vessel must have met the minimum documented harvest requirements in the CG using non-trawl gear and the documented harvests must have been caught and processed onboard the vessel.

In 2000, NMFS issued groundfish LLP licenses with the appropriate regulatory area endorsements, gear, vessel length, and vessel operational type designations based on the documented harvests of vessels. NMFS issued more than 300 LLP licenses endorsed for trawl gear, and more than 1,000 licenses for non-trawl gear for use in the BSAI and GOA. Non-trawl gear is commonly known as fixed gear and includes hook-and-line, pot, and jig gear. In many cases trawl and fixed gear LLP licenses were endorsed for multiple regulatory areas (e.g., WG, CG, and BS) if a vessel met the minimum number of documented harvests in more than one area. Additionally, a number of LLP licenses were also designated for both trawl and fixed gear in cases where the vessel met the documented harvests requirements using both trawl and fixed gear.

After LLP licenses were initially issued in 2000, NMFS became aware, through public testimony from fishing industry representatives and an independent review of landings data, that a substantial number of trawl and/or fixed gear endorsed LLP licenses were not being used for fishing in some, or all, of the regulatory areas for which they were endorsed. A variety of factors could result in the lack of use of an LLP license, including poor economic conditions in groundfish fisheries, choices by LLP license holders to focus on fisheries such as salmon or halibut that do not require the use of an LLP license, or other reasons specific to a license holder. LLP licenses that are valid but are not currently being used on a vessel are commonly known as "latent" LLP licenses.

In early 2007, the Council began reviewing the use of trawl-endorsed LLP licenses in the GOA and BSAI. In April 2008, after more than a year of review, development of an analysis, and extensive public comment, the Council adopted Amendment 92 to the BSAI FMP and Amendment 82 to the GOA FMP, both of which modified the LLP regarding eligibility criteria for trawl endorsements on LLP licenses. Amendments 92 and 82 removed trawl endorsements from LLP licenses that did not meet specific landing requirements during 2000 through 2006.

NMFS published a notice of availability for Amendments 92 and 82 on December 12, 2008 (73 FR 75659). A proposed rule was published on December 30, 2008 (73 FR 79773). NMFS approved Amendments 92 and 82 on March 16, 2009, and published a final rule implementing them on August 14, 2009 (74 FR 41080).

In late 2007, the Council began a similar process of reviewing the use of LLP licenses endorsed for fixed gear in the GOA. This review was initiated primarily at the request of active GOA fixed gear fishery participants who were concerned that holders of latent fixed-gear endorsed LLP licenses could resume fishing under the licenses in the future and thereby adversely affect active GOA fixed gear LLP licenses holders' fishing operations as well as the biological health of the fishery. Specifically, fixed-gear participants were concerned about the potential effects of additional effort in the GOA Pacific cod fishery that could increase competition and overcapacity in the fishery. Pacific cod is the primary fishery targeted by vessels using fixed gear in the GOA. In both the CG and WG regulatory areas, approximately one-fourth of the eligible LLP licenses were actively being used. The potential overcapacity from the remaining latent LLP licenses could have adverse effects on management of the fisheries. Increased fishery effort could make it more difficult for NMFS to close fisheries in a timely manner, thereby exceeding the total allowable catch (TAC) for a fishery.

During the development of this action, the Council also received input from the public requesting modification to the LLP to establish minimum landing requirements that must be met to allow a vessel to continue to participate in the Pacific cod fixed-gear fisheries in the GOA consistent with the approach adopted by the Council in 2002, under Amendment 67 to the FMP for groundfish of the BSAI (April 15, 2002; 67 FR 18129). Amendment 67 established a Pacific cod endorsement on LLP licenses that is required for vessels using hook-and-line and pot gear to participate in the directed fishery for Pacific cod in the BSAI. The term "directed fishing" is defined in regulation at § 679.2 and includes retained catch of Pacific cod that exceeds a minimum proportion of the total retained catch onboard a vessel. In April 2009, after more than a year of review and extensive public comment, the Council recommended modifications to the LLP to revise eligibility criteria for fixed gear endorsements on LLP licenses. The Council amended its final action in December 2009 to incorporate a change in the specific method used to allocate Pacific cod endorsed LLP licenses for specific persons (*see* the description under Action 4 of this preamble for additional detail).

**Notice of Availability and Proposed Rule**

NMFS published the notice of availability for Amendment 86 on July 2, 2010 (75 FR 38452), with a public comment period that closed on August 31, 2010. NMFS published the proposed rule for this action on July 23, 2010 (75 FR 43118), with a public comment period that closed on September 7, 2010. Amendment 86 was approved by NMFS on September 29, 2010. NMFS received two public comments from two unique persons on Amendment 86 and the proposed rule; these are summarized and responded to below. These comments did not result in any modification to the proposed rule.

**Actions Implemented by Rule**

This rule implements four different actions, all of which were components of the Council's final action.

- Action 1: Establishes a GOA Pacific cod endorsement for fixed gear LLP licenses.
- Action 2: Exempts certain vessels using jig gear in the GOA from the requirement to carry an LLP license.
- Action 3: Modifies the MLOA of certain LLP licenses.
- Action 4: Allows specific GOA community entities to request and receive LLP licenses with a Pacific cod endorsement.

The rationale and effects of these four actions are described in detail in the preamble to the proposed rule (July 23, 2010; 75 FR 43118), and are briefly summarized here. For additional detail, please see the proposed rule preamble (*See* **ADDRESSES**).

Action 1: Establishes a Pacific Cod Endorsement for Fixed Gear LLP Licenses

This rule assigns Pacific cod endorsements to LLP licenses that have met minimum landing requirements from January 1, 2002, through December 8, 2008, or that meet a specific exemption described below. This action preemptively reduces the potential adverse effects of overharvesting the GOA Pacific cod resource if latent LLP license holders became active in the fishery.

*Criteria for Assigning a Pacific Cod Endorsement*

This rule assigns a Pacific cod fishery endorsement to an LLP license based on landings in the directed Pacific cod fishery in the GOA from January 1, 2002, through December 8, 2008, made by vessels operating under the authority of that LLP license. NMFS will assign Pacific cod endorsements that are designated for (1) hook-and-line, pot, or jig gear; (2) specific GOA regulatory areas (*i.e.,* CG and WG); and (3) specific operational types (i.e., catcher vessels or catcher/processors). LLP licenses with an MLOA of less than 60 feet have different landing requirements compared to LLP licenses with an MLOA equal to or greater than 60 feet. Table 1 summarizes the landing requirement criteria that must be met for each gear type, regulatory area, operational type, and MLOA of the LLP license.

TABLE 1—SUMMARY OF LANDING REQUIREMENTS FOR A FIXED GEAR PACIFIC COD ENDORSEMENT

| Regulatory area | Gear type | Operational type of Pacific cod endorsement | MLOA of LLP license | Landing requirement in the Pacific cod directed fishery from January 1, 2002, through December 8, 2008 |
|---|---|---|---|---|
| CG | Hook-and-line | Catcher vessel | < 60 feet | 10 metric tons (mt). |
| | | | ≥ 60 feet | 50 mt. |
| | | Catcher/Processor | All | 50 mt. |
| | Jig* | Catcher vessel | All | 1 landing. |
| | | Catcher/Processor | All | |
| | Pot | Catcher vessel | < 60 feet | 10 mt |
| | | | ≥ 60 feet | 50 mt. |

TABLE 1—SUMMARY OF LANDING REQUIREMENTS FOR A FIXED GEAR PACIFIC COD ENDORSEMENT—Continued

| Regulatory area | Gear type | Operational type of Pacific cod endorsement | MLOA of LLP license | Landing requirement in the Pacific cod directed fishery from January 1, 2002, through December 8, 2008 |
|---|---|---|---|---|
| | | Catcher/Processor | All | 50 mt. |
| WG | Hook-and-line | Catcher vessel | < 60 feet | 10 mt. |
| | | | ≥ 60 feet | 50 mt. |
| | | Catcher/Processor | All | 50 mt. |
| | Jig* | Catcher vessel | All | 1 landing. |
| | | Catcher/Processor | All | |
| | Pot | Catcher vessel | < 60 feet | 10 mt. |
| | | | ≥ 60 feet | 50 mt. |
| | | Catcher/Processor | All | 50 mt. |

*LLP licenses and Pacific cod endorsements will be required only if a vessel uses more than five jigging machines, five lines, and more than 30 hooks per line.

A fixed gear LLP endorsement for Pacific cod reduces the risk that vessel operators could assign latent LLP licenses to other vessels, effectively reactivating those licenses and thereby increasing the amount of fixed gear effort in the Pacific cod fisheries. This additional effort could increase the harvest rate in the fixed-gear Pacific cod fishery as well as adversely affect currently active participants by increasing competition, diluting their potential gross revenues, and creating incentives for harvesters to race for fish in a potentially wasteful manner. This action effectively removes the potential for new effort in the fishery beyond currently active participants, as defined by this rule. This action provides additional control on fishing effort in the GOA Pacific cod fishery that is not provided under the current structure of the LLP.

This action does not include modifications to SEO-endorsed licenses because fishing effort in this regulatory area is currently low. The risk of additional effort in the fishery from latent fixed gear LLP license holders was deemed to be unlikely by the Council given the relatively small number of eligible LLP licenses and the TAC for Pacific cod in the SEO. This action does not include the BS or AI regulatory areas because a Pacific cod endorsement requirement has already been established for LLP licenses using fixed gear in these areas under Amendment 67 to the BSAI FMP (April 15, 2002; 67 FR 18129).

*Rationale for Landing Requirements*

The Council considered a range of options and alternatives to determine the minimum number of landings required to receive a Pacific cod endorsement. The range of years was selected by the Council based on the first year that NMFS could definitively assign landings data to a specific LLP license (2002), and a period year that represented the last year for which NMFS had data available on recent participation in the Pacific cod fisheries (December 8, 2008). The specific date of December 8, 2008, corresponds to the date that the Council selected as a control date after which landings would not be considered for purposes of qualifying for a Pacific cod endorsement. The Council recommended a control date to ensure that fishery participants did not engage in fishing practices for the sole purpose of qualifying for a Pacific cod endorsement, and to ensure that fishery landings represent sustained participation in the directed Pacific cod fishery. The Council balanced more recent participation against considerations of economic dependence and historical fishing practices when selecting the nearly 7-year time frame from January 1, 2002, through December 8, 2008. Groundfish harvested incidentally by vessels participating in any other fishery are excluded for the purpose of determining recent participation for this action because it is not considered directed fishing for Pacific cod.

The Council recommended that only catch from vessels fishing under the Federal TAC in either the Federal or parallel fishery would be included. The Federal TAC may be harvested in Federal waters, or in State of Alaska waters under a "parallel fishery." A parallel fishery occurs when the State of Alaska opens state waters concurrent with the Federal fishing season to allow vessels to access the Federal TAC in both state and Federal waters. The Council recommended including this catch because both of these fisheries have participants that are subject to Federal regulation, and vessels transit between state and Federal waters when harvesting Pacific cod that is assigned to the TAC. Catch from vessels fishing in the State of Alaska's Guideline Harvest Limit GHL Pacific cod fishery would not be included as qualifying catch to meet the requirements for a Pacific cod endorsement because this catch is not federally managed, is not subject to the TAC, and is managed exclusively by the State of Alaska.

After a review of groundfish catch history, the Council determined that different landing criteria should apply to different gear types, vessel operation types, and LLP MLOAs during the 7-year period from January 1, 2002, through December 8, 2008. The landing criteria recommended by the Council represent a minimal, but sufficient, amount of participation in the Pacific cod fishery to indicate some level of dependence on the fishery. The Council recommended that landing requirements apply to each regulatory area so that authority to fish Pacific cod could be removed only for those regulatory areas where minimum landing requirements were not met. Therefore, LLP licenses that were active in more than one regulatory area might meet the minimum landing requirements in one area but not another. The Council recommended this action to accomplish the goal of reducing the effects of potentially hundreds of new entrants into the Pacific cod fishery.

The preamble to the proposed rule, and sections 2 and 3 of the EA/RIR/FRFA prepared to support this rule contain a detailed description of the alternative landing requirements considered, and the rationale for the specific landing requirements chosen for each of the fixed gear types (*see*

**ADDRESSES**). That discussion is not repeated here.

Under this rule, a Pacific cod endorsement is required on all LLP licenses assigned to vessels using fixed gear to directed fish for Pacific cod in the WGOA and CGOA. Catcher vessels that use jig gear and meet specific vessel size and gear requirements will be exempt from the requirement to use an LLP license with a Pacific cod endorsement. This exemption is described in detail under Action 2. Other than the exemption described under Action 2, all vessels using fixed gear that are required to have an LLP license when fishing under the Federal TAC in either Federal or state waters are required to have a Pacific cod endorsement on the LLP license when directed fishing for Pacific cod. However, this requirement does not apply to vessels fishing in the Pacific cod GHL fishery, which is managed exclusively by the State of Alaska.

If a vessel, or vessels, to which an LLP license has been assigned meets minimum landings requirements applicable to a type of fixed gear and LLP license MLOA in a specific regulatory area during the period January 1, 2002, through December 8, 2008, then the LLP license used on that vessel, or vessels, will be assigned a Pacific cod fixed gear endorsement for those specific gear type(s) or specific regulatory area(s). An LLP license qualifies for more than one endorsement (*i.e.,* pot, hook-and-line, and/or jig) if it has qualified landings using more than one gear type.

In addition to issuing fixed gear endorsements based on directed harvests of Pacific cod during the January 1, 2002, through December 8, 2008, period, NMFS will issue Pacific cod endorsements to a limited number of LLP licenses that meet specific conditions even if those LLP licenses did not meet the minimum landing requirements. Specifically, NMFS will assign Pacific cod endorsements to LLP licenses that currently (1) have a catcher/processor endorsement; (2) were assigned to vessels that did not meet minimum landing requirements to qualify for a Pacific cod endorsement for catcher/processors using hook-and-line gear in either regulatory area where those LLP licenses are endorsed; and (3) were assigned to vessels that participated in industry efforts to reduce halibut prohibited species catch in the directed Pacific cod fishery in the GOA during 2006, 2007, or 2008.

This provision is intended to ensure that LLP license holders who decided not to use their vessels in the GOA during 2006, 2007, or 2008 will receive a Pacific cod endorsement. Specifically, this provision applies to LLP licenses that did not fish in the GOA in order to minimize halibut prohibited species catch. Hook-and-line catcher/processors minimize bycatch through voluntary private contractual arrangements. NMFS has a record of all LLP licenses that were used on catcher/processor vessels participating in the voluntary private contractual arrangements from 2006 through 2008. A list of LLP licenses, based on the best available catch data, eligible for this exemption (and thus able to receive an endorsement) appears at table 2 of this preamble.

In some cases, an LLP license is eligible to receive an endorsement if it met the landing requirement in either the CG or WG, and it qualifies for the exemption in the other regulatory area if it did not otherwise meet the landing requirement in that area. Table 2 notes whether an LLP license qualifies for the exemption in an area, or qualifies under the landing requirements in an area. An LLP license is not eligible for an endorsement exemption to a regulatory area if that LLP license had not been assigned an endorsement for that area prior to this action.

TABLE 2—LLP LICENSES QUALIFYING FOR HOOK-AND-LINE CATCHER/PROCESSOR ENDORSEMENT EXEMPTION

| LLP License No. | Eligible for CG endorsement exemption | Eligible for WG endorsement exemption |
|---|---|---|
| LLG 1400 | Yes | No (Qualifies under landing requirements). |
| LLG 1713 | Yes | No (Not eligible for an endorsement). |
| LLG 1785 | Yes | No (Qualifies under landing requirements). |
| LLG 1916 | Yes | No (Qualifies under landing requirements). |
| LLG 2112 | Yes | Yes. |
| LLG 2783 | Yes | No (Not eligible for an endorsement). |
| LLG 2892 | Yes | No (Qualifies under landing requirements). |
| LLG 2958 | Yes | No (Not eligible for an endorsement). |
| LLG 3616 | Yes | No (Not eligible for an endorsement). |
| LLG 3617 | Yes | No (Qualifies under landing requirements). |
| LLG 3676 | Yes | No (Qualifies under landing requirements). |
| LLG 4823 | Yes | No (Qualifies under landing requirements). |
| LLG 2081 | No (Qualifies under landing requirements) | Yes. |
| LLG 3090 | No (Not eligible for an endorsement) | Yes. |

Table 2 indicates that under this exemption, NMFS will issue 12 CG and three WG endorsements. An LLP license that receives a Pacific cod hook-and-line catcher/processor endorsement under this exemption can only be assigned to a vessel participating in the Pacific cod offshore sector that is fishing in the regulatory area of the GOA for which the endorsement is received. Regulations at § 679.2 define the inshore and offshore sector for Pacific cod. Current regulations assign the offshore sector of the GOA Pacific cod fishery 10 percent of the TAC in the CG and WG. The remaining 90 percent of the TAC will be assigned for vessels in the inshore sector.

In this rule, NMFS implements the Council's recommendation that LLP licenses receiving an endorsement under this provision "only be allowed to participate in the offshore fishery" by requiring that vessels fishing in a regulatory area for which they receive an endorsement under this exemption register and fish only in the offshore sector in that area.

The rule retains the requirement that vessel owners elect annually on their Federal Fisheries Permit application whether to participate in the inshore or the offshore sector of the GOA. Therefore, a vessel operator who is assigned an LLP license with a Pacific cod endorsement exemption cannot participate in the inshore sector in one regulatory area and the offshore sector in another regulatory area in the GOA during the same calendar year.

This rule modifies regulations at § 679.7 to clarify that once an LLP holder operates in either the inshore or the offshore sector in the GOA, any vessel to which that LLP license is

assigned cannot participate in the sector not selected for the remainder of the calendar year. This modification ensures that LLP license holders cannot alternate activities between the inshore and offshore sector, and potentially disadvantage other fishery participants who are only able to, or only choose to, annually participate in one sector. Additional detail on the inshore and offshore sector management is provided in the preamble to the proposed rule (see **ADDRESSES**). That discussion is not repeated here.

*Determining Landings Assigned to an LLP License*

Starting in 2002, NMFS has required that an LLP license designate a specific vessel on which it was being used. This requirement provides NMFS the information necessary to assign landings to a specific LLP, and allows NMFS to verify the use of an LLP license on a specific vessel. When information about the use of an LLP license on a specific vessel is combined with vessel landings records, NMFS can determine how many landings may be assigned to a specific LLP license during the January 1, 2002, through December 8, 2008, qualifying period. If an LLP license is not assigned a sufficient amount or number of landings in a specific regulatory area by vessel operation type and gear type for that MLOA, then under this rule NMFS will not issue a Pacific cod endorsement for that LLP license, unless that LLP license is eligible for an exemption from landing requirements as previously described for specific hook-and-line catcher/processor endorsed LLP licenses.

If a vessel was designated on more than one LLP license at the time of a creditable landing, NMFS will assign the credit for any of the vessel's landings to all LLP licenses assigned to, or "stacked," on that vessel at that time. Therefore, NMFS may credit a single landing to more than one LLP license. Because NMFS' catch accounting system does not indicate how specific landings should be assigned to multiple LLP licenses assigned to a vessel at the time a landing was made, this provision should resolve any potential disputes that could arise about the assignment of specific landings.

In order to receive a Pacific cod endorsement for either the CG or WG, an LLP holder with a valid LLP license will have to either demonstrate that it had sufficient cumulative landings of Pacific cod for fishing years 2002 through 2008, or that it landed a sufficient total amount of fish during that period, or that the LLP license holder qualifies for such an endorsement pursuant to the exception listed above.

Action 2: Exempt Certain Vessels Using Jig Gear From the Requirement to Carry an LLP License

The second action under this rule exempts vessels using jig gear in the GOA from the requirement to be assigned an LLP license, provided those vessels do not use more than five jigging machines, more than one line per machine, and more than 30 hooks on any one line.

This exemption is similar to an exemption that currently applies to jig gear vessels operating in the BSAI. Regulations at § 679.4 exempt vessels less than 60 ft LOA using a maximum of five jig machines, no more than one line per jig machine, and no more than 15 hooks per line, from the requirements of the LLP in the BSAI. The restrictions on jig gear are consistent with the gear allowed in the GOA state waters Pacific cod jig fisheries. State regulations allow the use of up to 150 hooks for vessels participating in the state GHL fishery.

Jig gear operators who meet the landing threshold described under Action 1 will receive a Pacific cod endorsement for jig gear that allows a vessel using an LLP license with this endorsement to use more than five jigging machines, more than five lines, and more than 30 hooks per line.

Additional detail on the rationale for the jig gear exemption is provided in the preamble to the proposed rule (*see* **ADDRESSES**). That discussion is not repeated here.

Action 3: Modifies the MLOA of Certain LLP Licenses

The third action under this rule modifies the MLOA specified on certain LLP licenses that are eligible to receive a Pacific cod endorsement under two different scenarios.

The first modification applies if (1) an LLP license has a specified MLOA greater than or equal to 60 feet; (2) that LLP license was consistently assigned to a single vessel under 60 feet LOA from January 1, 2002, through December 8, 2008; and (3) the vessel to which the LLP license was assigned met the landing thresholds applicable to LLP licenses with a specified MLOA under 60 feet. If these criteria are met, NMFS will issue a Pacific cod endorsement for the applicable gear type to the LLP license but modify the MLOA of the LLP license to match the LOA of the vessel to which the LLP license was assigned. In no case can the resulting MLOA specified on the LLP license be greater than 60 feet. This modification ensures that vessel owners can continue to use the vessel and LLP licenses in the fisheries as they had during the January 1, 2002, through December 8, 2008, time period and the LLP licenses receive a Pacific cod endorsement applicable to the length of the vessel to which the LLP license was assigned. This modification reduces the overall MLOA specified on those LLP licenses that meet these criteria.

To determine the MLOA that will be specified on the LLP license, NMFS will use the LOA of the vessel to which the LLP license is assigned on the effective date of this rule. If the LLP holder disagrees with the LOA on file with NMFS and wishes to provide data to NMFS to establish a different LOA for the vessel, this rule requires that the LLP license holder provide a survey conducted by a naval architect or marine surveyor independent from the vessel owner or LLP license holder to verify the LOA of the vessel. A vessel owner has 90 days from the effective date of this rule to provide the survey to NMFS. NMFS will not assign a Pacific cod endorsement to an LLP license holder with a greater vessel LOA than that shown in NMFS' record unless a timely independent survey was submitted and received by NMFS. If no survey is provided within the 90-day time frame, NMFS will reissue the LLP license with the MLOA equal to the LOA of the vessel to which the LLP license was assigned based on the LOA on file with NMFS. No LLP license that receives a Pacific cod endorsement under this provision can have an MLOA greater than 60 feet under any circumstance to ensure that the intent of the Council's recommendation is met. This procedure provides an opportunity for an LLP license holder to amend NMFS' official record consistent with the appeals process described below in this preamble.

This exemption applies only if an LLP license had been continuously assigned to a vessel under 60 feet LOA during that period. The redesignation of the MLOA on an LLP license that qualifies under this provision effectively prohibits the use of that LLP license on larger vessels that may have greater harvest capacity, but allows smaller vessels that had been assigned that LLP license to continue to operate in the Pacific cod fishery.

The second modification of an LLP MLOA applies if an LLP license (1) is eligible to receive a pot catcher vessel Pacific cod endorsement, and (2) has a specified MLOA of less than 50 feet. If these criteria are met, NMFS will redesignate the MLOA of those LLP licenses to be 50 feet. This modification

ensures that a limited number of vessel owners who had recently purchased vessels that are longer than the MLOA of the LLP license that is eligible to receive the Pacific cod endorsement can continue to use those LLP licenses on their longer vessels. This recommendation is consistent with the Council's goals of providing continuing opportunities for recent fishery participants and minimizing the potential for active participants to expand effort in the GOA Pacific cod fishery.

Additional detail on the rationale for both MLOA modifications is provided in the preamble to the proposed rule (*see* **ADDRESSES**). That discussion is not repeated here.

Action 4: Allows Specific Community Entities To Request and Receive LLP Licenses With a Pacific Cod Endorsement

The fourth action under this rule allows entities representing specific communities in the WG and CG to request a limited number of non-transferrable Pacific cod endorsed LLP licenses. NMFS will issue licenses that are endorsed for hook-and-line or pot gear with an MLOA of 60 feet. Once the community entity receives the LLP license, the community entity can assign that LLP license for use on a vessel designated by the entity. Prior to receiving the LLP license, the community entity eligible to receive the LLP license must submit a detailed plan describing how it will assign the LLP license to a specific vessel.

Previously, the Council recommended, and the Secretary approved, Amendment 66 to the GOA FMP, which implemented management measures to provide harvest opportunities to specific communities in the GOA (April 30, 2004; 69 FR 23681). Under Amendment 66, the Council defined a specific suite of smaller GOA communities that have historically participated in GOA fisheries but may lack some of the infrastructure and population base that could facilitate participation by residents of those communities in GOA fisheries, as compared to larger communities. Under Amendment 66, a community quota entity (CQE) was authorized to purchase halibut and sablefish quota share on behalf of the community it represents, and assign the resulting annual individual fishing quota (IFQ) to specific members of the community that meet minimum residency standards and other requirements. The CQE is intended to serve the interests of the community as a whole by providing access to fishery resources for residents of the community.

Communities eligible under Amendment 66 (1) have a population of less than 1,500 and at least 20 persons based on the 2000 United States Census; (2) are located on the GOA coast of the North Pacific Ocean; (3) have direct saltwater access; (4) lack direct road access to communities with a population greater than 1,500 persons; (5) have historic participation in the halibut and sablefish fisheries; and (6) are listed in Table 21 to part 679. Seventeen communities that meet these criteria are located in the CG, and four communities are located in the WG.

The Council chose to rely on the six criteria listed above under Amendment 66 to determine coastal communities that may benefit from the ability to retain or expand participation opportunities in the GOA Pacific cod fishery for their residents. This rule provides the CQEs that represent these communities the opportunity to enhance their access to fishery resources by providing CQEs with a limited number of Pacific cod endorsed fixed-gear LLP licenses.

The Council recommended that if an eligible community in the CG or WG forms a CQE under existing regulations at § 679.41(l)(3), that CQE could apply to receive a specified number of Pacific cod endorsed fixed-gear LLP licenses. If a CQE submitted a complete application for LLP licenses, NMFS will issue the CQE new LLP licenses with the applicable gear and area endorsements. CQEs that have already formed and been approved by NMFS are eligible to apply to receive LLP licenses.

If new CQE communities are identified that meet the criteria established under Amendment 66, the Council could choose to recommend that those communities be included as eligible to receive a Pacific cod endorsed LLP license if those CQEs represented a community in the CG or WG. Adding new CQE communities and specifying the number of Pacific cod endorsed LLP licenses that a community could receive would need to be undertaken in future rulemaking. In December 2010, the Council recommended that three additional communities be allowed to form CQE's based on the fact that they meet the criteria established under Amendment 66. Those communities would need to be added to the CQE eligibility list in Table 21 to part 679 under separate rulemaking. Only one of the three communities, Cold Bay, is located in the WG and would be eligible to receive a non-transferable Pacific cod endorsed LLP license. Cold Bay would not be eligible to receive an additional license until subsequent rule making is completed.

The Council clarified that a CQE can request a Pacific cod endorsed LLP license only for the area in which that community is located. CQE communities in the WG could receive only WG endorsed LLP licenses, and CQE communities in the CG could receive only CG endorsed LLP licenses.

In order to receive LLP licenses, the CQE must meet several requirements. Prior to requesting LLP licenses, the CQE must provide NMFS with a plan for soliciting and determining recipients of the LLP licenses issued to the CQE. Specifically, CQEs need to provide NMFS with (1) a statement describing the procedures that will be used to determine the distribution of LLP licenses to residents of the community represented by that CQE; (2) procedures used to solicit requests from residents to be assigned an LLP license; and (3) criteria used to determine the distribution of the use of LLP licenses among qualified community residents and the relative weighting of those criteria.

Second, once the CQE has submitted the application to NMFS and the CQE has selected a potential recipient to use the LLP license, NMFS requires that the CQE provide a letter of authorization to the vessel operator listing the specific person(s) and the specific vessel eligible to use an LLP license held by the CQE during a calendar year. An LLP license issued to a CQE cannot designate more than one vessel per calendar year. The CQE can amend the authorization letter to add additional persons authorized to use the LLP license on a vessel. The person designated to use the LLP license issued to the CQE is required to be onboard the vessel while the vessel is used to directed fish for Pacific cod or any other species authorized by that license. A copy of the authorization letter and any amendments to the authorization letter must be provided to NMFS, and a copy of that authorization letter and any amendments must be maintained onboard the vessel assigned the CQE's LLP license. Likewise, NMFS requires that the authorization letter be provided on or before the date that the LLP license is used on a vessel during a calendar year. Any amendments to the authorization to designate new authorized persons must be provided to NMFS prior to those persons using the CQE's Pacific cod LLP.

As part of this authorization letter, NMFS requires that the CQE attest that the persons authorized to use the LLP license meet residency requirements. Specifically, the CQE must attest that

the authorized person (1) is a citizen of the United States; and (2) has maintained a domicile in a CQE community in the CG or WG eligible to receive an LLP license endorsed for Pacific cod for the 12 consecutive months immediately preceding the time when the assertion of residence is made; and (3) is not claiming residency in another community, state, territory, or country, with an exception made for residents of the Village of Seldovia. Consistent with the definition of a resident under Amendment 66, residents of the Village of Seldovia shall be considered to be eligible community residents of the City of Seldovia for the purposes of eligibility to serve as an authorized vessel operator.

These requirements ensure that residents of communities receive the benefits of the LLP licenses issued to CQEs. Only one vessel can use a specific LLP license issued to a CQE per year to eliminate the potential that an LLP license could be used on multiple vessels. A CQE may not designate more than one vessel in cases of vessel loss. Because a CQE can designate a new vessel each year prior to the start of the fishing season, the effect of restricting the use of an LLP to only one vessel per year would not be expected to be a long-term constraint on fishing operations.

The CQE must provide an authorization letter assigning a specific vessel and designating the person(s) authorized use of the LLP license. The authorization letter requires that the CQE attest to individuals' residency, but does not require individuals to submit proof of residency to NMFS in order to use the LLP license issued to the CQE.

The Council identified the specific communities that would be eligible to receive LLP licenses if they formed a CQE. Those communities are listed in this final rule in Table 50 to part 679.

Several limitations apply to any LLP license that a CQE would receive. These include (1) all LLP licenses issued are non-transferable; (2) a limited number of LLP licenses can be issued to each CQE; (3) the LLP licenses have an MLOA of 60 feet; and (4) the LLP licenses have specific gear endorsements.

The number of LLP licenses that each CQE can request on behalf of a community is based on information indicating the number of LLP licenses held by residents of each eligible community and the estimated number of LLP licenses that will be extinguished under the other provisions of this action.

The number of LLP licenses that each CQE community can request is based on the Council's December 2009 action, and that number is listed in this final rule at Table 50 to part 679.

This rule modifies regulations at § 679.7(i)(1)(i), which limit to 10 the maximum number of LLP licenses that a person may hold, to fully implement the Council's intent to allow CQEs to provide harvest opportunities for local residents. This rule amends regulations at § 679.7(i) to prohibit the CQE representing the City of Sand Point from holding more than 14 groundfish LLP licenses, rather than prohibiting the CQE representing Sand Point from holding more than 10 groundfish LLP licenses. The limit on the number of LLP licenses that a CQE may hold includes all LLP licenses that a CQE may receive under the provisions of this rule, and any LLP licenses a CQE may receive by transfer under the provisions at § 679. The provision at 679.7(i)(1)(i) is specific to Sand Point and not for all CQE's.

The LLP licenses issued will have a specified MLOA of 60 feet. The gear endorsements on LLP licenses that can be requested by a CQE generally represent the overall harvest patterns by vessels using hook-and-line and pot gear within each regulatory area. NMFS will issue LLP licenses endorsed only for pot gear to CQEs representing communities in the WG. CQEs representing communities in the CG, including Yakutat, have the option of selecting what proportion of their LLP licenses would have a pot endorsement or a hook-and-line endorsement, provided the CQE notified NMFS within six months of the effective date of this rule of their choice. Selection of gear type is a one-time permanent choice. If a CQE does not notify NMFS within this time frame, then NMFS will issue any LLP licenses that are requested by a CQE so that half the LLP licenses issued to the CQE are endorsed for pot gear and half are endorsed for hook-and-line gear. In cases where the total number of groundfish licenses issued on behalf of a community listed in Table 50 to part 679 is not even, NMFS will issue one more groundfish license with a pot gear Pacific cod endorsement than the number of groundfish licenses with a hook-and-line gear Pacific cod endorsement.

CQEs must submit annual reports consistent with the annual report requirements established under Amendment 66. CQE annual reports must be submitted to NMFS and the governing body of the community that the CQE represents. The Council requested that the CQE provide information in the annual reports describing the use of LLP licenses during a calendar year. The annual report includes (1) the number of community residents requesting an LLP license from the CQE; (2) a description of the distribution of LLP licenses among community residents; (3) vessels assigned to use the LLP licenses; (4) the number and residency of crew employed on a vessel using the LLP license; and (5) the amount of payments made to CQEs for use of the LLP licenses, if any. These annual reports are due by January 31 for the prior fishing year for each community represented by the CQE for which those LLP licenses were granted.

NMFS did not establish an appeal process for CQEs to receive LLP licenses. NMFS is not removing or otherwise restricting existing harvest opportunities available to CQEs, so no appeal process is required. This rule allows CQEs to request LLP licenses provided the specific requirements detailed here are met. If those conditions are not met, NMFS will not issue LLP licenses to the CQEs. A potential CQE does have an opportunity to challenge and appeal the decision to certify its designation for a specific community. That provision is described in regulation at § 679.41(l)(3).

Additional detail on the issuance of Pacific cod endorsed LLP licenses to CQEs is provided in the preamble to the proposed rule (*see* **ADDRESSES**). That discussion is not repeated here.

**Process for Assigning New Pacific Cod Endorsements**

NMFS will create an official record with all relevant information necessary to assign landings to specific LLP licenses. Prior to modifying any LLP licenses, NMFS will notify all fixed gear LLP license holders of the status of their LLP license endorsements (i.e., the endorsements for specific fixed gear, operational types, and regulatory areas). Should an LLP license holder disagree with NMFS' official record, NMFS will provide an opportunity for a person to submit information to rebut the presumptions made by NMFS.

The official record created by NMFS contains vessel landings data, and the LLP licenses to which those landings are attributed. Evidence of the number and amount of landings in the Pacific cod fishery is based only on legally submitted NMFS weekly production reports for catcher/processors and state fish tickets for catcher vessels. In order to ensure that landings in the directed Pacific cod fishery are properly attributed to an LLP license, NMFS will assign any delivery of Pacific cod up to seven days after the closure of the Pacific cod season to an LLP license. The seven-day period accommodates

any final deliveries. The official record includes the records of the specific LLP licenses assigned to vessels and other relevant information necessary to attribute landings to specific LLP licenses. NMFS presumes the official record is correct, and a person wishing to challenge the presumptions in the official record bears the burden of proof through an evidentiary and appeals process. Regulations pertaining to appeals are described under § 679.43. A description of the official record and the appeals process is provided in the preamble to the proposed rule (*see* **ADDRESSES**). That discussion is not repeated here.

**Public Comment**

NMFS received two comments during the public comment period for Amendment 86 and the proposed rule. One comment provided a general criticism of fishery management, and was not relevant to Amendment 86 or the proposed rule. A second public comment noted that the proposed rule is consistent with the principles of Amendment 86, the needs, goals, and objectives of the GOA Pacific Cod fixed gear fishery, the Magnuson-Stevens Fishery Conservation and Management Act (MSA), and other applicable laws. Neither comment raised issues requiring a specific response.

**Changes From the Proposed Rule**

NMFS makes two changes in the final rule to clarify specific regulatory provisions that were addressed in the preamble to the proposed rule, but that were not adequately described in the regulatory text. The first change adds a paragraph at § 679.4(k)(10)(vi)(C)(*9*) to note that an LLP license with a Pacific cod endorsement issued to a CQE may not be assigned to more than one vessel per calendar year. This addition is consistent with text in the preamble and the Council's motion to the proposed rule noting that "An LLP license issued to a CQE could not designate more than one vessel per calendar year" (July 23, 2010; 75 FR 43127). The preamble to the proposed rule also notes:

> The Council recommended that only one vessel be allowed to use a specific LLP license issued to a CQE per year to reduce the potential that an LLP license could be used on multiple vessels. Allowing multiple vessels to use an LLP license in a given year could increase competition for Pacific cod resources in waters surrounding these communities. The Council did not recommend allowing a CQE to designate more than one vessel in cases of vessel loss. This restriction would not be expected to prevent the ability of community residents to access Pacific cod resources through a CQE LLP license because a minimum of two LLP licenses can be issued to any one CQE. Because a CQE can designate a new vessel each year prior to the start of the fishing season, the effect of restricting the use of an LLP to only one vessel per year would not be expected to be a long-term constraint on fishing operations.

(July 23, 2010; 75 FR 43127)

The added regulatory text at § 679.4(k)(10)(vi)(C)(*9*) gives full effect to the clear intent expressed in the preamble to the proposed rule. This added regulatory text is consistent with, and a logical outgrowth of, the proposed rule.

The second change to the regulatory text adds text at § 679.4(k)(10)(vi)(D) to specify that a CQE's authorization letter, or any subsequent amendments to that letter, must be sent to NMFS. The added text also specifies the address where that letter must be sent. This addition is consistent with the text in the preamble to the proposed rule that notes:

> NMFS would require that a copy of the authorization letter and any amendments to the authorization letter be provided to NMFS, and a copy of that authorization letter and any amendments would need to be maintained onboard the vessel assigned the CQE's LLP license. Likewise, NMFS would require that the authorization letter be provided on or before the date that the LLP license is used on a vessel during a calendar year. NMFS would also require that any amendments to the authorization to designate new authorized persons be provided to NMFS prior to those persons using the CQE's Pacific cod LLP.

(July 23; 2010, 75 FR 43127).

The regulatory text in the proposed rule at § 679.4(k)(10)(vi)(D) noted that the CQE must provide a copy of the authorization letter and any amendments to that letter to the vessel operator, but failed to specify that NMFS must also receive the authorization letter and any amendments. This final rule clarifies the regulatory text at § 679.4(k)(10)(vi)(D) to specify that that NMFS must also receive the authorization letter and any amendments. This clarification is consistent with the clear intent expressed in the preamble to the proposed rule and is consistent with, and a logical outgrowth of, the proposed rule.

**Classification**

The Assistant Administrator for Fisheries, NOAA, has determined that this rule is consistent with Amendment 86 to the Fishery Management Plan for Groundfish of the Gulf of Alaska, the MSA, and other applicable laws.

*Executive Order 12866*

This rule has been determined to be not significant for purposes of Executive Order 12866.

*Regulatory Flexibility Act*

A FRFA was prepared as required by section 604 of the Regulatory Flexibility Act (5 U.S.C. 604). The FRFA describes the economic impact this final rule will have on small entities. The EA/RIR/FRFA prepared for this final rule is available from NMFS (*see* **ADDRESSES**). The FRFA for this action explains the need for, and objectives of, the rule; notes that no public comments on the initial regulatory flexibility analysis were submitted; describes and estimates the number of small entities to which the rule will apply; describes projected reporting, recordkeeping, and other compliance requirements of the rule; and describes the steps the agency has taken to minimize the significant economic impact on small entities, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency that affect the impact on small entities was rejected. The need for and objectives of this action; a summary of the comments and responses; a description of the action, its purpose, and its legal basis; and a statement of the factual, policy, and legal reasons for selecting the alternative implemented by this action are described elsewhere in this preamble and are not repeated here.

The proposed rule was published in the **Federal Register** on July 23, 2010 (75 FR 43118). An Initial Regulatory Flexibility Analysis (IRFA) was prepared and described in the classification section of the preamble to the rule. The public comment period ended on September 7, 2010. NMFS received two comments from two individuals. None of the comments directly addressed the IRFA.

The entities directly regulated by this action are holders of LLP licenses endorsed for fixed-gear activity who conducted directed fishing for Pacific cod in the GOA. NMFS estimates that under this rule a maximum of 956 entities hold LLP licenses with fixed-gear endorsements designated for catcher vessel or catcher/processor operations may be affected by this rule; of these, an estimated 908 small entities will be directly regulated by this action.

The Small Business Administration (SBA) has established that a business involved in fish harvesting is a small business if it is independently owned

and operated, not dominant in its field of operation (including its affiliates), and if it has combined annual gross receipts not in excess of $4.0 million for all its affiliated operations worldwide. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 500 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. Because the SBA does not have a size criterion for businesses that are involved in both the harvesting and processing of seafood products, NMFS has in the past applied, and continues to apply, SBA's fish harvesting criterion for these businesses because catcher/processors are first and foremost fish harvesting businesses. Therefore, a business involved in both the harvesting and processing of seafood products is a small business if it meets the $4.0 million criterion for fish harvesting operations. NMFS is reviewing its small entity size classification for all catcher/processors in the United States. However, until new guidance is adopted, NMFS will continue to use the annual receipts standard for catcher/processors. Even if additional catcher/processors would have been identified as small entities under a revised small entity size classification, NMFS would have analyzed the effect on small entities using the same methods that were used in the IRFA prepared for the proposed rule. NMFS considered the effects of the proposed rule and attempted to reduce costs to all directly regulated entities regardless of the number of small entities.

The EA/RIR/FRFA (*see* **ADDRESSES**) prepared for this action analyzed projected reporting, recordkeeping, and other compliance requirements on directly regulated entities. Under this final rule, NMFS will require additional reporting, recordkeeping, and other compliance requirements. Specifically, CQEs must submit an application to receive fixed-gear LLP licenses endorsed for Pacific cod, the selection of fixed gear type by CQEs in the CG, a description of the methods used to assign any fixed gear LLP licenses received, a letter of authorization for persons using LLP licenses assigned to a CQE, and an annual report detailing the distribution and use of LLP licenses. In addition, persons who qualify to receive a fixed-gear endorsement for an LLP license that was used under specific conditions on a vessel that was less than 60 feet LOA must submit a vessel survey prior to receiving an endorsement on that LLP license if they disagree with existing LOA data held by NMFS. Existing recordkeeping and reporting requirements for registering vessels in the inshore or offshore sector, and the LLP appeals process have not been modified.

The objective of this action is to limit the number of potential participants in Federal fixed-gear Pacific cod fisheries in the GOA by assigning and requiring Pacific cod endorsements on LLP licenses, and to provide additional fixed gear licenses that may be used on behalf of specific GOA communities. NMFS expects this action will reduce uncertainty for active participants and provide additional harvest opportunities for residents of specific communities in the Western and Central GOA and the community of Yakutat whose residents have historically participated in Central GOA fisheries.

The Council's preferred alternative for this action, as implemented by this final rule, will reduce the number of potential participants in the directed Pacific cod fishery using fixed gear. NMFS estimates that a total of 1,227 fishery endorsements may be affected under this action. These fixed gear fishery endorsements are assigned to LLP licenses held by an estimated 956 entities. As a result of this action, NMFS estimates that 376 fishery endorsements for directed fishing for Pacific cod will be issued. It is not possible to determine the precise number of the 956 entities that will continue to hold fishery endorsements for directed fishing for Pacific cod.

As noted above, all or most of the entities that are directly impacted by this regulation are small entities. This action likely will not have a significant adverse impact on some of these entities relative to the status quo alternative. The EA/RIR/FRFA (*see* **ADDRESSES**) prepared for this action notes that this action removes latent LLP licenses, but would not be expected to adversely affect active participants in the fixed gear directed Pacific cod fishery. On balance, these changes are not likely to have a significant economic impact on an LLP license holder.

The Council and NMFS considered and analyzed two alternative approaches for the management of Pacific cod fishing by non-trawl LLP licenses in the CG and WG in the EA/RIR/IRFA: Alternative 1, status quo/no action; and Alternative 2, the preferred alternative, add a Pacific cod endorsement on the CG and WG GOA LLP licenses if minimum landing requirements are met. Alternative 2 includes a provision to issue new Pacific cod endorsed fixed gear LLP licenses to non-profit CQEs, representing specific communities in the CG and WG. These two alternatives examined ranges of options for a varying range of landing criteria and mechanisms for assigning Pacific cod endorsements. These alternative landing criteria and mechanisms and the options examined in the context of these alternatives constitute the suite of "significant alternatives" for this action for the purposes of the RFA.

During the development of this action, the Council considered and rejected alternatives that would have allocated quota to specific fishery participants, or allocated a portion of the TAC to specific fishery sectors and gear types. These alternatives were considered to be overly broad to address the goal of limiting the potential entry of latent effort into the Pacific cod directed fishery.

Compared with the status quo, Alternative 2, and the associated suite of elements and options comprising Alternative 2, minimizes adverse economic impacts on the directly regulated small entities. The action provides greater economic stability for fixed-gear LLP license holders with recent participation in the CG and WG Pacific cod fisheries. Alternative 2 reduces the potential for substantial increases in fishing effort from latent LLP license holders, and provides additional harvesting opportunities for CQEs who hold fixed-gear LLP licenses. In no case are these combined impacts expected to be substantial. Alternative 2 does not assign Pacific cod fishery endorsements to fixed-gear LLP licenses that have had little or no participation in Pacific cod fisheries in the CG and WG since 2002. Therefore, the effect of this action on those directly regulated entities is expected to be minimal. The effects should be minimal because the holders of latent LLP licenses are not expected to rely on the Pacific cod resource or have substantial revenue from this fishery given the lack of consistent participation in the fishery over a broad range of years. Furthermore, the addition of new Pacific cod endorsed fixed-gear licenses and the removal of LLP requirements for most vessels using jig gear may provide additional harvest opportunities for some catcher vessels in Federal waters. Many vessels currently active in state waters are catching fish assigned to the Federal TAC under the parallel fishery. It is not clear that these new Pacific cod endorsed fixed-gear licenses would substantially increase fishing effort. Although none of the alternatives are expected to have any significant economic or socioeconomic impacts, Alternative 2, the preferred alternative, minimizes the potential negative

impacts, such as less control over potential fishing effort in the GOA Pacific cod fishery and greater risk that the fishery could be subject to overharvest that could arise under Alternative 1, the status quo alternative.

NMFS has posted a small entity compliance guide on its Web site at *http://alaskafisheries.noaa.gov* to satisfy the Small Business Regulatory Enforcement Fairness Act of 1996 requirement for a plain language guide to assist small entities in complying with this rule.

*Collection-of-Information*

This rule contains a collection-of-information requirement subject to the Paperwork Reduction Act and which has been approved by OMB under Control Number 0648–0334. Public reporting burden per response is estimated to average four hours for an appeal of an initial administrative determination; 20 hours for a CQE to apply to receive an LLP license and select the applicable gear type of that license if that CQE is operating in the CG; 40 hours for the CQE annual report; 1 hour to submit a letter of authorization for a vessel and vessel operator from a CQE; and 1 hour to submit a vessel length survey for LLP license holders who qualify for a Pacific cod endorsement for vessels less than 60 feet LOA under specific conditions. Estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (*see* **ADDRESSEES**), 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 Paperwork Reduction Act, unless that collection of information displays a currently valid OMB control number.

**List of Subjects**

*15 CFR Part 902*

Reporting and recordkeeping requirements.

*50 CFR Part 679*

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: March 16, 2011.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

For the reasons set out in the preamble, NMFS amends 15 CFR Chapter IX and 50 CFR Chapter VI as follows:

## TITLE 15—COMMERCE AND FOREIGN TRADE

### CHAPTER IX—NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE

## PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL NUMBERS

■ 1. The authority citation for part 902 continues to read as follows:

**Authority:** 44 U.S.C. 3501 *et seq.*

■ 2. In § 902.1, in the table in paragraph (b), under the entry "50 CFR", add entries in alphanumeric order for "679.7(a)(1)," "679.7(a)(7)(vii) through (ix), 679.7(n)(1)(iv)", "679.7(a)(12), 679.7(k)(8)(i)", "679.7(a)(15)," "679.7(a)(18), 679.7(n)(3)", "679.7(a)(20)," "679.7(a)(21) and (22)," "679.7(b)(2)," "679.7(d)," "679.7(f)," "679.7(f)(8)(ii)," "679.7(i)," "679.7(k)," "679.7(l)," "679.7(n)," "679.7(n)(4)(ii)," and "679.7(o)" to read as follows:

**§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.**

* * * * *

(b) * * *

| CFR part or section where the information collection requirement is located | Current OMB control number (all numbers begin with 0648–) |
|---|---|
| * * * * * * * | |
| 50 CFR | |
| * * * * * * * | |
| 679.7(a)(1) | –0206. |
| 679.7(a)(7)(vii) through (ix), 679.7(n)(1)(iv) | –0334. |
| 679.7(a)(12), 679.7(k)(8)(i) | –0316. |
| 679.7(a)(15) | –0206. |
| 679.7(a)(18), 679.7(n)(3) | –0445. |
| 679.7(a)(20) | –0206 and –0514. |
| 679.7(a)(21) and (22) | –0206, –0445, and –0514. |
| 679.7(b)(2) | –0206. |
| 679.7(d) | –0269. |
| 679.7(f) | –0269 and –0272. |
| 679.7(f)(8)(ii) | –0272 and –0334. |
| 679.7(i) | –0334. |
| 679.7(k) | –0393. |
| 679.7(l) | –0513. |
| 679.7(n) | –0545. |
| 679.7(n)(4)(ii) | –0330. |
| 679.7(o) | –0565. |
| * * * * * * * | |

**TITLE 50—WILDLIFE AND FISHERIES**

**CHAPTER VI—FISHERY CONSERVATION AND MANAGEMENT, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE**

## PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 3. 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.

■ 4. In § 679.4,
■ a. Redesignate paragraphs (k)(2)(iii) and (k)(2)(iv) as paragraphs (k)(2)(iv) and (k)(2)(v); and paragraphs (k)(10) through (k)(12) as paragraphs (k)(11) through (k)(13);
■ b. Revise paragraph (k)(3)(i), and paragraph (k)(9) heading;
■ c. Add paragraphs (k)(2)(iii) and (k)(10).

The additions and revisions read as follows:

**§ 679.4 Permits.**

* * * * *

(k) * * *

(2) * * *

(iii) A vessel may use a maximum of five jig machines, one line per jig machine, and a maximum of 30 hooks per line, to conduct directed fishing for license limitation groundfish in the GOA without a groundfish license;

* * * * *

(3) * * *

(i) *Vessel MLOA*—(A) *General.* A license may be used only on a vessel named on the license, a vessel that complies with the vessel designation and gear designation specified on the license, and a vessel that has an LOA less than or equal to the MLOA specified on the license;

(B) *Modification of license MLOA for groundfish licenses with a Pacific cod endorsement in the GOA.* (*1*) A groundfish license with a specified MLOA less than or equal to 50 feet prior to April 21, 2011 that subsequently receives a Pacific cod endorsement in the GOA with a catcher vessel and pot gear designation as specified under paragraph (k)(10) of this section will be redesignated with an MLOA of 50 feet on the date that the Pacific cod endorsement is assigned to that groundfish license;

(*2*) A groundfish license with a specified MLOA greater than or equal to 60 feet:

(*i*) That was continuously assigned to a single vessel less than 60 feet LOA from January 1, 2002, through December 8, 2008; and

(*ii*) That met the landing thresholds applicable for a groundfish license with a specified MLOA of less than 60 feet for the specific gear designation(s) and regulatory area(s) applicable to that groundfish license as described in paragraph (k)(10) of this section, will be redesignated with an MLOA equal to the LOA of the vessel to which that groundfish license was assigned from January 1, 2002, through December 8, 2008, based on the LOA for that vessel in NMFS' non-trawl gear recent participation official record on April 21, 2011, or as specified by a marine survey conducted by an independent certified marine surveyor or naval architect provided that the license holder provides NMFS with a marine survey conducted by an independent certified marine surveyor or naval architect not later than 90 days after April 21, 2011 that specifies the LOA of the vessel to which that groundfish license was assigned.

(*3*) The MLOA specified on a groundfish license under paragraph (k)(3)(i)(B)(*2*) of this section may not exceed 60 feet.

* * * * *

(9) *Pacific cod endorsements in the BSAI.* * * *

(10) *Pacific cod endorsements in the Western and Central GOA*—(i) *General.* In addition to other requirements of this part, and unless specifically exempted in paragraph (k)(10)(iv) of this section, a license holder must have a Pacific cod endorsement on his or her groundfish license to conduct directed fishing for Pacific cod in the Western Gulf of Alaska or Central Gulf of Alaska with hook-and-line gear, pot gear, or jig gear on a vessel using more than five jig machines, more than one line per machine, and more than 30 hooks per line. A license holder can only use the specific non-trawl gear(s) indicated on his or her license to conduct directed fishing for Pacific cod in the Western Gulf of Alaska or Central Gulf of Alaska.

(ii) *Eligibility requirements for a Pacific cod endorsement.* This table provides eligibility requirements for Pacific cod endorsements on an LLP groundfish license:

| If a license holder's license has a * * * | And that license has an MLOA of * * * | And the license holder harvested Pacific cod with * * * | Then the license holder must demonstrate that he or she * * * | From January 1, 2002, through December 8, 2008, in * * * | To receive a Pacific cod endorsement that authorizes harvest in the directed Pacific cod fishery with * * * |
|---|---|---|---|---|---|
| (A) Catcher vessel designation. | < 60 feet ..... | hook-and-line gear. | legally landed at least 10 mt of Pacific cod in the directed Pacific cod fishery. | the Central Gulf of Alaska. | hook-and-line gear in the Central Gulf of Alaska. |
| (B) Catcher vessel designation. | ≥ 60 feet ..... | hook-and-line gear. | legally landed at least 50 mt of Pacific cod in the directed Pacific cod fishery. | the Central Gulf of Alaska. | hook-and-line gear in the Central Gulf of Alaska. |
| (C) Catcher vessel designation. | < 60 feet ..... | hook-and-line gear. | legally landed at least 10 mt of Pacific cod in the directed Pacific cod fishery. | the Western Gulf of Alaska. | hook-and-line gear in the Western Gulf of Alaska. |
| (D) Catcher vessel designation. | ≥ 60 feet ..... | hook-and-line gear. | legally landed at least 50 mt of Pacific cod in the directed Pacific cod fishery. | the Western Gulf of Alaska. | hook-and-line gear in the Western Gulf of Alaska. |
| (E) Catcher vessel designation. | < 60 feet ..... | pot gear ..... | legally landed at least 10 mt of Pacific cod in the directed Pacific cod fishery. | the Central Gulf of Alaska. | pot gear in the Central Gulf of Alaska. |
| (F) Catcher vessel designation. | ≥ 60 feet ..... | pot gear ..... | legally landed at least 50 mt of Pacific cod in the directed Pacific cod fishery. | the Central Gulf of Alaska. | pot gear in the Central Gulf of Alaska. |
| (G) Catcher vessel designation. | < 60 feet ..... | pot gear ..... | legally landed at least 10 mt of Pacific cod in the directed Pacific cod fishery. | the Western Gulf of Alaska. | pot gear in the Western Gulf of Alaska. |

| If a license holder's license has a * * * | And that license has an MLOA of * * * | And the license holder harvested Pacific cod with * * * | Then the license holder must demonstrate that he or she * * * | From January 1, 2002, through December 8, 2008, in * * * | To receive a Pacific cod endorsement that authorizes harvest in the directed Pacific cod fishery with * * * |
|---|---|---|---|---|---|
| (H) Catcher vessel designation. | ≥ 60 feet ..... | pot gear ..... | legally landed at least 50 mt of Pacific cod in the directed Pacific cod fishery. | the Western Gulf of Alaska. | pot gear in the Western Gulf of Alaska. |
| (I) Catcher vessel designation. | any ..... | jig gear ..... | at least one legal landing of Pacific cod in the directed Pacific cod fishery. | the Central Gulf of Alaska. | jig gear in the Central Gulf of Alaska. |
| (J) Catcher vessel designation. | any ..... | jig gear ..... | at least one legal landing of Pacific cod in the directed Pacific cod fishery. | the Western Gulf of Alaska. | jig gear in the Western Gulf of Alaska. |
| (K) Catcher/Processor vessel designation. | any ..... | hook-and-line gear. | legally landed at least 50 mt of Pacific cod in the directed Pacific cod fishery. | the Central Gulf of Alaska. | hook-and-line gear in the Central Gulf of Alaska. |
| (L) Catcher/Processor vessel designation. | any ..... | hook-and-line gear. | legally landed at least 50 mt of Pacific cod in the directed Pacific cod fishery. | the Western Gulf of Alaska. | hook-and-line gear in the Western Gulf of Alaska. |
| (M) Catcher/Processor vessel designation. | any ..... | pot gear ..... | legally landed at least 50 mt of Pacific cod in the directed Pacific cod fishery. | the Central Gulf of Alaska. | pot gear in the Central Gulf of Alaska. |
| (N) Catcher/Processor vessel designation. | any ..... | pot gear ..... | legally landed at least 50 mt of Pacific cod in the directed Pacific cod fishery. | the Central Gulf of Alaska. | pot gear in the Central Gulf of Alaska. |
| (O) Catcher/Processor vessel designation. | any ..... | jig gear ..... | at least one legal landing in the directed Pacific cod fishery. | the Central Gulf of Alaska. | jig gear in the Central Gulf of Alaska. |
| (P) Catcher/Processor vessel designation. | any ..... | jig gear ..... | at least one legal landing in the directed Pacific cod fishery. | the Western Gulf of Alaska. | jig gear in the Western Gulf of Alaska. |

(iii) *Explanations for Pacific cod endorsements.* (A) All eligibility amounts in the table at paragraph (k)(10)(ii) of this section will be determined based on round weight equivalents.

(B) NMFS shall assign a legal landing to a groundfish license in an area based only on information contained in the official record described in paragraph (k)(10)(v) of this section.

(C) Notwithstanding the eligibility amount in the table at paragraph (k)(10)(ii) of this section, NMFS shall assign a non-trawl Pacific cod endorsement with a catcher/processor and a hook-and-line gear designation in the regulatory areas specified to those groundfish licenses listed in Table 49 to part 679;

(D) If a groundfish license meets the criteria described in paragraph (k)(3)(i)(B)(*2*) of this section and NMFS has redesignated the MLOA of that groundfish license based on those criteria, then NMFS may assign a non-trawl Pacific cod endorsement with the specific gear designation(s) and regulatory area(s) applicable to the redesignated MLOA of that groundfish license based on the eligibility criteria established in paragraph (k)(10)(ii) of this section; and

(E) NMFS may issue groundfish licenses with non-trawl Pacific cod endorsements to CQEs as specified in paragraph (k)(10)(vi) of this section.

(iv) *Exemptions to Pacific cod endorsements.* Any vessel exempted from the License Limitation Program at paragraph (k)(2) of this section.

(v) *Non-trawl gear recent participation official record.* (A) The official record will contain all information used by the Regional Administrator to determine the following:

(*1*) The number of legal landings and amount of legal landings assigned to a groundfish license for purposes of the non-trawl gear designation participation requirements described in paragraph (k)(10)(ii) of this section;

(*2*) All other relevant information necessary to administer the requirements described in paragraphs (k)(3)(i)(B) and (k)(10) of this section.

(B) The official record is presumed to be correct. A groundfish license holder has the burden to prove otherwise.

(C) Only legal landings as defined in § 679.2 and documented on State of Alaska fish tickets or NMFS weekly production reports will be used to assign legal landings to a groundfish license.

(D) If more than one groundfish license holder is claiming the same legal landing because their groundfish license designated the vessel at the time that the legal landing was made, then each groundfish license for which the legal landing is being claimed will be credited with the legal landing.

(E) The Regional Administrator will specify by letter a 30-day evidentiary period during which an applicant may provide additional information or evidence to amend or challenge the information in the official record. A person will be limited to one 30-day evidentiary period. Additional information or evidence received after the 30-day evidentiary period specified in the letter has expired will not be considered for purposes of the initial administrative determination (IAD).

(F) The Regional Administrator will prepare and send an IAD to the applicant following the expiration of the 30-day evidentiary period if the Regional Administrator determines that the information or evidence provided by the person fails to support the person's claims and is insufficient to rebut the presumption that the official record is correct, or if the additional information, evidence, or revised application is not provided within the time period specified in the letter that notifies the applicant of his or her 30-day evidentiary period. The IAD will indicate the deficiencies with the information, or with the evidence submitted in support of the information. The IAD will also indicate which claims cannot be approved based on the available information or evidence. A person who receives an IAD may appeal pursuant to § 679.43. A person who

avails himself or herself of the opportunity to appeal an IAD will receive a non-transferable license pending the final resolution of that appeal, notwithstanding the eligibility of that applicant for some claims based on consistent information in the official record.

(vi) *Issuance of non-trawl groundfish licenses to CQEs.* (A) Each CQE that has been approved by the Regional Administrator under the requirements of § 679.41(l)(3) to represent a community listed in Table 50 to part 679 may apply to receive groundfish licenses on behalf of the communities listed in Table 50 to part 679 that CQE is designated to represent. In order to receive a groundfish license, a CQE must submit a complete application for a groundfish license to the Regional Administrator, NMFS, P.O. Box 21668, Juneau, AK 99802. A CQE may not apply for, and may not receive, more than the maximum amount of groundfish licenses designated in the regulatory area specified for a community listed in Table 50 to part 679.

(B) The application for a CQE to receive a groundfish license must include:

(*1*) Name of contact person(s) for the CQE, NMFS person number, permanent business mailing addresses, business phone, business e-mail, and business fax;

(*2*) A statement describing the procedures that will be used to determine the distribution of LLP licenses to residents of the community represented by that CQE;

(*3*) Procedures used to solicit requests from residents to be assigned an LLP license;

(*4*) Criteria used to determine the distribution of the use of LLP licenses among qualified community residents and the relative weighting of those criteria; and

(*5*) The gear designation of groundfish license for which the CQE is applying provided that the community for which the CQE is applying is eligible to receive a groundfish license designated for the Central Gulf of Alaska and the application to receive a groundfish license has been received by NMFS not later than six months after April 21, 2011.

(C) A groundfish license approved for issuance to a CQE by the Regional Administrator for a community listed in Table 50 to part 679:

(*1*) May not be transferred to any person from the CQE;

(*2*) Will have only the regional designation specified for that community as listed in Table 50 to part 679;

(*3*) Will have an MLOA of 60 feet specified on the license;

(*4*) Will have only a catcher vessel designation;

(*5*) Will receive only a non-trawl gear endorsement;

(*6*) Will be assigned a Pacific cod endorsement with a non-trawl gear designation as specified in paragraph (k)(10)(vi)(D) of this section.

(*7*) May not be assigned to any vessel other than the vessel specified for that groundfish license in the annual CQE authorization letter;

(*8*) May not be assigned for use by any person(s) other than the person(s) specified for that groundfish license in the annual CQE authorization letter, or any subsequent amendment to that authorization letter that is made by the CQE provided that NMFS receives that amendment prior to that person using that groundfish license aboard a vessel; and

(*9*) May not be assigned to more than one vessel per calendar year.

(D) The CQE must provide a copy of the annual CQE authorization letter, and any subsequent amendment to that authorization letter that is made by the CQE to NMFS and the vessel operator prior to the person(s) designated in the authorization letter using that groundfish license aboard a vessel. The vessel operator must maintain a copy of the annual CQE authorization letter, and any subsequent amendment to that authorization letter that is made by the CQE onboard the vessel when that vessel is directed fishing for Pacific cod under the authority of that groundfish license. The authorization letter, and any subsequent amendment to that authorization letter must be sent to the Regional Administrator, NMFS, P.O. Box 21668, Juneau, AK 99802.

(E) The CQE must attest in the annual CQE authorization letter, or any subsequent amendment to that authorization letter, that the person(s) using a groundfish license issued to a CQE:

(*1*) Is a citizen of the United States;

(*2*) Has maintained a domicile in a CQE community in the Central GOA or Western GOA eligible to receive an LLP license endorsed for Pacific cod for the 12 consecutive months immediately preceding the time when the assertion of residence is made; and

(*3*) Is not claiming residency in another community, state, territory, or country, except that residents of the Village of Seldovia shall be considered to be eligible community residents of the City of Seldovia for the purposes of eligibility to serve as an authorized person.

(F) Non-trawl Pacific cod gear endorsements on groundfish licenses approved for issuance to CQEs by the Regional Administrator shall have the following gear designations:

(*1*) NMFS will issue only pot gear Pacific cod endorsements for groundfish licenses with a Western Gulf of Alaska designation to CQEs on behalf of a community listed in Table 50 to part 679.

(*2*) NMFS will issue either a pot gear or a hook-and-line gear Pacific cod endorsement for a groundfish license with a Central Gulf of Alaska designation to CQEs on behalf of a community listed in Table 50 to part 679 based on the application for a groundfish license as described in paragraph (k)(10)(vi)(B) of this section provided that application is received by NMFS not later than six months after April 21, 2011. If an application to receive a groundfish license with a Central Gulf of Alaska designation on behalf of a community listed in Table 50 to part 679 is received later than six months after April 21, 2011, NMFS will issue an equal number of pot gear and hook-and-line gear Pacific cod endorsements for a groundfish license issued to the CQE on behalf of a community listed in Table 50 to part 679. In cases where the total number of groundfish licenses issued on behalf of a community listed in Table 50 to part 679 is not even, NMFS will issue one more groundfish license with a pot gear Pacific cod endorsement than the number of groundfish licenses with a hook-and-line gear Pacific cod endorsement.

(G) By January 31, the CQE shall submit a complete annual report on use of groundfish licenses issued to the CQE for the prior fishing year for each community represented by the CQE to the Regional Administrator, NMFS, P.O. Box 21668, Juneau, AK 99802, and to the governing body of each community represented by the CQE as identified in Table 21 to this part. A complete annual report contains the following information:

(*1*) The number of community residents requesting a groundfish license;

(*2*) A description of the distribution of groundfish licenses among community residents;

(*3*) Vessels assigned to use the groundfish licenses;

(*4*) The number and residency of crew employed on a vessel using the LLP license; and

(*5*) Any payments made to CQEs for use of the LLP licenses. Consistent with

the timeline required for submission of the CQE annual report for the use of halibut and sablefish IFQ, these annual reports are due by January 31 for the prior fishing year for each community represented by the CQE.

* * * * *

■ 5. In § 679.7,

■ A. Paragraphs (a)(7)(vii) through (a)(7)(ix) are added;

■ B. Paragraph (i)(1)(i) is revised;

■ C. Paragraph (i)(1)(v) is added; and

■ D. Paragraph (i)(10) is added

The additions and revisions read as follows:

**§ 679.7 Prohibitions.**

* * * * *

(a) * * *

(7) * * *

(vii) Operate a vessel in the "inshore component of the GOA" as defined in § 679.2 during a calendar year if that vessel is used to directed fish for Pacific cod under the authority of a groundfish license with a Pacific cod endorsement in the regulatory area listed in Table 49 to part 679.

(viii) Use a vessel operating under the authority of a groundfish license with a Pacific cod endorsement to directed fish for Pacific cod in the GOA apportioned to the inshore component of the GOA as specified under § 679.20(a)(6) if that vessel has directed fished for Pacific cod in the GOA apportioned to the offshore component of the GOA during that calendar year.

(ix) Use a vessel operating under the authority of a groundfish license with a Pacific cod endorsement to directed fish for Pacific cod in the GOA apportioned to the offshore component of the GOA as specified under § 679.20(a)(6) if that vessel has directed fished for Pacific cod in the GOA apportioned to the inshore component of the GOA during that calendar year.

* * * * *

(i) * * *

(1) * * *

(i) Hold more than 10 groundfish licenses in the name of that person at any time, except as provided in paragraphs (i)(1)(iii) and (i)(1)(v) of this section;

* * * * *

(v) The CQE representing the City of Sand Point may not hold more than 14 groundfish licenses.

* * * * *

(10) Operate a vessel under the authority of an LLP license issued to a CQE to directed fish for Pacific cod in the GOA if the person specified for that groundfish license in the annual CQE authorization letter, or any subsequent amendment to that authorization letter, is not onboard the vessel.

* * * * *

■ 6. Tables 49 and 50 to Part 679 are added to read as follows:

TABLE 49 TO PART 679—GROUNDFISH LICENSES QUALIFYING FOR HOOK-AND-LINE CATCHER/PROCESSOR ENDORSEMENT EXEMPTION

| Groundfish license * * * | Shall receive a Pacific cod endorsement with a catcher/processor and a hook-and-line designation in the following regulatory area(s) * * * |
|---|---|
| LLG 1400 ..... | Central Gulf of Alaska. |
| LLG 1713 ..... | Central Gulf of Alaska. |
| LLG 1785 ..... | Central Gulf of Alaska. |
| LLG 1916 ..... | Central Gulf of Alaska. |
| LLG 2112 ..... | Central Gulf of Alaska and Western Gulf of Alaska. |
| LLG 2783 ..... | Central Gulf of Alaska. |
| LLG 2892 ..... | Central Gulf of Alaska. |
| LLG 2958 ..... | Central Gulf of Alaska. |
| LLG 3616 ..... | Central Gulf of Alaska. |
| LLG 3617 ..... | Central Gulf of Alaska. |
| LLG 3676 ..... | Central Gulf of Alaska. |
| LLG 4823 ..... | Central Gulf of Alaska. |
| LLG 2081 ..... | Western Gulf of Alaska. |
| LLG 3090 ..... | Western Gulf of Alaska. |

TABLE 50 TO PART 679—MAXIMUM NUMBER OF GROUNDFISH LICENSES AND THE REGULATORY AREA SPECIFICATION OF GROUNDFISH LICENSES THAT MAY BE GRANTED TO CQES REPRESENTING SPECIFIC GOA COMMUNITIES

| Central GOA Pacific cod endorsed non-trawl groundfish license | | Western GOA Pacific cod endorsed non-trawl groundfish license | |
|---|---|---|---|
| Community | Maximum number of groundfish licenses that may be granted | Community | Maximum number of groundfish licenses that may be granted |
| Akhiok | 2 | Ivanof Bay | 2 |
| Chenega Bay | 2 | King Cove | 9 |
| Chignik | 3 | Perryville | 2 |
| Chignik Lagoon | 4 | Sand Point | 14 |
| Chignik Lake | 2 | | |
| Halibut Cove | 2 | | |
| Karluk | 2 | | |
| Larsen Bay | 2 | | |
| Nanwalek | 2 | | |
| Old Harbor | 5 | | |
| Ouzinkie | 9 | | |
| Port Graham | 2 | | |
| Port Lions | 6 | | |
| Seldovia | 8 | | |
| Tyonek | 2 | | |
| Tatitlek | 2 | | |
| Yakutat | 3 | | |

[FR Doc. 2011–6723 Filed 3–21–11; 8:45 am]

**BILLING CODE 3510–22–P**

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Part 230

### General Rules and Regulations, Securities Act of 1933

*CFR Correction*

In Title 17 of the Code of Federal Regulations, Parts 200 to 239, revised as of April 1, 2010, on page 686, in § 230.501, following paragraph (e)(3), reinstate the Note to paragraph (e) to read as follows:

**§ 230.501 Definitions and terms used in Regulation D.**

* * * * *

(e) * * *

**NOTE**: The issuer must satisfy all the other provisions of Regulation D for all purchasers whether or not they are included in calculating the number of purchasers. Clients of an investment adviser or customers of a broker or dealer shall be considered the "purchasers" under Regulation D regardless of the amount of discretion given to the investment adviser or broker or dealer to act on behalf of the client or customer.

* * * * *

[FR Doc. 2011–6830 Filed 3–21–11; 8:45 am]

**BILLING CODE 1505–01–D**

## DEPARTMENT OF HOMELAND SECURITY

### Bureau of Customs and Border Protection

## DEPARTMENT OF THE TREASURY

### 19 CFR Part 141

### Entry of Merchandise

*CFR Correction*

In Title 19 of the Code of Federal Regulations, Parts 141 to 199, revised as of April 1, 2010, on page 6, the second general authority citation for part 141 is removed.

[FR Doc. 2011–6840 Filed 3–21–11; 8:45 am]

**BILLING CODE 1505–01–D**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 179

**[Docket No. FDA–1999–F–0056; Formerly Docket No. 1999F–4372]**

### Irradiation in the Production, Processing, and Handling of Food; Confirmation of Effective Date

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

**ACTION:** Final rule; denial of requests for a stay of effective date and for a hearing; response to objections; confirmation of effective date.

**SUMMARY:** The Food and Drug Administration (FDA) is denying requests for a hearing on the final rule that amended the food additive regulations to provide for the safe use of ionizing radiation for the control of *Vibrio* species and other foodborne pathogens in fresh or frozen molluscan shellfish. After reviewing objections to the final rule and requests for a hearing, FDA has concluded that the objections do not justify a hearing or otherwise provide a basis for revoking the regulation. FDA also is denying the request for a stay of the effective date of the amendment to the food additive regulations.

**DATES:** The August 16, 2005, effective date for the final rule published at 70 FR 48057 is confirmed.

**FOR FURTHER INFORMATION CONTACT:** Lane A. Highbarger, Center for Food Safety and Applied Nutrition (HFS–255), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1204.

**SUPPLEMENTARY INFORMATION:**

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### I. Introduction

FDA published a notice in the **Federal Register** of October 19, 1999 (64 FR 56351), announcing the filing of a food additive petition (FAP 9M4682) by the National Fisheries Institute and the Louisiana Department of Agriculture and Forestry. In the **Federal Register** of August 16, 2005 (70 FR 48057), FDA issued a final rule permitting the irradiation of fresh or frozen molluscan shellfish for the control of *Vibrio* spp. and other food-borne pathogens. FDA based its decision on data in the petition and in its files. In the preamble to the final rule, FDA outlined the basis for its decision and responded to questions raised in several comments from Public Citizen and the Center for Food Safety (PC/CFS). The preamble to the final rule advised that objections to the final rule and requests for a hearing were due within 30 days of the publication date (*i.e.,* by September 15, 2005).

### II. Objections, Requests for a Hearing, and Requests for a Stay

Section 409(f)(1) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 348(f)(1)) provides that, within 30 days after publication of an order relating to a food additive regulation, any person adversely affected by such order may file objections, specifying with particularity the provisions of the order "deemed objectionable, stating reasonable grounds therefore, and requesting a public hearing upon such objections."

Under part 171 (21 CFR part 171) in § 171.110 of the food additive regulations, objections and requests for a hearing are governed by part 12 (21 CFR part 12) of FDA's regulations. Under § 12.22(a), each objection must meet the following conditions: (1) Must be submitted on or before the 30th day after the date of publication of the final rule; (2) must be separately numbered; (3) must specify with particularity the provision of the regulation or proposed order objected to; (4) must specifically state each objection on which a hearing is requested; failure to request a hearing on an objection constitutes a waiver of the right to a hearing on that objection; and (5) must include a detailed description and analysis of the factual information to be presented in support of the objection if a hearing is requested; failure to include a description and analysis for an objection constitutes a waiver of the right to a hearing on that objection.

Following publication of the final rule permitting the irradiation of fresh or frozen molluscan shellfish for the

control of *Vibrio* spp. and other food borne pathogens, FDA received numerous submissions within the 30-day objection period. All but two of these timely submissions express general opposition to the final rule, and are form letters urging the FDA to conduct additional studies on irradiating molluscan shellfish specifically and food in general. Although most of these letters request a hearing, no evidence is identified in support of these objections that could be considered in an evidentiary hearing (§ 12.22(a)(5)). Therefore, they have waived their right to a hearing. The Agency will not discuss these submissions further. FDA received two submissions that met the requirements of § 12.22(a), One of these two submissions is a letter sent jointly by PC/CFS containing 10 numbered objections to the final rule and requesting a hearing on each one. The second is a letter sent by Samuel Epstein (Dr. Epstein), containing six numbered objections, requesting a hearing on each. All but one of the issues raised by Dr. Epstein are identical to certain of those raised in the PC/CFS submission. Both PC/CFS and Dr. Epstein also requested a stay of action on the final rule. FDA addresses the PC/CFS and Dr. Epstein objections and hearing requests in section IV of this document.

FDA also received a large number of submissions after the close of the objection period; their content was identical or similar to the form letters expressing general opposition to the final rule. These tardy submissions failed to satisfy the requirements of 21 U.S.C. 348(f)(1) and need not be considered further by the Agency (*see ICMAD* v. *HEW,* 574 F.2d 553, 558 n.8 (DC Cir), *cert. denied,* 439 U.S. 893 (1978)).

Additionally, most of the issues raised in the PC/CFS and Dr. Epstein objections are similar or identical to issues that have been raised previously and that have been previously addressed in the rule being objected to (70 FR 48057) and in other Agency rulemaking concerning irradiation. The Agency will address these issues briefly; please refer to the cited **Federal Register** documents for a more comprehensive discussion.

## III. Standards for Granting a Hearing

Specific criteria for deciding whether to grant or deny a request for a hearing are set out in § 12.24(b). Under that regulation, a hearing will be granted if the material submitted by the requester shows, among other things, the following: (1) There is a genuine and substantial factual issue for resolution at a hearing; a hearing will not be granted on issues of policy or law; (2) the factual issue can be resolved by available and specifically identified reliable evidence; a hearing will not be granted on the basis of mere allegations or denials or general descriptions of positions and contentions; (3) the data and information submitted, if established at a hearing, would be adequate to justify resolution of the factual issue in the way sought by the requestor; a hearing will be denied if the data and information submitted are insufficient to justify the factual determination urged, even if accurate; and (4) resolution of the factual issue in the way sought by the person is adequate to justify the action requested; a hearing will not be granted on factual issues that are not determinative with respect to the action requested (*e.g.,* if the action would be the same even if the factual issue were resolved in the way sought).

A party seeking a hearing is required to meet a "threshold burden of tendering evidence suggesting the need for a hearing" (*Costle* v. *Pacific Legal Foundation,* 445 U.S. 198, 214–215 (1980), *reh. denied,* 446 U.S. 947 (1980), citing *Weinberger* v. *Hynson, Westcott & Dunning, Inc.,* 412 U.S. 609, 620–621 (1973)). An allegation that a hearing is necessary to "sharpen the issues" or to "fully develop the facts" does not meet this test (*Georgia Pacific Corp.* v. *U.S. EPA,* 671 F.2d 1235, 1241 (9th Cir. 1982)). If a hearing request fails to identify any factual evidence that would be the subject of a hearing, there is no point in holding one. In judicial proceedings, a court is authorized to issue summary judgment without an evidentiary hearing whenever it finds that there are no genuine issues of material fact in dispute and a party is entitled to judgment as a matter of law (*see* Rule 56, Federal Rules of Civil Procedure). The same principle applies in administrative proceedings (*see* § 12.28).

A hearing request must not only contain evidence, but that evidence should raise a material issue of fact concerning which a meaningful hearing might be held (*Pineapple Growers Association* v. *FDA,* 673 F.2d 1083, 1085 (9th Cir. 1982)). Where the issues raised in the objection are, even if true, legally insufficient to alter the decision, the Agency need not grant a hearing (*see Dyestuffs and Chemicals, Inc.* v. *Flemming,* 271 F.2d 281, 286 (8th Cir. 1959), *cert. denied,* 362 U.S. 911 (1960)). FDA need not grant a hearing in each case where an objector submits additional information or posits a novel interpretation of existing information (*see United States* v. *Consolidated Mines & Smelting Co.,* 455 F.2d 432 (9th Cir. 1971)). In other words, a hearing is justified only if the objections are made in good faith and if they "draw in question in a material way the underpinnings of the regulation at issue" (*Pactra Industries* v. *CPSC,* 555 F.2d 677 (9th Cir. 1977)). Finally, courts have uniformly recognized that a hearing need not be held to resolve questions of law or policy (*see Citizens for Allegan County, Inc.* v. *FPC, 414 F.2d 1125 (DC Cir. 1969); Sun Oil Co.* v. *FPC,* 256 F.2d 233, 240 (5th Cir.), *cert. denied,* 358 U.S. 872 (1958)).

Even if the objections raise material issues of fact, FDA need not grant a hearing if those same issues were adequately raised and considered in an earlier proceeding. Once an issue has been so raised and considered, a party is estopped from raising that same issue in a later proceeding without new evidence. The various judicial doctrines dealing with finality can be validly applied to the administrative process. In explaining why these principles "self evidently" ought to apply to an Agency proceeding, the U.S. Court of Appeals for the District of Columbia Circuit wrote: "The underlying concept is as simple as this: Justice requires that a party have a fair chance to present his position. But overall interests of administration do not require or generally contemplate that he will be given more than a fair opportunity." *Retail Clerks Union, Local 1401* v. *NLRB,* 463 F.2d 316, 322 (DC Cir. 1972). (*See Costle* v. *Pacific Legal Foundation, supra* at 215–220. *See* also *Pacific Seafarers, Inc* . v. *Pacific Far East Line, Inc.,* 404 F.2d 804 (DC Cir. 1968), *cert. denied,* 393 U.S. 1093 (1969)).

## IV. Analysis of Objections and Response to Hearing Requests

The letter from PC/CFS contains 10 numbered objections and requests a hearing on each of them. The letter from Dr. Epstein includes six numbered objections and requests a hearing on each. The issues raised in five of the six objections in the letter from Dr. Epstein are identical to issues raised in the letter from PC/CFS; in those cases, the issues will be considered together. FDA addresses each of the objections, as well as the evidence and information filed in support of each, comparing each objection and the information submitted in support of it to the standards for granting a hearing in § 12.24(b) as follows:.

### *A. Studies on Animals Fed Clams*

One objection raised by PC/CFS and Dr. Epstein states that the Agency failed

to consider two animal feeding studies that include toxicological evidence of harmful effects from consumption of irradiated molluscan shellfish. In support of this objection, PC/CFS submitted copies of brief summary reports of the two studies.

The first study is a 1976 reproduction study [1] in which irradiated (4 kiloGray (kGy) and 8 kGy) soft-shell clams were fed to chickens for 2 years. In a note appended to the summary report, the study authors state that the study was replicated (for differing durations) in the F1 and F2 generation birds (*i.e.,* the second and third generation birds bred from the parent generation used in the original study). The objection notes that FDA did not include this study on chickens in the Agency's September 15, 1982, master bibliography of more than 400 studies on the safety of irradiated foods and, that therefore, this study was not assessed by the Task Group for the Review of Toxicology Data on Irradiated Food.[2]

The objection goes on to describe certain of the reported results from the study on chickens, specifically results in the F1 and F2 generations, including the following: Higher hemoglobin values and smaller gonad weights in males of the F1 generation fed irradiated clams; and a decrease in "hatchability" of eggs, enlargement of kidneys in females (an effect that increased with increasing irradiation dose), decreases in egg fertility and embryonic viability, and lower body weights in females, in the F2 generation.

FDA acknowledges that this study was not included in the inventory of studies reviewed by the Bureau of Foods Irradiated Food Task Group in the early 1980s, and agrees that the endpoints cited in the objection were reported by the study authors. However, the Agency does not agree that FDA's failure to assess the study calls into question the safety of irradiated molluscan shellfish, as the objectors contend. The objection fails to note that many of the findings cited in the experimental report were observed both in chickens fed irradiated clams and in chickens fed unirradiated clams, and that the report discusses the need to supplement the diets of the clam-fed chickens with thiamine. Therefore, the observed effects may have been related to the nutritional effects of feeding diets consisting of 50 percent wet-weight of soft-shell clams to chickens. More importantly, if the negative effects cited by the objectors were due to the consumption of irradiated food, one would expect the findings to be reproducible in other studies on irradiated foods; however, such reproducibility is not seen in the large number of feeding studies that have been reviewed by FDA.

The objection also cites a second paper by the same researchers [3] describing a study on feeding clams irradiated at 4 kGy or 8 kGy to beagle dogs. According to the objection, the study showed a significant inverse correlation between the irradiation dose applied to the clams and the blood urea nitrogen (BUN) level of male dogs fed on them. PC/CFS and Dr. Epstein both go on to state that "[t]hough the researchers did not speculate, low blood urea nitrogen levels are usually a symptom of liver damage."

The Agency included this beagle dog study in the review of toxicology studies conducted in the early 1980s. The FDA reviewer noted the reported BUN results and also noted that, although the researchers indicated that organs were weighed and examined histopathologically, no results of the histopathological examination were included in the report. This suggests that the researchers did not find any evidence of liver (or other organ) damage, and in fact the study report includes no information that supports the objectors' contention that liver damage was an underlying condition in the animals tested. Furthermore, the Agency, as part of its rulemaking pertaining to the irradiation of meat and meat products, re-examined the findings reported in this study. As stated in the December 3, 1997, final rule (62 FR 64107 at 64113), FDA concluded that the decrease in BUN levels in this study was not of toxicological significance, and laid out its reasoning in that document and in a memorandum to the record (Ref. 1). Thus, the Agency disagrees with PC/CFS' and Dr. Epstein's contention that this study "* * * found serious toxicity concerns associated with irradiated molluscan shellfish."

A hearing will be denied if the data and information are insufficient to justify the factual determination urged, even if accurate (§ 12.24(b)(3)). FDA concludes the data and information are insufficient and, therefore, FDA is denying the request for a hearing on this issue.

*B. Microbiologic Safety of Molluscan Shellfish*

PC/CFS' second objection asserts that the final rule fails to ensure that the irradiation of molluscan shellfish will result in a product that is microbiologically safe. In support of this objection, PC/CFS cites a 1996 PhD dissertation by Dustin W. Dixon on the effects of irradiation on *Vibrio vulnificus* in shellstock oysters (raw oysters in their shell) harvested in Florida and Texas (Ref. 2). The objection states that there is a potential for microbial outgrowth post-irradiation, and cites Dixon's observation that the *V. vulnificus* count in oysters irradiated at 1.0 kGy and 3.0 kGy rose nearly to the level of that in unirradiated oysters after 2 and 9 days of storage, respectively. The objection states that Dixon concluded that "* * * irradiation processing cannot be considered as a method to sterilize shellstock oysters, and provide a shelf-stable product."

The objection also notes the potential for improper temperature control of irradiated molluscan shellfish prior to consumption by the consumer. The objection states that there is no guarantee that temperature conditions will be properly maintained and asserts that FDA is assuming that Hazard Analysis and Critical Control Point (HACCP) plans [4] will ensure consistent and adequate temperature control.

As noted by PC/CFS, the Dixon dissertation was submitted to the Agency as part of the molluscan shellfish petition. The stated objectives of the research presented in that document were to determine the effects of gamma irradiation on Florida and Texas shellstock oysters in terms of shelf life and microbial consequences. FDA does not dispute the findings of Dr. Dixon, and agrees that irradiation of molluscan shellfish to an absorbed dose of 5.5 kGy will not sterilize molluscan shellfish or create a shelf-stable product. FDA also agrees with Dr. Dixon's conclusion in his dissertation that irradiation may not be sufficient by itself to eliminate *V. vulnificus* in molluscan shellfish and that proper conditions of storage must be maintained after shellfish have been irradiated.

FDA disagrees, however, with PC/CFS' assertion that the final rule must "[en]sure the microbiological safety of fresh oysters." The standards for microbiological safety of molluscan

[1] Fegley, H.C. and Edmonds, R.E., in Food Irradiation Information, International Project in the Field of Food Irradiation, Karlsuhe, Germany, No. 6 (Supplement), 113–115, June 1976.

[2] The Bureau of Foods Irradiated Food Task Group consisted of toxicologists in the Bureau of Foods who reviewed many studies on food irradiation in the early 1980s.

[3] Fegley, H.C. and Edmonds, R.E., in Food Irradiation Information, International Project in the Field of Food Irradiation, Karlsruhe, Germany, No. 6 (Supplement), 111–112, June, 1976.

[4] FDA has established regulations for seafood HACCP in 21 CFR part 123.

shellfish are independent of the final rule permitting the irradiation of molluscan shellfish. Irradiation is but one measure for the control of *Vibrio* spp. and other food-borne pathogens. The rule is not predicated on the approved treatment, by itself, resulting in shellfish that are sterile or shelf-stable. A hearing will not be granted on factual issues that are not determinative with respect to the action requested (§ 12.24(b)(4)). Therefore, FDA is denying the request for a hearing based on this objection.

*C. Reasonable Certainty of No Harm*

PC/CFS' third objection states that "there is no reasonable certainty in the minds of competent scientists that irradiation is not harmful as applied to molluscan shellfish." In support of this objection, PC/CFS makes several assertions. First, PC/CFS refers to several sets of comments that it submitted to the docket for the molluscan shellfish rulemaking. PC/CFS states that those comments cite 11 "peer-reviewed papers or other publications stating safety concerns associated with irradiated foods" and that these comments refer to "at least 25 other highly 'competent' Ph.D.s or MDs who have stated that they have safety concerns in published literature." The objection states that, although these comments and papers refer to irradiation of food types other than molluscan shellfish, the Agency should have specifically considered the statements of these authors. Second, PC/CFS asserts that FDA misstated what is contained in its literature reference numbered as "Ref 20" in the final rule. Third, PC/CFS, as well as Dr. Epstein, asserts that FDA mischaracterized the findings of the Raltech study. In support of this assertion, PC/CFS submitted a copy of two summary reports from the "Raltech studies" and a 1984 trade press article that quotes Dr. Thayer of USDA. Finally, PC/CFS states that neither FDA's final rule nor the underlying petition actually contains data from, or references to, any toxicity studies on irradiated mollusks.

As evidence that there is not a "reasonable certainty of safety in the minds of competent scientists" PC/CFS notes that they have submitted comments including journal articles and other publications that express concerns with food irradiation. However, the articles do not contain any evidence that could be resolved at a hearing, nor has PC/CFS pointed to any evidence in the cited articles. Nor has PC/CFS pointed to any specific factual information in the cited articles on foods analogous to molluscan shellfish, which the Agency has ignored and which would call into question the Agency's conclusions. A hearing will not be granted on the basis of mere allegations or general descriptions of positions and contentions (§ 12.24(b)(2)). Therefore, FDA is denying the request for a hearing based on this objection.

The Agency agrees that reference 20 as cited in the final rule is incorrect. The proper reference is: S.G. Armstrong, S.G. Wylie, and D. N. Leach, "Effects of Preservation by Gamma Irradiation on the Nutritional Quality of Australian Fish," *Food Chemistry* 50 (1994) 351–357. This error does not demonstrate a lack of reasonable certainty of safety. A hearing will be denied if the information submitted is insufficient to justify the factual determination urged (§ 12.24(b)(3)).

The Agency disagrees with PC/CFS' and Dr. Epstein's assertion that the final rule mischaracterizes the findings of the "Raltech study." The Raltech studies were sponsored by the United States Department of Agriculture and conducted by Raltech Scientific Services. In this series of studies, conducted in the late 1970s and early 1980s, irradiation-sterilized chicken (doses ranged from 45–59 kGy) was fed to various types of animals. PC/CFS alleges that there were several negative health effects seen in these studies, including a significant dose-related decrease in the number of offspring of *Drosophila melanogaster* (fruit flies), and a high incidence of testicular tumors and significantly reduced survival in mice.

The Agency evaluated the results of the Raltech studies and has extensively discussed its conclusions regarding these studies in previous rulemaking documents (*see* 51 FR 13376 at 13386, 53 FR 53176 at 53188, and 55 FR 18538 at 18540). The Agency specifically discussed the results of the feeding study in mice and the mutagenicity study in fruit flies (*see, e.g.,* 55 FR 18538 at 18540). The Agency has described its reasoning in finding no evidence in any of the Raltech studies of adverse effects that could be attributed to consumption of irradiation-sterilized chicken. The Agency has found that the quantity and breadth of testing and the number and significance of endpoints assessed would have identified meaningful risks, if any existed. On those few occasions where adverse effects were reported, FDA found that those effects were not attributable to irradiation. PC/CFS does not submit or otherwise identify any factual data that would cause the Agency to alter its conclusions about these studies. Accordingly, FDA is denying the request for a hearing based on this objection (§ 12.24(b)(2)).

Finally, the Agency agrees that there were no toxicological studies conducted using irradiated molluscan shellfish submitted in the petition. As noted in the molluscan shellfish final rule (70 FR 48057 at 48068), the Agency has reviewed a large body of data that are relevant to the assessment of the potential toxicity of irradiated flesh foods. FDA has consistently taken the position that various scientifically validated types of data may properly support a safety determination for a proposed use of a food additive (*see* part 170 (21 CFR part 170) in § 170.20). For example, in the case of food irradiation, the Agency has taken advantage of the extensive research and large body of knowledge concerning the principles of radiation chemistry and the chemical composition of foods. PC/CFS' suggestion that data and information derived from studies of analogous irradiated foods are not sufficient to support a determination that irradiated molluscan shellfish are safe, is unsupported by specific data or other factual information. Further, the question of whether safety has been shown requires the application of the legal standard of safety as defined by FDA's regulations ("reasonable certainty of no harm") to a set of facts (*see* § 170.3(i)). As such, FDA concluded as a matter of law that the proposed use of irradiation to treat fresh and frozen molluscan shellfish with absorbed doses not to exceed 5.5 kGy is safe. A hearing will not be granted on issues of policy or law (§ 12.24(b)(1)). Therefore, FDA is denying the request for a hearing based on this objection.

*D. Factors Unique to Molluscan Shellfish*

PC/CFS objects to the molluscan shellfish final rule on the grounds that the Agency and the underlying petition failed to consider several factors that could make irradiated molluscan shellfish unsafe. These factors are: (1) Safety of irradiated salt water; (2) chemicals that irradiated molluscan shells may 'off-gas' [5]; (3) effects of irradiation on undigested shellfish stomach contents such as plankton and algae; (4) attenuation of irradiation effects from shell thickness (*i.e.,* that thicker shells may attenuate the effectiveness of irradiation); and (5) lack of data on furan creation from the shells. Dr. Epstein also objects on the basis of the issues relating to chemical byproducts from irradiated molluscan

[5] "Off-gassing" refers to volatile chemicals that may be emitted over time from a source.

shells, and the attenuation of irradiation effects from shell thickness.

First, the Agency notes that there is no basis to suggest that the presence of salts in water will affect the irradiation of molluscan shellfish because ionizing radiation, under the petitioned conditions, does not affect inorganic salts (Ref. 3). Second, the objection provides no information to show that mollusk shells (composed of approximately 95 percent calcium carbonate and 5 percent protein), when irradiated, would produce any chemicals that may off-gas into the meat, nor is there any information to suggest that such chemicals, were they to be formed, would render the food unsafe. Third, the objection provides no evidence that the stomach contents of irradiated molluscan shellfish are materially different from any other irradiated food (*i.e.,* composed predominantly of protein, fat, and carbohydrate). Fourth, the Agency agrees that varying shell thickness may attenuate the effectiveness of irradiation, and that this attenuation would increase with shell thickness. However, the objection provides no evidence that would cause the Agency to find that consumption of irradiated molluscan shellfish is not safe. As explained in section IV.B of this document, it is not necessary that irradiation "[en]sure the microbiological safety of fresh oysters." Parties irradiating molluscan shellstock are responsible for ensuring that treated food receives the minimum irradiation dose reasonably required to accomplish its intended technical effect and not more than the maximum dose specified by the applicable regulation (*see* 21 CFR 179.25(b)) . Finally, the Agency discussed the potential generation of furan in the final rule (70 FR 48057 at 48059) and concluded that irradiated molluscan shellfish do not generate furan at a rate that is higher than the background generation of furan in un-irradiated molluscan shellfish (Ref. 4). Although in the final rule the Agency cited data concerning furan formation from shucked oysters, the objection points to no factual data to suggest that irradiation of mollusks in the shell (which is approximately 95 percent calcium carbonate) would lead to furan formation from irradiation of the shell.

A hearing will not be granted on the basis of mere allegations or general descriptions of positions and contentions (§ 12.24(b)(2)). Neither PC/CFS nor Dr. Epstein has provided a basis for a hearing and FDA is denying the request for a hearing on this objection.

*E. Application of 100-Fold Safety Margin for 2-Alkylcyclobutanones*

PC/CFS and Dr. Epstein cite 21 CFR 170.22 [6] and object to the molluscan shellfish final rule (70 FR 48057) on the basis that FDA improperly failed to apply a 100-fold safety factor regarding the production of 2-alkylcyclobutanones (2–ACBs) from the irradiation of esterified fatty acids in considering the safety of irradiated molluscan shellfish. In support of their contention that the Agency should have applied a 100-fold safety factor to 2–ACBs, PC/CFS and Dr. Epstein make several assertions. First, the objection asserts that 2–ACBs are found only in irradiated foods and are known to be potentially toxic at certain concentrations and to promote tumor formation in the presence of known carcinogenic substances. The objection also asserts that the flesh of molluscan shellfish is distinct from that of other flesh foods because it contains a "unique combination" of fatty acids and that these fatty acids, when irradiated, produce a unique combination of 2–ACBs. The objection, therefore, maintains that FDA's reliance on the Raltech study to address concerns about 2–ACBs is flawed because that study involved chicken which has a lower stearic acid content than oysters. Finally, the objection asserts that "there are no adequate long-term safety studies that assist in assessing the overall health hazards that consuming 2–ACBs could pose, including likely variations in sensitivities to 2–ACBs among the human consumer population" and refers particularly to children and other vulnerable populations. In relation to this last point, PC/CFS submitted a publication on the susceptibility of children to environmental substances by William Au.[7]

The applicability of § 170.22 is a legal issue, and a hearing will not be granted on issues of law. The Agency notes that § 170.22 refers to safety factors to be used in determining whether a proposed use of a food additive will be safe. In the present instance, 2–ACBs are not the food additive that is the subject of the rulemaking. Therefore, the 100-fold safety factor discussed in § 170.22 does not apply to 2–ACBs. Further, as noted in the molluscan shellfish final rule (70 FR 48057 at 48066), applying a 100-fold safety factor to a processed food or to individual components of a processed food is not feasible or appropriate.

The Agency agrees that 2–ACBs have been reported to be formed in small quantities as a result of irradiation of fats and that these compounds have been identified in irradiated meat and poultry. In the final rule permitting the irradiation of molluscan shellfish, the Agency described in detail its assessment of the significance of the formation of 2–ACBs to a safety assessment of molluscan shellfish, which like poultry and meat, contain appreciable amounts of triglycerides. This assessment included a discussion of the contentions that 2–ACBs may cause DNA damage and may be tumor promoters at certain concentrations (70 FR 48057 at 48065 to 48067). While the objection repeats assertions made in comments to the final rule about the toxicity of 2–ACBs and the failure of the Agency to apply a 100-fold safety factor for 2–ACBs, the objection includes no new information or analysis that would call into question the Agency's rationale for its decision.

The objection states that molluscan shellfish contain a unique combination of fatty acids that differ from those in poultry, and that therefore, the Agency's reliance on the Raltech study to address concerns about 2–ACBs is flawed. In particular, the objection states that chicken meat contains less stearic acid than do oysters. It is true that the Agency considers the Raltech studies useful in assessing the effects of 2–ACBs in animals fed irradiated flesh foods (70 FR 48057 at 48066). In the Raltech studies, animals were fed chicken irradiated at a dose approximately 10 times the dose permitted in the molluscan shellfish final rule, at a level of 35 percent of the diet, for their lifetime. Thus, although the concentration of stearic acid in chickens is lower than in molluscan shellfish, the amount of 2–ACBs in the diets of the animals in the Raltech studies, including those formed from irradiation of stearic acid is likely to be higher than the amount in the human diet from irradiated molluscan shellfish (70 FR 48057 at 48066). As noted previously, there were no adverse toxicological effects seen in the Raltech studies that could be attributed to the consumption of irradiated chicken. In addition, it is important to note that the Agency has not relied solely on the Raltech studies in concluding that irradiation of molluscan shellfish under the conditions permitted in the final rule is safe. As pointed out in the final rule (70 FR 48057 at 48066), the Agency's review included studies in which animals were

[6] That section provides in relevant part that "[e]xcept where evidence is submitted which justifies use of a different safety factor, a safety factor in applying animal experimentation data to man of 100 to 1, will be used. * * *" 21 CFR 170.22.

[7] Au, W., Susceptibility of Children to Environmental Toxic Substances, *International Journal of Hygiene Environmental Health;* 205:1–3, 2002.

fed diets containing irradiated beef, pork, poultry, horse meat, and fish, and found no evidence of toxicity attributed to the consumption of these foods, which contain various levels and combinations of fatty acids that may potentially form 2–ACBs. The objection has thus misrepresented the basis for the Agency's decision when it contends that the final rule relies on the Raltech studies to discount concerns about 2–ACBs in irradiated molluscan shellfish.

In the molluscan shellfish final rule, the Agency noted that it had reviewed a multitude of studies on irradiated foods that would have contained radiolytic products including 2–ACBs, and which include long-term safety studies. FDA noted that it had previously concluded that "The results of the available toxicological studies of irradiated flesh foods * * * demonstrate that a toxicological hazard is highly unlikely because no toxicologically significant adverse effects attributable to consumption of irradiated flesh foods were observed in any of these studies" (62 FR 64107 at 64114). Although the objection alleges that there are no "adequate long-term safety studies that assist in assessing the overall health hazards that consuming 2–ACBs could pose," the objection provides no factual information to call into question the studies on which the Agency has relied, nor does it provide any new information or data to refute the analysis set out in the molluscan shellfish final rule.

The objection also cites the FDA's "rejection" of the 100-fold safety margin as inappropriate, given the need to "protect children and other vulnerable consumers." The paper by Dr. Au, which was submitted in support of this objection, is a commentary discussing the need to consider data and information that indicate that children are more susceptible to toxic contaminants than are adults in setting guidelines for protecting children's health. The objection provides no evidence to show that the Agency's conclusion that molluscan shellfish, irradiated under the conditions permitted by the regulation, are safe, fails to protect children and other vulnerable consumers. The submitted commentary includes no information or data relevant to the safety of irradiated molluscan shellfish.

In sum, the Agency is denying a hearing on the objection that FDA improperly rejected application of the 100-fold safety factor in § 170.22 to 2–ACBs produced in irradiated molluscan shellfish. The interpretation of the applicability of this regulation is a legal issue, and a hearing will not be granted on issues of law. Moreover, PC/CFS and Dr. Epstein have not presented any evidence supporting their contention that the potential levels of 2–ACBs in irradiated molluscan shellfish may render the food unsafe. PC/CFS' request for a hearing merely alleges that there is potential for harm, without providing any evidence that the Agency has not already considered. An objector must make an adequate proffer of evidence to support its allegations and to show that they provide a basis on which to call into question the Agency's conclusions (§ 12.24(b)(2)). Thus, neither PC/CFS nor Dr. Epstein has provided a basis for a hearing and FDA is denying their requests for a hearing based on this objection.

*F. Alleged Rejection of Published Evidence*

PC/CFS cites their comment submitted on May 14, 2001, and repeats the assertion made in that comment that the Agency ignored or improperly discounted a number of positive *in vivo* and *in vitro* mutagenicity studies, including five peer-reviewed published studies performed by the Indian National Institute of Nutrition (NIN) in which purported mutagenic effects were found in mice, rats, and monkeys, and in malnourished children, consuming freshly-irradiated wheat. In support of the objection, PC/CFS submitted excerpts from 1987 Congressional testimony by S.G. Srikantia, the former Director of NIN, who testified that FDA committed an error of judgment in accepting a report by a committee of Indian scientists discrediting the NIN studies (*see* 53 FR 53176 at 53182). The objection also asserts that FDA neglected to consider a statement made in 1988 by an Australian genotoxicity expert to a Committee of the Australian House of Representatives, stating that the malnourished children study's results seemed reasonable. In addition, the objection refers to two later publications by the NIN researchers rebutting criticisms of the study, and cites a statement by the former Director of NIN stating that the NIN's results were mirrored in a study on hamsters (Ref. 5) that found that polyploidy cells occurred five times more frequently in animals fed irradiated wheat in their diet, and that this increased incidence of polyploidy was related to irradiation dose.

The Agency has previously considered all of the various *in vitro* and *in vivo* mutagenicity studies cited by PC/CFS and discussed its conclusions in detail in previous documents (*see e.g.,* 51 FR 13376 at 13383 and 13385; 53 FR 53176 at 53181–3 and 53191–2; 70 FR 48057 at 48064 and 48067). Several of the studies cited in the comment refer to reports of in vitro mutagenicity of irradiated sugars in solution. The Agency previously has discussed in detail why it has concluded that the irradiation of simple sugars in solution is not a suitable model for predicting and extrapolating toxicity of irradiated foods. In the final rule permitting additional uses of ionizing radiation for the treatment of food, the Agency noted: "In feeding studies where sugars are present in a typically complex food matrix there is no increase in mutagenicity after irradiation. Studies have demonstrated that when a food containing sugars is irradiated, the food does not produce the same toxic effects that occur when these sugars are irradiated in simple solution. Thus, the Agency concluded that irradiated aqueous sugar solutions are unsuitable models for predicting and extrapolating toxicity of irradiated foods and that there is no evidence that radiolytic products from sugars present in irradiated foods cause toxic effects to animals or humans (51 FR 13376 at 13383)."

The objection provides no new evidence or rationale that provides a basis on which to find that FDA's conclusion on the relevance of these studies is incorrect.

The Agency also has previously repeatedly addressed in detail the interpretation of the NIN studies using freshly irradiated wheat and concluded that none of the studies on polyploidy done at NIN were reliable and that the studies do not demonstrate that adverse effects would be caused by ingestion of irradiated foods (51 FR 13376 at 13385; 53 FR 53176 at 53183; 70 FR 48057 at 48068). In the molluscan shellfish final rule, the Agency noted, citing earlier rulemaking: "A committee of Indian scientists critically examined the techniques, the appropriateness of experimental design, the data collected, and the interpretations of NIN scientists who claimed that ingestion of irradiated wheat caused polyploidy in rats, mice, and malnourished children. After careful deliberation, this committee concluded that the bulk of these data are not only mutually contradictory, but are also at variance with well-established facts of biology. The committee was satisfied that once these data were corrected for biases that had given rise to these contradictions, no evidence of increased polyploidy was associated with ingestion of irradiated wheat.

The Agency agreed with the conclusions of the committee of Indian scientists that the studies with irradiated foods do not demonstrate that

adverse effects would be caused by ingesting irradiated foods." (70 FR 48057 at 44067 and 44068)

Dr. Srikantia's testimony states that the FDA was wrong to accept the report of the committee of Indian scientists; he states that NIN has not repudiated the studies on polyploidy and that the Director of NIN submitted a rebuttal to the report of the committee of Indian scientists, and that "[h]ad it seen the Institute's rejoinder to the * * * report, surely, it would have been in a better position to evaluate that report." FDA previously has addressed all issues raised in Dr. Srikantia's testimony (*see e.g.*, 53 FR 53176 at 53182–3). As noted previously (53 FR 53176 at 53183) FDA did not state that NIN had repudiated the studies, nor did it base its own conclusions about the studies on a finding that the data were repudiated by NIN. FDA concluded that the available data from NIN did not provide an appropriate basis on which to conclude that increased polyploidy was caused by ingesting irradiated wheat. Furthermore, FDA in 1986 invited Dr. Srikantia to submit any information to FDA that would be relevant. Dr. Srikantia replied, but did not submit a copy of his rebuttal to the Indian government or any other report (*see* footnote 1, 53 FR 53176 at 53183).

The hamster study by Renner referenced by PC/CFS also has been discussed previously (53 FR 53176 at 53183 and 531834). The study involved the irradiation of hamster diets (composed primarily of carbohydrates) at high doses. The investigator concluded that at doses above 30 kGy there was a "[* * *] transitory effect [* * *] as evidenced by an increased incidence of polyploidy cells" but that "there was no evidence of any mutagenic effect being produced as a result of feeding an irradiated diet." He noted that no effects on incidence of polyploidy were seen at doses below 20 kGy. The objection contains no information that explains why this study is relevant to the molluscan shellfish (composed primarily of protein and fats) irradiated at doses up to 5.5 kGy.

In summary, all of the studies referenced by PC/CFS have been considered previously by FDA and the Agency's rationale for its conclusions on those studies has been discussed at length in previous rulemakings. Neither the objection, nor the testimony of Dr. Srikantia, nor the statement of the Australian expert, includes any new information or data that would refute the Agency's findings about the studies. PC/CFS' request for a hearing merely alleges that there is potential for harm, without providing any evidence that the Agency has not considered previously. An objector must make an adequate proffer of evidence to support its allegations and to show that they provide a basis on which to call into question the Agency's conclusions (§ 12.24(b)(2)). Thus, PC/CFS has not provided a basis for a hearing and FDA is denying PC/CFS' request for a hearing based on this objection.

*G. Alleged Warnings on Potential risks*

PC/CFS' seventh objection alleges that the "FDA misrepresents important published and unpublished warnings from qualified scientists calling for additional research on 2–ACBs."

The Agency previously has addressed the allegations of the potential harm of the long-term consumption of 2–ACBs that are produced from the irradiation of esterified fatty acids (70 FR 48057 at 48066) and the research performed on 2–ACBs. The Agency concluded: "2–ACBs have been reported as radiolysis products of fats (Refs. 6 and 7). Studies performed by researchers have reported that certain alkylcyclobutanones can cause single strand DNA breaks detectable by the COMET assay (Ref. 8). Several animal feeding studies have been conducted with fat-containing foods irradiated at doses far higher than would be used on molluscan shellfish. If 2–ACBs, at the level present in irradiated foods, were of sufficient toxicity to cause significant DNA damage, one would expect to have seen adverse effects in those studies where animals were fed meat as a substantial part of their diet."

The objection provides no additional information on 2–ACBs that the Agency has not addressed previously. The Agency does not consider the statements in the cited papers on 2–ACBs to be warnings; rather, the comments are statements presented by the authors that research should continue on 2–ACBs. These statements do not affect the Agency's determination that 2–ACBs do not cause the food to be unsafe at levels present in irradiated food.

Moreover, PC/CFS' request for a hearing merely alleges that there is potential for harm, without providing any evidence that the Agency has not already considered and determined did not demonstrate a potential for harm. An objector must make an adequate proffer of evidence to support its allegations and to show that they provide a basis on which to call into question the Agency's conclusions (§ 12.24(b)(2)). Thus, PC/CFS has not provided a basis for a hearing and FDA is denying PC/CFS' request for a hearing based on this objection.

*H. Alleged Failure To Follow Critical Guidelines for Food Additives*

PC/CFS and Dr. Epstein allege that FDA failed to follow "critical guidelines" for food additives. Specifically, the objections assert that although use of an irradiation source is statutorily defined as a food additive, 21 U.S.C. section 321(s), the final rule incorrectly characterizes irradiated molluscan shellfish as "processed foods" (70 FR 48057 at 48069), and as such, applied a lower safety standard. Second, the objections cite § 170.20 and assert that the Agency ignored provisions of that regulation. For example, the objections assert that the rule provides no evidence to support FDA's decision to ignore the current National Academy of Sciences-National Research Council (NAS–NRC) publication "Risk Assessment/Safety Evaluation of Food Chemicals" (*see* § 170.20(a)). Also citing § 170.20, the objections assert that the final rule provides no evidence that FDA gave due weight to anticipated levels and patterns of consumption of irradiated molluscan shellfish (*see* § 170.20 (a)). Third, the objections cite § 170.22 and state that the Agency failed to justify not using a 100-fold safety factor in the final rule. Fourth, the objection maintains that FDA failed to comply with the testing protocols set forth in the Redbook.[8] Finally, the objections state that FDA ignored the recommendations put forth in 1980 by the Bureau of Foods Irradiated Foods Committee (BFIFC) regarding the evaluation of irradiated foods.

A source of radiation used to process food is defined as a food additive in section 201(s) of the FD&C Act (21 U.S.C. 321(s)); the exposure of molluscan shellfish to ionizing radiation is what makes irradiated molluscan shellfish a processed food. The FD&C Act requires that a food additive, including a source of radiation used to process food, must be shown to be safe under the proposed conditions of use before the use can be approved. That is, the Agency must find that there is a reasonable certainty that consumption of an irradiated food is not harmful. FDA applied the same standards and guidelines that the Agency uses to evaluate all food additives to evaluate the safety of a source of ionizing radiation used to treat molluscan shellfish. The Agency's reference to

[8] Toxicological Principles for the Safety Assessment of Direct Food Additives and Color Additives Used in Food, "Red Book II," U.S. Food and Drug Administration, Center for Food Safety and Applied Nutrition, (1993, revised 2001).

irradiated molluscan shellfish as a "processed" food in the final rule did not change the Agency's finding that such shellfish is safe.

The Agency has previously addressed its reasoning in interpreting and applying its own regulations at §§ 170.20 and 170.22 in the molluscan shellfish final rule, in response to comments submitted by PC/CFS (70 FR 48057 at 48066 and 48068). The regulation at § 170.20(a) reads in part: "In reaching a decision on any petition filed under section 409 of the Act, the Commissioner will give full consideration to the specific biological properties of the compound and the adequacy of the methods employed to demonstrate safety for the proposed use, and the Commissioner will be guided by the principles and procedures for establishing the safety of food additives stated in current publications of the National Academy of Sciences-National Research Council. A petition will not be denied, however, by reason of the petitioner's having followed procedures other than those outlined in the publications of the National Academy of Sciences-National Research Council if, from available evidence, the Commissioner finds that the procedures used give results as reliable as, or more reliable than, those reasonably to be expected from the use of the outlined procedures. In reaching a decision, the Commissioner will give due weight to the anticipated levels and patterns of consumption of the additive specified or reasonably inferable."

In the molluscan shellfish final rule, the Agency explained that FDA has consistently taken the position that many scientifically valid types of data may properly support a finding that a proposed use of a food additive is safe. The Agency pointed out that NAS–NRC testing standards and guidelines have been stated in relatively general terms and that in practice, FDA has applied exposure and toxicological criteria that were current for the time, and appropriate for assessing the safety of a particular food additive (70 FR 48057 at 48068). In its objection, PC/CFS repeats its assertion that FDA failed to properly interpret its own regulation, but has provided no new information that would refute the Agency's reasoning. The objection implies that the Agency is obligated to explicitly discuss its consideration of NAS–NRC guidelines in its rules, but there is nothing in § 170.20 that imposes such an obligation on the Agency. The regulation requires the Commissioner of Food and Drugs (the Commissioner) to make a finding that the procedures used by the petitioner give results that are as reliable as, or more reliable than, those reasonably expected from use of the NAS–NRC guidelines. Acceptance of a petition based on alternate procedures implies that the Commissioner has made such a finding.

With respect to the assertion that FDA failed to give due weight to anticipated levels and patterns of consumption of irradiated molluscan shellfish, FDA previously has reviewed a large body of data relevant to the assessment of potential toxicity of irradiated flesh foods. In its evaluations of the safety of a source of radiation to treat food intended for human consumption, the Agency has identified three areas of concern to be addressed: (1) Potential toxicity, (2) nutritional adequacy, and (3) potential microbiological risk from treated foods. Each of these areas was discussed in detail in the molluscan shellfish final rule. FDA asserted that the Agency "can draw conclusions about the amounts of radiolysis products expected to be generated at radiation doses relevant to the subject petition by extrapolating from data obtained at higher doses for foods of similar composition irradiated under similar conditions (70 FR 48057 at 48059)." In its review of studies in which animals were fed diets containing beef irradiated at 56 kGy, fish at 6 kGy, horse meat at 6.5 kGy, fish at 56 kGy, and others (62 FR 64107 at 64113), the Agency found no evidence of toxicity attributable to the consumption of these foods.

FDA has concluded that products formed (typically oxidation products of food constituents) following irradiation of molluscan shellfish are the same as or similar to those found in non-irradiated foods after cooking. Further, radiolysis products in shellfish are essentially the same as those in red meat and poultry, since the composition is roughly the same. Additionally, shellfish make a smaller contribution to the average daily diet; therefore, exposure to radiolysis products from shellfish will be smaller than that from foods for which irradiation currently is regulated. Cooking and other heat processing methods remain the principle means for introducing such substances into the diet (Ref. 9). PC/CFS' assertion provides no basis to challenge FDA's assessment of the safety of irradiated molluscan shellfish.

In like manner, the assertions that FDA failed to follow its regulation in § 170.22, or to comply with recommendations in the Redbook or set forth by the BFIFC committee, have been raised previously by PC/CFS, Dr. Epstein, and others, and have been responded to by the Agency in the molluscan shellfish final rule (70 FR 48057 at 48066 and 48069) and in other previous rulemakings (*see e.g.,* 57 FR 6667 at 6669; 62 FR 64102 at 64105; and Section IV.E., above). The Agency has described its reasoning for concluding that the data and information considered in the evaluation of the petition to permit the irradiation of molluscan shellfish, when considered in its entirety, are sufficient to support the safety of molluscan shellfish irradiated under the conditions specified in the regulation. Once the Agency makes a finding of safety in a listing document, the burden shifts to an objector to come forward with evidence that calls into question FDA's conclusion (*see* § 12.24(b)(2)). PC/CFS and Dr. Epstein provide no new information on how the Agency failed to follow the regulations to establish the safety of irradiating molluscan shellfish to an absorbed dose of 5.5 kGy. A hearing will not be granted on the basis of mere allegations or general descriptions of positions and contentions (§ 12.24(b)(2)). The objectors must, at a minimum, raise a material issue concerning which a meaningful hearing might be held. Neither PC/CFS nor Dr. Epstein has provided a basis for a hearing and FDA is denying their request for a hearing based on this objection.

*I. Wholesomeness*

PC/CFS states that "FDA's final rule fails to address recent studies in its possession indicating that irradiation at low dose levels in oysters may cause unpleasant—perhaps unwholesome—byproducts." The objection discusses a report [9] presented at the 2002 annual meeting of the Institute of Food Technologists that suggests that molluscan shellfish irradiated at 2.0 kGy produced an "unpleasant yellow exudate." The objection goes on to discuss other potential organoleptic changes that may occur in irradiated molluscan shellfish (such as "grassy" and "oxidized" odors) as noted in Dixon's 1996 dissertation (Ref. 2). PC/CFS states that FDA's final rule failed to address these issues of "wholesomeness," and requests a hearing on these issues.

FDA previously has acknowledged that irradiation may cause organoleptic changes in foods (62 FR 64107 at 64110). Such organoleptic changes may make the food unappealing and unmarketable; however, undesirable organoleptic changes do not render the food unsafe. Neither the author of the

[9] Andrews, L. S., "Gamma Irradiation Processing to Reduce the Risk of Vibrio Infections from Raw Oysters," (unpublished presentation at the 2002 Annual Meeting), 2002.

report cited by PC/CFS nor PC/CFS itself suggests that there is any evidence that the noted "unpleasant yellow exudate" or other organoleptic changes would render irradiated molluscan shellfish unsafe.

PC/CFS' request for a hearing suggests that there is potential for harm from possible organoleptic changes from irradiation of molluscan shellfish, without providing any evidence to support this suggestion. An objector must make an adequate proffer of evidence to support its allegations and to show that they provide a basis on which to call into question the Agency's conclusions. A hearing will be denied if the Commissioner concludes that the data and information submitted are insufficient to justify the factual determination urged, even if accurate (§ 12.24(b)(3)). FDA concludes that the data and information are insufficient; therefore, FDA is denying the request for a hearing based on this objection.

*J. FDA Review Memoranda*

PC/CFS alleges that there are errors in some of the FDA review memoranda used to support the final rule. The objection states that these errors call into question the adequacy of the Agency's review processes that led to the Agency's conclusion that irradiated molluscan shellfish are safe. There are four parts to this objection; the Agency will address each part below.

Part one of this objection asserts that "FDA significantly misrepresents published research on the tumor-promoting qualities of 2–ACBs." Specifically, the objection states that an FDA memorandum in the record (Ref. 10) mischaracterizes the findings of a publication submitted by PC/CFS as part of a comment to the petition to irradiate molluscan shellfish (Ref. 11). The objection states that these alleged mischaracterizations "severely bias the Agency's analysis of 2–ACBs."

The disputed memorandum included a discussion of the Raul *et al.* (2002) paper submitted to the Agency by PC/CFS as part of its comment to the molluscan shellfish petition; the memorandum also discussed a commentary on the paper that was submitted with the comment (Ref. 12). The objection cited three selected sentence fragments from the memorandum which PC/CFS maintains are incorrect. The memorandum discussed the authors' observations and the limitations of the Raul, *et al.* study and stated that those limitations and inconsistencies in the data made it difficult to draw conclusions from the study. In the final rule (70 FR 48057 at 48067) the Agency discussed the limitations of the study and its reasoning in concluding that the results of long-term feeding studies were more relevant to a finding of safety than the Raul *et al.* study.

As FDA noted in the final rule (70 FR 48057 at 48067): "Given the limitations of the animal model and study design, ambiguous data, and the absence of close relationship between the chemical exposure used in the study and the expected human exposure, the Agency finds that the comment provides no substantial or reliable scientific information to show that there is reason to believe that the consumption of 2–ACBs will promote colon cancer. Moreover, the Agency notes that long term feeding studies performed using irradiated foods that contain 2–ACBs did not show any promotion of colon cancer. The results of these latter long term feeding studies are more relevant than results from the Raul paper because 2–ACBs were fed in the diet as in human exposure and the levels of exposure would still have been increased over usual dietary levels."

The Agency maintains that the disputed memorandum taken as a whole, including the sentence fragments highlighted by PC/CFS, accurately and reliably reflects the information in the Raul and Rao publications. Importantly, the factual issues raised by the three disputed statements were not determinative in the Agency's overall conclusions about the relevance of the Raul *et al.* study or to its determination that the irradiated molluscan shellfish under the conditions of the regulation are safe. A hearing will not be granted on factual issues that are not determinative with respect to the action requested (§ 12.24(b)(4)). Thus, PC/CFS has not provided a basis for a hearing and FDA is denying PC/CFS' request for a hearing based on this objection.

Part two of this objection asserts that FDA cites no evidence to dismiss the COMET assay as a valid technique for testing genetic toxicity. The objection asserts that the "technique has broad support within the scientific community" and quotes excerpts from several published reports that state that the COMET assay has utility, and is being increasingly used in the screening of various substances.

The Agency does not dispute the statements quoted by the PC/CFS nor the fact that the COMET assay is being increasingly studied and used to study the cellular response to DNA damage and repair. In the final rule, the Agency has addressed its conclusions pertaining to the COMET assay results (70 FR 48057 at 48065), as they are presented with respect to 2–ACBs and has determined that, when the totality of evidence is examined with other more standard genotoxicity testing methods, "the potential risk of 2–DCB, if any, is very low." The cited quotations do not provide any information related to the safety of consumption of 2–ACBs that may be present in irradiated molluscan shellfish that the Agency has not considered, and the objection contains no information that would cause the Agency to change its safety determination. A hearing will not be granted on factual issues that are not determinative with respect to the action requested (§ 12.24(b)(4)).

Part three of this objection states that certain FDA review memoranda (Chen to Highbarger, 12/21/2001, FAP 9M4697), (Morehouse to Highbarger, 6/l/2002, 9M4697), and (Chen to Highbarger, 4/7/2003, FAP 9M4695) are irrelevant to the analysis of irradiated molluscan shellfish, because they were written as part of the review of other petitions to permit the irradiation of certain other foods. This objection also states that one of the memoranda (Chen to Highbarger, 12/21/2001, FAP 9M4697) is inaccurate, because it states that "the radiolysis products of irradiated lipids and proteins are either the same as, or structurally very similar to, compounds found in foods that have not been irradiated." PC/CFS state that "numerous published articles show—and the FDA now admits—that 2–ACBs are fundamentally unique from any naturally occurring food component." Additionally, the objection states that this memorandum ignores the FDA Redbook's statement that genotoxicity tests can contribute to safety assessments.

The Agency acknowledges that the review memoranda cited were written as part of the review of two petitions to permit the irradiation of certain foods (other than molluscan shellfish) that are pending at the Agency: FAP 9M4695, submitted by the U.S. Department of Agriculture (64 FR 71792) [10] and FAP 9M4697, submitted by the National Food Processors Association on behalf of the Food Irradiation Coalition (65 FR 493 and 66 FR 23943).[11] The objection

[10] FAP 9M4695 requests that 21 CFR part 179 be amended to provide for the safe use of a 4.5 kiloGray (kGy) maximum dose of ionizing radiation to treat unrefrigerated (as well as refrigerated) uncooked meat, meat products, and certain meat food products to reduce levels of foodborne pathogens and extend shelf-life.

[11] FAP 9M4697 requests that 21 CFR part 179 be amended to provide for the safe use of ionizing radiation for control of foodborne pathogens, and extension of shelf-life, in a variety of human foods up to a maximum irradiation dosage of 4.5 kGy for non-frozen and non-dry products, and 10.0 kGy for

Continued

does not explain, however, why the information in those memoranda is irrelevant to the irradiation of molluscan shellfish to an absorbed dose of 5.5 kGy. These review memoranda describe chemistry and toxicology information related to the irradiation of protein, fat, and carbohydrate; these are components of molluscan shellfish. The Agency has repeatedly noted that its conclusions on safety of irradiating molluscan shellfish are based on the evaluation of the totality of evidence before it, and in particular, that information related to the irradiation of flesh foods is relevant to an evaluation of the safety of irradiated molluscan shellfish. The objection provides no information that would suggest the information in the cited memoranda is irrelevant to the molluscan shellfish final rule except to point out that they were written as part of the review of other petitions.

The objection also cites a statement from a memorandum written in 2001 that stated that "* * * radiolysis products of irradiated lipids and proteins are either the same as, or structurally very similar to, compounds found in foods that have not been irradiated" and points out that the Agency has since acknowledged that 2–ACBs have thus far not been found in food that has not been irradiated.[12] As noted in the objection itself, there is no factual issue in dispute, and the objection points to no reason why the statement in the 2001 memorandum calls into question the Agency's subsequent conclusions about the safety of irradiated molluscan shellfish.

Finally, this part of the objection alleges that the 2001 memorandum ignores the FDA Redbook's statement that genotoxicity tests can contribute significantly to safety assessments. The Agency agrees that genotoxicity testing can be useful in the assessment of the safety of food additives. In the molluscan shellfish final rule the Agency discussed the use of genotoxicity tests, and of long-term feeding studies, in the context of the safety assessment of irradiated foods (70 FR 48057 at 48064) concluding: "The Bureau of Foods Irradiated Foods Committee (BFIFC) recommended that foods irradiated at a dose above 1 kGy be evaluated using a battery of mutagenicity tests to assess whether long-term feeding studies in animals were necessary (Ref. 36). Mutagenicity studies are primarily used to screen for potential mutagenic effects. Animal feeding studies are more reliable for determining the true mutagenic potential of a compound that is consumed in food. (Ref. 37). Moreover, one cannot draw valid conclusions from data simply by summing positive and negative results without fully evaluating the individual studies and assessing what conclusions such studies support and considering the totality of evidence. If the occasional report of a mutagenic effect were valid and significant to health, one should have seen consistent adverse toxicological effects in the many long term and reproduction studies with animals. This has not been the case."

Thus, the Agency has acknowledged the utility of genotoxicity tests, but also states that when long-term animal feeding studies are available, that these latter studies are more reliable for determining the mutagenic potential of a compound consumed in food. Nothing in the objection would suggest that the Agency's position is in contradiction to the recommendations in the Redbook.

An objector must make an adequate proffer of evidence to support its allegations and to show that they provide a basis on which to call into question the agencies conclusions (§ 12.24(b)(2)). PC/CFS has not provided a basis for a hearing and FDA is denying PC/CFS' request for a hearing based on this objection.

Finally, part four of the objection states that an FDA memorandum (Folmer-Jensen to Highbarger, 8/2/2002, FAP 9M4697) states that other food processing methods (such as freezing, canning and drying) can result in loss of vitamins, but neglects to consider the potential for additional vitamin reduction if irradiated foods were to be subsequently processed by freezing, canning or drying. This part further cites a 1986 trade press article as evidence that irradiation, when combined with other food processing techniques, has a greater effect on reducing levels of vitamins than each process individually. The objection then questions the Agency's conclusion that the contribution of thiamine, niacin and vitamin B6 from fish and shellfish represents an insignificant contribution to the nutritional needs of Americans. The objection cites two studies that showed a substantial reduction in thiamine level in irradiated cod.

The Agency agrees that irradiation may reduce some vitamins in foods. Additionally, further processing may further reduce some vitamins in foods. The extent to which vitamin loss is nutritionally significant depends in part on the relative contribution of the food in question to the overall dietary intake of the vitamin. The Agency has concluded that the reductions of vitamins in molluscan shellfish will cause negligible changes in total dietary intake of the affected vitamins as a result of irradiating molluscan shellfish under the conditions of the regulation. The objection questions the Agency's analysis and conclusion, but offers no data or information to support a contention that permitting the irradiation of molluscan shellfish would have an adverse impact on the nutritional adequacy of the diet. Moreover, the objection contains no information that would cause the Agency to change its conclusion that the consumption of irradiated molluscan shellfish to an absorbed dose of 5.5 kGy is safe.

A hearing will be denied if the Commissioner concludes that the data and information submitted are insufficient to justify the factual determination urged, even if accurate ((§ 12.24(b)(3)). FDA concludes that the data and information are insufficient; therefore, FDA is denying the request for a hearing based on this objection.

*K. Chemicals Formed in Irradiated Foods*

One objection submitted by Dr. Epstein alleges that FDA has "ignore[d] the fact that irradiation can dramatically increase the concentration of many potentially toxic chemicals." Dr. Epstein specifically mentions benzene and toluene, quoting a statement from D.U. Ahn of Iowa State University: "[B]enzene and toluene * * * could be formed from amino acids upon irradiation * * * Benzene has deleterious effects on human health (Ref. 13)." In support of the quoted statement, the objection references a paper entitled "Effects of Electron Beam Irradiation and Antimicrobials on the Volatiles, Color, and Texture of Ready-to-Eat Turkey Breast Roll."

The Agency acknowledges that benzene, toluene, and other compounds are formed, albeit in very small amounts, when meats are irradiated at sterilizing doses (Ref. 14.). The formation of benzene and other volatile compounds (including toluene) in irradiated foods and their possible risk to human health has been extensively evaluated by FDA and discussed in previous rulemaking (*see* 62 FR 64107 at 64110–64111, 55 FR 18538 at 18542–18543 and 53 FR 53176 at 53197).

frozen or dry products, including: (1) Pre-processed meat and poultry; (2) both raw and preprocessed vegetables, fruits, and other agricultural products of plant origin; (3) certain multi-ingredient food products. The notice stated that the petition does not cover products composed in whole or in part of raw meat, poultry, or fish nor does it cover "ready-to-eat" fish products or ingredients made from fish.

[12] We note that recent studies have demonstrated that 2–ACBs are formed in certain foods that have not been irradiated (*e.g.,* roasted nuts).

Regarding benzene specifically, the Agency has stated: "The select Committee concluded that the small addition of benzene from radiation sterilized beef would contribute only a trivial increment to the normal body burden and is unlikely to increase significantly whatever hazard exists from other sources. FDA is not aware of any evidence that call this conclusion into question" (53 FR 53176 at 53197).

The objection identifies no evidence that the Agency overlooked, and does not provide any new evidence that would indicate benzene, toluene, or other chemicals are formed in irradiated molluscan shellfish in quantities that would pose a risk to human health. Thus, Dr. Epstein's request for a hearing based on this objection is denied because a hearing will not be granted on the basis of mere allegations or general descriptions of positions and contentions (§ 12.24(b)(2)).

The objection also criticizes the Agency for making "[a] blanket statement which the Agency fails to explain further: "FDA and food scientists worldwide have long agreed that the evaluation of the safety of irradiated foods requires consideration of the whole food, not the testing of each component." Dr. Epstein also takes issue with the Agency's statement that "* * * identification of major radiolysis products will aid in the interpretation of data."

Contrary to Dr. Epstein's remarks, the Agency provided a detailed explanation of its statement about safety testing of irradiated whole foods versus the testing of individual components of those foods in the context of its response to a comment expressing a different view about requirements for testing irradiated food (*see* 70 FR 48057 at 48066). Additionally, the Agency has provided detailed discussions of the role of chemical identification of radiolysis products in the evaluation of data from safety testing (*see* 70 FR 48507 at 48059 and 62 FR 64107 at 64110–64111 and section IV. H of this document).

In conclusion, the submitted objection contains no evidence that the Agency has overlooked and no new evidence that would call into question the Agency's previous conclusion that consumption of irradiated molluscan shellfish is safe. The objection merely alleges that there may possibly be formation of benzene and toluene and alleges a potential of harm. A hearing will not be granted on the basis of mere allegations or denials or general descriptions of positions and contentions (§ 12.24(b)(2)); therefore, FDA is denying the request for a hearing based on this objection.

## V. Summary and Conclusion

The FD&C Act requires that a food additive be shown to be safe prior to marketing under section 409 of the FD&C Act. Under § 170.3(i), a food additive is "safe" if there is a reasonable certainty in the minds of competent scientists that the substance is not harmful under the intended conditions of use. In the Agency's August 16, 2005, final rule approving the use of irradiation on fresh or frozen molluscan shellfish, FDA concluded that the studies conducted to establish the safety of this additive demonstrate that this use of irradiation is safe for its intended use on fresh or frozen molluscan shellfish.

The petitioner has the burden to demonstrate the safety of the additive to gain FDA approval. Nevertheless, once FDA makes a finding of safety in an approval document, the burden shifts to an objector, who must come forward with evidence that calls into question FDA's conclusion (*American Cyanamid Co.* v. *FDA,* 606 F.2d 1307, 1314–1315 (DC Cir. 1979)).

Despite their many allegations, PC/CFS and Dr. Epstein have not established that FDA overlooked significant information in the record in reaching its conclusion that the use of irradiation on fresh or frozen molluscan shellfish is safe. In such circumstances, FDA has determined that the objections do not raise any genuine and substantial issue of fact that can be resolved by an evidentiary hearing (§ 12.24(b)).

Accordingly, FDA is denying the requests for a hearing. In addition, PC/CFS' and Dr. Epstein's requests for a stay of the effectiveness of the August 16, 2005, regulation until a hearing is held are moot because FDA is denying all hearing requests. Thus, FDA is confirming August 16, 2005, as the effective date of the final rule published at 70 FR 48057.

## VI. References

The following references are on display at the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20857, under Docket No. FDA–1999–F–0056 (formerly 1999F–4372), and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.


1. Memorandum to the file, FAP 4M4428, from P. Hansen, FDA, dated October 31, 1997.
2. Dixon, D.W., "The Influence of Gamma Radiation Upon Shellstock Oysters, and Culturable and Viable but Nonculturable Vibrio vulnificus," a dissertation presented to the Graduate School of the University of Florida, 1996.
3. Diehl, J.F., "Safety of Irradiated Foods," second edition, Marcel Dekker, Inc., New York, 1995.
4. Memorandum for FAP 9M4682 from K. Morehouse, FDA, to L. Highbarger, FDA, July 15, 2005.
5. Renner, H.W., "Chromosome Studies on Bone Marrow Cells of Chinese Hamsters Fed a Radiosterilized Diet," *Toxicology,* 8:213–222, 1977.
6. Miesch, M., Ndiye, B., Hasselmann, C., and E. Marchioni, "2–Alkylcyclobutanones as Markers for Irradiated Food Stuffs—I. Synthesis of Saturated and Unsaturated Standards," *Radiation Physics and Chemistry,* 55:337–344, 1999.
7. Horvatovich, P., M. Miesch, C. Hasselmann, and E. Marchioni, "Supercritical Fluid Extractin of Hydrocarbons and 2–Alkylcyclobutanones for the Detection of Irradiated Foodstuffs," *Journal of Chromatography,* 897:259–268, 2000.
8. Delincée H, B.L. Pool-Zobel, and G. Rechkemmer "Genotoxicity of 2–Dodecyclcyclobutanone," Food Irradiation: Fifth German Conference, Report BFE–R–99–01, Federal Nutrition Research Institute, Karlsruhe, Germany (unpublished, 1998).
9. Memorandum for FAP 9M4682 and FAP 1M4727, from D. Folmer, FDA, to L. Highbarger, August 2, 2002.
10. Memorandum for FAP 9M4682 from T. Twaroski, FDA, to L. Highbarger, FDA, July 14, 2005.
11. Raul, F., F. Gosse, H. Delincee, A. Hartwig, E. Marchioni, M. Miesch, D. Werner, and D. Burnouf, "Food Borne Radiolytic Compounds (2–Alkylcyclobutanones) May Promote Experimental Colon Carcinogenesis," *Nutrition and Cancer,* 44(2):181–191, 2002.
12. Rao, C., "Do Irradiated Foods Cause or Promote Colon Cancer?", Division of Nutritional Carcinogenesis, Institute for Cancer Prevention, American Health Foundation—Cancer Center, Valhalla, NY (Unpublished, 2003), FDA notes that this article has now been published as a commentary in *Nutrition and Cancer,* 46(2):107–109, 2003.
13. Bureau of Food Irradiated Foods Committee, "Recommendations for Evaluation the Safety of Irradiated Food," prepared for the Director, Bureau of Foods, FDA, July 1980.
14. Toxicological Principles for the Safety Assessment of Direct Food Additives and Color Additives Used in Food, "Red Book II," U.S. Food and Drug Administration, Center for Food Safety and Applied Nutrition, 1993, revised 2001.
15. Zhu, M.J., *et al.,* "Effects of Electron Beam Irradiation and Antimicrobials on the Volatiles, Color, and Texture of Ready-to-Eat Turkey Breast Roll," *Journal of Food Science,* 69(5):C382–C387, 2004.
16. Federation of American Societies for Experimental Biology, Life Sciences Research Office, Evaluation of the Health Aspects of Certain Compounds Found in Irradiated Beef, Supplement 1979, 1977.

Dated: March 15, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011–6625 Filed 3–21–11; 8:45 am]

**BILLING CODE 4160–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R07–OAR–2010–0945; FRL–9281–6]**

## Approval and Promulgation of Implementation Plans; Nebraska: Prevention of Significant Deterioration; Greenhouse Gas Permitting Authority and Tailoring Rule Revision

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

**ACTION:** Final rule.

**SUMMARY:** EPA is taking final action to approve revisions to the State Implementation Plan (SIP) for Nebraska, submitted by the Nebraska Department of Environmental Quality (NDEQ) to EPA for final processing on January 14, 2011. These revisions cover two broad categories under Nebraska's prevention of significant deterioration (PSD) preconstruction permitting program. The first applies to revisions relating to permitting of greenhouse gas (GHG) emissions under the PSD program. The second applies to revisions incorporating relevant aspects of EPA's 2002 new source review (NSR) reform rules, submitted by letter dated November 19, 2010.

The GHG SIP revision, which incorporates updates to NDEQ's air quality regulations, includes two significant changes impacting the regulation of GHGs under Nebraska's PSD program. First, the SIP revision provides the State of Nebraska with authority to issue PSD permits governing GHGs. Second, the SIP revision establishes emission thresholds for determining which new stationary sources and modification projects become subject to Nebraska's PSD permitting requirements for their GHG emissions. The first provision is required under the GHG PSD SIP call, which EPA published on December 13, 2010, and which required the State of Nebraska to apply its PSD program to GHG-emitting sources. The second provision is consistent with the thresholds EPA established in the Tailoring Rule, published on June 3, 2010. EPA is approving this SIP revision because this SIP revision meets the requirements of the GHG PSD SIP Call.

In addition, in today's action, EPA is also taking final action to approve Nebraska's adoption of portions of EPA's 2002 NSR Reform rules, published December 31, 2002. EPA has determined that Nebraska's revisions track the Federal NSR Reform Rules. EPA previously determined that the implementation of the Federal NSR Reform Rules will be environmentally beneficial.

**DATES:** This rule will be effective March 22, 2011.

**ADDRESSES:** EPA has established a docket for this action under Docket Identification No. EPA–R07–OAR–2010–0945. 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, *i.e.,* 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 and Development Branch, Air and Waste Management Division, U.S. Environmental Protection Agency, Region 7, 901 North 5th Street, Kansas City, KS 66101. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section for further information. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** For information regarding the Nebraska SIP, contact Mr. Larry Gonzalez, Air Planning and Development Branch, Air and Waste Management Division, U.S. Environmental Protection Agency, Region 7, 901 North 5th Street, Kansas City, Kansas 66101. Mr. Gonzalez's telephone number is (913) 551–7041; e-mail address: *gonzalez.larry@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

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### I. What is the background for today's final action?

EPA has recently undertaken a series of actions pertaining to the regulation of GHGs that, although for the most part distinct from one another, establish the overall framework for today's final action for the Nebraska SIP. The first four of these actions include, as they are commonly called, the "Endangerment Finding" and "Cause or Contribute Finding," which EPA issued in a single final action,[1] the "Johnson Memo Reconsideration," [2] the "Light-Duty Vehicle Rule," [3] and the "Tailoring Rule." [4] Taken together, these actions established regulatory requirements for GHGs emitted from new motor vehicles and new motor vehicle engines; determined that such regulations, when they took effect on January 2, 2011, subject GHGs emitted from stationary sources to PSD requirements; and limited the applicability of PSD requirements to GHG sources on a phased-in basis.

In a separate action, the "GHG PSD SIP Call," [5] EPA called on the State of Nebraska and 12 other States with SIPs that do not provide authority to issue PSD permits governing GHGs to revise their SIPs to provide such authority. In that action, EPA took steps to ensure that in the 13 States that do not have authority to issue PSD permits to GHG-emitting sources at present, either the State or EPA would have the authority to issue such permits by January 2, 2011, or soon thereafter. EPA explained that although for most States, either the State or EPA is already authorized to issue PSD permits for GHG-emitting sources as of that date, Nebraska and the other 12 States have EPA-approved PSD programs that do not include GHG-emitting sources and therefore do not authorize these States to issue PSD permits to such sources. Accordingly, EPA issued the GHG PSD SIP Call to require a SIP revision that applies Nebraska's SIP PSD programs to GHG-emitting sources. EPA also established a SIP submittal deadline. In the proposed SIP call, EPA had stated that the deadline could range from as little as three weeks after the final SIP call was signed to as long as 12 months after the

[1] "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act." 74 FR 66496 (December 15, 2009).

[2] "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act." 74 FR 66496 (December 15, 2009).

[3] "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule." 75 FR 25324 (May 7, 2010).

[4] "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule." 75 FR 31514 (June 3, 2010).

[5] "Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Final Rule." 75 FR 77698 (December 13, 2010).

final SIP call was signed, and that each affected State was authorized to indicate to EPA a deadline to which it did not object. In the final SIP call, EPA established deadlines that ranged, for the various States, from December 22, 2010 (three weeks after signature), to December 1, 2011 (12 months after signature), based, in general, on each State's preference. Nebraska was one of the States for which EPA proposed and finalized the SIP Call. The State's comments regarding the proposed SIP call, submitted September 30, 2010, are included in the docket for this rulemaking. In the SIP call, EPA established a SIP submittal deadline for Nebraska of March 1, 2011, in accordance with Nebraska's preferences in that letter. As stated previously, Nebraska met this deadline by submitting a final rule addressing the SIP deficiency by letter dated January 14, 2011.

In addition, in the SIP call rulemaking, EPA stated certain requirements that the corrective SIP revision must meet, which are that the corrective SIP revision must—

(i) Apply the SIP PSD program to GHG-emitting sources;

(ii) Define GHGs as the same pollutant to which the Light-Duty Vehicle Rule [6] (LDVR) applies, that is, a single pollutant that is the aggregate of the group of six gases (carbon dioxide ($CO_2$), methane ($CH_4$), nitrous oxide ($N_2O$), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride ($SF_6$)); and

(iii) Either limit PSD applicability to GHG-emitting sources by adopting the applicability thresholds included in the Tailoring Rule or adopt lower thresholds and show that the State has adequate personnel and funding to administer and implement those lower thresholds.

In addition, if the corrective SIP revision adopts the Tailoring Rule thresholds, then it must either adopt the $CO_2e$ metric and use short tons (as opposed to metric tons) for calculating GHG emissions in order to implement those thresholds, or assure that its approach is at least as stringent as under the Tailoring Rule, so that the State does not exclude more sources than under the Tailoring Rule. 75 FR 77713 to 77715.

On October 19, 2010, in response to the Tailoring Rule and earlier GHG-related EPA rules, and in anticipation of the GHG PSD SIP Call rulemaking, NDEQ submitted a draft revision of its air quality regulations to EPA for approval into the Nebraska SIP to: (1) Provide the State of Nebraska with the authority to regulate GHGs under its PSD program; and (2) establish appropriate emission thresholds and time-frames for determining which new or modified stationary sources become subject to Nebraska's PSD permitting requirements for GHG emissions. Subsequently, on December 27, 2010, EPA published a proposed rulemaking to approve NDEQ's October 19, 2010, SIP revision under parallel processing (*see* 75 FR 81179).

EPA's December 27, 2010, proposed approval was contingent upon the State of Nebraska providing a final SIP revision that was substantially the same as the draft revision proposed for approval. On January 14, 2011, Nebraska submitted its final SIP revision. This SIP revision is the same as the proposed revision NDEQ submitted on October 19, 2010, for parallel processing. EPA is approving the final SIP revision in today's action.

In the December 27, 2010, proposed rulemaking, EPA also proposed to approve updates to Nebraska's SIP that reflected Nebraska's adoption of portions of EPA's 2002 NSR Reform Rules. In today's action EPA is also approving these NSR Reform updates.

## II. Analysis of Nebraska's SIP Revision

Section 110(k)(3) of the CAA provides that EPA shall approve a SIP revision as a whole if it meets all of the applicable requirements of the CAA. Nebraska received a SIP call because its PSD program does not apply to GHGs, and as a result, Nebraska is required to submit a SIP revision that applies PSD to GHGs and does so either at the Tailoring Rule thresholds or at lower thresholds, and, if the latter, then Nebraska is required to demonstrate that it has adequate resources for implementation.

Nebraska has submitted a SIP revision that provides this authority. Nebraska's SIP revision updates the definition in its regulations of "regulated NSR pollutant" to explicitly include GHGs as a regulated NSR pollutant. In addition, the Nebraska rules incorporate the same thresholds and phase-in schedule as the Tailoring Rule and they adopt the carbon dioxide equivalent ($CO_2e$) metric and use of short tons for determining the thresholds.

EPA has determined that Nebraska's GHG revisions meet the requirements of the SIP call and are consistent with the CAA and its implementing regulations regarding GHG.

In addition, EPA is also approving the portion of Nebraska's SIP revisions which address portions of EPA's 2002 NSR Reform rules. As EPA explained in the proposed rulemaking, Nebraska had previously made changes to its existing State regulations to adopt portions of the NSR Reform rules. 75 FR 81185.[7] Although these revisions were effective at the State level, NDEQ had not previously submitted these changes to EPA for approval into the Nebraska SIP. Thus, on November 19, 2010, NDEQ submitted these revisions to the Nebraska Administrative Code relating to NSR Reform to EPA for approval. These revisions included changes to the following Chapters of Title 129 of the Nebraska Administrative Code: Chapter 1 (*Definitions*), Chapter 2 (*Definition of Major Source*), Chapter 14 (*Permits: Public Participation*), Chapter 15 (*Permit Revisions; Reopening for Cause*), Chapter 17 (*Construction Permits—When Required*),[8] and Chapter 19 (*Prevention of Significant Deterioration of Air Quality*).

Nebraska's proposed SIP revision addressing NSR reform tracks the Federal NSR Reform Rules, and as stated previously, EPA has determined that the implementation of the Federal NSR Reform Rules will be environmentally beneficial. *See* 68 FR 44620 and 63021. EPA explained its analysis of the Nebraska revisions in detail in the proposal, at 75 FR 81186, and incorporates that explanation by reference in this final action. Accordingly, EPA determines that these changes are consistent with the requirements of section 110(l).

## III. What is EPA's response to comments received on the proposed action?

EPA received a single comment letter in response to the December 27, 2010, proposed rulemaking to approve revisions to Nebraska's SIP. These comments, provided by the Sierra Club, were supportive of Nebraska's proposed revisions and EPA's actions with respect to GHGs and the PSD and Title V GHG Tailoring Rule (75 FR 31514). The comments are provided in the docket for today's final action. EPA did not receive any comments on its proposal to approve the NSR reform revisions.

[6] "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule." 75 FR 25324 (May 7, 2010).

[7] EPA also explained that Nebraska did not adopt the portions of EPA's NSR reform rule which were vacated or remanded by the Court in *New York* v. *United States*, 413 F.3d3 (DC Cir. 2005). 75 FR 81186.

[8] EPA notes that in a subsequent letter dated February 1, 2011, NDEQ withdrew Chapter 17 (Construction Permits—When Required), sections 001.02T and 013.04T from the November 19, 2010 submittal. Those revisions, relating to construction permitting of minor (non-PSD) sources, define the term "chemical processing plant" as excluding ethanol production facilities. EPA is not acting on those provisions in this action.

**IV. What is the effect of today's final action?**

Final approval of Nebraska's January 14, 2011, SIP revision will make Nebraska's SIP adequate with respect to PSD requirements for GHG-emitting sources. Today's approval will incorporate into the SIP the GHG emission thresholds for PSD applicability that were set forth in EPA's Tailoring Rule, ensuring that smaller GHG sources emitting below these thresholds will continue to not be subject to permitting requirements. Today's approval will also incorporate portions of EPA's 2002 NSR Reform Rules, as adopted by Nebraska, into the SIP. Pursuant to section 110 of the CAA, EPA is approving the changes made in Nebraska's January 14, 2011, proposed SIP revision into the State's SIP. However, as we noted in the proposed approval of Nebraska's submittal, 75 FR 81183, this action only addresses the State's revisions as they relate to the PSD program, including regulation of GHGs under the State's PSD program. We intend to act separately on the State's revisions to its Title V program, as well as Nebraska's separate submittal of changes to the applicability of the PSD program to contain ethanol production facilities (the "Ethanol Rule").[9]

The GHG revisions to Nebraska's SIP-approved PSD program that EPA is approving today have been reviewed and determined to be consistent with the Tailoring Rule. EPA has also determined that the GHG revisions are adequate to correct the deficiencies which EPA found for Nebraska in the GHG SIP call. Finally, EPA has also determined that the Nebraska SIP revisions relating to NSR Reform are, in substantive content, the same as EPA's December 2002 NSR reform rule, as it relates to PALs, the "actual to projected actual" test, and the calculation of baseline actual emissions. Thus, EPA has determined that the January revisions to Nebraska's SIP are consistent with section 110 of the CAA.

**V. When is today's action effective?**

The effective date of today's final action is the date that this rule is published in the **Federal Register**. In accordance with 5 U.S.C. 553(d), a rule cannot be made effective less than 30 days from the date of publication unless it qualifies for an exception under that provision. Under 5 U.S.C. 553(d)(1), one such exception is "a substantive rule which grants or recognizes an exemption or relieves a restriction." Today's final action relieves a restriction because it allows Nebraska to issue permits, under the Federally approved SIP, to sources which are already required to have PSD permits covering GHGs, but which previously did not have a permit issuing authority available from which to seek such a permit. In addition, 5 U.S.C. 553(d)(3) allows an effective date less than 30 days after publication "as otherwise provided by the agency for good cause found and published with the rule." Because, as stated above, this rule allows Nebraska to issue PSD permits under the approved SIP for sources of GHGs already required to seek such permits, it avoids disruption in the State's permitting process which might otherwise occur. Additionally, the State's permitting process would potentially be disrupted if the NSR Reform provisions do not have the same effective date as the other provisions being approved today. Therefore, EPA finds good cause under 5 U.S.C. 553(d)(3) for this action to become effective immediately upon publication. For these reasons, the effective date of this rule is the date of publication.

**VI. Final Action**

EPA is taking final action to approve the State of Nebraska's SIP revisions, which adopt changes to Title 129 the Nebraska Administrative Code. The SIP revisions: (1) Provide the State with the authority to regulate GHGs under its PSD program, and (2) establish appropriate emissions thresholds, and timing, for determining PSD applicability with respect to new or modified GHG-emitting stationary sources in accordance with EPA's Tailoring Rule. The SIP revisions also adopt portions of EPA's 2002 NSR Reform rule as identified above. EPA has made the determination that the SIP revisions are approvable because they are in accordance with the CAA and EPA regulations, including regulations pertaining to PSD permitting.

**VII. Statutory and Executive Order Reviews**

Under the CAA, 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 CAA. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For those reasons, 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 CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this 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 amended 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

[9] *See* note 9.

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 23, 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).)

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

Environmental protection, Air pollution control, NSR Reform, Greenhouse gases, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: March 7, 2011.

**Karl Brooks,**

*Regional Administrator, Region 7.*

40 CFR part 52 is amended as follows:

## PART 52—[AMENDED]

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

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

### Subpart CC—Nebraska

■ 2. Section 52.1420(c) under "*Title 129—Nebraska Air Quality Regulations*" is amended as follows:

■ a. Revise the entries for 129–1, 129–14, 129–15, 129–17, and 129–19.

■ b. Add a new entry for 129–2.

The revisions and additions read as follows:

**§ 52.1420 Identification of plan.**

* * * * *

(c) * * *

EPA-APPROVED NEBRASKA REGULATIONS

| Nebraska citation | Title | State effective date | EPA approval date | Explanation |
|---|---|---|---|---|
| * | * | * | * | * |
| Title 129—Nebraska Air Quality Regulations | | | | |
| 129–1 | Definitions | 01/09/2011 | 03/22/2011 [Insert citation of publication]. | |
| 129–2 | Definition of Major Source | 03/14/2006 | 03/22/2011 [Insert citation of publication]. | |
| * | * | * | * | * |
| 129–14 | Permits: Public Participation | 02/06/2008 | 03/22/2011 [Insert citation of publication]. | |
| 129–15 | Permit Revisions; Reopening for Cause. | 02/06/2008 | 03/22/2011 [Insert citation of publication]. | |
| * | * | * | * | * |
| 129–17 | Construction Permits—When Required. | 02/06/2008 | 03/22/2011 [Insert citation of publication]. | Approval does not include Nebraska's revisions to sections 001.02T and 013.04T pertaining to ethanol production facilities, which were not submitted by the State. |
| 129–19 | Prevention of Significant Deterioration of Air Quality. | 02/06/2008 | 03/22/2011 [Insert citation of publication]. | |
| * | * | * | * | * |

* * * * *

[FR Doc. 2011–6419 Filed 3–21–11; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OAR–2005–0161; FRL–9284–2]**

**40 CFR Part 80**

## Denial of Petitions for Reconsideration of Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program

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

**ACTION:** Notice of denial of petitions for reconsideration.

**SUMMARY:** On May 24, 2010, the Clean Air Task Force (CATF), the National Wildlife Federation, the World Wildlife Fund and the Friends of the Earth petitioned the Administrator to reconsider an EPA rule, published on March 26, 2010 (75 FR 14670), which amended the Renewable Fuel Standard Program pursuant to Clean Air Act section 211(o). The petitioners alleged that EPA failed to properly require producers of renewable fuels to verify domestic crops and crop residues used to produce the renewable fuels complied with the applicable land use restrictions. Additionally, the CATF alleged that EPA did not properly account for the "global rebound effect" in the final analysis of the lifecycle greenhouse gas (GHG) emission impacts of renewable fuel production and use. On February 17, 2011, the Administrator denied the petitions for reconsideration and the accompanying requests for stays in implementing the regulations. This Notice announces the availability of EPA's decision.

**DATES:** EPA's denials of the petitions to reconsider were issued by letters dated February 17, 2011.

**FOR FURTHER INFORMATION CONTACT:** Paul Argyropoulos in the EPA's Office of

Transportation and Air Quality at (202) 564–1123 or *argyropoulos.paul@epa.gov.*

**SUPPLEMENTARY INFORMATION:** On May 24, 2010, the Clean Air Task Force (CATF), the National Wildlife Federation, the World Wildlife Fund and the Friends of the Earth petitioned the Administrator to reconsider an EPA rule, published on March 26, 2010 (75 FR 14670), which amended the Renewable Fuel Standard Program. This amendment (commonly referred to as RFS2) was adopted in response to Clean Air Act Section 211(o) as amended by the Energy Independence and Security Act of 2007 (EISA). The petitioners alleged that EPA failed to properly require producers of renewable fuels to verify domestic crops and crop residues used to produce the renewable fuels complied with the land use restrictions in EISA. The petitioners other than CATF requested a stay of the aggregate compliance portion of the RFS2 rules. Additionally, the CATF alleged that in this rule, EPA did not properly account for the "global rebound effect" in the final analysis of the lifecycle greenhouse gas (GHG) emission impacts of renewable fuel production and use. CATF requested a stay of the entire RFS2 final rule.

The EPA considers the lifecycle GHG emission assessment of renewable fuels and the land use restrictions applicable to renewable biomass provisions to be important parts of the RFS2 program and carefully reviewed the arguments and information provided by the petitioners on these two issues. On February 17, 2011, the Administrator responded by denying the petitions to reconsider. The EPA also denied all requests for a stay of implementation of the RFS2 regulations. The letters of denial and the supporting rationale have been posted on the EPA Web site at: *http://www.epa.gov/otaq/fuels/renewablefuels/notices.htm.*

Dated: March 14, 2011.

**Margo Tsirigotis Oge,**

*Director, Office of Transportation and Air Quality, Office of Air and Radiation.*

[FR Doc. 2011–6561 Filed 3–21–11; 8:45 am]

**BILLING CODE 6560–50–P**

## GENERAL SERVICES ADMINISTRATION

### 41 CFR Part 105–735

**[GSA Case 2011–01; Docket 2011–0007; Sequence 1]**

**RIN 3090–AJ10**

## Standards of Conduct

**AGENCY:** General Services Administration (GSA).

**ACTION:** Final Rule.

**SUMMARY:** The General Services Administration (GSA) is removing a part from the Code of Federal Regulations because it no longer provides employees with guidance on employee standards of conduct.

**DATES:** *Effective Date:* This final rule is effective March 22, 2011.

**FOR FURTHER INFORMATION CONTACT:** Ms. Eugenia D. Ellison, Office of General Counsel, General Services Administration, 1275 First Street, NE., Room 528, Washington, DC 20417, (202) 501–0765, FAX (202) 208–0085.

**SUPPLEMENTARY INFORMATION:**

### A. Background

The General Services Administration (GSA) published a final rule at 61 FR 56399, November 1, 1995 which codified GSA's supplemental standards of ethical conduct in the new 5 CFR part 6701. At that time, GSA removed from the CFR its old standards of conduct, which had been codified at 41 CFR part 105–735 and provided a number of cross-references to the new Government-wide standards of ethical conduct regulations and GSA's new supplemental regulations. GSA is removing part 105–735 because the cross-reference to the GSA Order is no longer applicable and employees are familiar with the remaining cross-referenced provisions and no longer refer to 41 CFR part 105–735 for guidance on employee standards of conduct.

### B. Administrative Procedure Act

Pursuant to 5 U.S.C. 553(b) and (d), GSA has determined that good cause exists for waiving the general notice of proposed rulemaking and 30-day delay in effectiveness as to these minor revisions. This action is being taken because this rule concerns matters of agency organization, practice and procedure and merely serves to remove a part of the Code of Federal Regulations which no longer provides guidance to GSA employees.

### C. Executive Order 12866 and 13563

GSA has determined that this final rule is not a significant rule for the purposes of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993.

In accordance with Executive Order 13563, Improving Regulation and Regulatory Review, dated January 18, 2011, GSA determined that this rule is not excessively burdensome to the public, and is consistent with 5 U.S.C. 7301.

### D. Regulatory Flexibility Act

GSA has determined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that this rulemaking will not have significant economic impact on a substantial number of small entities because it relates solely to agency management and personnel.

### E. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this rulemaking does not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35.

### F. Small Business Regulatory Enforcement Fairness Act

This final rule is also exempt from congressional review prescribed under 5 U.S.C. 801 since it relates solely to agency management and personnel.

### List of Subjects in 41 CFR Part 105–735

Conflict of interests, Ethical standards, Executive branch standards of conduct. Government Employees.

Dated: February 1, 2011.

**Martha Johnson,**

*Administrator of General Services.*

Accordingly, under the authority of 5 U.S.C. 7301 and for the reasons set forth in the preamble, the General Services Administration is amending title 41, chapter 105, of the Code of Federal Regulations by removing part 105–735.

[FR Doc. 2011–6608 Filed 3–21–11; 8:45 am]

**BILLING CODE 6820–FM–P**

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

**[DA 11–419; MB Docket No. 09–181; RM–11573]**

### Radio Broadcasting Services; Early and Lake Brownwood, TX

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The Audio Division dismisses the petition for rule making filed by Katherine Pyeatt, proposing the allotment of Channel 294C2 at Lake Brownwood; and grants the counterproposal filed by Munbilla Broadcasting Properties, Ltd., requesting the allotment of Channel 294A at Early, Texas. Channel 294A can be allotted at Early, consistent with the minimum distance separation requirements of the Commission's rules, at coordinates 31–46–21 NL and 98–52–41 WL, with a site restriction of 7.2 km (4.5 miles) northeast of the community

**DATES:** Effective April 18, 2011.

**FOR FURTHER INFORMATION CONTACT:** Deborah Dupont, Media Bureau, (202) 418–2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's *Report and Order,* MB Docket No. 09–181, adopted March 2, 2011, and released March 4, 2011. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, (800) 378–3160, or via the company's Web site, *http://www.bcpiweb.com.* This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506 (c)(4). The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* U.S.C. 801(a)(1)(A).

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

Radio, Radio broadcasting.

Federal Communications Commission.

**Nazifa Sawez,**

*Assistant Chief, Audio Division, Media Bureau.*

**Final Rule**

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

## PART 73—RADIO BROADCAST SERVICES

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

**Authority:** 47 U.S.C. 154, 303, 334, 336 and 339.

**§ 73.202 [Amended]**

■ 2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding Early, Channel 294A.

[FR Doc. 2011–6716 Filed 3–21–11; 8:45 am]

**BILLING CODE 6712–01–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### 50 CFR Part 16

**[Docket No. FWS–R3–FHC–2010–0094; 94140–1342–0000–N5]**

**RIN 1018–AT49**

### Injurious Wildlife Species; Listing the Bighead Carp (Hypophthalmichthys nobilis) as Injurious Fish

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

**ACTION:** Final rule.

**SUMMARY:** The U.S. Fish and Wildlife Service (Service) adds the bighead carp (*Hypophthalmichthys nobilis*), a large fish native to eastern Asia, to the list of injurious fish, mollusks, and crustaceans. The importation into the United States and interstate transportation between States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States of all forms of live bighead carp, gametes, viable eggs, and hybrids thereof is prohibited, except by permit for zoological, education, medical, or scientific purposes (in accordance with permit regulation at 50 CFR 16.22) or by Federal agencies without a permit solely for their own use.

**DATES:** This rule is effective March 22, 2011.

**ADDRESSES:** The final rule and supporting documents will be available on the Internet at *http://www.regulations.gov* at Docket No. FWS–R3–FHC–2010–0094.

**FOR FURTHER INFORMATION CONTACT:** Nate Caswell, Fish Biologist, U.S. Fish and Wildlife Service, Carterville Fish and Wildlife Conservation Office, 9053 Rt. 148, Suite A, Marion, IL 62959; telephone 618–997–6869; facsimile 618–997–9185. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

**Background**

In October 2002, the U.S. Fish and Wildlife Service (Service) received a petition signed by members of Congress representing the Great Lakes region to add bighead, silver, and black carp to the list of injurious wildlife under the Lacey Act (18 U.S.C. 42). In a final rule of July 10, 2007 (72 FR 37459), the Service added silver and largescale silver carp to the list of injurious wildlife at 50 CFR 16.13, and in a final rule of October 18, 2007 (72 FR 59019), the Service added black carp to this list. The Service published a **Federal Register** notice of inquiry on bighead carp (68 FR 54409; September 17, 2003) and provided a 60-day public comment period, but the listing process for this species was delayed. Another letter from members of Congress in 2009 supported the petitioned action for bighead carp.

The Asian Carp Prevention and Control Act (Pub. L. 111–307) was passed by the Senate on November 17, 2010, and by the House of Representatives on December 1, 2010, and signed into law by President Obama on December 14, 2010. The law amends the Lacey Act (18 U.S.C. 42) by adding the bighead carp (*Hypophthalmichthys nobilis*) to the list of injurious animals contained therein. The statutory prohibitions and exceptions for this species went into effect upon signature into law. This rule adds the bighead carp to the list of injurious fish, mollusks, and crustaceans at 50 CFR 16.13.

**Description of the Final Rule**

The regulations contained in 50 CFR part 16 implement the Lacey Act (18 U.S.C. 42) as amended. Under the terms of that law, the importation and interstate transportation of certain named wildlife is prohibited, with exceptions. Additionally, the Secretary of the Interior is authorized to prescribe by regulations other wild animals, or

viable eggs thereof, that are deemed to be injurious or potentially injurious to the health and welfare of human beings, to the interests of agriculture, forestry, or horticulture, or to the welfare and survival of the wildlife or wildlife resources of the United States.

The Asian Carp Prevention and Control Act added the bighead carp to the statutory list. The Service accordingly amends 50 CFR 16.13 to reflect the current list of prohibited wildlife. By adding all forms of live bighead carp (*Hypophthalmichthys nobilis*), gametes, viable eggs, and hybrids thereof to the list of injurious fish, mollusks, and crustaceans in 18 U.S.C. 42 and now in 50 CFR 16.13, their importation into the United States or transportation between States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States by any means whatsoever is prohibited except by permit for zoological, educational, medical, or scientific purposes, or by Federal agencies without a permit solely for their own use upon filing a written declaration with the District Director of Customs at the port of entry. In addition, no live bighead carp, gametes, viable eggs, or hybrids thereof acquired under permit may be sold, donated, traded, loaned, or transferred to any other person unless such person has a permit issued by the Director of the Service. The interstate transportation of any live bighead carp, gametes, viable eggs, or hybrids thereof that currently may be held in the United States for any purpose is prohibited, unless authorized by permit.

In adding bighead carp to the list of injurious fish, we are revising some of the current text in 50 CFR 16.13. These changes are nonsubstantive and for the purposes of creating a consistent format for the list and helping to ensure clarity.

**Effective Date**

We are making this rule effective upon publication in the **Federal Register**. In accordance with the Administrative Procedure Act (5 U.S.C. 553 (d)(3)), we find good cause to make this rule effective less than 30 days after publication in the **Federal Register**. With the signing of Public Law 111–307, the listing of bighead carp and the statutory prohibitions on importation into the United States and interstate transport went into effect on December 14, 2010. The Service does not have the authority to delay the effectiveness of the listing or the prohibitions. Therefore, we find good cause to make this rule effective immediately.

**Required Determinations**

This rulemaking amends the list of prohibited species in 50 CFR 16.13 to accurately reflect the addition made by Public Law 111–307, the Asian Carp Prevention and Control Act, which amends the U.S. Code (18 U.S.C. 42) by adding the bighead carp to its list of injurious animals. To update the Code of Federal Regulations to conform with Public Law 111–307, it is necessary to add this species to the implementing regulations (50 CFR 16.13). The Administrative Procedure Act requires publication of a proposed rule and the opportunity for public comment, except when such notice and comment would be impracticable, unnecessary, or contrary to the public interest. In this situation, public notice and the opportunity to comment are unnecessary because there would be nothing for the public to comment on. The Service does not have the authority to remove or alter either the listing that Congress put in place with Public Law 111–307 or the prohibitions that went into effect on December 14, 2010. The facts of this situation may also meet the "contrary to the public interest" standard under the APA to the extent that publication of a proposed rule would likely mislead the public by implying either that the prohibitions are not yet in effect or that the agency has discretion over whether the species should be listed or discretion over the scope or timing of the prohibitions. This rulemaking involves no discretionary or policy decisionmaking on the part of the Service, but merely amends regulations to reflect a change in statute. As such, neither an economic analysis nor an environmental assessment was required in conjunction with this rulemaking.

**Information Collection Requirements**

This final rule contains no information collection requirements for which Office of Management and Budget approval is required under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

**List of Subjects in 50 CFR Part 16**

Fish, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

Accordingly, 50 CFR part 16 is amended as described below:

## PART 16—INJURIOUS WILDLIFE

■ 1. The authority citation for part 16 is revised to read as follows:

**Authority:** 18 U.S.C. 42.

■ 2. Amend § 16.13(a)(2) as follows:

■ a. In paragraphs (a)(2)(i) through (iii) and paragraph (a)(2)(iv)(BB), by removing the semicolon at the end of the paragraph and adding a period in its place;

■ b. By removing paragraphs (a)(2)(v) and (vi); and

■ c. By adding a new paragraph (a)(2)(v) to read as follows:

**§ 16.13 Importation of live or dead fish, mollusks, and crustaceans, or their eggs.**

(a) * * *

(2) * * *

(v) Any live fish, gametes, viable eggs, or hybrids of the following Asian carp species in family Cyprinidae:

(A) *Hypophthalmichthys harmandi* (largescale silver carp).

(B) *Hypophthalmichthys molitrix* (silver carp).

(C) *Hypophthalmichthys nobilis* (bighead carp).

(D) *Mylopharyngodon piceus* (black carp).

* * * * *

Dated: March 4, 2011.

**Paul R. Schmidt.**

*Acting Director, Fish and Wildlife Service.*

[FR Doc. 2011–6507 Filed 3–21–11; 8:45 am]

**BILLING CODE 4310–55–P**

# Proposed Rules

Federal Register
Vol. 76, No. 55
Tuesday, March 22, 2011

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.

## GENERAL SERVICES ADMINISTRATION

### 5 CFR Chapter VII

### 41 CFR Chapters 101, 102, and 105, and Subtitle F

### 48 CFR Chapters 5 and 61

**[EO 013563–OGP–1; Docket 2011–0010; Sequence 1]**

### Reducing Regulatory Burden; Retrospective Review under E.O. 13563

**AGENCY:** Office of Governmentwide Policy, General Services Administration (GSA).

**ACTION:** Request for information.

**SUMMARY:** The General Services Administration (GSA) is requesting public input on how it can best implement the goals of Executive Order (EO) 13563, "Improving Regulation and Regulatory Review." E.O. 132563 was signed by President Obama on January 18, 2011, calls for an improvement in the creation and review of regulations and the better opportunities for the public to be part of this process. GSA will solicit public input through April 15, 2011, via comments received on a blog located at *http://www.gsa.gov/improvingregulations.* Later this year, GSA expects to release its retrospective review plan.

**DATES:** Comments will be accepted through April 15, 2011.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact General Services Administration, Office of Governmentwide Policy, Office of Travel, Transportation and Asset Management, at (202) 501–1777.

**SUPPLEMENTARY INFORMATION:**

#### A. Background

Executive Order 13563 directs each federal agency to consider "how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome." The EO calls on every agency to develop "a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether such regulations should be modified, streamlined, expanded or repealed to make the agency's regulatory program more effective and or less burdensome in achieving its regulatory objectives."

#### B. Procedures

Comments on Executive Order 13563 can be posted on a blog located on the Internet at *http://www.gsa.gov/improvingregulations.* To view Executive Order 13563 got to *http://www.gpo.gov/fdsys* and enter "executive order 13563" in the search box.

Dated: March 17, 2011.

**Janet Dobbs,**

*Director, Office of Travel, Transportation and Asset Management.*

[FR Doc. 2011–6657 Filed 3–21–11; 8:45 am]

**BILLING CODE 6820–14–P**

## DEPARTMENT OF AGRICULTURE

### Commodity Credit Corporation

### 7 CFR Part 1463

**RIN 0560–AI12**

### Tobacco Transition Payment Program; Cigar and Cigarette Per Unit Assessments

**AGENCY:** Commodity Credit Corporation and Farm Service Agency, USDA.

**ACTION:** Request for comments.

**SUMMARY:** The Commodity Credit Corporation (CCC) is requesting comments about the calculation of assessments to fund the Tobacco Transition Payment Program (TTPP). Currently the cigar portion of the assessment uses a per unit calculation that treats all cigars, large and small, the same. That policy is under review as the result of a court decision. This review could also affect cigarettes, which are subject to similar provisions.

**DATES:** We will consider comments that we receive by May 23, 2011.

**ADDRESSES:** We invite you to submit comments on this notice. In your comment, please specify RIN 0560–AI12 and include the volume, date, and page number of this issue of the **Federal Register**. You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Jane Reed, Economic and Policy Analysis Staff, Farm Service Agency, USDA, 1400 Independence Ave., SW., Mail Stop 0515, Washington, DC 20250–0514.

Comments may be inspected at the above address, in room 3722, between 8 a.m. and 4:30 p.m. Monday through Friday, except holidays.

**FOR FURTHER INFORMATION CONTACT:** Jane Reed; phone: (202) 720–6782. Persons with disabilities or who require alternative means for communication (Braille, large print, audio tape, *etc.*) should contact the USDA Target Center at (202) 720–2600 (voice and TDD).

**SUPPLEMENTARY INFORMATION:**

#### Background—TTPP Authority and Existing Regulations

TTPP was enacted in the Fair and Equitable Tobacco Reform Act of 2004 (FETRA) (7 U.S.C. 518–519a). FETRA was enacted as Title VI of Public Law 108–357. FETRA ended the former tobacco quota program and price supports, and created the 10-year (2005 through 2014) roughly $10 billion total TTPP. TTPP provides transition payments to certain tobacco producers and farm owners. TTPP is funded by assessments on manufacturers and importers of tobacco products. TTPP is sometimes called the "tobacco buyout" program. It is run by the Farm Service Agency (FSA) of the U.S. Department of Agriculture (USDA) on behalf of CCC. TTPP regulations are in 7 CFR part 1463.

#### Scope of This Request for Comments

This notice involves the collection of TTPP assessments, which are authorized in section 625 of FETRA (*see* 7 U.S.C. 518d). This notice focuses on the "Step B" cigar assessment, explained in greater detail below and addressed in § 1463.7 of the regulations. More specifically, this notice focuses on how those assessments are calculated for cigars, given that cigars vary widely in size, weight, and value but are assessed using a method based on the number of cigars handled.

The relevant FETRA provisions are the same for cigarettes as for cigars. Cigarettes are, therefore, in theory subject to the same issue of interpretation that led to this notice, however, as a practical matter may not be substantially affected by its resolution because cigarettes, unlike cigars, are taxed at a constant rate and are generally uniform in size, or more uniform in size than cigars.

Each year, FETRA assessments amount to about $1 billion for all tobacco product categories together. The assessments are collected quarterly.

**Current TTPP Assessment Methodology**

Calculation by USDA of the amount due from an individual manufacturer or importer currently involves two steps. "Step A" allots a percentage of the total program assessment to six product categories specifically identified in FETRA (subsection 518d(c)) by Congress. Those six categories are cigarettes, cigars, snuff, roll-your-own, pipe, and chewing tobacco.[1] The initial "Step A" percentage allotments have been over time adjusted for changes in relative volume in the categories, as required by subsection 518d(c). The cigar and cigarette categories combined generate about 98% of the total TTPP assessments, and have since FETRA was enacted. The cigar "Step A" allotment started at about 3 percent of the total allotments in fiscal year 2004, was up to 4 percent in 2009, and is now 7 percent. Cigarettes started at 96 percent and are now at 91 percent. Recent changes in volume may be in response to 2009 tax changes noted below.

Step B divides the category's assessment liability among the manufacturers and importers in that category. Currently, this is done by unit ("sticks") for cigars under the USDA regulations. That unit method of calculating assessments is the heart of the controversy (the subject of a recent court case). All "sticks" are treated as equal. A very small cigar generates the same FETRA assessment as a very large cigar, irrespective of the difference in weight, size, and value. USDA specified the calculation that way in the regulations because of the provisions of subsection 518d(g). At issue in this request for comments is whether the "unit" provisions of subsection 518d(g) are required to be considered to interpret FETRA, which as interpreted by USDA calls for "unit" volume calculations for cigarettes and cigars and weight volume calculations for the other four categories of tobacco. This follows, generally, the way the products are taxed.

**Tobacco Taxing Rates and Methods**

USDA does not have the authority to set tobacco product excise taxes. Excise tax rates and methods are outside the scope of this notice, however, taxing rates and methods are relevant to how TTPP assessments are calculated, or could be calculated, so some background on tobacco taxes is provided in this section to provide context.

"Small cigars" (for taxing purposes under other statutory, non-FETRA provisions) are those that weigh less than three pounds per 1,000 units. They are taxed, by agencies other than USDA, per unit (a certain dollar amount per 1,000 units). "Large cigars" (literally those that are not "small cigars") are taxed at a percentage of their value up to a certain maximum amount per 1,000 units. Thus the maximum tax rate for large cigars is a unit tax, but not all large cigars are taxed at a unit rate, if the value generates a unit amount that is below the maximum. The tax rates changed in 2009. Cigarettes are taxed by unit—a certain amount per 1,000 units. There are two tax categories for cigarettes, large and small, but there are no actual marketings in the "large" category. The other four categories of tobacco are taxed by weight.

**Step A Percentage Allotment Calculation Method**

Step A percentage allotments to the tobacco product categories were initially set in FETRA. USDA adjusts those periodically for changes in volume under subsection 518d(c).

USDA analyzed the Congressional Step A allotments and determined that the initial percentages were calculated by taking historical data for the six categories and then multiplying the weights or units in each category by the maximum tax rate (units for cigars and cigarettes—computed separately for large and small cigars—and weight for the others). This puts all product categories on a dollar basis.

Although the calculation was done separately for small and large cigars, Congress assigned one Step A percentage to cigars as a single category. As a result, there are only six categories in subsection 518d(c), not seven. There is one cigar category. There is not a separate "small cigar" category and a separate "large cigar" category.

Each year USDA uses data from the U.S. Department of the Treasury (Treasury) and the U.S. Department of Homeland Security Bureau of Customs and Border Security (Customs)—the new volume figures (units for cigars and cigarettes)—and multiplies them by the 2004 tax rates to adjust the Step A allotments using the calculation Congress was determined to have used for the initial Step A allotments. Those former tax rates (not the 2009 revised rates) are used so that the adjustments to the Step A category allotments are for changes in volume (units and weights) only, not changes in tax rates.

USDA issued a technical amendment in the **Federal Register** published December 10, 2010 (75 FR 76921–76923), explaining this policy regarding Step A and clarifying the rules. The Step A calculation is being challenged in a lawsuit different than the one that resulted in this notice. There it is argued against the USDA position that the new 2009 tax rates should be used for the computation.

**Step B Calculation**

This immediate controversy, however, involves, as noted, Step B. Step B is where a category's percentage allotment is divided among the manufacturers and importers in that category. As indicated, subsection 518d(g) has been implemented by USDA to divide the single cigar Step A category allotment among all cigars by unit. Subsection 518d(e) provides that no manufacturer or importer should have to pay more than the "pro rata" share of the volume in their category.

Small cigar manufacturers and importers have argued that calculating Step B by units makes them pay more than their "pro rata" share. They argue that "volume" under subsection 518d(e) cannot be measured by units in the manner currently undertaken by USDA despite subsection 518d(g).

USDA's method treats all cigar units, large and small, the same for purposes of dividing up the single Step A cigar percentage allotment. USDA does not break out the cigar category first into small and large cigars and then apply the unit division of subsection 518d(g).

**United States Code and Code of Federal Regulations (CFR) References**

The discussion of cigar assessments in this notice references both FETRA (as it appears in the United States Code) and the current regulations (as they appear in the CFR). To help commenters understand the context of this notice, the full text of section 518d is available at: *http://uscode.house.gov/uscode-cgi/fastweb.exe?getdoc+uscview+t05t08+2465+11++%28%29%20%20.*

FETRA was enacted October 22, 2004. The final rule implementing TTPP was published on February 10, 2005 (70 FR

[1] Throughout this document, we refer to "snuff, roll-your-own, pipe, and chewing tobacco" as the "other" four categories of tobacco.

7007–7014). There is a rulemaking exception in section 519a and the final rule was published without prior comment. The regulation was amended by a final rule published in the **Federal Register** on April 4, 2005 (70 FR 17150–17166). The regulation specifies a stick-based Step B cigar calculation and treats cigars as one category not two. The relevant regulation (for Step B calculations) is in 7 CFR 1463.7.

**Step B as Specified in FETRA**

The Step B controversy arises out of *Prime Time International, Inc.,* v. *Vilsack* (599 F.3d 678). There were several issues raised in the lawsuit. (The others will be addressed separately once the rulemaking issue is resolved.) The district court ruled for USDA on the Step B issue. The case then went to the Court of Appeals (the Court). The Court described the Step B unit disagreement this way:

> Prime Time contends that USDA's interpretation of the Fair and Equitable Tobacco Reform Act is contrary to ordinary construction and plain meaning of the word "volume" in the phrase "gross domestic volume," which is defined in section 518d(a)(2) as the "volume of tobacco products-removed (as defined by section 5702 of Title 26)" and "not exempt from tax" pursuant to provisions not relevant to this appeal, *supra* note 1. It observes that where statutory terms, such as "volume" here, are not defined in a statute, courts give them their ordinary meaning, citing *Asgrow Seed Co. v. Winterboer,* 513 U.S. 179, 187, 115 S.Ct. 788, 130 L.Ed.2d 682 (1995). USDA responds that "volume" is "clearly explained" in FETRA to mean the number of cigars because section 518d(g)(3) provides that the number of cigars determines the "volume of domestic sales" and thus "market share" under section 518d(f).

The Court described the suggested alternative to USDA's Step B calculation as dividing the Step A percentage into small and large cigar subclasses and then applying the unit division to each category separately. The Court said:

> Prime Time maintains, because FETRA requires that the allocation within a tobacco class be "on a pro rata basis" with "[n]o manufacturer or importer * * * required to pay an assessment that is based on a share that is in excess of the manufacturer's or importer's share of domestic volume." 7 U.S.C. 518d(e). Therefore, it argues, after allocating the assessment by class of tobacco products, USDA should divide the cigar class assessment into sub-classes of large and small cigars, with the relative allocation determined by total weight, and then divide the assessments among individual large and small cigar manufacturers and importers on a per-stick basis from the subdivided assessments, satisfying subsection (g)(3)(A). Prime Time contends such a method is required by the plain text of subsection (e) as well as subsection (i)(4)(B), which, upon administrative appeal, requires the Secretary to "make any revisions necessary to ensure that each manufacturer and importer pays only its correct pro rata share of total gross domestic volume from all sources."

As to the government's position that subsection 518d(g)(3) unambiguously required that all cigars be divided by unit (without a breakout of cigars into subclasses before the division by units), the Court said it did not see FETRA as being unambiguous:

> The plain text of FETRA does not self-evidently vindicate USDA's two step assessment method. Under FETRA, the "volume of domestic sales" and "market share" are not synonymous with "gross domestic volume." FETRA provides, for example, that "[t]he volume of domestic sales shall be calculated based on gross domestic volume," 7 U.S.C. 518d(g)(2) (emphasis added), indicating two different meanings for the terms. And section 518d(g)(3)(A) does not, on its face, require that a compound number of large and small cigars serve as the denominator when calculating a manufacturer's or importer's volume of domestic sales on a per-stick basis. Most critically, USDA's interpretation appears to ignore the pro-rata-basis limitation Congress imposed on assessments within a tobacco class in subsection (e). As interpreted by USDA, it is irrelevant that one large cigar consumes far more tobacco than a small cigar, and so accounts for a far larger segment of the market than its per-stick contribution would indicate. Yet the text and structure of the statute titled the Fair and Equitable Tobacco Reform Act suggests an easy counting metric for cigarettes and cigars may not override a statutory mandate that assessments be "allocated on a pro rata basis" within each class of tobacco product, *id.* § 518d(e)(1). Prime Time's interpretation suggests that there is at least one way to interpret FETRA's provisions consistently and in harmony, with none made superfluous or insignificant. See *Corley* v. *United States,* ___ U.S. ___, 129 S.Ct. 1558, 1566, 173 L.Ed.2d 443 (2009); *City of Anaheim, Cal. v. FERC,* 558 F.3d 521, 522 (D.C.Cir.2009).
>
> For the purpose of this appeal, the court need only observe that USDA's present interpretation is not mandated by the plain text of FETRA. USDA does not maintain that its interpretation of FETRA is a permissible view of an ambiguous statute entitled to deference under *Chevron* step 2, 467 U.S. at 843, 104 S.Ct. 2778. Given that FETRA does not appear to be susceptible of only a single interpretation, we reverse and remand to the district court with instructions to remand Prime Time's FETRA claims to the USDA for further proceedings. See *PDK Labs. Inc.* v. *U.S. DEA,* 362 F.3d 786, 797–98 (D.C.Cir.2004).

**Alternative Step B Methods**

As a result, the Court remanded the claims to USDA to reconsider and this request for comment is part of the process of reconsidering. Several points should be noted. First, the Court refers to weights for dividing cigars into two Step A subcategories. USDA does not have weight data for domestically manufactured small and large cigars. Cigars are not taxed based on weight. Weight information is not available on the Treasury reports and may not be known or reported by any part of the Federal government for domestically manufactured cigars. (There has been no reason for the Federal government to collect weights for cigars because they are not taxed on that basis). The same is true of cigarette weight data. USDA could ask the companies for the data, but subsection 518d(h) of FETRA requires tax reports to be used for these calculations. Those reports do not include the weight data either. Also, each manufacturer would be dependent on the accuracy of all other manufacturer's weight data reports to receive a correct assessment. The title of subsection (h), the subsection mentioned in (g), seems telling in this regard—"Measurement of Volume of Domestic Sales." The only metric on the reports for cigars is units.

There is another problem with this alternate approach. Ultimately, the alternative requires that large cigars be divided by unit. There are presumably variations in weight among small cigars but, in any event, there are wide weight and size variations among large cigars and if to pay more than the share represented by the respective weight violates subsection 518d(e), then it would appear that for the makers of smaller large cigars the alternative would violate subsection 518d(e). Therefore, it seems, the alternative would be self-contradictory.

To, however, do the Step B division strictly on weight (or on some other measure like taxes paid) would appear to disregard subsection 518d(g). If the point of the interpretation is to give meaning to all part of the statute, then dismissing subsection 518d(g) does not work. In the reply brief submitted in support of an alternative approach in the litigation, it was suggested that taxes paid would be used in lieu of weight:

> If FETRA is read plainly, wholly and harmoniously, then the cigar assessment process is clean, simple, and direct: (A) Allocate the amount of the total assessment among the six classes based on the federal excise taxes paid by each class, with separate figures for large and small cigars as USDA currently does. (B) Divide the class assessment for cigars into large and small cigar segments. This will divide the market share of cigars along the lines of the overall size and weight (and coincidently market value) of the products removed. (C) For large cigars, divide the amount of the total cigar assessment attributable to large cigars by the number or stick count of the large cigars

removed by each company to establish a company assessment. For small cigars, divide the amount of the total cigar assessment attributable to small cigars by the number of small cigars each company removes to establish the company assessment. This procedure respects all of FETRA's sections, calculating market share based on number of cigars while also ensuring assessments do not exceed respective shares of total gross domestic volume from all sources, as required by FETRA.

That approach still leaves dividing up large cigars by units. (That is also a problem for small cigars if small cigars are not standard in size.) Therefore, it has the same internal contradiction problem as the strict weight based alternative. Plus, as noted below, weights and taxes for cigars do not vary proportionately. To the contrary, taxes actually in some cases, at least since 2009, vary inversely to the size of the cigar in those instances where smallish large cigars are big enough to be taxed on a value basis rather than a unit basis.

The Court referred to common uses of the term "volume." It could be argued that volume might suggest weight in the proper instance. It does not, it would seem, suggest taxes paid. As for the use of units, there is no reason why volume cannot be a number and as to FETRA, as we note below, the word "volume" is strictly defined in subsection 518d(g) as a number and that makes particular sense it would seem since the government does not have weights for domestically manufactured cigars and it was based on units that the Step A calculation was made. Thus, and for the other reasons given here, the only definition for "volume" that makes sense is the actual one given in the statute—that which is in (g). This does not seem at all unusual for the reasons given. For example, if the issue were the volume of pedestrian traffic on a bridge, volume could well be measured as a number rather than the weight of the person who crossed the bridge or the taxes they paid.

Also, in the alternative suggested in the litigation, the Step A allotment would effectively be a seven category calculation. Yet, FETRA specifically only provides for six. There does not appear to be any rational reason why Congress would have put six in FETRA if seven were meant.

And, there is legislative history to suggest the use of six categories not seven was no accident. FETRA was enacted in October of 2004. The Senate Bill passed that summer had two assessments. One was to be a FDA assessment (ultimately jettisoned). The Bill's FDA assessment followed the same structure as section 518d. There was in the FDA assessment a Step A division among categories but that Step A division had seven categories, not six, as "large" and "little" cigars were made separate categories (150 C.R. 16047 (July 16, 2004), also 150 C.R. S8389). ("Little" was defined the same as "small" is now.) The TTPP assessment in the Senate Bill did not cover cigars at all (150 C.R. 16056 (July 16, 2004), also 150 C.R. S8397). There were only five categories. But in the end, the FDA provisions were taken out of the legislation that enacted FETRA and cigars were added to the TTPP without the cigar subcategories of the FDA assessment. That is, in the TTPP provisions that are now law, Congress went from five to six categories, specifically rejecting the seven-category (two-cigar category), FDA assessment model of the Bill that was at one time under consideration and which is what is actually suggested here. That is, Congress seems to have intentionally made cigars one category, not two, after considering the alternative. In addition, recent events noted below in which manufacturers have been fleeing the small cigar category for the cheaper taxes of the large cigar category indicates that there is not much difference between cigars on either side of the margin of the two categories, making it seemingly burdensome and market-affecting to separate the categories, which may have been a motivation for Congress as well.

That would seem to be important in this instance since the alternative suggested in the litigation was a two-cigar category alternative. Seemingly, Congress considered, but rejected, the breakout. The Senate Bill TTPP assessment provisions as they stood before cigars were added as a category was basically the same as they are now. Cigars were simply added.

Before cigars were added, size differential was not really a potential issue in theory because the other four categories of tobacco were weight categories and cigarettes may not have the weight variations of cigars. Congress added cigars purposely as a single category and did nothing to add provisions dealing with separating cigars by size.

To add a size element now or subcategories would seem to be to legislate rather than to interpret the legislation. FETRA has been in existence for 6 years without change. The definition of volume that seems to apply and be intended is that of subsection 518d(g)(3). That is why, for now, USDA, pending comment, maintains the current regulation and Step B procedure.

**Fairness of Assessment, Congressional Intent**

With regard to the alternative, there is in its favor, to the extent relevant, the potential equitable concern of small cigars generating the same liability as large ones. We address that more below. The Step A calculations are done separately for small and large cigars even though the end result is one Step A category. In support, on the other hand, of the current method, reading subsection 518d(g) as requiring a unit method can be seen as actually giving meaning to the other provisions of FETRA rather than being contrary to them.

FETRA as it was finally enacted does bounce among several concepts. Among them are (1) "market share" and (2) "volume of domestic sales" and (3) "gross domestic volume." Also there is the "pro rata" language. Under subsection 518d(e), USDA is to allocate Step B on a "pro rata" basis and subsection 518d(i)(4) specifies that each manufacturer and importer only pay their "correct share of total gross domestic volume from all sources." Specifically in subsection 518d(e) FETRA provides that the assessment be "allocated on a pro rata basis" based on the manufacturer's or importer's "share of gross domestic volume."

In the alternative view suggested in the litigation, it is suggested that a maker of small cigars is paying more than its "pro rata" share of the "gross domestic volume" if it pays the assessment as currently calculated because "gross domestic volume" cannot, it is suggested there, be based just on units. However, in subsection 518d(f) FETRA requires that the manufacturers and importers be assessed based on "market share" and "market share" is defined in subsection 518d(a) to mean "volume of domestic sales."

There appears to be a logical progression towards subsection 518d(g), which is entitled "Determination of volume of domestic sales." That is also the expression in the title of subsection 518d(h). Subsection 518d(g)(2) specifies that "the volume of domestic sales" be calculated based on "gross domestic volume" therefore tying the two concepts together, or seeming to, and then subsection 518d(g)(3) specifies that "volume of domestic sales" will be measured by units for cigars. Therefore, considering all of the sections together and weighing them all together with all of the potential for controversy that they may produce, it seems on balance at this time and subject to comment and further consideration that all FETRA

subsections seem to be tied together and given precise meaning in subsection 518d(g)(3) by tying the measure to units. This interpretation of all the parts of the statute to resolve any ambiguities produced by the various subsections seems particularly strong when all the suggested alternatives suggested so far result in contradictory interpretation for separate subsections of FETRA or involve data that no Federal Government agency has and cannot be verified if supplied by manufacturers, and would involve calculations that Congress presumably would have laid out in the statute. This view is not one of convenience on the part of the agency but reflects the actual provision of the statute both as to what Congress did express and what it did not.

Congress in subsection 518d(h) specifically called for the use of official government reports that do not include weight data for domestically manufactured cigars, and that section is specifically entitled "Measurement of Volume of Domestic Sales" and has only a unit metric for cigars. It was Congress that recognized the need for a ready method to collect the assessment. It was an add-on to the taxes paid elsewhere. The reports show taxes paid, but taxes paid is not a volume measure—a view that may be at issue in the Step A litigation referred to earlier—and, in any event, (h) is referenced in (g) which specifies that the "volume" method to be used is a unit method.

If Congress wanted to calculate Step B some other way, presumably Congress would have told USDA what to do and not left parts of the calculation to speculation, particularly given how detailed the specifications otherwise are in FETRA. Congress could have omitted the unit provision and specified that payments would be made on the basis of taxes paid. They did not do that. It may be that a particular party can show that the unit figures used by USDA are inaccurate. But that is a different issue than the method of the assessment.

It seems to follow, pending comment, that a manufacturer's or importer's "pro rata" share of the cigar volume would under FETRA and these provisions be their share of the total number of units together of all cigars thus resolving any ambiguities that might otherwise be left to debate by the more general provisions elsewhere in FETRA. The word "based" in subsection 518d(g)(2) would not seem to mean merely "derived from" allowing other elements to intercede in the volume determination since subsection 518d(f) (in conjunction with subsection 518d(a)) provides that the "volume of domestic sales" is determinative and subsection 518d(g)(3) specifies that that volume is a unit-based matter solely. It is not derived from that number—it is that number, or so FETRA seems to say.

The current approach therefore does seem to give meaning to all parts of FETRA. The current approach handles the matter in a coherent and logically consistent way. Companies, accordingly, do seem under the current regime to pay their pro rata share of the correct volume. Subsection 518d(g) defines "volume" (and is the only provision to do so) and therefore gives meaning to other parts of FETRA. Plus, as noted, the calculation method in FETRA is detailed and specific and Congress only enacted six categories not seven and seemed to do so intentionally. Congress has never changed FETRA even though it changed other taxes among the tobacco product categories in 2009.

The alternatives discussed in this notice are largely based on interpretations of 7 U.S.C. 518d(e) and whether the current method provides a fair assessment so that no company is paying more than its share of gross domestic volume. The current method that USDA uses could arguably be seen as "unfair" because tiny cigars generate as much assessment as very large, and expensive, cigars. However, USDA cannot change its obligations on the basis of what it believes to be fair not fair—that would be to legislate and it is not clear that Congress was unaware of these issues or regarded the current method as unfair. There is nothing in the statute to suggest that the calculation method is a policy call and, in any event on further consideration, there is no reason to necessarily consider the assessments "unfair" as enacted—or now.

Rather, the Step B assessments have only been about one-third of one cent per unit for small cigars, or about $3 per 1,000 units. This does not seem to have impeded the marketing of small cigars, judging from the numbers that have been reported to USDA from the tax reports. Presumably, this very small assessment was passed on to consumers. It was common to all parties in the same category so there was no competitive advantage.

Further, we understand that small cigars can be packaged like cigarettes, can be about the same size, and can compete with cigarettes. In 2004 the difference in general tax rates between small cigars and cigarettes was about $18 per 1,000 units ("small cigars" were taxed at about $2 per 1,000 units). The FETRA assessment of $3 per 1,000 units was much less than that difference and also cigarettes themselves generate a FETRA assessment. "Small cigars" thus would still have had an overall tax advantage. That may have figured in Congress's thinking in enacting FETRA.

There have been some changes in the tax situation since as noted above, the 2009 tax changes equalized "small cigar" and cigarette tax rates at about $50 per 1,000 units, but made no changes to FETRA. However, the tax changes apparently motivated small cigar makers to increase the size of their cigars so that they could be taxed at a value rate (about 50 percent of value) as "large cigars" (which results in an amount well below the maximum unit rate for large cigars) and not at a unit rate as small cigars.

At current rates, taxes for smaller large cigars (those are just heavy enough to be in the "large" category) are small enough (because their value is low enough) that they are taxed more cheaply (converted to a per unit basis) than those in the "small cigar" category. That is, these now slightly bigger cigars are now taxed, per unit, at a rate that is well below the roughly $50 per 1,000 units rate for "small cigars" and cigarettes. In fact, the difference between these smaller large cigars (which still may be marketed like the small cigars of old in packages of 20) and cigarettes may even be greater than the old difference between "small cigars" and cigarettes prior to the 2009 tax changes. That difference, it appears, can be even greater than the $18 difference under the former rates. Smaller large cigars still have a tax advantage over cigarettes.

We add in the way of perspective on these issues that there has been a reported shift in market volume from the "small" cigar category into the large category and cigar numbers have increased steeply as reflected in the change in the FETRA cigar Step A allotment. This means that that those that would benefit from a breakout of "small cigars" may now no longer so benefit from the alternate method of making the Step B calculation, thus suggesting a certain volatility in result which of itself may have been something that Congress would have wanted to avoid. Some companies that formerly exclusively sold small cigars appear to be primarily selling "large" cigars to maintain their tax advantages over cigarettes. "Large cigar" market volume numbers have increased substantially since the 2009 tax change. As for the future, if all small cigars are reformulated to meet the weight per 1,000 units requirements of the large cigar category and its cheaper tax rates, it could be that there are no marketings at all in the small cigar category, in which case the result of using the

alternate method would be exactly the same as the method currently used by USDA.

But assuming a situation in which there are substantial small cigar marketings in the actual "small cigar" tax category, changing the Step B method would substantially change assessment levels. Even applied to assessment data from the first quarter of 2010, it appears that the alternative method of using cigar subcategories would have increased the large cigar unit assessment as much as 12 times. That difference might actually have been greater before then because in 2010, the shift in market volume from small to large cigars had already begun.

We request comments on all aspects of the Step B assessment. Commenters can address whether they believe the Court's decision absolutely requires a change or merely requires a change if agency reconsideration of the current method of Step B division suggests that a change is appropriate. Comments in support of a change should suggest where USDA would obtain the data to implement the alternative and how that information would be verified. Comments should address the question of whether a change would be retroactive for all, or prospective only, for those other than the company in connection with the current litigation. Commenters may want to indicate whether "small cigars" are standard in size or provide other marketing information that may be germane to the consideration of this issue.

Commenters may want to address whether cigarettes should be impacted by any potential resulting changes. Because the statutory provisions at issue are also used for the assessment of cigarettes, particularly with respect to the use of units, cigarette manufacturers and importers may wish to comment on whether the cigarette Step B method currently in use should be changed or remain the same. For example, if our assumption that all cigarettes weigh the same is inaccurate, a change to the Step B calculation to take weight into account could impact cigarette manufacturers or importers.

### Conclusion and Guidance for Comments

CCC is requesting comments from the public on the method used to calculate TTPP assessments for cigar manufacturers and importers, and any related issues. Any change would be reflected in the regulations in 7 CFR part 1463. Specific comments addressing the issues raised above are preferred, but all comments are welcome. Proposals for alternatives should address data sources and costs and the provisions of FETRA that support the alternative. This notice does not change the regulations; any change would be published in a subsequent rulemaking document. Because FETRA exempts TTPP from notice and comment rulemaking, any future action would likely be a final rule.

The following suggestions may be helpful for preparing your comments:

- Explain your views as clearly as possible.
- Describe any assumptions that you used.
- Provide any technical information and data on which you based your views.
- Provide specific examples to illustrate your points.
- Offer specific alternatives to the current regulations or policies and indicate the source of necessary data, the estimated cost of obtaining the data, and how the data can be verified.
- Submit your comments to be received by FSA by the comment period deadline.

### Executive Order 12866

The Office of Management and Budget (OMB) designated this notice as not significant under Executive Order 12866, "Regulatory Planning and Review," and therefore has not reviewed this notice.

Signed in Washington, DC, on March 15, 2011.

**Val Dolcini,**

*Acting Executive Vice President, Commodity Credit Corporation.*

[FR Doc. 2011–6668 Filed 3–21–11; 8:45 am]

**BILLING CODE 3410–05–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2011–0254; Directorate Identifier 2010–NM–180–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER Series Airplanes

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

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

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for the products listed above. For certain airplanes, this proposed AD would require a one-time inspection for damage of the hydraulic actuator rod ends and actuator attach fittings on the thrust reversers, and repair or replacement if necessary. For all airplanes, this proposed AD also would require repetitive inspections for damage of the hydraulic actuator rod ends, attach bolts, and nuts; repetitive inspections for damage of fitting assemblies, wear spacers, and actuator attach fittings on the thrust reverser; repetitive measurements of the wear spacer; and corrective actions if necessary. This proposed AD was prompted by in-service damage of the attachment fittings for the thrust reverser actuator. We are proposing this AD to detect and correct such damage, which could result in actuator attach fitting failure, loss of the thrust reverser auto restow function, and consequent loss of control of the airplane.

**DATES:** We must receive comments on this proposed AD by May 6, 2011.

**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:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, *Attention:* Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; *phone:* 206–544–5000, extension 1; *fax:* 206–766–5680; *e-mail: me.boecom@boeing.com; Internet: https://www.myboeingfleet.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 Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office

(*phone:* 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Chris R. Parker, Aerospace Engineer, Propulsion Branch, ANM–140S, Seattle Aircraft Certification Office (ACO), FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; *phone:* 425–917–6496; *fax:* 425–917–6590; *e-mail: Chris.R.Parker@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

## Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2011–0254; Directorate Identifier 2010–NM–180–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

## Discussion

We have received a report indicating that the attachment fittings for the thrust reverser actuator have shown in-service wear damage. While in the stowed position, the actuator is locked and is in tension. The tensile load applied by the locking screw causes the hydraulic actuator rod end to rotate. As the hydraulic actuator rod end rotates, wear occurs to the bushings in the actuator attach fitting. The bushings continue to wear until there is contact directly between the hydraulic actuator rod end and the attach fitting. This condition, if not detected and corrected, could result in actuator attach fitting failure and loss of the thrust reverser auto restow function. Loss of the thrust reverser auto restow function removes one of the three primary levels of protection against an uncommanded thrust reverser deployment. An uncommanded thrust reverser deployment could result in loss of airplane control.

## Relevant Service Information

We reviewed Boeing Special Attention Service Bulletin 737–78–1083, dated June 30, 2010. For Group 1 airplanes, this service bulletin specifies a one-time detailed inspection to detect damage (*i.e.,* wear, cracks, nicks, dents, and scratches) of the hydraulic actuator rod ends and the actuator attach fittings on the right and left thrust reversers.

For airplanes on which damage is found on a hydraulic actuator rod end, this service bulletin specifies replacing of the hydraulic actuator rod end assembly with a new hydraulic actuator rod end assembly.

For airplanes on which no damage is found on an actuator attach fitting, this service bulletin specifies installing of a new spacer. For damage found on an actuator attach fitting that is within stated repair limits, this service bulletin specifies repairing the actuator attach fitting and installing a new spacer. For damage that exceeds the repair limits of the actuator attach fitting, this service bulletin specifies replacing the actuator attach fitting with a new actuator fitting.

For both Group 1 and Group 2 airplanes, this service bulletin describes procedures for repetitive inspections for damage (as specified in each inspection that follows), repetitive measurements, and corrective actions if necessary. The inspections and measurement include the following:

- A general visual inspection for cracks, nicks, dents, and scratches of the fitting assembly
- A detailed inspection for tears, holes, and disbonds of the wear spacer
- A measurement of the thickness of the wear spacer
- A detailed inspection for surface damage of the attach fitting
- A general visual inspection for damage (*i.e.* missing, cracked, or bent parts) of the rod end, attach bolt, and nut

The corrective actions include replacing spacers with new spacers, repairing attach fittings, replacing attach fittings with new attach fittings, replacing the rod end, attach bolt, and nuts with a new actuator rod end assembly.

## FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

## Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under "Differences Between the Proposed AD and the Service Information."

## Differences Between the Proposed AD and the Service Information

Appendix A of Boeing Special Attention Service Bulletin 737–78–1083, dated June 30, 2010, specifies a general visual inspection for cracks, nicks, dents, and scratches of the fitting assembly. We have determined that this inspection is accomplished during the detailed inspections specified in Appendix A of Boeing Special Attention Service Bulletin 737–78–1083, dated June 30, 2010.

Appendix A of Boeing Special Attention Service Bulletin 737–78–1083, dated June 30, 2010, specifies to replace missing, cracked, and bent rod ends, attach bolts, and nuts, but does not specify replacement parts and how to replace the affected part. This proposed AD would require replacing missing, cracked, and bent rod ends, attach bolts, and nuts with new parts in accordance with a method approved by the FAA.

## Costs of Compliance

We estimate that this proposed AD will affect 1,070 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

| Action | Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|---|
| One-time detailed inspection and installation (Group 1: 850 airplanes). | 28 work-hours × $85 per hour = $2,380. | $68 | $2,448 | $2,080,800. |
| General visual and detailed inspections (Group 1 and 2 airplanes). | 23 work-hours × $85 per hour = $1,955 per inspection cycle. | 0 | $1,955 per inspection cycle. | $2,091,850 per inspection cycle. |

We estimate the following costs to do any necessary repairs or replacements that would be required based on the results of the proposed inspection. These on-condition costs are based on all the thrust reverser attachment fittings needing repair or replacement. We have no way of determining the number of aircraft that might need these repairs or replacements.

ON-CONDITION COSTS

| Action | Labor cost | Parts cost | Cost per product |
|---|---|---|---|
| Attach fitting replacement | 75 work-hours × $85 per hour = $6,375. | $10,850 | $17,225 |

According to the manufacturer, some of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all costs in our cost estimate.

**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),

(3) Will not affect intrastate aviation in Alaska, and

(4) 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.

**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 airworthiness directive (AD):

**The Boeing Company:** Docket No. FAA–2011–0254; Directorate Identifier 2010–NM–180–AD.

**Comments Due Date**

(a) We must receive comments by May 6, 2011.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to The Boeing Company Model 737–600, –700, –700C,–800, –900, and –900ER series airplanes, certificated in any category, as identified in Boeing Special Attention Service Bulletin 737–78–1083, dated June 30, 2010.

**Subject**

(d) Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 78, Exhaust.

**Unsafe Condition**

(e) This AD was prompted by in-service damage of the attachment fittings for the thrust reverser actuator. We are issuing this AD to detect and correct such damage, which could result in actuator attach fitting failure, loss of the thrust reverser auto restow function, and consequent loss of control of the airplane.

**Compliance**

(f) Comply with this AD within the compliance times specified, unless already done.

**Inspection and Repair: Group 1 Airplanes**

(g) For Group 1 airplanes, as identified in Boeing Special Attention Service Bulletin 737–78–1083, dated June 30, 2010: At the compliance time specified in paragraph (g)(1) or (g)(2) of this AD, whichever is later, perform a one-time detailed inspection to detect wear, cracks, nicks, dents, and scratches of the hydraulic actuator rod ends and actuator attach fittings on the thrust reversers, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–78–1083, dated June 30, 2010.

(1) Within 7,500 flight hours after the effective date of this AD.

(2) Before the accumulation of 15,000 total flight cycles or 30,000 total flight hours, whichever occurs first.

(h) If any wear, crack, nick, dent, or scratch of any hydraulic actuator rod end is found during the inspection required by paragraph (g) of this AD: Before further flight, replace the affected hydraulic actuator rod end assembly with a new hydraulic actuator rod end assembly, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–78–1083, dated June 30, 2010.

(i) If no wear, cracks, nicks, dents, and scratches of any actuator attach fittings are found during the inspection required by paragraph (g) of this AD: Before further flight, install new wear spacers on the affected actuator attach fitting, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–78–1083, dated June 30, 2010.

(j) If any wear, crack, nick, dent, or scratch of any actuator attach fitting is found during the inspection required by paragraph (g) of this AD, and is less than 0.005 inch in depth: Before further flight, repair the affected actuator attach fitting and install the new wear spacer, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–78–1083, dated June 30, 2010.

(k) If any wear, crack, nick, dent, or scratch of any actuator attach fitting is found during the inspection required by paragraph (g) of this AD, and is 0.005 inch or greater in depth: Before further flight, replace the actuator attach fitting with a new actuator attach fitting, in accordance with the Accomplishment Instructions of Boeing

Special Attention Service Bulletin 737–78–1083, dated June 30, 2010.

**Repetitive Inspections and Corrective Actions**

(l) For Group 1 airplanes, as identified in Boeing Special Attention Service Bulletin 737–78–1083, dated June 30, 2010: Within 7,500 flight hours after accomplishing the requirements of paragraph (g) of this AD, do the actions specified in paragraphs (l)(1), (l)(2), (l)(3), and (l)(4) of this AD. Repeat the actions thereafter at intervals not to exceed 7,500 flight hours.

(1) Do a detailed inspection for tears, holes, and disbonds of the wear spacer, in accordance with Appendix A of Boeing Special Attention Service Bulletin 737–78–1083, dated June 30, 2010. If any tear, hole, or disbond is found, before further flight, replace the spacer with a new spacer, in accordance with Appendix A of Boeing Special Attention Service Bulletin 737–78–1083, dated June 30, 2010.

(2) Measure the thickness of the wear spacer in accordance with Appendix A of Boeing Special Attention Service Bulletin 737–78–1083, dated June 30, 2010. If the thickness is less than 0.020 inch, before further flight, replace the spacer with a new spacer, in accordance with Appendix A of Boeing Special Attention Service Bulletin 737–78–1083, dated June 30, 2010.

(3) Do a detailed inspection for surface damage of the attach fitting, in accordance with Appendix A of Boeing Special Attention Service Bulletin 737–78–1083, dated June 30, 2010.

(i) If the surface damage is less than 0.005 inch depth, before further flight, repair the attach fitting, in accordance with Appendix A of Boeing Special Attention Service Bulletin 737–78–1083, dated June 30, 2010.

(ii) If the surface damage is 0.005 inch or greater in depth, before further flight, replace the attach fitting with a new attach fitting, in accordance with Appendix B of Boeing Special Attention Service Bulletin 737–78–1083, dated June 30, 2010.

(4) Do a general visual inspection for damage (i.e. wear, missing, cracked, or bent parts) of the rod end, attach bolt, and nut, in accordance with Appendix A of Boeing Special Attention Service Bulletin 737–78–1083, dated June 30, 2010. If any damage is found, before further flight, replace the affected part with a new part in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA.

**Group 2 Inspection and Repair**

(m) For Group 2 airplanes, as identified in Boeing Special Attention Service Bulletin 737–78–1083, dated June 30, 2010: Within 12 months after the effective date of this AD, perform the actions required in paragraph (l) of this AD. Repeat the actions thereafter at intervals not to exceed 7,500 flight hours.

**Alternative Methods of Compliance (AMOCs)**

(n)(1) The Manager, Seattle Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be e-mailed to *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

**Related Information**

(o) For more information about this AD, contact Chris R. Parker, Aerospace Engineer, Propulsion Branch, ANM–140S, Seattle Aircraft Certification Office (ACO), FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; *phone:* 425–917–6496; *fax:* 425–917–6590; *e-mail: Chris.R.Parker@faa.gov.*

(p) For service information identified in this AD, contact Boeing Commercial Airplanes, *Attention:* Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; *phone:* 206–544–5000, extension 1; *fax:* 206–766–5680;*e-mail: me.boecom@boeing.com; Internet:https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, the FAA, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on March 14, 2011.

**Ali Bahrami,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2011–6613 Filed 3–21–11; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2011–0224; Directorate Identifier 2010–NM–210–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus Model A330–200 and –300 Series Airplanes

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

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

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for the products listed above that would supersede an existing AD. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

* * * * *

The airworthiness limitations applicable to Damage Tolerant Airworthiness Limitation Items (DT ALI) are currently given in Airbus A330 ALI Document reference AI/SE–M4/95A.0089/97, which is approved by the European Aviation Safety Agency (EASA) and referenced in Airbus Airworthiness Limitations Section (ALS) Part 2.

The issue 17 of Airbus A330 ALI Document introduces more restrictive maintenance requirements/airworthiness limitations. Failure to comply with this issue constitutes an unsafe condition.

This [EASA] AD supersedes EASA AD 2009–0102 [and retains the requirements therein], and requires the implementation of the new or more restrictive maintenance requirements/airworthiness limitations as specified in Airbus A330 ALI Document issue 17.

The unsafe condition is fatigue cracking, damage, and corrosion in certain structure, which could result in reduced structural integrity of the airplane. 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 May 6, 2011.

**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 Airbus SAS—Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80, e-mail *airworthiness.A330-A340@airbus.com;* Internet *http://www.airbus.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:** Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1138; fax (425) 227–1149.

**SUPPLEMENTARY INFORMATION:**

## Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2011–0224; Directorate Identifier 2010–NM–210–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

## Discussion

On April 20, 2006, we issued AD 2006–09–07, Amendment 39–14577 (71 FR 25919, May 3, 2006). That AD requires actions intended to address an unsafe condition on A330–200 and –300 series airplanes, A340–200 and –300 series airplanes, and A340–541 and –642 airplanes.

Since we issued AD 2006–09–07, Airbus has revised certain A330 Damage tolerant airworthiness limitations items to include more restrictive maintenance requirements/airworthiness limitations. The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2010–0174, dated August 17, 2010 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> The airworthiness limitations are distributed in the Airbus A330 Airworthiness Limitations Section (ALS).
>
> The airworthiness limitations applicable to Damage Tolerant Airworthiness Limitation Items (DT ALI) are currently given in Airbus A330 ALI Document reference AI/SE–M4/95A.0089/97, which is approved by the European Aviation Safety Agency (EASA) and referenced in Airbus Airworthiness Limitations Section (ALS) Part 2.
>
> The issue 17 of Airbus A330 ALI Document introduces more restrictive maintenance requirements/airworthiness limitations. Failure to comply with this issue constitutes an unsafe condition.
>
> This [EASA] AD supersedes EASA AD 2009–0102 [and retains the requirements therein], and requires the implementation of the new or more restrictive maintenance requirements/airworthiness limitations as specified in Airbus A330 ALI Document issue 17.

The unsafe condition is fatigue cracking, damage, and corrosion in certain structure, which could result in reduced structural integrity of the airplane. You may obtain further information by examining the MCAI in the AD docket.

## Relevant Service Information

Airbus has issued Document AI/SE–M4/95A.0089/97, "A330 Airworthiness Limitation Items," Issue 17, dated May 28, 2010. This document provides each mandatory time for maintenance tasks, structural inspection interval, and related structural inspection procedures.

## Related Rulemaking

On February 3, 2011, we issued AD 2011–04–05, Amendment 39–16605 (76 FR 8612, February 15, 2011), for Airbus Model A340–200, –300, –500, and –600 series airplanes, to require revising the maintenance program. Doing this revision terminates the requirements of AD 2006–09–07 for the Model A340 airplanes.

We are also considering issuance of another NPRM related to this NPRM. The NPRM we are considering, Directorate Identifier 2010–NM–211–AD, would restate the requirements of paragraph (f)(2) of AD 2006–09–07 for Model A330 airplanes.

## 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 54 products of U.S. registry.

The actions that are required by AD 2006–09–07, and retained in this proposed AD, take about 1 work-hour per product, at an average labor rate of $85 per work hour. Based on these figures, the estimated cost of the currently required actions is $85 per product.

We estimate that it would take about 1 work-hour per product to comply with the 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 $4,590, or $85 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 removing Amendment 39–14577 (71 FR 25919, May 3, 2006) and adding the following new AD:

**Airbus:** Docket No. FAA–2011–0224; Directorate Identifier 2010–NM–210–AD.

**Comments Due Date**

(a) We must receive comments by May 6, 2011.

**Affected ADs**

(b) This AD supersedes AD 2006–09–07, Amendment 39–14577.

**Applicability**

(c) This AD applies to Airbus Model A330–201, –202, –203, –223, –223F, –243, and –243F airplanes, and Model A330–301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes; certificated in any category; all manufacturer serial numbers.

**Note 1:** This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (j)(1) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

**Subject**

(d) Air Transport Association (ATA) of America Code 05.

**Reason**

(e) The mandatory continuing airworthiness information (MCAI) states:

* * * * *

The airworthiness limitations applicable to Damage Tolerant Airworthiness Limitation Items (DT ALI) are currently given in Airbus A330 ALI Document reference AI/SE–M4/95A.0089/97, which is approved by the European Aviation Safety Agency (EASA) and referenced in Airbus Airworthiness Limitations Section (ALS) Part 2.

The issue 17 of Airbus A330 ALI Document introduces more restrictive maintenance requirements/airworthiness limitations. Failure to comply with this issue constitutes an unsafe condition.

This [EASA] AD supersedes EASA AD 2009–0102 [and retains the requirements therein], and requires the implementation of the new or more restrictive maintenance requirements/airworthiness limitations as specified in Airbus A330 ALI Document issue 17.

The unsafe condition is fatigue cracking, damage, and corrosion in certain structure, which could result in reduced structural integrity of the airplane.

**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.

**Restatement of Requirements of Paragraph (F)(2) of AD 2006–09–07**

**Airworthiness Limitations Revision**

(g) For Model A330–201, –202, –203, –223, –243, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes: Within 3 months after June 7, 2006 (the effective date of AD 2006–09–07), revise the ALS of the Instructions for Continued Airworthiness by incorporating Airbus Document AI/SE–M4/95A.0089/97, "A330 Airworthiness Limitation Items," Issue 12, dated November 1, 2003, as specified in Section 9–2 of the Airbus A330 Maintenance Planning Document (MPD), into the ALS.

**New Requirements of This AD**

**Revise the Maintenance Program**

(h) Within 3 months after the effective date of this AD: Revise the maintenance program by incorporating Airbus Document AI/SE–M4/95A.0089/97, "A330 Airworthiness Limitation Items," Issue 17, dated May 28, 2010. At the times specified in Airbus Document AI/SE–M4/95A.0089/97, "A330 Airworthiness Limitation Items," Issue 17, dated May 28, 2010, comply with all applicable maintenance requirements and associated airworthiness limitations included in Airbus Document AI/SE–M4/95A.0089/97, "A330 Airworthiness Limitation Items," Issue 17, dated May 28, 2010. Accomplishing the revision in this paragraph ends the requirements in paragraph (g) of this AD.

**Alternative Intervals or Limits**

(i) Except as provided by paragraph (j)(1) of this AD, after accomplishing the actions specified in paragraph (h) of this AD, no alternatives to the maintenance tasks, intervals, or limitations specified in paragraph (h) of this AD may be used.

**FAA AD Differences**

**Note 2:** 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, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1138; fax (425) 227–1149. Information may be e-mailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding 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.

**Related Information**

(k) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2010–0174, dated August 17, 2010; Airbus Document AI/SE–M4/95A.0089/97, "A330 Airworthiness Limitation Items," Issue 12, dated November 1, 2003; and Airbus Document AI/SE–M4/95A.0089/97, "A330 Airworthiness Limitation Items," Issue 17, dated May 28, 2010; for related information.

Issued in Renton, Washington, on March 14, 2011.

**Ali Bahrami,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2011–6643 Filed 3–21–11; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2011–0255; Directorate Identifier 2010–NM–253–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus Model A310 Series Airplanes, and Airbus Model A300 B4–600, B4–600R, and F4–600R Series Airplanes, and Model C4–605R Variant F Airplanes (Collectively Called A300–600 Series Airplanes)

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

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

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

An operator reported several cases of wire damages at the pylon/wing interface. Analysis revealed that wires damages are due to installation quality issue resulting from lack of information in installation drawings and job cards.

Moreover detailed analysis has highlighted that the Low Pressure Valve (LPV) wires were not segregated by design.

* * * * *

If left uncorrected, the wire chafing could impact fire protection and detection system. It may also induce dormant failure on LPV preventing its closure leading to a permanent and uncontrolled fire (in case of fire ignited upstream the High Pressure Valve (HPV)).

* * * * *

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 May 6, 2011.

**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 Airbus SAS—EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; e-mail *account.airworth-eas@airbus.com;* Internet *http://www.airbus.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:** Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2011–0255; Directorate Identifier 2010–NM–253–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

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2010–0178, dated August 23, 2010 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

An operator reported several cases of wire damages at the pylon/wing interface. Analysis revealed that wires damages are due to installation quality issue resulting from lack of information in installation drawings and job cards.

Moreover detailed analysis has highlighted that the Low Pressure Valve (LPV) wires were not segregated by design.

Due to design similarities, A310, A300–600 and A300–600ST aeroplanes can be affected, depending on the wires installation in the concerned area.

If left uncorrected, the wire chafing could impact fire protection and detection system. It may also induce dormant failure on LPV preventing its closure leading to a permanent and uncontrolled fire (in case of fire ignited upstream the High Pressure Valve (HPV)).

For the reasons explained above, this AD requires the modification of the electrical installation in the pylon/wing interface to avoid wire damages.

The modification includes a general visual inspection of wires for damage. and repair if necessary. You may obtain further information by examining the MCAI in the AD docket.

### Relevant Service Information

Airbus has issued Mandatory Service Bulletin A300–24–6106, including Appendix 01, dated March 31, 2010; and Mandatory Service Bulletin A310–24–2106, including Appendix 01, dated May 27, 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 185 products of U.S. registry. We also estimate that it would take about 16 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $1,170 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $468,050, or $2,530 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:

**Airbus:** Docket No. FAA–2011–0255; Directorate Identifier 2010–NM–253–AD.

**Comments Due Date**

(a) We must receive comments by May 6, 2011.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to Airbus Model A300 B4–601, B4–603, B4–620, and B4–622 airplanes; Model A300 B4–605R and B4–622R airplanes; Model A300 F4–605R and F4–622R airplanes; Model A300 C4–605R Variant F airplanes; Airbus Model A310–203, –204, –221, –222, –304, –322, –324, and –325 airplanes; certificated in any category.

**Subject**

(d) Air Transport Association (ATA) of America Code 24: Electrical Power.

**Reason**

(e) The mandatory continuing airworthiness information (MCAI) states:

An operator reported several cases of wire damages at the pylon/wing interface. Analysis revealed that wires damages are due to installation quality issue resulting from lack of information in installation drawings and job cards.

Moreover detailed analysis has highlighted that the Low Pressure Valve (LPV) wires were not segregated by design.

* * * * *

If left uncorrected, the wire chafing could impact fire protection and detection system. It may also induce dormant failure on LPV preventing its closure leading to a permanent and uncontrolled fire (in case of fire ignited upstream the High Pressure Valve (HPV)).

* * * * *

**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.

**Actions**

(g) Within 30 months or 4,000 flight hours after the effective date of this AD, whichever occurs first: Modify the electrical installation in the pylon/wing interface on the left-hand and right-hand side by doing a general visual inspection of wires for damage and doing all applicable repairs, replace the cable tie with lacing tape, improve the electrical installation at the level of the electrical ramp, and improve the segregation of both routes of the LPV channels 1 and 2 between LPV connector and ramp; in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–24–6106, dated March 31, 2010 (for Airbus Model A300 B4–600, B4–600R, and F4–600R series airplanes, and Model C4–605R Variant F airplanes); or Airbus Mandatory Service Bulletin A310–24–2106, dated May 27, 2010 (for Airbus Model A310 series airplanes). Do all applicable repairs before further flight.

**FAA AD Differences**

**Note 1:** This AD differs from the MCAI and/or service information as follows: No differences.

**Other FAA AD Provisions**

(h) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149. Information may be e-mailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov*.

Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding 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.

**Related Information**

(i) Refer to MCAI European Aviation Safety Agency Airworthiness Directive 2010–0178, dated August 23, 2010; Airbus Mandatory Service Bulletin A300–24–6106, dated March 31, 2010; and Airbus Mandatory Service Bulletin A310–24–2106, dated May 27, 2010; for related information.

Issued in Renton, Washington, on March 14, 2011.

**Ali Bahrami,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2011–6614 Filed 3–21–11; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2011–0225; Directorate Identifier 2010–NM–211–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus Model A330–200 and –300 Series Airplanes

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

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

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for the products listed above. 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:

* * * * *

The airworthiness limitations applicable to the Safe Life Airworthiness Limitation Items (SL ALI) are given in Airbus A330 ALS Part 1 and A340 ALS Part 1, which are approved by the European Aviation Safety Agency (EASA).

The revision 05 of Airbus A340 ALS Part 1 introduces more restrictive maintenance requirements and/or airworthiness limitations. Failure to comply with this revision constitutes an unsafe condition.

For A330 aeroplanes, this EASA AD retains the requirements of EASA AD 2010–0131, which it supersedes.

For A340 aeroplanes, this EASA AD supersedes EASA AD 2009–0192, and requires the implementation of the new or more restrictive maintenance requirements and/or airworthiness limitations as specified in Airbus A340 ALS Part 1, revision 05.

The unsafe condition is fatigue cracking, damage, and corrosion in certain structure, which could result in reduced structural integrity of the airplane. 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 May 6, 2011.

**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 Airbus SAS—Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80, e-mail *airworthiness.A330-A340@airbus.com;* Internet *http://www.airbus.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:** Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1138; fax (425) 227–1149.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2011–0225; Directorate Identifier 2010–NM–211–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

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2010–0253, dated December 3, 2010 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

The airworthiness limitations are currently distributed in the Airbus A330 Airworthiness Limitations Section (ALS) and A340 ALS.

The airworthiness limitations applicable to the Safe Life Airworthiness Limitation Items (SL ALI) are given in Airbus A330 ALS Part 1 and A340 ALS Part 1, which are approved by the European Aviation Safety Agency (EASA).

The revision 05 of Airbus A340 ALS Part 1 introduces more restrictive maintenance requirements and/or airworthiness limitations. Failure to comply with this revision constitutes an unsafe condition.

For A330 aeroplanes, this EASA AD retains the requirements of EASA AD 2010–0131, which it supersedes.

For A340 aeroplanes, this EASA AD supersedes EASA AD 2009–0192, and requires the implementation of the new or more restrictive maintenance requirements and/or airworthiness limitations as specified in Airbus A340 ALS Part 1, revision 05.

The unsafe condition is fatigue cracking, damage, and corrosion in certain structure, which could result in reduced structural integrity of the airplane. You

may obtain further information by examining the MCAI in the AD docket.

**Relevant Service Information**

Airbus has issued A330 ALS Part 1, "Safe Life Airworthiness Limitation Items," Revision 05, dated July 29, 2010. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

**Related Rulemaking**

On April 20, 2006, we issued AD 2006–09–07, Amendment 39–14577 (71 FR 25919, May 3, 2006), that applies to Airbus Model A330–200 and –300 series airplanes and Model A340–200, –300, –500, and –600 series airplanes. That AD requires revising the airworthiness limitations section of the instructions for continued airworthiness to incorporate new information. This NPRM would include the requirements of paragraph (f)(2) of AD 2006–09–07 for Model A330 airplanes.

Additionally, on February 3, 2011, we issued AD 2011–04–06, Amendment 39–16606 (76 FR 8610, February 15, 2011), for Airbus Model A340–200, –300, –500, and –600 series airplanes, to require revising the maintenance program. Doing this revision terminates the requirements of AD 2006–09–07 for Model A340 airplanes.

We are also considering issuance of another NPRM related to this NPRM. The NPRM we are considering, Directorate Identifier 2010–NM–210–AD, would supersede AD 2006–09–07 and would restate the requirements of paragraph (f)(1) of AD 2006–09–07.

**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 55 products of U.S. registry.

The actions that are required by AD 2006–09–07, take about 1 work-hour per product, at an average labor rate of $85 per work hour. Based on these figures, the estimated cost of the currently required actions is $85 per product.

We estimate that it would take about 1 work-hour per product to comply with the 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 $4,675, or $85 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:

**Airbus:** Docket No. FAA–2011–0225; Directorate Identifier 2010–NM–211–AD.

**Comments Due Date**

(a) We must receive comments by May 6, 2011.

**Affected ADs**

(b) AD 2006–09–07, Amendment 39–14577, is affected by this AD. The requirements of paragraph (f)(2) of AD 2006–09–07 for Airbus Model A330 airplanes are restated in this AD.

**Applicability**

(c) This AD applies to Airbus Model A330–201, –202, –203, –223, –223F, –243, and –243F airplanes, and Model A330–301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes, certificated in any category, all manufacturer serial numbers.

**Note 1:** This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (j)(1) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

**Subject**

(d) Air Transport Association (ATA) of America Code 05.

**Reason**

(e) The mandatory continuing airworthiness information (MCAI) states:

* * * * *

The airworthiness limitations applicable to the Safe Life Airworthiness Limitation Items (SL ALI) are given in Airbus A330 ALS Part 1 and A340 ALS Part 1, which are approved by the European Aviation Safety Agency (EASA).

The revision 05 of Airbus A340 ALS Part 1 introduces more restrictive maintenance requirements and/or airworthiness limitations. Failure to comply with this revision constitutes an unsafe condition.

For A330 aeroplanes, this EASA AD retains the requirements of EASA AD 2010–0131, which it supersedes.

For A340 aeroplanes, this EASA AD supersedes EASA AD 2009–0192, and requires the implementation of the new or more restrictive maintenance requirements and/or airworthiness limitations as specified in Airbus A340 ALS Part 1, revision 05.

The unsafe condition is fatigue cracking, damage, and corrosion in certain structure, which could result in reduced structural integrity of the airplane.

**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.

**Restatement of Requirements of Paragraph (f)(2) of AD 2006–09–07**

*Airworthiness Limitations Revision*

(g) For Model A330–201, –202, –203, –223, –243, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes: Within 3 months after June 7, 2006 (the effective date of AD 2006–09–07), revise the ALS of the Instructions for Continued Airworthiness by incorporating Section 9–1 "Life limits monitored parts" Revision 05, dated April 7, 2005, of the Airbus A330 Maintenance Planning Document, into the ALS.

**New Requirements of This AD**

*Revise the Maintenance Program*

(h) Within 3 months after the effective date of this AD: Revise the maintenance program by incorporating Airbus A330 ALS Part 1, "Safe Life Airworthiness Limitation Items," Revision 05, dated July 29, 2010. Comply with all Airbus Safe Life ALS Part 1, "A330 Airworthiness Limitation Items," Revision 05, dated July 29, 2010, at the times specified therein. Accomplishing the revision in this paragraph ends the requirements in paragraph (g) of this AD.

**Alternative Intervals or Limits**

(i) Except as provided by paragraph (j)(1) of this AD, after accomplishing the actions specified in paragraph (h) of this AD, no alternatives to the maintenance tasks, intervals, or limitations specified in paragraph (h) of this AD may be used.

**FAA AD Differences**

**Note 2:** This AD differs from the MCAI and/or service information as follows:

(1) Although the applicability in the MCAI also identifies Airbus Model A340–200 –300, –500, and –600 series airplanes; this AD only applies to Airbus Model A330–200 and –300 series airplanes. FAA AD 2011–04–06 addresses Model A340–200, –300, –500, and –600 series airplanes.

(2) The applicability in the MCAI does not specify Model A330–223F and –243F airplanes. Those models are listed in the applicability of this AD.

(3) The MCAI requires incorporating Airbus A330 ALS Part 1, "Safe Life Airworthiness Limitation Items," Revision 04, dated January 28, 2010; however, this AD requires incorporating Airbus A330 ALS Part 1, "Safe Life Airworthiness Limitation Items," Revision 05, dated July 29, 2010, which adds the airworthiness limitation items for Model A330–223F and –243F airplanes.

**Other FAA AD Provisions**

(j) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1138; fax (425) 227–1149. Information may be e-mailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding 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.

**Related Information**

(k) Refer to MCAI EASA Airworthiness Directive 2010–0253, dated December 3, 2010; and Airbus A330 ALS Part 1, "Safe Life Airworthiness Limitation Items," Revision 05, dated July 29, 2010; for related information.

Issued in Renton, Washington, on March 14, 2011.

**Ali Bahrami,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2011–6644 Filed 3–21–11; 8:45 am]

**BILLING CODE 4910–13–P**

## SECURITIES AND EXCHANGE COMMISSION

## 17 CFR Part 240

**[Release No. 34–64087; File No. S7–10–11]**

**RIN 3235–AK98**

## Beneficial Ownership Reporting Requirements and Security-Based Swaps

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule.

**SUMMARY:** To preserve the application of our existing beneficial ownership rules to persons who purchase or sell security-based swaps after the effective date of new Section 13(o) of the Securities Exchange Act of 1934, we are proposing to readopt without change the relevant portions of Rules 13d–3 and 16a–1. The proposals are intended to clarify that following the July 16, 2011 statutory effective date of Section 13(o), which was added by Section 766 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), persons who purchase or sell security-based swaps will remain within the scope of these rules to the same extent as they are now.

**DATES:** Comments should be received on or before April 15, 2011.

**ADDRESSES:** Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*);
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–10–11 on the subject line; or
- Use the Federal Rulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

*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 S7–10–11. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for website 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. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:** Nicholas Panos, Senior Special Counsel, at (202) 551–3440, or Anne Krauskopf, Senior Special Counsel, at (202) 551–3500, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–3628.

**SUPPLEMENTARY INFORMATION:** We are proposing to readopt without change portions of Rules 13d–3 [1] and 16a–1 [2] under the Securities Exchange Act of 1934 ("Exchange Act").[3]

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## I. Overview and Background

### *A. Overview*

Section 766 of the Dodd-Frank Act amends the Exchange Act by adding Section 13(o), which provides that "[f]or purposes of this section and section 16, a person shall be deemed to acquire beneficial ownership of an equity security based on the purchase or sale of a security-based swap, only to the extent that the Commission, by rule, determines after consultation with the prudential regulators and the Secretary of the Treasury, that the purchase or sale of the security-based swap, or class of security-based swap, provides incidents of ownership comparable to direct ownership of the equity security, and that it is necessary to achieve the purposes of this section that the purchase or sale of the security-based swaps, or class of security-based swap, be deemed the acquisition of beneficial ownership of the equity security." Section 766 and Section 13(o) [4] become effective on July 16, 2011.[5]

The reason for this rulemaking, as discussed in more detail below, is to preserve the existing scope of our rules relating to beneficial ownership after Section 766 of the Dodd-Frank Act becomes effective. Absent rulemaking under Section 13(o), Section 766 may be interpreted to render the beneficial ownership determinations made under Rule 13d–3 inapplicable to a person who purchases or sells a security-based swap.[6] In that circumstance, it could become possible for an investor to use a security-based swap to accumulate an influential or control position in a public company without public disclosure. Similarly, a person who holds a security-based swap that confers beneficial ownership of the referenced equity securities under Section 13 and existing Rule 13d–3, or otherwise conveys such beneficial ownership through an understanding or relationship based upon the purchase or sale of the security-based swap, may no longer be considered a ten percent holder subject to Section 16 of the Exchange Act.[7] Further, an insider may no longer be subject to Section 16 reporting and short-swing profit recovery through transactions in security-based swaps that confer a right to receive either the underlying equity securities or cash. In addition, private parties may have difficulty making, or exercising private rights of action to seek to have made, determinations of beneficial ownership arising from the purchase or sale of a security-based swap.

To preserve the application of our existing beneficial ownership rules to persons who purchase or sell security-based swaps after the effective date of Section 13(o), we are proposing to readopt without change the relevant portions of Rules 13d–3 and 16a–1. These proposals are limited to the continued application of these rules by the Commission on the same basis that they currently apply to persons who use security-based swaps.[8] While these proposals are only intended to preserve the existing application of the beneficial ownership rules as they relate to security-based swaps, our staff is engaged in a separate project to develop proposals to modernize reporting under

[1] 17 CFR 240.13d–3.

[2] 17 CFR 240.16a–1.

[3] 15 U.S.C. 78a *et seq.*

[4] Pub. L. 111–203, 124 Stat. 1797.

[5] *See* Section 774 of the Dodd-Frank Act, Pub. L. 111–203, 124 Stat 1376 (2010), which states that Section 766 becomes effective "360 Days after the date of enactment."

[6] A "security-based swap" is defined in Section 3(a)(68) [15 U.S.C. 78c(a)(68), added by Section 761(a) of the Dodd-Frank Act]. Section 712(d) of the Dodd-Frank Act provides that the Commission and the Commodity Futures Trading Commission ("CFTC"), in consultation with the Board of Governors of the Federal Reserve System ("Federal Reserve"), shall jointly further define, among others, the terms "swap," "security-based swap," and "security-based swap agreement." These terms are defined in Sections 721 and 761 of the Dodd-Frank Act. The definitions of the terms "swap," "security-based swap," and "security-based swap agreement," and regulations regarding mixed swaps also are expected to be the subject of a separate rulemaking by the Commission and the CFTC. In addition, Section 721(c) and 761(b) of the Dodd-Frank Act provide the CFTC and the Commission with the authority to define the terms "swap" and "security-based swap," among other terms, to include transactions that have been structured to evade the requirements of subtitles A and B of Title VII, respectively, of the Dodd-Frank Act. To assist the Commission and CFTC in further defining the terms specified above, the Commission and the CFTC sought comment from interested parties. *See* Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, Release No. 34–62717 (Aug. 13, 2010) [75 FR 51429] (advance joint notice of proposed rulemaking regarding definitions).

[7] 15 U.S.C. 78p.

[8] In addition, the proposed readoption of the relevant portions of existing Rules 13d–3 and 16a–1(a) is neither intended nor expected to change any existing administrative or judicial application or interpretation of the rules.

Exchange Act Sections 13(d)[9] and 13(g).[10]

*B. Sections 13(d) and 13(g) and Rule 13d–3*

Sections 13(d) and 13(g) require a person who is the beneficial owner of more than five percent of certain equity securities[11] to disclose information relating to such beneficial ownership. While these statutory sections do not define the term "beneficial owner," the Commission has adopted rules that determine the circumstances under which a person is or may be deemed to be a beneficial owner. In order to provide objective standards for determining when a person is or may be deemed to be a beneficial owner subject to Section 13(d), the Commission adopted Exchange Act Rule 13d–3.[12] Application of the standards within Rule 13d–3 allows for case-by-case determinations as to whether a person is or becomes a beneficial owner, including a person who uses a security-based swap.

Under Rule 13d–3(a), a beneficial owner includes any person who directly or indirectly has or shares voting power and/or investment power over an equity security. Voting power includes "the power to vote, or to direct the voting of, such security" and investment power includes "the power to dispose, or to direct the disposition, of such security." Identifying each person who possesses voting or investment power requires an analysis of all of the relevant facts and circumstances. Rule 13d–3(a) provides that a beneficial owner "includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has or shares" voting power and/or investment power over an equity security. The rule, by its terms, provides that a person may become a beneficial owner through means other than an acquisition of securities or formal agreement, and that a person may be a beneficial owner even if that person shares voting or investment power with another person and is only able to indirectly exercise such power by directing the voting or disposition of the subject security.[13]

Rule 13d–3(b) provides that "[a]ny person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement, or device with the purpose [or] effect of divesting such person of beneficial ownership of a security or preventing the vesting of such beneficial ownership as part of a plan or scheme to evade the reporting requirements of section 13(d) or (g) of the Act shall be deemed for purposes of such sections to be the beneficial owner of such security." In contrast to Rule 13d–3(a), application of Rule 13d–3(b) may result in a beneficial ownership determination even if a person does not hold voting and/or investment power.[14]

Under Rule 13d–3(d)(1), a person is deemed a beneficial owner if the person has the right to acquire beneficial ownership, as defined in Rule 13d–3(a), at any time within 60 days. The right includes, but is not limited to, any right to acquire through the exercise of an option, warrant or right, conversion of a convertible security, or power to revoke a trust or similar agreement. Rule 13d–3(d)(1) further provides that if a person acquires an option, warrant, right, convertible security or power to revoke with the purpose or with the effect of changing or influencing control of the issuer, or as a participant in a transaction having such purpose or effect, then the person is deemed to be a beneficial owner immediately, regardless of when the option, right, convertible security or power to revoke is exercisable or convertible.

If beneficial ownership, as determined in accordance with Rules 13d–3(a), 13d–3(b) and 13d–3(d)(1), exceeds the designated thresholds, beneficial owners are required to provide specified disclosures. The disclosures are intended to be required of persons who have the potential to influence or gain control of the issuer.[15] Specifically, Section 13(d) and the rules thereunder require that a person file with the Commission, within ten days after acquiring, directly or indirectly, beneficial ownership of more than five percent of a class of equity securities, a disclosure statement on Schedule 13D,[16] subject to certain exceptions.[17] Section 13(g) and the rules thereunder enable certain persons who are the beneficial owners of more than five percent of a class of certain equity securities to instead file a short form Schedule 13G,[18] assuming certain conditions have been met.[19] These statutory provisions and corresponding rules also impose obligations on beneficial owners to report changes in the information filed.

The beneficial ownership disclosure requirements of Schedules 13D and 13G were designed to provide disclosures to security holders regarding persons holding significant positions in public companies, such as the identity of the beneficial owners, the amount of beneficial ownership, the existence of a beneficial owner group, and in the case of persons who file a Schedule 13D, plans or proposals regarding the issuer. The disclosures made in Schedules 13D and 13G have been viewed as contributing to the information available to help investors make fully informed investment decisions with respect to their securities.[20] An additional

[9] 15 U.S.C. 78m(d).

[10] 15 U.S.C. 78m(g).

[11] Section 13(d)(1) applies to any equity security of a class that is registered pursuant to Section 12 of the Exchange Act, any equity security issued by a "native corporation" pursuant to Section 37(d)(6) of the Alaska Native Claims Settlement Act, and any equity security described in Exchange Act Rule 13d–1(i) [17 CFR 240.13d–1(i)]. Rule 13d–1(i) explains that for purposes of Regulation 13D–G, "the term 'equity security' means any equity security of a class which is registered pursuant to section 12 of that Act, or any equity security of any insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of the Act, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940; *Provided,* Such term shall not include securities of a class of non-voting securities."

[12] Adoption of Beneficial Ownership Disclosure Requirements, Release No. 34–13291 (Feb. 24, 1977) [42 FR 12342].

[13] The Commission, in recognition of the breadth of this provision, has emphasized its necessity in order "to obtain disclosure from all those persons who have the ability to change or influence control." Filing and Disclosure Requirements Relating to Beneficial Ownership, Release No. 34–14692 (Apr. 21, 1978) [43 FR 18484].

[14] *See* Example 8 from Release No. 34–13291 for an illustration of how Rule 13d–3(b) can apply to a grant of an irrevocable proxy.

[15] S. Rep. No. 550, at 7 (1967); H.R. Rep. No. 1711, at 8 (1968); *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids, Hearings on S. 510 before the S. Banking and Currency Comm.,* 90th Cong. 16 (1967) ("The bill now before you has a much closer relationship to existing provisions of the Exchange Act regulating solicitation of proxies, since acquisitions of blocks of voting securities are typically alternatives to proxy solicitations, as methods of capturing or preserving control."); *Takeover Bids, Hearings on H.R. 14475 and S.510 before the Subcomm. on Commerce and Fin. of the H. Comm. on Interstate and Foreign Commerce,* 90th Cong. (1968).

[16] 17 CFR 240.13d–101.

[17] *See* Section 13(d)(6) and Rule 13d–1(b)–(d).

[18] 17 CFR 240.13d–102.

[19] *See* Amendments to Beneficial Ownership Reporting Requirements, Release No. 34–39538 (Jan. 12, 1998) [63 FR 2854] for a description of the types of persons eligible to file a Schedule 13G. The investors eligible to report beneficial ownership on Schedule 13G are commonly referred to as qualified institutional investors under Rule 13d–1(b), passive investors under Rule 13d–1(c), and exempt investors under Rule 13d–1(d). Unlike Section 13(d), Section 13(g) applies regardless of whether beneficial ownership has been "acquir[ed]" within the meaning of Section 13(d) or is viewed as not having been acquired for purposes of Section 13(d). For example, persons who obtain all their securities before the issuer registers the subject securities under the Exchange Act are not subject to Section 13(d) and persons who acquire not more than two percent of a class of subject securities within a 12-month period are exempt from Section 13(d) by Section 13(d)(6)(B), but in both cases are subject to Section 13(g).

[20] *See Computer Network Corp.* v. *Spohler* [1982 Transfer Binder] Fed Sec. L. Rep (CCH) ¶ 98,623 at 93,087 (D.D.C. March 23, 1982). *See also, San*

regulatory objective served by these disclosures is to provide management of the issuer with information to "appropriately protect the interests of its security holders."[21] In enacting the original Section 13(d) legislation, Congress made clear that its new regulatory initiative was intended to avoid "tipping the balance of regulation either in favor of management or in favor of the person [potentially] making the takeover bid."[22] In addition to providing information to issuers and security holders, Section 13(d) was adopted with a view toward alerting "the marketplace to every large, rapid aggregation or accumulation of securities, regardless of technique employed, which might represent a potential shift in corporate control."[23] On the basis of the information disclosed, the market would "value the shares accordingly"[24] due to the increased prospects for price discovery.[25]

### *C. Application of the Section 13 Beneficial Ownership Regulatory Provisions to Persons Who Purchase or Sell Security-Based Swaps*

As noted above, the term "security-based swap" is defined in Section 3(a)(68) of the Exchange Act.[26] Under our existing rules, holders of security-based swaps may be subject to beneficial ownership reporting. As explained in more detail below, in cases where a security-based swap confers voting and/or investment power (or a person otherwise acquires such power based on the purchase or sale of a security-based swap), grants a right to acquire an equity security, or is used with the purpose or effect of divesting or preventing the vesting of beneficial ownership as part of a plan or scheme to evade the reporting requirements, our existing regulatory regime may require the reporting of beneficial ownership.[27]

First, under existing Rule 13d–3(a), to the extent a security-based swap provides a person, directly or indirectly, with exclusive or shared voting and/or investment power over the equity security through a contractual term of the security-based swap or otherwise, the person becomes a beneficial owner of that equity security. Under Rule 13d–3(a), a person may become a beneficial owner even though the person has not acquired the equity security.[28]

Second, existing Rule 13d–3(b) generally provides that a person is deemed to be a beneficial owner if that person uses any contract, arrangement, or device as part of a plan or scheme to evade the beneficial ownership reporting requirements. To the extent a security-based swap is used with the purpose or effect of divesting a person of beneficial ownership or preventing the vesting of beneficial ownership as part of a plan or scheme to evade Sections 13(d) or 13(g), the security-based swap may be viewed as a contract, arrangement or device within the meaning of those terms as used in Rule 13d–3(b). A person using a security-based swap, therefore, may be deemed a beneficial owner under Rule 13d–3(b) in this context.

Finally, under existing Rule 13d–3(d)(1), a person is deemed a beneficial owner of an equity security if the person has a right to acquire the equity security within 60 days or holds the right with the purpose or effect of changing or influencing control of the issuer of the security for which the right is exercisable, regardless of whether the right to acquire originates in a security-based swap or an understanding in connection with a security-based swap. This type of right to acquire an equity security, if obtained through a security-based swap, is treated the same as any other right to acquire an equity security. Acquisition of such a right, regardless of its origin, results in a person being deemed a beneficial owner under Rule 13d–3(d)(1).

### *D. Section 16 and Rules 16a–1(a)(1) and 16a–1(a)(2)*

Section 16 was designed both to provide the public with information about securities transactions and holdings of every person who is the beneficial owner of more than ten percent of a class of equity security registered under Exchange Act Section 12[29] ("ten percent holder"), and each officer and director (collectively, "insiders") of the issuer of such a security, and to deter such insiders from profiting from short-term trading in issuer securities while in possession of material, non-public information. Upon becoming an insider, or upon Section 12

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*Francisco Real Estate Investors* v. *REIT of America,* [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,874, at 94,557 (D. Mass. Nov. 19, 1982), *aff'd in part, rev'd in part* 701 F.2d 1000 (1st Cir. 1983). The Commission also has recognized that Section 13(d) was enacted primarily to provide "adequate disclosure to stockholders in connection with any substantial acquisition of securities within a relatively short time." Adoption of Beneficial Ownership Disclosure Requirements, Release No. 34–13291, (Feb. 24, 1977) [42 FR 12342] *citing* S. Rep. No. 550, at 7 (1967).

[21] H.R. Rep. No. 1655, at 3 (1970); *see, e.g., Additional Consumer Protection in Corporate Takeovers and Increasing the Sec. Act Exemptions for Small Businessmen, Hearing Before the Sec. Subcomm. of the S. Banking and Currency Comm. on S. 336 and S. 343,* 91st Cong. (1970). *See also Bath Indus.* v. *Blot,* 427 F.2d 97, 113 (7th Cir. 1970). In addition, disclosures made in compliance with Sections 13(d) and 13(g) also provide issuers that file registration statements, annual reports, proxy statements and other disclosure documents with the information they use to disclose all beneficial owners of more than five percent of certain classes of the issuer's equity securities as required by Item 403 of Regulation S–K. [17 CFR 229.403]. *See generally* H.R. Rep. No. 1655.

[22] H.R. Rep. No. 1711, at 4 (1968); S. Rep. No. 550, at 3 (1968). Both the House and Senate reports emphasized that Section 13(d) was enacted "to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case."

[23] *GAF Corp.* v. *Milstein,* 453 F.2d 709, 717 (2d. Cir. 1971), *cert. denied,* 406 U.S. 910 (1972), cited by the Commission at footnote 16 in the following administrative proceeding: In the Matter of Harvey Katz, Release No. 34–20893 (April 25, 1984). A measure of what Congress considered to be large and rapid acquisitions is Section 13(d)(6)(B), which exempts acquisitions of two percent or less in the preceding twelve months.

[24] *General Aircraft Corp.* v. *Lampert,* 556 F.2d 90, 94 (1st Cir. 1977); *see also* S. Rep. No. 550, at 3 ("But where no information is available about the persons seeking control, or their plans, the shareholder is forced to make a decision on the basis of a market price which reflects an evaluation of the company based on the assumption that the present management and its policies will continue. The persons seeking control, however, have information about themselves and about their plans which, if known to investors, might substantially change the assumptions on which the market price is based.").

[25] *Takeover Bids, Hearings on 14475 and S. 510 before the Subcomm. on Commerce and Fin. of the H. Comm. on Interstate and Foreign Commerce,* 90th Cong. 12 (1968) (statement of Hon. Manuel F. Cohen, Chairman, U.S. Securities and Exchange Commission, "But I might ask, how can an investor evaluate the adequacy of the price if he cannot assess the possible impact of a change in control? Certainly without such information he cannot judge its adequacy by the current or recent market price. That price presumably reflects the assumption that the company's present business, control and management will continue. If that assumption is changed, is it not likely that the market price might change?").

[26] *See* note 6 above.

[27] Except as provided below regarding Section 16, this release does not address whether, or under what circumstances, an agreement, contract, or transaction that is labeled a security-based swap (including one which confers voting and/or investment power, grants a right to acquire one or more equity securities, or is used with the purpose or effect of divesting or preventing the vesting of beneficial ownership as part of a plan or scheme to evade the beneficial ownership reporting requirements) would be a purchase or sale of the underlying securit(ies) and treated as such for purposes of the federal securities laws, instead of a security-based swap. In this regard, among other things, the definition of "swap" (and therefore the definition of "security-based swap") specifically excludes the purchase or sale of one or more securities on a fixed or contingent basis, unless the agreement, contract, or transaction predicates the purchase or sale on the occurrence of a bona fide contingency that might reasonably be expected to affect or be affected by the creditworthiness of a party other than a party to the agreement, contract, or transaction. See Sections 1a(47)(B)(v) and (vi) of the Commodity Exchange Act, 7 U.S.C. 1a(47)(B)(v) and (vi).

[28] Exchange Act Section 13(d)(1) applies after a person directly or indirectly acquires beneficial ownership, regardless of whether the person has made an acquisition of the equity securities.

[29] 15 U.S.C. 78*l*.

registration of the class of equity security, Section 16(a)[30] requires an insider to file an initial report with the Commission disclosing his or her beneficial ownership of all equity securities of the issuer.[31] Section 16(a) also requires insiders to report subsequent changes in such ownership.[32] To prevent misuse of inside information by insiders, Section 16(b)[33] provides the issuer (or shareholders suing on the issuer's behalf) a strict liability private right of action to recover any profit realized by an insider from any purchase and sale (or sale and purchase) of any equity security of the issuer within a period of less than six months.[34]

As applied to ten percent holders, Congress intended Section 16 to reach persons presumed to have access to information because they can influence or control the issuer as a result of their equity ownership.[35] Because Section 13(d) specifically addresses these relationships, the Commission adopted Rule 16a–1(a)(1) to define ten percent holders under Section 16 as persons deemed ten percent beneficial owners under Section 13(d) and the rules thereunder.[36] The Section 13(d) analysis, such as counting beneficial ownership of those derivative securities exercisable or convertible within 60 days,[37] is imported into the ten percent holder determination for Section 16 purposes. The application of Rule 16a–1(a)(1) is straightforward; if a person is a ten percent beneficial owner as determined pursuant to Section 13(d) and the rules thereunder, the person is deemed a ten percent holder under Section 16.[38]

For purposes of Section 16(a) reporting obligations and Section 16(b) short-swing profit recovery, Rule 16a–1(a)(2) uses a different definition of "beneficial owner." Once a person is subject to Section 16, for reporting and profit recovery purposes, Rule 16a–1(a)(2) defines "beneficial owner" based on whether the person has or shares a direct or indirect pecuniary interest in the securities. A "pecuniary interest" in any class of equity securities means "the opportunity, directly or indirectly, to profit or share in any profit derived from a transaction in the subject securities."[39] An "indirect pecuniary interest" in any class of equity securities includes, but is not limited to "a person's right to acquire equity securities through the exercise or conversion of any derivative security, whether or not presently exercisable."[40] "Derivative securities" are "any option, warrant, convertible security, stock appreciation right, or similar right with an exercise or conversion privilege at a price related to an equity security, or similar securities with a value derived from the value of an equity security, but shall not include [* * *] rights with an exercise or conversion privilege at a price that is not fixed."[41] Equity securities of an issuer are "any equity security or derivative security relating to an issuer, whether or not issued by that issuer."[42]

This framework recognizes that holding derivative securities is functionally equivalent to holding the underlying equity securities for Section 16 purposes because the value of the derivative securities is a function of or related to the value of the underlying equity security.[43] Just as an insider's opportunity to profit begins upon purchasing or selling issuer common stock, the opportunity to profit begins when an insider engages in transactions in derivative securities that provide an opportunity to obtain or dispose of the stock at a fixed price.[44] Establishing or increasing a call equivalent position[45] (or liquidating or decreasing a put equivalent position)[46] is deemed a purchase of the underlying security, and establishing or increasing a put equivalent position (or liquidating or decreasing a call equivalent position) is deemed a sale of the underlying security.[47]

Rule 16a–1(a)(2) and the related rules described above recognize the functional equivalence of derivative securities and the underlying equity securities by providing that transactions in derivative securities are reportable, and matchable with transactions in other derivative securities and in the underlying equity.[48] For example, short-swing profits obtained by buying call options and selling the underlying stock, or buying the underlying stock and buying put options, are recoverable. This functional equivalence extends to all fixed-price derivative securities, whether issued by the issuer or a third party, and whether the form of settlement is cash or stock.[49]

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[30] 15 U.S.C. 78p(a).

[31] Insiders file these reports on Form 3 [17 CFR 249.103].

[32] Insiders file transaction reports on Form 4 [17 CFR 249.104] and Form 5 [17 CFR 249.105].

[33] 15 U.S.C. 78p(b).

[34] In addition, insiders are subject to the short sale prohibitions of Section 16(c) [15 U.S.C. 78p(c)].

[35] *See* S. Rep. No. 1455, at 55, 68 (1934); *See also* S. Rep. No. 792, at 20–1 (1934); S. Rep. No. 379, at 21–2 (1963).

[36] Ownership Reports and Trading By Officers, Directors and Principal Security Holders, Release No. 34–28869 (Feb. 21, 1991) [56 FR 7242].

[37] Rule 13d–3(d).

[38] For example, the Commission applied an analysis derived from Rule 13d–3(d)(1) in publishing its views regarding when equity securities underlying a security future that requires physical settlement should be counted for purposes of determining whether the purchaser of the security future is subject to Section 16 as a ten percent holder by operation of Rule 16a–1(a)(1). Commission Guidance on the Application Certain Provisions of the Securities Exchange Act of 1934, and Rules Thereunder to Trading in Security Futures Products, Release No. 34–46101 (June 21, 2002) [67 FR 43234] ("Futures Interpretive Release") at Q 7.

[39] Rule 16a–1(a)(2)(i).

[40] Rule 16a–1(a)(2)(ii)(F).

[41] Rule 16a–1(c)(6).

[42] Rule 16a–1(d). Further, Rule 16a–4(a) [17 CFR 240.16a–4(a)] provides that for purposes of Section 16, both derivative securities and the underlying securities to which they relate are deemed to the be the same class of equity securities, except that the acquisition or disposition of any derivative security must be separately reported.

[43] For example, the Futures Interpretive Release, at Q&A Nos. 8–13, explains the status of a security future as a derivative security for purposes of Section 16(a) reporting and Section 16(b) short-swing profit recovery.

[44] Ownership Reports and Trading By Officers, Directors and Principal Security Holders, Release No. 34–28869, at Section III.A (Feb. 21, 1991) [56 FR 7242].

[45] Rule 16a–1(b) provides that a "call equivalent position" is "a derivative security position that increases in value as the value of the underlying equity security increases, including, but not limited to, a long convertible security, a long call option, and a short put option position."

[46] Rule 16a–1(h) provides that a "put equivalent position" is "a derivative security position that increases in value as the value of the underlying equity decreases, including, but not limited to, a long put option and a short call option."

[47] Rule 16b–6(a).

[48] Rule 16b–6(b) generally exempts from Section 16(b) short-swing profit recovery the exercise or conversion of a fixed-price derivative security, provided that it is not out-of-the-money. Rule 16b–6(c) provides guidance for determining short-swing profit recoverable from transactions involving the purchase and sale or sale and purchase of derivative and other securities.

[49] Former Rule 16a–1(c)(3), adopted in Release No. 34–28869, excluded from the definition of "derivative securities" "securities that may be redeemed or exercised only for cash and do not permit the receipt of equity securities in lieu of cash, if the securities either: (i) Are awarded pursuant to an employee benefit plan satisfying the provisions of [former] § 240.16b–3(c); or (ii) may be redeemed or exercised only upon a fixed date or dates at least six months after award, or upon death, retirement, disability or termination of employment." As a corollary to adopting a broader Rule 16b–3 exemption, the Commission rescinded former Rule 16a–1(c)(3) in 1996, stating that "because the opportunity for profit based on price movement in the underlying stock embodied in a cash-only instrument is the same as for an instrument settled in stock, cash-only instruments should be subject to Section 16 to the same extent as other issuer equity securities." Ownership Reports and Trading by Officers, Directors and Principal Security Holders, Release No. 34–37260, at Section III.A (May 31, 1996) [61 FR 30376].

*E. Application of the Section 16 Beneficial Ownership Regulatory Provisions to Holdings and Transactions in Security-Based Swaps*

As described above, solely for purposes of determining who is subject to Section 16 as a ten percent holder, Rule 16a–1(a)(1) uses the beneficial ownership tests applied under Section 13(d) and its implementing rules, including Rules 13d–3(a), 13d–3(b), and Rule 13d–3(d)(1). As a result, for example, a person who has the right to acquire securities that would cause the person to own more than ten percent of a class of equity securities through a security-based swap that confers a right to receive equity at settlement or otherwise would be subject to Section 16 as a ten percent holder under existing Rule 16a–1(a)(1). Once a person is subject to Section 16, in order to determine what securities are subject to Section 16(a) reporting and Section 16(b) short-swing profit recovery for any insider (whether an officer, director or ten percent holder), existing Rule 16a–1(a)(2) looks to the insider's pecuniary interest (*i.e.,* opportunity to profit) in the securities. Under existing rules, this concept includes an indirect pecuniary interest in securities underlying fixed-price derivative securities, including security-based swaps, whether settled in cash or stock. Consistent with the derivative securities analysis, the Commission has stated that Section 16 consequences would arise from an equity swap transaction where either party to the transaction is a Section 16 insider with respect to a security to which the swap agreement relates.[50] The Commission has provided interpretive guidance regarding how equity swap transactions should be reported,[51] and adopted transaction code "K" to be used in addition to any other applicable code in reporting equity swap and similar transactions so that they can be easily identified.[52] An equity swap involving a single security, or a narrow-based security index, is a security-based swap as defined in Section 3(a)(68).

**II. Discussion of the Rule Proposals**

New Section 13(o) provides that a person shall be deemed a beneficial owner of an equity security based on the purchase or sale of a security-based swap only to the extent we adopt rules after making certain determinations and consulting with the prudential regulators and the Secretary of the Treasury. The regulatory provisions under which beneficial ownership determinations are currently made with respect to security-based swaps were enacted or adopted before Section 13(o). Accordingly, we are proposing to readopt the relevant portions of Rules 13d–3 and 16a–1 following consultation with the prudential regulators and the Secretary of Treasury to assure that these provisions continue to apply to a person who purchases or sells a security-based swap upon effectiveness of Section 13(o).

The purpose of the proposed rulemaking is solely to preserve the regulatory *status quo* and provide the certainty and protection that market participants have come to expect with the existing disclosures required by the rules promulgated under Sections 13(d), 13(g) and 16(a). While the use of security-based swaps has not been frequently disclosed in Schedule 13D and 13G filings, we are proposing to readopt Rules 13d–3(a), (b) and (d)(1) and the relevant portions of Rules 16a–1(a)(1) and (a)(2) to further the policy objectives of and foster compliance with these rules upon the effectiveness of Section 13(o).

Given the language in Section 13(o), as well as the newly amended Sections 13(d) and 13(g),[53] we are proposing to readopt these rules to remove any doubt that they will continue to allow for the same determinations of beneficial ownership that they do today. Readoption of these rule provisions is intended to ensure that persons who use security-based swaps remain subject to the Section 13(d), Section 13(g) and Section 16 regulatory regimes to the same extent such persons are now. Moreover, the proposed rulemaking is designed to preserve the private right of action provided by Section 16(b) and not disturb any other existing right of action.

Section 13(o) will not render the existing beneficial ownership regulatory provisions inapplicable to persons who obtain beneficial ownership independently from a security-based swap. For example, Rule 13d–3(d)(1) will continue to apply to persons who obtain a right to acquire equity securities if the right does not arise from the purchase or sale of a security-based swap. Rights, options, warrants, or conversion or certain revocation privileges, if acquired or held by persons under circumstances that do not arise from the purchase or sale of a security-based swap, will remain subject to Sections 13(d), 13(g) and 16 and may continue to be treated under Rule 13d–3(d)(1) as the acquisition of beneficial ownership,[54] and Rules 16a–1(a)(1) and 16a–1(a)(2) will continue to apply. Furthermore, Schedule 13D will continue to require certain disclosures relating to the purchase or sale of security-based swaps notwithstanding Section 13(o).[55]

[50] Ownership Reports and Trading by Officers, Directors and Principal Security Holders, Release No. 34–34514, at Section III.G (Aug. 10, 1994) [59 FR 42449]; Ownership Reports and Trading by Officers, Directors and Principal Security Holders, Release No. 34–37260, at Section IV.H (May 31, 1996) [61 FR 30376].

[51] Each report must provide the following information: (1) The date of the transaction; (2) the term; (3) the number of underlying shares; (4) the exercise price (*i.e.,* the dollar value locked in); (5) the non-exempt disposition (acquisition) of shares at the outset of the term; (6) the non-exempt acquisition (disposition) of shares at the end of the term (and at such earlier dates, if any, where events under the equity swap cause a change in a call or put equivalent position); (7) the total number of shares held after the transaction; and (8) any other material terms. Release No. 34–37260, at Section IV.H.

[52] General Instruction 8 to Form 4 [17 CFR 249.104] (U.S. SEC 1475 (08–07)) and Form 5 [17 CFR 249.105] (U.S. SEC 2270 (1–05)), as amended in Release No. 34–37260, at Section IV.I.

[53] See Section 766(b) of the Dodd-Frank Act, which amends Sections 13(d) and 13(g) to provide that a person "becomes or is deemed to become a beneficial owner * * * upon the purchase or sale of a security-based swap that the Commission may define by rule * * *."

[54] These rights to acquire beneficial ownership are not security-based swaps within the meaning of Section 13(o) because they are purchases and sales of securities. In this regard, the definition of "swap" in Section 721 of the Dodd-Frank Act (and therefore the definition of "security-based swap") excludes purchases and sales of securities, whether on a fixed or contingent basis. Under the Dodd-Frank Act, the term "security" is as defined in the Securities Act and the Exchange Act, which includes options, warrants, and rights to subscribe to or purchase a security and any convertible securities as well as the securities issuable upon exercise or conversion of such securities. In addition, Section 721 of the Dodd-Frank Act excludes from the definition of "swap" any put, call, straddle, option or privilege on any security, certificate of deposit, or group or index of securities, including any interest therein or based on the value thereof, that is subject to the Securities Act of 1933 and the Exchange Act. Furthermore, Section 13(o) does not affect the treatment of "security-based swap agreements" as defined in the Dodd-Frank Act. For example, Section 762(d)(5) of the Dodd-Frank Act clarifies that Section 16 continues to apply to security-based swap agreements.

[55] For example, beneficial owners who file a Schedule 13D and use a security-based swap will remain subject to the obligation to comply with Items 6 ("Contracts, Arrangements, Understandings or Relationships With Respect to Securities of the Issuer") and 7 ("Material to be Filed as Exhibits") and provide disclosures relating to the security-based swap depending upon the security-based swap's terms. In addition, beneficial owners who file a Schedule 13G pursuant to Rule 13d-1(b) or otherwise rely upon Rule 13d-1(b) to govern a future reporting obligation may be required to make disclosures on Schedule 13D instead based upon their purchase or sale of a security-based swap. *See* In the Matter of Perry Corp., Release No. 34–60351 (July 21, 2009).

*A. Beneficial Ownership Determinations under Section 13*

Section 13(o) provides that a person shall be deemed to acquire beneficial ownership of an equity security based on the purchase or sale of a security-based swap only to the extent that the Commission meets certain conditions and adopts a rule. Although the proposal to readopt Rule 13d–3(a), Rule 13d–3(b), and Rule 13d–3(d)(1) is being made in part pursuant to Section 13(o), we are not proposing any revision to the existing rule text. The proposed rules are the same as the existing rules in all respects.

1. Rule 13d–3(a)

We are proposing to readopt without change Rule 13d–3(a) to address any uncertainty with regard to the application of Rule 13d–3(a) to a person who purchases or sells a security-based swap. If readopted, a determination could continue to be made that a beneficial owner of equity securities includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has or shares voting power and/or investment power over the securities based on the purchase or sale of a security-based swap. Following initial consultation with the prudential regulators [56] and the Secretary of the Treasury, we preliminarily believe that:

- A person's possession of voting and/or investment power in an equity security based on the purchase or sale of a security-based swap is no different from voting or investment power in an equity security that exists independently from a security-based swap when (1) a security-based swap confers, or (2) an arrangement, understanding or relationship based on the purchase or sale of the security-based swap conveys, voting and/or investment power in an equity security. Security-based swaps therefore can provide incidents of ownership comparable to direct ownership of the underlying equity security within the meaning of Section 13(o) to the extent that the security-based swap confers, or an arrangement, understanding or relationship based upon the purchase or sale of the security-based swap conveys, voting and/or investment power in an equity security; and
- Retaining the existing regulatory treatment of security-based swaps in Rule 13d–3(a) is necessary to achieve the purpose of Section 13 so that Sections 13(d) and 13(g) continue to require the filing of beneficial ownership reports that produce disclosure by persons who have the ability or potential to change or influence control of the issuer. In addition, these persons may have the means to acquire significant amounts of equity securities wholly or partly based upon the purchase or sale of a security-based swap. As a result, these persons may have the potential to effect a change of control transaction or preserve or influence control of an issuer. In the case of Schedule 13D filers, these persons would be required to disclose their plans or proposals. Disclosures made in beneficial ownership reports are in the public interest and necessary for the protection of investors because they provide information about certain transactions and related acquisitions of beneficial ownership that: could disclose a potential shift in corporate control; impact the transparency and efficiency of our capital markets; and contribute to price discovery.

2. Rule 13d–3(b)

We are proposing to readopt without change Rule 13d–3(b) to address any uncertainty with regard to the continued application of Rule 13d–3(b) to a person who purchases or sells a security-based swap. Rule 13d–3(b) provides that a person is deemed to be a beneficial owner if that person uses any contract, arrangement, or device as a means to divest or prevent the vesting of beneficial ownership as part of a plan or scheme to evade the beneficial ownership reporting requirements. If readopted, Rule 13d-3(b) would continue to apply to any person that uses a security-based swap as part of a plan or scheme to evade reporting beneficial ownership and thereby accumulate influential or control positions in public issuers without disclosure.

Following initial consultation with the prudential regulators and the Secretary of the Treasury, we preliminarily believe that:

- A person's use of a security-based swap to divest or prevent the vesting of beneficial ownership as part of a plan or scheme to evade the application of Sections 13(d) or 13(g) is no different from a plan or scheme that uses a contract, arrangement or device that exists independently from a security-based swap. In this context, a person would be deemed to have beneficial ownership, and thus incidents of ownership comparable to direct ownership, but for the plan or scheme based in whole or in part upon the purchase or sale of a security-based swap; and
- Retaining the existing regulatory treatment of security-based swaps in Rule 13d–3(b) is necessary to achieve the purpose of Section 13 so that Sections 13(d) and 13(g) continue to require the filing of beneficial ownership reports that produce disclosure by persons who have the ability or potential to change or influence control of the issuer. In addition, these persons may have the means to acquire significant amounts of equity securities based in whole or in part upon the purchase or sale of a security-based swap, and therefore the potential to effect a change of control transaction or preserve or influence control of an issuer. In the case of Schedule 13D filers, these persons would be required to disclose their plans or proposals. Disclosures made in beneficial ownership reports are in the public interest and necessary for the protection of investors because they provide information about certain transactions and related acquisitions of beneficial ownership that: could disclose a potential shift in corporate control; impact the transparency and efficiency of our capital markets; and contribute to price discovery.

3. Rule 13d–3(d)(1)

We are proposing to readopt without change Rule 13d–3(d)(1) to address any uncertainty with regard to the continued application of Rule 13d–3(d)(1) to a person who purchases or sells a security-based swap. Rule 13d–3(d)(1) provides that a person will be deemed to be a beneficial owner of equity securities if the person has the right to acquire beneficial ownership of the securities within 60 days, or at any time if the right is held for the purpose of changing or influencing control. If readopted, Rule 13d–3(d)(1) would continue to apply to any person that obtains such a right based on the purchase or sale of a security-based swap.

The Commission has long recognized the importance of having the beneficial ownership reporting regime account for contingent interests in equity securities arising from investor use of derivatives, such as options, warrants or rights. The Commission adopted Rule 13d–3, the predecessor to Rule 13d–3(d)(1), on August 30, 1968,[57] approximately one month after Congress enacted Section

[56] Our staff has consulted with the Federal Reserve, the Office of the Comptroller of the Currency, the Farm Credit Administration, the Federal Housing Finance Agency, and the Federal Deposit Insurance Corporation. Our staff also consulted with the CFTC.

[57] Acquisitions, Tender Offers, and Solicitations, Release No. 34–8392 (Aug. 30, 1968) [33 FR 14109].

13(d).[58] The Commission also has treated futures contracts for equity securities the same as options, warrants, or rights for purposes of determining beneficial ownership.[59] When 60 days or less are left until the right to acquire may be exercised, or if a right has been acquired for the purpose or with the effect of changing or influencing control of the issuer of securities, we believe that treating the holder of the right as if the person is a beneficial owner under Rule 13d–3(d)(1) is necessary to achieve the purpose of Section 13 given the person's potential to influence or change control of the issuer.[60]

Following initial consultation with the prudential regulators and the Secretary of the Treasury, we preliminarily believe that:

- A person's right to acquire an equity security within 60 days based on the purchase or sale of a security-based swap is no different from a right to acquire the underlying equity security that exists independently from a security-based swap. A right to acquire an equity security within 60 days is comparable to direct ownership of the equity security because direct ownership is contingent, in some cases, only upon the exercise of that right and may result in the potential to change or influence control of the issuer upon acquisition of the equity security for which the right is exercisable. Security-based swaps, therefore, can provide incidents of ownership comparable to direct ownership of the underlying equity security within the meaning of Section 13(o) to the extent that the security-based swap confers a right to acquire an equity security within 60 days;
- A person who acquires or holds, with the purpose or effect of changing or influencing control of an issuer, a right to acquire an equity security based on the purchase or sale of a security-based swap is no different from a person who acquires or holds a right to acquire an equity security with the purpose of changing or influencing control of the issuer that exists independently from a security-based swap. Rights acquired or held in this context may be used in furtherance of a plan or proposal to change control of the issuer, and such rights to acquire equity securities may otherwise influence an issuer if held by a person intending to effect a change of control transaction or preserve or influence control of an issuer. Security-based swaps, therefore, can provide incidents of ownership comparable to direct ownership of the underlying equity security within the meaning of Section 13(o) to the extent that the security-based swap confers a right to acquire an equity security to a person that holds the right with the purpose or with the effect of changing or influencing control of the issuer or otherwise in connection with or as a participant in any transaction having such purpose or effect; and
- Retaining the existing regulatory treatment of security-based swaps under Rule 13d–3(d)(1) is necessary to achieve the purpose of Section 13 so that Sections 13(d) and 13(g) continue to require the filing of beneficial ownership reports that disclose certain transactions by persons who have the ability or potential to change or influence control of the issuer. These persons may have the means to acquire significant amounts of equity securities based in whole or in part upon the purchase or sale of a security-based swap, and therefore the potential to effect a change of control transaction or preserve or influence control of an issuer. In the case of Schedule 13D filers, these persons would be required to disclose their plans or proposals. Disclosures made in beneficial ownership reports are in the public interest and necessary for the protection of investors because they provide information about certain transactions and related acquisitions of beneficial ownership that: could disclose a potential shift in corporate control; impact the transparency and efficiency of our capital markets; and contribute to price discovery.

Request for Comment

1. In lieu of readopting the existing language of Rules 13d–3(a), 13d–3(b), and 13d–3(d)(1), should we instead adopt a new rule or amend the existing rules to specify the circumstances in which a purchase or sale of a security-based swap may confer a contingent or other interest in an equity security that, if held, could result in a person being deemed a beneficial owner for purposes of Sections 13(d) and 13(g)?

2. Are there any other rules or disclosure requirements that should be readopted or amended, such as Item 403 of Regulation S–K,[61] to preserve their existing application following effectiveness of Section 13(o)?

3. Should the Commission and/or staff provide interpretive guidance regarding how to provide disclosure with regard to security-based swaps in Schedules 13D or 13G? If so, what type of interpretive guidance would be appropriate?

4. How common is the use of security-based swaps to obtain incidents of ownership, such as voting or investment power, comparable to direct ownership in an issuer?

5. Are there other factors or features of security-based swaps we should consider for purposes of making the determinations required under Section 13(o) with regard to the relevant provisions of Rule 13d–3?

6. Does voting or investment power, a scheme to evade beneficial ownership reporting, or a right to acquire an equity security, when each arises from the purchase or sale of a security-based swap, differ materially from when each exists independently from a security-based swap?

*B. Section 16 Beneficial Ownership Rules*

1. Rule 16a–1(a)(1)

We are proposing to readopt without change a portion of Rule 16a–1(a)(1)[62] to preserve, solely for purposes of determining whether a person is a ten percent holder, the application of the relevant provisions within Rule 13d–3 to a person who uses a security-based swap. The proposed readoption of Rule 16a–1(a)(1) would not change the rule's provision that shares held by institutions eligible to file beneficial ownership reports on Schedule 13G that are held for clients in a fiduciary capacity in the ordinary course of

[58] *See* Act of July 29, 1968, Pub. L. 90–439, 82 Stat. 454.

[59] The Futures Interpretive Release provides two examples at Q & A No. 17 that explain when equity securities underlying a security future that requires physical settlement should be counted for purposes of determining whether the purchaser of the security future is subject to Regulation 13D–G by operation of Rule 13d–3(d)(1).

[60] *See* Filing and Disclosure Requirements Relating to Beneficial Ownership, Release No. 34–14692 (Apr. 21, 1978) [43 FR 18484].

[61] Item 403 of Regulation S–K requires an issuer to disclose in certain filings the name and amount of beneficial ownership held by any person known to be the beneficial owner of more than five percent of a class of its voting securities. Item 403 also requires the issuer to identify the name and amount of beneficial ownership held by each of its directors, director nominees and executive officers, regardless of whether the person's beneficial ownership exceeds five percent. We have not proposed to readopt Item 403 of Regulation S–K because Item 403 provides that the disclosures required are to be determined in accordance with the beneficial ownership determinations made under Rule 13d–3.

[62] We propose to readopt the portion of Rule 16a–1(a)(1) that precedes the proviso applicable to qualified institutions. The relevant portion of Rule 16a–1(a)(1) proposed for readoption reads as follows: "(a) The term *beneficial owner* shall have the following applications: (1) Solely for purposes of determining whether a person is a beneficial owner of more than ten percent of any class of equity securities registered pursuant to section 12 of the Act, the term "beneficial owner" shall mean any person who is deemed a beneficial owner pursuant to section 13(d) of the Act and the rules thereunder * * *."

business are not counted for purposes of determining ten percent holder status.[63]

Following initial consultation with the prudential regulators and the Secretary of the Treasury, we preliminarily believe that:

- For the same reasons and in the same circumstances as described above for Rule 13d–3(a), Rule 13d–3(b) and Rule 13d–3(d)(1), solely for purposes of determining whether a person is a ten percent holder subject to Section 16, the purchase or sale of a security-based swap, or class of security-based swap, can provide incidents of ownership comparable to direct ownership of the equity security within the meaning of Section 16; and
- The inclusion of equity securities based on the purchase or sale of a security-based swap, or class of security-based swap, for purposes of calculating ten percent holder status is necessary to achieve the purpose of Section 16, so that Section 16 continues to reach all persons that, under the Section 16 regime, are presumptively deemed to have access to inside information based on influence or control of the issuer through ownership of equity securities.

2. Rule 16a–1(a)(2)

The proposal to readopt without change a portion of Rule 16a–1(a)(2)[64] is intended solely to preserve the existing Section 16(a) reporting of security-based swap holdings and transactions and correspondingly to prevent the potential use of security-based swaps to engage in short-swing trading outside the scope of Section 16(b) short-swing profit recovery. The proposal to readopt would not change or otherwise affect any aspect of the pecuniary interest analysis and treatment of derivative securities under Section 16.

Following initial consultation with the prudential regulators and the Secretary of the Treasury, we preliminarily believe that:

- Because an insider's opportunity to profit through a security-based swap is no different from the opportunity to profit through transactions in any other fixed–price derivative security, and hence no different from the opportunity to profit through transactions in the underlying equity security, holdings and transactions in security-based swaps that are fixed–price derivative securities can provide incidents of ownership comparable to direct ownership of the underlying equity security within the meaning of Section 13(o); and
- Retaining the existing treatment of security-based swaps is necessary to achieve the purpose of Section 16 so that Section 16 continues to reach holdings and transactions that insiders can potentially use to profit based on misuse of inside information.

Request for Comment

7. In lieu of readopting the existing language of Rule 16a–1(a)(1), should the rule instead be amended to specifically reference security-based swaps? If so, in what manner?

8. In lieu of readopting the existing language of Rule 16a–1(a)(2), should the rule or any related rule that governs the treatment of derivative securities under Section 16 instead be amended to specifically reference security-based swaps? If so, in what manner?

9. Are there other factors that we should consider for purposes of making the determinations required under Section 13(o) with regard to Rule 16a–1(a)(1)?

10. Are there other factors that we should consider for purposes of making the determinations required under Section 13(o) with regard to Rule 16a–1(a)(2)?

*C. General Request for Comment*

We request and encourage any interested person to submit comments on any aspect of our proposals, other matters that might have an impact on the proposals, and any other suggestions for changes. We solicit comments particularly from the point of view of issuers, shareholders, prospective investors, financial analysts, and market participants. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our proposals where appropriate.

**III. Paperwork Reduction Act**

The rule proposals affect "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995, the PRA.[65] 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. We already have control numbers for Schedules 13D (OMB Control No. 3235–0145) and 13G (OMB Control No. 3235–0145) and Forms 3 (OMB Control No. 3235–0104) and 4 (OMB Control No. 3235–0287) and 5 (OMB Control No. 3235–0362). These schedules and forms contain item requirements that outline the information a reporting person must disclose.

*A. Background*

We are proposing to readopt without change portions of the rules enabling determinations of beneficial ownership to be made for purposes of Sections 13(d), 13(g) and 16 of the Exchange Act. The proposals are intended to clarify that following the effective date of Section 13(o), security-based swaps will remain within the scope of these rules to the same extent as they are now.

*B. Burden and Cost Estimates Related to the Proposed Amendments*

Preparing and filing a report on any of these schedules or forms is a collection of information. The hours and costs associated with preparing the disclosure, filing the schedules or forms and retaining records required by these rules constitute reporting and cost burdens imposed by each collection of information. If the rules we propose are readopted, reporting persons will remain obligated to disclose the same information that they were previously required to report on these schedules or forms. We therefore believe that if the rules are readopted, the overall information collection burden will remain approximately the same because beneficial ownership will remain reportable on the same basis as it is now.

*C. Request for Comment*

We request comment on this Paperwork Reduction Act Analysis. Pursuant to 44 U.S.C. 3506(c)(2)(B), we solicit comments to:

- Evaluate whether the proposed collection of information is necessary

[63] Securities not held in such a fiduciary capacity, however, must be counted in determining whether a Schedule 13G qualified institutional investor is a ten percent holder. This exclusion applies only to qualified institutions who acquire or hold securities of the issuer in the ordinary course of business without the purpose or effect of influencing or changing control, and thereby qualify to use Schedule 13G pursuant to Rule 13d–1(b)(1)(i). The exclusion does not apply to persons who qualify to use Schedule 13G as passive investors pursuant to Rule 13d–1(c), or as exempt investors pursuant to Rule 13d–1(d).

[64] We propose to readopt the portion of Rule 16a–1(a)(2) that precedes subparagraph (ii). The relevant portion of Rule 16a–1(a)(2) proposed for readoption reads as follows: "(2) Other than for purposes of determining whether a person is a beneficial owner of more than ten percent of any class of equity securities registered under Section 12 of the Act, the term *beneficial owner* shall mean any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has or shares a direct or indirect pecuniary interest in the equity securities, subject to the following: (i) The term *pecuniary interest* in any class of equity securities shall mean the opportunity, directly or indirectly, to profit or share in any profit derived from a transaction in the subject securities."

[65] 44 U.S.C. 3501 *et seq.*

for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and

• Evaluate whether there are ways to minimize the burden of the collection of information on those persons who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–10–11. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–10–11, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE., Washington, DC 20549–0123.

## IV. Economic Analysis

### *A. Introduction*

Section 23(a)(2) of the Exchange Act requires us, when adopting rules under the Exchange Act, to consider the impact on competition that the rules we adopt would have, and prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of that Act.[66] Further, Section 3(f) of the Exchange Act[67] and Section 2(c) of the Investment Company Act[68] require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. We have considered and discussed below the effects of the rules proposed for readoption on efficiency, competition, and capital formation, as well as the benefits and costs associated with the proposed rulemaking.

[66] 15 U.S.C. 78w(a)(2).

[67] 15 U.S.C. 78c(f).

[68] 15 U.S.C. 80a–2(c).

In order to more fully analyze the potential effects of readopting rules that are designed to preserve the regulatory *status quo* upon the effectiveness of Section 13(o), we have performed the analysis below in two separate ways. First, we analyze the impact of the proposed readoption compared to the *status quo,* in which the rules already apply to a person who purchases or sells a security-based swap. Second, we analyze the impact as if our rules did not already apply to persons who purchase or sell security-based swaps.

### *B. Benefits, Including the Impact on Efficiency, Competition and Capital Formation*

#### 1. When the Rules We Propose To Readopt Already Apply to Persons Who Purchase or Sell Security-Based Swaps

The proposal to readopt certain provisions of Rule 13d–3 and Rule 16a–1 would preserve the continued administration of existing rules adopted to improve the transparency of information available to investors, issuers and the marketplace. The proposal is intended to preserve that transparency regarding beneficial ownership positions and the intentions of persons who hold such positions, as well as the holdings of and transactions by Section 16 insiders. We are proposing to readopt, without change, rules that, when applied, may result in disclosure of beneficial ownership and insiders' holdings and transactions in equity securities. In addition, one of the rules proposed for readoption, Rule 16a–1(a)(2), also identifies transactions that may be subject to the private right of action to recover short-swing profit for the issuer provided by Section 16(b).

The proposal is being made solely to preserve the regulatory *status quo* regarding beneficial ownership reporting under Sections 13(d) and (g), Section 16 insider status as a ten percent holder, insider holding and transaction reporting under Section 16(a), and insider short-swing profit liability under Section 16(b). Application of the rules also will provide certainty regarding the Section 16(b) private right of action to recover insiders' short-swing profits for the issuer. Because the rules we propose are already in place and will remain unchanged, readoption and effectiveness of these rules should have minimal benefits, and little, if any, new effect on efficiency, competition, or capital formation or on the persons required to make the disclosures as a result of the application of the rules. Beneficial owners who use security-based swaps are already subject to these rules and are required to make any applicable disclosures. Because only a limited number of beneficial ownership reports contain disclosure that relates to security-based swaps, the potential effect of this rulemaking should be minimal. Shareholders, issuers, market participants and any other persons who rely upon the disclosures being made as a result of application of the rules similarly will receive little, if any, new benefit and are unlikely to experience any new impact on efficiency, competition or capital formation because the regulatory environment will remain the same as it is today.

#### 2. If the Rules We Propose Did Not Already Apply to Persons Who Purchase or Sell Security-Based Swaps

If one were to analyze the effect of readopting the rules we propose as if they did not already apply to a person who purchases or sells a security-based swap, there would be new benefits, as well as a beneficial effect on efficiency, competition and capital formation. These benefits could extend to beneficial owners required to comply with disclosure requirements as a result of the application of the rules we propose to readopt. These benefits also may extend to persons relying upon these disclosures, including prospective investors, shareholders, issuers, and other market participants. Any such benefits, if realized, would be attributable both to the removal of any regulatory uncertainty and to the resulting preservation of transparency.

##### a. Benefits, Including the Impact on Efficiency

Applying the rules to a person who purchases or sells a security-based swap confers a benefit to market participants by providing market transparency and removing, in some cases, information asymmetry. Prospective investors, shareholders, issuers and other market participants benefit from the transparency provided through disclosure made available by persons subject to Sections 13 and 16. For example, a Schedule 13D filing may disclose a potential change of control transaction and assist a shareholder in making an investment decision that would maximize the return on an investment. Disclosures made on Schedule 13G may identify for the marketplace important investment decisions made by institutional investors and other large shareholders or may provide notice to investors, issuers and the market regarding voting blocks of securities that have the potential to affect or influence control of an issuer.

Applying the rules to a person who purchases or sells a security-based swap assures that Section 16 will reach a person that, under the Section 16 regime, is presumptively deemed to have access to inside information based on influence or control of the issuer through equity ownership. In addition, applying the rules to a person who purchases or sells a security-based swap means that an insider (whether an officer, director, or ten percent holder) is required to report beneficial ownership with respect to transactions and holdings in a security-based swap that confers an indirect pecuniary interest in issuer equity securities. These reports, like other Section 16(a) reports, may provide shareholders and other market participants with useful information regarding insiders' views of the performance or prospects of the issuer.

Transparency of trading by persons covered by Sections 13 and 16, and transparency of accumulations of material ownership blocks or voting power based on the purchase or sale of a security-based swap, would increase informational efficiency in securities markets in particularly important areas, especially where a Schedule 13D filing may be the first required disclosure of an intended change of control of an issuer. Transparency confers a benefit by assuring the availability of information upon which investors may rely to make informed investment and voting decisions. The level of transparency provided by Rules 13d–1(a) and 16a–1 also may contribute to market efficiency because it could help facilitate the accurate pricing of securities. If the rules did not apply to a person who purchases or sells a security-based swap, investors and market participants, such as financial analysts and broker dealers, would not have information regarding the use of security-based swaps by persons subject to Sections 13 and 16, including major investors. The transparency provided by the application of our rules should help the market accurately price securities and may enable purchasers and sellers of securities to receive a benefit by avoiding costs, if any, associated with participation in transactions based on mispriced securities. For example, market efficiency should increase because the market will have readily available information about acquisitions of securities that involve the potential to change or influence control of an issuer in connection with the purchase or sale of a security-based swap. If persons who purchase or sell security-based swaps were excluded from this regulatory scheme, an incentive could arise to use security-based swaps to effect or influence the outcome of a change of control transaction. In addition, the pricing of a security would not readily reflect, if at all, ownership interests in the issuer derived from security-based swaps. In such circumstances, the application of the rules we propose for readoption would have the benefit of eliminating this incentive while increasing the quality of information available to price securities.

b. Benefits, Including the Impact on Competition

Public availability of information about the existence of persons who use security-based swaps and have the potential to change or influence control of the issuer affects competition in the market for corporate control. If bidders that use securities-based swaps comply with the beneficial ownership disclosure requirements, the balance Congress sought to strike between issuers and prospective bidders will not tip away from issuers.[69] Providing equal access to information regarding persons who use security-based swaps and have the ability to change or influence control of an issuer reinforces a legislative objective of Section 13(d) by assuring that a person will not be able to implement a change of control transaction by means of a large, undisclosed position. Applying our rules to persons who purchase or sell security-based swaps enables issuers to consider information about competitors in the market for corporate control, including those who may be able to offer a new or competing strategic alternative. Schedule 13D and 13G filings also may deliver greater certainty to market participants who make strategic, voting, or investment decisions wholly or partly based upon the information disclosed, and could reduce speculation about future plans or proposals relating to an issuer. For example, market participants may not be discouraged from introducing strategic plans or proposals to an issuer out of concern that an undisclosed interest in the issuer derived from a security-based swap could interrupt execution of their plan or proposal.

Section 16 is intended to provide the public with information about the securities transactions and holdings of officers, directors, and ten percent holders, and to mitigate informational advantages they may have in trading issuer securities. Applying Rule 16a–1(a)(1) to beneficial ownership based on the purchase or sale of a security-based swap discourages persons from unfairly profiting in trades based on the ability to become a ten percent holder partly or wholly based on the use of security-based swaps without becoming subject to Section 16. Applying Rule 16a–1(a)(2), which defines "beneficial ownership" based on pecuniary interest in issuer equity securities, to persons who purchase or sell security-based swaps prevents the development of a trading market potentially favoring any insider (whether an officer, director, or ten percent holder) to the extent that:

- Holdings and transactions involving security-based swaps may not be reported, thereby depriving investors of potentially useful information; and
- Insiders have the opportunity to misuse their potential informational advantages in trading without regard to potential short-swing profit liability.

c. Benefits, Including the Impact on Capital Formation

Making information publicly available generally lowers an issuer's cost of capital and facilitates capital formation, in comparison to what the cost of capital otherwise might be if the rules did not already apply to a person who purchases or sells a security-based swap. If the rules apply to a person who purchases or sells a security-based swap, the resulting transparency could favorably affect investor confidence in the capital markets and thereby not compromise capital formation.[70] If our rules require persons who use security-based swaps to provide disclosures in Schedules 13D and 13G and Forms 3, 4 and 5, investors will not insist on a higher risk premium in publicly-traded equity securities and consequently reduce capital formation. Informed investor decisions generally promote capital formation.[71]

In addition, market participants would benefit from the predictability associated with a regulatory environment in which all persons who have the potential to influence or change control of an issuer are definitively subject to the same beneficial ownership reporting rules. If there were questions as to whether our

[69] *See* note 22 above.

[70] *See* Luigi Guiso *et al., Trusting the Stock Market,* 63 J. Fin. 2557 (2008) (finding that trust in the fairness of the financial system is correlated with higher levels of stock market participation).

[71] *See* Merritt B. Fox, Randall Morck, Bernard Yeung & Artyom Durnev, *Law, Share Price Accuracy, and Economic Performance: the New Evidence,* 102 Mich L. Rev. 331 (2003) (empirical study of the value of disclosure requirements in enhancing investment efficiency); *see also Studies in Resource Allocation Processes* at p. 413 (Kenneth J. Arrow & Leonid Hurwicz eds., 2007) (explaining the relationship between informational efficiency and Pareto efficiency of resource allocation).

rules applied to persons who purchase or sell security-based swaps, market participants would have to accept more operational and legal risk because of the potentially unregulated treatment of persons who use security-based swaps with incidents of ownership comparable to direct ownership, as well as persons who have arrangements, understandings, or relationships concerning voting and/or investment power, the opportunity to acquire equity securities, or a plan or scheme to evade Sections 13(d) and 13(g) in connection with the purchase or sale of a security-based swap. By applying our rules to all persons who have the potential to influence or change control of the issuer, market participants would have assurance that securities pricing may reflect information derived from security-based swaps when Sections 13(d), 13(g), and 16 require reporting. The certainty provided by this consistent regulatory treatment could foster investor confidence and participation in the capital markets generally, and should not impair capital formation.

The rules we propose for readoption also would provide the SEC access to ownership and transaction information that would not be available if the rules did not already apply to a person who purchases or sells a security-based swap. The availability of this data should enhance the ability of the Commission and its staff to study and address issues that relate to this information. Ready access to this information also will continue to enable the Commission to exercise efficiently its enforcement mandate in this market segment, and thereby confer a benefit to all market participants by offering assurance that the integrity of security pricing is protected, and is otherwise consistent with the legislative purpose of Sections 13(d), 13(g), 13(o), and 16.

*C. Costs, Including the Impact on Efficiency, Competition and Capital Formation*

1. When the Rules We Propose Already Apply to Persons Who Purchase or Sell Security-Based Swaps

We preliminarily believe that the rules we propose would not, as a practical matter, impose any new costs on market participants, given that the proposed rulemaking is intended only to preserve the regulatory *status quo.* Although it is difficult to determine the number of entities and the costs to entities that are required to comply with the rules we propose to readopt, we believe that readoption of the rules would result in minimal, if any, costs to any person or entity (either small or large) and would have little, if any, burden on efficiency, competition or capital formation because the regulatory environment will remain the same as it is today.

Regulation 13D–G currently applies to any person that acquires or is deemed to acquire or hold beneficial ownership of more than five percent of certain classes of equity securities. The proposed readoption of the relevant provisions of Rule 13d–3 would not result in any change to the beneficial ownership reporting obligations of the persons now subject to the beneficial ownership regulatory provisions. Similarly, Section 16 applies to any person that acquires or is deemed to acquire more than ten percent of certain classes of equity securities, and the proposed readoption of Rule 16a–1(a)(1) would not result in any change in determining whether a person is subject to Section 16 as a ten percent holder. Further, for all insiders, the requirements for Section 16(a) reporting and Section 16(b) liability are based on whether the insider has a pecuniary interest in the securities, including indirectly through ownership of and transactions in fixed-price derivative securities, such as security-based swaps, whether settled in cash or stock. Accordingly, the proposed readoption of Rule 16a–1(a)(2) would not result in any change in determining reportable holdings and transactions, or transactions subject to short-swing profit recovery.

Because the rules proposed for readoption are applied today in determining whether a person is required to report beneficial ownership and insiders' holdings and transactions on Schedules 13D and 13G and Forms 3, 4 and 5, we do not believe the proposed rules will alter the costs associated with compliance. These schedules and forms already prescribe beneficial ownership information that a reporting person must disclose, and the proposed rulemaking does not broaden the scope of the information required to be reported on the respective schedules and forms. The compliance burden associated with completion of the relevant schedule or form may be greater or lesser depending on the relative simplicity of the beneficial ownership interest. We recognize that the cost of complying with the beneficial ownership reporting regime can include the cost of analyzing whether the particular interest requires reporting. If it is determined that the interest held constitutes beneficial ownership, and the amount of the beneficial ownership interest exceeds the relevant threshold, the owner must complete and file a schedule and/or form. The compliance burden associated with the readopted rules, however, including costs associated with legal and other professional fees, may decrease because of the regulatory certainty that this rulemaking is providing. Furthermore, the persons incurring this compliance burden may already be subject to a reporting obligation based on an earlier application of these rules, and may not be reporting beneficial ownership for the first time as a direct result of the purchase or sale of security-based swaps.

If the rules we propose are readopted, reporting persons will remain obligated to disclose the information currently required to be reported on these schedules or forms. We therefore believe that the overall compliance burden of the rules we propose to readopt will remain the same. In addition, we do not believe that compliance costs, or the disclosure provided to effect compliance, will affect competition among filers.

We also believe that shareholders, issuers, market participants and any other persons who rely upon the disclosures being made as a result of application of the rules we propose similarly will not be subjected to any new cost, or experience any new impact on efficiency, competition or capital formation because the rules we propose to readopt are already in place and will remain unchanged.

2. If the Rules We Propose Did Not Already Apply to Persons Who Purchase or Sell Security-Based Swaps

Costs could increase for a person who purchases or sells a security-based swap and immediately or eventually incurs the cost of filing or amending a beneficial ownership report if the person did not already determine that a reporting obligation existed based on his or her purchase or sale of a security-based swap. Further, an insider could incur costs from potential short-swing profit recovery arising out of a transaction in a security-based swap.

Application of our rules to a person who purchases or sells a security-based swap may affect competition. For example, a person who becomes a ten percent holder partly or wholly based on the use of a security-based swap would not be in a position to profit in trades prompted by a statutorily presumed informational advantage accentuated by the absence of a reporting requirement. In addition, beneficial owners who compete in the market for corporate control would lose

a competitive advantage upon the required disclosure of their beneficial ownership positions and any plans or proposals.

Upon application of the rules we propose to readopt, beneficial owners may accomplish their objectives with less efficiency, and the completion of change of control transactions may be delayed, due to potential interruptions that may arise or alternatives that might emerge as a result of public disclosures. If our rules did not already apply to a person who purchases or sells a security-based swap, that person could accumulate a large beneficial ownership position through the use of a security-based swap without public disclosure. This beneficial ownership position otherwise could have been used to implement or influence the outcome of a change of control transaction without alerting an issuer or the marketplace of these intentions. We believe, however, that the benefits of our rules would justify these costs.

The impact, if any, of the readoption of the rules we propose on capital formation should be insignificant. Compliance costs arising under the beneficial ownership reporting regime based on the purchase or sale of a security-based swap are not expected to redirect capital that otherwise could have been allocated to capital formation. Capital formation should not be affected by a possible decline in the use of security-based swaps resulting from the application of our rules to a person who purchases or sells a security-based swap, given that capital formation ordinarily is not dependent upon the proceeds from transactions in security-based swaps.

*D. Request for Comment*

We request comment on the costs and benefits associated with the individual rules, including identification and assessments of any costs and benefits not discussed in this analysis. In addition to the specific inquiries made throughout this release, we solicit comments on the usefulness of the rule proposals to reporting persons, registrants, and the marketplace at large. We encourage commentators to identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such costs or benefits, as well as any costs and benefits not already defined. We also request qualitative feedback on the nature of the benefits and costs described above. Finally, we also request comment on the following:

- Would readoption of the rules promote efficiency, competition and capital formation?
- Would the proposed rules, if readopted, have an adverse effect on competition or impose a burden on competition that is neither necessary nor appropriate in furthering the purposes of the Exchange Act?

Commentators are requested to provide empirical data and other factual support for their views if possible.

## V. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[72] a rule is "major" if it has resulted, or is likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

We request that commentators provide empirical data on (a) the annual effect on the economy; (b) any increase in costs or prices for consumers or individual industries; and (c) any effect on competition, investment or innovation.

## VI. Regulatory Flexibility Act Certification

We hereby certify pursuant to 5 U.S.C. 605(b) that this proposal, if adopted, would not have a significant economic impact on a substantial number of small entities. This proposal relates to beneficial ownership reporting and reporting by insiders of their transactions and holdings. The proposal would not amend existing rules or introduce new rules, and relates only to the readoption of existing rules. For this reason, it would not change the regulatory *status quo* and therefore the proposal should not have a significant economic impact on a substantial number of small entities.

In proposing to readopt these rules, we have considered their potential impact on the small entities that might be required to complete the schedules and forms. We do not collect information to estimate the number of small entities that would be subject to the rules we propose, if readopted, because the beneficial ownership schedules and forms do not capture specific information about the size of the reporting entity. We also do not collect information about small entities that might obtain beneficial ownership based on the purchase or sale of a security-based swap, or whether such beneficial ownership is directly responsible for triggering a reporting obligation.

Nevertheless, the staff has not noted that there are a significant number of entities of any size making beneficial ownership reports based on the purchase or sale of security based swaps. The incidence of small entities who report beneficial ownership based on the purchase or sale of a security-based swap appears to be rare. Moreover, due to their size, small businesses or small organizations would not ordinarily be expected to make beneficial ownership reports because they are less likely to have funds to make purchases exceeding the sizable thresholds that trigger a reporting obligation.

Finally, in most cases, the existing disclosure obligations are generally not likely to be burdensome for small entities. To the extent a small entity would be required to report beneficial ownership based on the purchase or sale of a security-based swap, it is likely that it could fulfill its reporting obligation by filing an abbreviated Schedule 13G so long as it does not hold beneficial ownership with the purpose or with the effect of changing or influencing control of an issuer. Schedule 13G is commonly referred to as a "short form" because less detailed disclosure is required by comparison to Schedule 13D. Accordingly, we do not believe the proposals, if adopted, would have a significant economic impact on small entities.

We encourage written comments regarding this certification. We request in particular that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

## VII. Statutory Authority

The proposed readoptions contained in this release are made under the authority set forth in Sections 3(a)(11), 3(b), 13, 16, 23(a) of the Exchange Act, Sections 30 and 38 of the Investment Company Act of 1940.

## List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

## Text of the Proposed Amendments

For the reasons set out in the preamble, the Commission proposes to amend Title 17, chapter II, of the Code of Federal Regulations as follows:

## PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The general authority citation for Part 240 is revised and the following

[72] Pub. L. 104–121, Title II, 110 Stat. 847, 873.

citations are added in numerical order to read as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78l, 78m, 78n, 78n–1, 78o, 78o–4, 78p, 78q, 78s, 78u–5, 78w, 78x, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 et seq.; 18 U.S.C. 1350; and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

Section 240.13d–3 is also issued under Pub. L. 111–203 § 766, 124 Stat. 1799 (2010).

Section 240.16a–1(a) is also issued under Pub. L. 111–203 § 766, 124 Stat. 1799 (2010).

* * * * *

Dated: March 17, 2011.

By the Commission.

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. 2011–6685 Filed 3–21–11; 8:45 am]

**BILLING CODE 8011–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Part 1

**[REG–131947–10]**

**RIN 1545–BJ71**

## Property Traded on an Established Market; Hearing Cancellation

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Cancellation of notice of public hearing on proposed rulemaking.

**SUMMARY:** This document cancels a public hearing on a proposed rulemaking relating to determining when property is traded on an established market (that is, publicly traded) for purposes of determining the issue price of a debt instrument.

**DATES:** The public hearing originally scheduled for April 13, 2011 at 10 a.m. is cancelled.

**FOR FURTHER INFORMATION CONTACT:** Funmi Taylor of the Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration) at (202) 622–7180 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:** A notice of proposed rulemaking and a notice of public hearing that appeared in the **Federal Register** on Friday, January 7, 2011 (76 FR 1101) announced that a public hearing was scheduled for April 13, 2011, at 10 a.m. in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. The subject of the public hearing is under section 1273(b) of the Internal Revenue Code.

The public comment period for the proposed rulemaking expired on March 8, 2011. The notice of proposed rulemaking and notice of public hearing instructed those interested in testifying at the public hearing to submit an outline of the topics to be addressed. As of Tuesday, March 15, 2011, no one has requested to speak. Therefore, the public hearing scheduled for April 13, 2011, is cancelled.

**LaNita VanDyke,**

*Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).*

[FR Doc. 2011–6603 Filed 3–21–11; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Part 1

**[REG–149335–08]**

**RIN 1545–BI57**

## Sales-Based Royalties and Vendor Allowances; Hearing

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of public hearing on proposed rulemaking.

**SUMMARY:** This document provides notice of public hearing on a notice of proposed rulemaking relating to the capitalization and allocation of royalties that are incurred only upon the sale of property produced or property acquired for resale (sales-based royalties) and adjusting the cost of merchandise inventory for an allowance, discount, or price rebated based on merchandise sales (sales-based vendor allowances). The regulations modify the simplified production method and the simplified resale method of allocating capitalized costs between ending inventory and cost of goods sold. The regulations affect taxpayers that incur capitalizable sales-based royalties and earn sales-based vendor allowances.

**DATES:** The public hearing is being held on Wednesday, April 13, 2011, at 10 a.m. The IRS must receive outlines of the topics to be discussed at the hearing by Monday, March 28, 2011.

**ADDRESSES:** The public hearing is being held in the auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Send submissions to: CC: PA: LPD: PR (REG–149335–08), room 5203, Internal Revenue Service, P. O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC: PA: LPD: PR (REG–149335–08), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit electronic outlines of oral comments via the Federal eRulemaking Portal at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, John Roman Faron at (202) 622–4930; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Richard A. Hurst at *Richard.A.Hurst@irscounsel.treas.gov* or (202) 622–7180 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:** The subject of the public hearing is the notice of proposed rulemaking (REG–149335–08) that was published in the **Federal Register** on Friday, December 17, 2010 (75 FR 78940).

Persons, who wish to present oral comments at the hearing that submitted written comments, must submit an outline of the topics to be discussed and the amount of time to be devoted to each topic (signed original and eight (8) copies) by Monday, March 28, 2011.

A period of 10 minutes is allotted to each person for presenting oral comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available, free of charge, at the hearing or in the Freedom of Information Reading Room (FOIA RR) (Room 1621) which is located at the 11th and Pennsylvania Avenue, NW., entrance, 1111 Constitution Avenue, NW., Washington, DC.

Because of access restrictions, the IRS will not admit visitors beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this document.

**LaNita Van Dyke,**

*Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).*

[FR Doc. 2011–6601 Filed 3–21–11; 8:45 am]

**BILLING CODE 4830–01–P**

**DEPARTMENT OF THE INTERIOR**

**National Park Service**

**36 CFR Part 7**

**RIN 1024–AD88**

## Special Regulations; Areas of the National Park System, Cape Cod National Seashore

**AGENCY:** National Park Service, Interior.

**ACTION:** Proposed Rule.

**SUMMARY:** The National Park Service (NPS) proposes to amend special regulations for Cape Cod National Seashore, to allow for a spring-season hunt for Eastern Wild Turkey. The proposed rule would implement the Cape Cod National Seashore Hunting Program Environmental Impact Statement of August 2007.

**DATES:** Comments must be received by April 21, 2011.

**ADDRESSES:** You may submit comments, identified by RIN 1024–AD88 by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Bob Grant, Chief Ranger, 99 Marconi Site Road, Wellfleet, MA 02667.

All submissions received must include the agency name and docket number or Regulation Identifier Number (RIN) 1024–AD88 for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Bob Grant, Chief Ranger, 99 Marconi Site Road, Wellfleet, MA 02667; *bob_grant@nps.gov.*

**SUPPLEMENTARY INFORMATION:**

### Description of the Park Area

In 1961 the U.S. Congress established Cape Cod National Seashore (CACO). In establishing the seashore, Congress directed that the unique flora and fauna, the physiographic conditions and the historic sites and structures be permanently preserved, the public enjoyment and understanding of the unique natural, historic, and scientific features the seashore be facilitated by establishing trails, observation points, exhibits and services for the public, and provided that adaptable portions of the seashore may be managed for camping, swimming, boating, sailing, hunting, fishing, and other activities of similar nature. Public Law 87–126, Sec. 7, Aug. 7, 1961, 75 Stat. 291.

The seashore comprises 43,608 acres of shoreline; salt marshes; clear, deep, freshwater kettle ponds; uplands; as well as a great diversity of species supported by these habitats. Lighthouses, a life-saving station, dune shacks, modern and Cape Cod-style houses, cultural landscapes, and wild cranberry bogs provide a glimpse into Cape Cod's past and continuing life ways. The Seashore offers six swimming beaches, eleven self-guiding nature trails, and a variety of picnic areas and scenic overlooks.

### Background

The 1961 legislation establishing CACO allowed the NPS to permit hunting within the seashore.

> The Secretary may permit hunting and fishing, including shellfishing, on lands and waters under his jurisdiction within the seashore in such areas and under such regulations as he may prescribe during open seasons prescribed by applicable local, State and Federal law. The Secretary shall consult with officials of the Commonwealth of Massachusetts and any political subdivision thereof who have jurisdiction of hunting and fishing, including shellfishing, prior to the issuance of any such regulations, and the Secretary is authorized to enter into cooperative arrangements with such officials regarding such hunting and fishing, including shellfishing, as he may deem desirable. * * * 16 U.S.C. 459b–6(c)

The proposed rule would increase hunting opportunities by expanding the hunting season to include a spring turkey hunt. Hunting within CACO that is authorized by NPS regulations is conducted in accordance with Commonwealth of Massachusetts, Department of Fisheries and Wildlife (MDFW) regulations. Upland game hunting is currently authorized at CACO and Eastern Wild Turkey is managed as a native upland game bird by the MDFW. The existing special regulation prohibits hunting from March 1 through August 31. The proposed rule is necessary because the Massachusetts spring turkey season generally takes place from late April to mid or late May when hunting is prohibited by the existing CACO special regulation. Fall turkey hunting could also be initiated if MDFW established such a season in its southeast region, but no rule change would be needed for a fall hunt since the State does not conduct hunting before September 1.

For many years, CACO cooperated with the MDFW to release ring-necked pheasants within the seashore to provide a pheasant hunt. In 2002, CACO was sued for failure to follow the National Environmental Policy Act (NEPA) with respect to the hunting program. In September 2003, the U.S. District Court ordered CACO to prepare a NEPA environmental assessment of the hunting program. The court also enjoined the pheasant hunt until CACO completed the NEPA assessment.

### National Environmental Policy Act Process

As a result of the court order, CACO initiated and completed a Final Environmental Impact Statement (FEIS), and Record of Decision (ROD), on the seashore hunting program.

The goals of the NEPA process were to develop and evaluate several alternative approaches for managing hunting at CACO that would:

- Balance diverse uses of the park while minimizing effects to wildlife populations, ecosystems, and sustaining natural processes;
- Reduce or avoid conflicts during recreational uses of the park;
- Protect natural and cultural resources, cultural heritage, and recreational values;
- Provide opportunities for future generations to enjoy the natural and cultural resources, cultural heritage, and recreational values of CACO; and
- Develop management solutions that address concerns related to the current hunting program to ensure diverse and high quality public experiences.

The chosen alternative as documented by the ROD, was Alternative B—Develop a Modified Hunting Program.

Through Alternative B, CACO seeks to increase hunting opportunities for native upland game bird species, including turkey, by establishing a turkey season generally consistent with MDFW regulations and making ancillary improvements to upland game bird habitat. The alternative would phase out pheasant stocking and hunting through adaptive management actions aimed at improving the availability of native upland game bird species. Hunting areas would be consolidated and clearly delineated and educational outreach concerning hunting would be expanded to hunting and non-hunting users. The NPS and MDFW would cooperatively monitor and manage game and other species.

Alternative B, implemented in part through the proposed rule, will increase hunting opportunities for native upland

game bird species. Eastern Wild Turkeys and Northern Bobwhite Quail are native species that were traditionally hunted on Cape Cod. Both turkeys and quail were extirpated from Cape Cod and other parts of New England in the past, but populations have now been restored to the point where MDFW has allowed hunting for some time.

The proposed rule will restore opportunities to hunt turkey by modifying the dates when turkey hunting is allowed within CACO, but does not expand hunting for any other species. Fall turkey hunting will also be allowed within CACO if MDFW establishes a fall season for the MDFW Southeast Region, which includes CACO.

Due to the limited turkey habitat within CACO, turkey hunting will be a controlled hunt, limiting the number of hunters, and will require hunters to obtain a NPS permit. Issuance of the permits may be managed through a lottery system. Specific areas will be designated as open to turkey hunting, generally for two to four weeks during the MDFW designated season. Continuation of this program will be based on monitoring of the annual hunt by MDFW, and responsive management, to ensure NPS goals regarding natural resource protection, visitor experience, and safety are met.

Alternative B requires the NPS to designate areas where hunting is permitted, replacing the current policy that allows hunting in all areas except where specifically prohibited (which had been designated by the posting of signs and maps). Some small patches of land that are of only minimal value for hunting will be closed to hunting. The no-hunting buffer adjacent to bike paths will be increased from 150 feet to 500 feet. Hunting areas may be further adjusted if necessary to meet public safety needs, and any changes will be made through the authority of the rule, and published in the superintendent's compendium. These changes will provide added protection for visitors using the bike paths; should result in more predictable areas where hunting activity is likely to be encountered; and will provide consistent buffers for hunting set-backs from roads, buildings, and bike paths. Further, the changes will facilitate more efficient monitoring by law enforcement staff and will minimally reduce hunting opportunities. Maps of the areas where hunting is allowed, along with applicable CACO and MDFW regulations, will be made readily available at various locations within CACO, and will be integrated into educational outreach materials.

**Updating the 1984 Special Regulation**

CACO's hunting program has generally followed the Commonwealth of Massachusetts' program, administered by the MDFW, with additional specific provisions or restrictions as necessary to meet park objectives and NPS policies. CACO regards MDFW as a key expert agency, with the State and region-wide perspective important for determining hunting seasons, bag limits, and other elements of a sound hunting program. As a result, management of hunting at CACO is best accomplished through close coordination between CACO and MDFW. CACO has adopted many of the State's regulations without additional restrictions, although the ultimate responsibility for developing and managing an appropriate hunting program for CACO rests with the NPS.

The current special regulation controlling hunting at CACO was promulgated through a proposed and final rule (48 FR 56971, December 27, 1983; and 49 FR 18442, April 30, 1984). That rulemaking recognized that the superintendent needed the discretion afforded by 36 CFR 1.5, Closures and public use limits, to designate appropriate locations where hunting is allowed, and to impose reasonable limits or restrictions necessary to address park specific issues such as public safety, resource protection and visitor use concerns. The proposed rule would authorize a new hunt during a time that previously was closed to hunting. It also creates a CACO-specific discretionary authority for the superintendent, consistent with the public notice requirement of 36 CFR 1.7, to require permits where appropriate and ensure that potential park specific issues such as public safety, resource protection, and visitor use can be addressed should they arise.

For example, at the time the FEIS (July 2007) and the ROD (September 2007), were completed, the MDFW had a two week spring turkey hunting season, at the end of April to early May. The FEIS/ROD statements of being "consistent with" the State season and "expand CACO's hunting season to accommodate the State's spring turkey hunt" was written in the context of the two week season. Since that date, the State has expanded its spring turkey season from two to four weeks, ending in late May. Due to possible user conflicts that may arise in late May, the CACO superintendent, using discretionary authority of the rule, will set the closing date of the season. CACO will strive to be consistent with the MDFW's turkey season dates, to avoid confusion, however the superintendent will have the discretion to adjust CACO's closing date, based on factors such as safety, use patterns, and the park's best interest.

Other locations within Massachusetts, such as the Massachusetts Military Reservation, have their own special regulations that have different dates than the standard dates/times established by the MDFW, in order to authorize hunting activities that are compatible with their land management concerns. The superintendent's discretion in this case would be similar to this established practice. The public will be notified of the spring turkey closing date, and other special conditions for the CACO hunting program, which will also be published in the superintendent's compendium.

**Reduced Public Comment Period**

The NPS intends the public be given the greatest possible opportunity to comment, while simultaneously recognizing that a delay in the rulemaking process is impracticable, and will not allow sufficient time to establish a spring 2011 turkey season, consistent with the start date identified by the State of Massachusetts for Wildlife Management Zone 12 (which includes CACO). Further, if there is a delay in the rulemaking process, CACO and the MDFW will not have sufficient time to notify the public of the regulatory change.

The proposed rule follows an extensive environmental analysis process described below, which concluded with the publication of a Final Environmental Impact Statement and subsequent Record of Decision that allows for implementation of this rule. The environmental analysis included a series of public meetings and a 60-day period for comment. The comments received from the public were considered while evaluating the alternatives in the FEIS resulting in the selection of Alternative B, which included establishing turkey hunting consistent with MDFW regulations. In developing the rule, the NPS consulted with the MDFW, which strongly supports a spring 2011 season. The National Wild Turkey Federation and more than a dozen Cape Cod sporting groups in the Barnstable League, including among others, the Highland Fish and Game Club, the Brewster Rod and Gun Club and the Bass River Rod and Gun Club, have also collectively strongly urged the NPS to initiate a turkey season this spring.

Finally, the failure to establish a spring 2011 season will have a direct negative effect on the economy of the

local communities as a result of lost sales of goods and services to turkey hunters. The NPS therefore finds that timely action is required, and consistent with 318 DM 5, is reducing the public comment period from 60 to 30 days.

**Compliance With Other Laws and Executive Orders**

*Regulatory Planning and Review (Executive Order 12866)*

This document is not a significant rule and the Office of Management and Budget has not reviewed this rule under Executive Order 12866.

(1) This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. This is an agency specific rule.

(3) This rule does not alter the budgetary effects of entitlements, grants, user-fees, or loan programs or the rights or obligations of their recipients.

(4) This rule does not raise novel legal or policy issues. The rule meets the requirements of the NPS general regulations at 36 CFR 2.2(b)(2).

*Regulatory Flexibility Act (RFA)*

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act, (5 U.S.C. 601 *et seq.*).

*Small Business Regulatory Enforcement Fairness Act (SBREFA)*

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of $100 million or more. The rule will benefit small businesses in the local communities through the sale of goods and services to turkey hunters.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. The rule will not impose restrictions on business in the local communities in the form of fees, recordkeeping or other requirements that would increase costs.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

*Unfunded Mandates Reform Act (UMRA)*

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local or Tribal governments or the private sector. A statement containing the information required by the UMRA (2 U.S.C. 1531 *et seq.*) is not required.

*Takings (Executive Order 12630)*

Under the criteria in Executive Order 12630, this rule does not have significant takings implications. A takings implication assessment is not required.

*Federalism (Executive Order 13132)*

Under the criteria in Executive Order 13132, the rule sufficient federalism implications to warrant the preparation of a Federalism summary impact statement. A Federalism summary impact statement is not required.

*Civil Justice Reform (Executive Order 12988)*

This rule complies with the requirements of Executive Order 12988. Specifically this rule:

(a) Meets the requirements of section 3(a) requiring all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

*Consultation With Indian Tribes (Executive Order 13175)*

Under the criteria in Executive Order 13175 we have evaluated this rule and determined that it has no potential effects on Federally recognized Indian Tribes.

*Paperwork Reduction Act (PRA)*

This rule does not contain information collection requirements and a submission under the PRA is not required. An individual seeking a NPS turkey hunting permit will only be required to present a drivers license, vehicle registration and Massachusetts State Hunting license, to ensure compliance with legal requirements, to verify the identity of the applicants and facilitate management of emergent or other incidents if they occur. OMB regulations at 5 CFR 1320.3(h) define this action as an exemption to the requirements of the PRA.

*National Environmental Policy Act (NEPA)*

This rule implements a portion of a major Federal action significantly affecting the quality of the human environment. CACO formally initiated the NEPA process with a Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) on the Cape Cod National Seashore Hunting Program. CACO published the NOI in the **Federal Register** on June 21, 2004. A series of public and agency scoping meetings followed to solicit input on hunting in the park from American Indian Tribes, Federal and State agencies and local towns, the public and interested groups. Using the information gathered during the scoping process, CACO prepared a Draft Environmental Impact Statement (Draft EIS) for public review and comment.

The comment period opened on April 21, 2006, with the Environmental Protection Agency's publication of a Notice of Availability (NOA) in the **Federal Register**, and closed on June 19, 2006, 60 days later. Two public meetings were held during the 60-day review period to receive oral comment. The availability of the Draft EIS and the dates and times of the public meetings were also publicized through a second NOA published by the NPS in the **Federal Register** on May 10, 2006, and through press releases sent to local newspapers and radio stations. Over 200 comments were received on the Draft EIS. These comments were used to improve the Draft and produce the Final EIS.

Completion of the Final EIS was noticed in the **Federal Register** by the DOI and EPA on August 7 and August 10, 2007, respectively. The Record of Decision (ROD) was signed on September 18, 2007. The chosen alternative was Alternative B—Develop a Modified Hunting Program. The Final EIS and ROD may be reviewed at: *http://www.nps.gov/caco/parkmgmt/planning.*

*Information Quality Act (IQA)*

In developing this rule we did not conduct or use a study, experiment or survey requiring peer review under the Information Quality Act (Pub. L. 106–554).

*Effects on the Energy Supply (Executive Order 13211)*

This rule is not a significant energy action under the definition in Executive Order 13211. A statement of Energy Effects is not required.

**Clarity of This Rule**

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, *etc.*

**Drafting Information**

The primary authors of this regulation were Stephen Prokop, former Chief Ranger CACO; Bob Grant, Chief Ranger CACO; Carrie Phillips, former Chief of Resources Management, CACO; Robin Lepore, Office of the Regional Solicitor, Department of the Interior; Philip A. Selleck, Associate Regional Director, Operations and Education, National Park Service, National Capital Region; Russel J. Wilson, Chief Regulations and Special Park Uses, National Park Service, Washington, DC; and A.J. North, Regulations Coordinator, National Park Service, Washington, DC.

**Public Participation**

Instructions: All submissions received must include the agency name and docket number or Regulation Identifier Number (RIN) for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

**Public Availability of Comments**

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**List of Subjects in 36 CFR Part 7**

National Parks, Hunting, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the National Park Service proposes to amend 36 CFR part 7 as follows:

## PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

1. The authority citation for Part 7 continues to read as follows:

**Authority:** 16 U.S.C. 1, 3, 9a, 462(k); Sec. 7.96 also issued under 36 U.S.C. 501–511, DC Code 10–137 (2001) and DC Code 50–2201 (2001).

2. In § 7.67 revise paragraph (f) to read as follows:

**§ 7.67 Cape Cod National Seashore.**

* * * * *

(f) *Hunting.* (1) Hunting is allowed at times and locations designated by the Superintendent as open to hunting.

(2) Except as otherwise provided in this section, hunting is permitted in accordance with § 2.2 of this chapter.

(3) Only deer, upland game (including Eastern Wild Turkey), and migratory waterfowl may be hunted.

(4) Hunting is prohibited from March 1st through August 31st each year, except for the taking of Eastern Wild Turkey as designated by the superintendent.

(5) The superintendent may:

(i) Require permits and establish conditions for hunting.

(ii) Temporarily limit, restrict, or terminate hunting access or activities after taking into consideration public health and safety, natural and cultural resource protection, and other management activities and objectives, such as those described in the Cape Cod National Seashore Hunting Program/Final Environmental Impact Statement.

(6) The public will be notified of such closures through one or more methods listed in § 1.7(a) of this chapter.

(7) Violating a closure, designation, use or activity restriction or a term or condition of a permit is prohibited. Violating a term or condition of a permit may also result in the suspension or revocation of the permit by the superintendent.

Dated: March 14, 2011.

**Will Shafroth,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 2011–6703 Filed 3–21–11; 8:45 am]

**BILLING CODE 4310–WV–P**

## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

### 37 CFR Chapter I

**[Docket No. PTO–C–2011–0017]**

### Improving Regulation and Regulatory Review

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Request for information.

**SUMMARY:** The United States Patent and Trademark Office ("USPTO" or "Office") is preparing a preliminary plan to review its existing significant regulations in response to the President's Executive Order 13563 on Improving Regulation and Regulatory Review. The purpose of this regulatory review is to determine whether any of these regulations should be modified, streamlined, expanded, or repealed in order to make the Office's regulatory program more effective and less burdensome. More effective and less burdensome regulations will help the Office in its mission to foster innovation and competitiveness through providing high quality and timely examination of patent and trademark applications, guiding domestic and international intellectual property policy, and delivering intellectual property information and education worldwide. The Office is asking the public to provide ideas and information about preparing such a review plan and to help the Office identify which regulations should be reviewed.

**DATES:** You must submit any comments on or before April 21, 2011.

**ADDRESSES:** Submit comments electronically by e-mailing them directly to the Office at *regulatory_review_comments@uspto.gov.* Comments may also be submitted by mail addressed to: Office of the General Counsel, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450, marked to the attention of Nicolas Oettinger. Although comments may be submitted by mail, the Office prefers to receive comments via the Internet. Comments may also be submitted through the Federal eRulemaking Portal Web site at *http://www.regulations.gov.* Additional instructions on providing comments through the Federal eRulemaking Portal are available at *http://www.regulations.gov.* All comments submitted directly to the Office or provided on the Federal eRulemaking Portal should include the docket number (PTO–P–2011–0017).

All comments will be available for public inspection upon request at the Office of the Commissioner for Patents, located in Madison East, Tenth Floor, 600 Dulany Street, Alexandria, Virginia, and will be available on the USPTO Web site at *http://www.uspto.gov.* All comments submitted through the Federal eRulemaking Portal will be made publicly available on that Web site. Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

**FOR FURTHER INFORMATION CONTACT:** Nicolas Oettinger, Office of the General Counsel, by telephone at 571–272–7832, by e-mail at *nicolas.oettinger@uspto.gov,* or by mail addressed to Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450, marked to the attention of Nicolas Oettinger.

**SUPPLEMENTARY INFORMATION:**

On January 18, 2011, President Obama issued Executive Order 13563, Improving Regulation and Regulatory Review. In the Executive Order, the President stated:

> Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand. It must measure, and seek to improve, the actual results of regulatory requirements.

E.O. 13563, 76 FR 3281, at Section 1(a). The Executive Order directed agencies to develop and submit, within 120 days, preliminary plans for reviewing their existing "significant regulations" (as that term is defined in Executive Order 12866) and determining whether and how such regulations could be made more effective and less burdensome. The Executive Order also directed agencies to provide the public with an opportunity to participate in the regulatory process and to provide comments on the development of such a plan, and further directed that timely on-line access to the rule making docket be provided so that the public had the opportunity to comment on all pertinent parts of the rule making docket.

As the Office begins work on a preliminary plan for reviewing its existing significant regulations, it is requesting that the public participate in that process. The Office is asking the public to provide comments on how such a plan should be developed, what such a plan should include, which significant regulations should be reviewed, and how those regulations might be improved. The Office recognizes that the intellectual property community and the public in general will have useful information and opinions about how USPTO regulations can be reviewed and improved in order to best achieve its mission of promoting innovation and competition. This request for comments will help the Office gather information that will inform its decisions about developing a plan for reviewing the Office's existing significant regulations.

The Office welcomes any comments that you think might be helpful in developing a plan for reviewing significant USPTO regulations. Some questions that may be helpful to consider in preparing such comments include:

1. What is the best way for the Office to identify which of its significant regulations should be modified, streamlined, expanded, or repealed? What process should the Office use to select rules for review and how should it prioritize such review?

2. What can the Office, relative to its regulation process, do to reduce burdens and maintain flexibility for the public while promoting its missions?

3. How can the Office ensure that its significant regulations promote innovation and competition in the most effective and least burdensome way? How can these Office regulations be improved to accomplish this?

4. Are there USPTO regulations that conflict with, or are duplicative of, regulations from other agencies? If so, please identify any such rules and provide any suggestions you might have for how this conflict or duplication can be resolved in order to help the Office achieve its mission more effectively.

5. How can the Office best encourage public participation in its rule making process? How can the Office best provide a forum for the open exchange of ideas among the Office, the intellectual property community, and the public in general?

These questions are not intended to be an exhaustive list of topics for public comment. While the Office welcomes and values all comments from the public in response to this request, these comments do not bind the Office to any further actions related to the comments, and the Office may not respond to every comment that is submitted.

Dated: March 15, 2011.

**David J. Kappos,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

[FR Doc. 2011–6660 Filed 3–21–11; 8:45 am]

**BILLING CODE 3510–16–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R04–OAR–2011–0055–201107; FRL–9285–1]**

## Approval and Promulgation of Implementation Plans and Designations of Areas for Air Quality Planning Purposes; Georgia: Macon; Determination of Attaining Data for the 1997 Annual Fine Particulate Standards

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to determine that the Macon, Georgia, fine particulate matter ($PM_{2.5}$) nonattainment area (hereafter referred to as "the Macon Area" or "the Area") has attained the 1997 annual average $PM_{2.5}$ National Ambient Air Quality Standards (NAAQS). The Macon Area is comprised of Bibb County in its entirety and a portion of Monroe County. This proposed determination of attainment is based upon complete, quality-assured and certified ambient air monitoring data for the 2007–2009 period showing that the Area has monitored attainment of the 1997 annual $PM_{2.5}$ NAAQS. If EPA finalizes this proposed determination of attainment, the requirements for the Area to submit an attainment demonstration and associated reasonably available control measures (RACM), a reasonable further progress (RFP) plan, contingency measures, and other planning State Implementation Plan (SIP) revisions related to attainment of the standard shall be suspended so long as the Area continues to attain the annual $PM_{2.5}$ NAAQS.

**DATES:** Comments must be received on or before April 21, 2011.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R04–OAR–2011–0055, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: benjamin.lynorae@epa.gov.*
3. *Fax:* (404) 562–9040.
4. *Mail:* EPA–R04–OAR–2011–0055, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960.
5. *Hand Delivery:* Lynorae Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

*Instructions:* Direct your comments to Docket ID No. EPA–R04–OAR–2011–0055. 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 through *http://www.regulations.gov* or e-mail, information that you consider to be CBI or otherwise protected. 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 electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Joel Huey or Sara Waterson, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Mr. Huey may be reached by phone at (404) 562–9104 or via electronic mail at *huey.joel@epa.gov*. Ms. Waterson may be reached by phone at (404) 562–9061 or via electronic mail at *waterson.sara@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

I. What action is EPA taking?
II. What is the background for this action?
III. Does the Macon area meet the annual $PM_{2.5}$ NAAQS?
A. Criteria
B. Macon Area Air Quality
IV. What is the effect of this action?
V. Statutory and Executive Order Reviews

## I. What action is EPA taking?

EPA is proposing to determine that the Macon Area (comprised of Bibb County in its entirety and a portion of Monroe County) has attaining data for the 1997 annual $PM_{2.5}$ NAAQS.[1] The proposal is based upon complete, quality-assured and certified ambient air monitoring data for the 2007–2009 monitoring period that shows the Area has monitored attainment of the 1997 annual $PM_{2.5}$ NAAQS.

## II. What is the background for this action?

On July 18, 1997 (62 FR 36852), EPA established an annual $PM_{2.5}$ NAAQS at 15.0 micrograms per cubic meter (μg/m$^3$) based on a 3-year average of annual mean $PM_{2.5}$ concentrations. At that time, EPA also established a 24-hour NAAQS of 65 μg/m$^3$. *See* 40 CFR 50.7. On January 5, 2005 (70 FR 944), EPA published its air quality designations and classifications for the 1997 $PM_{2.5}$ NAAQS based upon air quality monitoring data from those monitors for calendar years 2001–2003. These designations became effective on April 5, 2005. The Macon Area was designated nonattainment for the 1997 annual $PM_{2.5}$ NAAQS. *See* 40 CFR 81.311.

On October 17, 2006 (71 FR 61144), EPA retained the 1997 annual $PM_{2.5}$ NAAQS at 15.0 μg/m$^3$ based on a 3-year average of annual mean $PM_{2.5}$ concentrations and promulgated a 24-hour NAAQS of 35 μg/m$^3$ based on a 3-year average of the 98th percentile of 24-hour concentrations. On November 13, 2009, EPA designated the Macon Area as attainment for the 2006 24-hour NAAQS (74 FR 58688). In that action, EPA also clarified the designations for the NAAQS promulgated in 1997, stating that the Macon Area was designated as nonattainment for the annual NAAQS but attainment for the 24-hour NAAQS. Thus, today's action does not address attainment of either the 1997 or the 2006 24-hour NAAQS.

In response to legal challenges of the annual NAAQS promulgated in 2006, the U.S. Court of Appeals for the District of Columbia Circuit (DC Circuit) remanded this NAAQS to EPA for further consideration. *See American Farm Bureau Federation and National Pork Producers Council, et al.* v. *EPA,* 559 F.3d 512 (DC Cir. 2009). However, given that the 1997 and 2006 annual NAAQS are essentially identical, attainment of the 1997 annual NAAQS would also indicate attainment of the remanded 2006 annual NAAQS.

On April 25, 2007 (72 FR 20664), EPA promulgated its $PM_{2.5}$ Implementation Rule, codified at 40 CFR part 51, subpart Z, in which the Agency provided guidance for State and Tribal plans to implement the 1997 $PM_{2.5}$ NAAQS. This rule, at 40 CFR 51.1004(c), specifies some of the regulatory consequences of attaining the NAAQS, as discussed below.

[1] "1997 Annual NAAQS" refers to both the primary and secondary standards, which are identical.

## III. Does the Macon area meet the annual $PM_{2.5}$ NAAQS?

*A. Criteria*

Today's rulemaking assesses whether the Macon Area is attaining the 1997 annual $PM_{2.5}$ NAAQS. The Macon Area is comprised of Bibb County in its entirety and a portion of Monroe County.

Under EPA regulations at 40 CFR 50.7, the annual primary and secondary $PM_{2.5}$ NAAQS are met when the annual arithmetic mean concentration, as determined in accordance with 40 CFR part 50, Appendix N, is less than or equal to 15.0 μg/m$^3$ at all relevant monitoring sites in the subject Area.

*B. Macon Area Air Quality*

EPA has reviewed the ambient air monitoring data for the Macon Area in accordance with the provisions of 40 CFR part 50, Appendix N. All data considered have been quality-assured, certified, and recorded in EPA's Air Quality System (AQS) database. This review addresses air quality data collected in the 3-year period from 2007–2009.

The following table provides the annual average concentrations averaged over 2007–2009 at the sites in the Macon Area with at least 75 percent complete data in each quarter of each of those 3 years. The Macon-Allied Chemical monitor (13–021–0007) did not meet 75 percent completeness for the first quarter of 2008 and the Macon SE monitor (13–021–0012) did not meet 75 percent completeness for the second and fourth quarters of 2008 and third quarter of 2009. The 3-year average annual concentrations for 2007–2009 on this table without data substitution are 13.7 μg/m$^3$ for Macon Allied and 12.0 μg/m$^3$ for Macon SE. The 3-year average annual concentrations for 2007–2009 on this table with data substitution are 14.9 μg/m$^3$ for Macon Allied and 13.3 μg/m$^3$ for Macon SE. The data substitution procedures were separately applied to each site. The complete procedure for the maximum value data substitution test can be found in the EPA guidance document "Guideline on Data Handling Conventions for the PM NAAQS," dated April 1999.

Additionally, EPA and Georgia Environmental Protection Division believe an error occurred in the handling of the filter collected on February 4, 2009, and thus the data from the filter's analysis are invalid. A discussion on the sample invalidation can be found in the technical support document for this proposed rulemaking.

TABLE 1—ANNUAL AVERAGE CONCENTRATIONS IN THE MACON AREA

| Site name | Site number | Annual average concentration (μg/m$^3$) without data substitution | Annual average concentration (μg/m$^3$) with data substitution |
|---|---|---|---|
| Macon Allied | 13–021–0007 | [2] 13.7 | [3] 14.9 |
| Macon SE | 13–021–0012 | 12.0 | [4] 13.3 |

The Macon Area is meeting the 1997 annual $PM_{2.5}$ NAAQS both with and without data substitution. The official design value is the value without data substitution. EPA is now proposing to make the determination that the Macon Area is now meeting the 1997 annual $PM_{2.5}$ NAAQS.

Determinations of attainment are based on the most recent three years of complete, quality-assured data. EPA also considers additional quality-assured data to the extent those data are available. In accordance with Appendix N and standard EPA practice, EPA's review of the data was centered on the three most recent years of complete data, 2007–2009. Appendix N does not explicitly provide for comparisons to the NAAQS involving partial years of data, because various seasons of the year reflect various influences on $PM_{2.5}$ concentrations, and a partial year's data may not be representative of values that would be determined from a full year's data set. Nevertheless, EPA examined data that are available to date. For the Area, the available data for 2010 in the AQS database are below the NAAQS for both sites; however, not all of the 2010 data have been reported and they are not yet certified. Based on 2010 data in AQS available through the third quarter of 2010, the Macon Allied site has a preliminary 2008–2010 design value of 13.0 μg/m$^3$ and the Macon SE site has a preliminary 2008–2010 design value of 11.6 μg/m$^3$, and thus are consistent with continued attainment. The complete 2008—2010 design values are expected to be below 15.0 μg/m$^3$. On the basis of this review, EPA is proposing to determine that the Macon Area has attained the 1997 annual $PM_{2.5}$ NAAQS and is soliciting public comments on its proposed determination.

## IV. What is the effect of this action?

If this proposed determination of attainment is made final, the requirements for the Macon Area to submit an attainment demonstration and associated RACM, an RFP plan, contingency measures, and any other planning SIPs related to attainment of the 1997 annual $PM_{2.5}$ NAAQS would be suspended for so long as the Area continues to attain the $PM_{2.5}$ NAAQS. *See* 40 CFR 51.1004(c). Notably, as described below, any such determination would not be equivalent to the redesignation of the Area to attainment for the annual $PM_{2.5}$ NAAQS.

If this proposed rulemaking is finalized and EPA subsequently determines, after notice and comment rulemaking in the **Federal Register**, that the Area has violated the annual $PM_{2.5}$ NAAQS, the basis for the suspension of the specific requirements would no longer exist for the Macon Area, and the Area would thereafter have to address the applicable requirements. *See* 40 CFR 51.1004(c).

Finalizing this proposed action would not constitute a redesignation of the Area to attainment of the annual $PM_{2.5}$ NAAQS under section 107(d)(3) of the Clean Air Act (CAA). Further, finalizing this proposed action does not involve approving maintenance plans for the Area as required under section 175A of the CAA, nor would it find that the Area has met all other requirements for redesignation. Even if EPA finalizes the proposed action, the designation status of the Macon Area would remain nonattainment for the 1997 annual $PM_{2.5}$ NAAQS until such time as EPA determines that the Area meets the CAA requirements for redesignation to attainment and takes action to redesignate the Area.

This action is only a proposed determination of attainment that the Macon Area has attained the 1997

[2] Macon Allied design value considers co-located data where primary data are not available.

[3] Macon Allied design value considers data substitution of 58.1 μg/m$^3$ for all missing data in 1st quarter of 2008.

[4] Macon SE Annual Mean considers data substitution for second and fourth quarters of 2008 and 3rd quarter of 2009.

annual $PM_{2.5}$ NAAQS. Today's action does not address the 24-hour $PM_{2.5}$ NAAQS.

If the Macon Area continues to monitor attainment of the annual $PM_{2.5}$ NAAQS, the requirements for the Macon Area to submit an attainment demonstration and associated RACM, a RFP plan, contingency measures, and any other planning SIPs related to attainment of the annual $PM_{2.5}$ NAAQS will remain suspended.

**V. Statutory and Executive Order Reviews**

This action proposes to make a determination of attainment based on air quality, and would, if finalized, result in the suspension of certain Federal requirements, and it would not impose additional requirements beyond those imposed by State law. For that reason, this proposed action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994). In addition, this proposed 1997 annual average $PM_{2.5}$ NAAQS data determination for the Macon Area does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law.

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

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

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

Dated: March 10, 2011.

**A. Stanley Meiburg,**

*Acting Regional Administrator, Region 4.*

[FR Doc. 2011–6664 Filed 3–21–11; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R04–OAR–2011–0084–201112; FRL–9284–8]**

## Approval and Promulgation of Implementation Plans and Designations of Areas for Air Quality Planning Purposes; Alabama, Georgia, and Tennessee: Chattanooga; Determination of Attaining Data for the 1997 Annual Fine Particulate Standards

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to determine that the Chattanooga, Tennessee-Georgia, fine particulate ($PM_{2.5}$) nonattainment area (hereafter referred to as "the Chattanooga Area" or "Area") has attained the 1997 annual average $PM_{2.5}$ National Ambient Air Quality Standards (NAAQS). The Chattanooga Area is comprised of Hamilton County in Tennessee, Catoosa and Walker Counties in Georgia, and a portion of Jackson County in Alabama. This proposed determination of attainment is based upon complete, quality-assured and certified ambient air monitoring data for the 2007–2009 period showing that the Area has monitored attainment of the 1997 annual $PM_{2.5}$ NAAQS. If EPA finalizes this proposed determination of attainment, the requirements for the Area to submit an attainment demonstration and associated reasonably available control measures (RACM), a reasonable further progress (RFP) plan, contingency measures, and other planning State Implementation Plan (SIP) revisions related to attainment of the standard shall be suspended so long as the Area continues to attain the annual $PM_{2.5}$ NAAQS.

**DATES:** Comments must be received on or before April 21, 2011.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R04–OAR–2011–0084, by one of the following methods:

1. *http://www.regulations.gov*: Follow the on-line instructions for submitting comments.
2. *E-mail: benjamin.lynorae@epa.gov.*
3. *Fax:* (404) 562–9040.
4. *Mail:* EPA–R04–OAR–2011–0084, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960.
5. *Hand Delivery:* Lynorae Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

*Instructions:* Direct your comments to Docket ID No. EPA–R04–OAR–2011–0084. 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 through *http://www.regulations.gov* or e-mail, information that you consider to be CBI or otherwise protected. The *http://www.regulations.gov* website 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 electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically at *http://www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Joel Huey or Sara Waterson, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Mr. Huey may be reached by phone at (404) 562–9104 or via electronic mail at *huey.joel@epa.gov.* Ms. Waterson may be reached by phone at (404) 562–9061 or via electronic mail at *waterson.sara@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

I. What action Is EPA taking?
II. What Is the background for this action?
III. Does the Chattanooga area meet the annual $PM_{2.5}$ NAAQS?
A. Criteria
B. Chattanooga Area Air Quality
IV. What Is the effect of this action?
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## I. What action is EPA taking?

EPA is proposing to determine that the Chattanooga Area (comprised of Hamilton, Catoosa, and Walker Counties in their entireties and a portion of Jackson County) has attaining data for the 1997 annual $PM_{2.5}$ NAAQS.[1] The proposal is based upon complete, quality-assured and certified ambient air monitoring data for the 2007–2009 monitoring period that shows the Area has monitored attainment of the 1997 annual $PM_{2.5}$ NAAQS. Available data for 2010 indicate attaining data for the 1997 annual $PM_{2.5}$ NAAQS.

## II. What is the background for this action?

On July 18, 1997 (62 FR 36852), EPA established an annual $PM_{2.5}$ NAAQS at 15.0 micrograms per cubic meter (μg/m³) based on a 3-year average of annual mean $PM_{2.5}$ concentrations. At that time, EPA also established a 24-hour NAAQS of 65 μg/m³. *See* 40 CFR 50.7. On January 5, 2005 (70 FR 944), EPA published its air quality designations and classifications for the 1997 $PM_{2.5}$ NAAQS based upon air quality monitoring data from those monitors for calendar years 2001–2003. These designations became effective on April 5, 2005. The Chattanooga Area was designated nonattainment for the 1997 annual $PM_{2.5}$ NAAQS. *See* 40 CFR 81.301(Alabama), 40 CFR 81.311 (Georgia), and 40 CFR 81.343 (Tennessee).

On October 17, 2006 (71 FR 61144), EPA retained the 1997 annual $PM_{2.5}$ NAAQS at 15.0 μg/m³ based on a 3-year average of annual mean $PM_{2.5}$ concentrations, and promulgated a 24-hour NAAQS of 35 μg/m³ based on a 3-year average of the 98th percentile of 24-hour concentrations. On November 13, 2009, EPA designated the Chattanooga Area as attainment for the 2006 24-hour NAAQS (74 FR 58688). In that action, EPA also clarified the designations for the NAAQS promulgated in 1997, stating that the Chattanooga Area was designated as nonattainment for the annual NAAQS but attainment for the 24-hour NAAQS. Thus, today's action does not address attainment of either the 1997 or the 2006 24-hour NAAQS.

In response to legal challenges of the annual NAAQS promulgated in 2006, the U.S. Court of Appeals for the District of Columbia Circuit (DC Circuit) remanded this NAAQS to EPA for further consideration. See *American Farm Bureau Federation and National Pork Producers Council, et al.* v. *EPA,* 559 F.3d 512 (DC Cir. 2009). However, given that the 1997 and 2006 annual NAAQS are essentially identical, attainment of the 1997 annual NAAQS would also indicate attainment of the remanded 2006 annual NAAQS.

On April 25, 2007 (72 FR 20664), EPA promulgated its $PM_{2.5}$ Implementation Rule, codified at 40 CFR part 51, subpart Z, in which the Agency provided guidance for state and tribal plans to implement the 1997 $PM_{2.5}$ NAAQS. This rule, at 40 CFR 51.1004(c), specifies some of the regulatory consequences of attaining the NAAQS, as discussed below.

## III. Does the Chattanooga area meet the annual $PM_{2.5}$ NAAQS?

### *A. Criteria*

Today's rulemaking proposed to find that the Chattanooga Area is attaining the 1997 annual $PM_{2.5}$ NAAQS, and provides a basis for that final action. The Chattanooga Area is comprised of Hamilton, Catoosa, and Walker Counties in their entireties, and a portion of Jackson County.

Under EPA regulations at 40 CFR 50.7, the annual primary and secondary $PM_{2.5}$ NAAQS are met when the annual arithmetic mean concentration, as determined in accordance with 40 CFR part 50, Appendix N, is less than or equal to 15.0 μg/m³ at all relevant monitoring sites in the subject area.

### *B. Chattanooga Area Air Quality*

EPA has reviewed the ambient air monitoring data for the Chattanooga Area in accordance with the provisions of 40 CFR part 50, Appendix N. All data considered have been quality-assured, certified, and recorded in EPA's Air Quality System (AQS) database. This review addresses air quality data collected in the 3-year period from 2007—2009.

The following table provides the annual average concentrations averaged over 2007—2009 at the sites in the Chattanooga Area. The Rossville site did not have complete data for 2007. As a result, data substitution was performed and is discussed in the technical support document (TSD) for this proposed rule. The annual design value for 2007–2009 for the Chattanooga Area is 12.7 μg/m³, at the Siskin Drive site (47–065–4002).

[1] "1997 Annual NAAQS" refers to both the primary and secondary standards, which are identical.

[2] The Rossville site did not meet 75 percent data completeness for the 2007–2009 time period due to roof replacement and subsequent relocation of the monitor. Because the site passed data substitution analysis, the design value for the Area is the highest reading monitor, which is Tombras Avenue.

TABLE 1.—ANNUAL AVERAGE CONCENTRATIONS IN THE CHATTANOOGA AREA

| Site name | Site No. | Annual average concentration ($\mu g/m^3$) |
|---|---|---|
| Tombras Avenue | 47–065–0031 | 12.6 |
| Soddy Daisy High School | 47–065–1011 | 11.7 |
| Siskin Drive | 47–065–4002 | 12.7 |
| Rossville | 13–295–0002 | [2] 12.3 |

A new roof was installed in June of 2007 at the Rossville site; therefore, no data were collected from June 12, 2007, through November 13, 2007. The pitched roof no longer supported ambient air monitors, which resulted in the establishment of a new monitoring location. Due to the shut-down, the Rossville site did not meet data completeness requirements for 2007. Data substitution was used to determine the attainment status of the Rossville site. The Georgia Environmental Protection Division (GA EPD) developed a weight-of-evidence approach [3] for an alternative method of data substitution. The analysis used data from Siskin Drive and Tombras Avenue sites to determine the attainment status of the Rossville site. EPA has determined that GA EPD successfully demonstrated a strong correlation between the $PM_{2.5}$ data from the Rossville site and two other sites. Additionally, EPA's Office of Air Quality Planning and Standards did an additional analysis on the correlation between the sites. Further discussion on the data substitution can be found in the TSD for this proposed rule. Data completeness requirements were met at the other monitors in the Area.

Determinations of attainment are based on the most recent three years of complete, quality-assured data. EPA also considers additional quality-assured data to the extent those data are available. In accordance with Appendix N and standard EPA practice, EPA's review of the data was centered on the three most recent years of complete data, 2007–2009. Appendix N does not explicitly provide for comparisons to the NAAQS involving partial years of data, because various seasons of the year reflect various influences on $PM_{2.5}$ concentrations, and a partial year's data may not be representative of values that would be determined from a full year's data set. Nevertheless, EPA examined data that are available to date. For the Area, the available data for 2010 in the AQS database are below the NAAQS; however, not all of the 2010 data have been reported and they are not yet certified. Based on data available in AQS through the third quarter of 2010, the Tombras site has a preliminary 2008–2010 design value of 11.7 $\mu g/m^3$, the Soddy Daisy site has a preliminary 2008–2010 design value of 11.1 $\mu g/m^3$, the Siskin Drive site has a preliminary 2008–2010 design value of 11.7 $\mu g/m^3$, and the Rossville site has a preliminary design value of 10.9 $\mu g/m^3$. These preliminary design values are consistent with continued attainment, and the complete 2008—2010 design values are expected to be below 15.0 $\mu g/m^3$. On the basis of this review, EPA is proposing to determine that the Chattanooga Area has attained the 1997 annual $PM_{2.5}$ NAAQS, and is soliciting public comments on its proposed determination.

[3] For the Chattanooga analysis, the weight-of-evidence approach used was spatial averaging. The analysis can be found in the "Analysis of Rossville $PM_{2.5}$ Data" document provided by GA EPD on 5/5/2010. This document will be posted in the docket.

## IV. What is the effect of this action?

If this proposed determination of attainment is made final, the requirements for the Chattanooga Area to submit an attainment demonstration and associated RACM, a RFP plan, contingency measures, and any other planning SIPs related to attainment of the 1997 annual $PM_{2.5}$ NAAQS would be suspended for so long as the Area continues to attain the $PM_{2.5}$ NAAQS. *See* 40 CFR 51.1004(c). Notably, as described below, any such determination would not be equivalent to the redesignation of the Area to attainment for the annual $PM_{2.5}$ NAAQS.

If this proposed rulemaking is finalized and EPA subsequently determines, after notice and comment rulemaking in the **Federal Register**, that the Area has violated the annual $PM_{2.5}$ NAAQS, the basis for the suspension of the specific requirements would no longer exist for the Chattanooga Area, and the Area would thereafter have to address the applicable requirements. *See* 40 CFR 51.1004(c).

Finalizing this proposed action would not constitute a redesignation of the Area to attainment of the annual $PM_{2.5}$ NAAQS under section 107(d)(3) of the Clean Air Act (CAA). Further, finalizing this proposed action does not involve approving maintenance plans for the Area as required under section 175A of the CAA, nor would it find that the Area has met all other requirements for redesignation. Even if EPA finalizes the proposed action, the designation status of the Chattanooga Area would remain nonattainment for the 1997 annual $PM_{2.5}$ NAAQS until such time as EPA determines that the Area meets the CAA requirements for redesignation to attainment and takes action to redesignate the Area.

This action is only a proposed determination of attainment that the Chattanooga Area has attained the 1997 annual $PM_{2.5}$ NAAQS. Today's action does not address the 24-hour $PM_{2.5}$ NAAQS.

If the Chattanooga Area continues to monitor attainment of the annual $PM_{2.5}$ NAAQS, the requirements for the Chattanooga Area to submit an attainment demonstration and associated RACM, a RFP plan, contingency measures, and any other planning SIPs related to attainment of the annual $PM_{2.5}$ NAAQS will remain suspended.

## V. Statutory and Executive Order Reviews

This action proposes to make a determination of attainment based on air quality, and would, if finalized, result in the suspension of certain federal requirements, and it would not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994). In addition, this proposed 1997 annual average $PM_{2.5}$ NAAQS data determination for the Chattanooga Area does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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

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

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

Dated: March 10, 2011.

**A. Stanley Meiburg,**

*Acting Regional Administrator, Region 4.*

[FR Doc. 2011–6669 Filed 3–21–11; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 55

**[OAR–2004–0091; FRL–9284–6]**

## Outer Continental Shelf Air Regulations; Consistency Update for California

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to update a portion of the Outer Continental Shelf ("OCS") Air Regulations. Requirements applying to OCS sources located within 25 miles of States' seaward boundaries must be updated periodically to remain consistent with the requirements of the corresponding onshore area ("COA"), as mandated by section 328(a)(1) of the Clean Air Act, as amended in 1990 ("the Act"). The portion of the OCS air regulations that is being updated pertains to the requirements for OCS sources for which the Santa Barbara County Air Pollution Control District ("Santa Barbara APCD" or "District") is the designated COA. The intended effect of approving the OCS requirements for the Santa Barbara APCD is to regulate emissions from OCS sources in accordance with the requirements onshore. The changes to the existing requirements discussed below are proposed to be incorporated by reference into the Code of Federal Regulations and listed in the appendix to the OCS air regulations.

**DATES:** Any comments must arrive by April 21, 2011.

**ADDRESSES:** Submit comments, identified by docket number OAR–2004–0091, by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the on-line instructions.

2. E-mail: *steckel.andrew@epa.gov.*

3. *Mail or deliver:* Andrew Steckel (Air–4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

*Instructions:* All comments 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 Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an "anonymous access" system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. 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:* The index to the docket for this action 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:** Cynthia G. Allen, Air Division (Air–4), U.S. EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105, (415) 947–4120, *allen.cynthia@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

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I. Background and Purpose
II. EPA's Evaluation
III. Proposed Action
IV. Statutory and Executive Order Reviews

### I. Background and Purpose

On September 4, 1992, EPA promulgated 40 CFR part 55,[1] which established requirements to control air pollution from OCS sources in order to attain and maintain Federal and State ambient air quality standards and to comply with the provisions of part C of title I of the Act. Part 55 applies to all OCS sources offshore of the States except those located in the Gulf of Mexico west of 87.5 degrees longitude. Section 328 of the Act requires that for such sources located within 25 miles of a State's seaward boundary, the requirements shall be the same as would be applicable if the sources were located in the COA. Because the OCS requirements are based on onshore requirements, and onshore requirements may change, section 328(a)(1) requires that EPA update the OCS requirements as necessary to maintain consistency with onshore requirements.

Pursuant to section 55.12 of the OCS rule, consistency reviews will occur (1) at least annually; (2) upon receipt of a Notice of Intent under section 55.4; or (3) when a State or local agency submits a rule to EPA to be considered for incorporation by reference in part 55. This proposed action is being taken in response to the submittal of requirements by the Santa Barbara County APCD. Public comments received in writing within 30 days of

[1] *See* Notice of Proposed Rulemaking, December 5, 1991 (56 FR 63774), and the preamble to the final rule promulgated September 4, 1992 (57 FR 40792) for further background and information on the OCS regulations.

publication of this document will be considered by EPA before publishing a final rule.

Section 328(a) of the Act requires that EPA establish requirements to control air pollution from OCS sources located within 25 miles of States' seaward boundaries that are the same as onshore requirements. To comply with this statutory mandate, EPA must incorporate applicable onshore rules into part 55 as they exist onshore. This limits EPA's flexibility in deciding which requirements will be incorporated into part 55 and prevents EPA from making substantive changes to the requirements it incorporates. As a result, EPA may be incorporating rules into part 55 that do not conform to all of EPA's State implementation plan (SIP) guidance or certain requirements of the Act. Consistency updates may result in the inclusion of State or local rules or regulations into part 55, even though the same rules may ultimately be disapproved for inclusion as part of the SIP. Inclusion in the OCS rule does not imply that a rule meets the requirements of the Act for SIP approval, nor does it imply that the rule will be approved by EPA for inclusion in the SIP.

## II. EPA's Evaluation

In updating 40 CFR part 55, EPA reviewed the rules submitted for inclusion in part 55 to ensure that they are rationally related to the attainment or maintenance of Federal or State ambient air quality standards or part C of title I of the Act, that they are not designed expressly to prevent exploration and development of the OCS and that they are applicable to OCS sources. 40 CFR 55.1. EPA has also evaluated the rules to ensure they are not arbitrary or capricious. 40 CFR 55.12(e). EPA has excluded rules that regulate toxics, which are not related to the attainment and maintenance of Federal and State ambient air quality standards.

EPA is soliciting public comments on the issues discussed in this document or on other relevant matters. EPA will consider these comments before taking final action. Interested parties may participate in the Federal rulemaking procedure by submitting written comments to the EPA Region IX Office listed in the **ADDRESSES** section of this **Federal Register**.

## III. Proposed Action

1. After review of the requirements submitted by the Santa Barbara County APCD against the criteria set forth above and in 40 CFR part 55, EPA is proposing to make the following District requirements applicable to OCS sources. Earlier versions of these District rules are currently implemented on the OCS:

| Rule No. | Name | Adoption or amended date |
|---|---|---|
| 102 | Definitions | 1/20/11 |
| 202 | Exemptions to Rule 201 | 1/20/11 |
| 370 | Potential to Emit—Limitations for Part 70 Sources | 1/20/11 |
| 810 | Federal Prevention of Significant Deterioration (PSD) | 1/20/11 |
| 1301 | Part 70 Operating Permits—General Information | 1/20/11 |

## IV. Statutory and Executive Order Reviews

### *A. Executive Order 12866: Regulatory Planning and Review*

Under the Clean Air Act, the Administrator is required to establish requirements to control air pollution from OCS sources located within 25 miles of States' seaward boundaries that are the same as onshore air control requirements. To comply with this statutory mandate, EPA must incorporate applicable onshore rules into part 55 as they exist onshore. 42 U.S.C. 7627(a)(1); 40 CFR 55.12. Thus, in promulgating OCS consistency updates, EPA's role is to maintain consistency between OCS regulations and the regulations of onshore areas, provided that they meet the criteria of the Clean Air Act. Accordingly, this action simply proposes to update the existing OCS requirements to make them consistent with requirements onshore, without the exercise of any policy discretion by EPA. For that reason, this proposed action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes, nor does it impose substantial direct compliance costs on Tribal governments, nor preempt Tribal law.

Under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has approved the information collection requirements contained in 40 CFR part 55 and, by extension, this update to the rules, and has assigned OMB control number 2060–0249. Notice of OMB's approval of EPA Information Collection Request ("ICR") No. 1601.07 was published in the **Federal Register** on February 17, 2009 (74 FR 7432). The approval expires January 31, 2012. As EPA previously indicated (70 FR 65897–

65898 (November 1, 2005)), the annual public reporting and recordkeeping burden for collection of information under 40 CFR part 55 is estimated to average 549 hours per response, using the definition of burden provided in 44 U.S.C. 3502(2).

**List of Subjects in 40 CFR Part 55**

Environmental protection, Administrative practice and procedure, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Nitrogen oxides, Outer Continental Shelf, Ozone, Particulate matter, Permits, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: March 9, 2011.

**Jared Blumenfeld,**

*Regional Administrator, Region IX.*

Title 40 of the Code of Federal Regulations, Part 55, is proposed to be amended as follows:

## PART 55—[AMENDED]

1. The authority citation for part 55 continues to read as follows:

**Authority:** Section 328 of the Clean Air Act (42 U.S.C. 7401 *et seq.*) as amended by Public Law 101–549.

2. Section 55.14 is amended by revising paragraph (e)(3)(ii)(F) to read as follows:

**§ 55.14 Requirements that apply to OCS sources located within 25 miles of States' seaward boundaries, by State.**

* * * * *

(e) * * *

(3) * * *

(ii) * * *

(F) *Santa Barbara County Air Pollution Control District Requirements Applicable to OCS Sources.*

* * * * *

3. Appendix A to Part 55 is amended by revising paragraph (b)(6) under the heading "California" to read as follows:

**Appendix A to Part 55—Listing of State and Local Requirements Incorporated by Reference Into Part 55, by State**

* * * * *

California

* * * * *

(b) * * *

(6) The following requirements are contained in *Santa Barbara County Air Pollution Control District Requirements Applicable to OCS Sources:*

Rule 102 Definitions (Adopted 01/20/11)
Rule 103 Severability (Adopted 10/23/78)
Rule 106 Notice to Comply for Minor Violations (Repealed 01/01/2001)
Rule 107 Emergencies (Adopted 04/19/01)
Rule 201 Permits Required (Adopted 06/19/08)
Rule 202 Exemptions to Rule 201 (Adopted 01/20/11)
Rule 203 Transfer (Adopted 04/17/97)
Rule 204 Applications (Adopted 04/17/97)
Rule 205 Standards for Granting Permits (Adopted 04/17/97)
Rule 206 Conditional Approval of Authority to Construct or Permit to Operate (Adopted 10/15/91)
Rule 207 Denial of Application (Adopted 10/23/78)
Rule 210 Fees (Adopted 03/17/05)
Rule 212 Emission Statements (Adopted 10/20/92)
Rule 301 Circumvention (Adopted 10/23/78)
Rule 302 Visible Emissions (Adopted 10/23/78)
Rule 304 Particulate Matter-Northern Zone (Adopted 10/23/78)
Rule 305 Particulate Matter Concentration-Southern Zone (Adopted 10/23/78)
Rule 306 Dust and Fumes-Northern Zone (Adopted 10/23/78)
Rule 307 Particulate Matter Emission Weight Rate-Southern Zone (Adopted 10/23/78)
Rule 308 Incinerator Burning (Adopted 10/23/78)
Rule 309 Specific Contaminants (Adopted 10/23/78)
Rule 310 Odorous Organic Sulfides (Adopted 10/23/78)
Rule 311 Sulfur Content of Fuels (Adopted 10/23/78)
Rule 312 Open Fires (Adopted 10/02/90)
Rule 316 Storage and Transfer of Gasoline (Adopted 01/15/09)
Rule 317 Organic Solvents (Adopted 10/23/78)
Rule 318 Vacuum Producing Devices or Systems-Southern Zone (Adopted 10/23/78)
Rule 321 Solvent Cleaning Operations (Adopted 09/20/10)
Rule 322 Metal Surface Coating Thinner and Reducer (Adopted 10/23/78)
Rule 323 Architectural Coatings (Adopted 11/15/01)
Rule 324 Disposal and Evaporation of Solvents (Adopted 10/23/78)
Rule 325 Crude Oil Production and Separation (Adopted 07/19/01)
Rule 326 Storage of Reactive Organic Compound Liquids (Adopted 01/18/01)
Rule 327 Organic Liquid Cargo Tank Vessel Loading (Adopted 12/16/85)
Rule 328 Continuous Emission Monitoring (Adopted 10/23/78)
Rule 330 Surface Coating of Metal Parts and Products (Adopted 01/20/00)
Rule 331 Fugitive Emissions Inspection and Maintenance (Adopted 12/10/91)
Rule 332 Petroleum Refinery Vacuum Producing Systems, Wastewater Separators and Process Turnarounds (Adopted 06/11/79)
Rule 333 Control of Emissions from Reciprocating Internal Combustion Engines (Adopted 06/19/08)
Rule 342 Control of Oxides of Nitrogen ($NO_X$) from Boilers, Steam Generators and Process Heaters) (Adopted 04/17/97)
Rule 343 Petroleum Storage Tank Degassing (Adopted 12/14/93)
Rule 344 Petroleum Sumps, Pits, and Well Cellars (Adopted 11/10/94)
Rule 346 Loading of Organic Liquid Cargo Vessels (Adopted 01/18/01)
Rule 352 Natural Gas-Fired Fan-Type Central Furnaces and Residential Water Heaters (Adopted 09/16/99)
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* * * * *

[FR Doc. 2011–6673 Filed 3–21–11; 8:45 am]

**BILLING CODE 6560–50–P**

## DEPARTMENT OF HOMELAND SECURITY

## Federal Emergency Management Agency

## 44 CFR Part 67

**[Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–B–1158]**

## Proposed Flood Elevation Determinations

*Correction*

In proposed rule document 2010—31545 beginning on page 78654 in the issue of Thursday, December 16, 2010, make the following correction:

**§ 67.4 [Corrected]**

On page 78656, in § 67.4, in the table Maui County, Hawaii, the headings are corrected to read as set forth below:

| Flooding source(s) | Location of referenced elevation ** | * Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in feet (LTD) | | Communities affected |
|---|---|---|---|---|
| | | Effective | Modified | |
| **Maui County, Hawaii** | | | | |

* * * * *

[FR Doc. C1–2010–31545 Filed 3–21–11; 8:45 am]

**BILLING CODE 1505–01–D**

## DEPARTMENT OF THE INTERIOR

### Office of the Secretary

### 48 CFR Parts 1401, 1402, 1415, 1417, 1419, 1436, and 1452

**RIN 1093–AA13**

### Acquisition Regulation Miscellaneous Changes

**AGENCY:** Office of the Secretary, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of the Interior (DOI) is proposing to revise the Department of the Interior Acquisition Regulation (DIAR) in order to make minor corrections to DOI acquisition procedures to be consistent with the Federal Acquisition Regulation (FAR), and to add a new clause covering contract administration roles and responsibilities. Some DIAR coverage is being revised and obsolete material is being removed.

**DATES:** Submit comments by May 23, 2011.

**ADDRESSES:** You may submit comments on the rulemaking through the Federal eRulemaking Portal at *http://www.regulations.gov.* Please use the Regulation Identifier Number (RIN) 1093–AA13 in your message. Follow the instructions on the Web site for submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Tiffany A. Schermerhorn, Senior Procurement Analyst, Office of Acquisition and Property Management, Office of the Secretary, telephone (202) 513–0747, fax (202) 219–4244, or e-mail *tiffany_schermerhorn@ios.doi.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Background

This rule will revise the Department of the Interior Acquisition Regulation (DIAR) in order to update references to other federal and Departmental directives, remove obsolete material and references, and add a clause implementing agency policy regarding contract administration. The new clause notifies contractors of their roles and responsibilities in complying with technical direction given by authorized representatives of the contracting officer.

## II. Procedural Matters

*1. Public Availability of Comments*

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

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

This document is not a significant rule and is not subject to review by the Office of Management and Budget under Executive Order 12866.

(1) This rule will not have an effect of $100 million or more on the economy. The costs associated with these revisions will be strictly internal and borne entirely by the Federal government. These minimal costs will benefit taxpayers by making the acquisition process more efficient and transparent. This rule will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

(3) This rule does not alter the budgetary effects or entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

(4) This rule does not raise novel legal or policy issues.

*3. The Regulatory Flexibility Act*

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule will not impose any new requirements on small entities.

*4. Small Business Regulatory Enforcement Fairness Act (SBREFA)*

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of $100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

*5. Unfunded Mandates Reform Act*

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule will not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

*6. Takings (Executive Order 12630)*

Under the criteria in Executive Order 12630, this proposed rule does not have significant takings implications. This rule does not impose conditions or limitations on the use of any private property; consequently, a takings implication assessment is not required.

*7. Federalism (Executive Order 13132)*

Under the criteria in Executive Order 13132, this rule does not have Federalism implications. This rule does not substantially or directly affect the relationship between Federal and State governments or impose costs on States or localities. A Federalism Assessment is not required.

*8. Civil Justice Reform (Executive Order 12988)*

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

(a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) of the Order.

*9. Paperwork Reduction Act of 1995*

This rule does not contain an information collection, as defined by the Paperwork Reduction Act.

*10. National Environmental Policy Act*

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 is not required.

*11. Data Quality Act*

In developing this rule we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub. L. 106–554).

*12. Effects on the Energy Supply*

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

*13. Clarity of this Regulation*

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the "**ADDRESSES**" section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, which sections where you feel lists or tables would be useful, etc.

**List of Subjects in 48 CFR Parts 1401, 1402, 1415, 1417, 1419, 1436, and 1452**

Government procurement.

Dated: March 7, 2011.

**John C. Henderson,**

*Acting Assistant Secretary for Policy, Management and Budget.*

For the reasons set out in the preamble, we propose to amend Chapter 14 of Title 48 Code of Federal Regulations, parts 1401, 1402, 1415, 1417, 1419, 1436, and 1452 as follows:

1. The authority citation for 48 CFR Chapter 14 continues to read as follows:

**Authority:** Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

## PART 1401—DEPARTMENT OF THE INTERIOR ACQUISITION REGULATION SYSTEM

2. Revise § 1401.670 to read as follows:

**§ 1401.670 Contracting officers' representatives.**

When a CO elects to appoint an individual to act as an authorized representative in the administration of a contract, the CO must notify the contractor of the COR appointment in writing, and provide the name and contact information of the COR.

3. Revise § 1401.670–1 to read as follows:

**§ 1401.670–1 Contract clause.**

Insert the clause at 1452.201–70 in solicitations and contracts under which a COR will be appointed.

## PART 1402—DEFINITIONS OF WORDS AND TERMS

4. In § 1402.170, remove the entry "BUDS Business Utilization Development Specialist" from the list, and add to the list the entry "SBS Small Business Specialist" after "SBA Small Business Administration."

## PART 1415—CONTRACTING BY NEGOTIATION

5. In § 1415.404–4, remove the reference to "FAR 15.905" in paragraph (a), and add in its place "FAR 15.404–4, and remove paragraph (c).

## PART 1417—SPECIAL CONTRACTING METHODS

6. Remove Subpart 1417.5.

## PART 1419—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS

7. In § 1419.202–70, revise the section heading, and revise paragraph (h) to read as follows:

**§ 1419.202–70 Acquisition screening and SBS recommendations.**

* * * * *

(h) The CO shall document the rationale for not accepting a SBS recommendation on DI Form 1886, under "Notes." (See FAR 19.202.) Disagreements between the CO and the SBS concerning the decision to use a set aside or the 8(a) program shall be resolved by the BPC. The BPC shall annotate the resolution, with signature, in the "Notes" section of the form. The BPC may consult with the OSDBU to obtain assistance in resolving the disagreement.

## PART 1436—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

8. In § 1436.270–1, in paragraph (b), remove the table entitled "Table 1436–1—Uniform Contract Format" and add in its place the following table:

**§ 1436.270–1 Uniform contract format.**

* * * * *

TABLE 1436–1—UNIFORM CONTRACT FORMAT

| Section | Title |
|---|---|
| **Part I—The Schedule** | |
| A | Solicitation/contract form. |
| B | Bid schedule. |

TABLE 1436–1—UNIFORM CONTRACT FORMAT—Continued

| Section | Title |
|---|---|
| C | Specifications/Drawings. |
| D | Packaging and marking. |
| E | Inspection and acceptance. |
| F | Deliveries or performance. |
| G | Contract administration data. |
| H | Special contract requirements. |
| **Part II—Contract Clauses** | |
| I | Contract clauses. |
| **Part III—List of Documents, Exhibits, and Other Attachments** | |
| J | List of attachments. |
| **Part IV—Representations and Instructions** | |
| K | Representations, certifications, and other statements of offerors. |
| L | Instructions, conditions, and notices to offerors. |
| M | Evaluation factors for award. |

## PART 1452—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

9. Add new § 1452.201–70 to read as follows:

**§ 1452.201–70 Authorities and delegations.**

As prescribed in § 1401.670–1, insert the following clause:

**AUTHORITIES AND DELEGATIONS (XXX 2011)**

(a) The Contracting Officer is the only individual authorized to enter into or terminate this contract, modify any term or condition of this contract, waive any requirement of this contract, or accept nonconforming work.

(b) The Contracting Officer will designate a Contracting Officer's Representative (COR) at time of award. The COR will be responsible for technical monitoring of the contractor's performance and deliveries. The COR will be appointed in writing, and a copy of the appointment will be furnished to the Contractor. Changes to this delegation will be made by written changes to the existing appointment or by issuance of a new appointment.

(c) The COR is not authorized to perform, formally or informally, any of the following actions:

(1) Promise, award, agree to award, or execute any contract, contract modification, or notice of intent that changes or may change this contract;

(2) Waive or agree to modification of the delivery schedule;

(3) Make any final decision on any contract matter subject to the Disputes Clause;

(4) Terminate, for any reason, the Contractor's right to proceed;

(5) Obligate in any way, the payment of money by the Government.

(d) The Contractor shall comply with the written or oral direction of the Contracting Officer or authorized representative(s) acting within the scope and authority of the appointment memorandum. The Contractor need not proceed with direction that it considers to have been issued without proper authority. The Contractor shall notify the Contracting Officer in writing, with as much detail as possible, when the COR has taken an action or has issued direction (written or oral) that the Contractor considers to exceed the COR's appointment, within 3 days of the occurrence. Unless otherwise provided in this contract, the Contractor assumes all costs, risks, liabilities, and consequences of performing any work it is directed to perform that falls within any of the categories defined in paragraph (c) prior to receipt of the Contracting Officer's response issued under paragraph (e) of this clause.

(e) The Contracting Officer shall respond in writing within 30 days to any notice made under paragraph (d) of this clause. A failure of the parties to agree upon the nature of a direction, or upon the contract action to be taken with respect thereto, shall be subject to the provisions of the Disputes clause of this contract.

(f) The Contractor shall provide copies of all correspondence to the Contracting Officer and the COR.

(g) Any action(s) taken by the Contractor, in response to any direction given by any person acting on behalf of the Government or any Government official other than the Contracting Officer or the COR acting within his or her appointment, shall be at the Contractor's risk.

(End of clause)

10. In § 1452.228–7, in paragraph (a), remove the reference "1428.311–2" and add in its place "1428.311–1."

[FR Doc. 2011–6646 Filed 3–21–11; 8:45 am]

BILLING CODE 4310–RF–P

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

### 49 CFR Part 571

**[Docket No. NHTSA–2009–0093]**

### Federal Motor Vehicle Safety Standards; Roof Crush Resistance

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

**ACTION:** Response to petition for reconsideration.

**SUMMARY:** This document responds to a petition for reconsideration of a final rule that upgraded the agency's safety standard on roof crush resistance. The petition was submitted by the National Truck Equipment Association (NTEA). After carefully considering the petition, we are denying it.

**FOR FURTHER INFORMATION CONTACT:** For non-legal issues, you may call Christopher J. Wiacek, NHTSA Office of Crashworthiness Standards, telephone 202–366–4801. For legal issues, you may call J. Edward Glancy, NHTSA Office of Chief Counsel, telephone 202–366–2992. You may send mail to these officials at the National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., West Building, Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

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## I. Background

### *A. Multi-Stage Vehicles and the Multi-Stage Certification Scheme*

#### 1. Multi-Stage Vehicles

Multi-stage vehicles are motor vehicles that are produced in two or more stages. These vehicles are not produced by a single manufacturer on an assembly line as is the typical passenger car or sport utility vehicle. Instead, one manufacturer produces an "incomplete vehicle" which requires further manufacturing operations to become a completed vehicle. As defined in 49 CFR 567.3, an incomplete vehicle is an assemblage consisting, at a minimum, of chassis (including the frame) structure, power train, steering system, suspension system, and braking system, in the state that those systems are to be part of the completed vehicle, but requires further manufacturing operations to become a completed vehicle.[1]

Most incomplete vehicles are manufactured by large or substantial manufacturers, such as General Motors Company ("GM"), Ford Motor Company ("Ford"), Chrysler Group LLC ("Chrysler"), Navistar International Corporation, and Freightliner. Most final-stage manufacturers are small businesses.[2] Multi-stage vehicles are aimed at a variety of niche markets, most of which are too small to be serviced economically by single-stage manufacturers, which tend to have large assembly facilities in a small number of locations.

In terms of degree of completeness, the spectrum of incomplete vehicles ranges from a stripped chassis to a chassis-cab. A stripped chassis is an incomplete vehicle without an occupant compartment. A chassis-cab is an incomplete vehicle, with a completed occupant compartment, that requires only the addition of cargo-carrying, work-performing, or load-bearing components to perform its intended functions. *See* 49 CFR 567.3. In appearance, a chassis-cab looks like a pickup truck without a box or truck bed behind the cab. A type of incomplete vehicle that falls between stripped chassis and chassis-cabs on this spectrum is a chassis cutaway, which is an incomplete vehicle delivered with a partial occupant compartment that does not have a rear wall. A chassis cutaway may be visualized as a pickup truck or van without a rear wall behind the driver and without a box or truck bed behind the cab.

In a typical situation, the incomplete vehicle is delivered to the final-stage manufacturer which adds work-performing or cargo-carrying components to complete the vehicle. For example, the incomplete vehicle may be a chassis-cab, *i.e.,* have a cab, but nothing built on the frame behind the cab. As completed, it may be a dry freight van (box truck), dump truck, tow truck, or plumber's truck. A cutaway may be completed into a vehicle in which the driver can enter the rear area without leaving the vehicle, such as a small airport shuttle, a small recreation vehicle, or some service trucks used by tradesmen. A stripped chassis may be completed into a bus or large recreation vehicle.

In some cases, there may also be intermediate-stage manufacturers involved in the production of a multi-stage motor vehicle.

#### 2. Safety Standards and Certification

NHTSA issues Federal motor vehicle safety standards (FMVSS) applicable to new motor vehicles and certain items of motor vehicle equipment under the authority of the National Traffic and Motor Vehicle Safety Act, as amended and codified as Chapter 301 of Title 49 of the United States Code, "Motor Vehicle Safety" (Vehicle Safety Act).[3] Manufacturers are prohibited from manufacturing for sale, selling or importing into the United States motor vehicles and equipment subject to an applicable FMVSS unless the vehicle or equipment complies with the standard and is covered by a certification issued pursuant to 49 U.S.C. 30115.[4] This prohibition is not absolute. The prohibition on selling non-compliant vehicles does not apply to a person who establishes that the person had no reason to know, despite exercising reasonable care, that a motor vehicle or equipment does not comply with applicable FMVSSs. *See United States* v. *Chrysler Corp.,* 158 F.3d 1350, 1355 (DC Cir. 1998).

Under the certification provision of the Vehicle Safety Act, a manufacturer is required to certify that the vehicle or equipment complies with applicable FMVSSs. A person may not issue the certificate, if in exercising reasonable care, the person has reason to know that the certificate is false or misleading in a material respect. The certification provision recognizes distributions of certification responsibilities for multi-stage vehicles between final-stage and incomplete motor vehicle manufacturers.[5]

The Vehicle Safety Act employs a self-certification process, which imposes responsibility on the manufacturer(s) to certify the vehicle or equipment item as complying with the applicable FMVSS. In this process, the manufacturer(s) do not submit information for certification to NHTSA and NHTSA does not certify any motor vehicles or motor vehicle equipment as complying with applicable FMVSS. *See* 73 FR 79207, 79212 (Dec 24, 2008).

Many of NHTSA's most important safety standards specify performance requirements in the context of a crash test or some other kind of test that may

[1] The definition of "incomplete vehicle" also includes incomplete trailers, and many manufacturers of incomplete trailers are not large businesses.

[2] As defined by The Regulatory Flexibility Act of 1980, as amended, 5 U.S.C. 601(3) (2011).

[3] 49 U.S.C. 30101 *et seq.*

[4] 49 U.S.C. 30112(a).

[5] The statute provides in pertinent part: If the intermediate or final-stage manufacturer elects to assume responsibility for compliance with the standard covered by the documentation provided by an incomplete motor vehicle manufacturer, the intermediate or final-stage manufacturer shall notify the incomplete motor vehicle manufacturer in writing within a reasonable time of affixing the certification label. 49 U.S.C. 30115(b).

significantly damage the tested vehicle. The specific tests specified in the agency's crashworthiness standards are carefully developed to simulate real world crashes, thereby assuring that vehicle occupants are provided protection in actual driving situations.

NHTSA's motor vehicle safety standards contain the test conditions and procedures that the agency will use to evaluate the performance of the vehicle or equipment being tested for compliance with the particular safety standard. NHTSA follows these specified test procedures and conditions when conducting its compliance testing. However, manufacturers are not required to test their products in the manner specified in the relevant safety standard, or even to test the product at all, as their basis for certifying that the product complies with all relevant standards.

A manufacturer may evaluate its products in various ways to determine whether the vehicle or equipment will comply with the safety standards and to provide a basis for its certification of compliance. Depending on the circumstances, the manufacturer may be able to base its certification on actual testing (according to the procedure specified in the standard or some other procedure), computer simulation, engineering analysis, technical judgment or other means.[6]

NHTSA has developed regulations for certification and specific certification regulations for multi-stage vehicles. The certification process is governed by 49 CFR part 567 *Certification.* 49 CFR 567.5 sets forth the certification requirements for manufacturers of vehicles manufactured in two or more stages. Certification responsibilities for the applicable FMVSSs are communicated between incomplete vehicle manufacturers and final-stage manufacturers with the use of an incomplete vehicle document (IVD). Each manufacturer of an incomplete vehicle, with limited exceptions,[7] assumes responsibility for certification-related duties under the Vehicle Safety Act with respect to the vehicle as further manufactured or completed by the final-stage manufacturer, to the extent that the vehicle is completed in accordance with the IVD.[8]

Final-stage manufacturers have complementary duties. Pursuant to 49 CFR 567.5(d), final-stage manufacturers assume responsibility for certification-related matters under the Vehicle Safety Act, except to the extent that the incomplete vehicle manufacturer has expressly assumed responsibility for standards related to systems and components it supplied and except to the extent that the final-stage manufacturer completed the vehicle in accordance with the prior manufacturers' IVD or any addendum furnished pursuant to 49 CFR part 568, as to the FMVSSs fully addressed therein.[9]

The incomplete vehicle manufacturer furnishes an IVD for incomplete vehicles pursuant to 49 CFR 568.4. For each applicable FMVSS, the incomplete vehicle manufacturer makes one of three affirmative statements in the IVD: (1) A Type 1 statement that the vehicle when completed will conform to the standard if no alterations are made in identified components; (2) a Type 2 statement that sets forth the specific conditions of final manufacture under which the incomplete vehicle manufacturer specifies that the completed vehicle will conform to the standard; or (3) a Type 3 statement that conformity to the standard cannot be determined based on the incomplete vehicle as supplied, and the incomplete vehicle manufacturer makes no representation as to conformity with the standard.

When the IVD makes a Type 1 or Type 2 statement, there is "pass-through" certification unless a subsequent manufacturer manufactures the vehicle in a way as to violate the language in the IVD. The final-stage manufacturer can rely on the IVD to certify the vehicle to a particular standard.

If a vehicle that is completed and certified in accordance with the agency's regulations is altered by an individual or manufacturer before the first retail sale, that individual or manufacturer is known as a vehicle "alterer."[10] An alterer has different requirements detailed in 49 CFR 567.7. In essence, an alterer must certify and affix a label stating that the vehicle was altered and remains in compliance with all applicable FMVSS affected by the alteration.[11]

3. 2005 and 2006 Rules on Certification of Vehicles Built in Two or More Stages

On February 14, 2005, NHTSA published in the **Federal Register** (70 FR 7414) a final rule amending four different parts of Title 49 Code of Federal Regulations to address various certification issues related to vehicles built in two or more stages. Among other things, the rule expanded the application of pass-through certification, which, as adopted in the 1970s applied only to chassis-cabs, so that pass-through certification can be used for multi-stage vehicles based on other types of incomplete vehicles.[12]

In the preamble to the February 2005 final rule, and in other documents in that rulemaking, NHTSA discussed the history of issues related to the certification of vehicles built in two or more stages, which have long been sources of contention to many, including between incomplete vehicle manufacturers and final-stage manufacturers.

NTEA petitioned for reconsideration of the February 2005 multi-stage certification final rule. On May 15, 2006, NHTSA responded to that organization's petition in a final rule; response to petition for reconsideration published in the **Federal Register** (71 FR 28168). While the agency made some changes in the February 2005 final rule in response to the petition, it denied the remainder of the petition for reconsideration that addressed issues regarding certification of multi-stage vehicles and responsibility for recalls of multi-stage vehicles.

In its petition for reconsideration of the February 2005 certification final rule, NTEA challenged the regulatory scheme of certifying multi-stage vehicles.[13] It repeated its historical mantra that the provided IVDs are unworkable, insufficient, and that it is not possible for a final-stage manufacturer to comply with the agency's multi-stage certification regulations. Furthermore, NTEA argued that even if compliance were possible, it would be economically ruinous to NTEA's members.

In denying most aspects of NTEA's petition for reconsideration, NHTSA provided detailed responses to these and other arguments. We explained that certification is important for safety and that the certification scheme is "workable."

[6] 71 FR 28168, 28183–28184 (May 15, 2006).

[7] *See* 70 FR 7414, 7432–33 (February 14, 2005); 49 CFR 567.5(b) and (c).

[8] 49 CFR 567.5(b)(1).

[9] 49 CFR 567.5(d)(1).

[10] 49 CFR 567.3

[11] While NTEA's petition for reconsideration combines alterers and final-stage manufacturers into one definition, NHTSA notes that the two types are different and subject to different regulations. Namely, an alterer will not usually receive an IVD or have the potential for pass-through certification. As such, NHTSA will refer to these two entities separately in this document.

[12] *See* 49 CFR 567.5 (1977 and 1978); 42 FR 37814 (July 25, 1977).

[13] We note that NTEA submitted its comments on NHTSA's notice of proposed rulemaking ("NPRM") to upgrade the roof crush resistance standard in November 2005. Those comments, which addressed a number of multi-stage issues, were thus submitted after the agency had published its February 2005 final rule on certification of multi-stage vehicles but before NHTSA responded to NTEA's petition for reconsideration of the certification rule on May 15, 2006.

As part of responding to NTEA's claim in its petition to the 2005 Rule that the existing IVD's are not workable, we carefully examined the certification statements included in an IVD that NTEA appended to its petition.[14] The IVD was for the General Motors (GM) C/K chassis-cab (this is comparable to the full size GM pickup trucks). We analyzed certification statements for FMVSS Nos. 105, *Hydraulic and Electric Brake Systems;* 135, *Light Vehicle Brake Systems;* 204, *Steering Control Rearward Displacement;* 201, *Occupant Protection in Interior Impact;* 212, *Windshield Mounting;* 219, *Windshield Zone Intrusion;* 214, *Side Impact Protection;* 208, *Occupant Crash Protection;* 216, *Roof Crush Resistance;* and 301, *Fuel System Integrity.* In each instance, we showed why the IVD was workable and why various limitations were reasonable. We also explained that issues regarding impracticability should be decided in the context of rulemaking for each FMVSS.[15]

As we further explained, in recognition of the fact that incomplete vehicle manufacturers do not control work performed by final-stage manufacturers and can fairly anticipate only some things but not everything done to the incomplete vehicle by final-stage manufacturers, the regulatory system of "pass-through" certification in which the final-stage manufacturers have responsibility for certification of the vehicle[16] but may rely on IVDs is reasonable. The IVD commonly provides the basis for the final-stage manufacturer's certification with enumerated FMVSS. The IVD is a general document that accompanies the incomplete vehicle, and typically is not limited to one application (addition of one type of body or one type of equipment), but contains limits and conditions in light of the nature and capacity of the chassis and potential problems resulting from completion of an incomplete vehicle.

We stated that NTEA sought to remove the certification responsibility from final-stage manufacturers and impose much of that responsibility on incomplete vehicle manufacturers. Also, we explained that NTEA's petition ignored the fact that incomplete vehicle manufacturers do not control what final-stage manufacturers do with the incomplete vehicles.

As we noted, a system of pass-through certification has existed for more than 25 years, and in that time many multi-stage vehicles have been built and certified by final-stage manufacturers. This fact alone indicates that the system is workable and operates as intended. Moreover, as we pointed out, the availability of multi-stage vehicles belies NTEA's position.[17] And, contrary to that petitioner's position, market forces create business reasons for incomplete vehicle manufacturers to provide workable IVDs. We noted that NTEA's argument ignores the fact that the system is not broken, as evidenced by the many types of multi-stage vehicles that are being manufactured and offered for sale, including those manufactured by NTEA members. These include ambulances, service trucks, small school buses, mid-size buses, tow trucks and vans.[18] The fact that vehicles such as these are being made indicates that the IVDs are workable. We also noted that NTEA ignored the cooperative relationships between incomplete and final-stage manufacturers.[19]

We also explained that many resources are available to final-stage manufacturers.[20] As a group, final-stage manufacturers do not operate in an informational vacuum. In addition to the IVDs, these resources include upfitter[21] guides from incomplete vehicle manufacturers, incomplete vehicle manufacturer help lines, the final-stage manufacturers' own experience and judgment, and commercially available software.

In our May 15, 2006 response to petitions for reconsideration of the February 2005 rule, we explained that certification serves an important safety function in the multi-stage vehicle business. Many multi-stage vehicles carry people and important cargo—from school children on school buses to liquid fuel on propane and gasoline trucks. The safety need for certification of compliance with FMVSS in these types of vehicles is uncontroverted.[22]

*B. May 2009 Final Rule Upgrading FMVSS No. 216, Roof Crush Resistance*

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–59, added a section to the Vehicle Safety Act titled Vehicle rollover prevention and crash mitigation, codified at 49 U.S.C. 30128. Subsection (a) required the Secretary to initiate rulemaking proceedings, for the purpose of establishing rules or standards that will reduce vehicle rollover crashes and mitigate deaths and injuries associated with such crashes for motor vehicles with a gross vehicle weight rating (GVWR) of not more than 4,536 kilograms (10,000 pounds). Subsection (d) required that one of the rulemaking proceedings initiated under subsection (a) was to establish performance criteria to upgrade FMVSS No. 216 relating to roof strength for driver and passenger sides, and expressly required issuance of a final rule.

On May 12, 2009, as part of a comprehensive plan for reducing the serious risk of rollover crashes and the risk of death and serious injury in those crashes, NHTSA published in the **Federal Register** (74 FR 22348) a final rule substantially upgrading FMVSS No. 216, *Roof Crush Resistance.* The upgraded standard is designated FMVSS No. 216a, *Roof Crush Resistance; Upgraded Standard.*

First, for the vehicles previously subject to the standard, *i.e.,* passenger cars and multipurpose passenger vehicles, trucks and buses with a Gross Vehicle Weight Rating (GVWR) of 2,722 kilograms (6,000 pounds)[23] or less, the rule doubled the amount of force the vehicle's roof structure must withstand in the specified test, from 1.5 times the vehicle's unloaded weight to 3.0 times the vehicle's unloaded weight. We note that this value is sometimes referred to as the strength-to-weight ratio (SWR), *e.g.,* a SWR of 1.5, 2.0, 2.5, and so forth.

Second, the rule extended the applicability of the standard so that it will also apply to vehicles with a GVWR greater than 6,000 pounds, but not greater than 10,000 pounds. The rule established a force requirement of 1.5 times the vehicle's unloaded weight for these newly included vehicles.

Third, the rule required all of the above vehicles to meet the specified force requirements in a two-sided test, instead of a single-sided test. For the two-sided test, the same vehicle must meet the force requirements when tested

[14] 71 FR at 28177–28183 (section titled "The Existing IVDs Are Workable").

[15] 71 FR at 28186.

[16] Incomplete vehicles are classified as original equipment items. 70 FR 7414, 7418 (Feb. 14, 2005). *See* 49 U.S.C. § 30102(a) (definitions of motor vehicle and motor vehicle equipment).

[17] 71 FR at 28176 (section titled "The Availability of Multistage Vehicles Belies NTEA's Position") and at 28184–85 (section titled "NHTSA's Market Forces Argument Is Justified and Consistent with the Multistage Vehicle Market").

[18] *See, e.g.,* NTEA comments, NHTSA–2005–22143–0108, p.1.

[19] We cited the example of General Motors' relationships with final-stage manufacturers it refers to as "Special Vehicle Manufacturers." 71 FR at 28185.

[20] 71 FR at 28183–28184 (section titled "Additional Resources Available to Final-Stage Manufacturers").

[21] Final-stage manufacturers are sometimes referred to as "upfitters" in the trade. *See generally* 71 FR at 28174.

[22] *See* 71 FR at 28175–28176.

[23] FMVSS No. 216(a) references both kilograms and pounds. For ease of reading, we will refer to the pound measurement in this document.

first on one side and then on the other side of the vehicle.

Fourth, the rule established a new requirement for maintenance of headroom, *i.e.,* survival space, during testing in addition to the existing limit on the amount of roof crush.

NHTSA included a number of special provisions to address the concerns of multi-stage manufacturers, alterers, and small volume manufacturers. The rule excluded from FMVSS No. 216a multi-stage trucks with a GVWR greater than 6,000 pounds not built using a chassis-cab or using an incomplete vehicle with a full exterior van body, *i.e.,* NHTSA extended standard No. 216a to only multi-stage trucks in this weight range for which the incomplete vehicle manufacturer provided a completed roof structure.

The rule permitted vehicles manufactured in two or more stages, other than chassis-cabs, and vehicles that are changed in certain ways to raise the height of the roof, to be certified to the roof crush requirements of FMVSS No. 220, *School Bus Rollover Protection,* instead of FMVSS No. 216a.

The regulation added a test specification that provided for the removal of added structures prior to testing on vehicles built on a chassis-cab incomplete vehicle if some portion of the added body structure is above the height of the incomplete vehicle. It also provided additional leadtime for vehicles produced in two or more stages and altered vehicles.[24]

### C. Challenge by NTEA

NTEA filed a petition for review of the May 2009 final rule in the United States Court of Appeals for the Sixth Circuit. That organization had submitted comments during the rulemaking opposing the agency's proposed revisions with respect to multi-stage vehicles.

### D. Consent Motion To Stay Briefing Schedule

NHTSA filed with the Court a motion for a stay of the briefing schedule. The agency stated that it believed the Court's consideration of the challenge by NTEA would be facilitated by a fuller response to the comments that organization had submitted during the rulemaking, which would permit both NTEA and the Court to more fully address the agency's rationale. NHTSA also noted that petitions for reconsideration of the rule were pending before the agency. NTEA consented to the motion and the Court granted a six-month stay of the briefing schedule on October 2, 2009.

### E. April 2010 Further Response to NTEA Comments

On April 7, 2010, NHTSA published in the **Federal Register** (75 FR 17590) a document providing a further response to the comments submitted by NTEA in the roof crush resistance rulemaking (hereinafter referred to as the "Further Response"). The agency also published two other documents related to the May 2009 final rule. One of those documents denied two petitions for reconsideration of that rule.[25] Those petitions requested, among other things, that the agency apply the same, more stringent strength-to-weight ratio requirement to heavier light vehicles, *i.e.,* ones with a GVWR greater than 6,000 pounds as it had applied to other light vehicles. The other document was a correcting rule.[26]

In the Further Response, we provided a detailed discussion of the multi-stage issues in the rulemaking to upgrade FMVSS No. 216. Among other things, we discussed a section included in the NPRM concerning multi-stage issues, provided an overview of the comments we received on multi-stage issues, including comments submitted by NTEA, the Advocates for Highway Safety ("Advocates"), National Mobility Equipment Dealers Association ("NMEDA") and Recreational Vehicle Industry Association ("RVIA"). We also discussed our response to the comments about multi-stage issues included in the preamble to our May 2009 final rule.

In the Further Response, we provided a detailed further response to NTEA's comments. We explained that, as a general matter, NTEA's comments on the agency's proposal to upgrade FMVSS No. 216 centered on two premises: (1) NHTSA's assumption that pass-through certification is available is invalid; and (2) because NHTSA's pass-through certification scheme is invalid, NHTSA's analysis of the rule's impact and costs are flawed. The end result, according to NTEA, was that NHTSA's regulation on roof crush is impracticable for multi-stage vehicles, and, therefore, NHTSA's roof crush regulations should not include any requirements for multi-stage vehicles.

We noted that to reach NTEA's conclusion—FMVSS No. 216a should not apply to multi-stage vehicles—one has to be of the view that the certification scheme for multi-stage vehicles, which has been in place for several decades, is unworkable and invalid, as applied to requirements for chassis-cabs under FMVSS No. 216a.[27]

We rejected NTEA's arguments as to multi-stage vehicles covered by the regulation. We noted that while NTEA has repeatedly provided pessimistic claims that the present certification scheme for multi-stage vehicles is invalid and unworkable, the availability of multi-stage vehicles belies that claim. There are many multi-stage vehicles on the road that have been certified to a number of standards, and the final-stage manufacturers are still in business. There are large numbers of multi-stage vehicles, such as school buses, box trucks, work trucks, flatbed and stake trucks, tow trucks, dump trucks, and gasoline tank trucks on the road.

We also noted that final-stage manufacturers have certified multi-stage vehicles with a GVWR of 6,000 pounds or less to the FMVSS No. 216 as it existed before the May 2009 upgrade of that rule. FMVSS No. 216 was extended to trucks, buses, and multipurpose vehicles (MPVs) with a GVWR of 6,000 pounds or less in a final rule published in 1991. A GVWR of 6,000 pounds or less is relatively low for commercial vehicles,[28] which results in limited offerings in this category. But, significantly, GM has sold an incomplete vehicle chassis-cab, the GMT–355,[29] that has a GVWR of 6,000 pounds or less and is therefore subject to FMVSS No. 216. GM would not have offered and sold the vehicle for years if there was not a market for them, as completed by final-stage manufacturers.

We explained that under the May 2009 roof crush resistance rule, FMVSS No. 216a will not be applicable to vehicles with a GVWR greater than 10,000 pounds. Incomplete vehicle manufacturers will not need to provide an IVD regarding FMVSS No. 216a for these heavier vehicles. We explained that, in our estimation, the largest numbers of multi-stage vehicles are in this category.

We observed that NTEA's comments contemplated no assistance from the incomplete vehicle manufacturer. We explained, however, that NHTSA has seen the converse to be true—there are IVDs, upfitter guides, best practices manuals and help lines provided by incomplete vehicle manufacturers.

[24] The foregoing presents some highlights. The reader is referred to the entire document and subsequent documents, including a further response to NTEA's comment and a response to petitions for reconsideration.

[25] 75 FR 17605 (April 7, 2010).

[26] 75 FR 17604 (April 7, 2010).

[27] *See* 71 FR at 28169–28171.

[28] For example, most full size pickup trucks have a GVWR well above 6,000 pounds. *See* Ford, 2011 Truck Payload Workbook, p. 7, *available at https://www.fleet.ford.com/truckbbas/topics/2011/2011_Truck_Payload_Workbook.pdf* (last accessed Feb. 14, 2011).

[29] This platform has been used for the Chevrolet Colorado and GMC Canyon pickup trucks, which are small or compact pickup trucks. *See generally* 75 FR at 17593.

Final-stage manufacturers also have their own technical expertise.

We explained that final-stage manufacturers can use their judgment, including engineering or technical judgment, to certify vehicles. Testing, as provided in the FMVSS, is not required as a matter of law to certify a vehicle.[30] Instead, sound judgment may be used. Many final-stage manufacturers bring considerable judgment to bear. They have been building and certifying vehicles for years. Final-stage manufacturers can and do use their base of experience in certifying vehicles as complying with the FMVSS.

We also stated that NHTSA provided substantial leadtime. The rule becomes effective for multi-stage vehicles with a GVWR of 6,000 pounds or less, *i.e.,* the vehicles already covered by FMVSS No. 216, on September 1, 2016, and for the other multi-stage vehicles with a GVWR of 10,000 pounds or less on September 1, 2017. These dates are one year after the requirements are fully effective for manufacturers of single-stage vehicles, the same entities that supply an incomplete chassis-cab to a final-stage manufacturer.

In the Further Response, we made a number of points for which we provided detailed discussion and explanation. We discussed how the current certification scheme is not an unlawful delegation of agency authority and that IVDs concerning FMVSS No. 216 are workable. We also discussed the FMVSS No. 220 testing alternative that was incorporated into the rule after being suggested by the RVIA. We also explained why we believed that there were little if no costs for multi-stage manufacturers to comply with FMVSS No. 216a.

## II. NTEA Petition for Reconsideration

After we published our Further Response, on May 24, 2010, NTEA submitted a petition for reconsideration to NHTSA. NTEA's petition requested that we either exclude multi-stage vehicles from the coverage of FMVSS No. 216a or amend the final rule in a manner that would ensure more readily available compliance alternatives for final-stage manufacturers.

In summary, NTEA's petition made five points. First, NTEA stated that unreasonably restrictive conformity statements in IVDs put final-stage manufacturers in the position of either taking "undue" risk of certification or exiting the business. The petitioner stated that the fact that final-stage manufacturers certify vehicles does not suggest that pass-through certification under NHTSA's regulations is workable or valid or practicable for purposes of Section 30111(a) of the Vehicle Safety Act. NTEA claimed that this certification risk was a basis for the court of appeals decision in *National Truck Equipment Association* v. *National Highway Traffic Safety Administration,* 919 F.2d 1148 (6th Cir. 1990) (1990 *NTEA* decision).

NTEA presented its arguments on the 1990 *NTEA* decision for the proposition that the agency must offer the regulated party a chance to demonstrate compliance in order for a standard to meet the practicability requirement of the Vehicle Safety Act. NTEA stated that the court ruled that where final-stage manufacturers could not afford to conduct the test in the subject safety standards, NHTSA had to put the alternatives in the standard itself.

NTEA argued that the court in the 1990 *NTEA* decision identified problems insofar as pass-through certification was concerned: (1) NHTSA's regulations at the time did not provide for pass-through certification for vehicles completed on chassis other than chassis-cabs; and (2) pass-through certification would not be an adequate compliance alternative to costly testing to the extent incomplete vehicle manufacturers provided unduly restrictive conformity statements in their IVDs.

NTEA focused on the conformity language for FMVSS No. 216 in GM's IVD for the GMT–355 (2006 Model Year) and assumed that other incomplete vehicle manufacturers would provide similar conformity statements for the new version of FMVSS No. 216.[31] NTEA took issue with NHTSA's interpretation that the conformity language for FMVSS No. 216 in the IVD for the GMT–355 (2006 Model Year) provides a meaningful pass-through opportunity. NTEA believes that NHTSA's analysis "completely ignores the actual language of GM's conformity statement." It claimed that the language of GM's conformity statement is restrictive. It also stated that the legal liability of a final-stage manufacturer for conformity with FMVSS No. 216, as allocated pursuant to 49 CFR 567.5, cannot depend on a "conjuring exercise" of what is, at minimum, a "hopelessly ambiguous" IVD statement drafted by GM, an incomplete vehicle manufacturer.

NTEA argued that there is no meaningful distinction between receiving a Type 3 conformity statement for a cutaway chassis, on the one hand, and receiving some version of the Type 1 conformity statement for FMVSS No. 216 that GM provides for the GMT–355 chassis, on the other. In both cases, according to NTEA, the final-stage manufacturer cannot use pass-through certification with respect to FMVSS No. 216 and legal responsibility for compliance with that standard is automatically assigned to the final-stage manufacturer.

NTEA concluded its first argument by urging NHTSA to amend FMVSS No. 216a and/or 49 CFR 567.5 to ensure that IVDs contain conformity statements that provide final-stage manufacturers with a reasonable opportunity to use pass-through certification. In the absence of such amendments, NTEA urged NHTSA to exclude multi-stage vehicles from the population of vehicles subject to FMVSS No. 216a.

Second, NTEA stated that it does not advocate shifting certification responsibility from final-stage manufacturers to incomplete vehicle manufacturers. Instead, NTEA argued that all multi-stage vehicles should be excluded from this safety standard, because it believes the safety standard is not practicable.

NTEA claimed that NHTSA, in its Further Response, misconstrued NTEA's position regarding multi-stage vehicle certification. In that response, NHTSA stated that NTEA sought to remove the certification responsibility from final-stage manufacturers and impose much of that responsibility on incomplete vehicle manufacturers. NHTSA also stated that NTEA's petition ignored the fact that incomplete vehicle manufacturers do not control what final-stage manufacturers do with the incomplete vehicles.

NTEA countered that it has not suggested in this proceeding that certification responsibility for multi-stage vehicles be shifted from final-stage manufacturers to incomplete vehicle manufacturers. Rather, with respect to FMVSS No. 216a, it stated that multi-stage vehicles should be excluded from the rule's coverage because in its view there is an absence of practicable compliance alternatives for final-stage manufacturers.

NTEA offered three reasons for its position, two of which, consistent with prior assertions, placed blame on other

[30] This has long been recognized in interpretations by NHTSA's Chief Counsel. *E.g.,* Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Ms. S. Trinkl, Quality Management, DEKRA Automobil GmbH (December 30, 2004), *available at http://isearch.nhtsa.gov/files/Trinkl.1.html* (last accessed February 14, 2011).

[31] NTEA's initial comments were based on GM's 2006 IVD; however, attached to the petition for reconsideration was GM's 2010 IVD. As the two documents are materially similar, we will refer to them collectively. *See* Appendix A of NTEA's Petition for Reconsideration, May 24, 2010, Docket No. NHTSA–2009–0093–0022.

entities: (1) Final-stage manufacturers cannot afford to conduct tests described in FMVSS No. 216a, or perform computer simulations (or other engineering analyses) that replicate the performance of vehicles in the test contained in that standard; (2) pass-through certification is not available to final-stage manufacturers because incomplete vehicle manufacturers are often unwilling or unable to provide conformity statements that permit final-stage manufacturers to build even the most common configurations of multi-stage vehicles within such conformity statements; and (3) NHTSA has not included in FMVSS No. 216a an affordable and objective alternative means (*i.e.,* an alternative to testing or pass-through certification) by which a final-stage manufacturer can certify conformity of a vehicle to the standard. NTEA concluded that final-stage manufacturers do not have a meaningful chance to demonstrate compliance with FMVSS No. 216a. Therefore, it stated that NHTSA should exclude all multi-stage vehicles from this safety standard.

Third, NTEA argued that excluding all multi-stage vehicles would not unacceptably deprive those users of the safety benefits provided by the roof crush standard. While essentially ignoring the vehicles that are under the umbrella of the safety provision of the rule, NTEA stated that its statistics show that the vast majority of multi-stage vehicles rated above 6,000 lbs. GVWR are outside the scope of FMVSS No. 216a, and their users would not benefit from the standard's safety benefits. NTEA noted that in extending the standard from vehicles with a GVWR greater than 6,000 pounds to include those with a GVWR of 10,000 pounds or less, NHTSA excluded trucks other than ones built on chassis-cabs (and incomplete vehicles with a full exterior van body) and this means that the agency excluded approximately one-third of multi-stage vehicles with a GVWR of 6,001 pounds to 10,000 pounds. NTEA also said that chassis with a GVWR of over 10,000 pounds constitute 94.5 percent of the entire market of chassis rated above 6,000 pounds. Thus, the vast majority of multi-stage vehicles above 6,000 pounds GVWR are already excluded from FMVSS No. 216a, and its position would not have any appreciable effect on the multi-stage vehicle population that will be subject to the rule.

Fourth, NTEA took issue with NHTSA's Regulatory Impact Analysis done for the final rule. NTEA stated that a review of the agency's final rule and its Regulatory Impact Analysis indicated that NHTSA tested numerous vehicles but did not include any completed multi-stage vehicles in the testing it performed to support its amendments to FMVSS No. 216a. In NTEA's view, NHTSA has no test data to support a conclusion that the revised test in the final rule is workable and reasonable with respect to multi-stage vehicles. The petitioner also stated that the pass/fail rates computed by NHTSA and the agency's study of the appropriate roof crush resistance requirements in its assessment of the new testing procedure were conducted without considering a single multi-stage vehicle.

NTEA argued that in the absence of testing any multi-stage vehicles in support of its amendments to FMVSS No. 216a, the rule cannot be justified in light of the difficulties final-stage manufacturers have with certifying. The petitioner added that in the agency's regulatory analysis of the cost effectiveness and net benefits of the final rule, NHTSA stated that the cost/benefit impacts are disproportionately influenced by relatively large contributions to costs and small contributions to benefits from vehicles over 6,000 pounds GVWR. NTEA also stated that the agency concluded that the benefits of the standard will be limited, particularly for vehicles in this higher weight range.

NTEA also claimed that, in its analysis of the costs of compliance, the Regulatory Impact Analysis is silent insofar as multi-stage vehicles are concerned. It argued that the agency's cost analysis was based upon costs incurred for mass-produced single-stage vehicles, and do not reflect the fact that final-stage manufacturers produce countless configurations of custom-designed vehicles, many of which are "one off." NTEA stated that NHTSA made no attempt separately to determine the cost of compliance for final-stage manufacturers, even for those who cannot pass-through the incomplete vehicle manufacturer's certification and who therefore have no compliance alternative other than performing the test in FMVSS No. 216a.

The petitioner stated that NHTSA's position regarding the costs to final-stage manufacturers to comply with FMVSS No. 216a is summarized in NHTSA's Regulatory Flexibility Act analysis, which states that small businesses using chassis-cabs will be in a position to take advantage of "pass-through certification," and therefore are not expected to incur any additional expenditures. NTEA repeated its disagreement with the assessment that pass-through certification will be available for all multi-stage vehicles built on chassis-cabs. According to NTEA, even if incomplete vehicle manufacturers provided reasonable conformity statements, those statements would not cover all multi-stage vehicles produced by final-stage manufacturers. NTEA stated that, as NHTSA has observed, incomplete vehicle manufacturers do not control work performed by final-stage manufacturers and can fairly anticipate only some things, but not everything done by final-stage manufacturers. Accordingly, NTEA stated that some number of multi-stage vehicles will not be able to use pass-through certification.

Finally, NTEA concluded its petition with a recommendation that NHTSA should amend the final rule in a way that would, in the petitioner's view, make it practicable as applied to multi-stage vehicles. NTEA repeated that most final-stage manufacturers cannot perform or simulate the tests for FMVSS No. 216a and other more complex and expensive standards that include tests. Due to the number of types and configurations of final-stage manufacturing, NTEA believes that all the safety standards that include tests are inherently impracticable.

The petitioner stated that in order to make FMVSS No. 216a practicable for final-stage manufacturers, NHTSA should amend its regulations to (1) ensure that the conformity statements provided by incomplete vehicle manufacturers are reasonable in light of the known types and sizes of multi-stage vehicles built on the chassis that are subject to those conformity statements, (2) provide final-stage manufacturers with an efficient way to challenge unduly restrictive conformity statements, and (3) identify specific steps that can be taken by a final-stage manufacturer that will constitute "reasonable care," for purposes of 49 U.S.C. 30115(a), in certifying a vehicle as complying with FMVSS No. 216a, when the vehicle must be completed outside the parameters of a reasonable conformity statement. These generalized views were not accompanied by concrete suggestions for regulatory language. NTEA went on to state that in the event NHTSA does not amend FMVSS No. 216a and/or its multi-stage vehicle certifications to, in its view, make pass-through certification a practicable compliance option, or exclude multi-stage vehicles from the coverage of FMVSS No. 216a, then the agency must incorporate into its regulations another means for final-stage manufacturers to prove compliance.

NTEA noted that NHTSA stated that final-stage manufacturers need not conduct the tests set forth in the FMVSSs such as FMVSS No. 216a, and

that they may be able to base their certifications to that standard on "computer simulation, engineering analysis, engineering judgment or other means." It also noted that NHTSA further stated that there are many resources available to final-stage manufacturers with regard to certification: upfitter guides from incomplete vehicle manufacturers, incomplete vehicle manufacturer help lines, the final-stage manufacturers' own experience and judgment, and commercially available software, and that final-stage manufacturers can use their judgment, including engineering or technical judgment, to certify vehicles.

NTEA stated that, however, none of these suggestions are incorporated into NHTSA's regulations as a means of demonstrating conformity with FMVSS No. 216a, and therefore do not meet the requirements that the methods of proving compliance must be offered in the body of the standard itself. NTEA argued that in the event NHTSA does not amend its FMVSS certification regulations to make pass-through certification a practicable compliance option, NHTSA must exclude multi-stage vehicles from the population of vehicles subject to FMVSS No. 216a.

**III. Response to NTEA's Petition**

After carefully considering NTEA's petition, we have decided to deny it. The reasons for our denial are set forth below.

*A. Introduction*

As discussed earlier, our rulemaking to upgrade FMVSS No. 216 was required by Congress in SAFETEA–LU. That statute required the agency to issue a final rule establishing performance criteria to upgrade FMVSS No. 216 relating to roof strength for driver and passenger sides, for motor vehicles with a GVWR of not more than 10,000 pounds. An underlying safety concern was the crushing of the roof into the occupant compartment in rollover crashes.

Throughout the rulemaking, we carefully considered issues related to all types of vehicles, including multi-stage vehicle issues. In the NPRM, for example, the agency explained why we thought a proposed option for certain multi-stage vehicles to meet the requirements of FMVSS No. 220, *School Bus Rollover Protection,* instead of FMVSS No. 216a, *Roof Crush Resistance; Upgraded Standard,* appeared to offer a reasonable approach that increased safety in rollovers and at the same time provided a mechanism for compliance. NHTSA included in the final rule a number of other provisions to address the legitimate concerns of multi-stage manufacturers.

First, in the upgraded FMVSS No. 216a rule, after considering NTEA's comments, we only extended it to those multi-stage trucks that arrive from the incomplete vehicle manufacturer with a completed roof structure. We excluded those trucks where the final-stage manufacturer would need to complete the roof structure. Specifically, we excluded from FMVSS No. 216a multi-stage trucks with a GVWR greater than 6,000 pounds not built using a chassis-cab and those not built using an incomplete vehicle with a full exterior van body. Thus, as relevant to the petition now before the agency, the main thrust of the amended rule is that multi-stage trucks based on chassis-cabs, whose roof structures, by definition, are manufactured by an incomplete vehicle manufacturer, have the same roof strength requirements as a completed pickup truck produced by the same manufacturer.

Second, we provided an alternative testing option for certain multi-stage manufacturers. Vehicles manufactured in two or more stages, other than chassis-cabs, and vehicles which are changed in certain ways to raise the height of the roof, can be certified to the roof crush requirements of FMVSS No. 220, *School Bus Rollover Protection,* instead of FMVSS No. 216a. We note that the Recreation Vehicle Industry Association (RVIA) had supported our proposal to permit FMVSS No. 220 as an option for small motor homes allowing manufacturers of them to address issues concerning such specialized vehicles built in two or more stages.

Third, we added a test specification into the final rule so that the roof structure is the only part of the vehicle that is tested. NHTSA's test procedures specify that the vehicle's sills and chassis will be secured to a rigid horizontal surface. *See* FMVSS No. 216a S 7.1. According to the test's procedure, the chassis-cab is supported by a horizontal surface at the sills, not the vehicle's frame, and only the cab is compressed downward onto that horizontal surface. This ensures that the vehicle's roof is tested, independent of the vehicle's frame.[32] Also, if a final-stage manufacturer adds a box onto a chassis-cab, and that box is taller than the roof, the box will be removed prior to testing the chassis-cab's roof strength. This will ensure that only the vehicle's roof structure is tested.

Fourth, we provided additional leadtime for multi-stage manufacturers. This means that the vehicle manufacturers will build their pickup trucks, which are the basis for chassis-cab incomplete vehicles, as having the requisite roof strength one year prior to incomplete and multi-stage vehicles built on chassis-cabs. The extra year will provide additional time in which final-stage manufacturers may consider the fully-certified pickup trucks.

Despite these tailored provisions that, in relevant part, regulated only final-stage trucks built on chassis-cabs and excluded those built on cutaways and stripped chassis, NTEA petitioned the agency for exclusion of all multi-stage vehicles from FMVSS No. 216a. In its petition for reconsideration NTEA alleged that the upgraded FMVSS No. 216a is not practicable for final-stage manufacturers. The end result of NTEA's petition is for no regulation of its members. NTEA reaches this conclusion without addressing the safety of the occupants in a chassis cab, who, if they were in a comparable pickup truck, would have the benefits and protections of FMVSS No. 216a. NTEA offered as grounds for this position that the costs of compliance are too high, conformity statements in IVDs are too restrictive, and the text of FMVSS No. 216a does not include an alternative to testing or pass-through certification [33] by which a final-stage manufacturer can confirm conformity of a vehicle to the standard. NTEA concluded by adopting the language from a case involving stripped chassis vehicles where the vehicle manufacturers would have to design and assemble parts and the standard included a dynamic crash test—actually crashing the trucks into a wall—that its members are denied a chance to demonstrate compliance with FMVSS No. 216a.[34]

We disagree with NTEA's request to exclude all multi-stage vehicles from FMVSS No. 216a. Such action would deprive occupants of multi-stage vehicles built on chassis-cabs of the regulatory safety protections of roof crush resistance that occupants of comparable pickup trucks have under FMVSS No. 216a.

The assessment for whether a FMVSS is practicable depends, of course, on the

[32] For a visual reference, please *see* the photos of tested vehicles in NHTSA's test reports on roof crush resistance. *E.g.* NHTSA Test Report No. 571, Ford F–250, *available at http://www-nrd.nhtsa.dot.gov/database/aspx/comdb/querytesttable.aspx* (last accessed on February 14, 2011) and available at Docket No. NHTSA–2009–0093–0020 at pp. 292–299.

[33] NTEA did not spell out alternatives in its comments.

[34] *National Truck Equipment Association* v. *National Highway Traffic Safety Administration,* 919 F.2d 1148, 1153, 1155 (6th Cir. 1990).

vehicles and standard at issue. Here, we will focus on chassis-cabs—multi-stage trucks that arrive at the final-stage manufacturer as incomplete vehicles with an intact roof structure—since that is the type of vehicle NTEA discusses in its petition. FMVSS No. 216a is an upgrade of an existing regulation that was well understood, as distinguished from an entirely new regulation. Before FMVSS No. 216a was adopted, FMVSS No. 216 had covered roof crush in multi-stage vehicles up to and including 6,000 pounds GVWR. NHTSA continues to believe that regulation of chassis-cabs under FMVSS No. 216a is practicable. NTEA has not justified its position that all multi-stage vehicles should be excluded from regulation under FMVSS No. 216a.

*B. NTEA's Petition Is Unsupported by Evidence of an Actual Problem*

NHTSA views the matter before the final-stage manufacturer from the perspective of starting with an incomplete chassis-cab truck and completing it by adding a truck body. In so doing, given that FMVSS No. 216a is an upgraded rule, as distinguished from an entirely new rule, NHTSA may take into account fact that the roof crush regulation has been in effect for years for vehicles with a GVWR of 6,000 pounds or under.

NHTSA pointed out that final-stage manufacturers have been certifying to FMVSS No. 216 for years. NTEA does not deny this. Instead, NTEA's comments say that most final-stage manufacturers took "undue" certification risk. NTEA goes on to say that "[t]hose manufacturers used their best judgment in certifying the vehicles they produced based on their experience and the information available to them." But NTEA expressed concern that they had no way of determining whether such efforts would constitute reasonable care for purposes of the Vehicle Safety Act.

NTEA has not cited one example of an enforcement case against a NTEA member based on improper certification. Nor has NTEA cited one business injury by an NTEA member related to certification to FMVSS No. 216. There have not been any enforcement cases and there have been no recalls performed for noncompliances with FMVSS No. 216 or 220 by any manufacturer, including final-stage manufacturers. NTEA's inability to provide tangible information of actual injury has been long-running. In April 2010 and May 2006, NHTSA noted that NTEA had not identified any final-stage manufacturer that has been unable to certify a vehicle under the existing certification framework. Specific to the roof crush standard, in the agency's Further Response, NHTSA pointed out that not one final-stage manufacturer identified a problem certifying a vehicle built on a 2006 GMT–355 chassis-cab. In its May 2010 petition, NTEA does not provide any examples of how a final-stage manufacturer has actually been prevented from certifying its vehicle. More generally, in the May 2006 multi-stage vehicle rulemaking, in response to NTEA's petition we stated that we would address issues of impracticability in the context of an individual FMVSS or on a petition for temporary exemption, indicating that we sought information for each rulemaking as to how the rule was impractical.[35] NTEA did not provide this information in the FMVSS No. 216a rulemaking, although NTEA does provide a textual objection to the GMT–355 IVD (2006) provisions on FMVSS No 216a. In NTEA's view NHTSA's analysis of GM's IVDs in the agency's Further Response ignores the actual language of GM's conformity statement.

NTEA is effectively asking to make vehicles based on chassis-cabs less safe than pickup trucks because of a hypothetical argument. Without evidence in the record of final-stage manufacturers legitimately not being able to certify these vehicles to FMVSS No. 216 or incurring significant and very costly technical problems in certifying vehicles, we are loathe to roll back these important safety benefits. NHTSA does not believe FMVSS No. 216a is impracticable as applied to final-stage manufacturers. In fact, the agency believes that it has removed from the proposed rule provisions that could make it impracticable as applied to final-stage manufacturers.

*C. In Extending FMVSS No. 216 to Heavier Vehicles, NHTSA Only Included Those Multi-Stage Vehicles for Which the Incomplete Vehicle Manufacturer Provides an Intact Roof*

In extending FMVSS No. 216 to heavier vehicles, we specifically included the types of multi-stage vehicles as to which the standard is practicable and excluded the types of multi-stage vehicles as to which the standard could have been impracticable, consistent with the 1990 *NTEA* decision. The upgraded standard applies to chassis-cabs [36] and certain vans, vehicles that are equipped by the incomplete vehicle manufacturer with a completed roof and structure. Compliance and certification will not be difficult for final-stage manufacturers of these included vehicles, as the final-stage manufacturer will receive these incomplete vehicles from the incomplete vehicle manufacturer with a compliant, intact roof. Given that the final-stage manufacturing done on the included vehicles would not affect the vehicle's roof strength, final-stage manufacturers will not need to do more than ensure that their modifications do not take the vehicle out of compliance with FMVSS No. 216a. On the other hand, we excluded those trucks for which the final-stage manufacturer would design and build the vehicle's roof or its supporting structure.

More particularly, as described above, a chassis-cab from an incomplete vehicle manufacturer is essentially a pickup truck without the cargo bed. The pickup truck and chassis-cab employ a body-on-frame structure. In a body-on-frame vehicle, as used here, the frame includes the chassis structure, power train, and suspension, steering and braking systems. The cab and body are mounted to the frame. When the chassis-cab leaves the incomplete vehicle manufacturer, it will have a completed cab, and will have two steel frame rails running longitudinally behind the cab. Final-stage manufacturers typically add a body onto the frame rails behind the cab; the body stores work-related materials or cargo. As we explained in our Further Response, an illustrative example of a chassis-cab vehicle is a delivery truck. The final-stage manufacturer adds a cargo box to the back of the incomplete vehicle, and a door is provided at the rear of the cargo box for access to its contents.

In the next several years, Ford, GM, Chrysler and other manufacturers of incomplete vehicles with a GVWR of 10,000 pounds or less will be required to upgrade their pickup trucks, as necessary, to meet the upgraded FMVSS No. 216a published in 2009. These pickup trucks will have an intact roof that will meet FMVSS No. 216a.

NHTSA's approach is confirmed by its exclusion from FMVSS No. 216a of multi-stage trucks not built on a chassis-cab. Typically, these excluded vehicles would be built on cutaways or on a stripped chassis. In a cutaway chassis, the back wall of the occupant

[35] 71 FR 28186.

[36] Some manufacturers may use the term "pick-up box delete" instead of "chassis-cab" in marketing materials for those instances where the incomplete vehicle manufacturer completes a pickup truck, but "deletes" the pickup box. These vehicles are sold as an incomplete vehicle. *See* Ford, 2010 Body Application Guide, *available at https://www.fleet.ford.com/truckbbas/topics/bodyappguide.html* (last accessed February 14, 2010).

compartment is missing, or cutaway, *i.e.* there is no wall behind the front seats. A stripped chassis, which is less complete than a cutaway, would ordinarily not have a roof structure at all. These types of multi-stage vehicles were addressed in the 1990 *NTEA* case. Because these trucks would arrive without an intact roof, there could be some of the problems described in the 1990 *NTEA* case.

Also excluded from FMVSS No. 216a are vehicles with a GVWR greater than 10,000 pounds. The vast majority of the multi-stage trucks have a GVWR in excess of 10,000 pounds,[37] as NTEA noted.

*D. The Typical Modifications Made by Final-Stage Manufacturers Do Not Affect Roof Strength*

The addition by a final-stage manufacturer of a body such as a cargo box behind the cab, where the pickup bed is located on a pickup truck, would not affect the strength of the roof. There is therefore no reason to expect that the final-stage manufacturer will have difficulty complying with FMVSS No. 216a in making this or similar kinds of additions/modifications, *e.g.,* attaching various types of cargo or equipment-carrying compartments to the truck frame behind the cab.

NTEA describes itself as "the nation's only trade association representing distributors and manufacturers of multi-stage produced, work-related trucks, truck bodies, and equipment," and states that it has over 1,600 member companies.[38] While NTEA members are undoubtedly familiar with incomplete vehicles and bodies and equipment that are added to them,[39] NTEA did not provide any real world examples demonstrating that the modifications made by final-stage manufacturers will affect the strength of a roof of a chassis-cab. Instead, it stated that the attachment of a truck body onto the frame presents pass-through certification problems with GM's IVD for a Model Year 2006 GMT–355 chassis, which has a GVWR of 6,000 pounds or less. These concerns were hypothetical and not supported by the NTEA members' real world experience of completing and certifying vehicles.

The market for incomplete vehicles with a GVWR of 6,000 pounds or less is limited. GM offered the incomplete version of the small pickup truck built on the GMT–355 chassis, known as the Canyon or Colorado. Other vehicle manufacturers did not offer incomplete vehicles in this category. Some light duty truck bodies from equipment suppliers have been available for the small GM incomplete vehicle.

We expect that incomplete vehicles within the newly regulated weight class from over 6,000 pounds to 10,000 pounds GVWR will be available. For final-stage manufacturers using chassis-cabs with a GVWR of 10,000 pounds or less, the additions to complete the vehicles appear to be routine and involve the attachment of a truck body manufactured by an equipment manufacturer onto a chassis-cab manufactured by an incomplete vehicle manufacturer.

In its Body Application Guide, Ford lists the typical applications for multi stage vehicles built on chassis-cabs.[40] For chassis-cabs with a GVWR of 10,000 pounds or less, the typical installations appear to be for service providers, including contractors, caterers, painters, and electricians, and typically use a "service body." These service bodies are typically not fabricated from scratch; instead, they are ordered from an equipment manufacturer, such as an NTEA equipment supplier member, and the final-stage manufacturer would install it on the chassis-cab. The service bodies can be as simple as a platform bed, to an electrician's truck that contains "toolboxes" and shelves on the side.

As an example of a service body, the KSS, is sold by the Knapheide Manufacturing Company ("Knapheide"). The KSS is a service body that looks similar to a pickup bed, except that the sides above the fender wells contain cabinets.[41] A smaller truck bed remains in between the cabinets. The KSS is a box that attaches to the frame behind the cab, and is not incorporated into the cab itself. As such, the KSS would not affect the vehicle's roof strength in a FMVSS No. 216a test.

The Knapheide KSS bodies can be customized further from the base truck body. These customizations do not affect the roof or its support structure. This is true even for ladder racks. According to the design drawings, the ladder racks mount to the KSS body, and hang over the vehicle's roof. The ladder racks do not attach to the chassis-cab itself. Instead, the racks remain suspended over the top of the cab.[42] Furthermore, in a test by NHTSA under FMVSS No. 216a, the ladder racks would be removed before testing the vehicle's roof strength.

Knapheide also advertises its installation methods, and sells a "Spring Mounting Kit" that "provides flexible attachment of the front of the body to the chassis and minimizes the risk of torsional fatigue cracking."[43] The spring mounting kit's hardware "utilizes the existing holes in the chassis and body end rail." For certain Ford vehicles, which, according to this document, do not have holes on the top of the frame, adapter plates are U-bolted to the top of the frame to facilitate spring mounting. This document indicates that there are mounting options that do not require final-stage manufacturers to alter a vehicle's frame rail.

Other equipment manufacturers' service bodies indicate an easy installation. Hillsboro Industries, Inc.

[37] Ford publishes a "Body Application Guide" on its Web site that provides a description of the types of incomplete vehicles that it sells. *See* Ford, 2010 Body Application Guide, *available at https://www.fleet.ford.com/truckbbas/topics/bodyappguide.html* (last accessed February 14, 2010). This document assists in "matching the truck customer's length and load carrying requirements with the appropriate" Ford incomplete vehicle. According to this document, FMVSS No. 216a would likely apply to Ford's F–250 truck and certain F–350 trucks with a pick-up box delete option, as these trucks have a GVWR of 10,000 pounds or less. As mentioned previously, Ford does not market these vehicles as chassis-cabs; instead, Ford uses the term "pick-up box delete option" for these incomplete vehicles. FMVSS No. 216a would not apply to the majority of F–350, and all F–450, F–550, F–650, and F–750 vehicles. Likewise, it would not apply to Ford's cutaways or stripped chassis vehicles. Apparent from this document is the limited number of incomplete vehicles to which FMVSS No. 216a likely will apply.

[38] NTEA comments, NHTSA–2005–22143–0108, p.1.

[39] NTEA has annual Work Truck Shows that are large events that NTEA bills as North America's largest vocational truck event. In 2011 and 2012, it will be in the Indiana Convention Center in Indianapolis. As explained by NTEA, the Work Truck Show brings together thousands of industry professionals including vocational, governmental and private truck fleet managers and truck buyers from the range of weight markets, as well as hundreds of truck and equipment manufacturers, distributors and dealers. According to promotional materials, the event gives attendees the opportunity to check out the latest full-size work trucks, vocational equipment, and vehicle components. It also features industry-specific technical and business management training sessions. The Association represents nearly 1,600 companies that manufacture, distribute, install, sell and repair commercial trucks, truck bodies, truck equipment, trailers and accessories. *See http://www.ntea.com/worktruckshow/about/* (last accessed February 14, 2011).

[40] *See* Ford, 2010 Body Application Guide, *available at https://www.fleet.ford.com/truckbbas/topics/bodyappguide.html* (last accessed February 14, 2010).

[41] Brochure from the Knapheide Manufacturing Company, The All New KSS, *available at http://www.knapheide.com/literature/gmc_kss.pdf* (last accessed February 14, 2011).

[42] Brochure from the Knapheide Manufacturing Company, KSS Body Option, *available at http://www.knapheide.com/pdfpages/optionfitpages/kssoptions/KSOPG18.pdf* (last accessed February 14, 2011).

[43] Brochure from the Knapheide Manufacturing Company, Service Body Option, *available at http://www.knapheide.com/pdfpages/optionfitpages/servicebodyoptions/PG47.pdf* (last accessed on February 14, 2011).

sells an aluminum light truck bed.[44] This type of product would typically be installed on a truck under 10,000 pounds GVWR, and the completed vehicle would therefore need to comply with the FMVSS No. 216a requirements. According to the owner's manual, the aluminum truck bed arrives equipped with bed sills that attach to the chassis-cab's frame rail in three places. The bed sills can be bolted or welded to the chassis-cab frame. The front of the bed sills must be at least 4⅛″ inches from the vehicle's cab, and, therefore, do not attach to the vehicle's chassis-cab. After the sills are attached to the frame, the aluminum light truck bed is then mounted with bolts on top of the bed sills. In summary, this truck body attaches sills to the vehicle's frame in only three places, and the cab is not modified.[45]

Another manufacturer of service bodies, RKI, furnishes mounting kits standard with its service bodies.[46] While RKI offers a large number of customizable options for its service bodies, the bodies all mount to a 12 gauge metal treadplate that is installed on top of the vehicle's frame and added steel cross members. Here, the service body does not mount directly to the frame itself, but to a treadplate attached on top of the frame. This approach standardizes the mounting to the treadplate and there would not be problematic modifications to the vehicle's frame.

As indicated by the above, the mounting of the body on a truck does not affect the strength of the roof.

GM Upfitter's Best Practices Manual "provide[s] engineering recommendations and guidelines to assist the Special Vehicle Manufacturer (SVM) for all areas in the conversion process" (An upfitter is a final-stage manufacturer and SVMs are upfitters recognized by GM). According to GM, these guidelines "generally reflect industry recognized processes and procedures" that are intended to help the upfitter "maintain the safety, reliability, and integrity of the vehicle's original design, as well as comply with any state, Federal, or industry requirement."[47]

GM Upfitter's Best Practices Manual provides eight pages on the preferred way to mount a box to a truck frame.[48] These recommendations are detailed and include illustrated diagrams. In fact, GM Upfitter's Best Practices Manual states that "NTEA advises that proper body mounting practices and materials are necessary in order to avoid damaging the frame side rail and body."[49] The recommended approaches include: (1) U-Bolt/Threaded Rod and End Plate Technique to secure the truck body's longitudinal mounting rails to the chassis frame; (2) Brackets and Pinch Bolts Techniques where fabricated and formed brackets of angles are welded and/or bolted to the longitudinal mounting rails of the body and bolted to the chassis frame; (3) the Rigid Mounting Technique where the service/utility body is attached directly to existing holes, such as the OEM pickup box attachment points; and (4) the Shear Plate Approach, where a shear plate and bolts are used to attach the non-rigid body to the frame rails.[50] The GM Upfitters' guide provides direction on the various types of bodies and the rigidity of the selected body types.[51]

In the Further Response, we noted that these four mounting types in the GM Upfitter's Best Practices Manual were approved by NTEA, all four mounting techniques mount to the frame and are permissible under the GM IVD for the GMT–355, and none of the mounting methods involve attachments to the roof-supporting members, including the A- and B-pillars (the A-pillar is the roof support just behind the windshield; the B-pillar is the roof support behind the front door). In a footnote response, NTEA stated that these four mounting techniques are draft recommendations and only address some of "hundreds of vehicle configurations that are built by final-stage manufacturers."[52] However, NTEA does not contradict that these four mounting techniques do not involve attachments to the A- and B-pillar, nor do they address NHTSA's contention that they are permissible under the GM IVD.

Similarly, GM's Upfitter Guide states that final-stage manufacturers should design their body-mounting schemes to comply with either the GM Guidelines in the GM Body Builders Manual, NTEA Industry Standards, and Federal Government Mil-Std Specifications.[53] Noticeably absent from NTEA's petition is any reference to the NTEA Industry Standards.

*E. Final-Stage Truck Manufacturers Have Opportunities That Permit Them To Certify Their Vehicles to FMVSS No. 216a Without Testing*

Consistent with its longstanding position on NHTSA's safety standards that include tests, NTEA argued that FMVSS No. 216a is impracticable for its members. In its view, pass-through certification is not available. Therefore, its members are unable to certify their vehicles to FMVSS No. 216a without "undue" certification risk, since they cannot afford to conduct expensive vehicle tests to demonstrate compliance for small production runs.

1. Pass-Through Certification Is Available on the GMT–355 IVD

The opening and central thrust of NTEA's petition is its disagreement with NHTSA's assessment that pass-through certification is available for vehicles built on chassis-cabs. In its petition, NTEA focused on the wording of the General Motors GMT–355 (small pickup truck) 2006 chassis IVD provision for FMVSS No. 216. NTEA stated that the simple mounting of a box to a chassis-cab's frame rail invalidates GM's IVD for FMVSS No. 216 because it affects the properties of the frame rail, and prevents final-stage manufacturers from utilizing pass-through certifications. NTEA argued that, in general, an IVDs' restrictiveness prevents pass-through opportunities for final-stage manufacturers, forcing final-stage manufacturers to conduct expensive testing or cost-prohibitive computer simulations. This alleged burden goes beyond the real world burden in which, as NTEA recognizes, final-stage manufacturers have used their best judgment in certifying the vehicles they produced based on their experience and the information available to them, albeit with what NTEA refers to as certification risk.

In our Further Response, NHTSA explained that it reviewed the IVDs identified by NTEA as being too restrictive and found them to be

[44] *See generally,* Brochure from Hillsboro Industries, Inc., Aluminum Truck beds, *available at http://hillsboroindustries.com/Products/Brochures/AluminumTruckBedBrochure.pdf* (last accessed February 14, 2011).

[45] Hillsboro Industries, Inc., Aluminum Light Truck Bed Owner's Manual, *available at http://www.hillsboroindustries.com/Support/AluminumTruckBedsManual.pdf* (last accessed February 14, 2011).

[46] RKI, Inc., Service Body Specification L, S and T 40" & 42" CA, *available at http://www.rki-us.com/images/uploads/Service%20Body%20Specifications.pdf* (last accessed February 14, 2011).

[47] "GM Upfitter—Best Practices Manual," *http://www.gmupfitter.com/best_practice_manuals.html* (last accessed February 14, 2011).

[48] GM, GM Upfitter—Chassis Best Practices," 2010, *available at http://www.gmupfitter.com/publicat/REV_FF–3_BstPrac_Chss_Indx_0810.pdf* (last accessed February 14, 2011); *see also* GM, GM Upfitter—Chassis Best Practices, 2009, NHTSA–2009–0093–0020, pp. 87–96.

[49] GM, GM Upfitter—Chassis Best Practices," 2010, at 23.

[50] *Id. at* 23.

[51] *Id. at* 24.

[52] NTEA Petition for Reconsideration, Docket No. NHTSA–2009–0093–0022, page 13, fn. 18.

[53] GM, GM Upfitter—Chassis Best Practices," 2010, at p. 21.

workable. NHTSA reviewed the statements in the provided IVDs as to FMVSS No. 216. Specifically, the agency reviewed the Type 1 conformity statements for the GM 2006 GMT–355 incomplete truck and the GM 2006 C/K full size incomplete truck.[54] The agency stated that pass-through certification is available for the GMT–355, as the "conformity statement in the IVD is written to allow modifications to the incomplete vehicle, but not to the components that affect the vehicle's roof strength." The agency further noted that pass-through certification would not be provided if vehicle components related to roof strength are modified. As we explained, NTEA had not provided any examples of modification necessary to the roof structure or the A- and B-pillars. As described previously, the A-pillar is the roof support just behind the windshield; the B-pillar is the roof support behind the front door.

NTEA read the 2006 and 2010 IVD as preventing the simple addition of an aftermarket body, because, it argues GM's conformity statement is invalidated by alterations that affects the function, physical, chemical, or mechanical properties of any component, assembly or system, "including, but not limited to" various systems. NTEA argued that this goes beyond the chassis-cab and as a result, there is no difference between a Type 1 and a Type 3 statement.

NTEA stated that NHTSA's interpretation, above, is not on the spectrum of plausibility and later refers to GM's provision, in the alternative, as "hopelessly ambiguous." However, as GM noted in its comments to NTEA's Petition for Reconsideration to the multi-stage vehicle certification rule, NTEA's claim that any body or equipment mounting invalidates the IVD is overreaching.[55] NTEA made almost identical claims about GM's IVDs in that rulemaking that they make in this rulemaking.

As we have stated previously, pass-through certification is and we believe will be available for chassis-cabs. We believe that pass-through certification on the 2006 GMT–355 IVD is available even using NTEA's limited reading of that IVD. As discussed above, there are body mounting techniques that do not "affect" the properties of the frame rail. For example, in the Rigid Mounting Technique and in the Shear Plate Approach, it is recommended by GM and NTEA's Subcommittee on Body Mounting Practices that the final-stage manufacturer utilizes existing holes on the chassis-cab's frame to attach an aftermarket truck body. A truck body, which is comparable to the original pickup truck box in that it is attached to the frame behind the cab, attached with bolts to existing holes in the chassis-cab's frame would not "affect" the vehicle's properties. No additions are made to chassis-cab's roof, its support pillars, or other supporting structures. No alterations are made to the vehicle's frame rail.

Furthermore, the concern is certifying compliance with FMVSS No. 216a. Repeating what we stated before, we added a test specification into the final rule so that the roof structure is the only part of the vehicle that is tested. Under the test procedure for roof strength in FMVSS No. 216a, the chassis-cab is supported by a horizontal surface under the cab along the sills, and not the vehicle's frame. Only the vehicle's cab is compressed into that structure. The frame generally and other parts of the vehicle are not tested in this test. Modifications to the frame rail in attaching a body to the incomplete vehicle would not be tested or affect the FMVSS No. 216a test. Assuming that the FMVSS No. 216a test applied, a final-stage manufacturer that installed a service body onto a GMT–355 utilizing existing holes could certify based on GM's Type 1 statement. We believe this would qualify as pass-through,[56] and a final-stage manufacturer could certify without the need for testing.

We note that GM uses language regarding no alterations being made which affect the properties of "the components, assemblies or systems including but not limited to those listed below" elsewhere, including in its certification for FMVSS No. 118, *Power-Operated Window, Partition, and Roof-Panel Systems,* 49 CFR 571.118. This is instructive. We do not view that IVD language for power windows as referring to components, assemblies or systems unless they are related to the standard for which the certification applies, namely power window system performance. Similarly, we view the language regarding roof crush as pertaining to components, assemblies, or systems affecting roof crush.

2. Certification Alternatives Are Available to Final-Stage Manufacturers

NTEA's argument concerning certification relies on a self-generated and false dichotomy about certification opportunities, either: (1) Pass-through certification or (2) testing in accordance with the test in the FMVSS. As has been made clear by the agency in the multi-stage certification rulemaking and this FMVSS No. 216a rulemaking, and recognized by others, final-stage manufacturers may certify on other bases. With respect to this rule, NTEA ignores the obvious alternatives available to final-stage manufacturers.

Before turning to the specifics, we recognize that FMVSS No. 216a does not apply until September 1, 2016, which is five-and-a-half years away. We do not know with certainty what statements the IVDs will contain, but we can look at current IVDs and make reasonable assumptions.

First, the GM IVD is not the only relevant IVD, as other manufacturers sell incomplete vehicles. The IVD for Model Year 2011 Chrysler incomplete vehicles, dated April 5, 2010, contains the following statement: "[t]his vehicle, when completed, will conform to [F]MVSS 216—Roof Crush Resistance if no alterations are made to the roof panel or its support structure, including the roof rails, front header, roof pillars, the door window frames, the windshield and the windshield mounting system."[57] This provides an opportunity for final-stage manufacturers to achieve pass-through certification so long as they do not alter the roof or its supporting structure.

Ford does not have a statement in its IVD on FMVSS No. 216, which only

[54] As we noted in our Further Response, NTEA stated that GM included an identical conformity statement for FMVSS No. 216 in its IVD for the GM 2006 C/K full size incomplete truck, although, to NTEA's knowledge, GM did not produce a C/K chassis rated 6,000 pounds GVWR or below. FMVSS No. 216 would have applied to the vehicle only if it were rated with a GVWR of 6,000 pounds or less.

[55] GM's May 13, 2005 comment on NTEA's petition for reconsideration of the multi-stage certification rule, Docket No. NHTSA–99–5673–0056.

[56] In the Further Response, NHTSA stated in a footnote that alterers removing a pickup truck bed and replacing it with a different body could affect the unloaded vehicle weight of the vehicle. In its petition, NTEA stated that the footnote suggests that body weight (and presumably body weight distribution), by itself, affects testing and compliance with FMVSS No. 216. The unloaded vehicle weight is a factor in the calculation of the SWR. *See* 49 CFR 571.216a S5.2(b). Incomplete vehicle manufacturers' IVDs contain a maximum unloaded vehicle weight that must not be exceeded. *See* Ford's Incomplete Vehicle Manual, p. 5*, infra* note 58. In this rulemaking, vehicle manufacturers noted that to minimize their manufacturing tooling costs, they would need to design their roof strength performance to the worst case weight for a given model line. *See* 75 FR 17605, 17608 (April 7, 2010). In view of this design approach, we do not anticipate an issue with unloaded vehicle weight and compliance with FMVSS No. 216a. Of course, alterers should consider the effect of their additions. Alterers should consult with the manufacturer providing the complete vehicle that is altered.

[57] Chrysler Group LLC, Incomplete Vehicle Document 2011 Model Year, April 5, 2010, *available at http://www.dodge.com/bodybuilder/2011/docs/cc/dddpivd.pdf* (last accessed on February 14, 2011).

applies to vehicles with a GVWR under 6,000 pounds or less until September 1, 2016. However, the general language used throughout Ford's IVD does not appear to be restrictive. For example, for FMVSS No. 118, *Power-Operated Window, Partition, and Roof-Panel Systems,* Ford stated that the completed vehicle will comply to this standard if the "power operated windows, motors, wiring, and key and switch activation systems, where provided by Ford Motor Company, are not removed, relocated, altered or modified in any way." [58] Similarly, Chrysler's IVD statement on FMVSS No. 118 stated that its incomplete vehicle, when completed, will conform to FMVSS No. 118 if "no alterations are made to the power window and related electrical systems." [59] Based on these statements, and others, it does not appear that these IVDs are "unduly restrictive" for final-stage manufacturers.

As we have explained, we do not read GM's IVD as restrictively as NTEA reads it. However, if final-stage manufacturers feel unduly restricted by the language in GM's IVD, a different manufacturer's chassis-cab could be used.

Second, in certain instances, final-stage manufacturers may be able to use information obtained from equipment manufacturers in making certifications. We note, for example, that Knapheide advertises that its KC series bodies for conventional cab chassis, which are designed for specific Ford, Dodge, and GM chassis, have a mounting kit, Knapheide Quick Mount brackets and hardware, "designed to comply with FMVSS–301." [60]

The final-stage manufacturer, rather than the equipment manufacturer, will be certifying compliance of a vehicle with applicable FMVSS. Thus, as part of exercising reasonable care in considering information provided by an equipment manufacturer, the final-stage manufacturer needs to consider whether it is reasonable to rely on the information. For example, the final-stage manufacturer can ask the equipment manufacturer about the basis of any representation it makes related to compliance with FMVSS. It can also consider whether there is reason to consider the equipment company a reliable company and the amount of experience and expertise it may have related to the manufacture of vehicles that meet applicable FMVSSs.

Third, an IVD provides the basis on which a final-stage manufacturer could certify, without literal pass-through certification. This statement was made in our Further Response, and is not addressed in NTEA's petition for reconsideration. If an IVD is read as not providing actual pass-through, it will still provide a basis for the final-stage manufacturer to certify its vehicles as complying with FMVSS No. 216a. Using the example of the GMT–355 IVD, the IVD states that the incomplete vehicle conforms to FMVSS No. 216 unless certain kinds of alterations are made. Thus, according to GM, the GMT–355, albeit an incomplete vehicle, complies with FMVSS No. 216 at the time it leaves the incomplete vehicle manufacturer.

For example, if a final-stage manufacturer installs a Knapheide service body on the back of a GM C/K chassis-cab by drilling holes into the frame and installing fabricated brackets, the final-stage manufacturer could still certify without conducting testing. The final-stage manufacturer can use the IVD, coupled with its knowledge that the work it does in mounting a truck body to the rear of the incomplete vehicle does not modify the roof supports (A- or B-pillars) or roof itself, to come to the conclusion that it will not take the vehicle out of compliance with FMVSS No. 216a. It could rely on its own technical judgment, calculations, information obtained by calling the manufacturer, reviewing body-building manuals, or looking at a host of other resources available. Regardless, it knows it was given an incomplete vehicle with a compliant roof, and will only need to certify based on that fact and its own work. This is not a complex or difficult task, as the addition of a truck body such as bins or a box attached directly to the frame would not affect roof strength.

Fourth, NHTSA makes available its data and reports from its testing of various makes and models of vehicles to various FMVSSs. NHTSA's Office of Vehicle Safety Compliance tests vehicles, including pickup trucks. Before testing, NHTSA commonly asks a manufacturer for its certification data. For those safety standards that include tests, the agency will perform a test as specified in the FMVSS. The results of these tests are publicly available. In the past, these tests included FMVSS No. 216. NHTSA's testing under FMVSS No. 216a is currently planned to begin later this year, as vehicles are certified to this standard. *See* 49 CFR 571.216a S8. If NHTSA tests a pickup truck and a final-stage manufacturer is considering using it as a chassis-cab, the final stage-manufacturer can consult the testing results and underlying data.

Fifth, many resources exist to assist the final-stage manufacturers in certification. We stated this fact in our May 2006 response and in the April 2010 Further Response. NTEA does not address the prevalence of these resources. These resources, most of which are detailed manuals and instructions from the incomplete vehicle manufacturer, are relevant both to situations where there is pass-through certification and also where a final-stage manufacturer may base its certification on an IVD coupled with its evaluation.

As to pass-through, we note that in some instances, the body builder manuals may be incorporated into the IVD. NHTSA's multi-stage regulation, 49 CFR 568.4(9)(b), contains the following statement: "[t]o the extent the IVD expressly incorporates by reference body builder or other design and engineering guidance (Reference Material), the incomplete vehicle manufacturer shall make such Reference Material readily available to subsequent manufacturers. Reference Materials incorporated by reference in the IVD shall be deemed to be part of the IVD."

The GM Upfitter Web site includes the statement that "The Body Builders Manual contains information that may be used in addition to the Incomplete Vehicle Document (IVD) for any manufacturer making alterations to a GM complete/incomplete vehicle. No alteration should be made to the incomplete vehicle which either directly or indirectly results in any component, assembly or system being in nonconformance with any Federal Motor Vehicle Safety Standard or Emission Regulation." [61]

GM's IVD (Attachment A of NTEA's petition) states, "[i]f supplemental technical information is required to support this document, go to the body builder Web site located at *http://www.gmupfitter.com* or contact the Upfitter Integration Hotline at 1–800–875–4742."

Ford's Incomplete Vehicle Manual for the 2010 Super Duty F-Series contains the following statement: "[t]hroughout this manual you will find references to information found in the *Ford Truck*

[58] Ford, 2008 Super Duty F–Series Incomplete Vehicle Manual, March, 2007, p. 15, *available at https://www.fleet.ford.com/truckbbas/non-html/2008/08ivm_%20fseriesmar.pdf* (last accessed on February 14, 2011); Ford, 2011 Super Duty F–Series Incomplete Vehicle Manual, March 2010, *available at https://www.fleet.ford.com/truckbbas/topics/2011/2011_SD-F_IVM_BC34-19A268-AB.pdf* (last accessed on February 14, 2011).

[59] Chrysler Group, LLC, Incomplete Vehicle Document 2011 Model Year, page 2.

[60] Knapheide Manufacturing Company, Standard Service Bodies Specifications, *available at http://www.knapheide.com/pdfpages/pricepages/servicebody/UBPP2-3.pdf* (last accessed on February 14, 2011).

[61] GM Upfitter Body Builder manuals, *http://www.gmupfitter.com/body_builder_manuals.html* (last accessed on February 14, 2011).

*Body Builders Layout Book.* Additional Design Recommendations and specifications are also provided to assist subsequent stage manufacturers in completing chassis-cab and incomplete vehicles. The *Ford Truck Body Builders Layout Book* can be accessed via the Web at *http://www.fleet.ford.com/truckbbas* under the "Publications" tab; a CD–ROM copy may be ordered under the same tab."[62]

These resources can help the final-stage manufacturer in determining whether a vehicle complies with a certain standard. These resources, whether they are printed instructions, or a telephone call to the incomplete vehicle manufacturer, may provide the basis of the judgment needed to certify.

*F. FMVSS No. 216a Does Not Place "Undue" Certification Risk on Final-Stage Manufacturers*

Despite the limited assessment required of a final-stage manufacturer in certifying a completed chassis-cab vehicle to FMVSS No. 216a with the options described above, and the fact that multi-stage vehicles have been certified to FMVSS No. 216 for many years, NTEA argued that the self-certification scheme enacted by Congress forces its members to undertake "undue" certification risk. While NTEA acknowledged that multi-stage vehicles have been and are being built and certified to FMVSS No. 216, NTEA presented the issues as whether NHTSA's regulations "can permissibly allocate to final-stage manufacturers full legal responsibility for compliance with a safety standard when those manufacturers have no reasonable means of demonstrating conformity to that standard." Elsewhere in its petition, NTEA stated that it "has never suggested that incomplete vehicle manufacturers take all certification responsibility for multi-stage vehicles." As we understand these two statements, even though final-stage manufacturers are selling and certifying vehicles, FMVSS No. 216a is impractical because it forces final-stage manufacturers to take legal responsibility under the Vehicle Safety Act for their work. NTEA's solution is to have single-stage manufacturers certify those vehicles as being compliant with FMVSS No. 216a, but exclude final-stage manufacturers from certification.

First, in general, final-stage manufacturers do not have full legal responsibility—each manufacturer in the manufacturing chain is responsible for affixing its own certification label. *See* 49 CFR 567.4(a) and 567.5. As NTEA noted in its Vehicle Certification Guide, final-stage manufacturers assumed full legal responsibility prior to the 2005 amendments to the certification rule, but now "each company in the manufacturing chain will be legally responsible for its own work."[63] As we have described, for FMVSS No. 216a, the incomplete vehicle manufacturer will deliver to the final-stage manufacturer a chassis-cab with a FMVSS No. 216a compliant, intact roof structure.

Second, although NTEA stated that unreasonably restrictive conformity statements put final-stage manufacturers in the position of either taking "undue" risk of certification or exiting the business, we note that NTEA has not provided any evidence of a single final-stage manufacturer forced to "exit the business" or harmed by the "undue" certification risk.[64]

Third, NTEA generally believes that its members do not have the "reasonable means" to "demonstrate conformity" with any safety standard that includes tests. Therefore, NTEA requested that the agency identify specific steps that can be taken by a final-stage manufacturer that will constitute "reasonable care," for purposes of 49 U.S.C. 30115(a), in certifying a vehicle as complying with FMVSS No. 216a. NTEA cited language from the 1990 *NTEA* decision for the proposition that "[i]n order for a standard to meet the practicability requirement, it must offer the regulated party a chance to demonstrate compliance," and "in order for a standard to be practicable, it must offer in the body of the standard itself, a means for all subjected to the standard to prove compliance." *NTEA, 919 F.2d.* at 1153.

We note that the factual predicate in the 1990 *NTEA* decision was different than the situation at issue here. The 1990 *NTEA* court had before it a safety standard on steering wheel rearward displacement in crashes that applied to both chassis-cab and non-chassis-cab final-stage manufacturers. The final-stage manufacturers faced dynamic testing (crashing a vehicle into a wall) or studies they could not afford. The court noted that, at that time, pass-through regulations only applied to chassis-cabs, and final-stage manufacturers that manufactured on a cutaway chassis or stripped chassis could not pass-through the certification provided by the chassis-cab manufacturer. *NTEA,* 919 F.2d. at 1152. The court order from the 1990 *NTEA* case remanded the standard to the "extent that it applies to vehicles completed by final-stage manufacturers that cannot pass-through the certification of the initial manufacturer." *NTEA,* 919 F.2d. at 1158.

For FMVSS No. 216a, we have specifically excluded those multi-stage trucks for which the final-stage manufacturer would be responsible for manufacturing the roof and/or its support structure and certifying it, as was the case with cutaways and stripped chassis. As relevant here, FMVSS No. 216a applies only to final-stage manufacturers that build trucks on a chassis-cab.

Chassis-cabs will depart from the incomplete vehicle manufacturer's facility with an IVD and a compliant roof. In NTEA's view, they cannot be relied upon, because final-stage manufacturers are only provided with "overly-restrictive" IVDs that limit pass-through opportunities. Therefore, NTEA argued, because final-stage manufacturers are presented with a document that they read, to be applicable, limits later-stage manufacturing, they must conduct expensive tests or computer simulations, the cost of which, is prohibitive or take "undue" certification risk. Furthermore, NTEA argued that since NHTSA has not described in the standard, in advance, each and every way that a final-stage manufacturer can demonstrate "reasonable care," FMVSS No. 216a is impracticable.

We disagree. We have explained in the multi-stage vehicle rulemaking why we reject NTEA's broad claims about the current multi-stage certification scheme not providing final-stage manufacturers a reasonable way to ensure compliance and certify their vehicles. *See* 71 FR 28168; 70 FR 7414. Likewise, we explained above that pass-through certification is available, and that other methods, short of testing, are available if pass-through certification is not.[65]

There appears to be a fundamental misunderstanding about the applicability of the tests described in FMVSS No. 216a and other standards' "crash tests." Simply put, "reasonable care" does not require a manufacturer to test its vehicles in the manner specified

[62] Ford, 2011 Super Duty F-Series Incomplete Vehicle Manual, March 2010, p.35, *supra* note 58.

[63] National Truck Equipment Association, Certification Guide, Appendix 5l (2007).

[64] NTEA does state in a footnote in its petition that its members "report that incomplete vehicle manufacturers refrain from providing any such guidance on certification issues." NTEA Petition for Reconsideration, Docket No. NHTSA–2009–0093–022, p. 6, fn 10.

[65] NTEA's petition for reconsideration of FMVSS No. 216a is not appropriate mechanism to address multi-stage certification issues, such as requesting a mechanism to challenge conformity statements. These issues were resolved in the multi-stage certification rulemaking in 2006.

by the relevant safety standard, or even to test the vehicles at all. A manufacturer may choose any means of evaluating its products to determine whether the vehicle complies with the requirements of the safety standards, provided, however, that the manufacturer certifies that the vehicle will comply with the safety standards when tested by the agency according to the procedures described in the standard. *See* 49 U.S.C. 30115.[66]

To put this into context, it is helpful to consider the way that single-stage manufacturers typically certify vehicles. Each manufacturer assembles a vehicle for testing that it decides is representative of a model. It then certifies other variations of the model based upon the test results and engineering design of the vehicles within that model. In essence, the single-stage manufacturers certify based upon testing and evaluation, and do so even though the word "evaluation" does not appear in the safety standards. That is so because single-stage manufacturers, such as GM, Ford, or Honda, do not "demonstrate conformity" by testing each and every vehicle that they sell—to do so would mean that all consumers would buy crash-tested vehicles. Instead, single-stage vehicle manufacturers will ordinarily conduct, or sponsor, vehicle testing to support their certifications with a FMVSS. For the vehicles that they sell, as we have stated, and as GM stated in 2005 in comments to NTEA's petition for reconsideration of the multi-stage vehicle certification rule, certification is based on testing and evaluation."[67]

We recognize, of course, that small final-stage manufacturers may not have the resources of large, single-stage manufacturers to conduct "testing and/or evaluation." For that reason, we excluded from FMVSS No. 216a those multi-stage trucks for which the final-stage manufacturer would be responsible for designing and manufacturing the roof structure. However, for chassis- cabs, which arrive from the incomplete vehicle manufacturer with a compliant, intact roof structure certified by a reputable manufacturer on the basis of testing and/or evaluation, we do not see how the final-stage manufacturer's additions will affect the vehicle's roof strength that would require more testing. Nor has NTEA provided any examples. As we have explained repeatedly, and discussed above, these final-stage manufacturers can use pass-through certification. If they cannot, they can use the IVD as the foundation on which they can certify, as they will receive a vehicle certified as compliant with FMVSS No. 216a, or they can rely on a comparable pickup truck that has been certified by the manufacturer. Certifications can and will occur without testing or computer simulations, as the final-stage manufacturer can evaluate the vehicle in light of the available information provided by the incomplete vehicle manufacturers in IVDs and other resources familiar to final-stage manufacturers, and its addition(s) or alteration(s).

Despite this practical understanding, NTEA demands that the agency place the instances that will constitute reasonable care in FMVSS No. 216a. In short, NTEA is seeking a kind of assurance of compliance that is inconsistent with that of self-certification under 49 U.S.C. 30115, and fundamentally different from that of manufacturers generally, including single-stage manufacturers.

The agency has long said that it is unable to judge what efforts would constitute "reasonable care" in advance of the actual circumstances. This answer has been provided by multiple administrations over the decades in response to requests to provide interpretations of the Vehicle Safety Act.[68] Moreover, NHTSA does not delineate "reasonable care" in the Federal motor vehicle safety standards.[69] This is due to the fact that the exercise of reasonable care is different from and broader than demonstrating conformity with a safety standard by the test method described in the standard.[70]

We note that the term "reasonable care" is similar to the term "reasonable person," which is a widely understood term used in tort law. *Black's Law Dictionary* defines "reasonable care" as being "the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances."[71]

While testing in accordance with the test procedures described in NHTSA's standards may be the best approach, it is not the only way to certify. As we have indicated before, the United States self-certification system leaves it up to the vehicle manufacturer as to the bases it uses to certify its vehicles. This provides reasonable flexibility that may take into account new approaches and technologies without the time consuming process of adopting detailed regulations; in fact, at least major manufacturers have not advocated burdening certification with detailed, technical regulations. The providing of a step-by-step method of how a vehicle manufacturer should certify its product is something that was not called for or contemplated by Congress when it enacted the broad self-certification system, rather than a system of governmental approval in advance of the sale of the product,[72] as in the case with certain drugs.

NTEA, which has noted that thousands of items are produced for work truck applications, has not suggested how the instances that constitute reasonable care should or could be included in an objective Federal motor vehicle safety standard. If there is a way around this dilemma, NTEA has not provided an answer,

[66] Congress used different terms in its requirements for Federal motor vehicle safety standards and for certification. The differences are meaningful. The authorization for standards provides, among other things, that the standards be "stated in objective terms." 49 U.S.C 30111(a). In contrast, reasonable care, which is used in 49 U.S.C. 30112(b)(2) [prohibitions on manufacture and sale of noncomplying motor vehicles] and 49 U.S.C. 30115 [certification of compliance] looks more broadly to care exercised by a prudent and competent person under similar circumstances. *See* definition from Black's Law Dictionary, below.

[67] *See* GM's May 13, 2005 comment on NTEA's petition for reconsideration of the multi-stage certification rule, Docket No. NHTSA–99–5673–0056.

[68] *See e.g.,* Letter from Philip R. Recht, Chief Counsel, NHTSA, to Mr. Mark Warlick, Four Winds International Corporation (February 27, 1995), *available at http://isearch.nhtsa.gov/files/10595.html* (last accessed February 14, 2011).; Letter from Paul Jackson Rice, Chief Counsel, NHTSA, to Mr. Vaughn Crawley, Vice President, Monitor Manufacturing Co. (August 15, 1990), *available at http://isearch.nhtsa.gov/files/2625y.html* (last accessed February 14, 2011); and Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Ms. S. Trinkl, Quality Management, DEKRA Automobil GmbH (December 30, 2004), *available at http://isearch.nhtsa.gov/files/Trinkl.1.html* (last accessed February 14, 2011).

[69] In a final rule concerning advanced air bags issued in 2000, the agency removed the "due care provision" contained in FMVSS No. 208, *Occupant Crash Protection,* stating that it does not fit with the overall statutory scheme and "it introduces a measure of subjectivity into the issue of whether a vehicle complies with a standard." 65 FR 30680, 30725 (May 12, 2000).

[70] While NTEA objects to being subject to reasonable care standards, its members are otherwise subject to such standards. *See Croskey* v. *BMW of North America,* 532 F.3d 511 (6th Cir. 2008); *Morales* v. *American Honda Motor Co.,* 151 F.3d 500 (6th Cir. 1998); *see also Williamson* v. *Mazda Motor of America,* 131 S.Ct. 1131 (2011); *Fabian* v. *Fulmer Helmets, Inc.,* 628 F.3d. 278 (6th Cir. 2010); *Sours* v. *General Motors Corp.,* 717 F.2d 1511, 1517 (6th Cir. 1983); Restatement (Third) of Torts, Product Liability § 2, 4 (1998).

[71] Black's Law Dictionary, Eighth Edition, Thomson West.

[72] *See generally,* Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Ms. S. Trinkl, Quality Management, DEKRA Automobil GmbH (December 30, 2004), *available at http://isearch.nhtsa.gov/files/Trinkl.1.html* (last accessed February 14, 2011) (for brief comparison of the European approval process and the U.S. self-certification process).

despite repeated entreaties for it to do so.

As the industry and the agency understands, there can be many methods a manufacturer can use to form the basis of its certification other than conducting a test using the procedures contained in a particular Federal motor vehicle safety standard. This, apparently, is understood by NTEA. In its Truck Equipment Handbook,[73] it states that the principle of due care [74] allows one vehicle type to be certified on the basis of testing a similar vehicle type. It also states in that handbook that, in cases of modification and/or completion of vehicles outside of the chassis manufacturer's guidelines, the principle of due care allows the small manufacturer to employ one or a combination of alternative testing methods, such as engineering analysis and calculations, computer simulations, periodic testing, laboratory tests and inspection by an independent laboratory to certify the vehicle. NTEA also states in the handbook that while such tests, calculations and simulations need not be performed for each vehicle, "a manufacturer must be *reasonably* certain that a particular vehicle configuration will conform to all applicable standards." [75] (Emphasis added.)

As explained in this response, the demands placed on final-stage manufacturers by FMVSS No. 216a are minimal—all that is required is reasonableness. If the roof or its structure is not modified or altered, the final-stage manufacturer can rely on the IVD for pass-through certification or another basis on which it can certify. In instances of the latter, for purposes of FMVSS No. 216a, the agency believes that a final-stage manufacturer's reasonable reliance on the IVD or on a comparable pickup truck that has been certified by the manufacturer, coupled with sound technical judgment, would constitute the exercise of reasonable care should no modifications be made to the chassis-cab's roof or its A- or B-pillars. In our view, however, more robust means of analysis for completed chassis-cabs, including testing, may be appropriate in instances where the final-stage manufacturer alters or modifies the intact roof structure or its supporting structures. NTEA has not identified an instance when this has been a necessity.

*G. NTEA's Claim That NHTSA Needs To Test Multi-Stage Vehicles in Support of Its Regulatory Analysis Ignores the Fact That We Excluded the Trucks That Could Cause Compliance or Certification Issues for Final-Stage Manufacturers*

NTEA stated that a review of the agency's final rule and Regulatory Impact Analysis indicates that NHTSA did not include any completed multi-stage vehicles in connection with any of the testing it performed to support its amendments to FMVSS No. 216a. It said that it appears that NHTSA has no test data to support a conclusion that the revised test in the final rule is workable and reasonable with respect to multi-stage vehicles.

As discussed earlier, to address practicability concerns, we included chassis-cabs in FMVSS No. 216a, and excluded those trucks for which final-stage manufacturers would be completing or building the roof structure. These are the vehicles that could likely cause practicability problems for final-stage truck manufacturers.

The chassis-cabs will have intact, compliant roofs at the time they are delivered to the final-stage manufacturer. Moreover, these vehicles will be identical in material respects to vehicles that are sold by the same incomplete vehicle manufacturers as pickup trucks, and have the same roof structures. The incomplete vehicle manufacturers will be redesigning the roof structures of their pickup trucks, as necessary, to meet FMVSS No. 216a, and will then be providing incomplete versions of the same vehicles, with the same roof structures, to final-stage truck manufacturers. The final-stage truck manufacturers will be able to comply with FMVSS No. 216a by not taking these vehicles out of compliance with the standard. It is for this reason that NHTSA's technical analyses did not specifically test multi-stage vehicles. Furthermore, as the chassis-cabs are based on the incomplete vehicle manufacturer's pickup trucks, and the FMVSS No. 216a test only compresses the supported cab, it would be redundant to separately test multi-stage versions of these vehicles.

The 216a Test

Part of the rationale for not testing completed multi-stage vehicles is due to the nature of the FMVSS No. 216a test. Originally, in the NPRM, we proposed a test with a rigid support under the vehicle's frame. However, in the test procedure adopted in the May 2009 final rule, the agency will support the vehicle body off of its suspension and rigidly secure the vehicle's sill and chassis on a rigid horizontal surface.[76] An angled platen compresses the vehicle above its A- and B-pillars. The vehicle must meet the specified strength-to-weight (SWR) to be considered compliant.

As we stated in the final rule, the FMVSS No. 216a test was adopted and changed from the NPRM test procedure based on comments from the industry and because the test procedure was found to reduce unwanted deflection of the vehicle body when undergoing testing when the load is applied to the roof. This was done due to issues in conducting the test with body-on-frame vehicles, *e.g.* chassis-cabs.

We excluded those multi-stage trucks from FMVSS No. 216a where the final-stage manufacturer would design and fabricate the roof, its support structure, or a portion thereof. We included chassis-cabs in FMVSS No. 216a; only the vehicle's cab is tested, and not the frame. As we explained, incomplete vehicle manufacturers are responsible for the design and fabrication of these chassis-cabs, most of which are based off of pickup trucks sold directly to consumers in dealerships.

In its petition, NTEA argued that NHTSA failed to consider or test multi-stage vehicles in the final rule. Given the vehicles covered, the standard, and the test procedure, such testing is not necessary for our analysis.[77] First, as we stated previously, only the vehicle's chassis-cab is tested, and the chassis-cab is supported by a horizontal surface at the vehicle's sill. The cab is compressed from an angled platen above the A- and the B-pillars into this added, rigid support at the cab's sill. Therefore, modifications to the vehicle's frame would not affect the vehicle's compliance in the FMVSS No. 216a test. Second, if a final-stage manufacturer installs a box that is taller than the cab, the box will be removed. Similarly, any additions to the roof will be removed

[73] National Truck Equipment Association, Truck Equipment Handbook, Eighth edition, October 2010, p. 61.

[74] The National Traffic and Motor Vehicle Safety Act originally required the exercise of "due care." 80 Stat. 722 (1966), *see NTEA*, 919 F.2d. at 1151. The wording was changed to "reasonable care" in the recodification of the Federal transportation laws in 1994 to maintain consistency throughout the revised code. *See* H.R. Rep. 103–180, at 3, reprinted in 1994 U.S.C.C.A.N. 818. The recodification expressly provided that there is no substantive change in meaning. *See* Public Law 103–272, 108 Stat. 745.

[75] National Truck Equipment Association, Truck Equipment Handbook, Eighth edition, October 2010, p. 61.

[76] A detailed discussion is located at 74 FR at 22367 under the heading, "Tie Down Procedure."

[77] However, NHTSA did test a Ford F–250 chassis-cab on October 2, 2008. *See* Docket No. NHTSA–2009–0093–0019. Video files and test reports are available to the public through NHTSA's Internet vehicle crash test database: *http://www-nrd.nhtsa.dot.gov/database/veh/veh.htm.*

before the test, per the regulation. Furthermore, it is not apparent how the modifications generally made by a final-stage manufacturer will create compliance difficulties with FMVSS No. 216a. Moreover, as we explained in the multi-stage certification rulemaking, if final-stage manufacturers identify particular areas where compliance with FMVSS No. 216a is a problem, they, or NTEA on behalf of its members, can petition for a temporary exemption under 49 CFR part 555.[78]

In our Further Response, we stated that in analyzing the 2006 GMT–355 IVD, which is for a body-on-frame vehicle, pass-through certification would be available to final-stage manufacturers if no modifications were made to the roof or its structural support members. We still believe that to be true. NTEA has not presented NHTSA with descriptions or evidence of any modifications that are made to a chassis-cab or its support structure. If such modifications do occur, they could affect the vehicle's compliance with FMVSS No. 216a if the roof or its support structure is weakened. However, we have no evidence that such modifications occur. As we presented earlier in this document, NHTSA is unaware of equipment manufacturers that require modifications to the chassis-cab or its support structure.

The only modifications mentioned by NTEA in it comments or petition is where a final-stage manufacturer drills holes in the frame rails behind the chassis-cab and attaches a box onto those frame rails. FMVSS No. 216a will only test the roof strength of the chassis-cab independent of the vehicle's frame. The chassis-cab is manufactured by an incomplete vehicle manufacturer who will provide the final-stage manufacturer with a compliant roof. Therefore, provided modifications are not made to the vehicle's chassis-cab or its support structure, subsequent modifications to the vehicle's frame rails will not affect the vehicle's performance in the FMVSS No. 216a test. For those reasons, NHTSA believes there was no reason for the agency to specifically test a completed multi-stage truck in support of its evaluation.

*H. All Multi-Stage Vehicles Should Not Be Excluded*

NTEA argued that excluding all multi-stage vehicles would not unacceptably deprive those users of the safety benefits provided by the roof crush standard. NTEA stated that its statistics show that the vast majority of multi-stage vehicles are rated above 6,000 pounds. NTEA noted that FMVSS No. 216a excludes trucks other than ones built on chassis-cabs (and incomplete vehicles with a full exterior van body), meaning that the agency excluded approximately one-third of multi-stage vehicles with a GVWR of 6001 pounds to 10,000 pounds. NTEA also said that chassis with a GVWR of over 10,000 pounds constitute 94.5 percent of the entire market of chassis rated above 6,000 pounds. Thus, the vast majority of multi-stage vehicles above 6,000 pounds GVWR are already excluded from FMVSS No. 216a, and its position would not have any appreciable effect on the multi-stage vehicle population that will be subject to the rule.

NTEA's argument ignores the fact that Congress, in SAFETEA–LU, required NHTSA to establish rules or standards that will reduce vehicle rollover crashes and mitigate deaths and injuries associated with such crashes for motor vehicles with a GVWR of not more than 10,000 pounds. We recognized in the final rule that there are benefits for vehicles with a GVWR above 6,000 pounds up to 10,000 pounds, although they are relatively small compared to those associated with lighter vehicles. However, the benefits are not trivial. We noted that if a multi-stage vehicle is involved in a rollover, the vehicle's roof strength will be an important factor in providing occupant protection.

In the final rule, as discussed above, NHTSA included those multi-stage trucks that have an intact, compliant roof structure when it leaves the incomplete vehicle manufacturer and excluded those trucks for which the final-stage manufacturer would be responsible for designing and manufacturing the roof structure. While the number of included vehicles is a small number of the total multi-stage vehicles built and certified every day, adequate justification as to why the drivers of chassis-cabs should be less safe than the driver of a nearly identical pickup truck has not been provided. This is especially so when the later-stage manufacturing does not affect the strength of the chassis-cab's roof.

While there may not be an appreciable effect on the entire multi-stage population, as NTEA argues, that was not the intent. Instead, the intent was to implement the provisions of SAFETEA–LU and, where practicable, to give drivers of vehicles with a GVWR of 10,000 pounds or less increased safety in case of a rollover. We note that NTEA has not presented a persuasive safety argument. Instead, its arguments are based primarily on overstated certification risk. As such, we believe that this rule should continue to include those vehicles with an intact, compliant roof structure, whether they are delivered to the dealership or the final-stage manufacturer.

[78] NTEA stated to its members that it could submit a petition and individual companies would only need to submit limited information to opt-in. *See* National Truck Equipment Association, Certification Guide, Appendix 5l (2007).

## IV. Conclusion

For the reasons discussed above, we deny the petition for reconsideration submitted by NTEA.

**Authority:** 49 U.S.C. 322, 30111, 30115, 30166 and 30177; delegation of authority at 49 CFR 1.50.

Issued: March 16, 2011.

**Daniel C. Smith,**

*Senior Associate Administrator for Vehicle Safety.*

[FR Doc. 2011–6595 Filed 3–21–11; 8:45 am]

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### 50 CFR Part 17

**[Docket No. FWS–R4–ES–2010–0011; MO 92210–0–0008]**

## Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List the Berry Cave Salamander as Endangered

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

**ACTION:** Notice of 12-month petition finding.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce a 12-month finding on a petition to list the Berry Cave salamander (*Gyrinophilus gulolineatus*) as endangered under the Endangered Species Act of 1973, as amended (Act). After review of all available scientific and commercial information, we find that listing the Berry Cave salamander is warranted. Currently, however, listing is precluded by higher priority actions to amend the Lists of Endangered and Threatened Wildlife and Plants. Upon publication of this 12-month petition finding, we will add the Berry Cave salamander to our candidate species list. We will develop a proposed rule to list the Berry Cave salamander as our priorities allow. We will make any determination on critical habitat during development of the proposed listing rule. During any interim period, we will address the status of the candidate taxon through our annual Candidate Notice of Review (CNOR).

**DATES:** The finding announced in this document was made on March 22, 2011.

**ADDRESSES:** This finding is available on the Internet at *http://www.regulations.gov* at Docket Number FWS–R4–ES–2010–0011. Supporting documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Tennessee Ecological Services Field Office, 446 Neal Street, Cookeville, TN 38501. Please submit any new information, materials, comments, or questions concerning this finding to the above street address.

**FOR FURTHER INFORMATION CONTACT:** Mary E. Jennings, Field Supervisor, Tennessee Ecological Services Field Office, 446 Neal Street, Cookeville, TN 38501; by telephone 931–528–6481; or by facsimile at 931–528–7075. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

## Background

Section 4(b)(3)(B) of the Act (16 U.S.C. 1531 *et seq.*) requires that, for any petition to revise the Federal Lists of Threatened and Endangered Wildlife and Plants that contains substantial scientific or commercial information that listing a species may be warranted, we make a finding within 12 months of the date of receipt of the petition. In this finding, we determine whether the petitioned action is: (a) Not warranted, (b) warranted, or (c) warranted, but immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether species are endangered or threatened, and expeditious progress is being made to add or remove qualified species from the Federal Lists of Endangered and Threatened Wildlife and Plants. Section 4(b)(3)(C) of the Act requires that we treat a petition for which the requested action is found to be warranted but precluded as though resubmitted on the date of such finding, that is, requiring a subsequent finding to be made within 12 months. We must publish these 12-month findings in the **Federal Register**.

*Previous Federal Actions*

On January 22, 2003, we received a petition dated January 15, 2003, from Dr. John Nolt, University of Tennessee—Knoxville, requesting that we list the Berry Cave salamander as endangered under the Act. The petition clearly identified itself as such and included the requisite identification information for the petitioner, as required in 50 CFR 424.14(a). In a February 24, 2003, letter to the petitioner, we responded that we had received the petition but that, due to court orders and settlement agreements for other listing and critical habitat actions that required nearly all of our listing and critical habitat funding, we would not be able to further address the petition at that time.

The 90-day petition finding was published in the **Federal Register** on March 18, 2010 (75 FR 13068). The Service found that the information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files did provide substantial scientific or commercial information indicating that listing the Berry Cave salamander may be warranted. In the finding, we stated that we were initiating a status review to determine whether listing the species was warranted, and would issue a 12-month finding accordingly. This document constitutes the 12-month finding on the January 15, 2003, petition to list the Berry Cave salamander.

*Species Information*

Taxonomy and Species Description

Three taxonomic entities have been formally described within the Tennessee cave salamander species complex. The pale salamander (*Gyrinophilus palleucus palleucus*) is the most widely distributed member of the group and is found in middle Tennessee, northern Alabama, and northwestern Georgia. The Big Mouth Cave salamander (*G. p. necturoides*) is restricted to one cave in middle Tennessee, and the Berry Cave salamander (*G. gulolineatus*) (formerly recognized as the subspecies *G. p. gulolineatus*) has been recorded from nine locations in eastern Tennessee.

Members of the Tennessee cave salamander complex are related to the spring salamander (*G. porphyriticus*); however, unlike the spring salamander, they usually are found in caves and are neotenic, meaning that they normally retain larval characteristics as adults. Individuals occasionally metamorphose and lose their larval characters (Simmons 1976, p. 256; Yeatman and Miller 1985, pp. 305–306), and metamorphosis can be induced by subjecting them to hormones (Dent and Kirby-Smith 1963, p. 123).

The Berry Cave salamander is differentiated from other members of the group by a distinctive dark stripe on the upper portion of the throat, a wider head, a flatter snout, and possibly a larger size (Brandon 1965, p. 347). Despite these differences, the taxonomic status of the Berry Cave salamander has been debated for some time. The Berry Cave salamander was recognized as a distinct aquatic, cave-dependant taxon of the Tennessee cave salamander complex by Brandon (1965, pp. 346–352), who described it as a subspecies (*G. p. gulolineatus*). The Tennessee Wildlife Resources Agency (TWRA) (2005, p. 50) still uses this subspecific designation. Brandon *et al.* (1986, pp. 1–2) suggested the Berry Cave salamander be considered separate from the Tennessee cave salamander based on nonadjacent ranges (it is geographically isolated from other members of the complex), dissimilarity in bone structures of transformed adults, and morphology of neotenic adults. Furthermore, Niemiller *et al.* (2010b, p. 5) found that Berry Cave salamander populations they sampled have three unique alleles when compared to the Tennessee cave salamander. According to Niemiller *et al.* (2008, p. 2), current taxonomy recognizes the Tennessee cave salamander (*G. palleucus*) and the Berry Cave salamander (*G. gulolineatus*) as two independent species. Because most authorities now assign the Berry Cave salamander species-level status (Brandon 1965, p. 347; Brandon 1986, pp. 1–2; Collins 1991, p. 43; Simmons 1976, p. 276; IUCN 2010; ITIS 2010), we consider the Berry Cave salamander to be a distinct species, *G. gulolineatus,* for the purposes of this finding.

Distribution

Until recently, only eight populations of the Berry Cave salamander were documented: Seven from caves and one from a roadside ditch in McMinn County, Tennessee, where three individuals were collected (presumably washed into the ditch from a cave). Salamanders in Cruze Cave, formerly considered to be Berry Cave salamanders, are now thought to be spring salamanders (Miller and Niemiller 2008, p. 14). A closer analysis of Cruze Cave animals revealed the presence of an iris (absent in the Berry Cave salamander), a high propensity to metamorphose (23 percent of individuals collected), and relatively large eye size when compared to Berry Cave salamanders (Miller and Niemiller 2008, p. 14). Furthermore, genetics indicated that Cruze Cave individuals shared the spring salamander's haplotype (closely linked genetic markers present on a single chromosome) and group (having a common ancestor) (Niemiller 2006, p. 41). Therefore Cruze Cave is no longer

thought to contain a population of Berry Cave salamanders.

However, recent population surveys (April 2004 through June 2007) resulted in the discovery of Berry Cave salamanders in two new Knox County caves (Aycock Spring and Christian caves). According to Miller and Niemiller (2008, p. 10), the Berry Cave salamander is recorded from nine localities within the Appalachian Valley and Ridge Province in East Tennessee. These include eight caves within the Upper Tennessee River and Clinch River drainages (Niemiller *et al.* 2009, p. 243) and one unknown cave in McMinn County, Tennessee (Brandon 1965, p. 348). The Berry Cave salamander is currently known from Berry Cave, which is located south of Knoxville, Tennessee (in Roane County) (Niemiller 2006, p. 96); from Mud Flats, Aycock Spring, Christian, Meades Quarry, Meades River, and Fifth caves in Knox County (Niemiller and Miller 2010, p. 2), the latter three being part of the larger Meades Quarry Cave System (Brian Miller, Middle Tennessee State University, pers. comm., 2010); from Blythe Ferry Cave (in Meigs County) (Niemiller and Miller 2010, p. 2); and from an unknown cave in Athens, McMinn County, Tennessee. The Athens record is based solely on the three specimens collected in a roadside ditch during a flooding of Oostanaula (Eastanollee) Creek (Brandon 1965, pp. 348–349). The species has not been observed in the Athens area since 1953.

Miller and Niemiller (2008, p. 11) suggested that populations of the Berry Cave salamander could occur throughout the Valley and Ridge Province in interconnected subterranean waters associated with the Tennessee River. Distribution studies are limited due to inaccessibility of smaller cave systems, but Miller and Niemiller (2006, p. 15) suggest that cave salamander populations are likely small. Western dispersal appears to be prohibited by a fault zone located west of the East Tennessee Aquifer System (Miller and Niemiller 2008, p. 10).

Historical estimates of Berry Cave salamander densities and population trends are lacking. Miller and Niemiller (2006, p. 44) provided numbers of Berry Cave salamanders observed in Berry and Mudflats caves by decade, but the information has gaps and is insufficient for analysis. Miller and Niemiller (2005, p. 93) planned to implant salamanders with tags for population estimates on return cave visits, comparing marked to unmarked individuals captured. However, in an unpublished report to TWRA (Miller and Niemiller 2006, p. 15), the authors state that time constraints did not allow for mark-recapture studies to be performed in each cave and that population estimates were based on the number of salamanders found during the surveys. These surveys concluded that Berry Cave salamander populations are robust at Berry and Mudflats caves where population declines had been previously reported (Miller and Niemiller 2008, p. 1; Miller and Niemiller 2006, p. 44). According to Miller and Niemiller (2008, pp. 1, 17–20), a total of 113 caves in Middle and East Tennessee were surveyed from the time period of April 2004 through June 2007, resulting in observations of 63 Berry Cave salamanders.

Habitat

Limited information is available concerning the habitat requirements of the Berry Cave salamander. According to Miller and Niemiller (2008, pp. 10–11), the Berry Cave salamander is associated with subterranean waters within the Appalachian Valley and Ridge Province in East Tennessee. In general, cave-obligate salamanders require an inflow of organic detritus, aquatic organisms on which to feed, and sufficient cover in the form of rocks and ledges. Studies indicate that the tendency to utilize cover varies between caves, but the Berry Cave salamander often seeks refuge in crevices, cover areas, and overhanging ledges when disturbed (Niemiller *et al.* 2010b, p. 10; Miller and Niemiller 2006, p. 11).

Biology

Life requirements of the Tennessee cave salamander complex are poorly documented due to their reclusive nature and the obscurity of subterranean environments (Niemiller 2006, p. 9). Animals found in the same location during mark-recapture studies indicate that Berry Cave salamander territories are diminutive (Miller and Niemiller 2008, p. 11).

Little is known in general about breeding habits, life spans, or numbers comprising individual populations within the Tennessee cave salamander complex (Miller and Niemiller 2005, p. 92). Transition time from larval stage to reproductive adult is currently undocumented. Members of the Tennessee cave salamander complex are paedomorphic (retain juvenile characteristics as an adult) and become sexually mature without metamorphosing into an adult form (Brandon 1966, in Niemiller *et al.* 2008, p. 2). Female salamanders in the Tennessee cave salamander complex are believed to be gravid from late autumn to early winter (Niemiller *et al.* 2010a, p. 39). *Gyrinophilus* species are generalist feeders and cannibalization of other conspecifics (belonging to the same species) may cause females of some species to seek isolation from main cave streams for oviposition (laying eggs) (Niemiller *et al.* 2010a, pp. 38–39). To date, neither eggs nor embryos have been described (Niemiller and Miller 2010, p. 1).

**Summary of Information Pertaining to the Five Factors**

Section 4 of the Act (16 U.S.C. 1533), and implementing regulations (50 CFR 424), set forth procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, a species may be determined to be endangered or threatened based on any of the following five factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

In considering what factors might constitute threats to a species, we must look beyond the mere exposure of the species to the factor to evaluate whether the species may respond to the factor in a way that causes actual impacts to the species. If there is exposure to a factor and the species responds negatively, the factor may be a threat and we attempt to determine how significant a threat it is. The threat is significant if it drives, or contributes to, the risk of extinction of the species such that the species warrants listing as endangered or threatened as those terms are defined in the Act.

In making this finding, information pertaining to the Berry Cave salamander in relation to the five factors provided in section 4(a)(1) of the Act is discussed below.

*Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range*

According to Caldwell and Copeland (1992, pp. 3–4), the greatest threats to the Tennessee cave salamander complex are derived from agricultural runoff, pesticide use in residential and agricultural settings, over-collection, increased water flow into and through cave systems following timber operations, and siltation caused by the removal of trees from riparian zones. Although standard best management

practices (BMPs) for timber harvesting require intact riparian buffers and prohibit instream operation of heavy equipment, these BMPs are not always followed and may not fully prevent sediment from entering streams. Siltation may adversely affect reproduction by filling crevices used for egg deposition or covering the eggs themselves (Miller and Niemiller 2006, p. 22). Niemiller and Miller (2006, p. 10) believe that Berry Cave salamander populations, specifically, are most vulnerable to habitat degradation associated with urbanization, over-collecting, and poor silvicultural and agricultural practices.

Boone and Bridges (2003) (in Miller and Niemiller (2006, p. 22)) found that water contamination caused by pesticide and roadway runoff poses a considerable threat to cave systems. Hayes *et al.* (2006, p. 40) suggest that amphibians are particularly vulnerable to pesticides due to their highly permeable skin combined with the fact that their critical reproductive and developmental stages occur while they are in aquatic environments. Some persistent pesticides are active at low environmental concentrations and act as endocrine disrupters in amphibians, causing delayed metamorphosis, developmental retardation, and stunted larval growth (Hayes *et al.* 2006, p. 40).

According to Miller and Niemiller (2008, p. 13), there are few water quality data available for caves where the Berry Cave salamander is documented, and the source of the streams is not well understood. Niemiller (2006, p. 96) observed three individuals in Meades Quarry Cave and three in Mudflats Cave, caves that are heavily silted and prone to flooding (Miller and Niemiller 2006, p. 22). The Mudflats Cave system is thought to be affected by residential pollution (*e.g.,* herbicides, pesticides, exhaust runoff, and silt load) from a nearby housing development (Miller and Niemiller 2008, p. 13), although no studies have been done to substantiate this (Miller, pers. comm., 2005). Caldwell and Copeland (1992, p. 3) suggest that increased "through flow" (water passing through the cave) can flush salamanders and their aquatic invertebrate food base from caves as well as introduce contaminants into them at a quicker rate. Miller and Niemiller (2006, pp. 22–23) cite Boone and Bridges (2003) as evidence of adverse effects to amphibian species from pesticide contamination, but note that regular flooding of caves appears to wash silt from the systems and that data on the long-term effects to the species from "through flow" fluctuations are lacking.

Meades Quarry Cave continues to be greatly impacted by past quarrying activities. Niemiller *et al.* (2010b, p. 11) indicate that cave passages were destroyed by quarrying and that lye leaching continues to alkalize the system near the main entrance to the cave. Water pH tests reveal fluctuations in pH levels from 8.4 to 12.7 downstream of the cave entrance, and Berry Cave salamanders have been observed with chemical burns (Niemiller *et al.* 2010b, p. 11). Matthew Niemiller (University of Tennessee, pers. comm., 2010) suggested that removal of larger lye deposits would reduce alkalinity input if the main point source could be located.

There are substantial concerns for the six documented Knox County caves where Berry Cave salamanders are known to occur (Mud Flats, Aycock Spring, Christian, Meades Quarry, Meades River, and Fifth caves) due to growth of metropolitan Knoxville (Miller and Niemiller 2008, p. 1). Construction activities, such as residential and business developments, land clearing, and highway projects, frequently result in stream siltation, toxic runoff (*e.g.,* solvents, chemical spills, road salt oil and grease), and urban pollution. Stream temperatures are elevated by removal of trees from riparian zones (forested land along streams and rivers), and hydrologic fluctuations result from increased silt load; elevated stream temperatures and hydrologic fluctuations both potentially affect the quantity and quality of organic matter available to cave systems. Data are currently lacking on long-term effects of hydrologic fluctuations on salamander population size, but it is thought that an increase in siltation affects reproduction (Miller and Niemiller 2006, pp. 22–23). While Berry Cave salamander populations have persisted, development is known to be occurring and affecting the salamander in all six Knox County caves. Heavy siltation is present in Mudflats Cave, believed to be associated with the Gettysvue housing development (Niemiller *et al.* 2010b, p. 11). Miller and Niemiller (2008, p. 13) indicate that residential housing developments and roads are being constructed near Aycock Spring and Christian caves. Development of a major roadway known as the James White Parkway (South Knoxville Boulevard) has potential to impact Berry Cave salamander populations in the Meades Quarry Cave system (Meades Quarry, Meades River, and Fifth caves) by increased siltation from construction, the creation or closures of cave openings by blasting and excavating activities which could affect organic input into the system, and an increase in impervious surface runoff that may contain various environmental contaminants (*e.g.,* oil, herbicides, salt). Meades Quarry Cave contains the largest population of Berry Cave salamanders documented and is currently impacted by hybridization with the spring salamander and lye leaching associated with past quarrying activities (Niemiller and Miller 2010, p. 3; M. Niemiller, pers. comm., July 2010).

Due to the proximity of the Meades Quarry Cave system to the proposed James White Parkway, the Service requested, during a March 4, 2003, meeting with the Tennessee Department of Transportation (TDOT), that a study be prepared to determine whether the potential alignments would impact the surface area that recharges the Meades Quarry Cave system. As a result, TDOT contracted ARCADIS to perform a dye trace study of the affected watershed. ARCADIS (2009, p. 1–2) conducted a hydrogeologic dye trace study from April through June 2009 to determine which karst features within the Toll Subwatershed (*i.e.,* a surface watershed overlying Meades Quarry and Cruze caves) are connected to the Meades Quarry Cave system. A positive trace from a large sinkhole, just north of Sevierville Pike, indicates that it directly recharges the Meades Quarry Cave system, and it is likely that four smaller sinkholes, in proximity to this one, also drain into the Meades Quarry Cave (ARCADIS 2009, pp. 5–1, 5–2). Dye trace results demonstrated a general southwest to northeast orientation of groundwater flow (ARCADIS 2009, p. 5–1) and appeared to substantiate the hypothesis (based on surface flow) that Cruze Cave and Meades Quarry Cave systems were not hydrologically connected.

TDOT, in cooperation with the Federal Highway Administration, is preparing an EIS for the James White Parkway project (John Hunter, TDOT Project Manager, pers. comm., June 2009; Luke Eggering, Parsons Consulting, pers. comm. October 2010). The concerns for potential impacts to the Meades Quarry Cave system and the Berry Cave salamander are being addressed by substantial changes in project design. In an effort to satisfy the purpose and need of the project while minimizing environmental impacts, TDOT is now proposing to construct a fully access-controlled facility (South Knoxville Boulevard EIS 2010, p. 10). Furthermore, the alignments under consideration have been purposefully designed to avoid or minimize impacts to the recharge area for the Meades

Quarry Cave system (South Knoxville Boulevard EIS 2010, p. 43). If direct impacts are unavoidable, TDOT is proposing to install filtration systems at sinkholes that recharge the Meades Quarry Cave system and to suggest that local planners control growth by implementing development buffers around environmentally sensitive areas (South Knoxville Boulevard EIS 2010, pp. 43–44).

Ogden (2005) conducted a dye trace study on the watershed contributing groundwater to the Berry Cave system in Roane County, Tennessee. As determined by Ogden (2005, p. 4), five first-order streams contribute to surface recharge of the Berry Cave system. The recharge area was delineated following two dye traces and is comprised of first-order streams that join the main sinking stream at the cave entrance (Ogden 2005, p. 19). The cave stream is believed to receive year-round input from Lawhon and Schommen springs and empties into a spring on the bank of the Watts Bar Lake (Ogden 2005, p. 4). Water quality results indicated normal conductivity levels and low nitrate levels despite extensive cattle grazing within the recharge area. Sulfate, iron, and phosphate levels were also determined to be low, and pH measured at approximately 7.0 at the time of sampling (Ogden 2005, p. 14). According to The Nature Conservancy (2006, Table 2), current threats to Berry Cave include bacteriological loading in the form of fecal coliform from agricultural runoff, disruption of organic flow due to a lack of cattle exclusion, and erosion/sedimentation caused by cattle access to streams that feed into Berry Cave. However, water quality tests conducted in conjunction with the dye trace study indicate that the system is uncontaminated (Ogden 2005, p. 14), and we have no evidence to suggest that any of these impacts are occurring.

The Federal Government's Clean Water Act (CWA) of 1972 (33 U.S.C. 1251 *et seq.*) sets standards for releasing pollutants into waters of the United States and regulates water quality standards for surface water. Projects that could impact waters having a "significant nexus" to "navigable waters" are required under this law to apply for a National Pollutant Discharge Elimination System (NPDES) permit prior to construction. The Tennessee Department of Environment and Conservation's Division of Water Pollution Control under the Tennessee Water Quality Control Act requires that the applicant perform compensatory mitigation for loss of linear feet of stream or pay into the Tennessee Stream Mitigation Program. While these laws are designed to protect water quality, impacts from projects are seldom viewed cumulatively, and compensatory mitigation might not involve reparation activities within the affected watershed. Therefore, degradation of habitat for this species is ongoing, and these laws have not been adequate to fully protect this species from water quality impacts associated with increasing development and urbanization.

In summary, Knox County populations are believed to be highly susceptible to habitat degradation from surrounding development (Miller and Niemiller 2008, p. 13). Residential pollutants, increased silt load from construction activities, and runoff of impervious surfaces associated with urban development are ongoing threats to Berry Cave salamander populations in six caves within metropolitan Knoxville. Three of these populations (Meades Quarry, Meades River, and Fifth caves) are part of the larger Meades Quarry Cave system (Miller, pers. comm., 2010) and could be impacted by development of the proposed James White Parkway Project. Past quarrying activities have resulted in high water pH levels within the Meades Quarry Cave and observations of Berry Cave salamanders with chemical burns. Residential housing developments and road construction are occurring in proximity to Aycock Spring and Christian caves (Miller and Niemiller 2008, p. 13). The Mudflats Cave population is believed to be impacted by a nearby housing development and associated water quality impacts (Miller and Niemiller 2008, p. 13). Water samples indicate that Berry Cave is uncontaminated, and cattle access to streams that recharge the system is evidently not impacting the cave system at this time. However, because of the overall vulnerability of the Berry Cave salamander to impacts associated with urbanization and the extent of overlap between current and projected urbanization and Berry Cave salamander populations, we find the present or threatened destruction, modification, or curtailment of its habitat or range to be a significant threat of moderate magnitude. Further, the information available to us at this time does not indicate that the magnitude or imminence of this threat is likely to be appreciably reduced in the foreseeable future.

*Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes*

Most caves containing Berry Cave salamander populations are privately owned, and visits to some of these caves are unsupervised (Miller and Niemiller 2006, p. 24; Niemiller *et al.* 2010b, p. 12), making the Berry Cave salamander vulnerable to recreational harvest. The most robust Berry Cave salamander populations occur in caves that are either gated or owned by conscientious landowners who monitor access, but the threat of harvesting individuals for the pet trade exists in unmonitored caves (M. Niemiller, pers. comm., 2010). Because populations are considered to be small (Miller and Niemiller 2006, p. 15) and reproductive rates are low, unregulated take of individuals could severely deplete breeding populations of Berry Cave salamanders (Niemiller *et al.* 2010b, p. 12). However, we currently have no evidence to suggest that recreational harvesting of Berry Cave salamander populations is occurring.

The Tennessee Cave salamander is listed as Threatened by the State of Tennessee. This listing provides protection for the Berry Cave salamander as a State-classified subspecies of the Tennessee cave salamander under the Tennessee Nongame and Endangered or Threatened Wildlife Species Conservation Act of 1974 (Tennessee Code Annotated sections 70–8–101–112). Take of a listed species, as defined by this State legislation, is unlawful, and potential collectors are required to possess a State permit. However, many cave visitors and recreational cavers are likely unaware of the protected status of the Berry Cave salamander. Moreover, Miller and Niemiller (2005, p. 93) find that most recreational cavers are unable to properly identify salamander species, and even biologists misidentify larval spring salamanders as Tennessee cave salamanders. Thus, the State listing of the Berry Cave salamander as a subspecies of the Threatened Tennessee cave salamander may not alone provide adequate protection for this species.

In summary, although the potential for harvesting of individuals exists in unmonitored caves, we have no information to indicate that collection for the pet trade or other purposes is occurring. Furthermore, the Tennessee State law discussed above is designed to provide State protection to the Berry Cave salamander as a classified subspecies of the Tennessee cave salamander, although a general lack of public knowledge with regard to State wildlife laws and common species misidentification may limit the State law's protectiveness. Because we have no evidence to believe otherwise, we find that overutilization for commercial, recreational, scientific, or educational purposes is a low and nonimminent threat.

*Factor C. Disease or Predation*

In a June 20, 2005, e-mail to the Service, Dr. Brian Miller of Middle Tennessee State University communicated concerns for parasitic infections in *Gyrinophilus* species in two caves. Miller and Niemiller (2006, p. 24) observed pervasive, raised nodules on the skin of all Berry Cave salamanders collected within the Berry Cave system. The population appeared otherwise healthy, and no individuals were taken for analysis (Miller and Niemiller 2006, p. 15). Crayfish are believed to be predators of the Tennessee cave salamander complex and were numerous in caves where injured individuals were found, but Miller and Niemiller (2006, p. 23) did not consider crayfish predation to be a serious threat to cave salamanders.

In summary, we are uncertain as to whether disease or predation constitutes a demonstrable threat to Berry Cave salamander populations at this time. Because of the otherwise healthy appearance of individuals, we find disease or predation to be a minimal threat of low magnitude.

*Factor D. The Inadequacy of Existing Regulatory Mechanisms*

The Berry Cave salamander and its habitats are afforded some protection from water quality and habitat degradation under the Federal Clean Water Act and the Tennessee Department of Environment and Conservation's Division of Water Pollution Control under the Tennessee Water Quality Control Act. However, as demonstrated under Factor A, degradation of habitat for this species is ongoing despite the protection afforded by these laws. These laws alone have not been adequate to fully protect this species from water quality impacts associated with increasing development and urbanization.

The Tennessee Cave salamander was listed as Threatened by the State of Tennessee in 1994. This listing provided protection for the Berry Cave salamander as a classified subspecies of the Tennessee cave salamander. Under the Tennessee Nongame and Endangered or Threatened Wildlife Species Conservation Act of 1974 (Tennessee Code Annotated sections 70–8–101–112), "[I]t is unlawful for any person to take, attempt to take, possess, transport, export, process, sell or offer for sale or ship nongame wildlife, or for any common or contract carrier knowingly to transport or receive for shipment nongame wildlife." Further, regulations included in the Tennessee Wildlife Resources Commission Proclamation 00–15 Endangered or Threatened Species state the following: "Except as provided for in Tennessee Code Annotated, Section 70–8–106(d) and (e), it shall be unlawful for any person to take, harass, or destroy wildlife listed as threatened or endangered or otherwise to violate terms of Section 70–8–105(c) or to destroy knowingly the habitat of such species without due consideration of alternatives for the welfare of the species listed in (1) of this proclamation, or (2) the United States list of Endangered fauna." Under these regulations, potential collectors of this species are required to have a State collection permit, although the effectiveness of this permit is uncertain (*see* Factor B analysis above).

In summary, degradation of Berry Cave salamander habitat is ongoing despite the protection afforded by State and Federal laws and corresponding regulations. Despite these laws, development and associated pollution continue to adversely affect the species. Because of the vulnerability of Knox County populations of the Berry Cave salamander and the imminence of these threats, we find the inadequacy of existing regulatory mechanisms to be a significant threat of high magnitude. Further, the information available to us at this time does not indicate that the magnitude or imminence of this threat is likely to be appreciably reduced in the foreseeable future.

*Factor E. Other Natural or Manmade Factors Affecting the Species' Continued Existence*

According to M. Niemiller (pers. comm., July 2010), molecular and morphological evidence exists of hybridization between the Berry Cave salamander and the spring salamander in Meades Quarry Cave. Hybridization between the two species may be a natural threat to pure Berry Cave salamander populations as it affects the genetic integrity of the species. Studies are underway by Ben Fitzpatrick (Assistant Professor, Department of Ecology and Evolutionary Biology, University of Tennessee) and Niemiller to determine the extent of hybridization that is occurring between taxa in this system. It is debatable as to whether this phenomenon is anthropogenically induced or a natural process (M. Niemiller, pers. comm., July 2010). Currently, the Berry Cave salamander maintains its species distinctiveness in spite of ongoing interbreeding and range overlap with spring salamanders (Niemiller *et al.* 2010b, p. 5), and hybridization is only known to be occurring in Meades Quarry Cave (M. Niemiller, pers. comm., July 2010). Research indicates that there is low gene flow between the two species (Niemiller *et al.* 2008, p. 2), and Berry Cave salamanders and spring salamanders are infrequently observed in the same cave systems (Niemiller *et al.* 2010b, p. 13).

The Intergovernmental Panel on Climate Change (IPCC) concluded that evidence of warming of the climate system is unequivocal (IPCC 2007a, p. 30). Numerous long-term climate changes have been observed, including changes in arctic temperatures and ice, and widespread changes in precipitation amounts, ocean salinity, wind patterns, and aspects of extreme weather including droughts, heavy precipitation, heat waves, and the intensity of tropical cyclones (IPCC 2007b, p. 7). While continued change is certain, the magnitude and rate of change is unknown in many cases. Species that are dependent on specialized habitat types, that are limited in distribution, or that have become restricted to the extreme periphery of their range will be most susceptible to the impacts of climate change. As previously mentioned, the Berry Cave salamander is known only from the Appalachian Valley and Ridge Province in East Tennessee within the Upper Tennessee River and Clinch River drainages in Knox, Roane, Meigs, and McMinn Counties, Tennessee. The species is believed to be confined to subterranean aquatic environments (Niemiller *et al.* 2010, p. 5), and has been documented in only eight caves and a roadside observation where individuals were presumably washed from a cave. Western dispersal is prohibited by a fault that occurs along the west of the East Tennessee Aquifer System (Miller and Niemiller 2008, p. 10). Data on recent trends and predicted changes for the Southeast United States (Karl *et al.* 2009, pp. 111–116) provide some insight for evaluating the threat of climate change to the species. Since 1970, the average annual temperature of the region has increased by about 2 degrees Fahrenheit (°F) (1.1° Celsius (°C)), with the greatest increases occurring during winter months. The geographic extent of areas in the Southeast region affected by moderate to severe drought has increased by 12 percent in the spring and 14 percent in the summer over the past three decades (Karl *et al.* 2009, p. 111). These trends are expected to increase.

Rates of warming are predicted to more than double in comparison to what the Southeast has experienced since 1975, with the greatest increases projected for summer months. Depending on the emissions scenario

used for modeling change, average temperatures are expected to increase by 4.5 °F to 9 °F (2.5 °C to 5 °C) by the 2080s (Karl *et al.* 2009, p. 111). While there is considerable variability in rainfall predictions throughout the region, increases in evaporation of moisture from soils and loss of water by plants in response to warmer temperatures are expected to contribute to increased frequency, duration, and intensity of droughts (Karl *et al.* 2009, p. 112). If these rainfall predictions are accurate, streams that feed karst systems could experience significant decreases in flow volumes, lower dissolved oxygen content, and warmer temperatures. These variables could influence the amount and quality of organic input to cave systems essential in sustaining healthy prey populations for the Berry Cave salamander.

Application of continental-scale climate change models to regional landscapes and even more local or "step-down" models projecting habitat potential based on climatic factors, is informative but contains a high level of uncertainty when predicting future effects to individual species and their habitats. This is due to a variety of factors including regional weather patterns, local physiographic conditions, life stages of individual species, generation time of species, and species' reactions to changing carbon dioxide levels. Therefore, the usefulness of models in assessing the threat of climate change on the Berry Cave salamander within its range is also limited. Due to a variety of factors, *e.g.,* variability surrounding regional rainfall predictions and how these precipitation events would affect the species, uncertainty remains regarding whether cave systems would maintain current ambient temperatures and how climate changes might affect inflow of organic detritus and availability of invertebrate food sources; we are therefore unable to confidently identify climate change threats (or their magnitude) to the Berry Cave salamander. We have no evidence that climatic changes observed to date have had any adverse impact on the species or its habitat.

In summary, hybridization is occurring between the Berry Cave salamander and the spring salamander in Meades Quarry Cave (Niemiller *et al.* 2010b, p. 5), although there appears to be low gene flow between the two species (Niemiller *et al.* 2008, p. 2). Because Meades Quarry Cave is still believed to house the healthiest population (Niemiller and Miller 2010, p. 3) and hybridization is not known to be impacting Berry Cave salamander populations in other caves, we find this natural or manmade factor affecting the species' continued existence to be a threat of low magnitude. Although climate change may affect the species in the future, we lack adequate information to make reasonable predictions regarding the extent of the impact at this time. The available information does not indicate that climate change is a significant threat to the Berry Cave salamander, or that it is likely to become a significant threat in the foreseeable future.

**Finding**

As required by the Act, we conducted a review of the status of the species and considered the five factors in assessing whether the Berry Cave salamander is in danger of extinction or likely to become so within the foreseeable future throughout all or a significant portion of its range. We examined the best scientific and commercial information available regarding the past, present, and future threats faced by the Berry Cave salamander. We reviewed the petition, information available in our files, and other available published and unpublished information, and we consulted with species and habitat experts and other Federal and State agencies.

This status review identified threats to the Berry Cave salamander attributable to Factors A, B, C, D, and E (*see* Table 1 below). However, ongoing threats are from habitat modification, inadequacy of existing regulatory mechanisms, and other natural and manmade factors (Factors A, D, and E). These are in the form of lye leaching in the Meades Quarry Cave as a result of past quarrying activities, a proposed roadway with potential to impact the recharge area for the Meades Quarry Cave system, urban development in Knox County, water quality impacts despite existing State and Federal laws, and hybridization between spring salamanders and Berry Cave salamanders in Meades Quarry Cave. Because the available evidence would suggest that the Berry Cave salamander exists in relatively low population densities (Miller and Niemiller 2006, p. 15) and distribution is confined to subterranean waters within the Tennessee River and Clinch River watersheds (Miller and Niemiller 2008, p. 10), the species cannot readily tolerate losses of populations or even many individuals.

TABLE 1—SUMMARY OF BERRY CAVE SALAMANDER STATUS AND THREATS BY DOCUMENTED POPULATION

| Population locality | Current status | Regional/local threats |
|---|---|---|
| Aycock Spring Cave (Knox County, TN) | Extant | Factors A, B, and D: Urban development, potential for unregulated take, and inadequacy of existing regulatory mechanisms (ongoing threat). |
| Berry Cave (Roane County, TN) | Extant | Factor C: Parasites (perceived threat). |
| Blythe Ferry Cave (Meigs County, TN) | Unknown (last obs. 1975). | Unknown. |
| Christian Cave (Knox County, TN) | Extant | Factors A, B, and D: Urban development, potential for unregulated take, and inadequacy of existing regulatory mechanisms (ongoing threat). |
| Fifth Cave (Knox County, TN) | Extant | Factors A and D: Proposed roadway, urban development, and inadequacy of existing regulatory mechanisms (ongoing threat). |
| Meades River Cave (Knox County, TN) | Extant | Factors A and D: Proposed roadway, urban development, and inadequacy of existing regulatory mechanisms (ongoing threat). |
| Meades Quarry Cave (Knox County, TN) | Extant | Factors A, D, and E: Proposed roadway, urban development, inadequacy of existing regulatory mechanisms, lye leaching, and other natural and manmade factors (ongoing threat). |
| Mudflats Cave (Knox County, TN) | Extant | Factors A, B, and D: Urban development, potential for unregulated take, and inadequacy of existing regulatory mechanisms (ongoing threat). |

TABLE 1—SUMMARY OF BERRY CAVE SALAMANDER STATUS AND THREATS BY DOCUMENTED POPULATION—Continued

| Population locality | Current status | Regional/local threats |
|---|---|---|
| Roadside ditch (McMinn County, TN) | Unknown (last obs. 1953). | Factors A and D: Urban development and inadequacy of existing regulatory mechanisms (ongoing threat if the population exists). |

Development is largely responsible for pollution entering cave systems where Berry Cave salamanders occur and could additionally cause fluctuations in organic matter input and hydrologic levels as a result of sediment deposition, higher temperatures in streams that recharge systems when trees are removed from riparian zones (forested land along streams and rivers), and an increase in toxic runoff. The proposed James White Parkway project has the potential to directly impact Berry Cave salamander populations within the Meades Quarry Cave system (Meades Quarry, Meades River, and Fifth caves) by increased siltation from construction, creation or closures of cave openings by blasting activities that would affect organic input into the system, and toxic roadway runoff into sinkholes that recharge the Meades Quarry Cave system. We have determined that these factors could lead to a decline in Berry Cave salamander abundance because the majority of documented populations are located within the urban growth boundary of metropolitan Knoxville, and Meades Quarry Cave houses the largest population known.

On the basis of the best scientific and commercial information available, we find that the petitioned action, to list the Berry Cave salamander under the Act is warranted. We will make a determination on the status of the species as endangered or threatened when we prepare a proposed listing determination. However, as explained in more detail below, an immediate proposal of a regulation implementing this action is precluded by higher priority listing actions, and progress is being made to add or remove qualified species from the Lists of Endangered and Threatened Wildlife and Plants.

**Emergency Listing**

We reviewed the available information to determine if the existing and foreseeable threats render the species at risk of extinction now such that issuing an emergency regulation temporarily listing the species in accordance with section 4(b)(7) of the Act is warranted. We determined that issuing an emergency regulation temporarily listing the species is not warranted at this time because recent studies have documented two new populations of Berry Cave salamanders (Aycock Spring and Christian caves) and have resulted in observations of robust populations at historical sites previously reported to be in decline (Miller and Niemiller 2008, p. 1). Furthermore, the threat to Berry Cave salamander populations from construction of the James White Parkway is being partially addressed by TDOT's proposal for a fully access-controlled facility and the design of alignment alternatives to purposefully avoid or minimize impacts to sinkholes that recharge the Meades Quarry Cave system (South Knoxville Boulevard EIS 2010, pp. 10, 43). However, if at any time we determine that issuing an emergency regulation temporarily listing the Berry Cave salamander is warranted, we will initiate the action at that time.

**Listing Priority Number**

The Service adopted guidelines on September 21, 1983 (48 FR 43098) to establish a rational system for utilizing available resources for the highest priority species when adding species to the Lists of Endangered or Threatened Wildlife and Plants or eclassifying species listed as threatened to endangered status. These guidelines, titled "Endangered and Threatened Species Listing and Recovery Priority Guidelines," address the immediacy and magnitude of threats, and the level of taxonomic distinctiveness by assigning priority in descending order to monotypic genera (genus with one species), full species, and subspecies (or equivalently, distinct population segments of vertebrates). Using these guidelines, we assign each candidate a listing priority number (LPN) of 1 to 12, depending on the magnitude of the threats (high or moderate to low), immediacy of threats (imminent or nonimminent), and taxonomic status of the species. The lower the LPN, the higher the listing priority (that is, a species with an LPN of 1 would have the highest listing priority). We assigned the Berry Cave salamander an LPN of 8 based on our finding that the species faces threats that are of moderate magnitude and are imminent. These threats include the present or threatened destruction, modification, or curtailment of its habitat or range, and the inadequacy of existing regulatory mechanisms. Our rationale for assigning the Berry Cave salamander a LPN of 8 is outlined below.

Under the Service's LPN guidelines, the magnitude of threat is the first criterion we look at when establishing a listing priority. The guidelines indicate that species with the highest magnitude of threat are those species facing the greatest threats to their continued existence. These species receive the highest listing priority. We consider the threats facing the Berry Cave salamander to be moderate in magnitude. Several of the threats to the species (roadway construction, development in proximity to populations, and impacts to water quality) occur across the majority of the species' range. Due to its limited geographic range within subterranean waters of the Tennessee and Clinch River systems, impacts to these systems could have a detrimental effect on Berry Cave salamander populations. Habitat degradation associated with residential, business, and commercial development has high potential to adversely affect Berry Cave salamander populations by impacting water quality. While water quality regulations such as the Clean Water Act and the Tennessee Water Quality Control Act are designed to protect aquatic systems, stream mitigation practices only provide for loss of linear feet of stream and do not consider water quality concerns or impacts to affected species. Six of the eight caves where the species has been documented are within Knoxville's urban boundary (Niemiller and Miller 2010, p. 2) and are highly susceptible to future development activities. While the threats facing the species are numerous and in some cases widespread, we decided they were of moderate, rather than high, magnitude because the salamander still occurs in several different cave systems, and existing populations appear stable. Nonetheless, intensification of these threats could threaten the long-term viability of the species.

Under our LPN guidelines, the second criterion we consider in assigning a listing priority is the immediacy of threats. This criterion is intended to ensure that the species that face actual, identifiable threats are given priority

over those for which threats are only potential or for those that are intrinsically vulnerable but are not known to be presently facing such threats. The threats are imminent because we have factual information that the threats are identifiable and ongoing, and that they often overlap or occur throughout most of the species' range. These actual, identifiable threats are covered in detail under the discussion of Factors A and D of this finding and currently include chronic lye leaching in the Meades Quarry Cave due to past quarrying activities, highway development and urban growth in Knox County, and water quality impacts despite existing State and Federal laws.

The third criterion in our LPN guidelines is intended to devote resources to those species representing highly distinctive or isolated gene pools as reflected by taxonomy. The Berry Cave salamander is a valid taxon at the species level, and therefore receives a higher priority than subspecies, but a lower priority than species in a monotypic genus.

In summary, the Berry Cave salamander faces imminent threats of moderate magnitude, and is a valid taxon at the species level. Thus, in accordance with our LPN guidelines, we have assigned the Berry Cave salamander an LPN of 8.

We will continue to monitor the threats to, and status of, the Berry Cave salamander on an annual basis, and should the magnitude or the imminence of the threats change, we will revisit our assessment of the LPN.

Work on a proposed listing determination for the Berry Cave salamander is precluded by work on higher priority listing actions with absolute statutory, court-ordered, or court-approved deadlines and on final listing determinations for those species that were proposed for listing with funds from Fiscal Year 2011. This work includes all the actions listed in the tables below under expeditious progress.

**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, $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 that 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" (House Report 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 some FYs since 2006, we have been able to use some of the critical habitat subcap funds to fund proposed listing determinations for high-priority candidate species. In other FYs, 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. At this time, for FY 2011, we do not know if we will be able to use some of the critical habitat subcap funds to fund proposed listing determinations.

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, set the limits on 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 Pub. L. 97–304 (Endangered Species Act Amendments of 1982), 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 2011, on March 2, 2011, Congress passed a continuing resolution which provides funding at the FY 2010 enacted level through March 18, 2011. Until Congress appropriates funds for FY 2011 at a different level, we will fund listing work based on the FY 2010 amount. Thus, at this time in FY 2011, the Service anticipates an appropriation of $22,103,000 for the listing program based on FY 2010 appropriations. Of that, the Service anticipates needing to dedicate $11,632,000 for determinations of critical habitat for already listed species. Also $500,000 is appropriated for foreign species listings under the Act. The Service thus has $9,971,000 available 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 FY 2010, the Service received many new petitions and a single petition to list 404 species. The receipt of petitions for a large number of species is consuming the Service's listing funding that is not dedicated to meeting court-ordered commitments. Absent some ability to balance effort among listing duties under existing funding levels, it is unlikely that the Service will be able to initiate any new listing determination for candidate species in FY 2011.

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, we used a portion of our funding to work on the actions described above for listing actions related to foreign species. In FY 2011, we anticipate using $1,500,000 for work on listing actions for foreign species which reduces funding available for domestic listing actions; however, currently only $500,000 has been allocated for this function. Although there are 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 2011 Allocation Table (part of our record).

For the above reasons, funding a proposed listing determination for the Berry Cave Salamander, which has an LPN of 8, is precluded by court-ordered and court-approved settlement agreements, listing actions with absolute statutory deadlines, and work on proposed listing determinations for those candidate species with a higher listing priority (*i.e.,* candidate species with LPNs of 1 to 7).

Based on our September 21, 1983, guidelines for assigning an LPN for each candidate species (48 FR 43098), we have a significant number of species with a LPN of 2. Using these guidelines, 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 on proposed and final listing rules for those 40 candidates, we apply the ranking criteria to the next group of candidates with an LPN 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, because 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.

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. (Although we do not discuss it in detail here, we are also 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. So far during FY 2011, we have completed one delisting rule.) Given the limited resources available for listing, we find that we are making expeditious progress in FY 2011 in the Listing Program. This progress included preparing and publishing the following determinations:

FY 2011 COMPLETED LISTING ACTIONS

| Publication date | Title | Actions | FR pages |
|---|---|---|---|
| 10/6/2010 | Endangered Status for the Altamaha Spinymussel and Designation of Critical Habitat. | Proposed Listing, Endangered | 75 FR 61664–61690 |
| 10/7/2010 | 12-month Finding on a Petition to list the Sacramento Splittail as Endangered or Threatened. | Notice of 12-month petition finding, Not warranted. | 75 FR 62070–62095 |
| 10/28/2010 | Endangered Status and Designation of Critical Habitat for Spikedace and Loach Minnow. | Proposed Listing, Endangered (uplisting). | 75 FR 66481–66552 |
| 11/2/2010 | 90-Day Finding on a Petition to List the Bay Springs Salamander as Endangered. | Notice of 90-day Petition Finding, Not substantial. | 75 FR 67341–67343 |
| 11/2/2010 | Determination of Endangered Status for the Georgia Pigtoe Mussel, Interrupted Rocksnail, and Rough Hornsnail and Designation of Critical Habitat. | Final Listing, Endangered | 75 FR 67511–67550 |
| 11/2/2010 | Listing the Rayed Bean and Snuffbox as Endangered | Proposed Listing, Endangered | 75 FR 67551–67583 |
| 11/4/2010 | 12-Month Finding on a Petition to List Cirsium wrightii (Wright's Marsh Thistle) as Endangered or Threatened. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 67925–67944 |
| 12/14/2010 | Endangered Status for Dunes Sagebrush Lizard | Proposed Listing, Endangered | 75 FR77801–77817 |
| 12/14/2010 | 12-month Finding on a Petition to List the North American Wolverine as Endangered or Threatened. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 78029–78061 |
| 12/14/2010 | 12-Month Finding on a Petition to List the Sonoran Population of the Desert Tortoise as Endangered or Threatened. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 78093–78146 |
| 12/15/2010 | 12-Month Finding on a Petition to List *Astragalus microcymbus* and *Astragalus schmolliae* as Endangered or Threatened. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 78513–78556 |
| 12/28/2010 | Listing Seven Brazilian Bird Species as Endangered Throughout Their Range. | Final Listing, Endangered | 75 FR 81793–81815 |
| 1/4/2011 | 90-Day Finding on a Petition to List the Red Knot subspecies *Calidris canutus roselaari* as Endangered. | Notice of 90-day Petition Finding, Not substantial. | 76 FR 304–311 |
| 1/19/2011 | Endangered Status for the Sheepnose and Spectaclecase Mussels. | Proposed Listing, Endangered | 76 FR 3392–3420 |
| 2/10/2011 | 12-Month Finding on a Petition to List the Pacific Walrus as Endangered or Threatened. | Notice of 12-month petition finding, Warranted but precluded. | 76 FR 7634–7679 |
| 2/17/2011 | 90-Day Finding on a Petition To List the Sand Verbena Moth as Endangered or Threatened. | Notice of 90-day Petition Finding, Substantial. | 76 FR 9309–9318 |
| 2/22/2011 | Determination of Threatened Status for the New Zealand-Australia Distinct Population Segment of the Southern Rockhopper Penguin. | Final Listing, Threatened | 76 FR 9681–9692 |
| 2/22/2011 | 12-Month Finding on a Petition to List *Solanum conocarpum* (marron bacora) as Endangered. | Notice of 12-month petition finding, Warranted but precluded. | 76 FR 9722–9733 |
| 2/23/2011 | 12-Month Finding on a Petition to List Thorne's Hairstreak Butterfly as Endangered. | Notice of 12-month petition finding, Not warranted. | 76 FR 991–10003 |
| 2/23/2011 | 12-Month Finding on a Petition to List *Astragalus hamiltonii, Penstemon flowersii, Eriogonum soredium, Lepidium ostleri,* and *Trifolium friscanum* as Endangered or Threatened. | Notice of 12-month petition finding, Warranted but precluded & Not Warranted. | 76 FR 10166–10203 |
| 2/24/2011 | 90-Day Finding on a Petition to List the Wild Plains Bison or Each of Four Distinct Population Segments as Threatened. | Notice of 90-day Petition Finding, Not substantial. | 76 FR 10299–10310 |
| 2/24/2011 | 90-Day Finding on a Petition to List the Unsilvered Fritillary Butterfly as Threatened or Endangered. | Notice of 90-day Petition Finding, Not substantial. | 76 FR 10310–10319 |
| 3/8/2011 | 12-Month Finding on a Petition to List the Mt. Charleston Blue Butterfly as Endangered or Threatened. | Notice of 12-month petition finding, Warranted but precluded. | 76 FR 12667–12683 |
| 3/8/2011 | 90-Day Finding on a Petition to List the Texas Kangaroo Rat as Endangered or Threatened. | Notice of 90-day Petition Finding, Substantial. | 76 FR 12683–12690 |
| 3/10/2011 | Initiation of Status Review for Longfin Smelt | Notice of Status Review | 76 FR 13121–31322 |

Our expeditious progress also includes work on listing actions that we funded in FY 2010 and FY 2011 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, when compared to preparing separate proposed rules for each of them in the future.

ACTIONS FUNDED IN FY 2010 AND FY 2011 BUT NOT YET COMPLETED

| Species | Action |
|---|---|
| **Actions Subject to Court Order/Settlement Agreement** | |
| Mountain plover [4] | Final listing determination. |
| Hermes copper butterfly [3] | 12-month petition finding. |
| 4 parrot species (military macaw, yellow-billed parrot, red-crowned parrot, scarlet macaw) [5] | 12-month petition finding. |
| 4 parrot species (blue-headed macaw, great green macaw, grey-cheeked parakeet, hyacinth macaw) [5] | 12-month petition finding. |
| 4 parrot species (crimson shining parrot, white cockatoo, Philippine cockatoo, yellow-crested cockatoo) [5] | 12-month petition finding. |
| Utah prairie dog (uplisting) | 90-day petition finding. |
| **Actions with Statutory Deadlines** | |
| Casey's june beetle | Final listing determination. |
| 6 Birds from Eurasia | 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) [4]. | Final listing determination. |
| Ozark hellbender [4] | Final listing determination. |
| Altamaha spinymussel [3] | Final listing determination. |
| 3 Colorado plants (*Ipomopsis polyantha* (Pagosa Skyrocket), *Penstemon debilis* (Parachute Beardtongue), and *Phacelia submutica* (DeBeque Phacelia)) [4]. | Final listing determination. |
| Salmon crested cockatoo | Final listing determination. |
| 6 Birds from Peru & Bolivia | Final listing determination. |
| Loggerhead sea turtle (assist National Marine Fisheries Service) [5] | Final listing determination. |
| 2 mussels (rayed bean (LPN = 2), snuffbox No LPN) [5] | Final listing determination. |
| CA golden trout [4] | 12-month petition finding. |
| Black-footed albatross | 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./ Proposed listing. |
| Dusky tree vole | 12-month petition finding. |
| 3 MT invertebrates (meltwater lednian stonefly (*Lednia tumana*), *Oreohelix* sp. 3, *Oreohelix* sp. 31) 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) [3] | 12-month petition finding. |
| Platte River caddisfly (from 206 species petition) [5] | 12-month petition finding. |
| Gopher tortoise—eastern population | 12-month petition finding. |
| Grand Canyon scorpion (from 475 species petition) | 12-month petition finding. |
| *Anacroneuria wipukupa* (a stonefly from 475 species petition) [4] | 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. |
| 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 [3] | 12-month petition finding. |
| Western gull-billed tern | 12-month petition finding. |
| Ozark chinquapin (*Castanea pumila* var. *ozarkensis*) [4] | 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. |
| Ashy storm-petrel [5] | 12-month petition finding. |
| Honduran emerald | 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. |
| 32 Pacific Northwest mollusks species (snails and slugs) [1] | 90-day petition finding. |
| 42 snail species (Nevada & Utah) | 90-day petition finding. |
| Peary caribou | 90-day petition finding. |
| Spring Mountains checkerspot butterfly | 90-day petition finding. |
| Spring pygmy sunfish | 90-day petition finding. |

ACTIONS FUNDED IN FY 2010 AND FY 2011 BUT NOT YET COMPLETED—Continued

| Species | Action |
|---|---|
| Bay skipper | 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 [4] | 90-day petition finding. |
| 404 Southeast species | 90-day petition finding. |
| Franklin's bumble bee [4] | 90-day petition finding. |
| 2 Idaho snowflies (straight snowfly & Idaho snowfly) [4] | 90-day petition finding. |
| American eel [4] | 90-day petition finding. |
| Gila monster (Utah population) [4] | 90-day petition finding. |
| Arapahoe snowfly [4] | 90-day petition finding. |
| Leona's little blue [4] | 90-day petition finding. |
| Aztec gilia [5] | 90-day petition finding. |
| White-tailed ptarmigan [5] | 90-day petition finding. |
| San Bernardino flying squirrel [5] | 90-day petition finding. |
| Bicknell's thrush [5] | 90-day petition finding. |
| Chimpanzee | 90-day petition finding. |
| Sonoran talussnail [5] | 90-day petition finding. |
| 2 AZ Sky Island plants (*Graptopetalum bartrami* & *Pectis imberbis*) [5] | 90-day petition finding. |
| I'iwi [5] | 90-day petition finding. |
| **High-Priority Listing Actions** | |
| 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. |
| 2 Arizona springsnails [2] (*Pyrgulopsis bernadina* (LPN = 2), *Pyrgulopsis trivialis* (LPN = 2)) | Proposed listing. |
| Chupadera springsnail [2] (*Pyrgulopsis chupaderae* (LPN = 2)) | Proposed listing. |
| 8 Gulf Coast 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)) [4]. | Proposed listing. |
| Umtanum buckwheat (LPN = 2) and white bluffs bladderpod (LPN = 9) [4] | Proposed listing. |
| Grotto sculpin (LPN = 2) [4] | Proposed listing. |
| 2 Arkansas mussels (Neosho mucket (LPN = 2) & Rabbitsfoot (LPN = 9)) [4] | Proposed listing. |
| Diamond darter (LPN = 2) [4] | Proposed listing. |
| Gunnison sage-grouse (LPN = 2) [4] | Proposed listing. |
| Coral Pink Sand Dunes Tiger Beetle (LPN = 2) [5] | Proposed listing. |
| Miami blue (LPN = 3) [3] | Proposed listing. |
| Lesser prairie chicken (LPN = 2) | Proposed listing. |
| 4 Texas salamanders (Austin blind salamander (LPN = 2), Salado salamander (LPN = 2), Georgetown salamander (LPN = 8), Jollyville Plateau (LPN = 8)) [3]. | Proposed listing. |
| 5 SW aquatics (Gonzales Spring Snail (LPN = 2), Diamond Y springsnail (LPN = 2), Phantom springsnail (LPN = 2), Phantom Cave snail (LPN = 2), Diminutive amphipod (LPN = 2)) [3]. | Proposed listing. |
| 2 Texas plants (Texas golden gladecress (*Leavenworthia texana*) (LPN = 2), Neches River rose-mallow (*Hibiscus dasycalyx*) (LPN = 2)) [3]. | Proposed listing. |
| 4 AZ plants (Acuna cactus (*Echinomastus erectocentrus* var. *acunensis*) (LPN = 3), Fickeisen plains cactus (*Pediocactus peeblesianus fickeiseniae*) (LPN = 3), Lemmon fleabane (*Erigeron lemmonii*) (LPN = 8), Gierisch mallow (*Sphaeralcea gierischii*) (LPN = 2)) [5]. | Proposed listing. |
| FL bonneted bat (LPN = 2) [3] | Proposed listing. |
| 3 Southern FL plants (Florida semaphore cactus (*Consolea corallicola*) (LPN = 2), shellmound applecactus (*Harrisia* (=*Cereus*) *aboriginum* (=*gracilis*)) (LPN = 2), Cape Sable thoroughwort (*Chromolaena frustrata*) (LPN = 2)) [5]. | Proposed listing. |
| 21 Big Island (HI) species [5] (includes 8 candidate species—5 plants & 3 animals; 4 with LPN = 2, 1 with LPN = 3, 1 with LPN = 4, 2 with LPN = 8). | Proposed listing. |
| 12 Puget Sound prairie species (9 subspecies of pocket gopher (*Thomomys mazama* ssp.) (LPN = 3), streaked horned lark (LPN = 3), Taylor's checkerspot (LPN = 3), Mardon skipper (LPN = 8)) [3]. | Proposed listing. |
| 2 TN River mussels (fluted kidneyshell (LPN = 2), slabside pearlymussel (LPN = 2) [5] | Proposed listing. |
| Jemez Mountain salamander (LPN = 2) [5] | 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 and FY 2011 funds.
[4] Funded with FY 2010 funds.
[5] Funded with FY 2011 funds.

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, these actions described above collectively constitute expeditious progress.

The Berry Cave salamander will be added to the list of candidate species upon publication of this 12-month finding. We will continue to monitor the status of this species as new information becomes available. This review will determine if a change in status is warranted, including the need to make prompt use of emergency listing procedures.

We intend that any proposed listing action for the Berry Cave salamander will be as accurate as possible. Therefore, we will continue to accept additional information and comments from all concerned governmental agencies, the scientific community, industry, or any other interested party concerning this finding.

### References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Tennessee Ecological Services Field Office (*see* **ADDRESSES** section).

### Authors

The primary authors of this notice are the staff members of the Tennessee Ecological Services Field Office.

### Authority

The authority for this section is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: March 8, 2011.

**Rowan W. Gould,**

*Acting Director, Fish and Wildlife Service.*

[FR Doc. 2011–6347 Filed 3–21–11; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 17

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 224

**[Docket No. 100104003–1195–02]**

**RIN 0648–AY49**

## Endangered and Threatened Species; Proposed Listing of Nine Distinct Population Segments of Loggerhead Sea Turtles as Endangered or Threatened

**AGENCIES:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce; United States Fish and Wildlife Service (USFWS), Interior.

**ACTION:** Proposed rule; 6-month extension of the deadline for a final listing decision.

**SUMMARY:** We (NMFS and USFWS; also collectively referred to as the Services) are extending the date by which a final determination will be made regarding the March 16, 2010, proposed rule to list nine Distinct Population Segments (DPS) of loggerhead sea turtles, *Caretta caretta,* as endangered or threatened under the Endangered Species Act of 1973, as amended (ESA). We are taking this action because substantial disagreement exists regarding the interpretation of the existing data on status and trends and its relevance to the assessment of risk of extinction to the Northwest Atlantic Ocean DPS of the loggerhead turtle. Additionally, considerable disagreement exists regarding the magnitude and immediacy of the fisheries bycatch threat and measures to reduce this threat to the Northwest Atlantic Ocean DPS of the loggerhead turtle. We are soliciting new information or analyses that will help clarify these issues. Comments previously submitted need not be resubmitted as they already have been incorporated into the public record and will be fully considered in the final rule. The Services believe that allowing an additional 6 months to evaluate and assess the best scientific and commercial data available would better inform our final determination on the listing status of the nine proposed DPSs of the loggerhead turtle.

**DATES:** All public comments must be received by April 11, 2011. A final determination on this listing action will be made no later than September 16, 2011.

**ADDRESSES:** You may submit comments, identified by the RIN 0648–AY49, by any of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal at *http://www.regulations.gov.*
- *Mail:* NMFS National Sea Turtle Coordinator, Attn: Loggerhead Proposed Listing Rule, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Room 13657, Silver Spring, MD 20910 or USFWS National Sea Turtle Coordinator, U.S. Fish and Wildlife Service, 7915 Baymeadows Way, Suite 200, Jacksonville, FL 32256.
- *Fax:* To the attention of NMFS National Sea Turtle Coordinator at 301–713–0376 or USFWS National Sea Turtle Coordinator at 904–731–3045.

*Instructions:* All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS and USFWS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only. The proposed rule and other materials relating to this proposal can be found on the NMFS Office of Protected Resources Web site at *http://www.nmfs.noaa.gov/pr/species/turtles/loggerhead.htm.*

**FOR FURTHER INFORMATION CONTACT:** Barbara Schroeder, NMFS (ph. 301–713–1401, fax 301–713–4060, e-mail *barbara.schroeder@noaa.gov*), Sandy MacPherson, USFWS (ph. 904–731–3336, fax 904–731–3045, e-mail *sandy_macpherson@fws.gov*), Marta Nammack, NMFS (ph. 301–713–1401, fax 301–713–4060, e-mail *marta.nammack@noaa.gov*), or Lorna Patrick, USFWS (ph. 850–215–7438, fax 850–763–2177, e-mail *lorna_patrick@fws.gov*). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, 24 hours a day, 7 days a week.

**SUPPLEMENTARY INFORMATION:**

## Background

We issued a final rule listing the loggerhead sea turtle as threatened throughout its worldwide range on July 28, 1978 (43 FR 32800). On July 12, 2007, we received a petition from Center for Biological Diversity and Turtle Island Restoration Network to list the "North Pacific populations of loggerhead sea turtle" as an endangered species under the ESA. NMFS published a notice in the **Federal Register** on November 16, 2007 (72 FR 64585), concluding that the petition presented substantial scientific information indicating that the petitioned action may be warranted. Also, on November 15, 2007, we received a petition from Center for Biological Diversity and Oceana to list the "Western North Atlantic populations of loggerhead sea turtle" as an endangered species under the ESA. NMFS published a notice in the **Federal Register** on March 5, 2008 (73 FR 11849), concluding that the petition presented substantial scientific information indicating that the petitioned action may be warranted.

On March 12, 2009, the petitioners (Center for Biological Diversity, Turtle Island Restoration Network, and Oceana) sent a 60-day notice of intent to sue to the Services for failure to make 12-month findings on the petitions. The statutory deadlines for the 12-month findings were July 16, 2008, for the North Pacific petition and November 16, 2008, for the Northwest Atlantic petition. On May 28, 2009, the petitioners filed a Complaint for Declaratory and Injunctive Relief to compel the Services to complete the 12-month findings. On October 8, 2009, the petitioners and the Services reached a settlement in which the Services agreed to submit to the **Federal Register** a 12-month finding on the two petitions on or before February 19, 2010. On February 16, 2010, the United States District Court for the Northern District of California modified the February 19, 2010, deadline to March 8, 2010.

On March 16, 2010, the Services announced 12-month findings on the petitions to list the North Pacific populations and the Northwest Atlantic populations of the loggerhead sea turtle as DPSs with endangered status and included a proposed rule to designate nine loggerhead DPSs worldwide, seven as endangered (North Pacific Ocean DPS, South Pacific Ocean DPS, Northwest Atlantic Ocean DPS, Northeast Atlantic Ocean DPS, Mediterranean Sea DPS, North Indian Ocean DPS, and Southeast Indo-Pacific Ocean DPS) and two as threatened (Southwest Indian Ocean DPS and South Atlantic Ocean DPS).

## Extension of Final Listing Determination

The ESA, section 4(b)(6), requires that we take one of three actions within 1 year of a proposed listing: (1) Finalize the proposed listing; (2) withdraw the proposed listing; or (3) extend the final determination by not more than 6 months, if there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination, for the purposes of soliciting additional data.

The Services proposed to list the Northwest Atlantic Ocean DPS of the loggerhead sea turtle as endangered. However, in preparing the final rule, there was substantial disagreement regarding the interpretation of the existing data on status and trends and its relevance to the assessment of extinction risk to the Northwest Atlantic Ocean DPS. There was also considerable disagreement regarding the magnitude and immediacy of the fisheries bycatch threat and measures to reduce this threat to the Northwest Atlantic Ocean DPS. The Services need to fully evaluate and assess the best scientific and commercial data available and ensure consistent interpretation of data and application of statutory standards for all of the nine proposed DPSs.

In consideration of the disagreement surrounding the population status and the magnitude and immediacy of the threats for the proposed Northwest Atlantic Ocean DPS of the loggerhead turtle, we extend the timeline for the final determination for an additional 6 months (until September 16, 2011) to resolve the scientific disagreement.

## Information Solicited

We intend that any final action resulting from this proposal will be as accurate as possible and based on the best scientific and commercial data available. We are specifically soliciting new information or analyses from the public about the proposed Northwest Atlantic Ocean DPS regarding: (1) The relevance of the population size to the stability and resilience of the DPS; (2) the immediacy of the threats and risks, particularly the bycatch of loggerhead sea turtles in commercial fisheries, to the DPS; and (3) the timeframe over which the threats or risks may affect the DPS. In addition, we are seeking information on the consistency of our application of statutory standards for all of the nine proposed DPSs.

Previously submitted written comments on this proposal need not be resubmitted. In making any final decision on the proposed action, we will take into consideration the comments and any additional information we receive. We request that all data, information, and comments be accompanied by supporting documentation such as maps, bibliographic references, or reprints of pertinent publications.

**Authority:** 16 U.S.C. 1531 *et seq.*

Dated: March 16, 2011.

**Eric C. Schwaab,**

*Assistant Administrator for Fisheries, National Marine Fisheries Service.*

**Gregory E. Siekaniec,**

*Acting Director, U.S. Fish and Wildlife Service.*

[FR Doc. 2011–6732 Filed 3–17–11; 8:45 am]

BILLING CODE 3510–22–P

# Notices

Federal Register
Vol. 76, No. 55
Tuesday, March 22, 2011

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–2010–0122]**

### Notice of Request for Extension of Approval of an Information Collection; Karnal Bunt; Importation of Wheat and Related Articles

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

**ACTION:** Extension of approval of an information collection; comment request.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with regulations for the importation of wheat and related articles from regions affected with Karnal bunt.

**DATES:** We will consider all comments that we receive on or before May 23, 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-2010-0122* 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–2010–0122, 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–2010–0122.

*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:** For information on regulations for the importation of wheat and related articles from regions affected with Karnal bunt, contact Mr. William Aley, Senior Import Specialist, Risk Management and Plants for Planting Policy, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1231; (301) 734–5057. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

**SUPPLEMENTARY INFORMATION:**

*Title:* Karnal Bunt; Importation of Wheat and Related Articles.

*OMB Number:* 0579–0240.

*Type of Request:* Extension of approval of an information collection.

*Abstract:* As authorized by the Plant Protection Act (7 U.S.C. 7701 *et seq.*) (PPA), the Secretary of Agriculture may prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of any plant, plant product, biological control organism, noxious weed, means of conveyance, or other article if the Secretary determines that the prohibition or restriction is necessary to prevent a plant pest or noxious weed from being introduced into or disseminated within the United States. This authority has been delegated to the Animal and Plant Health Inspection Service (APHIS), which administers regulations to implement the PPA.

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 smut fungus *Tilletia indica* (Mitra) Mundkhur and is spread by spores, primarily through the movement of infected seed. Karnal bunt is found in Afghanistan, India, Iraq, Pakistan, and portions of Mexico and the United States.

To prevent the introduction and spread of various wheat diseases, including Karnal bunt, APHIS's regulations in Subpart—Wheat Diseases (7 CFR 319.59–1 through 319.59–4) prohibit the importation of wheat seed, straw, and other products into the United States from regions affected with Karnal bunt.

The regulations require that certain regulated articles imported from Karnal bunt-free areas within regions regulated for Karnal bunt be accompanied by a phytosanitary certificate that must be completed by an official of the national plant protection organization of the region of origin. The certificate must include a declaration stating that the regulated articles originated in areas where Karnal bunt is not known to occur, as attested to either by survey results or by testing for bunted kernals or spores.

We are asking the Office of Management and Budget (OMB) to approve our use of this information collection activity for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate 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;

(2) Evaluate the accuracy of our estimate of the burden of the 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, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.,* permitting electronic submission of responses.

*Estimate of burden:* The public reporting burden for this collection of information is estimated to average 1.2 hours per response.

*Respondents:* U.S. importers/exporters of wheat, foreign Federal officials.

*Estimated annual number of respondents:* 500.

*Estimated annual number of responses per respondent:* 1.

*Estimated annual number of responses:* 500.

*Estimated total annual burden on respondents:* 600 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 16th day of March 2011.

**Kevin Shea,**

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

[FR Doc. 2011–6604 Filed 3–21–11; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2010–0115]**

### Availability of an Environmental Assessment and Finding of No Significant Impact for a Biological Control Agent for Air Potato

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

**ACTION:** Notice.

**SUMMARY:** We are advising the public that an environmental assessment and finding of no significant impact have been prepared by the Animal and Plant Health Inspection Service relative to the control of air potato (*Dioscorea bulbifera*). Based on its finding of no significant impact, the Animal and Plant Health Inspection Service has determined that an environmental impact statement need not be prepared.

**FOR FURTHER INFORMATION CONTACT:** Dr. Shirley Wager-Page, Chief, Pest Permitting Branch, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1237; (301) 734–8453.

**SUPPLEMENTARY INFORMATION:**

#### Background

The Animal and Plant Health Inspection Service (APHIS) is proposing to issue permits for the release of an insect, *Liliioceris cheni,* into the continental United States for use as a biological control agent to reduce the severity of air potato (*Dioscorea bulbifera*) infestations.

On January 19, 2011, we published in the **Federal Register** (76 FR 3076–3077, Docket No. APHIS–2010–0115) a notice [1] in which we announced the availability, for public review and comment, of an environmental assessment (EA) that examined the potential environmental impacts associated with the proposed release of this biological control agent into the continental United States.

We solicited comments on the EA for 30 days ending February 18, 2011. We received one comment by that date, from a State agricultural agency. The commenter, who supported the proposed release, asked whether, when the shipments of *L. cheni* were imported, the identity of the specimens was confirmed and if voucher specimens had been established. The commenter was concerned that the validity of the host specificity testing would be called into question if the identity of the specimens was not firmly established. We have notified the commenter that the identity of the specimens was confirmed at the time of their importation and that voucher specimens have been set aside.

In this document, we are advising the public of our finding of no significant impact (FONSI) regarding the release of *L. cheni,* into the continental United States for use as a biological control agent to reduce the severity of air potato (*Dioscorea bulbifera*) infestations. The finding, which is based on the EA, reflects our determination that release of this biological control agent will not have a significant impact on the quality of the human environment.

The EA and FONSI may be viewed on the Regulations.gov Web site (see footnote 1). Copies of the EA and FONSI are also available for public inspection at USDA, room 1141, South Building, 14th Street and Independence Avenue, SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect copies are requested to call ahead on (202) 690–2817 to facilitate entry into the reading room. In addition, copies may be obtained by calling or writing to the individual listed under **FOR FURTHER INFORMATION CONTACT**.

The EA and FONSI have been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Done in Washington, DC, this 16th day of March 2011.

**Kevin Shea,**

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

[FR Doc. 2011–6605 Filed 3–21–11; 8:45 am]

**BILLING CODE 3410–34–P**

[1] To view the notice, EA, and FONSI go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS–2010–0115.*

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Lake Tahoe Basin Federal Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Lake Tahoe Federal Advisory Committee (LTFAC) will hold meetings on March 31, 2011, April 6, 2011, and April 19, 2011 at the Lake Tahoe Basin Management Unit, 35 College Drive, South Lake Tahoe, CA 96150. This Committee, established by the Secretary of Agriculture on December 15, 1998 (64 FR 2876), is chartered to provide advice to the Secretary on implementing the terms of the Federal Interagency Partnership on the Lake Tahoe Region and other matters raised by the Secretary.

**DATES:** The meetings will be held March 31, 2011 beginning at 10 a.m. and ending at 4 p.m. and April 6, 2011, beginning at 10 a.m. and ending at 4 p.m. and April 19, 2011 beginning at 10 a.m. and ending at 4 p.m.

**ADDRESSES:** The meetings will be held at the Lake Tahoe Basin Management Unit, 35 College Drive, South Lake Tahoe, CA 96150.

*For Further Information or to Request an Accommodation (one week prior to meeting date) Contact:* Arla Hains, Lake Tahoe Basin Management Unit, Forest Service, 35 College Drive, South Lake Tahoe, CA 96150, (530) 543–2773.

**SUPPLEMENTARY INFORMATION:** Items to be covered on the agenda on March 31, 2011: (1) Tahoe Working Group presentation on the Southern Nevada Public Management Act (SNPLMA) Round 12 capital project nominations and science themes, and (2) public comment. Items to be covered on the agenda on April 6 include: (1) Follow-up presentations on the SNPLMA Round 12 capital project nominations and science themes, and (2) public comments. Items to be covered on the agenda on April 9 include (1) LTFAC SNPLMA Round 12 preliminary recommendations for capital projects and science themes, and (2) public comment.

All Lake Tahoe Basin Federal Advisory Committee meetings are open to the public. Interested citizens are encouraged to attend at the above address. Issues may be brought to the attention of the Committee during the open public comment period at the meeting or by filing written statements with the secretary for the Committee before or after the meeting. Please refer any written comments to the Lake Tahoe Basin Management Unit at the contact address stated above.

This **Federal Register** notice will be published less than 15 calendar days based on these exceptional circumstances: (1) The 2011 LTFAC has only recently received a preliminary confirmation (February 1, 2011); and (2) there will be timely meeting notification through the LTBMU Web site at *http://www.fs.fed.us/r5/ltbmu/local/ltfac/.*

Dated: March 16, 2011.

**Michael LeFevre,**

*Acting Forest Supervisor.*

[FR Doc. 2011–6629 Filed 3–21–11; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF AGRICULTURE

### Grain Inspection, Packers and Stockyards Administration

### Designation for the Owensboro, KY; Bloomington, IL; Iowa Falls, IA; Casa Grande, AZ; Fargo, ND; Grand Forks, ND; and Plainview, TX Areas

**AGENCY:** Grain Inspection, Packers and Stockyards Administration, USDA.

**ACTION:** Notice.

**SUMMARY:** GIPSA is announcing the designation of the following organizations to provide official services under the United States Grain Standards Act, as amended (USGSA): J. W. Barton Grain Inspection Service, Inc. (Barton); Central Illinois Grain Inspection, Inc. (Central Illinois); Central Iowa Grain Inspection Service, Inc. (Central Iowa); Farwell Commodity and Grain Services, Inc. (Farwell Southwest); North Dakota Grain Inspection Service, Inc. (North Dakota); Northern Plains Grain Inspection Service, Inc. (Northern Plains); and Plainview Grain Inspection and Weighing Service, Inc. (Plainview).

**DATES:** *Effective Date:* April 1, 2011.

**ADDRESSES:** Karen W. Guagliardo, Branch Chief, Review Branch, Compliance Division, GIPSA, USDA, STOP 3604, Room 1647–S, 1400 Independence Avenue, SW., Washington, DC 20250–3604.

**FOR FURTHER INFORMATION CONTACT:** Karen W. Guagliardo, 202–720–8262 or *Karen.W.Guagliardo@usda.gov.*

*Read Applications:* All applications and comments will be available for public inspection at the office above during regular business hours (7 CFR 1.27(c)).

**SUPPLEMENTARY INFORMATION:** In the August 30, 2010, **Federal Register** (75 FR 52925), GIPSA requested applications for designation to provide official services in the geographic areas presently serviced by the agencies named above. Applications were due by September 29, 2010.

Barton, Central Illinois, Central Iowa, Farwell Southwest, North Dakota, Northern Plains, and Plainview were the sole applicants for designations to provide official services in these areas. As a result, GIPSA did not ask for additional comments.

GIPSA evaluated all available information regarding the designation criteria in section 7(f)(l) of the USGSA (7 U.S.C. 79(f)) and determined that Barton, Central Illinois, Central Iowa, Farwell Southwest, North Dakota, Northern Plains, and Plainview are qualified to provide official services in the geographic areas specified in the August 30, 2010, **Federal Register** for which they applied. These designation actions to provide official services in the specified areas are effective April 1, 2011 and will terminate on March 31, 2014.

Interested persons may obtain official services by contacting these agencies at the following telephone numbers:

| Official agency | Headquarters location and telephone | Designation start | Designation end |
|---|---|---|---|
| Barton | Owensboro, KY (270) 683–0616 | 4/1/2011 | 3/31/2014 |
| Central Illinois | Bloomington, IL (309) 827–7121 | 4/1/2011 | 3/31/2014 |
| Central Iowa | Iowa Falls, IA (641) 648–3467 Additional Location: Alden, IA. | 4/1/2011 | 3/31/2014 |
| Farwell Southwest | Farwell, TX (520) 421–1027 | 4/1/2011 | 3/31/2014 |
| North Dakota | Fargo, ND (701) 293–7420 Additional Locations: Taylor, ND; Ayr, ND; Teutopolis, IL; Cahokia, IL; Wayne City, IL; Enderlin, ND; Hillsboro, ND. | 4/1/2011 | 3/31/2014 |
| Northern Plains | Grand Forks, ND (701) 772–2414 | 4/1/2011 | 3/31/2014 |
| Plainview | Plainview, TX (806) 893–1364 | 4/1/2011 | 3/31/2014 |

Section 7(f)(1) of the USGSA authorizes GIPSA's Administrator to designate a qualified applicant to provide official services in a specified area after determining that the applicant is better able than any other applicant to provide such official services (7 U.S.C. 79 (f)(1)).

Under section 7(g)(1) of the USGSA, designations of official agencies are effective for no longer than 3 years unless terminated by the Secretary; however, designations may be renewed according to the criteria and procedures prescribed in section 7(f) of the Act.

**Authority:** 7 U.S.C. 71—87k.

**J. Dudley Butler,**

*Administrator, Grain Inspection, Packers and Stockyards Administration.*

[FR Doc. 2011–6592 Filed 3–21–11; 8:45 am]

**BILLING CODE 3410–KD–P**

## DEPARTMENT OF AGRICULTURE

### Grain Inspection, Packers and Stockyards Administration

### Opportunity for Designation in the Aberdeen, SD; Decatur, IL; Hastings, NE; Fulton, IL; the State of Missouri, and the State of South Carolina Areas; Request for Comments on the Official Agencies Servicing These Areas

**AGENCY:** Grain Inspection, Packers and Stockyards Administration, USDA.

**ACTION:** Notice.

**SUMMARY:** The designations of the official agencies listed below will end on September 30, 2011. We are asking persons or governmental agencies interested in providing official services in the areas presently served by these agencies to submit an application for designation. In addition, we are asking for comments on the quality of services provided by the following designated agencies: Aberdeen Grain Inspection, Inc. (Aberdeen); Decatur Grain Inspection, Inc. (Decatur); Hastings Grain Inspection, Inc. (Hastings); John R. McCrea Agency, Inc. (McCrea); Missouri Department of Agriculture (Missouri); and South Carolina Department of Agriculture (South Carolina).

**DATES:** Applications and comments must be received by April 21, 2011.

**ADDRESSES:** Submit applications and comments concerning this notice using any of the following methods:

- *Applying for Designation on the Internet:* Use FGISonline (*https://fgis.gipsa.usda.gov/default_home_FGIS.aspx*) and then click on the Delegations/Designations and Export Registrations (DDR) link. You will need to obtain an FGISonline customer number and USDA eAuthentication username and password prior to applying.
- *Submit Comments Using the Internet:* Go to Regulations.gov (*http://www.regulations.gov*). Instructions for submitting and reading comments are detailed on the site.
- *Hand Delivery/Courier Address:* Karen W. Guagliardo, Review Branch Chief, Compliance Division, GIPSA, USDA, Room 1647–S, 1400 Independence Avenue, SW., Washington, DC 20250.
- *Mail:* Karen W. Guagliardo, Review Branch Chief, Compliance Division, GIPSA, USDA, STOP 3604, 1400 Independence Avenue, SW., Washington, DC 20250–3604.
- *Fax:* Karen W. Guagliardo, 202–690–2755.
- *E-mail: Karen.W.Guagliardo@usda.gov.*

READ APPLICATIONS AND COMMENTS: All applications and comments will be available for public inspection at the office above during regular business hours (7 CFR 1.27(c)).

**FOR FURTHER INFORMATION CONTACT:** Karen W. Guagliardo, 202–720–8262 or *Karen.W.Guagliardo@usda.gov.*

**SUPPLEMENTARY INFORMATION:** Section 7(f)(1) of the United States Grain Standards Act (USGSA) (7 U.S.C. 71–87k) authorizes GIPSA's Administrator to designate a qualified applicant to provide official services in a specified area after determining that the applicant is better able than any other applicant to provide such official services. Under section 7(g)(1) of the USGSA, designations of official agencies are effective for 3 years unless terminated by the Secretary, but may be renewed according to the criteria and procedures prescribed in section 7(f) of the Act.

*Areas Open for Designation:*

**Aberdeen**

Pursuant to Section 7(f)(2) of the Act, the following geographic areas in the States of North Dakota and South Dakota are assigned to this official agency:

- Bounded on the North by U.S. Route 12 east to State Route 22; State Route 22 north to the Burlington-Northern (BN) line; the Burlington-Northern (BN) line east to State Route 21; State Route 21 east to State Route 49; State Route 49 south to the North Dakota-South Dakota State line; the North Dakota-South Dakota State line east to U.S. Route 83; U.S. Route 83 north to State Route 13; State Route 13 east and north to McIntosh County; the northern McIntosh County line east to Dickey County; the northern Dickey County line east to U.S. Route 281; U.S. Route 281 south to the North Dakota-South Dakota State line; the North Dakota-South Dakota State line east;
- Bounded on the East by the eastern South Dakota State line (the Big Sioux River) to A54B;
- Bounded on the South by A54B west to State Route 11; State Route 11 north to State Route 44 (U.S. 18); State Route 44 west to the Missouri River; the Missouri River south-southeast to the South Dakota State line; the southern South Dakota State line west; and
- Bounded on the West by the western South Dakota State line north; the western North Dakota State line north to U.S. Route 12.

**Decatur**

Pursuant to Section 7(f)(2) of the Act, the following geographic areas in the State of Illinois are assigned to this official agency:

- Bounded on the North by the northern and eastern DeWitt County lines; the eastern Macon County line south to Interstate 72; Interstate 72 northeast to the eastern Piatt County line;
- Bounded on the East by the eastern Piatt, Moultrie, and Shelby County lines;
- Bounded on the South by the southern Shelby County line; a straight line running along the southern Montgomery County line west to State Route 16 to a point approximately one mile northeast of Irving; and
- Bounded on the West by a straight line from this point northeast to Stonington on State Route 48; a straight line from Stonington northwest to Elkhart on Interstate 55; a straight line from Elkhart northeast to the west side of Beason on State Route 10; State Route 10 east to DeWitt County; the western DeWitt County line.

Decatur's assigned geographic area does not include the following grain elevators inside Decatur's area, which have been and will continue to be serviced by the following official agency: Champaign-Danville Grain Inspection Departments, Inc.: Moultrie Grain Association, Cadwell, Moultrie County; Tabor Grain Company (three elevators), Farmer City, DeWitt County; and Topflight Grain Company, Monticello, Piatt County.

**Hastings**

Pursuant to Section 7(f)(2) of the Act, the following geographic areas in the State of Nebraska are assigned to this official agency:

- Bounded on the North by the northern Nebraska State line from the western Sioux County line east to the eastern Knox County line;
- Bounded on the East by the eastern and southern Knox County lines; the eastern Antelope County line; the northern Madison County line east to U.S. Route 81; U.S. Route 81 south to the southern Madison County line; the southern Madison County line; the eastern Boone, Nance, and Merrick County lines; the Platte River southwest; the eastern Hamilton County line; the northern and eastern Fillmore County lines; the southern Fillmore County line west to U.S. Route 81; U.S. Route 81 south to State Highway 8; State Highway 8 west to the County Road 1 mile west of U.S. Route 81; the County Road south to the southern Nebraska State line;
- Bounded on the South by the southern Nebraska State line, from the County Road 1 mile west of U.S. Route 81, west to the western Dundy County line; and
- Bounded on the West by the western Dundy, Chase, Perkins, and Keith County lines; the southern and western Garden County lines; the southern Morrill County line west to U.S. Route 385; U.S. Route 385 north to the southern Box Butte County line; the southern and western Sioux County lines north to the northern Nebraska State line.

The following grain elevators, located outside of the above contiguous

geographic area, are part of this geographic area assignment: Farmers Coop, and Big Springs Elevator, both in Big Springs, Deuel County (located inside Kansas Grain Inspection Service, Inc.'s area); and Huskers Cooperative Grain Company, Columbus, Platte County (located inside Fremont Grain Inspection Department, Inc.'s, area).

**McCrea**

Pursuant to Section 7(f)(2) of the Act, the following geographic areas in the States of Illinois and Iowa are assigned to this official agency:

- Carroll and Whiteside Counties, Illinois and
- Clinton and Jackson Counties, Iowa.

**Missouri**

Pursuant to Section 7(f)(2) of the Act, the entire State of Missouri is assigned to this official agency.

**South Carolina**

Pursuant to Section 7(f)(2) of the Act, the entire State of South Carolina, except those export port locations within the State, which are serviced by GIPSA, is assigned to this official agency.

**Opportunity for Designation**

Interested persons or governmental agencies may apply for designation to provide official services in the geographic areas specified above under the provisions of section 7(f) of the USGSA and 7 CFR 800.196(d). Designation in the specified geographic areas is for the period beginning October 1, 2011, and ending September 30, 2014. To apply for designation or for more information, contact Karen W. Guagliardo at the address listed above or visit GIPSA's Web site at *http://www.gipsa.usda.gov.*

**Request for Comments**

We are publishing this notice to provide interested persons the opportunity to comment on the quality of services provided by the Aberdeen, Decatur, Hastings, McCrea, Missouri, and South Carolina official agencies. In the designation process, we are particularly interested in receiving comments citing reasons and pertinent data supporting or objecting to the designation of the applicants. Submit all comments to Karen W. Guagliardo at the above address or at *http://www.regulations.gov.*

We consider applications, comments, and other available information when determining which applicants will be designated.

**Authority:** 7 U.S.C. 71–87k.

**J. Dudley Butler,**

*Administrator, Grain Inspection, Packers and Stockyards Administration.*

[FR Doc. 2011–6589 Filed 3–21–11; 8:45 am]

**BILLING CODE 3410–KD–P**

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

*Agency:* National Oceanic and Atmospheric Administration (NOAA).

*Title:* Atlantic Sea Scallop Fishery Management Plan Data Collection.

*OMB Control Number:* 0648–0491.

*Form Number(s):* None.

*Type of Request:* Regular submission (revision and renewal of a current information collection).

*Number of Respondents:* 783.

*Average Hours per Response:* Trip declaration, powerdown notification, trip termination, compensation trip identification, daily catch reports and temporary individual fishing quota (IFQ) transfers, 2 minutes; prelanding reports and ownership cap forms, 5 minutes; broken trip adjustments and permanent IFQ transfers, 10 minutes; trip exchanges, 15 minutes; replacement/upgrade and confirmation of permit history forms, 3 hours; cost recovery payments, 2 hours; sector proposals, 300 hours; sector operation plans, 200 hours.

*Burden Hours:* 2,804.

*Needs and Uses:* This request is for a revision and renewal of a currently approved information collection.

National Marine Fisheries Service (NMFS) Northeast Region manages the Atlantic sea scallop (scallop) fishery of the Exclusive Economic Zone (EEZ) off the East Coast under the Atlantic Sea Scallop Fishery Management Plan (FMP). The regulations implementing the FMP are at 50 CFR part 648. This collection includes the following reporting requirements for scallop vessel owners, operators, and fishery participants: Vessel monitoring system (VMS) trip declarations for all scallop vessels, including powerdown declarations; notification of access area trip termination for limited access scallop vessels; submission of access area compensation trip identification; submission of broken trip adjustment and access area trip exchange forms; VMS purchase and installation for individuals that purchase a federally permitted scallop vessel; submission of ownership cap forms for individual fishing quota (IFQ) scallop vessels; submission of vessel replacement, upgrade and permit history applications for IFQ, Northern Gulf of Maine (NGOM), and Incidental Catch (IC) scallop vessels; submission of VMS pre-landing notification form by IFQ vessels; enrollment into the state waters exemption program; submission of requests for IFQ transfers; payment of cost recovery bills for IFQ vessels; sector proposals for IFQ vessels and industry participants; sector operations plans for approved sector proposals.

*Affected Public:* Business or other for-profit organizations.

*Frequency:* Daily, on occasion and annually.

*Respondent's Obligation:* Mandatory.

*OMB Desk Officer:* *OIRA_Submission@omb.eop.gov.*

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: March 17, 2011.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2011–6647 Filed 3–21–11; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

*Agency:* Bureau of Industry and Security.

*Title:* Technical Data Letter of Explanation.

*OMB Control Number:* 0694–0047.

*Form Number(s):* N/A.

*Type of Request:* Regular submission (extension of a currently approved information collection).

*Burden Hours:* 5,332.

*Number of Respondents:* 3,497.

*Average Hours per Response:* 30 minutes to 2 hours.

*Needs and Uses:* The technical data letters of explanation will assure the Bureau of Industry and Security that U.S.-origin technical data will be exported only for authorized end-uses, users and destinations. The information contained in the letters describes the transaction and fixes the scope of technology to be exported, the parties to the transaction, their roles, the purpose for the export, and the methods authorized to be used in exporting the technology. The letters also place the foreign consignee on notice that the technical data is subject to U.S. export controls and may only be re-exported in accordance with U.S. law.

*Affected Public:* Businesses or other for-profit organizations.

*Frequency:* On occasion.

*Respondent's Obligation:* Required to obtain benefits.

*OMB Desk Officer:* Jasmeet Seehra, (202) 395–3123.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov).*

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Jasmeet Seehra, OMB Desk Officer, by e-mail to *Jasmeet_K._Seehra@omb.eop.gov,* or by fax to (202) 395–5167.

Dated: March 17, 2011.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2011–6715 Filed 3–21–11; 8:45 am]

**BILLING CODE 3510–33–P**

## DEPARTMENT OF COMMERCE

### Office of the Secretary

### Proposed Information Collection; Comment Request; Complaint of Discrimination Based on Sexual Orientation Against the U.S. Department of Commerce

**AGENCY:** Office of the Secretary, Office of Civil Rights.

**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 May 23, 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(s) and instructions should be directed to Kathryn Anderson, 202–482–3680, or *KAnderson@doc.gov*.

**SUPPLEMENTARY INFORMATION:**

#### I. Abstract

Pursuant to Executive Order 11478 and Department of Commerce Administrative Order (DAO) 215–11, an employee or applicant for employment with the Department of Commerce who alleges that he or she has been subjected to discriminatory treatment based on sexual orientation by the Department of Commerce or one of its subagencies, must submit a signed statement that is sufficiently precise to identify the actions or practices that form the basis of the complaint.

The complainant is also required to provide an address and phone number where the complainant or his or her representative may be contacted. Through use of this standardized form (CD–545), the Office of Civil Rights proposes to collect the information required by the Executive Order and DAO in a uniform manner that will increase the efficiency of complaint processing and trend analyses of complaint activity.

#### II. Method of Collection

A paper form, signed by the complainant or his/her designated representative, must be submitted by mail or delivery service, in person, or by facsimile transmission.

#### III. Data

*OMB Control Number:* 0690–0024.

*Form Number:* CD–545.

*Type of Review:* Regular submission (extension of a currently approved information collection).

*Affected Public:* Individuals or households.

*Estimated Number of Respondents:* 20.

*Estimated Time per Response:* 30 minutes.

*Estimated Total Annual Burden Hours:* 10.

*Estimated Total Annual Cost to Public:* $78.

#### 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: March 16, 2011.

**Glenna Mickelson,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2011–6612 Filed 3–21–11; 8:45 am]

**BILLING CODE 3510–BP–P**

## DEPARTMENT OF COMMERCE

### Census Bureau

### Proposed Information Collection; Comment Request; Annual Wholesale Trade Survey

**AGENCY:** U.S. Census Bureau, 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, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** To ensure consideration, written comments must be submitted on or before May 23, 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(s) and instructions should be directed to John Miller, U.S. Census Bureau, Room 8K081, Washington, DC 20233–6500, (301) 763–2758.

**SUPPLEMENTARY INFORMATION:**

**I. Abstract**

The Annual Wholesale Trade Survey (AWTS) covers employer firms with establishments located in the United States and classified in wholesale trade as defined by the North American Industry Classification System (NAICS). This sector comprises two main types of wholesalers: (1) Merchant wholesalers that sell goods on their own account (including sales offices and sales branches, except retail stores, maintained by manufacturing, refining, or mining enterprises apart from their plants or mines for the purpose of marketing their products) and (2) business to business electronic markets, agents, and brokers that arrange sales and purchases for others generally for a commission or fee.

Firms are selected for this survey using a stratified random sample where strata are defined by industry and annual sales size. The sample, consisting of approximately 7,600 wholesale businesses, is selected from the Business Register, which contains all Employer Identification Numbers (EINs) and listed establishment locations. The sample is updated quarterly to reflect employer "births" and "deaths" by adding new employer businesses identified in the Business and Professional Classification Survey and deleting firms and EINs when it is determined they are no longer active.

Respondents are separated into three classifications: (1) Merchant wholesale establishments, excluding manufacturers' sales branches and offices; (2) manufacturers' sales branches and offices; and (3) agents, brokers, and business to business electronic markets. The first classification is asked to provide sales, e-commerce, inventories, method of inventory valuation, inventories held outside the United States, purchases, and operating expenses. The second classification is asked to provide sales, e-commerce, inventories, method of inventory valuation, inventories held outside the United States, and operating expenses. The third classification is asked to provide commissions, sales on their own account, and operating expenses. These data are collected to provide a sound statistical basis for the formation of policy by various government agencies. These data are used to satisfy a variety of public and business needs such as economic market analysis, company performance, and forecasting future demands. Results will be available, at the United States summary level, for selected wholesale industries approximately fourteen months after the end of the reference year.

A new sample will be introduced with the 2011 AWTS. It is expected that approximately 60–70% of the companies that are asked to report will be doing so for the first time (and, consequently, 60–70% of the old sample will no longer be asked to report). In order to link estimates from the new and prior samples, we will be asking companies to provide data for 2011 and 2010. The 2012 AWTS and subsequent years will request one year of data until a new sample is once again introduced.

An additional change will occur with the 2012 AWTS. We will request data on detailed operating expenses that were previously requested under a separate supplemental mailing (conducted every 5 years). The last supplemental mailing was conducted in conjunction with the 2007 AWTS under OMB No. 0607–0942. While the wholesale portion of that program will be collapsed into the AWTS, we will continue to ask only the additional detailed expense questions every 5 years. These detailed expense questions are only applicable to the merchant wholesale establishments, excluding manufacturers' sales branches and offices.

**II. Method of Collection**

We collect this information by Internet, fax, mail, and telephone.

**III. Data**

*OMB Control Number:* 0607–0195.

*Form Number:* SA–42, SA–42A, SA–42(MSBO), SA–42A(MSBO), SA–42(AGBR), SA–42A(AGBR).

*Type of Review:* Regular submission.

*Affected Public:* Wholesale firms located in the United States.

*Estimated Number of Respondents:* 7,600.

*Estimated Time per Response:* 74 minutes (3-year average).

*Estimated Total Annual Burden Hours:* 9,405 hours (3-year average).

*Estimated Total Annual Cost:* The total cost to respondents is estimated to be $272,839.

*Respondent's Obligation:* Mandatory.

*Legal Authority:* Title 13, United States Code, Sections 182, 224, and 225.

**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: March 16, 2011.

**Glenna Mickelson,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2011–6599 Filed 3–21–11; 8:45 am]

**BILLING CODE 3510–07–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–427–801, A–428–801, A–475–801, A–588–804, A–412–801]**

### Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative and Changed-Circumstances Reviews

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**DATES:** *Effective Date:* March 22, 2011.

**FOR FURTHER INFORMATION CONTACT:** Yang Jin Chun, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–5760.

**SUPPLEMENTARY INFORMATION:**

**Background**

At the request of interested parties, the Department of Commerce (the Department) initiated administrative reviews of the antidumping duty orders on ball bearings and parts thereof from

France, Germany, Italy, Japan, and the United Kingdom for the period May 1, 2009, through April 30, 2010. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 75 FR 37759 (June 30, 2010). On November 12, 2010, we rescinded in part the administrative reviews of the antidumping duty orders on ball bearings and parts thereof from France, Germany, Italy, Japan, and the United Kingdom. *See Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Partial Rescission of Antidumping Duty Administrative Review,* 75 FR 69402 (November 12, 2010). On January 14, 2011, we extended the due date for the completion of the preliminary results of reviews by 45 days. *See Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Reviews,* 76 FR 2647 (January 14, 2011). On February 24, 2011, we also initiated the changed-circumstances review of the antidumping duty order on ball bearings and parts thereof from Germany and announced our intent to conduct the changed-circumstances review in the context of the administrative review. *See Ball Bearings and Parts Thereof From Germany: Initiation of Antidumping Duty Changed-Circumstances Review,* 76 FR 10335 (February 24, 2011). The preliminary results of the reviews are currently due no later than March 17, 2011.

**Extension of Time Limit for Preliminary Results**

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), requires the Department to complete the preliminary results within 245 days after the last day of the anniversary month of an order for which a review is requested and the final results within 120 days after the date on which the preliminary results are published. If it is not practicable to complete the review within these time periods, section 751(a)(3)(A) of the Act allows the Department to extend the time limit for the preliminary results to a maximum of 365 days after the last day of the anniversary month.

We determine that it is not practicable to complete the preliminary results of these reviews within the current time limit because of the number of companies and complexity of various issues. Therefore, we are extending the time period for issuing the preliminary results of these reviews by 32 days until April 18, 2011.

This notice is published in accordance with section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2).

Dated: March 16, 2011.

**Christian Marsh,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2011–6746 Filed 3–21–11; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–580–809]**

### Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Extension of the Final Results of the Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**DATES:** *Effective Date:* March 22, 2011.

**FOR FURTHER INFORMATION CONTACT:** Matthew Jordan and Joshua Morris, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–1540 and (202) 482–1779, respectively.

**Background**

On December 14, 2010, the Department of Commerce ("the Department") published its preliminary results of the antidumping duty administrative review of circular welded non-alloy steel pipe from the Republic of Korea, covering the period November 1, 2008, through October 31, 2009. *See Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Preliminary Results of the Antidumping Duty Administrative Review,* 75 FR 77838 (December 14, 2010) ("*Preliminary Results*"). Currently, the final results are due no later than April 13, 2011.

**Extension of Time Limit for Final Results**

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended ("Act"), requires that the Department issue the final results of an administrative review within 120 days after the date on which the preliminary results are published. If it is not practicable to complete the review within that time period, section 751(a)(3)(A) of the Act allows the Department to extend the deadline for the final results to a maximum of 180 days after the date on which the preliminary results are published.

The Department has determined that it requires additional time to complete this review. A significant issue has been raised after the *Preliminary Results* and the Department needs to allow time for parties to provide information on the issue, brief the issue, and provide rebuttal comments. Thus, it is not practicable to complete this review by April 13, 2011, and the Department is extending the time limit for completion of the final results by an additional 60 days to June 12, 2011, in accordance with section 751(a)(3)(A) of the Act. However, June 12, 2011, falls on a Sunday, and it is the Department's long-standing practice to issue a determination the next business day when the statutory deadline falls on a weekend, federal holiday, or any other day when the Department is closed. *See Notice of Clarification: Application of "Next Business Day" Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005). Accordingly, the deadline for completion of the final results is now no later than June 13, 2011.

We are issuing and publishing this notice in accordance with sections 751(a)(3)(A) and 777(i) of the Act.

Dated: March 16, 2011.

**Christian Marsh,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2011–6726 Filed 3–21–11; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–552–801]**

### Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** On September 15, 2010, the Department of Commerce ("Department") published the *Preliminary Results* of the sixth administrative review and sixth new shipper review of the antidumping duty order on certain frozen fish fillets ("frozen fish fillets") from the Socialist Republic of Vietnam ("Vietnam").[1] We

[1] *See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results and Partial Rescission of the Sixth Antidumping Duty Administrative Review*

Continued

gave interested parties an opportunity to comment on the *Preliminary Results* and, based upon our analysis of the comments and information received, we made changes to the margin calculations for the final results of these reviews. The final weighted-average margins are listed below in the "Final Results of the Reviews" section of this notice. The period of review ("POR") is August 1, 2008, through July 31, 2009.

**DATES:** *Effective Date:* March 22, 2011.

**FOR FURTHER INFORMATION CONTACT:** Emeka Chukwudebe or Javier Barrientos, 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) 482–0219 or (202) 482–2243, respectively.

**SUPPLEMENTARY INFORMATION:**

## Case History

As noted above, on September 15, 2010, the Department published the *Preliminary Results* of this administrative and new shipper review. On September 16, 2010, and January 24, 2011, officials from the Government of Vietnam met with officials from the Department.[2] We extended the deadlines for submission of surrogate value comments and case briefs.[3] On October 7, 2010, majority staff members from the Senate Finance Committee met with officials from the Department.[4] On November 5, 2010, following the recent decision in *Dorbest*,[5] the Department placed wage rate data on the record for comments.[6] Between November 25, 2010, and November 30, 2010, we conducted verification of Vinh Hoan Corporation ("Vinh Hoan"). On December 23, 2010, the Department fully extended the time limit for completion of the final results of this administrative review and new shipper review.[7] On January 24, 2011, the Department placed new information on the record and invited comments from interested parties.

On January 26, 2011, the Department held a public hearing.[8] On February 8, 2011, counsel for Petitioners[9] met with officials from the Department.[10] On February 17, 2011, counsel for the respondents[11] met with officials from the Department.[12] We invited interested parties to comment on the *Preliminary Results.* Between November 22, 2010, and February 14, 2011, we received case and rebuttal briefs from Petitioners, the respondents, separate rate respondents,[13] as well as other interested parties[14] in these reviews.[15] As a result of our analysis, we have made changes to the *Preliminary Results.*

## Scope of the Order[16]

The product covered by the order is frozen fish fillets, including regular, shank, and strip fillets and portions thereof, whether or not breaded or marinated, of the species *Pangasius Bocourti, Pangasius Hypophthalmus* (also known as *Pangasius Pangasius*), and *Pangasius Micronemus.* Frozen fish fillets are lengthwise cuts of whole fish. The fillet products covered by the scope include boneless fillets with the belly flap intact ("regular" fillets), boneless fillets with the belly flap removed ("shank" fillets), boneless shank fillets cut into strips ("fillet strips/finger"), which include fillets cut into strips, chunks, blocks, skewers, or any other shape. Specifically excluded from the scope are frozen whole fish (whether or not dressed), frozen steaks, and frozen belly-flap nuggets. Frozen whole dressed fish are deheaded, skinned, and eviscerated. Steaks are bone-in, cross-section cuts of dressed fish. Nuggets are the belly-flaps. The subject merchandise will be hereinafter referred to as frozen "basa" and "tra" fillets, which are the Vietnamese common names for these species of fish. These products are classifiable under tariff article codes 1604.19.4000, 1604.19.5000, 0305.59.4000, 0304.29.6033 (Frozen Fish Fillets of the species *Pangasius* including basa and tra) of the Harmonized Tariff Schedule of the United States ("HTSUS").[17] The order covers all frozen fish fillets meeting the above specification, regardless of tariff classification. Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

## Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties are addressed in "Certain Frozen Fish Fillets from the Socialist Republic of Vietnam ("Vietnam"): Issues and Decision Memorandum for the Final Results,"

*and Sixth New Shipper Review,* 75 FR 56062 (September 15, 2010) ("*Preliminary Results*").

[2] *See* Memorandum to the file, from Julia Hancock, Special Assistant, Import Administration, dated September 21, 2010; *see also* Memorandum to the file, from James Doyle, Office Director, Import Administration, dated January 25, 2011.

[3] *See* Letter from Alex Villanueva, Program Manager, Office 9, to Interested Parties: Extending Surrogate Value Submission & Briefing Schedule for 6th New Shipper and 6th Antidumping Administrative Reviews of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam (September 21, 2010). *See also* Letter from Alex Villanueva, Program Manager, Office 9, to Interested Parties: Extending Surrogate Value Submission for 6th New Shipper and 6th Antidumping Administrative Reviews of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam. (October 13, 2010). *See also* Memorandum For: All Interested Parties, from Emeka Chukwudebe, Case Analyst, Import Administration, dated October 22, 2010. *See also* Memorandum For: All Interested Parties, from Javier Barrientos, Case Analyst, Import Administration, dated November 22, 2010.

[4] *See* Memorandum to the file, Re: sixth Administrative Review of Frozen Fish Fillets from the Socialist Republic of Vietnam ("Vietnam"), dated October 18, 2010.

[5] *See Dorbest Limited* v. *United States,* 604 F.3d 1363, 1372 (Fed. Cir. 2010) ("*Dorbest*").

[6] *See* Memorandum to the file through James C. Doyle, Office 9 Director, and Alex Villanueva, Office 9 Program Manager, from Emeka Chukwudebe, Office 9 Case Analyst, Sixth Antidumping Duty Administrative and New Shipper Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam ("Vietnam"): Industry-Specific Wage Rate Selection (November 5, 2010).

[7] *See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Extension of Time Limit for the Final Results of the Sixth Antidumping Duty Administrative and New Shipper Reviews,* 75 FR 80795 (December 23, 2010).

[8] *See* Letter to Interested Parties from James C. Doyle, Office 9 Office Director, Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Consolidated Public Hearing Schedule (January 26, 2011).

[9] Catfish Farmers of America and the following individual U.S. catfish processors: America's Catch, Consolidated Catfish Companies, LLC dba Country Select Catfish, Delta Pride Catfish, Inc., Harvest Select Catfish, Inc., Heartland Catfish Company, Pride of the Pond, and Simmons Farm Raised Catfish, Inc. (collectively, "Petitioners").

[10] *See* Memorandum to the file, from Alex Villanueva, Program Manager, Import Administration, dated September 21, 2010.

[11] These companies include: Vinh Hoan; Vinh Quang Fisheries Corporation ("Vinh Quang"); and CUU Long Fish Joint Stock Company ("CL–Fish").

[12] *See* Memorandum to the file, from Alex Villanueva, Program Manager, Import Administration, dated February 21, 2011.

[13] These companies include: (1) An Giang Fisheries Import and Export Joint Stock Company (aka Agifish or AnGiang Fisheries Import and Export); (2) Anvifish Co., Ltd.; (3) Anvifish Joint Stock Company ("Anvifish JSC"), (4) East Sea Seafoods Limited Liability Company (formerly known as East Sea Seafoods Joint Venture Co., Ltd.) ("ESS LLC"); and (5) East Sea Seafoods Joint Venture Co., Ltd.

[14] These include: (1) Richwell Group, Inc.; and 2) Vietnam Association of Seafood Exports and Producers.

[15] At the Department's request, interested parties submitted additional comments regarding information placed on the record as a result of the Department's January 24, 2011, meeting with officials from the Government of Vietnam.

[16] *See Notice of Antidumping Duty Order: Certain Frozen Fish Fillets From the Socialist Republic of Vietnam,* 68 FR 47909 (August 12, 2003) ("*Order*").

[17] Until July 1, 2004, these products were classifiable under tariff article codes 0304.20.60.30 (Frozen Catfish Fillets), 0304.20.60.96 (Frozen Fish Fillets, NESOI), 0304.20.60.43 (Frozen Freshwater Fish Fillets) and 0304.20.60.57 (Frozen Sole Fillets) of the HTSUS. Until February 1, 2007, these products were classifiable under tariff article code 0304.20.60.33 (Frozen Fish Fillets of the species *Pangasius* including basa and tra) of the HTSUS.

(March 14, 2011) ("I&D Memo"). A list of the issues which parties raised, and to which we responded in the I&D Memo, is attached to this notice as an Appendix. The I&D Memo is a public document and is on file in the Central Records Unit ("CRU"), Main Commerce Building, Room 7046, and is accessible on the Department's Web site at *http://www.trade.gov/ia.* The paper copy and electronic version of the memorandum are identical in content.

**Changes Since the Preliminary Results**

Based on a review of the record, verification, the hearing, as well as comments received from interested parties regarding our *Preliminary Results,* we have made certain revisions to the margin calculation for Vinh Hoan, Vinh Quang, and CL-Fish for the final results. For the reasons explained in the I&D Memo at Comment I, we have changed our surrogate country selection from the Philippines to Bangladesh. For all other changes to the calculations of Vinh Hoan, Vinh Quang, and CL-Fish, see the I&D Memo and company specific analysis memorandum. For changes to the surrogate values, *see* the I&D Memo and "Memorandum to the File, through Alex Villanueva, Program Manager, AC/CVD Operations, Office 9, from Javier Barrientos, Senior Case Analyst, and Emeka Chukwudebe, Case Analyst, AD/CVD Operations, Office 9, Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Surrogate Values for the Final Results," (March 14, 2011).

**Use of Facts Available ("FA") and Adverse Facts Available ("AFA")**

Section 776(a) of the Tariff Act of 1930, as amended ("the Act") provides that the Department shall apply FA if (1) necessary information is not on the record, or (2) an interested party or any other person (A) withholds information that has been requested, (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

Section 776(b) of the Act further provides that the Department may use an adverse inference in applying FA when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Such an adverse inference may include reliance on information derived from the petition, the final determination, a previous administrative review, or other information placed on the record.

Based on findings at verification, we are applying partial AFA to Vinh Hoan's freight distances because the Department finds that the information necessary to calculate an accurate and otherwise reliable margin is not available on the record. Specifically, the Department could not verify the distances to transport fish from some of Vinh Hoan's farms to its processing facilities. Consequently, in accordance with 776(b) of the Act, we find that an adverse inference is necessary because Vinh Hoan did not act to the best of its ability to provide the Department with verifiable data within its exclusive control. Therefore, for the final results, pursuant to 776(a)(2)(D) of the Act, we applied partial AFA to Vinh Hoan's freight distances. *See* Comment 9A of the I*&D Memo.*

**Final Partial Rescission**

In the *Preliminary Results,* the Department preliminarily rescinded the review with respect to Acomfish and Binh An.[18] These companies reported that they had no shipments of subject merchandise to the United States during the POR. As we stated in the *Preliminary Results,* our examination of shipment data from U.S. Customs and Border Protection ("CBP") for these companies confirmed that there were no entries of subject merchandise from them during the POR.[19] The Department did not receive any comments regarding the preliminary rescission of these companies claiming no shipments. Therefore, we are rescinding the administrative review with respect to Acomfish and Binh An. In addition, as explained in Comment VII of the I&D Memo, we are rescinding the review with respect to Anvifish JSC. Finally, we note that as Anvifish JSC was the only company receiving the Vietnam-Wide entity rate in the *Preliminary Results,* but is no longer under review, the Vietnam-Wide entity is also no longer under review.

**Separate Rates**

The statute and the Department's regulations do not directly address the establishment of a rate to be applied to individual companies not selected for individual examination where the Department limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. The Department's practice in this regard, in cases involving limited selection based on exporters accounting for the largest volumes of trade, has been to weight-average the rates for the selected companies excluding zero and *de minimis* rates and rates based entirely on AFA. Generally we have looked to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for respondents we did not individually examine in an administrative review. Section 735(c)(5)(A) of the Act instructs that we are not to calculate an all-others rate using any zero or *de minimis* margins or any margins based on total facts available. Section 735(c)(5)(B) of the Act also provides that, where all margins are zero, *de minimis,* or based on total FA, we may use "any reasonable method" for assigning the rate to non-selected respondents. One method that section 735(c)(5)(B) of the Act contemplates as a possibility is "averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated."

In the *Preliminary Results,* the Department applied to the separate rate companies the rate calculated for the single mandatory respondent in the administrative review. For these final results, the rate calculated for the single mandatory respondent is zero. While the statute contemplates that we may use an average of the zero, *de minimis* and AFA rates determined in an investigation, we have available in these reviews information that would not be available in an investigation, namely rates from prior proceedings. We have determined that it is more appropriate in these reviews to use a calculated rate from a previous segment to apply to the separate rate companies as this method does not rely on zero, *de minimis* or FA margins and there is no reason to find that it is not reasonably reflective of potential dumping margins for the non-selected companies. *See* Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act, H. Doc. 316, 103d Cong., Vol. 1 (1994) at 873. In these reviews, we have three companies that qualify for a separate rate: Agifish, ESS LLC and Southern Fishery Industries Company ("South Vina").

For the three separate rate respondents, Agifish, ESS LLC and South Vina, the most recent calculated rate from a previous administrative review that is not zero, *de minimis* or based on FA is $0.02 per kilogram, which was based on the calculated rate for QVD Food Company in the fourth

[18] Asia Commerce Fisheries Joint Stock Company (aka Acomfish JSC) ("Acomfish") and Binh An Seafood Joint Stock Co. ("Binh An").

[19] *See Preliminary Results.*

administrative review. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Amended Final Results of the Fourth Antidumping Duty Administrative Review,* 74 FR 17816 (April 17, 2009). This is similar to the method applied in the most recently completed administrative review. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews,* 75 FR 12726 (March 17, 2010) and accompanying Issues and Decision Memorandum.

**Final Results of the Reviews**

The weighted-average dumping margins for the POR are as follows:

| Exporter | Weighted-average margin (dollars per kilogram) |
|---|---|
| (1) Vinh Hoan | $0.00 |
| (2) Vinh Quang | 0.00 |
| (3) Agifish | 0.02 |
| (4) ESS LLC | 0.02 |
| (5) South Vina | 0.02 |
| (6) CL-Fish[20] | 0.00 |

**Assessment**

Upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of review. Pursuant to 19 CFR 351.212(b)(1), we will calculate importer-specific (or customer) per unit duty assessment rates based on the ratio of the total amount of the dumping margins calculated for the examined sales to the total entered value of those same sales. We will instruct CBP to assess antidumping duties on all appropriate entries covered by these reviews if any importer-specific assessment rate is above or *de minimis.*

**Cash Deposit Requirements**

The following cash-deposit requirements will be effective upon publication of the final results of these administrative and new shipper reviews for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For the exporters listed above, the cash deposit rate will be the rate established in these final results of review (except, if the rate is zero or *de minimis, i.e.,* less than 0.5 percent, a zero cash deposit rate will be required for that company); (2) for previously investigated or reviewed Vietnamese and non-Vietnamese exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all Vietnamese exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the Vietnamese-wide rate of $2.11 per kilogram; and (4) for all non-Vietnamese exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the Vietnamese exporters that supplied that non-Vietnamese exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

**Reimbursement of Duties**

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties has occurred and the subsequent assessment of doubled antidumping duties.

**Administrative Protective Orders**

This notice also serves as a final reminder to parties subject to administrative protective order ("APO") of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing these administrative and new shipper reviews and notice in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: March 14, 2011.

**Kim Glas,**

*Acting Deputy Assistant Secretary for Import Administration.*

**Appendix I—Issues & Decision Memorandum**

**General Issues**

COMMENT I: SELECTION OF SURROGATE COUNTRY
- A. Economic Comparability
- B. Significant Producer of the Comparable Merchandise
- C. Data Considerations

COMMENT II: ZEROING

COMMENT III: LABOR RATE METHODOLOGY

COMMENT IV: SURROGATE VALUES
- A. Financial Ratios
- B. Salt
- C. Water
- D. STPP, CO Gas, PE bags, Carton, Tape, Label, Plastic Sheet, Banding, and Diesel
- E. Electricity
- F. Truck Freight
- G. Brokerage and Handling
- H. Containerization
- I. By-Products
  - i. Fish Waste
  - ii. Broken Meat
  - iii. Fish Skins
- J. Adjustment for Finished Goods Inventory

**Company-Specific Issues**

COMMENT V: RATE FOR SOUTH VINA

COMMENT VI: RATE FOR VINH QUANG
- A. Indirect Selling Expenses
- B. Movement Expenses
- C. Packing Labor

COMMENT VII: RESCISSION OF ANVIFISH JSC

COMMENT VIII: CASH DEPOSIT INSTRUCTIONS FOR ESS LLC

COMMENT IX: RATE FOR VINH HOAN
- A. Freight Distances for Fish
- B. Farming Factors
- C. Electricity and Coal for Byproducts

[FR Doc. 2011–6564 Filed 3–21–11; 8:45 am]

**BILLING CODE 3510–DS–P**

[20] CL-Fish is a new shipper review, aligned with, but not part of the administrative review.

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Application(s) for Duty-Free Entry of Scientific Instruments

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be postmarked on or before April 11, 2011. Address written comments to Statutory Import Programs Staff, Room 3720, U.S. Department of Commerce, Washington, D.C. 20230. Applications may be examined between 8:30 a.m. and 5 p.m. at the U.S. Department of Commerce in Room 3720.

*Docket Number:* 11–021. *Applicant:* Naval Postgraduate School, Department of Physics, 833 Dyer Rd., Monterey, CA 93943. *Instrument:* Electron Microscope. *Manufacturer:* FEI Company, Czech Republic. *Intended Use:* The instrument will be used to look at a range of semiconducting and other light emitting materials. It will be used to analyze the surface topography of the samples and the corresponding light emitted from the materials.

*Justification for Duty-Free Entry:* There are no instruments of the same general category manufactured in the United States. Application accepted by Commissioner of Customs: March 1, 2011.

Dated: March 16, 2011.

**Gregory Campbell,**

*Director, Subsidies Enforcement Office.*

[FR Doc. 2011–6736 Filed 3–21–11; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Application(s) for Duty-Free Entry of Scientific Instruments

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be postmarked on or before April 11, 2011. Address written comments to Statutory Import Programs Staff, Room 3720, U.S. Department of Commerce, Washington, DC 20230. Applications may be examined between 8:30 a.m. and 5 p.m. at the U.S. Department of Commerce in Room 3720.

*Docket Number:* 11–012. *Applicant:* UChicago Argonne, LLC. 9700 South Cass Ave., Lemont, IL 60439. *Instrument:* TFS500 Atomic Layer Deposition System. *Manufacturer:* Beneq OY, Finland. *Intended Use:* The instrument will be used in experiments on atomic layer deposition (ALD) growth of thin film materials to determine the optimal conditions of temperature, pressure, flux and precursor combinations. For the research the instrument is required to have a modular deposition chamber so that the system can be reconfigured to optimize the coating process for different substrates. It also requires a precursor delivery system that can be heated to 500 degrees Celsius to vaporize non-volatile chemical precursors. It also requires inert gas purging between the deposition chamber and outer heating chambers to contain the precursors without the need for a gas-tight seal at this junction. *Justification for Duty-Free Entry:* There are no instruments of the same general category being manufactured in the United States. *Application accepted by Commissioner of Customs:* February 2, 2011.

*Docket Number:* 11–016. *Applicant:* UChicago Argonne, LLC. 9700 South Cass Ave., Lemont, IL 60439–4873. *Instrument:* Single Roll Presser. *Manufacturer:* A–Pro Co., Ltd, South Korea. *Intended Use:* The instrument will be used for making novel electrodes for lithium-ion cells, which are subjected to electrochemical performance testing to determine the influence of the active materials in the electrodes and electrolyte. The instrument is unique in that it is semi-automated with a high attention to dimensional tolerances, temperature control and safety, helping guarantee that the research cells made will be of industrial level quality and consistency for the experiments. Justification for Duty-Free Entry: There are no instruments of the same general category being manufactured in the United States. *Application accepted by Commissioner of Customs:* February 2, 2011.

*Docket Number:* 11–018. *Applicant:* Purdue University, Birck Nanotechnology Center, 1205 West State Street, West Lafayette, IN 47907–2057. *Instrument:* Rapid Thermal Annealer. *Manufacturer:* Qualiflow Jipelec, France. *Intended Use:* The instrument will be used to conduct fast temperature ramping experiments with the purpose of annealing the research sample within. The instrument is designed for quick ramping of temperature in order to keep the thermal budget at a minimum. The instrument has a temperature ramp rate of 300 degrees Celsius per second. Other key characteristics that distinguish this instrument from others are vacuum purge capability and contamination control. *Justification for Duty-Free Entry:* There are no instruments of the same general category being manufactured in the United States. *Application accepted by Commissioner of Customs:* March 1, 2011.

Dated: March 16, 2011.

**Gregory Campbell,**

*Acting Director, IA Subsidies Enforcement Office.*

[FR Doc. 2011–6734 Filed 3–21–11; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### National Institute of Standards and Technology

### National Voluntary Laboratory Accreditation Program (NVLAP) Workshop for Laboratories Interested in the Testing of Health Information Technology (HIT) Electronic Health Record Technology

**AGENCY:** National Institute of Standards and Technology (NIST), Commerce.

**ACTION:** Notice of public workshop.

**SUMMARY:** The National Voluntary Laboratory Accreditation Program (NVLAP) will hold a public workshop on Tuesday, April 26, 2011 at the Marriott Hotel, Gaithersburg Marriott Washingtonian Center, located at 9751 Washingtonian Boulevard, Gaithersburg, MD 20878. The purpose of the workshop is the exchange of information among NVLAP, the NIST Information Technology Laboratory, the Department of Health and Human Services (HHS), laboratories interested in seeking NVLAP accreditation to perform Testing of Health Information Technology (HIT) electronic health record technology under the permanent certification program administered under the Office of the National Coordinator for Health Information Technology, HHS.

There is no charge for the workshop; however, advanced registration is necessary. There will be no on-site, same-day registration. The deadline is Wednesday, April 20, 2011.

**DATES:** The workshop will be held on Tuesday, April 26, 2011 from 9 a.m. to 4:30 p.m. Contact Beth Thomas at *beth.thomas@nist.gov* or (301) 975–4521 for pre-registration.

**ADDRESSES:** The workshop will be held in the Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Boulevard, Gaithersburg, MD 20878.

**FOR FURTHER INFORMATION CONTACT:** Dana Leaman, (301) 975–4679, e-mail: *dana.leaman@nist.gov.* The mailing address is 100 Bureau Drive, Mail Stop 2140, Gaithersburg, MD 20899–2140. Information regarding NVLAP and the accreditation process can be viewed at *http://www.nist.gov/nvlap.*

**SUPPLEMENTARY INFORMATION:** In response to a request from the U.S. Department of Health and Human Services (HHS), National Coordinator for Health Information Technology, the National Voluntary Laboratory Accreditation Program (NVLAP) is considering establishing an accreditation program for laboratories that test HIT electronic health record technology.

NVLAP accreditation criteria are established in accordance with the Code of Federal Regulations (CFR, title 15, Part 285), NVLAP Procedures and General Requirements. To be accredited by NVLAP, laboratories conducting testing of HIT electronic health record technology will be required to meet ISO/IEC International Standard 17025, general requirements for the competence of testing and calibration laboratories. In addition, for each new LAP, NVLAP works with the affected testing community to develop program-specific technical requirements. These requirements tailor the general accreditation criteria referenced in Sections 4 and 5 of the NIST handbook 150 to the test and services in the new LAP. Program-specific requirements include the details of the scope of accreditation, test and measurement equipment, personnel requirements, validation of test methods, and reporting of test results.

NVLAP accreditation does not imply any guarantee (certification) of laboratory performance or test/calibration data. NVLAP accreditation is a finding of laboratory competence.

Dated: March 15, 2011.

**Charles H. Romine,**

*Acting Associate Director for Laboratory Programs.*

[FR Doc. 2011–6688 Filed 3–21–11; 8:45 am]

**BILLING CODE 3510–13–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XA308**

### Endangered and Threatened Species; Take of Anadromous Fish

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

**ACTION:** Receipt of an application for a new scientific research permit.

**SUMMARY:** Notice is hereby given that NMFS has received a scientific research permit application request relating to salmonids listed under the Endangered Species Act (ESA). The proposed research is intended to increase knowledge of the species and to help guide management and conservation efforts. These documents are also available upon written request or by appointment by contacting NMFS by phone (707) 575–6097 or fax (707) 578–3435.

**DATES:** Written comments on the permit application must be received at the appropriate address or fax number (*see* **ADDRESSES**) no later than 5 p.m. Pacific standard time on April 21, 2011.

**ADDRESSES:** Written comments on this application should be submitted to the Protected Resources Division, NMFS, 777 Sonoma Avenue, Room 325, Santa Rosa, CA 95404. Comments may also be submitted via fax to (707) 578–3435 or by e-mail to *FRNpermits.SR@noaa.gov.*

The application and related documents may be viewed online at: *https://apps.nmfs.noaa.gov/preview/preview_open_for_comment.cfm.*

**FOR FURTHER INFORMATION CONTACT:** Jeffrey Jahn, Santa Rosa, CA (ph.: 707–575–6097, e-mail.: *Jeffrey.Jahn@noaa.gov*).

**SUPPLEMENTARY INFORMATION:**

#### Species Covered in This Notice

This notice is relevant to federally threatened Central California Coast (CCC) steelhead (*Oncorhynchus mykiss*).

#### Authority

Scientific research permits are issued in accordance with section 10(a)(1)(A) of the ESA of 1973 (16 U.S.C. 1531–1543) and regulations governing listed fish and wildlife permits (50 CFR parts 222–226). NMFS issues permits based on findings that such permits: (1) Are applied for in good faith; (2) if granted and exercised, would not operate to the disadvantage of the listed species which are the subject of the permits; and (3) are consistent with the purposes and policies set forth in section 2 of the ESA. The authority to take listed species is subject to conditions set forth in the permits.

Anyone requesting a hearing on the application listed in this notice should set out the specific reasons why a hearing on this application would be appropriate (*see* **ADDRESSES**). Such hearings are held at the discretion of the Assistant Administrator for Fisheries, NMFS.

#### Application Received

URS Corporation in Oakland, CA, is requesting a 5-year scientific research permit (Permit 16115) to take juvenile CCC steelhead associated with a research project in the Guadalupe River watershed in Santa Clara County, CA. In the study described below, researchers do not expect to kill any listed fish but a small number may die as an unintended result of the research activities.

The purpose of the research program is to collect warmwater fish species to analyze individuals for total mercury content, and to obtain information on CCC steelhead presence. Target species include adult California roach (*Lavinia symmetricus*) and young of the year largemouth bass (*Micropterus salmoides*). CCC steelhead captured during sampling will be placed in an aerated bucket, enumerated, measured and released at the point of capture; no samples will be taken of CCC steelhead. Locations and habitat conditions in areas that CCC steelhead are captured will be noted.

Sampling will occur once annually in 2011, 2012, and 2016; sample collection will take place between May 1 and June 30, depending on seasonal weather patterns and permit conditions. Fish will be collected by backpack electrofisher at five stream sampling sites. Captured unlisted warmwater fish will be analyzed for total mercury content to assess the success of Total Maximum Daily Load implementation efforts. URS Corporation will also be conducting boat electrofishing in reservoirs that do not contain ESA-listed anadromous fish and therefore take of CCC steelhead is not expected as a result of this collection method.

The program will satisfy the Regional Water Quality Control Board requirement to monitor mercury in waters downstream of historic quicksilver mines in the Guadalupe River watershed. Increased information regarding CCC steelhead habitat use and preference and proper management of mercury loads in this watershed are benefits associated with this research program.

This notice is provided pursuant to section 10(c) of the ESA. NMFS will evaluate the application, associated documents, and comments submitted to determine whether the application meets the requirements of section 10(a) of the ESA and Federal regulations. The final permit decision will not be made until after the end of the 30-day comment period. NMFS will publish notice of its final action in the **Federal Register**.

Dated: March 16, 2011.

**Angela Somma,**

*Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2011–6731 Filed 3–21–11; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[Docket No. 110309187–1185–01]**

**RIN 0648–XA105**

### Endangered and Threatened Wildlife; Notice of 90-Day Finding on a Petition To List the Caribbean Electric Ray as Threatened or Endangered Under the Endangered Species Act (ESA)

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

**ACTION:** Notice of 90-day petition finding.

**SUMMARY:** We (NMFS) announce a 90-day finding on a petition to list the Caribbean electric ray (*Narcine bancroftii*) as threatened or endangered under the ESA. We find that the petition does not present substantial scientific or commercial information indicating that the petitioned action may be warranted.

**ADDRESSES:** Copies of the petition and related materials are available upon request from the Chief, Protected Resources Division, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701, or online from the Southeast Regional Office-Protected Resources Division Web site: *http://sero.nmfs.noaa.gov/pr/ListingPetitions.htm.*

**FOR FURTHER INFORMATION CONTACT:** Andrew Herndon, NMFS Southeast Region, 727–824–5312, or Marta Nammack, NMFS Office of Protected Resources, 301–713–1401.

**SUPPLEMENTARY INFORMATION:** On September 7, 2010, we received a petition from WildEarth Guardians to list the Caribbean electric ray as threatened or endangered under the ESA. The petitioner asserts that the species has declined 98 percent since 1972 in the northern Gulf of Mexico and that it faces threats from incidental taking as shrimp trawl bycatch and also from habitat degradation, including the BP oil spill in the Gulf of Mexico.

#### ESA Statutory and Regulatory Provisions and Evaluation Framework

Section 4(b)(3)(A) of the ESA of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires, to the maximum extent practicable, that within 90 days of receipt of a petition to list a species as threatened or endangered, the Secretary of Commerce (Secretary) make a finding on whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, and to promptly publish such finding in the **Federal Register** (16 U.S.C. 1533(b)(3)(A)). When it is found that substantial scientific or commercial information in a petition indicates the petitioned action may be warranted (a "positive 90-day finding"), we are required to promptly commence a review of the status of the species concerned during which we will conduct a comprehensive review of the best available scientific and commercial information. In such cases, we shall conclude the review with a finding as to whether, in fact, the petitioned action is warranted within 12 months of receipt of the petition. Because the finding at the 12-month stage is based on a more thorough review of the available information, as compared to the narrow scope of review at the 90-day stage, a "may be warranted" finding does not prejudge the outcome of the status review.

Under the ESA, a listing determination may address a "species," which is defined to also include subspecies and, for any vertebrate species, any distinct population segment (DPS) that interbreeds when mature (16 U.S.C. 1532(16)). A joint NOAA–U.S. Fish and Wildlife Service (USFWS) policy clarifies the agencies' interpretation of the phrase "distinct population segment" for the purposes of listing, delisting, and reclassifying a species under the ESA (61 FR 4722; February 7, 1996). A species, subspecies, or DPS is "endangered" if it is in danger of extinction throughout all or a significant portion of its range, and "threatened" if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (ESA sections 3(6) and 3(20), respectively, 16 U.S.C. 1532(6) and (20)). Pursuant to the ESA and our implementing regulations, we determine whether species are threatened or endangered because of any one or a combination of the following five section 4(a)(1) factors: (1) The present or threatened destruction, modification, or curtailment of habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; and (5) any other natural or manmade factors affecting the species' existence (16 U.S.C. 1533(a)(1), 50 CFR 424.11(c)).

ESA-implementing regulations issued jointly by NMFS and USFWS (jointly, "the Services") (50 CFR 424.14(b)) define "substantial information" in the context of reviewing a petition to list, delist, or reclassify a species as the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted. In evaluating whether substantial information is contained in a petition, the Secretary must consider whether the petition: (1) Clearly indicates the administrative measure recommended and gives the scientific and any common name of the species involved; (2) contains detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species; (3) provides information regarding the status of the species over all or a significant portion of its range; and (4) is accompanied by the appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps (50 CFR 424.14(b)(2)).

Court decisions have clarified the appropriate scope and limitations of the Services' review of petitions at the 90-day finding stage, in making a determination that a petitioned action "may be" warranted. As a general matter, these decisions hold that a petition need not establish a "strong likelihood" or a "high probability" that a species is either threatened or endangered to support a positive 90-day finding.

We evaluate the petitioner's request based upon the information in the petition including its references, and the information readily available in our files. We do not conduct additional research, and we do not solicit information from parties outside the agency to help us in evaluating the petition. We will accept the petitioner's sources and characterizations of the information presented, if they appear to be based on accepted scientific principles, unless we have specific information in our files that indicates the petition's information is incorrect, unreliable, obsolete, or otherwise irrelevant to the requested action. Information that is susceptible to more than one interpretation or that is contradicted by other available information will not be dismissed at the 90-day finding stage, so long as it is reliable and a reasonable person would conclude it supports the petitioner's assertions. In other words, conclusive information indicating the species may meet the ESA's requirements for listing is not required to make a positive 90-day finding. We will not conclude that a lack of specific information alone negates a positive 90-day finding, if a reasonable person would conclude that the unknown information itself suggests an extinction risk of concern for the species at issue.

To make a 90-day finding on a petition to list a species, we evaluate whether the petition presents substantial scientific or commercial information indicating the subject species may be either threatened or endangered, as defined by the ESA. First we evaluate whether the information presented in the petition, along with the information readily available in our files, indicates that the petitioned entity constitutes a "species" eligible for listing under the ESA. Next, we evaluate whether the information indicates that the species at issue faces extinction risk that is cause for concern; this may be indicated in information expressly discussing the species' status and trends, or in information describing impacts and threats to the species. We evaluate any information on specific demographic factors pertinent to evaluating extinction risk for the species at issue (*e.g.,* population abundance and trends, productivity, spatial structure, age structure, sex ratio, diversity, current and historical range, habitat integrity or fragmentation), and the potential contribution of identified demographic risks to extinction risk for the species. We then evaluate the potential links between these demographic risks and the causative impacts and threats identified in section 4(a)(1).

Information presented on impacts or threats should be specific to the species and should reasonably suggest that one or more of these factors may be operative threats that act or have acted on the species to the point that it may warrant protection under the ESA. Broad statements about generalized threats to the species, or identification of factors that could negatively impact a species, do not constitute substantial information that listing may be warranted. We look for information indicating that not only is the particular species exposed to a factor, but that the species may be responding in a negative fashion; then we assess the potential significance of that negative response.

Many petitions identify risk classifications made by other organizations or agencies, such as the International Union on the Conservation of Nature, the American Fisheries Society, or NatureServe, as evidence of extinction risk for a species. Risk classifications by other organizations or made under other Federal or State statutes may be informative, but the classification alone may not provide the rationale for a positive 90-day finding under the ESA. For example, as explained by NatureServe, their assessments of a species' conservation status do "not constitute a recommendation by NatureServe for listing under the U.S. Endangered Species Act" because NatureServe assessments "have different criteria, evidence requirements, purposes and taxonomic coverage than government lists of endangered and threatened species, and therefore these two types of lists should not be expected to coincide" (*http://www.natureserve.org/prodServices/statusAssessment.jsp*). Thus, when a petition cites such classifications, we will evaluate the source information that the classification is based upon, in light of the standards on extinction risk and impacts or threats discussed above.

**Information on Species Status and Extinction Risk**

The petition describes a few demographic factors specific to the Caribbean electric ray that could be indicative of its extinction risk, including: the abortion of embryos by gravid females when stressed, low survival rates of incidentally caught individuals, the species' relative rarity, and a critically low population count. The petition also states that the species' declines in the Gulf of Mexico and South Atlantic and habitat degradation are additional factors indicating the species is imperiled. These two factors are discussed in the ESA section 4(a)(1) factor analysis section below.

The majority of the other demographic factors are discussed in the World Conservation Union's (IUCN) synopsis of the threats to the species, which the petitioner relies heavily upon to support the assertion that the Caribbean electric ray is imperiled. The IUCN provides the following rationale for assigning a critically endangered classification to the Caribbean electric ray: "Electric rays are sluggish swimmers, with small home ranges, highly localized within an area and concentrating in surf zones adjacent to barrier beaches and on offshore sand bars in warm months and moving offshore in winter (Rudloe, 1989), making them susceptible to localized population depletion. The species is captured as bycatch by inshore shrimp trawl and other fisheries. It does not appear to be utilized and is discarded at sea, but survivorship rates are thought to be very low. Furthermore, abortion of embryos by captured gravid females is of concern. While specific catch data are lacking over most of the species' range, declines to 2 [percent] (95% confidence intervals 0.5 to 5%) of its baseline abundance in 1972 have been demonstrated in the Northern Gulf of Mexico. Shrimp trawl fishing is intense in that area and while the implementation of Turtle Exclusion Devices and Bycatch Reduction Devices has lowe[re]d overall bycatch rates, these mitigation measures are thought to be ineffective for this species due to it[s] size and sluggish swimming ability. Given the species' very low age at maturity it would take a very intense fishery to locally eliminate this species; however, this has been demonstrated in the Northern Gulf of Mexico. Further data showing declines of a similar magnitude are available from the U.S. east coast and Florida. While specific data are lacking, fishing activities, both artisanal and commercial in nature are generally intense and most often unregulated in shallow inshore waters of the remainder of the species' range. Given that large declines have been documented in U.S. waters where data are available, there is no reason to suspect that similar declines have not also occurred elsewhere across the species' range. The species is therefore globally assessed as Critically Endangered, based on observed declines in U.S. waters and inferred declines throughout the rest of the species' range. Information from outside U.S. waters is a priority (Carvalho *et al.,* 2007)."

The IUCN could not identify a population trend for the Caribbean

electric ray. The petition cites the decline in species abundance in the northern Gulf of Mexico reported in Shepherd and Myers (2005) as evidence the population is in decline. Population decline can result in extinction risk that is cause for concern in certain circumstances (*e.g.,* if the decline is rapid and/or below a critical minimum population threshold and the species has low resilience for recovery from a decline) (Musick, 1999). While the petitioner provides some evidence that the Caribbean electric ray population, at least in the Northern Gulf of Mexico, may have declined relatively rapidly, it fails to provide substantial information that the species is at a critically low population level or has a low resilience for recovery. An analysis of the apparent population decline is discussed below in the Other Natural or Manmade Factors section.

The petitioner claims the Caribbean electric ray has such a critically low population count that "it is increasingly vulnerable to extirpation from stochastic events." To determine that there is substantial information indicating that the species may be in danger of extinction now or in the foreseeable future due to small population size or stochastic events, information provided in the petition or existing in our files should be specific to the species and should reasonably suggest that these factors may be operative threats that act on the species to the point that it may warrant protection under the ESA. Broad statements about a generalized threat to species with small populations do not constitute substantial information that listing may be warranted. There is no information in our files indicating the species is at risk due to small population size or stochastic events, and the petition fails to provide any species specific information to that effect. Presumably, the petitioner believes the 98 percent decline in trawl abundance from 1972 to 2002 in the Northern Gulf of Mexico has reduced the population of the Caribbean electric ray to a critically low level (*see* the discussion under the Other Natural or Manmade Threats section for more on this decline). However, while a decline in relative catch per unit effort during fisheries independent monitoring (FIM) surveys likely does imply a decline in abundance, relative to 1972 levels, there are no estimates of abundance in the petition or in our files. Thus, the claim of a critically low population count is unsupported. Data in our files, which is a continuation of the same dataset analyzed by Shepherd and Myers (2005), show that since 2002 Caribbean electric rays have been documented in FIM cruises every year through 2010. Further, the Caribbean electric ray was the fifth (out of 31) most common species recorded in the data presented in Shepherd and Myers (2005). While we do not have an estimate of population numbers, the data does indicate that the species is relatively common, and it occurs in high enough abundance to be detected repeatedly during annual sampling. Species that are vulnerable to stochastic events generally have small ranges (endemism), fractured ranges, or dependence on limited habitat features that are themselves vulnerable to stochastic events. The petition and the information in our files do not provide any support that vulnerability to stochastic events may be an extinction risk concern for the Caribbean electric ray.

Outside the United States and the Northern Gulf of Mexico, shrimp fishing may be catching Caribbean electric rays, but beyond general statements on the quantities of bycatch produced during shrimp trawling, the petition fails to provide any information on what impact those fisheries may be having on the species. While we acknowledge that bycatch in foreign shrimp fisheries may be affecting the Caribbean electric ray, the petition provides no evidence that those interactions have somehow reduced Caribbean electric ray populations to critically low levels. There is also no information within our files to indicate that bycatch in foreign shrimp fisheries is having an effect on the Caribbean electric ray.

While the onus of determining what a critically low population count may be for the Caribbean electric ray should not necessarily fall on the petitioner, the petitioner must provide at least some information on what a critically low population count may be. Otherwise, the statements that the Caribbean electric ray populations are critically low are nothing more than an unsupported conclusion. The petition fails to provide substantial evidence that the Caribbean electric ray's population is critically low throughout its range. Data in the petition and in our files suggest that in the northern Gulf of Mexico the Caribbean electric ray is relatively common and regularly encountered (NMFS unpublished data, Shepherd and Myers 2005).

The petition also cites the abortion of embryos by gravid females caught in shrimp trawls as another characteristic that imperils the species by lowering its reproductive output. The petition provides no information on the rate at which gravid females are caught or what percent of gravid female actually abort embryos. Without such information it is impossible to determine what effect this trait has on the population. In slower maturing species, with small brood sizes and long gestation periods, the abortion of embryos could be particularly harmful because of the time and energy needed to produce another litter, potentially reducing the species' resiliency for recovery. However, unlike other ray and shark species, the Caribbean electric ray matures relatively early (females at approximately 2 years of age (Carvalho *et al.,* 2007)), has a short gestation period, has relatively large litters, and has an estimated population doubling time ranging from 4.5–14 years (Froese and Pauly, 2010). Thus, the Caribbean electric ray has a relatively high resiliency for recovery.

The petition states that "Electric Rays are generally discarded at sea, and survivorship rates are believed to be quite low," citing the IUCN's assessment of the species (i.e., Carvalho *et al.,* 2007). Review of that assessment provided no additional information, and we have no information in our files on the survivorship of incidentally caught Caribbean electric rays. Beyond the IUCN statement, the petition provides no additional information on the survival rates of Caribbean electric rays incidentally caught in shrimp trawls. Providing only a single reference and no additional information regarding the survivorship of discarded Caribbean electric ray does not represent substantial information that the species warrants listing under the ESA.

The petition references the Reef Environmental Education Foundation's (REEF) database sightings of the Caribbean electric ray as evidence that "sightings of the Electric ray are extremely rare in recent years." That database indicates the Caribbean electric ray is not commonly observed (*i.e.,* less than 50 percent of the time), and when it is seen, it is usually in low abundance (*i.e.,* usually only a single individual). As the petition points out, the Caribbean electric ray is relatively small (*i.e.,* ~60 cm), buries itself in the sand or mud, and appears to prefer nearshore sandy habitats. Given these characteristics, it is not particularly surprising that a small, buried animal, commonly found away from reef habitats, is not reported frequently by divers. Further, there is no indication from these data that the number of sightings has declined over time. Additionally, Shepherd and Myers (2005) reported that the Caribbean electric ray was the fifth most common species encountered.

While it is unclear how rare the species actually is, rarity alone is not an indication that a species faces an

extinction risk that is cause for concern. A species' rarity could be of concern if the species was distributed in small, isolated populations, or had a very restricted geographic range and was subject to specific habitat degradation. The information in the petition suggests the species is wide-ranging, found from North Carolina, through the Gulf of Mexico, to the north coast of South America, as well as in the Lesser and Greater Antilles (Carvalho *et al.,* 2007). The petition argues that the Caribbean electric ray's habitat is being degraded, but does not provide information on any habitat degradation threats that are specific to the species (see discussion on habitat degradation below).

Based on the information provided in the petition and available in our files on demographic factors of the Caribbean electric ray, we conclude there is not substantial information to indicate the species may be facing an extinction risk that is cause for concern.

**Information on Threats to the Species**

We next evaluated whether the information in the petition concerning the extent and severity of one or more of the ESA section 4(a)(1) factors suggests these impacts and threats may be posing a risk of extinction to the Caribbean electric ray that is cause for concern. The petition states that three of the five ESA section 4(a)(1) factors may affect the Caribbean electric ray. We evaluate those three factors below.

**Present or Threatened Destruction, Modification, or Curtailment of Habitat or Range**

The petition states "[the Caribbean electric ray] is threatened by habitat destruction from energy development, burgeoning human populations, and other pressures," claiming that "though the [Caribbean electric ray]'s range is relatively large, localized habitat loss and degradation are threats to significant portions of the species' range." The petition also makes a general reference to how coastal areas of the United States and other nations are being threatened and destroyed, and non-specifically references studies suggesting these changes are "affecting all species of sharks and rays (Camhi *et al.,* 1998)." The only specific statement provided in the petition regarding the extent of habitat degradation is a referenced statement from the proposed rule to list the largetooth sawfish under the ESA (75 FR 25174; May 7, 2010), which stated:

> Coastal habitats in the southern [U.S.] Gulf of Mexico region have experienced and continue to experience losses due to urbanization. Wetland losses in the Gulf of Mexico region of the U.S. [average] annual net losses of 60,000 acres (242.8 $km^2$) of coastal and freshwater habitats from 1998 to 2004. Although wetland restoration activities are ongoing in this region of the U.S., the losses significantly outweigh the gains. These losses have been attributed to commercial and residential development, port construction (dredging, blasting, and filling activities), construction of water control structures, modification to freshwater inflows (Rio Grande River in Texas), and gas and oil related activities.

The coastal habitats in the United States are being impacted by urbanization. However, the petition characterizes these impacts as generalized threats to the species. It fails to provide any information beyond these broad statements indicating how habitat degradation may be affecting the Caribbean electric ray to a point where it may warrant protection under the ESA. The only specific statements in the petition regarding habitat degradation appear to be almost entirely unrelated to the Caribbean electric ray. The species description provided in the petition states the Caribbean electric ray "concentrat[es] in the surf zone adjacent to barrier beaches and offshore sand bars in warm months and moves offshore in winter (Rudloe 1989)," and "are unable to penetrate fresh water to any extent." Given this description, the petition fails to demonstrate why or how the loss of wetlands and freshwater habitats would affect a species commonly found in sandy marine habitats. Thus, enumeration of these threats does not constitute substantial information that listing may be warranted.

The petition also discusses impacts from oil and gas exploration. It specifically mentions the Deepwater Horizon (DWH) oil spill, stating that following "the April 2010 [BP] oil spill disaster, the threat of habitat modification and degradation is now more acute for Gulf of Mexico marine life, including the Caribbean electric ray." The petition concludes that "the current oil spill situation, combined with the already-strained ecosystems in the Gulf of Mexico and coastal areas within the Ray's range, is a recipe for extinction, particularly given its current lack of ESA protection." The petition further states that "drilling [for oil and gas] * * * subjects marine species, including the [Caribbean electric ray], to elevated risks." Finally, the petition references the IUCN's statement that "pollution and oil exploration may also adversely affect the habitat of [the Caribbean electric ray], although no specific information is available (Carvalho *et al.,* 2007)," as supporting evidence of habitat degradation.

We also acknowledge oil and gas exploration may adversely affect the marine environment. The DWH oil spill was an unprecedented disaster, likely impacting the marine ecosystem in ways that may not be fully known for decades. However, like the discussion regarding the effects of losing coastal habitat, the petition fails to provide any information on the specific effects to Caribbean electric rays beyond broad statements on the impacts of oil and gas exploration. Thus, these threats do not constitute substantial information that listing may be warranted.

Beyond the impacts from habitat loss and oil and gas exploration, the petition also presents arguments that the destruction of coral reef habitats may be adversely affecting the Caribbean electric ray. The petition states that for "localized [Caribbean electric ray] populations living in coral reef habitats, habitat degradation in the form of coral reef destruction is a serious threat." Reef habitats in the Gulf of Mexico and Caribbean are threatened by multiple factors, including: natural abrasion and breakage, anthropogenic abrasion and breakage, sedimentation, persistent elevated sea surface temperature, competition, excessive nutrients, and sea level rise. However, the petition fails to demonstrate to what extent the Caribbean electric ray even utilize these habitats and how impacts to coral reefs would cause specific adverse effects to the species such that protection under the ESA may be warranted. Thus, these broad statements about generalized threats to the species do not constitute substantial information that listing may be warranted.

The petition also requests that we consider "the effects of Florida red tide [in] limiting the range of [Caribbean electric ray] around this State and other areas." Asserting that "[r]ed tide (*Karenia brevia*) is a local phenomenon in the Gulf of Mexico, along the Florida coast, and it impacts many species of fish and wildlife." While red tide events can cause deaths of aquatic species, possibly even the Caribbean electric ray, the petition fails to describe how and to what extent red tides may be affecting the species. More importantly, the petition fails to provide any compelling evidence regarding how the natural, localized phenomenon of red tide is threatening to destroy, modify, or curtail the habitat or range of the Caribbean electric ray. Thus, this does not constitute substantial information that listing may be warranted.

**Inadequacy of Existing Regulatory Mechanisms**

The petitioner also maintains listing is warranted due to the inadequacy of existing regulatory mechanisms. The petition presents two basic tenets with regard to this claim: (1) There are no species specific regulations in place to protect the Caribbean electric ray; and (2) shrimp trawl bycatch is the primary threat to the Caribbean electric ray, and the regulations requiring the use of turtle excluder devices and bycatch reduction devices (TED/BRDs) are inadequate to protect the species because TED/BRDs do not effectively release Caribbean electric rays.

The simple lack of species specific regulations does not necessarily mean a species' listing is warranted. To conclude that listing may be warranted because of inadequate regulatory mechanisms, there must be evidence that the lack of regulations has actually caused or is a contributing factor to the potential endangerment of the Caribbean electric ray. The petition fails to provide any supporting information on how the lack of species specific regulations has actually contributed to the endangerment of the Caribbean electric ray.

The petition also claims that existing regulations requiring TED/BRDs are inadequate to protect the Caribbean electric ray because TED/BRDs are ineffective in releasing Caribbean electric rays. However, the petition fails to provide substantial information specific to the species regarding the release or retention rates of Caribbean electric rays in shrimp nets equipped with TED/BRDs. Instead, the petitioner's claim that TED/BRDs are ineffective is based on broad statements about finfish swimming ability related to size. Specifically, the petition states that "[d]evices intended to reduce bycatch are ineffective for this species due to it[s] size and slow speed (Steele *et al.,* 2002 at p. 349). As these researchers explain, this is because 'larger fish were more likely to escape [shrimp trawl nets] than smaller fish, probably because swimming ability is positively associated with size in fishes.'" However, this statement is misleading as written. The Steele *et al.* (2002) study did not catch any ray species and did not comment on whether TED/BRDs would be effective in releasing the Caribbean electric ray. The entire quote reads: "[w]ith some exceptions, larger fish were more likely to escape than smaller fish, probably because swimming ability is positively associated with size in fishes (Wardle, 1993)" (Steele *et al.,* 2002); the quote is not specific to the Caribbean electric ray. Beyond this non-specific statement, the petition fails to present any information to suggest that TED/BRDs are ineffective in releasing Caribbean electric ray.

Conversely, information from the NMFS technical experts who develop and test TED/BRDs indicate that TED/BRDs could be effective in releasing smaller animals depending on their orientation (J. Mitchell NMFS, to A. Herndon NMFS, pers. comm., 2010). NMFS' research on the effectiveness of TED/BRDs has not collected length frequency data for rays captured and released during those tests. However, NMFS scientists involved in that research indicate that for an animal the size of the Caribbean electric ray (*i.e.,* ~60 cm), the exclusion rate might be as high as 75 percent for a bottom opening TED, but likely lower (*i.e.,* less than 35 percent) for a top opening TED (J. Mitchell NMFS, to A. Herndon NMFS, pers. comm., 2010). However, no specific data are available on the effectiveness of TED/BRDs in releasing Caribbean electric rays from shrimp trawls.

The petition also fails to acknowledge any potential beneficial effects from the implementation of TED requirements in most shrimp fisheries in the mid-1990s. Given the information available, mandatory TED requirements likely have had at least some beneficial effect.

**Other Natural or Manmade Factors**

The petition states bycatch is the primary natural or manmade factor affecting the Caribbean electric ray's continued existence. More specifically, it states "[t]he decline of the ray by 98 [percent] since 1972 in the Northern Gulf of Mexico is likely primarily caused by shrimp trawling (Carvalho *et al.,* 2007)," citing ineffective TED/BRDs and intense shrimping effort as causative factors. However, the petition's conclusion appears to be based on misleading statements and invalid assumptions.

The petition asserts that shrimp trawling is likely the primary cause of the 98 percent decline of the ray since 1972 in the Northern Gulf of Mexico. This statement is misleading. The decline referenced by the petition is from a study by Shepherd and Myers (2005) that estimated the Caribbean electric ray's relative abundance from FIM survey data available from 1972 to 2002. The data presented in that study show what appears to be a significant decline in mean standardized catch per tow (MSCPT) of the Caribbean electric ray from 1972 to 1973. However, those data also show that from 1973 through 2002 the MSCPT for the Caribbean electric ray appears to remain essentially stable. The petitioner's statement regarding the decline of the species since 1972 does not mention the stable MSCPT from 1973 to 2002. Thus, the assertion regarding population decline appears to be based on a decline solely between two data points from 1972 to 1973.

Although questionable, we cannot dismiss the petition's conclusion that the decline in MSCPT from 1972 to 1973 was evidence of a population decline. However, the data provided by the petitioner also show that no additional decline in relative abundance appears to have occurred after 1973. The data in our files also indicate the Caribbean electric ray is still encountered consistently during FIM trawl projects. Based on this information, we do not believe the information presented on the decline in MSCPT from 1972 to 1973 is evidence that the species is currently facing an extinction risk that is cause for concern.

The petition also asserts "[s]imilar high rates of decline, around [a] 95 [percent] decrease, have occurred in the United States coastal areas between Cape Canaveral, Florida, and Cape Hatteras, North Carolina," citing the Shepherd and Myers (2005) study. However, no such statement could be found in the referenced study.

The petitioner's statements regarding the ineffectiveness of TED/BRDs were addressed in the preceding section.

The petition also provided outdated statistics on the total level of shrimp fishing occurring annually in the United States (4–5 million hours annually; Shepherd and Myers (2005)) in support of its argument that shrimp fishing is intense in areas where the Caribbean electric ray is present. While the amount of fishing effort reported by Shepherd and Myers (2005) may have been correct, the petitioner failed to acknowledge the drastic changes in the shrimp fishery, particularly in the northern Gulf of Mexico. Since 2001, the total annual amount of shrimp fishing effort in the Gulf of Mexico has declined each year with the exception of 2009. Effort has declined from a high of approximately 6.7 million hours in 2001 to approximately 2.1 million hours in 2008 (NMFS unpublished data); a reduction of over 68 percent. Effort rebounded slightly in 2009 to 2.6 million hours (NMFS unpublished data), approximately 61 percent less effort than was documented in 2001. External factors such as low shrimp prices, rising fuel costs, competition with imported shrimp products, and the impacts of hurricanes in the Gulf of

Mexico (particularly Hurricanes Katrina and Rita) are all factors that have acted to reduce fishing effort (GMFMC, 2007). This reduction in effort has likely reduced the potential threat of shrimp trawling to the Caribbean electric ray. Not acknowledging these reductions in effort is misleading and mischaracterizes the current potential threat of shrimp trawling.

The petitioner also claims that "[i]ntense shrimp fisheries exist in multiple other countries surrounding the Gulf of Mexico as well, within the [Caribbean electric ray's] range." The petition concludes that "[s]ince fishing activities are similarly intense and most often unregulated in these areas, similar declines to that of the United States are likely across the species' range (Carvalho *et al.,* 2007)." Information provided in the petition and readily available in our files does not support these statements.

Information provided in the petition on the range of the species shows the species occurring along the Atlantic coasts of Mexico, Belize, Costa Rica, Panama, and Colombia, as well as in Venezuela, Cuba, Jamaica, and the Lesser Antilles. Of the countries listed, only Mexico and Venezuela even appeared on the Food and Agricultural Organization's list of the top 35 shrimp fishing nations from 2000–2005 (Gillet, 2008). Subsequent to the publication of that list, commercial shrimp fishing in Venezuela has been banned. Likewise, Belize has also recently banned all industrial shrimp fishing. While Costa Rica, Panama, and Colombia do have active commercial shrimp fisheries, they fish primarily in the Pacific Ocean where the Caribbean electric ray is not found. The state of the commercial shrimp fishery in Cuba is unknown, but the political and economic climate within the country makes it unlikely to be a source of great fishing effort. In the Lesser Antilles, only Trinidad and Tobago has a commercial shrimp fishery (M. Barnette, NMFS, to A. Herndon, NMFS, pers. comm., 2010).

Based on the preceding information, it appears extremely unlikely that the Caribbean electric ray is facing intense shrimp fisheries in multiple other countries within the Caribbean electric ray's range. In fact, statements regarding the Caribbean electric ray's exposure to intense shrimp fisheries outside the United States are misleading. In the Caribbean electric ray's range, only Mexico has a sizeable shrimp fishery. The Mexican shrimp fishery has experienced the same limiting factors as the U.S. fleet, and has declined to a similar degree over the last decade (M. Barnette, NMFS, to A. Herndon, NMFS, pers. comm., 2010). Thus, the petition does not accurately represent the potential threat posed by shrimp trawling throughout the range of the species. The available information does not indicate that the potential impacts from shrimp fisheries have caused declines or likely contributed to the endangerment of the species throughout the rest of its range. Therefore, this threat does not constitute substantial information that listing may be warranted.

In summary, the petitioner claims that shrimp trawling has caused Caribbean electric ray declines in the Gulf of Mexico and South Atlantic, and is likely causing declines elsewhere, primarily because of ineffective TED/BRDs and intense fishing effort. Based on information presented in the petition and contained within our files, these statements are either unsubstantiated or inaccurate representations of the available data. Thus, the petition does not provide substantial information that listing may be warranted.

In addition to the potential threat from shrimp fishing, the petitioner also claims that the species is prone to a specific type of infection when in captivity. While the information provided by the petition does suggest that the species is prone to infection, the petition fails to explain why the species' susceptibility to infection in captivity suggests a threat to wild populations. Thus, the existence of disease in captive animals does not constitute substantial information that listing may be warranted.

## Petition Finding

After reviewing the information contained in the petition and information readily available in our files, we conclude the petition fails to present substantial scientific or commercial information indicating the petitioned action may be warranted.

## References Cited

A complete list of all references is available upon request from the Protected Resources Division of the NMFS Southeast Regional Office (*see* **ADDRESSES**).

## Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: March 17, 2011.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

[FR Doc. 2011–6692 Filed 3–21–11; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XA310**

### National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric; Public Meeting

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

**ACTION:** Notice of a public meeting.

**SUMMARY:** The NOAA Fisheries will hold a Workshop to discuss the data and models that will be used in the 2011 stock assessments for sablefish, petrale sole and Dover sole.

**DATES:** The Pre-assessment Workshop will be held beginning at 9 a.m., Tuesday, April 5, 2011 and end at 5:30 p.m. or as necessary to complete business for the day. The Workshop will reconvene on Wednesday, April 6 at 9 a.m. and will adjourn by 1 p.m.

**ADDRESSES:** The Pre-assessment Workshop for sablefish, Dover sole and petrale sole will be held at the Hallmark Resort, 744 S.W. Elizabeth Street, Newport, OR 97365; telephone: (1–888) 448–4449.

*Science Center address:* DOC, NOAA Fisheries, Northwest Fisheries Science Center, Newport Research Station—Bldg. 955, 2032 S.E. OSU Drive, Newport, OR 97365–5275; telephone: (541) 867–0500.

**FOR FURTHER INFORMATION CONTACT:** Ms. Stacey Miller, NMFS Northwest Fisheries Science Center; telephone: (541) 961–8475; or Dr. Jim Hastie, Northwest Fisheries Science Center (NWFSC); telephone: (206) 860–3412.

**SUPPLEMENTARY INFORMATION:** This Pre-Assessment Workshop is intended to provide a forum for the exchange of information and ideas between members of the fishing community and other members of the public, stock assessment authors, and data managers. The specific objectives of the workshop are to: (1) Discuss the data to be used in the sablefish, petrale sole and Dover sole stock assessment models; (2) discuss approaches for improving stock assessment modeling efforts; (3) identify anomalies in the data and discuss possible explanations; and (4) identify data gaps and future research possibilities.

Although non-emergency issues not contained in the meeting agenda may come before the Workshop participants for discussion, those issues may not be the subject of formal Workshop action

during this meeting. Workshop 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 workshop participants' intent to take final action to address the emergency.

**Special Accommodations**

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Stacey Miller at (541) 961–8475 at least 5 days prior to the meeting date.

Dated: March 16, 2011.

**Tracey L. Thompson,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. 2011–6594 Filed 3–21–11; 8:45 am]

**BILLING CODE 3510–22–P**

## CONSUMER PRODUCT SAFETY COMMISSION

### Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Publicly Available Consumer Product Safety Information Database

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Notice.

**SUMMARY:** The Consumer Product Safety Commission (Commission) is announcing that a collection of information entitled Publicly Available Consumer Product Safety Information Database has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

**FOR FURTHER INFORMATION CONTACT:** Linda Glatz, Division of Policy and Planning, Office of Information Technology and Technology Services, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone: (301) 504–7671 or by e-mail to *lglatz@cpsc.gov.*

**SUPPLEMENTARY INFORMATION:** In the **Federal Register** of May 24, 2010, 75 FR 29156, the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3501–3520. A final rule was published in the **Federal Register** of December 9, 2010, 75 FR 76832. 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. OMB has now approved the information collection and has assigned OMB control number 3041–0146. The approval expires on January 31, 2014. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain.*

**Todd A. Stevenson,**

*Secretary, Consumer Product Safety Commission.*

[FR Doc. 2011–6645 Filed 3–21–11; 8:45 am]

**BILLING CODE 6355–01–P**

## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**ACTION:** Comment request.

**SUMMARY:** The Department of Education (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA) (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 reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before May 23, 2011.

**ADDRESSES:** Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Please note that written comments received in response to this notice will be considered public records.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: March 17, 2011.

**Darrin A. King,**

*Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.*

**Office of Vocational and Adult Education**

*Type of Review:* Revision.

*Title of Collection:* Measures and Methods for the National Reporting System for Adult Education.

*OMB Control Number:* 1830–0027.

*Agency Form Number(s):* N/A.

*Frequency of Responses:* Annually.

*Affected Public:* State, Local, or Tribal Government, State Educational Agencies or Local Educational Agencies.

*Total Estimated Number of Annual Responses:* 57.

*Total Estimated Number of Annual Burden Hours:* 18,050.

*Abstract:* OVAE requests a revision to its data collection requirements for four measures, entered employment, retained employment, entry into postsecondary education and attainment of a secondary credential by changing the population to which these measures apply. Currently, states report on the relevant outcome for students who set goals related to the measure. Goal setting is being replaced with automatic cohort designation related to a student's employment status, having a secondary credential and taking GED tests. Approval is also sought for collecting new data on teacher experience and certification and student's years of schooling.

Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4523. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department

of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2011–6717 Filed 3–21–11; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**ACTION:** Comment request.

**SUMMARY:** The Department of Education (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA) (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 reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before May 23, 2011.

**ADDRESSES:** Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Please note that written comments received in response to this notice will be considered public records.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: March 17, 2011.

**Darrin A. King,**

*Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.*

**Office of Postsecondary Education**

*Type of Review:* Reinstatement.

*Title of Collection:* Student Aid and Fiscal Responsibility Act (SAFRA) Payments to Loan Servicers for Job Retention: Final Requirements.

*OMB Control Number:* 1840–0815.

*Agency Form Number(s):* N/A.

*Frequency of Responses:* Annually.

*Affected Public:* Businesses or other for-profit; Not-for-profit institutions.

*Total Estimated Number of Annual Responses:* 37.

*Total Estimated Number of Annual Burden Hours:* 1,221.

*Abstract:* The Department of Education (ED) is requesting clearance of the data associated with this clearance. The data collected will facilitate the determination of eligibility for an award under the requirements in section 458(a)(7) of the Higher Education Act of 1965 as amended (HEA, as added by section 2212(b)(1) of the Student Aid and Fiscal Responsibility Act (SAFRA) of 2010). Federal Family Education Loan Program servicers must submit certain annualized payroll and the number of employees on their staff to be considered for an award. ED will award each eligible a portion of $25,000,000, plus a portion of $6,000,000 an incentive, that is a carryover from FY 2010. The awards will be made by the end of FY 2011.

Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4546. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2011–6689 Filed 3–21–11; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Notice of Submission for OMB Review

**AGENCY:** Department of Education.

**ACTION:** Comment request.

**SUMMARY:** The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

**DATES:** Interested persons are invited to submit comments on or before April 21, 2011.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or e-mailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov*. Please note that written comments received in response to this notice will be considered public records.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The OMB is particularly interested in comments which: (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.

Dated: March 17, 2011.

**Darrin A. King,**

*Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.*

**Institute of Education Sciences**

*Type of Review:* Revision.

*Title of Collection:* National Assessment of Educational Progress (NAEP) 2012 Wave I (LTT Reading and Mathematics).

*OMB Control Number:* 1850–0790.

*Agency Form Number(s):* N/A.

*Frequency of Responses:* Once.

*Affected Public:* Individuals or households.

*Total Estimated Number of Annual Responses:* 105,951.

*Total Estimated Annual Burden Hours:* 16,339.

*Abstract:* The National Assessment of Educational Progress (NAEP) is a Federally authorized survey of student achievement at grades 4, 8, and 12 in various subject areas, such as mathematics, reading, writing, science, U.S. history, civics, geography, economics, and the arts. In the current legislation that reauthorized NAEP (The No Child Left Behind Act of 2001 (Pub. L. 107–110)), Congress mandated again the collection of national education survey data through a national assessment program. In 2012, NAEP will administer Long-Term Trend (LTT) reading and mathematics assessments to students at ages 9, 13, and 17. The LTT assessments are designed to give information on the changes in academic performance since the 1970's. Measuring trends of student achievement or change over time requires the precise replication of past procedures. LTT assessments are administered every four years to students at ages 9, 13, and 17, in mathematics and reading. Student performance results are reported for the nation.

Copies of the information collection submission for OMB review may be accessed from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or from the Department's Web site at *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4538. When you access the information collection, click on "Download Attachments " to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2011–6686 Filed 3–21–11; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**ACTION:** Comment Request.

**SUMMARY:** The Department of Education (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA) (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 reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before May 23, 2011.

**ADDRESSES:** Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Please note that written comments received in response to this notice will be considered public records.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: March 17, 2011.

**Darrin A. King,**

*Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.*

**Office of Postsecondary Education**

*Type of Review:* New.

*Title of Collection:* Student Support Services Annual Performance Report.

*OMB Control Number:* Pending.

*Agency Form Number(s):* N/A.

*Frequency of Responses:* Annually.

*Affected Public:* Businesses or other for-profit; Not-for-profit institutions.

*Total Estimated Number of Annual Responses:* 1,034.

*Total Estimated Number of Annual Burden Hours:* 15,510.

*Abstract:* Student Support Services Program grantees must submit the report annually. The reports are used to evaluate grantees' performance, and to award prior experience points at the end of each project (budget) period. The Department also aggregates the data to provide descriptive information on the projects and to analyze the impact of the Student Support Services Program on the academic progress of participating students.

Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4542. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed

to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2011–6674 Filed 3–21–11; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Notice of Submission for OMB Review

**AGENCY:** Department of Education.

**ACTION:** Comment Request.

**SUMMARY:** The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

**DATES:** Interested persons are invited to submit comments on or before April 21, 2011.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or e-mailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov.* Please note that written comments received in response to this notice will be considered public records.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The OMB is particularly interested in comments which: (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.

Dated: March 16, 2011.

**Darrin A. King,**

*Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.*

**Federal Student Aid**

*Type of Review:* Extension.

*Title of Collection:* William D. Ford Federal (Direct Loan) Program and Federal Family Education Loan Program, Teacher Loan Forgiveness Application and Teacher Loan Forgiveness Forbearance Request.

*OMB Control Number:* 1845–0059.

*Agency Form Number(s):* N/A.

*Frequency of Responses:* On Occasion.

*Affected Public:* Individuals or households.

*Total Estimated Number of Annual Responses:* 8,700.

*Total Estimated Annual Burden Hours:* 2,871.

*Abstract:* These forms serve as the means by which eligible borrowers in the Federal Family Education Loan Program and the William D. Ford Federal Direct Loan Program apply for teacher loan forgiveness and request forbearance on their loans while performing qualifying teaching service. The Teacher Loan Forgiveness Application is used by eligible Federal Family Education Loan and Direct Loan program borrowers; borrowers apply for loan forgiveness after they have completed five years of qualifying teaching service at a low-income elementary school, secondary school, or educational service agency. The Teacher Loan Forgiveness Forbearance Request serves as the means by which a borrower who intends to apply for teacher loan forgiveness requests forbearance (permission to temporarily cease making payments) on the loans for which he or she is seeking forgiveness while performing qualifying teaching service applies for said loan forgiveness.

Copies of the information collection submission for OMB review may be accessed from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or from the Department's Web site at *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4485. When you access the information collection, click on "Download Attachments " to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2011–6672 Filed 3–21–11; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Applications for New Awards; Fund for the Improvement of Postsecondary Education—Comprehensive Program

**AGENCY:** Office of Postsecondary Education, Department of Education.

**ACTION:** Notice.

**Overview Information**

*Fund for the Improvement of Postsecondary Education (FIPSE)—Comprehensive Program*

Notice inviting applications for new awards for fiscal year (FY) 2011.

*Catalog of Federal Domestic Assistance (CFDA) Number:* 84.116B.

**DATES:** *Applications Available:* March 22, 2011.

*Deadline for Transmittal of Applications:* May 23, 2011.

*Deadline for Intergovernmental Review:* July 20, 2011.

**Full Text of Announcement**

**I. Funding Opportunity Description**

*Purpose of Program:* The Comprehensive Program supports innovative grants and cooperative agreements to improve postsecondary education. It supports reforms, innovations, and significant improvements of postsecondary education that respond to problems of national significance and serve as national models.

*Priorities:* This notice contains three competitive preference priorities and two invitational priorities. The competitive preference priorities are from the notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486).

*Competitive Preference Priorities:* For FY 2011, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i), we award up to an additional two points, for each priority met, to an application that meets one or

more of these priorities. We will not award more than a total of six competitive preference points to any application.

These priorities are:

*Competitive Preference Priority 1—Increasing Postsecondary Success*

Projects that are designed to address one or more of the following priority areas:

(a) Increasing the number and proportion of high-need students (as defined in this notice) who persist in and complete college or other postsecondary education and training.

(f) Increasing the number and proportion of postsecondary students who complete college or other postsecondary education and training and who are demonstrably prepared for successful employment, active participation in civic life, and lifelong learning.

*Competitive Preference Priority 2—Enabling More Data-Based Decision-Making*

Projects that are designed to collect (or obtain), analyze, and use high-quality and timely data, including data on program participant outcomes, in accordance with privacy requirements (as defined in this notice), in the following priority area:

Improving postsecondary student outcomes relating to enrollment, persistence, and completion and leading to career success.

*Competitive Preference Priority 3—Improving Productivity.*

Projects that are designed to significantly increase efficiency in the use of time, staff, money, or other resources while improving student learning or other educational outcomes (*i.e.,* outcome per unit of resource). Such projects may include innovative and sustainable uses of technology, modification of school schedules and teacher compensation systems, use of open educational resources (as defined in this notice), or other strategies.

*Invitational Priorities:* For FY 2011, these priorities are invitational priorities. Under 34 CFR 75.105(c)(1), we do not give an application that meets these priorities a competitive or absolute preference over other applications.

These priorities are:

*Invitational Priority 1—Curriculum Alignment.*

Under this priority, we are particularly interested in initiatives to align curriculum between high schools and colleges and between 2- and 4-year postsecondary programs.

*Invitational Priority 2—Reducing Instructional Costs.*

For applicants that are addressing *Competitive Preference Priority 3—Improving Productivity,* we are particularly interested in projects that propose to make meaningful and constructive changes to postsecondary courses and programs that effectively demonstrate potential in improving learning outcomes while reducing the cost of delivery.

*Definitions:* These definitions are from the notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010.

*High-need children and high-need students* means children and students at risk of educational failure, such as children and students who are living in poverty, who are English learners, who are far below grade level or who are not on track to becoming college- or career-ready by graduation, who have left school or college before receiving, respectively, a regular high school diploma or a college degree or certificate, who are at risk of not graduating with a diploma on time, who are homeless, who are in foster care, who are pregnant or parenting teenagers, who have been incarcerated, who are new immigrants, who are migrant, or who have disabilities.

*Open educational resources (OER)* means teaching, learning, and research resources that reside in the public domain or have been released under an intellectual property license that permits their free use or repurposing by others.

*Privacy requirements* means the requirements of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, and its implementing regulations in 34 CFR part 99, the Privacy Act, 5 U.S.C. 552a, as well as all applicable Federal, State and local requirements regarding privacy.

**Program Authority:** 20 U.S.C. 1138–1138d.

*Applicable Regulations:* (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 82, 84, 85, 86, 97, 98, and 99. (b) The notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486).

**Note:** The regulations in 34 CFR part 79 apply to all applicants except Federally recognized Indian Tribes.

**Note:** The regulations in 34 CFR part 86 apply to institutions of higher education (IHEs) only.

## II. Award Information

*Type of Award:* Discretionary grants.

*Estimated Available Funds:* The Administration has requested $64,036,000 for the Fund for the Improvement of Postsecondary Education for FY 2011, of which we intend to use an estimated $20,347,000 for awards under this competition. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process, if Congress appropriates funds for this program.

*Estimated Range of Awards:* $500,000–$750,000 for a three year project period. $150,000-$200,000 for the first year.

*Estimated Average Size of Awards:* $733,000—for a three-year project period. $175,000 for the first year.

*Maximum Award:* We will reject any application that proposes a budget exceeding $750,000 for the 36 month budget period. The Assistant Secretary for Postsecondary Education may change the maximum amount through a notice published in the **Federal Register**.

*Estimated Number of Awards:* 28.

**Note:** The Department is not bound by any estimates in this notice.

*Project Period:* Up to 36 months.

## III. Eligibility Information

1. *Eligible Applicants:* IHEs or combinations of IHEs and other public and private nonprofit institutions and agencies.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

## IV. Application and Submission Information

1. *Address to Request Application Package:* ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. FAX: (703) 605–6794. If you use a telecommunications device for the deaf (TDD), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *http://www.EDPubs.gov* or at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application package from ED Pubs, be sure to identify this program or competition as follows: CFDA number 84.116B.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille,

large print, audiotape, or computer diskette) by contacting the person or team listed under *Accessible Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

Page Limit: The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the application narrative to no more than 30 pages.

- A "page" is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger, or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The 30-page limit does not apply to the cover sheet; the budget section, including the budget narrative; the assurances and certifications; the one-page abstract; the resumes; the bibliography; or the letters of support. However, the page limit does apply to all of the application narrative section.

**Note:** Partial pages (pages on which the narrative or data do not take up the full page) are counted as whole pages for purposes of the page limitation.

We will reject your application if you exceed the page limit.

3. *Submission Dates and Times:*

*Applications Available:* March 22, 2011.

*Deadline for Transmittal of Applications:* May 23, 2011.

Applications for grants under this program must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

*Deadline for Intergovernmental Review:* July 20, 2011.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined in the Grants.gov 3-Step Registration Guide (*see http://www.grants.gov/section910/Grants.govRegistrationBrochure.pdf*).

7. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

*a. Electronic Submission of Applications*

Applications for grants under the Comprehensive Program, CFDA number 84.116B, must be submitted electronically using the Governmentwide Grants.gov Apply site at *http://www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the Comprehensive Program at *http://www.Grants.gov.* You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.,* search for 84.116, not 84.116B).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no

later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.

• The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.

• You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *http://www.G5.gov.*

• You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.

• You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.

• You must upload any narrative sections and any other attachments to your application as files in a .PDF (Portable Document) format only. If you upload a file type other than a .PDF or submit a password-protected file, we will not review that material.

• Your electronic application must comply with any page-limit requirements described in this notice.

• After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).

• We may request that you provide us original signatures on forms at a later date.

*Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System:* If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

**Note:** The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

*Exception to Electronic Submission Requirement:* You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the Grants.gov system; *and*

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Sarah T. Beaton, Comprehensive Program, U.S. Department of Education, 1990 K Street, NW., room 6054, Washington, DC 20006–8521. FAX: (202) 502–7877.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

*b. Submission of Paper Applications by Mail*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.116B), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not

accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

**Note:** The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

*c. Submission of Paper Applications by Hand Delivery*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.116B), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

**Note for Mail or Hand Delivery of Paper Applications:** If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

## V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and are listed in the application package.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

## VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:*

(a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* Under the Government Performance and Results Act of 1993 (GPRA), the Department will use the following two performance measures in assessing the successful performance of the Comprehensive Program:

(1) The extent to which funded projects are being replicated (*i.e.,* adopted or adapted by others).

(2) The extent to which projects are being institutionalized and continued after funding.

If funded, you will be asked to collect and report data from your project on steps taken toward achieving the outcomes evaluated by these performance measures (*i.e.,* institutionalization and replication). Consequently, applicants are advised to include these two outcomes in conceptualizing the design, implementation, and evaluation of their proposed projects. Institutionalization and replication are important outcomes that ensure the ultimate success of projects funded under this program.

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made "substantial progress toward meeting the objectives in its approved application." This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

## VII. Agency Contact

**FOR FURTHER INFORMATION CONTACT:** Sarah T. Beaton, Comprehensive Program, U.S. Department of Education, 1990 K Street, NW., room 6054, Washington, DC 20006–8544. Telephone: (202) 502–7621.

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

## VIII. Other Information

*Accessible Format:* Individuals with disabilities can obtain this document and a copy of the application package in

an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

*Electronic Access to This Document:* You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.* To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *http://www.gpo.gov/fdsys.*

Dated: March 17, 2011.

**Eduardo M. Ochoa,**

*Assistant Secretary for Postsecondary Education.*

[FR Doc. 2011–6640 Filed 3–21–11; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

**[CFDA: 84.133N–1 and 84.133A–15]**

## Funding Priorities and Selection Criterion; Disability and Rehabilitation Research Projects and Spinal Cord Injury Model Systems Centers and Multi-Site Collaborative Research Projects

**AGENCY:** Office of Special Education and Rehabilitative Services, Department of Education.

**ACTION:** Notice of proposed priorities and selection criterion.

**SUMMARY:** The Assistant Secretary for Special Education and Rehabilitative Services proposes certain funding priorities and a selection criterion for the Disability and Rehabilitation Research Projects and Centers Program administered by the National Institute on Disability and Rehabilitation Research (NIDRR). Specifically, this notice proposes (1) a priority under the Special Projects and Demonstrations for Spinal Cord Injuries Program for SCIMS Centers (proposed priority 1), and (2) a priority and selection criterion for Disability and Rehabilitation Research Projects (DRRPs) that will serve as the SCIMS Multi-Site Collaborative Research Projects (proposed priority 2). The Assistant Secretary may use one or more of these priorities and selection criterion for competitions in fiscal year (FY) 2011 and later years. We take this action to focus research attention on areas of national need.

**DATES:** We must receive your comments on or before April 21, 2011.

**ADDRESSES:** Address all comments about this notice to Lynn Medley, U.S. Department of Education, 400 Maryland Avenue, SW., room 5140, Potomac Center Plaza (PCP), Washington, DC 20202–2700.

If you prefer to send your comments by e-mail, use the following address: *Lynn.Medley@ed.gov.* You must include "Proposed Priorities for SCIMS centers and SCIMS Multi-Site Collaborative Research Projects" in the subject line of your electronic message.

**FOR FURTHER INFORMATION CONTACT:** Lynn Medley. Telephone: (202) 245–7338 or by e-mail: *Lynn.Medley@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:**

This notice of proposed priorities and selection criterion is in concert with NIDRR's currently approved Long-Range Plan (Plan). The Plan, which was published in the **Federal Register** on February 15, 2006 (71 FR 8165), can be accessed on the Internet at the following site: *http://www.ed.gov/about/offices/list/osers/nidrr/policy.html.*

Through the implementation of the Plan, NIDRR seeks to: (1) Improve the quality and utility of disability and rehabilitation research; (2) foster an exchange of expertise, information, and training to facilitate the advancement of knowledge and understanding of the unique needs of traditionally underserved populations; (3) determine best strategies and programs to improve rehabilitation outcomes for underserved populations; (4) identify research gaps; (5) identify mechanisms of integrating research and practice; and (6) disseminate findings.

This notice proposes two priorities and a selection criterion that NIDRR intends to use for competitions in FY 2011 and possibly later years. However, nothing precludes NIDRR from publishing additional priorities or selection criteria, if needed. Furthermore, NIDRR is under no obligation to make an award for either of these priorities. The decision to make awards will be based on the quality of applications received and available funding.

*Invitation to Comment:* We invite you to submit comments regarding this notice. To ensure that your comments have maximum effect in developing the notice of final priorities and selection criterion, we urge you to identify clearly the specific priority or selection criterion that each comment addresses.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed priorities and selection criterion. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about this notice in room 5133, 550 12th Street, SW., PCP, Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Washington, DC time, Monday through Friday of each week except Federal holidays.

*Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record:* On request we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

*Purpose of Program:* The purpose of the Disability and Rehabilitation Research Projects and Centers Program is to plan and conduct research, demonstration projects, training, and related activities, including international activities, to develop methods, procedures, and rehabilitation technology, that maximize the full inclusion and integration into society, employment, independent living, family support, and economic and social self-sufficiency of individuals with disabilities, especially individuals with the most severe disabilities, and to improve the effectiveness of services authorized under the Rehabilitation Act of 1973, as amended (Rehabilitation Act).

Under the Disability and Rehabilitation Research Projects and Centers umbrella program, the Department funds projects through a number of funding mechanisms, including the Special Projects and Demonstrations for Spinal Cord Injuries (SCI) Program and Disability and Rehabilitation Research Projects (DRRP). The SCIMS centers are funded through the Special Projects and Demonstrations for SCI program and the SCIMS Multi-Site Collaborative Research Projects are funded as DRRPs.

**Special Projects and Demonstrations for Spinal Cord Injuries Program**

The SCIMS centers program is funded through the Special Projects and Demonstrations for Spinal Cord Injuries Program. This program provides assistance for projects that provide comprehensive rehabilitation services to individuals with spinal cord injuries, and conducts spinal cord research, as specified in 34 CFR 359.10 and 359.11.

**DRRP Program**

DRRPs are designed to improve the effectiveness of services authorized under the Rehabilitation Act by developing methods, procedures, and rehabilitation technologies that advance a wide range of independent living and employment outcomes for individuals with disabilities, especially individuals with the most severe disabilities. DRRPs carry out one or more of the following types of activities, as specified and defined in 34 CFR 350.13 through 350.19: research, training, demonstration, development, dissemination, utilization, and technical assistance. An applicant for assistance under this program must demonstrate in its application how it will address, in whole or in part, the needs of individuals with disabilities from minority backgrounds (34 CFR 350.40(a)). The approaches an applicant may take to meet this requirement are found in 34 CFR 350.40(b). In addition, NIDRR intends to require all DRRP applicants to meet the requirements of the *General Disability and Rehabilitation Research Projects (DRRP) Requirements* priority that it published in a notice of final priorities in the **Federal Register** on April 28, 2006 (71 FR 25472).

Additional information on the DRRP program can be found at: *http://www.ed.gov/rschstat/research/pubs/res-program.html#DRRP.*

**Program Authority:** 29 U.S.C. 760 and 764(a) and 764(b)(4).

*Applicable Program Regulations:* 34 CFR part 350 and 359.

*Proposed Priorities:* This notice contains two proposed priorities.

**Background**

The SCIMS program is designed to study the course of recovery and outcomes following the delivery of a coordinated system of care for individuals with SCI. For purposes of this program, SCI is defined as a clinically discernible degree of neurologic impairment of the spinal cord following a traumatic event. The Department currently supports 14 SCIMS centers through this program. These centers provide comprehensive rehabilitation services to individuals with SCI and conduct SCI research, including clinical research and community-based research.

There is a continued need for research to assist individuals who acquire and live with SCI. While SCI remains a low-incidence condition (estimates are that there are 12,000 newly acquired SCI in the U.S. each year), the number of people surviving SCI continues to grow, largely fueled by improved emergency and acute care (*http://www.ninds.nih.gov/disorders/sci/detail_sci.htm*).

SCI are complex and likely to be long-term. Significant costs are associated with SCI because of recurring medical and rehabilitation needs, including home and vehicle modifications and personal assistants (Priebe *et al.,* 2007). Increased survival rates of individuals with SCI have raised new research questions. For instance, research is needed to develop rehabilitation interventions that address functional challenges experienced by individuals with SCI who are aging (Field and Jette, 2007; Winkler, 2008). For example, "overuse syndrome" is a consequence of living with a SCI and manifests itself in degeneration of joints and chronic pain in the shoulders and neck and is associated with using the arms to propel a wheelchair or transfer from one place to another. Chronic pain can be a debilitating secondary condition to SCI, and effective, sustainable treatments remain elusive (Hauser and Gruen, 2009; Hosalkar, *et al.,* 2009).

Since 1973, the SCIMS centers have collected and contributed information on common data elements for a centralized SCI database, referred to as the SCIMS database, which is maintained through a NIDRR-funded grant for a National Data and Statistical Center.

As of October 2010, the SCIMS database included initial information on 27,553 individuals, with follow-up information on 22,605 individuals, including 1,034 people who have provided information for more than 30 years. Further information about the SCIMS database, including inclusion criteria, can be found at the following Web site: *https://www.nscisc.uab.edu.*

The SCIMS program is the largest network of research centers devoted to SCI in the world. The low SCI incidence rate makes collaboration across SCIMS centers critical in order to involve investigators with the necessary expertise and to combine the number of subjects who are available for rigorous testing of interventions (Boulenguez & Vinay, 2009). The SCIMS program has evolved into a multi-site platform that can serve as a resource for testing promising interventions. NIDRR funds the SCIMS centers under the Special Projects and Demonstrations for SCI program, as well as separate DRRPs that serve as SCIMS collaborative research projects. These efforts comprise the SCIMS program. Through the priorities proposed in this notice, the Department seeks to fund research and other work carried out under this program.

In accordance with section 204(b)(4) of the Rehabilitation Act and 34 CFR part 359, Proposed Priority 1 would establish SCIMS centers that will build upon the work of the currently-funded SCIMS centers to provide rehabilitation services to individuals with SCI and conduct SCI research.

Proposed Priority 2, authorized under section 204(a) of the Rehabilitation Act and 34 CFR part 350, would provide for DRRPs to conduct multi-site research that contributes to evidence-based rehabilitation interventions and clinical practice guidelines that improve the lives of individuals with SCI. These projects are designed to serve the overall purpose of the DRRP program.

To be eligible under Priority 2, an applicant must have received a grant under Priority 1. The Department intends to announce the competition for Priority 2 awards after selecting grantees from the Priority 1 competition. Only successful applicants from the Priority 1 competition will be eligible to apply for awards under the Priority 2 competition.

**References**

Alexander, M.S., Anderson, K.D., Beiring-Sorensen, F., Blight, A.R., Brannon. R., Bryce, T.N. Whiteneck, G. 2009). Outcome measures in spinal cord injury: recent assessments and recommendations for future directions. Spinal Cord, 47: 582–591.

Boulenguez, P. and Vinay, L. (2009). Strategies to restore motor functions after spinal cord injury. Current Opinion in Neurobiology, 19(6):587–600.

Field, M.J. and Jette, A.M. (2007). Secondary Conditions and Aging with Disability in M.J. Field & A.M. Jette (Eds). The Future of Disability in American (pp.136–161). Washington, DC: National Academies Press.

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**Proposed Priority 1—Spinal Cord Injury Model Systems Centers**

The Assistant Secretary for Special Education and Rehabilitative Services proposes a priority for the funding of Spinal Cord Injury Model Systems (SCIMS) centers of care (SCIMS Centers). The SCIMS Centers must provide comprehensive, multidisciplinary services to individuals with spinal cord injury (SCI) as a basis for conducting research that contributes to evidence-based rehabilitation interventions and clinical and practice guidelines. The SCIMS program is designed to generate new knowledge that can be used to improve outcomes of individuals with SCI in one or more domains identified in NIDRR's currently approved Long Range Plan, published in the **Federal Register** on February 15, 2006, 71 FR 8165: health and function, participation and community living, technology, and employment. Each SCIMS Center must contribute to this outcome by—

(a) Providing a multidisciplinary system of rehabilitation care specifically designed to meet the needs of individuals with SCI. The system must encompass a continuum of care, including emergency medical services, acute care services, acute medical rehabilitation services, and post-acute services;

(b) Continuing the assessment of long-term outcomes of individuals with SCI by enrolling at least 30 subjects per year into the SCIMS database, following established protocols for the collection of enrollment and follow-up data on subjects;

(c) Proposing and conducting at least one, but no more than two, site-specific research projects to test innovative approaches to treating SCI and to assessing outcomes in one or more domains identified in the Plan: health and function, participation and community living, technology, and employment;

(d) Participating as research collaborators in at least one module project. Module projects are research collaborations with one or more other SCIMS Centers—on topics of mutual interest and expertise. These module projects are carried out as part of the SCIMS Centers' activities. They are not part of the SCIMS Multi-Site Collaborative Projects, which are funded under a separate priority.

**Note:** The SCIMS Centers' Project Directors will work together to determine the substance and the methods that will be used to conduct these module projects. NIDRR staff will facilitate this post-award discussion and negotiation.

Each applicant under this priority must—

(1) Demonstrate, in its application, its capacity to successfully engage in multi-site collaborative research. This capacity includes access to research participants, the ability to maintain data quality, and the ability to adhere to research protocols; and

(2) Propose to spend at least 15 percent of its annual budget on participating in a module project, as described in paragraph (d) of this priority;

(e) Addressing the needs of persons with disabilities including individuals from traditionally underserved populations;

(f) Coordinating with the NIDRR-funded Model Systems Knowledge Translation Center (MSKTC) to provide scientific results and information for dissemination to clinical and consumer audiences; and

(g) Ensuring participation of persons with disabilities in conducting SCIMS research.

**Proposed Priority 2—Spinal Cord Injury Model Systems (SCIMS) Multi-Site Collaborative Research Projects**

The Assistant Secretary for Special Education and Rehabilitative Services proposes a priority for the funding of Disability and Rehabilitation Research Projects (DRRPs) to serve as Spinal Cord Injury Model Systems (SCIMS) multi-site collaborative research projects. To be eligible under this priority, an applicant must have received a grant under the SCIMS Centers priority (Proposed Priority 1 in this notice). Following completion of a competition using the SCIMS Centers priority, the Department will invite successful applicants under that competition to apply for funding under this SCIMS Multi-Site Collaborative Research Projects priority.

Each SCIMS multi-site collaborative research project must be designed to contribute to evidence-based rehabilitation interventions and clinical practice guidelines that improve the lives of individuals with spinal cord injury (SCI) through research, including the testing of approaches to treating SCI or the assessment of the outcomes of individuals with SCI. Each SCIMS multi-site collaborative research project must contribute to this outcome by—

(a) Collaborating with three or more of the NIDRR-funded SCIMS centers (for a minimum of four SCIMS sites). Applicants may also propose to include as part of their multi-site collaborative research project other SCI research sites that are not participating in a NIDRR-funded program;

(b) Conducting multi-site research on questions of significance to SCI rehabilitation, using clearly identified research designs. The research must focus on outcomes in one or more domains identified in NIDRR's currently approved Long Range Plan, published in the **Federal Register** on February 15, 2006, 71 FR 8165: health and function, participation and community living, technology, and employment;

(c) Demonstrating the capacity to carry out multi-site collaborative research projects, including administrative capabilities, experience with management of multi-site research protocols, and demonstrated ability to maintain standards for quality and confidentiality of data gathered from multiple sites;

(d) Addressing the needs of people with disabilities, including individuals from traditionally underserved populations;

(e) Coordinating with the NIDRR-funded Model Systems Knowledge Translation Center (MSKTC) to provide scientific results and information for dissemination to clinical and consumer audiences; and

(f) Ensuring participation of individuals with disabilities in conducting SCIMS research.

**Types of Priorities**

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register**. The effect of each type of priority follows:

*Absolute priority:* Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

*Competitive preference priority:* Under a competitive preference priority, we give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

*Invitational priority:* Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

**Proposed Selection Criterion**

*Background:* The Department is interested in ensuring that grantees use rigorous methods to carry out multi-site research conducted under Proposed Priority Two. The selection criteria that are available for use in DRRP competitions (34 CFR 350.53 and 350.54) are not sufficiently detailed to allow evaluation of large-scale multi-site collaborative research projects. Therefore, we propose an additional criterion to address methods for carrying out multi-site research collaboration and would use this selection criterion when evaluating applications under the SCIMS Multi-Site Collaborative Research Projects priority (Proposed Priority Two). This proposed criterion will be used to evaluate applicants' capacity to manage and carry out a number of complex tasks that are involved in the successful conduct of multi-site collaborative research.

**Proposed Selection Criteria**

In accordance with the provisions of 34 CFR 350.53 and 350.54 and in addition to the selection criteria specified in those sections, the Secretary proposes to consider the following factor in evaluating applications submitted under the SCIMS Multi-Site Collaborative Research Projects priority:

The extent to which the applicant clearly documents its capacity to carry out a multi-site research project, including demonstrated administrative capabilities, experience with managing and following multi-site research protocols, and ability to maintain and meet standards for quality and confidentiality of data gathered from multiple sites.

*Final Priorities and Selection Criteria:* We will announce the final priorities and selection criteria in a notice in the **Federal Register**. We will determine the final priorities and selection criteria after considering responses to this notice and other information available to the Department. This notice does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

**Note:** This notice does *not* solicit applications. In any year in which we choose to use any of these priorities, we invite applications through a notice in the **Federal Register**.

*Executive Order 12866:* This notice has been reviewed in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this proposed regulatory action.

The potential costs associated with this proposed regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this proposed regulatory action, we have determined that the benefits of the proposed priorities and selection criteria justify the costs.

**Discussion of Costs and Benefits**

The benefits of the Disability and Rehabilitation Research Projects and Centers Programs have been well established over the years in that similar projects have been completed successfully. The priorities proposed in this notice will generate new knowledge through research and development. Another benefit of this proposed regulatory action is that the establishment of new DRRPs will improve the lives of individuals with disabilities. The new DRRPs will generate, disseminate, and promote the use of new information that will improve the options for individuals with disabilities to perform regular activities in the community.

*Intergovernmental Review:* This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

*Accessible Format:* Individuals with disabilities can obtain this document in an accessible format (*e.g.*, braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., room 5075, PCP, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

*Electronic Access to This Document:* You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.* To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *www.gpoaccess.gov/nara/index.html.*

*Catalog of Federal Domestic Assistance (CFDA) Numbers:* 84.133N–1 and 84.133A–15.

Dated: March 17, 2011.

**Alexa Posny,**

*Assistant Secretary for Special Education and Rehabilitative Services.*

[FR Doc. 2011–6711 Filed 3–21–11; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

**[CFDA: 84.133A–6, 84.133A–7, and 84.133A–8]**

### Funding Priorities: Disability and Rehabilitation Research Projects and Centers Program

**AGENCY:** Office of Special Education and Rehabilitative Services, Department of Education.

**ACTION:** Notice of proposed priorities.

**SUMMARY:** The Assistant Secretary for Special Education and Rehabilitative Services proposes three funding priorities for the Disability and Rehabilitation Research Projects and Centers Program administered by the National Institute on Disability and Rehabilitation Research (NIDRR). Specifically, this notice proposes a priority for the Americans with Disabilities Act (ADA) National Network Regional Centers (Proposed Priority 1), the ADA National Network Knowledge Translation Center (Proposed Priority 2), and the ADA National Network Research Collaborative (Proposed Priority 3). The Assistant Secretary may use one or more of these priorities for competitions in fiscal year (FY) 2011 and later years. We take this action to focus attention on areas of national need.

**DATES:** We must receive your comments on or before April 21, 2011.

**ADDRESSES:** Address all comments about this notice to Lynn Medley, U.S. Department of Education, 400 Maryland Avenue, SW., Room 5140, Potomac Center Plaza (PCP), Washington, DC 20202–2700.

If you prefer to send your comments by e-mail, use the following address: *Lynn.Medley@ed.gov*. You must include "Proposed Priorities for Americans with Disabilities Act (ADA) National Network Regional Centers, Knowledge Translation Center, and Collaborative" in the subject line of your electronic message.

**FOR FURTHER INFORMATION CONTACT:** Lynn Medley. Telephone: (202) 245–7338 or by e-mail: *Lynn.Medley@ed.gov*.

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:** This notice of proposed priorities is in concert with NIDRR's currently approved Long-Range Plan (Plan). The Plan, which was published in the **Federal Register** on February 15, 2006 (71 FR 8165), can be accessed on the Internet at the following site: *http://www.ed.gov/about/offices/list/osers/nidrr/policy.html*.

Through the implementation of the Plan, NIDRR seeks to: (1) Improve the quality and utility of disability and rehabilitation research; (2) foster an exchange of expertise, information, and training to facilitate the advancement of knowledge and understanding of the unique needs of traditionally underserved populations; (3) determine the best strategies and programs to improve rehabilitation outcomes for underserved populations; (4) identify research gaps; (5) identify mechanisms of integrating research and practice; and (6) disseminate findings.

This notice proposes three priorities that NIDRR intends to use for DRRP competitions in FY 2011 and possibly later years. However, nothing precludes NIDRR from publishing additional priorities if needed. Furthermore, NIDRR is under no obligation to make an award for any of these priorities. The decision to make an award will be based on the quality of applications received and available funding.

*Invitation to Comment:* We invite you to submit comments regarding this notice. To ensure that your comments have maximum effect in developing the notice of final priorities, we urge you to identify clearly the specific priority that each comment addresses.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed priorities. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about these proposed priorities in Room 5133, 550 12th Street, SW., PCP, Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Washington, DC time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

*Purpose of Program:* The purpose of the Disability and Rehabilitation Research Projects and Centers Program is to plan and conduct research, demonstration projects, training, and related activities, including international activities, to develop methods, procedures, and rehabilitation technology, that maximize the full inclusion and integration into society, employment, independent living, family support, and economic and social self-sufficiency of individuals with disabilities, especially individuals with the most severe disabilities, and to improve the effectiveness of services authorized under the Rehabilitation Act of 1973, as amended (Rehabilitation Act).

**Disability and Rehabilitation Research Projects**

The purpose of NIDRR's Disability and Rehabilitation Research Projects (DRRPs) are to improve the effectiveness of services authorized under the Rehabilitation Act of 1973, as amended, by developing methods, procedures, and rehabilitation technologies that advance a wide range of independent living and employment outcomes for individuals with disabilities, especially individuals with the most severe disabilities. DRRPs carry out one or more of the following types of activities, as specified and defined in 34 CFR 350.13 through 350.19: Research, training, demonstration, development, dissemination, utilization, and technical assistance. An applicant for assistance under this program must demonstrate in its application how it will address, in whole or in part, the needs of individuals with disabilities from minority backgrounds (34 CFR 350.40(a)). The approaches an applicant may take to meet this requirement are found in 34 CFR 350.40(b). In addition, NIDRR intends to require all DRRP applicants to meet the requirements of the *General Disability and Rehabilitation Research Projects (DRRP) Requirements* priority that it published in a notice of final priorities in the **Federal Register** on April 28, 2006 (71 FR 25472).

Additional information on DRRPs can be found at: *www.ed.gov/rschstat/research/pubs/res-program.html#DRRP*.

*Program Authority:* 29 U.S.C. 762(g) and 764(a).

*Applicable Program Regulations:* 34 CFR part 350.

*Proposed Priorities:*

This notice contains three proposed priorities. *Background:* The Americans with Disabilities Act of 1990, as amended (ADA), 42 U.S.C. 12101 *et seq.,* prohibits discrimination against individuals with disabilities in employment, public accommodations, State and local government activities, and telecommunications.

Since 1991, NIDRR has supported grants to 10 regional Disability and Business Technical Assistance Centers (DBTACs), which provide ADA training, technical assistance, and ADA-related materials to individuals and entities with rights and responsibilities under the ADA.

In years 2006–2010, NIDRR made several key changes in the DBTAC program. Specifically, NIDRR added a research component to the scope of the DBTAC program, established a DBTAC Coordination, Outreach, and Research Center (DBTAC CORC) (*See* notice of final priorities published in the **Federal Register** on June 9, 2006 (71 FR 33562)), and expanded DBTAC data collection requirements in order to provide more thorough and descriptive reports on the volume and content of the services that the DBTACs provide.

NIDRR made these changes in order to (a) better align the DBTACs with NIDRR's research mission, and (b) enable the DBTACs to develop new knowledge about the ADA and DBTAC activities in order to enhance ongoing training, technical assistance, and dissemination activities. Over the past five years, the DBTACs have published numerous journal articles, held a series of research conferences, and conducted other knowledge translation activities to share the new knowledge about the ADA gained from their research. Examples of key research topics include access to postsecondary education among students with disabilities, access to healthcare services among people with disabilities, and reasonable accommodations in the workplace.

NIDRR intends to continue these research and data collection activities in the coming grant cycle by funding the ADA National Network Regional Centers, the ADA National Network Knowledge Translation Center, and the ADA National Network Research Collaborative.

In addition to these NIDRR-initiated changes, there have also been key changes in legislation and regulations since the last competition for the DBTAC program. For example, in 2008, the ADA Amendments Act (Pub. L. 110–325) was signed into law. The ADA Amendments Act clarifies and expands the definition of disability through several new provisions. These include a provision that affirms that mitigating measures (*e.g.,* medication, assistive technology, accommodations) have no bearing in determining whether an individual meets the definition of having a disability and another provision that clarifies the extent to which the ADA covers individuals with disabilities that are episodic or in remission. In 2010, the U.S. Department of Justice published new regulations implementing titles II and III of the ADA (28 CFR part 35 and 28 CFR part 36). In 2011, the U.S. Equal Employment Opportunity Commission plans to publish new regulations implementing title I of the ADA (29 CFR part 1630).

In addition, a number of ADA compliance issues have gained more attention in recent years, including access to information technologies (National Council on Disability, 2006) and to emergency management services (National Council on Disability, 2009, U.S. Department of Education, 2008, U.S. Department of Homeland Security, 2005). These legislative and regulatory changes and emerging issues highlight a continuing need for NIDRR to support activities to raise awareness of, and promote compliance with, the ADA. To address this need, NIDRR proposes three priorities under which it would fund an ADA National Network that would replace the DBTAC program.

Under Proposed Priority 1, we would establish 10 ADA National Network Regional Centers (ADA Regional Centers) that would constitute the core of the ADA National Network. These ADA Regional Centers would provide comprehensive training and technical assistance and would disseminate materials to individuals and entities with rights and responsibilities under the ADA.

Under Proposed Priority 2, we would fund the ADA National Network Knowledge Translation Center (ADA KT Center). The ADA KT Center would maintain the ADA National Network Web site; review and synthesize the existing ADA research literature; maintain a detailed database describing the training, technical assistance, and dissemination activities provided by the ADA National Network; and promote the use of ADA research to implement the ADA more effectively. This ADA KT Center would also provide logistical and financial support for annual meetings of the Project Directors of the 10 ADA Regional Centers and for a conference on ADA-related research.

Under Proposed Priority 3, we would fund two collaborative research grants that contribute to ADA knowledge of national significance. This priority would allow the ADA Regional Centers to conduct collaborative research using the regional network structure as a foundation for multi-site research to inform ADA implementation and to improve the performance of the ADA National Network.

*References:*

National Council on Disability. (2009, August 12). *Effective emergency management: Making improvements for communities and people with disabilities.* Retrieved December 7, 2010, from *http://www.ncd.gov/newsroom/publications/2009/pdf/NCD_EmergencyManagement.pdf.*

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U.S. Department of Education. (2008, April). *Emergency management research and people with disabilities: A research guide.* Retrieved December 7, 2010, from *http://www2.ed.gov/rschstat/research/pubs/index.html#emergencyguide.*

U.S. Department of Homeland Security. (2005, July 21). *Individuals with disabilities in emergency preparedness.* Retrieved December 7, 2010, from *http://www.dhs.gov/xlibrary/assets/crcl-icc-report-july05.pdf.*

*Proposed Priority 1—Americans with Disabilities Act (ADA) National Network Regional Centers.*

The Assistant Secretary for Special Education and Rehabilitative Services proposes a priority for the funding of 10 Disability and Rehabilitation Research Projects (DRRPs) to serve as the ADA National Network Regional Centers (formerly known as Disability Business Technical Assistance Centers (DBTACs)), one within each of the 10 U.S. Department of Education regions that cover all of the United States. Together, the 10 ADA National Network Regional Centers (ADA Regional Centers), along with the ADA National Network Knowledge Translation Center (ADA KT Center, funded under a separate priority) and the ADA Research Collaboratives (funded under a separate priority) will comprise the ADA National Network. Each ADA Regional Center must be designed to contribute to the following outcomes:

(a) Improved understanding by ADA stakeholders of their rights and responsibilities under the ADA. Each ADA Regional Center must contribute to this outcome by implementing a sustained program of training, technical assistance, and information dissemination (collectively, ADA Network Services), aimed at ADA stakeholders, including local, regional, and national groups representing such stakeholders. NIDRR anticipates that ADA stakeholders will need information on both longstanding ADA requirements as well as recent legislative and regulatory changes affecting those requirements, such as the ADA Amendments Act, the revised title II and III regulations (28 CFR parts 35 and 36, respectively), the anticipated revisions to the title I regulations (29 CFR part 1630), and information on issues associated with ADA compliance in emerging areas such as access to information technologies and emergency management services. For purposes of this priority, the term "ADA stakeholders" refers to individuals and entities with rights and responsibilities under the ADA.

(b) Improved understanding of ADA stakeholders' need for and receipt of ADA Network Services over time, including services to address emerging issues related to compliance with ADA requirements. Each of the 10 ADA Regional Centers must contribute to this outcome by—

(1) Entering, directly into the database maintained by the ADA National Network Knowledge Translation Center ("ADA KT Center", funded under a separate priority), the required data about each of the ADA Network Services that it provides. These data must include, but are not limited to, (1) the ADA title or titles, regulations, and specific topics that are addressed by the ADA Network Services provided, (2) the modality of service provision (*e.g.,* in-person presentation, webinar), and (3) non-identifying information about the recipient or recipients of the ADA Network Services;

(2) Collaborating with the ADA KT Center to analyze data about ADA stakeholder requests for information and the services that the ADA Regional

Center provides, and applying new knowledge from those analyses to further tailor and improve the provision of ADA Network Services; and

(3) Identifying and implementing other appropriate methods for assessing the needs of ADA stakeholders.

(c) Enhanced efficiency and effectiveness of ADA Network Services. Each of the ten ADA Regional Centers must contribute to this outcome by—

(1) Partnering with the ADA KT Center and other ADA Regional Centers to develop, provide, and distribute ADA training and technical assistance materials, and other informational products and services. These materials, products, and services include, but are not limited to, the ADA National Network Web site, as well as materials, products, and services that are relevant to ADA stakeholders in multiple regions.

(2) Attending and participating in the annual meetings of the ADA Regional Centers' Project Directors, to be held in Washington, DC.

*Proposed Priority 2—Americans with Disabilities Act (ADA) National Network Knowledge Translation Center (ADA KT Center).*

The Assistant Secretary for Special Education and Rehabilitative Services proposes a priority for the funding of a Disability and Rehabilitation Research Project (DRRP) to serve as an Americans with Disabilities Act (ADA) National Network Knowledge Translation Center (ADA KT Center). For purposes of this priority, the term "ADA stakeholders" refers to individuals and entities with rights and responsibilities under the ADA. Under this priority, the ADA KT Center must be designed to contribute to the following outcomes:

(a) Optimal efficiency and impact of the ADA National Network's training, technical assistance, and information dissemination activities (ADA Network Services). The ADA KT Center must contribute to this outcome by—

(1) Establishing and implementing an online system to enable the 10 ADA Regional Centers to share training and technical assistance documents and other materials;

(2) Facilitating the joint development of ADA products and materials by the 10 ADA Regional Centers in content areas in which it is possible to maximize resources and avoid duplication of efforts;

(3) Serving as the central repository for ADA National Network information and products, and maintaining ADA Network document portals and Web sites currently funded by NIDRR; and

(4) Organizing and providing logistical and financial support for annual meetings of the ADA Regional Centers' Project Directors in Washington, DC. These meetings will facilitate collaboration between the 10 ADA Regional Centers, and will allow the Project Directors of the ADA Regional Centers to meet and share information directly with their Federal partners in the U.S. Department of Justice, Equal Employment Opportunity Commission, and other relevant agencies.

(b) Increased use of available ADA-related research findings to inform behavior, practices, or policies that improve equal access in society for individuals with disabilities. The ADA KT Center must contribute to this outcome by—

(1) Systematically reviewing existing ADA-related research. The ADA KT Center must identify and conduct systematic reviews of individual ADA research studies to assess the quality of those studies and to synthesize the findings from those studies. In so doing, the ADA KT Center must select appropriate review methods, taking into account the type of research and stage of knowledge development in each area of ADA research. These areas may include, but are not limited to research on specific titles of the ADA, research on ADA issues in specific industries, and research on ADA issues that are relevant to individuals with specific types of disabilities; and

(2) Identifying, for future research, topics that would provide new knowledge or tools to help individuals with rights and responsibilities under the ADA (ADA stakeholders) implement and comply with the ADA. The ADA KT Center must identify future research topics based on the information gathered through the systematic reviews conducted under paragraph (b)(1) of this priority, in combination with information about gaps in ADA stakeholder knowledge related to ADA implementation. The ADA KT Center must collaborate with ADA stakeholders to determine these knowledge gaps.

(c) Increased awareness and utilization of ADA-related research findings by appropriate ADA stakeholder groups. The ADA KT Center must contribute to this outcome by—

(1) Combining or adapting knowledge translation approaches from the existing literature to disseminate and promote the use of ADA-related research generated by the ADA National Network Research Collaborative (funded under a separate priority) and other NIDRR grantees as appropriate; and

(2) Organizing and providing logistical and financial support for a conference on ADA-related research. This conference must highlight research findings produced by the ADA National Network Research Collaborative and other ADA researchers. This conference must take place in year five of the ADA National Network grant cycle.

(d) Improved understanding of ADA stakeholders' need for and receipt of ADA Network Services over time, including services to address emerging issues related to compliance with ADA requirements. The ADA KT Center must contribute to this outcome by—

(1) Continuing the operation and maintenance of the existing database for data submitted by each of the ADA Regional Centers. This database was previously known as the Outcome Measurement System, and is presently operated by the DBTAC Coordination, Outreach, and Research Center (CORC). This database was designed to contain data on each DBTAC's core activities, including training, technical assistance, public awareness events, and dissemination of materials. In operating and maintaining this database, the ADA KT Center must ensure confidentiality of personally identifiable information, and provide quality control and data-retrieval capabilities, using cost-effective technologies and a user-friendly interface;

(2) Providing training and technical assistance to ADA Regional Centers on analyzing data and using the database;

(3) Monitoring the quality of data submitted by the ADA Regional Centers; and

(4) Collaborating with NIDRR and the ADA Regional Centers to ensure that the database is accurate, comprehensive, easy to use, and up-to-date.

*Proposed Priority 3—ADA National Network Research Collaborative.*

The Assistant Secretary for Special Education and Rehabilitative Services proposes a priority for the funding of a Disability and Rehabilitation Research Project (DRRP) to serve as a National ADA Network Research Collaborative (Collaborative). The Collaborative must be designed to contribute to knowledge of national significance related to ADA implementation and compliance. To be eligible under this priority, an applicant must have received a grant under the ADA National Network Regional Center priority (Priority 1). The Collaborative must conduct research using the regional structure of the ADA National Network as a foundation for multi-site research that would inform ADA implementation efforts. The Collaborative must consist of the applicant and an additional three or more of the NIDRR-funded ADA Regional Centers (for a minimum of four ADA Regional Centers). In addition, the

Collaborative may include researchers who are not a part of the ADA National Network. For purposes of this priority, the term "ADA stakeholders" refers to individuals and entities with rights and responsibilities under the ADA. The Collaborative must be designed to contribute to the following outcomes:

(a) Improved knowledge related to ADA implementation. The Collaborative must contribute to this outcome by—

(1) Conducting research on one or more areas in the ADA. These areas may include, but are not limited to research on specific titles of the ADA, research on ADA issues in specific industries, or research on ADA issues that are relevant to individuals with specific types of disabling conditions;

(2) Addressing research questions or hypotheses of national significance that are directly relevant to individuals and entities with rights and responsibilities under the ADA (ADA stakeholders); and

(3) Using appropriate and clearly-identified research designs to generate reliable and valid findings.

(b) Improved ADA stakeholder awareness and utilization of research findings produced by the ADA National Network. The Collaborative must contribute to this outcome by—

(1) Preparing research products (*e.g.,* articles and presentations) that describe the findings of the Collaborative's research. The Collaborative must also share these research products and research findings with the ADA Regional Centers and the ADA KT Center, which the Department intends to fund under separate priorities, for further dissemination to ADA stakeholders; and

(2) Participating in the ADA National Network research conference.

*Types of Priorities:*

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register.** The effect of each type of priority follows:

*Absolute priority:* Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

*Competitive preference priority:* Under a competitive preference priority, we give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

*Invitational priority:* Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

*Final Priorities:* We will announce the final priorities in a notice in the **Federal Register.** We will determine the final priorities after considering responses to this notice and other information available to the Department. This notice does not preclude us from proposing additional priorities or requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

**Note:** This notice does not solicit applications. In any year in which we choose to use these priorities, we invite applications through a notice in the **Federal Register.**

*Executive Order 12866:* This notice has been reviewed in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this proposed regulatory action.

The potential costs associated with this proposed regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this proposed regulatory action, we have determined that the benefits of the proposed priorities justify the costs.

*Discussion of Costs and Benefits:*

The benefits of the Disability and Rehabilitation Research Projects and Centers Programs have been well established over the years in that similar projects have been completed successfully. These proposed priorities will generate new knowledge through research and development. Another benefit of these proposed priorities is that the establishment of new DRRPs will improve the lives of individuals with disabilities. The new DRRPs will generate, disseminate, and promote the use of new information that will improve the options for individuals with disabilities to perform regular activities in the community.

*Intergovernmental Review:* This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

*Accessible Format:* Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., Room 5075, PCP, Washington, DC 20202–2550. *Telephone:* (202) 245–7363. If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

*Electronic Access to This Document:* You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.* To use PDF you must have Adobe Acrobat Reader, which is available free at this site. **Note:** The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Catalog of Federal Domestic Assistance (CFDA) Number: 84.133A–6, 84.133A–7, and 84.133A–8.

Dated: March 17, 2011.

**Alexa Posny,**

*Assistant Secretary for Special Education and Rehabilitative Services.*

[FR Doc. 2011–6713 Filed 3–21–11; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF ENERGY

### Notice of Availability of the Draft Environmental Impact Statement and Public Hearing Notice for the Texas Clean Energy Project, near Odessa, Ector County, TX

**AGENCY:** Department of Energy.

**ACTION:** Notice of Availability and Public Hearing.

**SUMMARY:** The U.S. Department of Energy (DOE) announces the availability of the *Texas Clean Energy Project Draft Environmental Impact Statement* (DOE/EIS–0444D) for public review and comment, as well as the date, location, and time for a public hearing. The draft environmental impact statement (EIS) analyzes the potential environmental impacts associated with the Texas Clean Energy Project (TCEP), which would be constructed and operated by Summit Texas Clean Energy, LLC, an affiliate of Summit Power Group, Inc. (Summit). Summit's proposal was selected by DOE to receive financial assistance under the Clean Coal Power Initiative (CCPI) program.

DOE prepared this draft EIS in accordance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), the

Council on Environmental Quality (CEQ) regulations that implement the procedural provisions of NEPA (40 CFR parts 1500–1508), and the DOE procedures implementing NEPA (10 CFR part 1021).

**DATES:** DOE invites the public to comment on the draft EIS during the public comment period, which ends May 2, 2011. DOE will consider all comments postmarked or received during the public comment period in preparing the final EIS and will consider late comments to the extent practicable.

DOE will hold a public hearing on April 5, 2011, in Odessa, Texas. An informational session will be held from 4 p.m. to 7 p.m., preceding the formal presentations and formal comment period from 7 p.m. to approximately 9 p.m. *See* the *Public Hearing* section for details on the hearing process and locations.

**ADDRESSES:** Requests for information about this draft EIS and requests to receive a copy of it should be directed to: Mr. Mark L. McKoy, Environmental Manager, U.S. Department of Energy, National Energy Technology Laboratory, M/S B07, P.O. Box 880, Morgantown, WV 26507–0880. Additional information about the draft EIS may also be requested by electronic mail at: *mmckoy@netl.doe.gov* or by telephone: (304) 285–4426, or toll-free at: (800) 432–8330, extension 4426. The draft EIS will be available at: *http://nepa.energy.gov/*. Copies of the draft EIS are also available for review at the locations listed in the **SUPPLEMENTARY INFORMATION** section of this Notice.

Written comments on the draft EIS can be mailed to Mr. Mark L. McKoy, Environmental Manager, at the address noted above. Written comments may also be submitted by fax to: (304) 285–4403, or submitted electronically to: *mmckoy@netl.doe.gov*. Oral comments on the draft EIS will be accepted verbatim only during the public hearing scheduled for the date and location provided in the **DATES** section of this Notice.

**FOR FURTHER INFORMATION CONTACT:** For further information on the proposed project or the draft EIS, please contact Mr. Mark L. McKoy (*see* **ADDRESSES**). For general information regarding the DOE NEPA process, please contact: Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance (GC–54), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0103; *telephone:* (202) 586–4600; *fax:* (202) 586–7031; or leave a message at: (800) 472–2756.

**SUPPLEMENTARY INFORMATION:** DOE proposes to provide limited financial assistance (approximately $450 million), through a cooperative agreement, to Summit for the proposed TCEP. The project proponent team includes: Summit; Blue Source, LLC; Siemens, AG; Linde AG (operating through Selas Fluid Processing, Corp.); Fluor Corporation; and CW NextGen, Inc.

The TCEP would use coal-fueled integrated gasification combined-cycle technology to generate electric power and would capture carbon dioxide ($CO_2$) for use in enhanced oil recovery (EOR) and eventual sequestration. The plant would generate 400 megawatts (gross) of electricity, of which approximately 213 megawatts would be provided to the power grid. It would also produce urea, argon, and sulfuric acid for sale in commercial markets. Because of its multiple production capabilities, the plant is referred to as a poly-generation (or polygen) plant. DOE would provide approximately 26 percent of the $1.73 billion (rounded-2009 dollars) in development and capital costs recognized under the DOE cooperative agreement.

The polygen plant would be built on a 600 acre oil field site in Ector County, Texas, north of the abandoned oil town of Penwell. Summit would design and construct the plant to capture approximately 90 percent of its $CO_2$. During the demonstration phase of the plant's operations, the project would sequester about 3 million tons of $CO_2$ per year by transporting it in pipelines to existing oil fields in the Permian Basin of West Texas for use in EOR operations by third-party buyers of the $CO_2$. Following the demonstration phase, the polygen plant would continue in commercial operation for 30 to 50 years and would continue to capture its $CO_2$.

The draft EIS evaluates the potential impacts of the proposed project, connected actions, and reasonable alternatives. Because the proposed project may affect wetlands, the draft EIS includes an assessment of impacts to wetlands in accordance with DOE regulations for Compliance with Floodplains and Wetlands Environmental Review Requirements (10 CFR part 1022).

DOE analyzed two alternatives in the draft EIS, the Proposed Action and the No Action Alternative. Under the Proposed Action, DOE would provide approximately $450 million in cost-shared funding under the CCPI program to the proposed project. DOE has already provided a portion of the total funding ($23.2 million) to Summit for DOE's share of the preliminary design and project definition.

Under the No Action Alternative, DOE would not provide continued funding under the CCPI Program. In the absence of DOE funding, Summit could pursue two options. First, the facility and supporting infrastructure could be built as proposed without DOE funding. The potential environmental impacts of this option would be essentially the same as the Proposed Action. Second, Summit could choose to cancel the project, and none of the proposed facilities would be built. This option would not contribute to the goal of the CCPI program, which is to accelerate commercial deployment of advanced coal technologies with carbon capture and sequestration that provide the United States with clean, reliable, and affordable energy. For purposes of this draft EIS, DOE assumes that the project would not be built under the No Action Alternative.

DOE has developed an overall strategy for compliance with NEPA for the CCPI program consistent with CEQ regulations (40 CFR parts 1500–1508) and DOE regulations (10 CFR part 1021). This strategy has two phases. The first phase involves an open solicitation and competitive selection process to obtain a set of projects that best meets program needs. The applications that meet the mandatory eligibility requirements constitute the range of reasonable alternatives available to DOE to meet the program's purpose and needs. Following reviews by technical, environmental, and financial panels and a comprehensive assessment by a merit review board, DOE officials select those projects that they conclude best meets the program's purposes and needs. By broadly soliciting proposals to meet the programmatic purposes and needs for DOE action and by evaluating the potential environmental impacts associated with each proposal before selecting projects that would go forward to the second phase, DOE considers a reasonable range of alternatives for implementing CCPI. The second phase consists of preparing detailed NEPA analyses for each selected project. For the TCEP, DOE determined that providing financial assistance to the proposed project would constitute a major federal action that may significantly affect the quality of the human environment. Therefore, DOE has prepared this draft EIS to assess the potential environmental impacts of Summit's proposed project and the options that are still under consideration by Summit.

Alternative sites considered by Summit in developing the proposed

project are presented in the EIS. Alternative sources of water supply and reasonable alternative routes for linear facilities are addressed as options in the draft EIS.

The draft EIS considers the environmental consequences that may result from the proposed project and describes additional mitigation that might be used to reduce various impacts. Potential impacts identified during the scoping process and analyzed in the draft EIS relate to the following:

Air quality; soils, geology, and mineral resources; ground water; surface water; biological resources; aesthetics; cultural resources; land use; socioeconomics; environmental justice; community services; utility systems; transportation; materials and waste management; human health, safety, and accidents; and noise and vibration.

*Availability of the Draft EIS*

Copies of the draft EIS have been distributed to Members of Congress; Native American tribal governments; Federal, State, and local officials; and agencies, organizations, and individuals who may be interested or affected. The draft EIS will be available on the Internet at: *http://nepa.energy.gov/*. Copies of the draft EIS are available for public review at the following location: University of Texas of the Permian Basin, J. Conrad Dunagan Library, Main Floor, 4901 E. University Avenue, Odessa, TX 79762–0001. Additional copies also can be requested (*see* **ADDRESSES**).

**Public Hearing**

DOE will conduct a public hearing on April 5, 2011 at the MCM Elegante Hotel, 5200 E. University Boulevard, Odessa, TX 79762 to obtain comments on the draft EIS. Requests to speak at the public hearing can be made by calling or writing to Mr. Mark L. McKoy (*see* **ADDRESSES**). Requests to speak that have not been submitted prior to the hearing will be accepted in the order in which they are received during the hearing. Speakers are encouraged to provide a written version of their oral comments or supplementary materials for the record. Each speaker will be allowed approximately five minutes to present comments. Those speakers who want more than five minutes should indicate the length of time desired in their request. Depending on the number of speakers, DOE may need to limit all speakers to five minutes initially and provide additional opportunities as time permits. Comments will be recorded by a court reporter and will become part of the public record. Oral and written comments will be given equal consideration.

The hearing will begin at 4 p.m. with an informational session. Formal presentations and a formal comment session will begin at approximately 7 p.m. DOE will begin the hearing's formal session with overviews of the DOE program, proposed project, and NEPA process, followed by oral statements by the pre-registered speakers. Speakers may be asked questions to help ensure that DOE fully understands the comments. A presiding officer will establish the order of speakers and provide any additional procedures necessary to conduct the meetings.

All meetings will be accessible to people with disabilities. In addition, any individual needing specific assistance, such as a sign language interpreter or a translator, should contact Mr. Mark L. McKoy (*See* **ADDRESSES**) at least 48 hours in advance of the hearing so that arrangements can be made.

Issued in Washington, DC, on March 17, 2011.

**Mark J. Matarrese,**

*Director, Office of Environment, Security, Safety & Health, Office of Fossil Energy.*

[FR Doc. 2011–6694 Filed 3–21–11; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Bonneville Power Administration

### Central Ferry to Lower Monumental 500-kilovolt Transmission Line Project

**AGENCY:** Bonneville Power Administration (BPA), Department of Energy (DOE).

**ACTION:** Notice of Availability of Record of Decision (ROD).

**SUMMARY:** This notice announces the availability of the ROD to implement the Central Ferry—Lower Monumental 500-kilovolt (kV) Transmission Line Project in Garfield, Columbia, and Walla Walla counties, Washington. BPA has decided to implement the Combination A Alternative identified in the Central Ferry—Lower Monumental 500-kV Transmission Line Project Final Environmental Impact Statement (DOE/EIS–0422, February 2011). The Combination A Alternative consists of constructing a new 500-kV single-circuit transmission line from BPA's new Central Ferry Substation near the Port of Central Ferry in Garfield County generally west through Garfield, Columbia, and Walla Walla counties to BPA's existing Lower Monumental Substation in Walla Walla County, a distance of about 38 miles. The transmission line route begins at the new Central Ferry Substation along the Snake River, and runs southwest for about 11 miles mostly parallel to and about 1,200 to 2,500 feet (about ¼; mile to ½ mile) south of BPA's two existing Little Goose-Lower Granite 500-kV steel lattice transmission lines. The route then angles away from the existing lines and proceeds southwest for about 6 miles before crossing the Tucannon River directly north of the town of Starbuck. The route then proceeds west for about 20 miles from the Tucannon River crossing to BPA's existing Lower Monumental Substation. BPA will acquire new 150-foot-wide right-of-way for the entire length of the new line. Approximately 161 new lattice steel transmission towers, ranging in height from about 104 to 189 feet with an average span length between towers of about 1,200 feet, will be constructed in the new right-of-way. The conductor and overhead ground wire for the new transmission line will be placed on these towers, and counterpoise would be buried in the ground at selected towers. Construction of the new line also will include the upgrade of about 5 miles of existing access roads, and the construction of about 38 miles of new access roads. Power circuit breakers, disconnect switches, and other electrical equipment will be installed at Lower Monumental Substation. In the vicinity of the Lower Monumental Substation, six existing steel lattice towers that support existing transmission lines in this area will be relocated to allow entry of the Central Ferry-Lower Monumental transmission line into the substation. Fiber optic cable will be installed along a portion of the new line. All mitigation measures identified in the EIS are adopted.

**ADDRESSES:** Copies of the ROD and EIS may be obtained by calling BPA's toll-free document request line, 1–800–622–4520. The ROD and EIS are also available on our Web site, *http://www.bpa.gov/go/centralferrylomo.*

**FOR FURTHER INFORMATION CONTACT:** Tish Eaton, Bonneville Power Administration—KEC–4, P.O. Box 3621, Portland, Oregon 97208–3621; toll-free telephone number 1–800–622–4519; fax number 503–230–5699; or e-mail *tkeaton@bpa.gov.*

Issued in Portland, Oregon, on March 11, 2011.

**Stephen J. Wright,**

*Administrator and Chief Executive Officer.*

[FR Doc. 2011–6662 Filed 3–21–11; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. CP11–120–000]**

### Liberty Gas Storage, LLC and LA Storage, LLC; Notice of Joint Application for Abandonment and Certificate of Public Convenience and Necessity

Take notice that on March 4, 2011, Liberty Gas Storage, LLC (Liberty) and LA Storage, LLC (LA Storage) filed with the Federal Energy Regulatory Commission (Commission) a joint application under section 7 for (i) Authorization from the Commission pursuant to section 7(b) of the NGA for Liberty to abandon by transfer certain facilities to LA Storage; (ii) a certificate of public convenience and necessity pursuant to section 7(c) of the NGA for LA Storage to acquire, own and operate such facilities; (iii) authorization for LA Storage to charge market-based rates for the storage and hub services it will provide; (iv) a blanket construction certificate issued to LA Storage under Subpart F of Part 157 of the Commission's Regulations; and (v) a blanket transportation certificate issued to LA Storage under Subpart G of Part 284 of the Commission's regulations.

Questions regarding the joint application may be directed to William Rapp, Counsel for Liberty and LA Storage, 101 Ash Street, San Diego, CA 92101; telephone (619) 699–5050; e-mail: *wrapp@semprapipelines.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify Federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all Federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 7 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, 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:* April 5, 2011.

Dated: March 15, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–6616 Filed 3–21–11; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[P–13123–002–CA]**

### Eagle Mountain Pumped Storage Hydroelectric Project; Eagle Crest Energy; Notice of Teleconference

a. *Date and Time of Meeting:* Friday, April 15, 2011 at 9 a.m. (Pacific Time).

b. *Place:* By copy of this notice we are inviting all interested parties to attend a teleconference from their location.

c. *FERC Contact:* Kenneth Hogan, (202) 502–8434: *Kenneth.Hogan@ferc.gov.*

d. *Purpose of the Meeting:* Commission staff will be meeting with the staff of the U.S. Fish and Wildlife Service and Eagle Crest Energy as part of its on-going Section 7 Endangered Species Act consultation efforts.

e. All local, state, and federal agencies, tribes, and interested parties, are hereby invited to listen in on the teleconference. The phone number and passcode to the teleconference will be provided upon a request made by interested parties. Please make that request to Ms. Ginger Gillian, representative of Eagle Crest Energy, via e-mail at: *ggillin@geiconsultants.com;* or via telephone at: 503–697–1478. All requests for the teleconference phone number and passcode must be made no later than 3 p.m. (Pacific Time), Wednesday, April 13, 2011.

Dated: March 15, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–6615 Filed 3–21–11; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 12495–002]**

### Cascade Creek, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On February 1, 2011, Cascade Creek, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Cascade Creek Hydroelectric Project (Cascade Creek project) to be located on Cascade Creek, Swan Lake, and Falls Lake in the vicinity of Petersburg, Alaska. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project will consist of the following: (1) A low-head weir on Swan Lake with a 3-foot-high, 50-foot-long crest gate and an intake siphon; (2) a 16,000-foot-long, 12 to 14-foot diameter unlined power conduit; (3) an 780-foot-long, 9-foot-diameter steel penstock from the power conduit to the powerhouse; (4) a 140-foot by 80-foot concrete and metal powerhouse containing three turbines with a capacity of 70 megawatts (MW); (5) an approximately 18.7-mile-long, 138-kV transmission line which will tie into an undetermined interconnection near Petersburg; and (6) appurtenant facilities. The estimated annual generation of the Cascade Creek project would be 205 gigawatt-hours.

*Applicant Contact:* Chris Spens, Cascade Creek, LLC, 3633 Alderwood Avenue, Bellingham, WA 98225.

*FERC Contact:* Ryan Hansen (202) 502–8074 or by e-mail at *ryan.hansen@ferc.gov.*

*Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications:* 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *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. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, 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–12495–002) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: March 15, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–6617 Filed 3–21–11; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Notice Announcing Preliminary Permit Drawing

| | Project No. |
|---|---|
| Lock+ Hydro Friends Fund XXXVIII | 13744–000 |
| FFP Missouri 12, LLC | 13755–000 |
| Allegheny 2 Hydro, LLC | 13774–000 |
| Three Rivers Hydro LLC | 13780–000 |

The Commission has received four preliminary permit applications deemed filed on May 18, 2010, at 8:30 a.m.,[1] for proposed projects to be located at the Army Corps of Engineers' Allegheny River Lock and Dam No. 2 on the Allegheny River, in Allegheny County, Pennsylvania. The applications were filed by Lock+ Hydro Friends Fund XXXVIII for Project No. 13744, FFP Missouri 12, LLC, for Project No. 13755, Allegheny 2 Hydro, LLC, for Project No. 13774, and Three Rivers Hydro LLC for Project No. 13780.

On March 24, 2011, at 10 a.m. (eastern time), the Secretary of the Commission, or her designee, will conduct a random drawing to determine the filing priority of the applicants identified in this notice. The Commission will select among competing permit applications as provided in section 4.37 of its regulations.[2] The priority established by this drawing will be used to determine which applicant, among those with identical filing times, will be considered to have the first-filed application.

The drawing is open to the public and will be held in room 2C, the Commission Meeting Room, located at 888 First St., NE., Washington, DC 20426. A subsequent notice will be issued by the Secretary announcing the results of the drawing.

Dated: March 15, 2011.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2011–6768 Filed 3–21–11; 8:45 am]

**BILLING CODE 6717–01–P**

[1] Under the Commission's Rules of Practice and Procedure, any document received after regular business hours is considered filed at 8:30 a.m. on the next regular business day. 18 CFR 385.2001(a)(2) (2010).

[2] 18 CFR 4.37 (2010).

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OAR–2007–0482; FRL–9284–7]**

### Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; SmartWay Transport Partnership (New Collection)

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

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request for a new collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

**DATES:** Additional comments may be submitted on or before April 21, 2011.

**ADDRESSES:** Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2007–0482, to (1) EPA online using *http://www.regulations.gov* (our preferred method), by e-mail to: *a-and-r-Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Air Docket, Mail Code 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB by mail to Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Attention:* Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Denise Kearns, Office of Air and Radiation, Office of Transportation and Air Quality, Transportation and Regional Programs Division, U.S. Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; *telephone:* 734–214–4240; *Fax:* 734–214–4906; *e-mail: kearns.denise @epa.gov.*

**SUPPLEMENTARY INFORMATION:** EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On April 28, 2009 (74 FR 19222), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OAR–2007–0482, which is available for online viewing at *http://www.regulations.gov*, or in person viewing at the Air Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC 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 Reading Room is 202–566–1744, and the telephone number for the Air Docket is 202–566–1742.

Use EPA's electronic docket and comment system at *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select "docket search," then key in the docket ID number identified above. **Please note** that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

*Title:* SmartWay Transport Partnership (New Collection).

*ICR numbers:* EPA ICR No. 2265.01, OMB Control No. 2060–NEW.

*ICR status:* This ICR is for a new information collection activity. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

*Abstract:* The EPA's Office of Air and Radiation (OAR) supports the SmartWay Transport Partnership, an energy conservation deployment program that aims to improve fuel efficiency and curb greenhouse gas emissions generated by the freight goods movement industry. OAR developed the SmartWay Transport Partnership under directives outlined in Subtitle D of the Energy Policy Act of 2005 which calls on EPA to assess the energy and air quality impacts of activities within the freight industry. These activities include long-duration truck idling, the development and promotion of strategies for reducing idling, fuel consumption, and negative air quality effects. SmartWay's objectives also are consistent with the Federal Technology Transfer Act and other laws that support collaborative partnerships between government and industry.

The partnership is open to organizations that either use or provide freight transport services for goods movement. "Affiliate" organizations that do not operate freight transport fleets, but that are working to strengthen the freight industry, such as industry trade associations, state and local transportation agencies and environmental groups, also may sign on as SmartWay partners.

All organizations that join SmartWay, including carriers, shippers and affiliates are asked to provide EPA with information.

Specifically, as a first step toward partnering with EPA, organizations that operate fleets, such as freight carriers, shippers and logistics management companies, commit to assessing and improving the environmental performance of their freight transport activities. A company joins SmartWay when it: (1) Conducts an assessment of its transportation and freight-based management activities and inputs its results into SmartWay's online environmental measurement tracking system; and (2) provides a signed partnership agreement to EPA. Data outputs from the environmental tracking system are used by companies to establish a baseline and set goals for reducing fuel use and emissions. Under their partnership agreement, companies also agree to annually update the environmental performance tracking system and provide those updated results to EPA.

Data outputs from the environmental tracking system are vital to the SmartWay Partnership for several reasons. First, the data provides confirmation that EPA's SmartWay partners have set a baseline, established objectives and are meeting those objectives as outlined in their partnership agreement. The environmental measurement tracking system also makes it possible for EPA to assist our partners in adjusting their commitments, as appropriate, and to update them with environmental performance and technology information that will empower them to improve their efficiency and achieve their environmental goals. This information also improves EPA's knowledge and understanding of the environmental and energy impacts associated with goods movement, and the effectiveness of both proven and emerging strategies to lessen those impacts.

In addition to requesting tracking updates on fuel consumption and environmental performance, EPA may from time to time provide opportunities to encourage SmartWay partners to provide other kinds of information, to improve the program's services. These opportunities may be made available to all SmartWay partners, including affiliates. Some examples of the kinds of information and topics that partners might provide input to EPA on could include opinions and test data on the effectiveness of new and emerging technology applications; the reach and value of partnering with EPA through the SmartWay program; and awareness of the SmartWay brand. In some instances, EPA might also query other freight industry representatives (not just SmartWay partners), including trade and professional associations, nonprofit environmental groups, energy, and

community organizations, and schools and universities, and a small sampling of the general public on these topics.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 3 hours per response. Burden means the total time, effort, and financial resources expended by persons to generate, maintain, retain, disclose and provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

*Respondents/Affected Entities:* Transportation carriers; retail and industrial shippers that contract with transportation carriers; logistics and supply chain management companies; and non-profit and other affiliates organizations.

*Estimated Number of Respondents:* 3,225.

*Frequency of Response:* Annually.

*Estimated Total Annual Hour Burden:* 8,301.

*Estimated Total Annual Cost:* $531,089, which includes $1,350 annualized capital or O&M costs.

Dated: March 16, 2011.

**John Moses,**

*Director, Collection Strategies Division.*

[FR Doc. 2011–6687 Filed 3–21–11; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9285–2]**

## Office of Research and Development; Ambient Air Monitoring Reference and Equivalent Methods: Designation of Four New Equivalent Methods

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of the designation of four new equivalent methods for monitoring ambient air quality.

**SUMMARY:** Notice is hereby given that the Environmental Protection Agency (EPA) has designated, in accordance with 40 CFR Part 53, four new equivalent methods: One each for measuring concentrations of $PM_{2.5}$ and lead (Pb) and two for measuring concentrations of $PM_{10}$ in the ambient air.

**FOR FURTHER INFORMATION CONTACT:** Robert Vanderpool, Human Exposure and Atmospheric Sciences Division (MD–D205–03), National Exposure Research Laboratory, U.S. EPA, Research Triangle Park, North Carolina 27711. *E-mail: Vanderpool.Robert@epa.gov.*

**SUPPLEMENTARY INFORMATION:** In accordance with regulations at 40 CFR Part 53, the EPA evaluates various methods for monitoring the concentrations of those ambient air pollutants for which EPA has established National Ambient Air Quality Standards (NAAQSs) as set forth in 40 CFR Part 50. Monitoring methods that are determined to meet specific requirements for adequacy are designated by the EPA as either reference methods or equivalent methods (as applicable), thereby permitting their use under 40 CFR Part 58 by States and other agencies for determining compliance with the NAAQSs.

The EPA hereby announces the designation of four new equivalent methods for measuring pollutant concentrations in the ambient air: One for $PM_{2.5}$, one for Pb, and two for $PM_{10}$. These designations are made under the provisions of 40 CFR Part 53, as amended on June 22, 2010 (75 FR 35597).

The new $PM_{2.5}$ equivalent method is an automated monitoring method (analyzer) utilizing a measurement principle based on active sampling of ambient aerosols and contemporaneous analysis by means of a light-scattering technique for determination of particle size and mass concentration. The newly designated equivalent method is identified as follows:

EQPM–0311–195, "Grimm Technologies, Inc. Model EDM 180 $PM_{2.5}$ Monitor," light scattering continuous ambient particulate monitor operated for 24 hours at a volumetric flow rate of 1.2 L/min, configured with a Nafion®-type air sample dryer, complete for operation with firmware version 7.80 or later, in accordance with the Grimm Technologies, Inc. Model EDM 180 Operation and Instruction Manual. The optional graphic presentation can be made with the software model 1.177 version 3.30 or later.

The application for an equivalent method determination for this candidate method was received by the EPA on April 6, 2010. The monitor is commercially available from the applicant, GRIMM Technologies, Inc., 5833 Stewart Parkway, Suite 203, Douglasville, GA 30153.

It should be noted that this Grimm Model EDM 180 $PM_{2.5}$ Monitor is not only a semi-continuous $PM_{2.5}$ analyzer but it is also the first equivalent method designated by EPA that is based on an optical measurement technique and, further, one that does not involve inertial separation of particles in the $PM_{2.5}$ size range or collection of the $PM_{2.5}$ on a particle filter. Because this new measurement approach is being approved for NAAQS compliance measurements for the first time, users are encouraged to consider the special nature of this method when introducing it into a SLAMS PM2.5 monitoring network. The EPA Regional Offices can offer guidance in this regard.

The new equivalent method for Pb is a manual method that uses the sampling procedure specified in the EPA Reference Method for total suspended particulate matter (TSP) (High-Volume Method, 40 CFR Part 50, Appendix B), with a particular extraction and analytical procedure. The method is identified as follows:

EQL–0311–196, "Heated Ultrasonic Nitric and Hydrochloric Acid Digestion and ICP/AES Analysis for Lead (Pb) on TSP High-Volume Filters." A sample of total suspended particulate matter (TSP) is collected on a glass fiber filter, using the sampler and procedure of the EPA Reference Method for the Determination of Suspended Particulate Matter in the Atmosphere (High-Volume Method) (40 CFR 50, Appendix B). The TSP sample is extracted with a solution of nitric and hydrochloric acid, heated in an ultrasonic bath to 80 °C for one hour, and brought to a final volume of 40 mL. The lead content of the sample extract is analyzed by Inductively Coupled Plasma-Atomic Emission Spectrometry (ICP–AES), based on EPA SW–846 Method 6010C.

The application for an equivalent method determination for this method was submitted by the Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711 and was received by the Office of Research and Development on June 24, 2010. The method description is available at *http://www.epa.gov/ttnamti1/pb-monitoring.html.*

The two new equivalent methods for $PM_{10}$ are both manual, gravimetric sampling methods employing a particulate sampler configured for dual filter sampling and using a virtual impactor to separate the fine and coarse PM fractions for collection on separate filters. The two newly designated $PM_{10}$ methods are identified as follows:

EQPS–311–197, "Thermo Scientific Partisol® 2000–D Dichotomous Air Sampler,"

configured for dual-filter, single-event sampling of fine ($PM_{2.5}$) and coarse ($PM_{10-2.5}$) particles, using a virtual impactor to separate fine and coarse PM into two samples for collection on two separate filter membranes, operated for a 24-hour sample period and in accordance with the Thermo Scientific Partisol® 2000–D Dichotomous Operating Manual.

EQPS–0311–198, "Thermo Scientific Dichotomous Partisol®–Plus Model 2025–D Sequential Air Sampler," configured for dual-filter sampling of fine ($PM_{2.5}$) and coarse ($PM_{10-2.5}$) particles, using a virtual impactor to separate the fine and coarse PM into two samples for collection on two separate filter membranes, and operated with the modified filter shuttle mechanism implemented May 31, 2008 and firmware version 1.500, or later, for 24-hour continuous sample periods and in accordance with the Dichotomous Partisol®–Plus Model 2025–D Sequential Air Sampler Operating Manual.

Applications for equivalent method determinations for these candidate methods were received by the EPA on September 7, 2010. The samplers are commercially available from the applicant, Thermo Fisher Scientific, Air Quality Instruments, Environmental Instruments Division, 27 Forge Parkway, Franklin, MA 02038.

The analytical procedure for the Pb method and the test analyzers or samplers representative of the other methods have been tested in accordance with the applicable test procedures specified in 40 CFR Part 53 (as amended on June 22, 2010). After reviewing the results of those tests and other information submitted by the applicants in the respective applications, EPA has determined, in accordance with Part 53, that these methods should be designated as equivalent methods. The information submitted by the applicants in the respective applications will be kept on file, either at EPA's National Exposure Research Laboratory, Research Triangle Park, North Carolina 27711 or in an approved archive storage facility, and will be available for inspection (with advance notice) to the extent consistent with 40 CFR Part 2 (EPA's regulations implementing the Freedom of Information Act).

As designated equivalent methods, these methods are acceptable for use by States and other air monitoring agencies under the requirements of 40 CFR Part 58, Ambient Air Quality Surveillance. For such purposes, each method must be used in strict accordance with the operation or instruction manual or standard operating procedure associated with the method and subject to any specifications and limitations (*e.g.,* configuration or operational settings) specified in the applicable designated method description (*see* the identifications of the methods above).

Use of the methods should also be in general accordance with the guidance and recommendations of applicable sections of the "Quality Assurance Handbook for Air Pollution Measurement Systems, Volume I," EPA/600/R–94/038a and "Quality Assurance Handbook for Air Pollution Measurement Systems, Volume II, Ambient Air Quality Monitoring Program" EPA–454/B–08–003, December, 2008 (available at *http://www.epa.gov/ttn/amtic/qalist.html*). Vendor modifications of a designated equivalent method used for purposes of Part 58 are permitted only with prior approval of the EPA, as provided in Part 53. Provisions concerning modification of such methods by users are specified under Section 2.8 (Modifications of Methods by Users) of Appendix C to 40 CFR part 58.

In general, a method designation applies to any sampler, analyzer, or method which is identical to the sampler, analyzer, or method described in the application for designation. In some cases, similar samplers or analyzers manufactured prior to the designation may be upgraded or converted (*e.g.,* by minor modification or by substitution of the approved operation or instruction manual) so as to be identical to the designated method and thus achieve designated status. The manufacturer should be consulted to determine the feasibility of such upgrading or conversion.

Part 53 requires that sellers of designated reference or equivalent method analyzers or samplers comply with certain conditions. These conditions are specified in 40 CFR 53.9.

Aside from occasional breakdowns or malfunctions, consistent or repeated noncompliance with any of these conditions should be reported to: Director, Human Exposure and Atmospheric Sciences Division (MD–E205–01), National Exposure Research Laboratory, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

Designation of these new equivalent methods is intended to assist the States in establishing and operating their air quality surveillance systems under 40 CFR Part 58. Questions concerning the commercial availability or technical aspects of the methods should be directed to the applicants.

**Jewel F. Morris,**

*Acting Director, National Exposure Research Laboratory.*

[FR Doc. 2011–6681 Filed 3–21–11; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9284–9]**

## Cross-Media Electronic Reporting Regulation Authorized Program Revision/Modification Approvals: State of Colorado

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

**ACTION:** Notice.

**SUMMARY:** This notice announces EPA's approval, under regulations for Cross-Media Electronic Reporting, of the State of Colorado's request to revise/modify certain of its EPA-authorized programs to allow electronic reporting.

**DATES:** EPA's approval is effective March 22, 2011.

**FOR FURTHER INFORMATION CONTACT:** Evi Huffer, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 566–1697, *huffer.evi@epa.gov,* U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, or Karen Seeh, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 566–1175, *seeh.karen@epa.gov.*

**SUPPLEMENTARY INFORMATION:** On October 13, 2005, the final Cross-Media Electronic Reporting Rule (CROMERR) was published in the **Federal Register** (70 FR 59848) and codified as Part 3 of title 40 of the CFR. CROMERR establishes electronic reporting as an acceptable regulatory alternative to paper reporting and establishes requirements to assure that electronic documents are as legally dependable as their paper counterparts. Under Subpart D of CROMERR, state, tribe or local government agencies that receive, or wish to begin receiving, electronic reports under their EPA-authorized programs must apply to EPA for a revision or modification of those programs and obtain EPA approval. Subpart D also provides standards for such approvals based on consideration of the electronic document receiving systems that the state, tribe, or local government will use to implement the electronic reporting. Additionally, in § 3.1000(b) through (e) of 40 CFR Part 3, Subpart D provides special procedures for program revisions and modifications to allow electronic reporting, to be used at the option of the state, tribe or local

government in place of procedures available under existing program-specific authorization regulations. An application submitted under the Subpart D procedures must show that the state, tribe or local government has sufficient legal authority to implement the electronic reporting components of the programs covered by the application and will use electronic document receiving systems that meet the applicable Subpart D requirements.

On August 31, 2010, the Colorado Department of Public Health and Environment (CODPHE) submitted an application for its Net Discharge Monitoring Report (NetDMR) electronic document receiving system for revision/modification of its EPA-authorized programs under title 40 CFR. EPA reviewed CODPHE's request to revise its EPA-authorized programs and, based on this review, EPA determined that the application met the standards for approval of authorized program revisions/modifications set out in 40 CFR part 3, subpart D. In accordance with 40 CFR 3.1000(d), this notice of EPA's decision to approve Colorado's request for revision to its 40 CFR Part 123— National Pollutant Discharge Elimination System (NPDES) State Program Requirements and Part 403—General Pretreatment Regulations For Existing And New Sources Of Pollution EPA-authorized programs for electronic reporting of discharge monitoring report information submitted under 40 CFR parts 122 and 403 is being published in the **Federal Register**.

CODPHE was notified of EPA's determination to approve its application with respect to the authorized programs listed above.

Dated: March 8, 2011.

**Andrew Battin,**

*Director, Office of Information Collection.*

[FR Doc. 2011–6663 Filed 3–21–11; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection(s) Being Submitted for Review and Approval to the Office of Management and Budget (OMB), Comments Requested

March 15, 2011.

**SUMMARY:** The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501–3520. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a currently valid OMB control number.

**DATES:** Written Paperwork Reduction Act (PRA) comments should be submitted on or before April 21, 2011. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via the Internet at *Nicholas_A._Fraser@omb.eop.gov* and to the Federal Communications Commission via e-mail to *PRA@fcc.gov.* To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called "Currently Under Review", (3) click on the downward-pointing arrow in the "Select Agency" box below the "Currently Under Review" heading, (4) select "Federal Communications Commission" from the list of agencies presented in the "Select Agency" box, (5) click the "Submit" button to the right of the "Select Agency" box, and (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB Control Number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.

**FOR FURTHER INFORMATION CONTACT:** Judith B. Herman, Office of Managing Director, (202) 418–0214. For additional information or copies of the information collection(s), contact Judith B. Herman, OMD, 202–418–0214 or e-mail *judith-b.herman@fcc.gov.*

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060–0262.

*Title:* Section 90.179, Shared Use of Radio Stations.

*Form Number:* N/A.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Business or other for-profit, not-for-profit institutions and state, local or tribal government.

*Number of Respondents and Responses:* 42,000 respondents; 42,000 responses.

*Estimated Time per Response:* 15 minutes for records maintenance; and 45 minutes for preparation of sharing agreements: 1 hour total time per response.

*Frequency of Response:* Recordkeeping requirement, on occasion reporting requirement and third party disclosure requirement.

*Obligation to Respond:* Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. sections 154(i), 161, 303(g), 303(r), and 332(c)(7).

*Total Annual Burden:* 42,000 hours.

*Total Annual Cost:* N/A.

*Privacy Act Impact Assessment:* N/A.

*Nature and Extent of Confidentiality:* There is no need for confidentiality.

*Needs and Uses:* The Commission will submit this expiring collection during this comment period to obtain the three year clearance from the Office of Management and Budget (OMB). There is no change in the Commission's reporting, recordkeeping and/or third party disclosure requirements. There is no change in the Commission's previous burden estimates.

The Commission was directed by the United States Congress, in the Balanced Budget Act of 1997, to dedicate 2.4 MHz of electromagnetic spectrum in the 746–806 MHz band for public safety services. Section 90.179 requires that Part 90 licensees that share use of their private land mobile radio facility on a non-profit, cost-sharing basis keep a written agreement as part of the station records. Regardless of the method of sharing, an up-to-date list of persons who are sharing the station and the basis of their eligibility under Part 90 must be maintained. The requirement is necessary to identify users of the system should interference problems develop.

This information is used by the Commission to identify users of the system should interference problems develop. This information is used by the Commission to investigate interference

complaints and resolve interference and operational complaints that may arise among the users.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary, Office of the Secretary, Office of Managing Director.*

[FR Doc. 2011–6596 Filed 3–21–11; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

March 16, 2011.

**SUMMARY:** The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501–3520. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a currently valid OMB control number.

**DATES:** Written Paperwork Reduction Act (PRA) comments should be submitted on or before May 23, 2011. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to the Federal Communications Commission via e-mail to *PRA@fcc.gov* and *Cathy.Williams@fcc.gov.*

**FOR FURTHER INFORMATION CONTACT:** For additional information, contact Cathy Williams on (202) 418–2918.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060–0027.

*Title:* Application for Construction Permit for Commercial Broadcast Station, FCC Form 301.

*Form Number:* FCC Form 301.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Business or other for-profit entities; Not-for-profit entities; State, local or Tribal governments.

*Number of Respondents and Responses:* 4,544 respondents; 7,980 responses.

*Estimated Time per Response:* 1–6.25 hours (average).

*Frequency of Response:* On occasion reporting requirement; Third-party disclosure requirement.

*Obligation to Respond:* Required to obtain or retain benefits. Statutory authority for the information collection requirements is contained in Sections 154(i), 303 and 308 of the Communications Act of 1934, as amended.

*Total Annual Burden:* 20,257 hours.

*Total Annual Costs:* $88,116,793.

*Nature and Extent of Confidentiality:* There is no need for confidentiality with this collection of information.

*Privacy Impact Assessment:* No impact(s).

*Needs and Uses:* On January 28, 2010, the Commission adopted a First Report and Order and Further Notice of Proposed Rulemaking in MB Docket No. 09–52, FCC 10–24. On March 3, 2011, the Commission adopted a Second Report and Order ("Second R&O"), First Order on Reconsideration, and Second Further Notice of Proposed Rule Making in MB Docket No. 09–52, FCC 11–28. The Second R&O adopts modifications to the manner in which the Commission awards preferences to applicants under the provisions of Section 307(b) of the Act. For Section 307(b) purposes, licensees and permittees seeking to change community of license must demonstrate that the facility at the new community represents a preferential arrangement of allotments (FM) or assignments (AM) over the current facility. Applications that are submitted to change an existing radio facility's community of license must include an Exhibit containing information demonstrating that the proposed change of community of license will result in a preferential arrangement of allotments or assignments under Section 307(b).

Consistent with actions taken by the Commission in the Second R&O, the Instructions to the Form 301 have been revised to incorporate the information that must be included in the Exhibit, which is responsive to the "Community of License Change—Section 307(b)" question in the Form 301. The Form 301 itself has not been revised, nor have any questions been added to the Form 301. Rather, the Instructions for the Form 301 have been revised to assist applicants with completing the mandatory, responsive Exhibit.

The modifications to the Commission's allotment and assignment policies adopted in the Second R&O include a rebuttable "Urbanized Area service presumption" under Priority (3), whereby an application to locate or relocate a station as the first local transmission service at a community located within an Urbanized Area, that would place a daytime principal community signal over 50 percent or more of an Urbanized Area, or that could be modified to provide such coverage, will be presumed to be a proposal to serve the Urbanized Area rather than the proposed community.

In the case of an AM station, the determination of whether a proposed facility "could be modified" to cover 50 percent or more of an Urbanized Area will be made based on the applicant's certification in the Exhibit that there could be no rule-compliant minor modifications to the proposal, based on the antenna configuration or site, and spectrum availability as of the filing date, that could cause the station to place a principal community contour over 50 percent or more of an Urbanized Area. In the case of an FM station, the determination of whether a proposed facility "could be modified" to cover 50 percent or more of an Urbanized Area will be based on an applicant's certification in the Exhibit that there are no existing towers in the area to which, at the time of filing, the applicant's antenna could be relocated pursuant to a minor modification application to serve 50 percent or more of an Urbanized Area. Specifically, an FM applicant would need to certify that there could be no rule-compliant minor modification on the proposed channel to provide a principal community signal over 50 percent or more of an Urbanized Area, in addition to covering the proposed community of license. In doing so, FM applicants will be required to consider all existing registered towers in the Commission's Antenna Structure Registration database, in addition to any unregistered towers currently used by licensed radio stations. Furthermore, we expect all applicants to consider widely-used techniques, such as directional antennas and contour protection, when

certifying that the proposal could not be modified to provide a principal community signal over the community of license and 50 percent or more of an Urbanized Area.

To the extent the applicant wishes to rebut the Urbanized Area service presumption, the Exhibit must include a compelling showing (a) that the proposed community is truly independent from the Urbanized Area; (b) of the community's specific need for an outlet of local expression separate from the Urbanized Area; and (c) the ability of the proposed station to provide that outlet.

For applicants making a showing under Priority (4), other public interest matters, the Exhibit must provide a description of all populations gaining or losing third, fourth, or fifth reception service, and the percentage of the population in the station's current protected contour that will lose third, fourth, or fifth reception service, if any. The Commission will also require applicants to not only set forth the populations gaining and losing service under the proposal, but also the numbers of services those populations will receive if the application is granted, and an explanation as to how the proposal provides a preferential arrangement of allotments or assignments and advances the revised Section 307(b) policies.

The Commission specifically stated that these modified allotment and assignment procedures will apply to any applications to change community of license that are pending as of the release date of the Second R&O, March 3, 2011. Therefore, an applicant with a pending community of license change application must file an amendment demonstrating how the proposal represents a preferential arrangement of allotments or assignments under the policy modifications adopted in the Second R&O. For example, an applicant claiming Priority (3) would have to file the above-referenced "could be modified" certification, if appropriate, or a showing to rebut the Urbanized Area service presumption, if applicable. Similarly, an applicant claiming Priority (4) will have to make a showing as to the populations gaining or losing service under the proposed community of license change, as well as the numbers of services those populations will receive if the application is granted, and an explanation as to how the proposal advances the revised Section 307(b) priorities set out in the Second R&O. See Second R&O, FCC 11–28, at 22–23 ¶ 39. Such amendments must be filed once the information collection requirements are approved by OMB and the effective date for the requirements is announced by the Commission. Finally, under Priority (4) applicants may offer any other information they believe pertinent to a public interest showing and relevant to the Commission's consideration.

*OMB Control Number:* 3060–0029.

*Title:* Application for Construction Permit for Reserved Channel Noncommercial Educational Broadcast Station, FCC Form 340.

*Form Number:* FCC Form 340.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Business or other for-profit entities; Not-for-profit entities; State, local or Tribal governments.

*Number of Respondents and Responses:* 2,765 respondents; 2,765 responses.

*Estimated Time per Response:* 1–6 hours (average).

*Frequency of Response:* On occasion reporting requirement; Third-party disclosure requirement.

*Obligation to Respond:* Required to obtain or retain benefits. Statutory authority for the information collection requirements is contained in Sections 154(i), 303 and 308 of the Communications Act of 1934, as amended.

*Total Annual Burden:* 7,150 hours.

*Total Annual Costs:* $29,079,700.

*Nature and Extent of Confidentiality:* There is no need for confidentiality with this collection of information.

*Privacy Impact Assessment:* No impact(s).

*Needs and Uses:* On January 28, 2010, the Commission adopted a First Report and Order in the Matter of Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, MB Docket No. 09–52, FCC 10–24 (released February 3, 2010). On March 3, 2011, the Commission adopted a Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making in MB Docket No. 09–52, FCC 11–28 (released March 3, 2011). In the First Report and Order, the Commission adopted the Tribal Priority proposed in the Notice of Proposed Rule Making, with some modifications. Under the Tribal Priority, a Section 307(b) priority will apply to an applicant meeting all of the following criteria: (1) The applicant is either a Federally recognized Tribe or Tribal consortium, or an entity 51 percent or more owned or controlled by a Tribe or Tribes; (2) at least 50 percent of the daytime principal community contour of the proposed facilities covers Tribal Lands, in addition to meeting all other Commission technical standards; (3) the specified community of license is located on Tribal Lands; and (4) the applicant proposes the first local Tribal-owned noncommercial educational transmission service at the proposed community of license. The proposed Tribal Priority would apply, if at all, before the fair distribution analysis currently used to evaluate noncommercial educational applications. The Tribal Priority does not prevail over an applicant proposing first overall reception service to a significant population. The First Order on Reconsideration modifies the initially adopted Tribal Priority coverage requirement, by creating an alternative coverage standard under criterion (2), enabling Tribes to qualify for the Tribal Priority even when their Tribal Lands are too small or irregularly shaped to comprise 50 percent of a radio station's signal. In such circumstances, Tribes may claim the priority (i) if the proposed principal community contour of the station encompasses 50 percent or more of that Tribe's Tribal Lands, but does not cover more than 50 percent of the Tribal lands of a non-applicant Tribe, (ii) serves at least 2,000 people living on Tribal Lands, and (iii) the total population on Tribal Lands residing within the station's service contour constitutes at least 50 percent of the total covered population, with provision for waivers as necessary to effectuate the goals of the Tribal Priority. This modification will enable Tribes with small or irregularly shaped lands to qualify for the Tribal Priority. The First Order on Reconsideration also provides that, under criterion (2), even an applicant whose Tribal Lands would be covered by 50 percent or more of the proposed principal community contour (the original coverage standard set forth in the First Report and Order) may not claim the credit if the principal community contour would cover more than 50 percent of the Tribal Lands of a non-applicant Tribe.

FCC Form 340 and its instructions have been revised to accommodate those applicants qualifying for the new Tribal Priority. After adoption of the First Report and Order, we added new Questions 1 and 2, which seek information as to the applicant's eligibility for the Tribal Priority and direct applicants claiming the priority to prepare and attach an exhibit, to Section III. The instructions for Section III were also revised to assist applicants with completing the new questions and preparing the exhibit. In the First Order on Reconsideration, the Commission added an alternative definition of "Tribal Coverage" to that adopted in the First Report and Order. Accordingly, we

have modified the instructions for Section III, Question 2, to comport with the new alternative Tribal Coverage definition. The form itself has not been revised, nor have any questions been added to Form 340.

*OMB Control Number:* 3060–0996.

*Title:* AM Auction Section 307(b) Submissions.

*Form Number:* N/A.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Business or other for-profit entities; Not-for-profit entities; State, local or Tribal governments.

*Number of Respondents and Responses:* 210 respondents; 210 responses.

*Estimated Time per Response:* 0.5–6 hours (average).

*Frequency of Response:* On occasion reporting requirement.

*Obligation to Respond:* Required to obtain or retain benefits. Statutory authority for the information collection requirements is contained in Sections 154(i), 307(b) and 309 of the Communications Act of 1934, as amended.

*Total Annual Burden:* 1,029 hours.

*Total Annual Costs:* $2,126,100.

*Nature and Extent of Confidentiality:* There is no need for confidentiality with this collection of information.

*Privacy Impact Assessment:* No impact(s).

*Needs and Uses:* On January 28, 2010, the Commission adopted a First Report and Order and Further Notice of Proposed Rulemaking ("First R&O") in MB Docket No. 09–52, FCC 10–24. The First R&O adopted changes to certain procedures associated with the award of broadcast radio construction permits by competitive bidding, including modifications to the manner in which it awards preferences to applicants under the provisions of Section 307(b). In the *First R&O,* the Commission added a new Section 307(b) priority that would apply only to Native American and Alaska Native Tribes, Tribal consortia, and majority Tribal-owned entities proposing to serve Tribal lands. As adopted in the First R&O, the priority is only available when all of the following conditions are met: (1) The applicant is either a Federally recognized Tribe or Tribal consortium, or an entity that is 51 percent or more owned or controlled by a Tribe or Tribes; (2) at least 50 percent of the area within the proposed station's daytime principal community contour is over that Tribe's Tribal lands, in addition to meeting all other Commission technical standards; (3) the specified community of license is located on Tribal lands; and (4) in the commercial AM service, the applicant must propose first or second aural reception service or first local commercial Tribal-owned transmission service to the proposed community of license, which must be located on Tribal lands. Applicants claiming Section 307(b) preferences using these factors will submit information to substantiate their claims.

On March 3, 2011, the Commission adopted a Second Report and Order ("Second R&O"), First Order on Reconsideration, and Second Further Notice of Proposed Rule Making in MB Docket No. 09–52, FCC 11–28. The First Order on Reconsideration modifies the initially adopted Tribal Priority coverage requirement, by creating an alternate coverage standard under criterion (2), enabling Tribes to qualify for the Tribal Priority even when their Tribal lands are too small or irregularly shaped to comprise 50 percent of a station's signal. In such circumstances, Tribes may claim the priority (i) if the proposed principal community contour encompasses 50 percent or more of that Tribe's Tribal lands, but does not cover more than 50 percent of the Tribal lands of a non-applicant Tribe; (ii) serves at least 2,000 people living on Tribal lands, and (iii) the total population on Tribal lands residing within the station's service contour constitutes at least 50 percent of the total covered population, with provision for waivers as necessary to effectuate the goals of the Tribal Priority. This modification will now enable Tribes with small or irregularly shaped lands to qualify for the Tribal Priority.

The modifications to the Commission's allotment and assignment policies adopted in the Second R&O include a rebuttable "Urbanized Area service presumption" under Priority (3), whereby an application to locate or relocate a station as the first local transmission service at a community located within an Urbanized Area, that would place a daytime principal community signal over 50 percent or more of an Urbanized Area, or that could be modified to provide such coverage, will be presumed to be a proposal to serve the Urbanized Area rather than the proposed community. In the case of an AM station, the determination of whether a proposed facility "could be modified" to cover 50 percent or more of an Urbanized Area will be made based on the applicant's certification in the Section 307(b) showing that there could be no rule-compliant minor modifications to the proposal, based on the antenna configuration or site, and spectrum availability as of the filing date, that could cause the station to place a principal community contour over 50 percent or more of an Urbanized Area. To the extent the applicant wishes to rebut the Urbanized Area service presumption, the Section 307(b) showing must include a compelling showing (a) that the proposed community is truly independent from the Urbanized Area; (b) of the community's specific need for an outlet of local expression separate from the Urbanized Area; and (c) the ability of the proposed station to provide that outlet.

In the case of applicants for new AM stations making a showing under Priority (4), other public interest matters, an applicant that can demonstrate that its proposed station would provide third, fourth, or fifth reception service to at least 25 percent of the population in the proposed primary service area, where the proposed community of license has two or fewer transmission services, may receive a dispositive Section 307(b) preference under Priority (4). An applicant for a new AM station that cannot demonstrate that it would provide the third, fourth, or fifth reception service to the required population at a community with two or fewer transmission services may also, under Priority (4), calculate a "service value index" as set forth in the case of *Greenup, Kentucky and Athens, Ohio,* Report and Order, 2 FCC Rcd 4319 (MMB 1987). If the applicant can demonstrate a 30 percent or greater difference in service value index between its proposal and the next highest ranking proposal, it can receive a dispositive Section 307(b) preference under Priority (4). Except under these circumstances, dispositive Section 307(b) preferences will not be granted under Priority (4) to applicants for new AM stations. The Commission specifically stated that these modified allotment and assignment procedures will not apply to pending applications for new AM stations and major modifications to AM facilities filed during the 2004 AM Auction 84 filing window.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary, Office of the Secretary, Office of Managing Director.*

[FR Doc. 2011–6598 Filed 3–21–11; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

March 15, 2011.

**SUMMARY:** The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501–3520. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a currently valid OMB control number.

**DATES:** Written Paperwork Reduction Act (PRA) comments should be submitted on or before May 23, 2011. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to the Federal Communications Commission via e-mail to *PRA@fcc.gov* and *Cathy.Williams@fcc.gov.*

**FOR FURTHER INFORMATION CONTACT:** For additional information, contact Cathy Williams on (202) 418–2918.

**SUPPLEMENTARY INFORMATION:** *OMB Control Number:* 3060–0652.

*Title:* Section 76.309, Customer Service Obligations; Section 76.1602, Customer Service—General Information, Section 76.1603, Customer Service—Rate and Service Changes and Section 76.1619, Information and Subscriber Bills.

*Form Number:* N/A.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Business or other for-profit entities; State, Local or Tribal Government.

*Number of Respondents and Responses:* 8,260 respondents; 1,117,540 responses.

*Estimated Time per Response:* 0.0167 to 1 hour.

*Frequency of Response:* On occasion reporting requirement; Third party disclosure requirement.

*Obligation to Respond:* Required to obtain or retain benefits. The statutory authority for this collection of information is contained in Sections 4(i) and 632 of the Communications Act of 1934, as amended.

*Total Annual Burden:* 50,090 hours.

*Total Annual Cost:* None.

*Privacy Act Impact Assessment:* No impact(s).

*Nature and Extent of Confidentiality:* There is no need for confidentiality with this collection of information.

*Needs and Uses:* The Commission released on October 14, 2010, a Third Report and Order and Order on Reconsideration, FCC 10–181, CS Docket 97–80 and PP Docket 00–67, modifying the Commission's rules to implement Section 629 of the Communications Act (Section 304 of the Telecommunications Act of 1996). Section 629 of the Communications Act directs the Commission to adopt rules to assure the commercial availability of "navigation devices," such as cable set-top boxes. One rule modification in the Third Report and Order and Order on Reconsideration is intended to prohibit price discrimination against retail devices. This modification requires cable operators to disclose annually the fees for rental of navigation devices and single and additional CableCARDs as well as the fees reasonably allocable to the rental of single and additional CableCARDs and the rental of operator-supplied navigation devices if those devices are included in the price of a bundled offer.

*OMB Control Number:* 3060–0849.

*Title:* Commercial Availability of Navigation Devices.

*Form Number:* N/A.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Business or other for-profit entities.

*Number of Respondents and Responses:* 962 respondents; 586,712 responses.

*Estimated Time per Response:* 0.00278 to 40 hours.

*Frequency of Response:* Recordkeeping requirement; Third party disclosure requirement; On occasion reporting requirement; Annual reporting requirement; Semi-annual reporting requirement.

*Obligation to Respond:* Required to obtain or retain benefits. The statutory authority for this information collection is contained in Sections 4(i), 303(r) and 629 of the Communications Act of 1934, as amended.

*Total Annual Burden:* 61,353 hours.

*Total Annual Cost:* $170,300.

*Privacy Act Impact Assessment:* No impact(s).

*Nature and Extent of Confidentiality:* There is no need for confidentiality with this collection of information.

*Needs and Uses:* The Commission released on October 14, 2010 a Third Report and Order and Order on Reconsideration, FCC 10–181, CS Docket 97–80 and PP Docket 00–67, (as corrected by an Order on Reconsideration, FCC 11–7, CS Docket 97–80 and PP Docket 00–67) modifying the Commission's rules to implement Section 629 of the Communications Act (Section 304 of the Telecommunications Act of 1996). The rules are modified to (1) require cable operators to support the reception of switched digital video services on retail devices to ensure that subscribers are able to access the services for which they pay regardless of whether they lease or purchase their devices; (2) prohibit price discrimination against retail devices to support a competitive marketplace for retail devices; (3) require cable operators to allow self-installation of CableCARDs where device manufacturers offer device-specific installation instructions to make the installation experience for retail devices comparable to the experience for leased devices; (4) require cable operators to provide multi-stream CableCARDs by default to ensure that cable operators are providing their subscribers with current CableCARD technology; and (5) clarify that CableCARD device certification rules are limited to certain technical features to make it easier for device manufacturers to get their products to market. These rules are intended to achieve Section 629's directive to assure a retail market for navigation devices, such as set-top boxes, that can access cable services.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary, Office of the Secretary, Office of Managing Director.*

[FR Doc. 2011–6597 Filed 3–21–11; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than April 6, 2011.

A. Federal Reserve Bank of San Francisco (Kenneth Binning, Vice President, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. *Bank of Idaho Holding Company Employee Stock Ownership Plan,* Idaho Falls, Idaho; to retain control of Bank of Idaho Holding Company, and thereby indirectly retain control of The Bank of Idaho, both of Idaho Falls, Idaho.

Board of Governors of the Federal Reserve System, March 17, 2011.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 2011–6650 Filed 3–21–11; 8:45 am]

**BILLING CODE 6210–01–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 April 15, 2011.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Minier Financial, Inc. Employee Stock Ownership Plan with 401(k) Provisions,* Minier, Illinois; to acquire additional voting shares, for a total of up to 35 percent of the voting shares, of Minier Financial, Inc., and thereby indirectly acquire additional voting shares of First Farmers State Bank, both of Minier, Illinois.

Board of Governors of the Federal Reserve System, March 17, 2011.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 2011–6651 Filed 3–21–11; 8:45 am]

**BILLING CODE 6210–01–P**

## FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

### Sunshine Act; Notice of Meeting

**TIME AND DATE:** 10 a.m. (Eastern Time), March 28, 2011.

**PLACE:** 4th Floor Conference Room, 1250 H Street, NW., Washington, DC 20005.

**STATUS:** Parts will be open to the public and parts closed to the public.

**MATTERS TO BE CONSIDERED:**

**Parts Open to the Public**

1. Approval of the minutes of the February 28, 2011 Board member meeting.
2. Thrift Savings Plan activity report by the Executive Director:
   a. Monthly Participant Activity Report;
   b. Monthly Investment Performance Report;
   c. Legislative Report.
3. Communication Awards.
4. Audit Report Discussion.
5. Audit Findings Summary Report.
6. Department of Labor Audit Briefing.
7. Roth Project Update.

**Parts Closed to the Public**

8. Security.
9. Personnel.

**CONTACT PERSON FOR MORE INFORMATION:** Thomas J. Trabucco, Director, Office of External Affairs, (202) 942–1640.

Dated: March 18, 2011.

**Thomas K. Emswiler,**

*Secretary, Federal Retirement Thrift Investment Board.*

[FR Doc. 2011–6875 Filed 3–18–11; 4:15 pm]

**BILLING CODE 6760–01–P**

## GENERAL SERVICES ADMINISTRATION

**[GSA Bulletin FTR 11–06; Docket 2011–0002; Sequence 2]**

### Maximum Per Diem Rates for the States of California, Mississippi, New York, Pennsylvania, Texas, and Virginia

**AGENCY:** Office of Governmentwide Policy, General Services Administration (GSA).

**ACTION:** Notice of Per Diem Bulletin 11–06, revised continental United States (CONUS) per diem rates.

**SUMMARY:** The General Services Administration (GSA) has conducted its mid-year review and has determined that the per diem rates for certain locations in the States of California, Mississippi, New York, Pennsylvania, Texas, and Virginia are inadequate.

**DATES:** This notice is effective April 1, 2011, and applies for travel performed on or after April 1, 2011, through September 30, 2011.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Jill Denning, Office of Governmentwide Policy, Travel Management Policy, at (202) 208–7642. Please cite FTR Per Diem Bulletin 11–06.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

After an analysis of the per diem rates established for FY 2011 (see the **Federal Register** notice at 75 FR 52947, August 30, 2010, and FTR Bulletin 11–01), non-standard area per diem rates are being established or changed for the following locations:

*State of California*

- San Bernadino County
- San Francisco County

*State of Mississippi*

- Lafayette County

*State of New York*

- Bronx, New York, Kings, Queens, and Richmond Counties

*State of Pennsylvania*

- Dauphin County

*State of Texas*

- Hunt County

*State of Virginia*

- Caroline County

Per diem rates are published on the Internet at *http://www.gsa.gov/perdiem* as FTR per diem bulletins. This process ensures timely notice of increases or decreases in per diem rates established by GSA for Federal employees on official travel within CONUS. Notices published periodically in the **Federal Register,** such as this one, now constitute the only notification of revisions in CONUS per diem rates to agencies.

Dated: March 15, 2011.

**Robert Holcombe,**

*Program Director, Office of Travel, Transportation and Asset Management.*

[FR Doc. 2011–6659 Filed 3–21–11; 8:45 am]

**BILLING CODE 6820–14–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Meeting of the Chronic Fatigue Syndrome Advisory Committee

**AGENCY:** Department of Health and Human Services, Office of the Secretary, Office of the Assistant Secretary for Health.

**ACTION:** Notice.

**SUMMARY:** As stipulated by the Federal Advisory Committee Act, the U.S. Department of Health and Human Services is hereby giving notice that the Chronic Fatigue Syndrome Advisory Committee (CFSAC) will hold a meeting. The meeting will be open to the public.

**DATES:** The meeting will be held on Tuesday and Wednesday, May 10 and 11, 2011. The meeting will be held from 9 a.m. until 5 p.m. on May 10, 2011, and 9 a.m. until 4:30 p.m. on May 11, 2011.

**ADDRESSES:** Department of Health and Human Services; Room 800, Hubert H. Humphrey Building; 200 Independence Avenue, SW., Washington, DC 20201. For a map and directions to the Hubert H. Humphrey building, please visit *http://www.hhs.gov/about/hhhmap.html.*

**FOR FURTHER INFORMATION CONTACT:** Wanda K. Jones, DrPH; Executive Secretary, Chronic Fatigue Syndrome Advisory Committee, Department of Health and Human Services; 200 Independence Avenue, SW., Hubert Humphrey Building, Room 712E; Washington, DC 20201. Please direct all inquiries to *cfsac@hhs.gov.*

**SUPPLEMENTARY INFORMATION:** CFSAC was established on September 5, 2002. The Committee shall advise and make recommendations to the Secretary, through the Assistant Secretary for Health, on a broad range of topics including (1) the current state of knowledge and research and the relevant gaps in knowledge and research about the epidemiology, etiologies, biomarkers and risk factors relating to CFS, and identifying potential opportunities in these areas; (2) impact and implications of current and proposed diagnosis and treatment methods for CFS; (3) development and implementation of programs to inform the public, health care professionals, and the biomedical academic and research communities about CFS advances; and (4) partnering to improve the quality of life of CFS patients.

The agenda for this meeting is being developed. The agenda will be posted on the CFSAC Web site, *http://www.hhs.gov/advcomcfs,* when it is finalized. The meeting will be broadcast over the Internet as a real-time streaming video. It also will be recorded and archived for on demand viewing through the CFSAC Web site.

Public attendance at the meeting is limited to space available. Individuals must provide a government-issued photo ID for entry into the building where the meeting is scheduled to be held. Those attending the meeting will need to sign-in prior to entering the meeting room. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the designated contact person at *cfsac@hhs.gov* in advance.

Members of the public will have the opportunity to provide oral testimony at the May 10–11, 2011, meeting if pre-registered. Individuals who wish to address the Committee during the public comment session must pre-register by Monday, April 18, 2011, via e-mail to *cfsac@hhs.gov.* Time slots for public comment will be available on a first-come, first-served basis and will be limited to five minutes per speaker; no exceptions will be made. Individuals registering for public comment should submit a copy of their oral testimony in advance to *cfsac@hhs.gov,* prior to the close of business on Monday, April 18, 2011.

If you do not submit your written testimony by the close of business Monday, April 18, 2011, you may bring a copy to the meeting and present it to a CFSAC Support Team staff member. Your testimony will be included in a notebook available for viewing by the public on a table at the back of the meeting room.

Members of the public not providing public comment at the meeting who wish to have printed material distributed to CFSAC members for review should submit, at a minimum, one copy of the material to the Executive Secretary, at *cfsac@hhs.gov,* prior to close of business on Monday, April 18, 2011. Submissions are limited to five typewritten pages. If you wish to remain anonymous, please notify the CFSAC support team upon submission of your materials to *cfsac@hhs.gov.*

All testimony and printed material submitted for the meeting are part of the official meeting record and will be uploaded to the CFSAC Web site and made available for public inspection. Testimony and materials submitted should not include any sensitive personal information, such as a person's social security number; date of birth; driver's license number, State identification number or foreign country equivalent; passport number; financial account number; or credit or debit card number. Sensitive health information, such as medical records or other individually identifiable health information, or any non-public corporate or trade association information, such as trade secrets or other proprietary information also should be excluded from any materials submitted.

Dated: March 18, 2011.

**Wanda K. Jones,**

*Executive Secretary, Chronic Fatigue Syndrome Advisory Committee.*

[FR Doc. 2011–6702 Filed 3–21–11; 8:45 am]

**BILLING CODE 4150–42–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Nominations to the Advisory Committee on Blood Safety and Availability

**AGENCY:** Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

**ACTION:** Notice.

**SUMMARY:** The Office of Assistant Secretary for Health (OASH) is seeking nominations of qualified individuals to be considered for appointment as members of the Advisory Committee on Blood Safety and Availability (ACBSA).

ACBSA is a Federal advisory committee within the Department of Health and Human Services. Management support for the activities of this Committee is the responsibility of the OASH. The qualified individuals will be nominated to the Secretary of Health and Human Services for consideration of appointment as members of the ACBSA. Members of the Committee, including the Chair, are appointed by the Secretary. Members are invited to serve on the Committee for up to four-year terms.

**DATES:** All nominations must be received no later than 4 p.m. EDT on April 22, 2011 at the address listed below.

**ADDRESSES:** All nominations should be mailed or delivered to Mr. James Berger, Associate Public Health Advisor for Blood, Organ and Tissue Safety; Office of Assistant Secretary for Health; Department of Health and Human Services; 1101 Wootton Parkway, Suite 250; Rockville, MD 20852. Telephone: (240) 453–8803.

**FOR FURTHER INFORMATION CONTACT:** Mr. James Berger, Associate Public Health Advisor for Blood, Organ and Tissue Safety. Contact information for Mr. Berger is provided above.

A copy of the Committee charter and roster of the current membership can be obtained by contacting Mr. Berger or by accessing the ACBSA Web site at *http://www.hhs.gov/bloodsafety*.

**SUPPLEMENTARY INFORMATION:** The ACBSA shall provide advice to the Secretary through the Assistant Secretary for Health. The Committee shall advise on a range of policy issues to include: (1) Definition of public health parameters around safety and availability of the blood supply and blood products, (2) broad public health, ethical and legal issues related to transfusion and transplantation safety, and (3) the implications for safety and availability of various economic factors affecting product cost and supply.

The Committee consists of 20 voting members; 14 public members, including the Chair, and six (6) individuals designated to serve as official representative members. The public members are selected from State and local organizations, advocacy groups, provider organizations, academic researchers, ethicists, private physicians, scientists, consumer advocates, legal organizations, and from among communities of persons who are frequent recipients of blood or blood products. The six individuals who are appointed as official representative members are selected to serve the interests of the blood and blood products industry or professional organizations. The representative members are selected from the following groups: the AABB (formerly the American Association of Blood Banks); the plasma protein fraction community; one of the two major distributors of blood on a rotating basis, a trade organization or manufacturer of blood, plasma, infectious disease screening assays or other tissue test kits or equipment; and a major health care organization that purchases blood and blood products. Where more than one company produces a specified product or process, representatives from those companies shall rotate on the same schedule as public members.

All ACBSA members are authorized to receive the prescribed per diem allowance and reimbursement for travel expenses that are incurred to attend meetings and conduct committee-related business, in accordance with Standard Government Travel Regulations. Individuals who are appointed to serve as public members are authorized also to receive a stipend for attending Committee meetings and to carry out other Committee-related business. Individuals who are appointed to serve as representative members for a particular interest group or industry are not authorized to receive a stipend for the performance of these duties.

This announcement is to solicit nominations of qualified candidates to fill four currently vacant positions on the ACBSA. Two candidates will fill public member positions as special government employees. In addition, two candidates will be representative members as identified in the charter.

**Nominations**

In accordance with the charter, persons nominated for appointment as members of the ACBSA should be among authorities knowledgeable in blood banking, transfusion medicine, plasma therapies, transfusion and transplantation safety, bioethics, and/or related disciplines. Nominations should be typewritten. The following information should be included in the package of material submitted for each individual being nominated for consideration of appointment: (a) The name, return address, daytime telephone number and affiliation(s) of the individual being nominated, the basis for the individual's nomination, the category for which the individual is being nominated, and a statement bearing an original signature of the nominated individual that, if appointed, he or she is willing to serve as a member of the Committee; (b) the name, return address, and daytime telephone number at which the nominator may be contacted. Organizational nominators must identify a principal contact person in addition to the contact; and (c) a copy of a current curriculum vitae or resume for the nominated individual.

Individuals can nominate themselves for consideration of appointment to the Committee. All nominations must include the required information. Incomplete nominations will not be processed for consideration. The letter from the nominator and certification of the nominated individual must bear original signatures; reproduced copies of these signatures are not acceptable.

The Department is legally required to ensure that the membership of HHS Federal advisory committees is fairly balanced in terms of points of view represented and the functions to be performed by the advisory committee. Every effort is made to ensure that the views of women, all ethnic and racial groups, and people with disabilities are represented on HHS Federal Advisory committees and, therefore, the Department encourages nominations of qualified candidates from these groups. The Department also encourages geographic diversity in the composition of the committee. Appointment to this Committee shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, disability, and cultural, religious, or socioeconomic status.

The Standards of Ethical Conduct for Employees of the Executive Branch are applicable to individuals who are appointed as public members of Federal advisory committees. Individuals appointed to serve as public members of Federal advisory committees are classified as special government employees (SGEs). SGEs are government employees for purposes of the conflict of interest laws. Therefore, individuals appointed to serve as public members of the ACBSA are subject to an ethics review. The ethics review is conducted to determine if the individual has any interests and/or activities in the private sector that may conflict with performance of their official duties as a member of the Committee. Individuals appointed to serve as public members of the committee will be required to disclose information regarding financial holdings, consultancies, and research grants and/or contracts.

Dated: March 15, 2011.

**James J. Berger,**

*Associate Public Health Advisor for Blood, Organ and Tissue Safety.*

[FR Doc. 2011–6701 Filed 3–21–11; 8:45 am]

**BILLING CODE 4150–41–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Combining Subjective and Objective Methods for Quantifying Contact Rates and Mixing Pattern in School-Aged Children, Funding Opportunity Announcement (FOA), CK11–006, Initial Review

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting:

*Time and Date:* 8 a.m.–5 p.m., May 3, 2011 (Closed).

*Place:* Sheraton Gateway Hotel Atlanta Airport, 1900 Sullivan Road, Atlanta, Georgia 30337, *Telephone:* (770) 997–1100.

*Status:* The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

*Matters To Be Discussed:* The meeting will include the initial review, discussion, and evaluation of applications received in response to "Combining Subjective and Objective Methods for Quantifying Contact Rates and Mixing Pattern in School-Aged Children, FOA CK11–006."

*Contact Person For More Information:* Gregory Anderson, M.S., M.P.H., Scientific Review Officer, CDC, 1600 Clifton Road, NE., Mailstop E60, Atlanta, Georgia 30333, *Telephone:* (404) 498–2293. The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: February 25, 2011.

**Elaine L. Baker,**

*Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 2011–6641 Filed 3–21–11; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Statement of Organization, Functions, and Delegations of Authority

Part C (Centers for Disease Control and Prevention) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (45 FR 67772–76, dated October 14, 1980, and corrected at 45 FR 69296, October 20, 1980, as amended most recently at 76 FR 1167, dated January 7, 2011) is amended to reflect the reorganization of the Office of Surveillance, Epidemiology and Laboratory Services, Centers for Disease Control and Prevention.

Section C–B, Organization and Functions, is hereby amended as follows: Delete in its entirety the title for the Knowledge Management Branch (CPGBB). within the Division of Laboratory Policy and Practice (CPGB), Laboratory Science Policy and Practice Program Office (CPG), Office of Surveillance, Epidemiology and Laboratory Services (CP) and insert the Technology Management Branch (CPGBB).

Following the title and functional statement for the Laboratory Policy Branch (CPGBC), insert the following:

*Laboratory Training Branch (CPGBD).* (1) Provides advanced laboratory training to maintain a competent, prepared, and sustainable national/global laboratory workforce; (2) analyzes, designs, develops, and implements effective needs-based training pertaining to public health laboratory methodology and technology; (3) evaluates the efficiency and effectiveness of public health laboratory education and training for state and local public health, clinical, military, CDC, and other federal agency laboratorians; and (4) evaluates the effectiveness and measures the outcomes of all training to ensure a high quality product for all end users.

Delete in its entirety the functional statement for the Division of Leadership and Practice (CPLC) within the Scientific Education and Professional Development Program Office (CPL), Office of Surveillance, Epidemiology and Laboratory Services (CP) and insert the following:

*Division of Leadership and Practice (CPLC).* (1) Plans, directs, and manages CDC-wide training and service programs for the teaching and training of public health professionals in public health practice, including public health leadership and management, public policy, program planning, implementation, and evaluation; (2) plans, directs, and manages CDC-wide training and service programs for fellowships and internships sponsored by other partner organizations and implemented within CDC (*e.g.,* Emerging Leaders Program, Presidential Management Fellowship, and Association of Schools of Public Health Fellowship); (3) incorporates principles of adult learning theory and current learning standards into the design, delivery, and evaluation of education and training products; (4) leads content development and implementation of workforce development programs intended to increase the number of individuals choosing public health careers; (5) responds to domestic and international requests for assistance and consultation (Emergency Operations Center deployment); (6) maintains knowledge of continuing education standards to uphold national accreditations and provides guidance and consultation, incorporating principles of adult learning theory with course developers to ensure educational activities are accredited for continuing education; (7) works with partner agencies to articulate and build curricula for public health workforce competencies in leadership and management; (8) maintains liaison with other governmental agencies, academic institutions and organizations, state and local health agencies, private health organizations, professional organizations, and other outside groups; (9) provides technical assistance, consultation, resources and training for SEPDPO, other CDC fellowships, and the broader health workforce, including, but not limited to the development and dissemination of standard curricula, training, and related materials, in leadership and management; (10) develops and maintains appropriate internal and external partnerships to foster best practices in the design and delivery of educational activities and training; and (11) collaborates, as appropriate, with the CDC OD, other CIOs, and domestic and international agencies to carry out the functions of the division.

Following the title and functional statement for the Public Health Prevention Service Branch (CPLCC), insert the following:

*Educational Design and Accreditation Branch (CPLCD).* (1) Provides consultation, guidance, and technical assistance to course developers, incorporating principles of learning theory to ensure consistent design and delivery of accredited educational activities; (2) maintains knowledge of continuing education standards and applies quality assurance practices required to uphold national accreditations; (3) assesses need and demand for additional accreditations to support professional license and certification needs of technical and professional staff within the health workforce; (4) develops and maintains internal and external partnerships to foster best practices in the design and

delivery of educational activities and training; (5) maintains knowledge of information technology and learning standards as they apply to education and training to demonstrate and promote compliance and best practices by CDC programs; (6) applies the principles of instructional systems design and learning theory to design, develop, deliver, and evaluate informational and instructional products; (7) implements and maintains the CDC Training and Continuing Education Online web-based accreditation and registration system; (8) adapts information systems and processes to reflect current best practices and adherence to accreditation requirements; and (9) provides technical assistance and guidance to learners to ensure accreditation and learner support.

Delete in its entirety the title and functional statement for the Division of Training Development and Services (CPLD) within the Scientific Education and Professional Development Program Office (CPL), Office of Surveillance, Epidemiology and Laboratory Services (CP)

Dated: March 10, 2011.

**James D. Seligman,**

*Acting Chief Operating Officer, Centers for Disease Control and Prevention.*

[FR Doc. 2011–6515 Filed 3–21–11; 8:45 am]

**BILLING CODE 4160–18–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–1991–F–0203] (Formerly Docket No. 91F–0111)**

### Hartech Corporation; Denial Without Prejudice of Food Additive Petition

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

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is denying a food additive petition (FAP 1M4246) proposing that the food additive regulations be amended to provide for the safe use of a source of ionizing radiation to treat shellfish, including crustaceans.

**DATES:** This order is effective June 20, 2011; except as to any provisions that may be stayed by the filing of proper objections. Submit either electronic or written objections and requests for a hearing by April 21, 2011.

**ADDRESSES:** You may submit either electronic or written objections and requests for a hearing identified by Docket No. FDA–1991–F–0203, by any of the following methods:

*Electronic Submissions*

Submit electronic objections in the following way:

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

*Written Submissions*

Submit written objections in the following ways:

*Fax:* 301–827–6870.

*Mail/Hand delivery/Courier (for paper, disk, or CD–ROM submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Richard E. Bonnette, Center for Food Safety and Applied Nutrition (HFS–255), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740–3835, 301–436–1235.

**SUPPLEMENTARY INFORMATION:** In a notice published in the **Federal Register** of April 16, 1991 (56 FR 15373), FDA announced that a food additive petition (FAP 1M4246) had been filed by Hartech Corp. (formerly United States Harvest Technologies, Inc., One East Chase St., suites 1112 and 1113, Baltimore, MD). The petition proposed to amend the food additive regulations in § 179.26 *Ionizing radiation for the treatment of food* (21 CFR 179.26) to provide for the safe use of a source of ionizing radiation to treat shellfish, including crustaceans.

For any food additive petition, the burden is on the petitioner to submit to FDA data and information that are adequate for the Agency to determine that the proposed use of the additive under the specified conditions of use is safe (21 U.S.C. 348(c)(3)(A), 21 CFR 171.1). Hartech Corp. was notified of significant deficiencies in the information supporting its petition by letters from the Agency dated May 28, 1992, February 5, 1999, December 15, 2004, March 19, 2009, and May 22, 2009. The deficiencies related primarily to concerns about the possibility of *Clostridium botulinum* outgrowth in irradiated products, especially where the normal growth pattern of typical spoilage organisms could be changed by irradiation, thus reducing perception of spoilage. FDA had therefore requested information on typical spoilage and pathogenic microbial populations of shellfish irradiated at the maximum dose requested. FDA also requested additional data on the efficacy of the proposed doses of irradiation in reducing pathogens in crustaceans because the petition only included data on the efficacy of irradiation in reducing the levels of *Vibrio* species in oysters.

Hartech Corp. has not provided information to address these deficiencies, and the Agency's most recent letters to Hartech Corp.'s last known address were returned as undeliverable. Additional efforts to contact this petitioner have been unsuccessful. The petitioner has not provided sufficient data and information for the Agency to conclude that the proposed use of the food additive is safe in accordance with section 409 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 348). FDA is therefore denying the petition without prejudice to a future filing (21 U.S.C. 348(c)(1)(B), 21 CFR 171.100(a)).

This order is effective as shown in the **DATES** section of this document; except as to any provisions that may be stayed by the filing of proper objections. Any person who will be adversely affected by this order may file with the Division of Dockets Management (*see* **ADDRESSES**) either electronic or written objections. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. It is only necessary to send one set of documents. It is no longer necessary to send three copies of all documents. Identify documents with the docket number found in brackets in the heading of this document. Any objections received in response to the order may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday. FDA will publish notice of the objections that the Agency has received or lack thereof in the **Federal Register.**

Dated: March 15, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011–6624 Filed 3–21–11; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–1990–F–0390] (Formerly Docket No. 90F–0074)**

### Alpha Omega Technology, Inc.; Denial Without Prejudice of Food Additive Petition

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

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is denying a food additive petition (FAP 0M4181) proposing that the food additive regulations be amended to provide for the safe use of a source of irradiation to treat shellfish and finfish.

**DATES:** This order is effective June 20, 2011; except as to any provisions that may be stayed by the filing of proper objections. Submit either electronic or written objections and requests for a hearing by April 21, 2011.

**ADDRESSES:** You may submit either electronic or written objections and requests for a hearing, identified by FDA–1990–F–0390, by any of the following methods:

**Electronic Submissions**

Submit electronic objections in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

**Written Submissions**

Submit written objections in the following ways:

- *FAX:* 301–827–6870.
- *Mail/Hand delivery/Courier (for paper, disk, or CD–ROM submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Richard E. Bonnette, Center for Food Safety and Applied Nutrition (HFS–255), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740–3835, 301–436–1235.

**SUPPLEMENTARY INFORMATION:** In a notice published in the **Federal Register** of March 15, 1990 (55 FR 9772), FDA announced that a food additive petition (FAP 0M4181) had been filed by Alpha Omega Technology, Inc., 1279 Route 46 East, Parsippany, NJ 07054. The petition proposed to amend the food additive regulations in § 179.26 *Ionizing radiation for the treatment of food* (21 CFR 179.26) to provide for the safe use of a source of irradiation to treat finfish and shellfish.

For any food additive petition, the burden is on the petitioner to submit to FDA data and information that are adequate for the Agency to determine that the proposed use of the additive under the specified conditions of use is safe (21 U.S.C. 348(c)(3)(A); 21 CFR 171.1). Alpha Omega Technology, Inc., was informed of significant deficiencies in its petition by letters from FDA dated May 28, 1992, September 15, 1993, February 10, 1999, July 20, 2004, March 19, 2009, and May 22, 2009. The deficiencies related primarily to the possibility of *Clostridium botulinum* outgrowth in packaged products, especially where the normal growth pattern of typical spoilage organisms could be changed by irradiation, thus reducing perception of spoilage.

FDA noted that the data provided in the petition indicated that there was very little margin of safety with regard to the concern for *C. botulinum* outgrowth and toxin elaboration, particularly in irradiated fish stored at temperatures between 46 and 50 degrees Fahrenheit. FDA therefore requested data demonstrating that products irradiated at the maximum dose requested and subjected to some temperature abuse would show evidence of spoilage before showing evidence of toxicity.

Alpha Omega Technology, Inc., has been unresponsive to these requests, and other efforts to contact the petitioner regarding the petition have not been successful. The petitioner has not provided sufficient data and information for the Agency to conclude that the proposed use of the food additive is safe in accordance with section 409 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 348). Consequently, FDA is denying the petition without prejudice to a future filing (21 U.S.C. 348(c)(1)(B), 21 CFR 171.100(a)).

This order is effective as shown in the DATES section of this document; except as to any provisions that may be stayed by the filing of proper objections. Any person who will be adversely affected by this order may file with the Division of Dockets Management (*see* **ADDRESSES**) either electronic or written objections. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. It is only necessary to send one set of documents. It is no longer necessary to send three copies of all documents. Identify documents with the docket number found in brackets in the heading of this document. Any objections received in response to the order may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday. FDA will publish notice of the objections that the Agency has received or lack thereof in the **Federal Register**.

Dated: March 15, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011–6623 Filed 3–21–11; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2011–N–0002]**

### Food and Drug Administration/Xavier University Global Medical Device Conference

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

**ACTION:** Notice of public conference.

**SUMMARY:** The Food and Drug Administration (FDA) Cincinnati District, in co-sponsorship with Xavier University, is announcing a public conference entitled "FDA/Xavier University Global Medical Device Conference." This 3-day public conference includes presentations from key FDA officials and industry experts. The public conference has three separate tracks of interest for quality, regulatory affairs, and clinical research professionals, and is intended for companies of all sizes and employees at all levels.

*Dates and Times:* The public conference will be held on May 4, 2011, from 8:30 a.m. to 5 p.m.; May 5, 2011, from 8:30 a.m. to 5 p.m.; and May 6, 2011, from 8:30 a.m. to 1 p.m.

*Location:* The public conference will be held on the campus of Xavier University, 3800 Victory Pkwy.,

Cincinnati, OH 45207, 513–745–3073 or 513–745–3396.

*Contact Persons:*

*For information regarding this notice:* Gina Brackett, Food and Drug Administration, 6751 Steger Dr., Cincinnati, OH 45237, 513–679–2700, ext 167, FAX: 513–679–2772, e-mail: *gina.brackett@fda.hhs.gov.*

*For information regarding the conference and registration:* Marla Phillips, Xavier University, 3800 Victory Pkwy., Cincinnati, OH 45207, 513–745–3073, e-mail: *phillipsm4@xavier.edu.*

*Registration:* There is a registration fee. The conference registration fees cover the cost of the presentations, training materials, receptions, breakfasts, lunches, and dinners for the 3 days of the conference. Early registration ends April 3, 2011. Standard registration ends May 2, 2011. There will be onsite registration. The cost of registration is as follows:

TABLE 1—REGISTRATION FEES

| Attendee | Fee by April 3, 2011 | Fee by May 3, 2011 |
|---|---|---|
| Industry | $995 | $1,200 |
| Small Business (<100 employees) | 800 | 1,000 |
| Academic | 600 | 750 |
| FDA/Government Employee | 140 | 140 |

The following forms of payment will be accepted: American Express, Visa, Mastercard, and company checks.

To register online for the public conference, please visit the "Registration" link on the conference Web site at *http://www.XavierMedCon.com.* FDA has verified the Web site address, but is not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**.

To register by mail, please send your name, title, firm name, address, telephone and fax numbers, e-mail, and payment information for the fee to Xavier University, Attention: Sue Bensman, 3800 Victory Pkwy., Cincinnati, OH 45207. An e-mail will be sent confirming your registration.

Attendees are responsible for their own accommodations. The conference headquarter hotel is the Downtown Cincinnati Hilton Netherlands Plaza, 35 West 5th St., Cincinnati, OH, 45202, 513–421–9100. Special conference block rates are available through April 12, 2011. To make reservations online, please visit the "Venue/Logistics" link at *http://www.XavierMedCon.com.* If you need special accommodations due to a disability, please contact Marla Phillips (see *Contact Persons*) at least 7 days in advance of the conference.

**SUPPLEMENTARY INFORMATION:** The public conference helps fulfill the Department of Health and Human Services and FDA's important mission to protect the public health. The conference will provide those engaged in FDA-regulated medical devices (for humans) with information on the following topics:

- Changes Within the Center for Devices and Radiological Health (CDRH) That Will Impact Our Industry.
- 510(k) Changes: Panel Discussion.
- Combination Products Panel.
- Update on Quality System Regulations. Warning Letter and Enforcement Action Trends.
- MDUFMA Legislation.
- Corrective and Preventive Actions.
- Clinical Data Requirement Changes—Premarket Clearance.
- Reimbursement Panel.
- MDR Reporting/Vigilance.
- Ethical Issues Leading to Non-Compliance In Clinical Trials.
- Risk Management and Design Controls.
- 510(k) SE Decision Making Process.
- Warning Letter Trends for Sponsor-Monitors and CRO's.
- Supplier Controls.
- Advertising, and Promotion and Labeling Pre- and Post-Market.
- Ensuring Site Compliance in Clinical Trials.
- FDA's Bioresearch Monitoring Program–Overview and Current Activities.
- Inspection Readiness.
- Training.
- International Regulatory Update.
- FDCA, Anti Kickback and False Claims Act, Implications of Investigator-Initiated Trials.
- Recalls, Requirements and Challenges.
- CE Mark.
- Adverse Event Reporting During Clinical Investigation in the EU.
- Clinical Evaluation for EU Market Access.
- Using Electronic Medical Records.
- Cooperative Research Activities Between Academia and Industry.

FDA has made education of the drug and device manufacturing community a high priority to help ensure the quality of FDA-regulated drugs and devices. The conference helps to achieve objectives set forth in section 406 of the Food and Drug Administration Modernization Act of 1997 (21 U.S.C. 393), which includes working closely with stakeholders and maximizing the availability and clarity of information to stakeholders and the public. The conference also is consistent with the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) by providing outreach activities by Government agencies to small businesses.

Dated: March 14, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011–6619 Filed 3–21–11; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Amended Notice of Establishment

Notice is hereby given as a correction in the announcement of the establishment of the NCI–Frederick Advisory Committee, which was published in the **Federal Register** on March 15, 2011, 75 FR 14035.

This FRN is amended to replace the word "Council" used in the second paragraph to the word "Committee".

Dated: March 16, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–6742 Filed 3–21–11; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Biomedical Imaging and Bioengineering; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Council for Biomedical Imaging and Bioengineering.

The meeting will be open to the public as indicated below, with attendance 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.

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/or contract proposals 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 and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Advisory Council for Biomedical Imaging and Bioengineering NACBIB May, 2011.

*Date:* May 20, 2011.

*Open:* 9:15 a.m. to 12 p.m.

*Agenda:* Report from the Institute Director, other Institute Staff and discussion of strategic plan.

*Place:* Bethesda Marriott Suites, 6711 Democracy Boulevard, Independence Room (2nd Level), Bethesda, MD 20817.

*Closed:* 1 p.m. to 2:30 p.m.

*Agenda:* To review and evaluate grant applications and/or proposals.

*Place:* Bethesda Marriott Suites, 6711 Democracy Boulevard, Independence Room (2nd Level), Bethesda, MD 20817.

*Contact Person:* Anthony Demsey, PhD, Director, National Institute of Biomedical Imaging and Bioengineering, 6707 Democracy Boulevard, Room 241, Bethesda, MD 20892.

Any interested person may file written comments with the committee 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.

Information is also available on the Institute's/Center's home page: *http://www.nibib1.nih.gov/about/NACBIB/NACBIB.htm*, where an agenda and any additional information for the meeting will be posted when available.

Dated: March 16, 2011.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–6748 Filed 3–21–11; 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, Review of Program Project (P01) Applications.

*Date:* April 13–14, 2011.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Courtyard by Marriott Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

*Contact Person:* Rebecca H. Johnson, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, 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: March 16, 2011.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–6735 Filed 3–21–11; 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 an Interagency Autism Coordinating Committee (IACC) meeting.

The meeting will feature special presentations and activities to celebrate HHS Autism Awareness Month. The IACC will also discuss committee business items including the 2010 Summary of Advances and the 2009 Portfolio Analysis. The meeting will be open to the public and will be accessible by Web cast and conference call.

*Name of Committee:* Interagency Autism Coordinating Committee (IACC).

*Type of meeting:* Open meeting.

*Date:* April 11, 2011.

*Time:* 9 a.m. to 5 p.m. *Eastern Time*—Approximate end time.

*Agenda:* The meeting will feature special presentations and activities to celebrate HHS Autism Awareness Month. The IACC will also discuss committee business items including the 2010 Summary of Advances and the 2009 Portfolio Analysis.

*Place:* Ronald Reagan Building and International Trade Center, The Polaris Room, 1300 Pennsylvania Ave., NW., Washington, DC 20004.

*Conference Call:* Dial: 888–577–8995; Access code: 1991506.

*Cost:* The meeting is free and open to the public.

*Web cast Live: http://videocast.nih.gov/.*

*Registration: http://www.acclaroresearch.com/oarc/4-11-11/.* 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.

*Deadlines:* Notification of intent to present oral comments: April 1st by 5 p.m. ET. Submission of written/electronic statement for oral comments: April 4th by 5 p.m. ET. Submission of written comments: April 5th by 5 p.m. ET.

*Access:* Metro accessible—Federal Triangle Metro (Orange/Blue 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:** Any member of the public interested in presenting oral comments to the Committee must notify the Contact Person listed on this notice by 5 p.m. ET on Friday, April 1, 2011, with their request to present oral comments at the meeting. Interested individuals and representatives of organizations must submit a written/electronic copy of the oral statement/

comments including a brief description of the organization represented by 5 p.m. ET on Monday, April 4, 2011.

Statements submitted will become a part of the public record. Only one representative of an organization will be allowed to present oral comments, and presentations will be limited to three to five minutes per speaker, depending on number of speakers to be accommodated within the allotted time. Speakers will be assigned a time to speak in the order of the date and time when their request to speak is received, along with the required submission of the written/electronic statement by the specified deadline.

In addition, any interested person may submit written comments to the IACC prior to the meeting by sending the comments to the Contact Person listed on this notice by 5 p.m. ET, Tuesday, April 5, 2011. The comments should include the name and, when applicable, the business or professional affiliation of the interested person. All written comments received by the deadlines for both oral and written public comments will be provided to the IACC for their consideration and will become part of the public record. The meeting will be open to the public through a conference call phone number and Web cast live on the Internet. 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 or Web cast, please e-mail *IACCTechSupport@acclaroresearch.com* or call the IACC Technical Support Help Line at 443–680–0098.

To access the Web cast live on the Internet the following computer capabilities are required: (A) Internet Explorer 5.0 or later, Netscape Navigator 6.0 or later or Mozilla Firefox 1.0 or later; (B) Windows® 2000, XP Home, XP Pro, 2003 Server or Vista; (C) Stable 56k, cable modem, ISDN, DSL or better Internet connection; (D) Minimum of Pentium 400 with 256 MB of RAM (Recommended); (E) Java Virtual Machine enabled (Recommended).

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.

Schedule is subject to change.

Information about the IACC is available on the Web site: *http://www.iacc.hhs.gov.*

Dated: March 15, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–6727 Filed 3–21–11; 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 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Mental Health Special Emphasis Panel, New, Rapidly-Acting Treatments for Treatment-Resistant Depression (RAPID).

*Date:* April 7, 2011.

*Time:* 11 a.m. to 5 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

*Contact Person:* Francois Boller, MD, PhD, Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6142, MSC 9606, Bethesda, MD 20892–9606, 301–443–1513, *bollerf@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: March 15, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–6733 Filed 3–21–11; 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, Special Emphasis Panel, RFA on AIDS Consortium.

*Date:* April 21–22, 2011.

*Time:* 8 a.m. to 6 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

*Contact Person:* Ranga Srinivas, PhD, Chief, Extramural Project Review Branch, EPRB, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 5635 Fishers Lane, Room 2085, Bethesda, MD 20892, 301–451–2067, *srinivar@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: March 15, 2011.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–6730 Filed 3–21–11; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### Customs and Border Protection

### Agency Information Collection Activities: Record of Vessel Foreign Repair or Equipment Purchase

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** 30-Day notice and request for comments; Extension of an existing information collection: 1651–0027.

**SUMMARY:** U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and

Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Record of Vessel Foreign Repair or Equipment Purchase (CBP Form 226). This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with a change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (76 FR 3151) on January 19, 2011, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

**DATES:** Written comments should be received on or before April 21, 2011.

**ADDRESSES:** Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

**SUPPLEMENTARY INFORMATION:** U.S. Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act (Pub. L. 104–13). Your comments should address one 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/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components 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 collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological techniques or other forms of information.

*Title:* Record of Vessel Foreign Repair or Equipment Purchase.

*OMB Number:* 1651–0027.

*Form Number:* CBP Form 226.

*Abstract:* 19 U.S.C. 1466(a) provides for a 50 percent *ad valorem* duty assessed on a vessel master or owner for any repairs, purchases, or expenses incurred in a foreign country by a commercial vessel registered in the United States. CBP Form 226, Record of Vessel Foreign Repair or Equipment Purchase, is used by the master or owner of a vessel to declare and file entry on equipment, repairs, parts, or materials purchased for the vessel in a foreign country. This information enables CBP to assess duties on these foreign repairs, parts or materials. CBP Form 226 is provided for by 19 CFR 4.7 and 4.14 and is accessible at *http://forms.cbp.gov/pdf/CBP_Form_226.pdf.*

*Current Actions:* CBP proposes to extend the expiration date of this information collection with a change to the burden hours based on the number of responses filed with CBP in 2010. There is no change to the information being collected.

*Type of Review:* Extension (with change).

*Affected Public:* Businesses.

*Estimated Number of Respondents:* 100.

*Estimated Number of Responses per Respondent:* 11.

*Estimated Number of Total Annual Responses:* 1,100.

*Estimated Time per Response:* 45 minutes.

*Estimated Total Annual Burden Hours:* 825.

If additional information is required contact: Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street, NW., 5th Floor, Washington, DC 20229–1177, at 202–325–0265.

Dated: March 17, 2011.

**Tracey Denning,**

*Agency Clearance Officer, U.S. Customs and Border Protection.*

[FR Doc. 2011–6648 Filed 3–21–11; 8:45 am]

**BILLING CODE 9111–14–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5486–N–06]**

### Notice of Proposed Information Collection for Public Comment on Evaluation of the Office of University Partnerships Programs Telephone Survey

**AGENCY:** Office of Policy Development and Research, HUD.

**ACTION:** Notice

**SUMMARY:** The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

**DATES:** Comments Due Date: May 23, 2011.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and should be sent to: Reports Liaison Officer, Office of Policy Development and Research, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 8230, Washington, DC 20410.

**FOR FURTHER INFORMATION CONTACT:** Ndeye Jackson, Department of Housing and Urban Development, Office of Policy Development and Research, 451 7th Street, SW., Room 8126, Washington DC 20401; telephone (202) 402–5737, (this is not a toll free number). Copies of the proposed data collection instruments and other available documents may be obtained from Ms. Jackson.

**SUPPLEMENTARY INFORMATION:** The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended). This notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including if the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

*Title of Proposal:* Evaluation of the Office of University Partnerships Programs.

*Description of the need for information and proposed use:* The Department is conducting this evaluation under contract with Abt Associates Inc. and its subcontractors, Econometrica and ACKCO. This study is

an evaluation of four grant programs funded through HUD's Office of University Partnerships (OUP). The four OUP programs are: Historically Black Colleges and Universities (HBCU); Hispanic-Serving Institutions Assisting Communities (HSIAC); Alaskan Native/ Native Hawaiian Institutions Assisting Communities (ANNHIAC); and Tribal Colleges and Universities Program (TCUP). This evaluation will be the first to systematically document program outcomes and to assess where certain factors, such as partnership structure or the types of activities completed with grant funds affect outcomes. To collect the information necessary for this study, the Department will conduct two telephone surveys of staff members from a sample of OUP grant recipients that have received a grant between fiscal years 2005 and 2008. Surveys will be conducted with 67 OUP grantees. The first grantee survey will query the number of OUP grants an institution received during the study period; how the OUP grants were used; and whether the grants were interrelated. The second grantee survey will ask about: community outcomes were achieved; project beneficiaries other funding sources used in conjunction with OUP funding; and how partners worked together to implement grant activities.

*Members of the affected public:* The telephone surveys will affect approximately 67 institutional recipients of an OUP Program Grant.

*Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:* For the OUP recipient survey, the researchers will administer a set of two interviews to 67 recipient staff. The first interview is expected to last 20 minutes; the second interview is expected to last 60 minutes for a total burden hour estimate of 90 hours.

| Respondents | Number of respondents | Number responses per respondent | Average burden/response (in hours) | Total burden hours |
|---|---|---|---|---|
| Telephone interview | 67 | 2 | 40 | 90 |

*Status of the proposed information collection:* Pending OMB approval.

**Authority:** Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: March 14, 2011.

**Raphael W. Bostic,**

*Assistant Secretary for Policy Development and Research.*

[FR Doc. 2011–6607 Filed 3–21–11; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5415–C–34]**

## HUD's Fiscal Year (FY) 2010 NOFA for the Self-Help Homeownership Opportunity Program (SHOP) Technical Correction and Extension of Deadline Date

**AGENCY:** Office of the Chief of the Human Capital Officer, HUD.

**ACTION:** Notice of technical correction.

**SUMMARY:** HUD announces the availability on *http://*www.Grants.gov and its website at *http://www.hud.gov/offices/adm/grants/nofa10/grpshop.cfm* a technical correction to the FY 2010 NOFA for the Self-Help homeownership Opportunity Program (SHOP).

This notice corrects the Threshold Requirement in the NOFA to make clear that a SHOP applicant and its affiliates must qualify as eligible public or private nonprofit organizations under federal or state law. This Notice also corrects sections in the NOFA that relate to this threshold requirement.

This notice also makes applicants aware of a correction to the eLogic Model form HUD 96010 SHOP V12.3 012811. The coding in the form originally posted did not allow the macros to function properly. The coding has been corrected and the corrected HUD 96010 SHOP V12.3 030311 form is contained in the Instructions Download. Applicants that have already submitted an application using an earlier version of the eLogic Model, should pull a new Logic Model from the instructions download, complete a new eLogic Model, attach the new Logic Model to their application, and resubmit the application. The Technical Correction also extends the deadline date for the Self-Help homeownership Opportunity Program (SHOP) NOFA until April 18, 2011.

The Catalogue of Federal Domestic Assistance (CFDA) number for this program is 14.247.

**DATES:** The application submission deadline for the FY 2010 SHOP NOFA is being extended until April 18, 2011.

**FOR FURTHER INFORMATION CONTACT:** For additional information concerning the Self-Help Homeownership Opportunity Program, contact Ginger Macomber, SHOP Program Manager, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7162, Washington, DC 20410–7000; telephone 202–402–4605 (this is not a toll-free number). Persons with speech or hearing impairments may access this telephone number via TTY by calling the toll-free Federal Information Relay Service during working hours at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:** On February 1, 2011, HUD posted its FY 2010 Notice of Funding Availability (NOFA) for the Self-Help Homeownership Opportunity Program. The FY 2010 SHOP NOFA announced the availability of approximately $26.7 million in FY 2010 funding to be awarded to national and regional nonprofit organizations and consortia which facilitate and encourage innovative homeownership opportunities for low-income individuals and families.

Dated: March 15, 2011.

**Barbara S. Dorf,**

*Director, Office of Departmental Grants Management and Oversight, Office of the Chief Human Capital Officer.*

[FR Doc. 2011–6606 Filed 3–21–11; 8:45 am]

**BILLING CODE 4210–67–P**

## INTER-AMERICAN FOUNDATION BOARD MEETING

### Sunshine Act Meetings

**TIME AND DATE:** March 28, 2011, 9 a.m.–1:30 p.m.

**PLACE:** 901 N. Stuart Street, Tenth Floor, Arlington, Virginia 22203.

**STATUS:** Open session

**MATTERS TO BE CONSIDERED:**

- Approval of the Minutes of the December 13, 2010, Meeting of the Board of Directors
- President's Report
- Foundation Programs
- Budget/Fiscal Situation
- Congressional Affairs
- Strategic Planning
- Advisory Council

- RedEAmérica
- Website Demonstration
- Next Meetings

**PORTIONS TO BE OPEN TO THE PUBLIC:**

- Approval of the Minutes of the December 13, 2010, Meeting of the Board of Directors
- President's Report
- Foundation Programs
- Budget/Fiscal Situation
- Congressional Affairs
- Strategic Planning
- Advisory Council
- RedEAmérica
- Website Demonstration
- Next Meetings

**PORTIONS TO BE CLOSED TO THE PUBLIC:**

- None

**CONTACT PERSON FOR MORE INFORMATION:** Jennifer Hodges Reynolds.

**Jennifer Hodges Reynolds,**

*General Counsel, (703) 306–4301.*

[FR Doc. 2011–6816 Filed 3–18–11; 4:15 pm]

**BILLING CODE 7025–01–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R2–ES–2011–N036; 20124–1113–0000–F5]**

### Endangered and Threatened Species Permit Applications

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

**ACTION:** Notice of receipt of applications; request for public comment.

**SUMMARY:** The following applicants have applied for scientific research permits to conduct certain activities with endangered species under the Endangered Species Act of 1973, as amended (Act). The Act requires that we invite public comment on these permit applications.

**DATES:** To ensure consideration, written comments must be received on or before April 21, 2011.

**ADDRESSES:** Written comments should be submitted to the Chief, Endangered Species Division, Ecological Services, P.O. Box 1306, Room 6034, Albuquerque, NM 87103. Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act. Documents will be available for public inspection, by appointment only, during normal business hours at the U.S. Fish and Wildlife Service, 500 Gold Ave. SW., Room 6034, Albuquerque, NM 87102. Please refer to the respective permit number for each application when submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Susan Jacobsen, Chief, Endangered Species Division, P.O. Box 1306, Albuquerque, NM 87103; (505) 248–6920.

**SUPPLEMENTARY INFORMATION:**

**Public Availability of Comments**

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**Permit TE–33863A**

*Applicant:* Deborah Blackburn, Austin, Texas.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for golden-cheeked warbler (*Dendroica chrysoparia*) and black-capped vireo (*Vireo atricapilla*) within Texas, and southwestern willow flycatcher (*Empidonax traillii extimus*) within Texas, New Mexico, Arizona, Oklahoma, Utah, Nevada, California, and Colorado.

**Permit TE–33921A**

*Applicant:* City of San Antonio, San Antonio, Texas.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for golden-cheeked warbler (*Dendroica chrysoparia*) and black-capped vireo (*Vireo atricapilla*) within Texas.

**Permit TE–34030A**

*Applicant:* Dustin McBride, North Richland Hills, Texas.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for Houston toad (*Bufo houstonensis*) within Texas.

**Permit TE–106816**

*Applicant:* Douglas High School, Douglas, Arizona.

Applicant requests a new permit for holding a refugium and breeding population for Yaqui topminnow (*Poeciliopsis occidentalis sonoriensis*) and Yaqui chub (*Gila pupurea*) at Douglas High School, to establish, reestablish, or augment populations consistent with appropriate agreements and necessary State and Federal permits.

**Permit TE–819451**

*Applicant:* Ecosystem Management, Albuquerque, New Mexico.

Applicant requests a renewal to a current permit for research and recovery purposes to conduct presence/absence surveys for black-footed ferret (*Mustela nigripes*), interior least tern (*Sterna antillarum anthalassos*), northern aplomado falcon (*Falco femeralis septentrionalis*), and southwestern willow flycatcher (*Empidonax traillii extimus*) within New Mexico and Arizona.

**Permit TE–35152A**

*Applicant:* Ronald Van Den Bussche, Stillwater, Oklahoma.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for Ozark big-eared bat (*Corynorhinus townsendii ingens*) and gray bat (*Myotis grisescens*) within Arkansas and Oklahoma.

**Permit TE–35159A**

*Applicant:* New Mexico State Land Office, Santa Fe, New Mexico.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for southwestern willow flycatcher (*Empidonax traillii extimus*) and Rio Grande silvery minnow (*Hybognathus amarus*) within New Mexico.

**Permit TE–35163A**

*Applicant:* Joseph Grzybowski, Norman, Oklahoma.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys, nest surveys, and banding activities for black-capped vireo (*Vireo atricapilla*) within Texas and Oklahoma.

**Permit TE–169770**

*Applicant:* New Mexico Interstate Stream Commission, Santa Fe, New Mexico.

Applicant requests an amendment to a current permit for research and recovery purposes to conduct a spawning study, propagate, and collect and transport eggs for Rio Grande silvery minnows (*Hybognathus amarus*) within the Los Lunas Silvery Minnow Refugium, New Mexico.

**Permit TE–837751**

*Applicant:* Bureau of Reclamation, Phoenix, Arizona.

Applicant requests an amendment to a current permit for research and

recovery purposes to conduct presence/absence surveys for woundfin (*Plagopterus agrentissimus*) within Arizona.

**Permit TE–35429A**

*Applicant:* Chris Sledge, Weatherford, Texas.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for golden-cheeked warbler (*Dendroica chrysoparia*) and black-capped vireo (*Vireo atricapilla*) within Texas.

**Permit TE–35437A**

*Applicant:* Tulsa District U.S. Army Corps of Engineers, Tulsa, Oklahoma.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for gray bat (*Myotis grisescens*), Indiana bat (*Myotis sodalis*), Ozark big-eared bat (*Corynorhinus townsendii ingens*), black-capped vireo (*Vireo atricapilla*), interior least tern (*Sterna antillarum*), leopard darter (*Percina pantherina*), Neosho madtom (*Noturus placidus*), Arkansas River shiner (*Notropis girardi*), Ouachita rock pocketbook (*Arkansia wheeleri*), winged mapleleaf (*Quadrula fragosa*), and American burying beetle (*Nicrophorus americanus*) within Oklahoma, Texas, and Kansas.

**Permit TE–35591A**

*Applicant:* Marc Baker, Chino Valley, Arizona.

Applicant requests a new permit for research and recovery purposes to collect flower buds for chromosome counts from Arizona hedgehog cactus (*Echinocereus triglochidiatus var. arizonicus*) within the Tonto National Forest, Arizona.

**Permit TE–35429A**

*Applicant:* Chris Sledge, Weatherford, Texas.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for two ground beetles without common names (*Rhadine exilis* and *Rhadine infernalis*), Helotes mold beetle (*Batrisodes venyivi*), Cokendolpher Cave harvestman (*Texella cokendolpheri*), Robber Baron Cave meshweaver (*Cicurina baronia*), Madla Cave meshweaver (*Cicurina madla*), Bracken Bat Cave meshweaver (*Cicurina venii*), Government Canyon Bat Cave meshweaver (*Cicurina vespera*), Government Canyon Bat Cave spider (*Neoleptoneta microps*), Tooth Cave spider (*Neoleptoneta myopica*), Tooth Cave pseudoscorpion (*Tartarocreagris texana*), Bee Creek Cave harvestman (*Texella reddelli*), Kretschmarr Cave mold beetle (*Texamaurops reddelli*), Tooth Cave ground beetle (*Rhadine persephone*), Bone Cave harvestman (*Texella reyesi*), and Coffin Cave mold beetle (*Batrisodes texanus*) within Texas.

**Permit TE–36653A**

*Applicant:* PBS&J, Austin, Texas.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for golden-cheeked warbler (*Dendroica chrysoparia*), black-capped vireo (*Vireo atricapilla*), southwestern willow flycatcher (*Empidonax traillii extimus*), interior least tern (*Sterna antillarum anthalassos*), northern aplomado falcon (*Falco femeralis septentrionalis*), red-cockaded woodpecker (*Picoides borealis*), Yuma clapper rail (*Rallus logirostris yumanensis*), Houston toad (*Bufo houstonensis*), Barton Springs salamander (*Eurycea sosorum*), San Marco salamander (*Eurycea nana*), Texas blind salamander (*Typhlomolge rathbuni*), fountain darter (*Etheostoma fonticola*), San Marcos gambusia (*Gambusia georgei*), Comal Springs riffle beetle (*Heterelmis comalensis*), Comal Springs dryopid beetle (*Stygoparnus comalensis*), Peck's Cave amphipod (*Stygobromus pecki*), two ground beetles without common names (*Rhadine exilis* and *Rhadine infernalis*), Helotes mold beetle (*Batrisodes venyivi*), Cokendolpher Cave harvestman (*Texella cokendolpheri*), Robber Baron Cave meshweaver (*Cicurina baronia*), Madla Cave meshweaver (*Cicurina madla*), Bracken Bat Cave meshweaver (*Cicurina venii*), Government Canyon Bat Cave meshweaver (*Cicurina vespera*), Government Canyon Bat Cave spider (*Neoleptoneta microps*), Tooth Cave spider (*Neoleptoneta myopica*), Tooth Cave pseudoscorpion (*Tartarocreagris texana*), Bee Creek Cave harvestman (*Texella reddelli*), Kretschmarr Cave mold beetle (*Texamaurops reddelli*), Tooth Cave ground beetle (*Rhadine persephone*), Bone Cave harvestman (*Texella reyesi*), and Coffin Cave mold beetle (*Batrisodes texanus*) within Texas, Louisiana, Mississippi, Arkansas, Arizona, and New Mexico.

**Permit TE–012642**

*Applicant:* Blue Earth Ecological Consultants, Santa Fe, New Mexico.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for southwestern willow flycatcher (*Empidonax traillii extimus*) within New Mexico.

**Permit TE–066458**

*Applicant:* National Aquarium, Washington, DC.

Applicant requests a new permit for research and recovery purposes to hold and display, for educational purposes, the following species: Texas blind salamander (*Typhlomolge rathbuni*), bonytail chub (*Gila elegans*), desert pupfish (*Cyprinodon macularius*), razorback sucker (*Xyrauchen texanus*), Gila topminnow (*Poeciliopsis occidentalis*), and woundfin (*Plagopterus argentissimus*), which were obtained from the Dexter National Fish Hatchery in New Mexico and will be held at the National Aquarium.

**Permit TE–168185**

*Applicant:* Cox-McLain Environmental Consulting, Inc., Austin, Texas.

Applicant requests an amendment to a current permit for research and recovery purposes to conduct presence/absence surveys for southwestern willow flycatcher (*Empidonax traillii extimus*) within Texas.

**Authority:** 16 U.S.C. 1531 *et seq.*

Dated: March 7, 2011.

**Joy Nicholopoulos,**

*Regional Director, Southwest Region, Fish and Wildlife Service.*

[FR Doc. 2011–6634 Filed 3–21–11; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

### Revision of Agency Information Collection for Financial Assistance and Social Services

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice of Submission to Office of Management and Budget.

**SUMMARY:** The Bureau of Indian Affairs (BIA) is submitting to the Office of Management and Budget a revision to the information collection, titled "Financial Assistance & Social Services, 25 CFR 20." The information collection is currently authorized by OMB Control Number 1076–0017, which expires March 31, 2012. The information collection requires applicants to provide information in support of their eligibility for BIA assistance and services and requires a subset of those applicants to complete an ISP in order to obtain General Assistance. Revisions include changes to the application form to address all five types of assistance authorized by 25 CFR 20 and a new

standardized form for Individual Self-Sufficiency Plans (ISPs).

**DATES:** Interested persons are invited to submit comments on or before *April 21, 2011.*

**ADDRESSES:** You may submit comments on the information collection to the Desk Officer for the Department of the Interior, Office of Management and Budget, either by facsimile at (202) 395–5806, or you may send an e-mail to *OIRA_DOCKET@omb.eop.gov.* Please send a copy of your comments to Sue Settles, Chief, Division of Human Services, Office of Indian Services, Bureau of Indian Affairs, Department of the Interior, 1849 C Street, NW., Mail Stop 4513, Washington, DC 20240, *facsimile:* (202) 208–5113, *e-mail: Sue.Settles@bia.gov.*

**FOR FURTHER INFORMATION CONTACT:** You may request further information or obtain copies of the information collection request submission from Sue Settles, *telephone:* (202) 513–7621.

**SUPPLEMENTARY INFORMATION:**

## I. Abstract

The BIA is seeking to revise the information collection it conducts to provide assistance under 25 CFR 20 to eligible Indians when comparable financial assistance or social services either are not available or not provided by State, tribal, county, local, or other Federal agencies. Approval for this collection expires March 31, 2012. The information collection allows BIA to determine whether an individual is eligible for assistance and services. This information collection is being revised to allow revisions to the Application to promote usefulness in obtaining needed client information. Specifically, the application form was revised to include all Financial Assistance and Social Service components including General Assistance, Child Assistance, Adult Care Assistance, Burial Assistance, and Emergency Assistance. The Application was also revised to be more user-friendly and assist in the eligibility determination process. In addition, the revised Application includes a case management tool for case workers. The case management tool is a breakdown of each Financial Assistance component to be utilized as a checklist of items to include in the case file, to check for during the application and intake process, and again during the eligibility determination. The checklist is a guide to 25 CFR part 20. The Application includes instructions on client appeal rights, the fraud statement, the appeal process, Paperwork Reduction Act and the Privacy Act. This information collection is also being revised to standardize the Individual Self-Sufficiency Plan (ISP) that is used for a subset of the General Assistance applicants. The standardized form will guide BIA and tribal case workers in obtaining information to develop the ISP with the client. The form will allow case workers to develop more meaningful and attainable goals through specific action steps. No third party notification or public disclosure burden is associated with this collection. BIA is requesting an increase in the estimated burden hours for this information collection to better account for the groups of respondents (applicants for any of the five types of assistance versus the subset of applicants requesting General Assistance), to better account for the time it takes respondents to complete the application and, where appropriate, provide information for an employability assessment and ISP.

## II. Request for Comments

The BIA requests that you send your comments on this collection to the location listed in the **ADDRESSES** section. Your comments should address: (a) The necessity of the information collection for the proper performance of the agencies, including whether the information will have practical utility; (b) the accuracy of our estimate of the burden (hours and cost) of the collection of information, including the validity of the methodology and assumptions used; (c) ways we could enhance the quality, utility and clarity of the information to be collected; and (d) ways we could minimize the burden of the collection of the information on the respondents, such as through the use of automated collection techniques or other forms of information technology.

Please note that an agency may not sponsor or conduct, and an individual need not respond to, a collection of information unless it has a valid OMB Control Number. Approval for this collection expires March 31, 2012.

It is our policy to make all comments available to the public for review at the location listed in the **ADDRESSES** section during the hours of 9 a.m.—5 p.m., Eastern Time, Monday through Friday except for legal holidays. Before including your address, phone number, e-mail address or other personally identifiable information, be advised that your entire comment—including your personally identifiable information—may be made public at any time. While you may request that we withhold your personally identifiable information, we cannot guarantee that we will be able to do so.

## III. Data

*OMB Control Number:* 1076–0017.

*Title:* Financial Assistance and Social Services, 25 CFR 20.

*Brief Description of Collection:* Submission of this information is required of Indian applicants of BIA financial assistance and social services. BIA uses the information to determine if an individual is eligible for services and, where appropriate, to conduct an employability assessment and jointly develop with the individual an Individual Self-Sufficiency Plan outlining how the individual can attain self-sufficiency. Response is required to obtain a benefit.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Individual Indians seeking financial assistance or social services from BIA.

*Number of Respondents:* 240,000 provide information on the application, and of those, 95,000 contribute information to an employability assessment and ISP.

*Total Number of Responses:* Once, on occasion.

*Estimated Time per Response:* 1.5 (0.5 hours for the application + 1 hour for the employability assessment and ISP).

*Estimated Total Annual Burden:* 215,000 hours ((240,000 × 0.5 hours for applications) + (95,000 × 1 hour for employability assessment and ISP)).

Dated: March 14, 2011.

**Alvin Foster,**

*Acting Chief Information Officer—Indian Affairs.*

[FR Doc. 2011–6714 Filed 3–21–11; 8:45 am]

**BILLING CODE 4310–4J–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLNM940000L1420000.BJ0000]**

### Notice of Filing of plats of survey, New Mexico

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of filing of Plats of Survey.

**SUMMARY:** The plats of survey described below are scheduled to be officially filed in the New Mexico State Office, Bureau of Land Management, Santa Fe, New Mexico, thirty (30) calendar days from the date of this publication.

**FOR FURTHER INFORMATION CONTACT**

These plats will be available for inspection in the New Mexico State Office, Bureau of Land Management, 301 Dinosaur Trail, Santa Fe, New

Mexico. Copies may be obtained from this office upon payment. Contact Marcella Montoya at 505–954–2097, or by e-mail at *Marcella_Montoya@nm.blm.gov,* for assistance.

**SUPPLEMENTARY INFORMATION:**

**New Mexico Principal Meridian, New Mexico (NM)**

The plat, representing the dependent resurvey and survey, in Township 10 South, Range 14 East, of the New Mexico Principal Meridian, accepted January 5, 2011, for Group 928 NM.

The plat, representing the dependent resurvey and survey, in Township 8 North, Range 2 East, of the New Mexico Principal Meridian, accepted January 26, 2011, for Group 1095 NM.

The plat, representing the dependent resurvey and survey, in Township 15 North, Range 2 East, of the New Mexico Principal Meridian, accepted February 24, 2011, for Group 1098 NM.

The supplemental plat, for Township 15 North, Range 1 East, of the New Mexico Principal Meridian accepted November 23, 2010.

**Indian Meridian, Oklahoma (OK)**

The plat, representing the dependent resurvey and survey in Township 23 North, Range 2 East, of the Indian Meridian, accepted December 6, 2010, for Group 196 OK.

The plat, representing the dependent resurvey and survey in Township 12 North, Range 20 East, of the Indian Meridian, accepted January 14, 2011, for Group 194 OK.

The plat, representing the dependent resurvey and survey in Township 3 South, Range 5 West, of the Indian Meridian, accepted January 25, 2011, for Group 191 OK.

The plat, in two sheets, representing the dependent resurvey and survey in Township 7 North, Range 9 West, of the Indian Meridian, accepted January 31, 2011, for Group 185 OK.

If a protest against a survey, in accordance with 43 CFR 4.450–2, of the above plat is received prior to the date of official filing, the filing will be stayed pending consideration of the protest. A plat will not be officially filed until the day after all protests have been addressed.

If a protest against a survey, as shown on any of the above plats, is received prior to the date of official filing, the filing will be stayed pending consideration of the protest. A plat will not be officially filed until the day after all protests have been dismissed and become final or appeals from the dismissal affirmed.

A person or party who wishes to protest against any of these surveys must file a written protest with the Bureau of Land Management New Mexico State Director stating that they wish to protest.

A statement of reasons for a protest may be filed with the notice of protest to the State Director or the statement of reasons must be filed with the State Director within thirty (30) days after the protest is filed.

**Robert A. Casias,**

*Deputy State Director of Cadastral, Survey/GeoSciences.*

[FR Doc. 2011–6642 Filed 3–21–11; 8:45 am]

**BILLING CODE 4310–FB–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLCAN00000.L18200000.XZ0000]**

### Notice of Public Meeting: Northeast California Resource Advisory Council

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of public meeting.

**SUMMARY:** In accordance with the Federal Land Policy and Management Act of 1976 (FLPMA), and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Northeast California Resource Advisory Council will meet as indicated below.

**DATES:** The committee will meet Wednesday and Thursday, April 20 and 21, 2011, in Burney, California. On April 20, the RAC will convene at 10 a.m. at the Veterans Memorial Hall, 37410 Main Street, and depart on a field tour. Members of the public are welcome. They must provide their own transportation, food and beverages. On April 21, the council meets from 8 a.m. until 2 p.m. at the Veterans Memorial Hall. The public is welcome.

**FOR FURTHER INFORMATION CONTACT:** Nancy Haug, BLM Northern California District manager, (530) 224–2160; or Joseph J. Fontana, BLM public affairs officer, (530) 252–5332.

**SUPPLEMENTARY INFORMATION:** The 15-member council advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management in northeast California and the northwest corner of Nevada. Agenda items at this meeting include management of wild horses and burros, alternative energy proposals on public lands, and ongoing land and natural resources issues in northeast California. The council will accept public comments at 11 a.m. Depending on the number of persons wishing to speak, and the time available, the time for individual comments may be limited. Members of the public are welcome on field tours, but they must provide their own transportation, food and beverages. Individuals who plan to attend and need special assistance, such as sign language interpretation and other reasonable accommodations, should contact the BLM as provided above.

Dated: March 15, 2011.

**Joseph J. Fontana,**

*Public Affairs Officer.*

[FR Doc. 2011–6639 Filed 3–21–11; 8:45 am]

**BILLING CODE 4310–40–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLCAN00000.L18200000.XZ0000]**

### Notice of Public Meeting: Northeast California Resource Advisory Council Subcommittee

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of public meeting.

**SUMMARY:** In accordance with the Federal Land Policy and Management Act of 1976 (FLPMA), and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Northeast California Resource Advisory Council's wild horse and burro management subcommittee will meet as indicated below.

**DATES:** The subcommittee will meet Monday, March 28, 2011, at 1 p.m., at the Bureau of Land Management Alturas Field Office, 708 West 12th St., Alturas, California.

**FOR FURTHER INFORMATION CONTACT:** Nancy Haug, BLM Northern California District manager, (530) 224–2160; or Joseph J. Fontana, BLM public affairs officer, (530) 252–5332.

**SUPPLEMENTARY INFORMATION:** The 15-member council advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management in northeast California and the northwest corner of Nevada. At the meeting the council wild horse and burro management subcommittee members will discuss the BLM's recently announced reforms to the Wild Horse and Burro Program. Members of the public are welcome.

Individuals who plan to attend and need special assistance, such as sign language interpretation and other reasonable accommodations, should contact the BLM as provided above.

Dated: June 14, 2010.

**Joseph J. Fontana,**

*Public Affairs Officer.*

[FR Doc. 2011–6635 Filed 3–21–11; 8:45 am]

**BILLING CODE 4310–40–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

**[NPS–PWRO–PWR–1228–6476; 8145–8B90–SZM]**

### Draft Environmental Impact Statement for Extension of F-Line Historic Streetcar Service, Golden Gate National Recreation Area and San Francisco Maritime National Historical Park, County of San Francisco, CA

**AGENCY:** National Park Service.

**ACTION:** Notice of Availability for Draft Environmental Impact Statement for Extension of F-Line Historic Streetcar Service, Golden Gate National Recreation Area and San Francisco Maritime National Historical Park.

**SUMMARY:** In accordance with § 102(2)(C) of the National Environmental Policy Act of 1969, and pursuant to the Council on Environmental Quality's regulations (40 CFR parts 1500–08), the National Park Service has prepared a Draft Environmental Impact Statement (Draft EIS) for the proposed extension of the northern waterfront Municipal Railway Historic Streetcar Service. Beginning at Fisherman's Wharf, this proposed railway extension would serve visitors to two popular units of the National Park System—San Francisco Maritime National Historical Park and the Fort Mason area of Golden Gate National Recreation Area. This project is being developed in close coordination with San Francisco Municipal Railway (Muni) and other City and County of San Francisco planning and transportation agencies. The course of action proposed would lengthen the historic streetcar F-line approximately .85 mile from Fisherman's Wharf to the San Francisco Maritime National Historical Park and thence to the Golden Gate National Recreation Area. Currently, the F-line serves more than 20,000 passengers daily and is one of Muni's most popular lines, yet does not provide direct access to heavily visited Aquatic Park and Fort Mason Center areas. The intended effect of this proposal is to provide park visitors and transit-dependent city residents with high-quality rail transit that improves transportation access and mobility. In addition to the proposal, the Draft EIS evaluates a No-Action alternative, and documents early consideration of preliminary options not carried forward for analysis.

*Background:* A congressionally-mandated Travel Study completed in 1977 recommended restoring the historic rail link between the Hyde Street Pier and Fort Mason to improve access to various National Park Service (NPS) sites. The rail line was subsequently abandoned (1980), and the area between Hyde Street Pier and the Fort Mason tunnel entrance was designated a National Historic Landmark District in 1987 (which is now encompassed in the San Francisco Maritime National Historical Park created in 1988). Also, in the late 1980s federal highway funds originally intended for extending Interstate 280 were reallocated to a number of alternative transportation facilities along the Embarcadero including creation of an historic streetcar line along Market Street and the Embarcadero to Fisherman's Wharf. In 2000 this service was extended to Fisherman's Wharf. The popularity of the historic streetcars resulted in public and private interest in extending the service to the disjunct NPS areas.

The Municipal Railway currently operates historic streetcar service on Market Street and along the San Francisco waterfront (F-Line) to the line's existing terminus in the Fisherman's Wharf area. The proposed expansion would extend west to San Francisco Maritime National Historical Park (NHP) and on to Fort Mason. The NHP is visited by approximately 4 million people annually and is currently served by very popular cable cars (often crowded at peak tourist times) as well as streetcar and bus lines. Fort Mason, home to the Fort Mason Center, houses more than 40 non-profit organizations offering more than 15,000 events a year and attracting upwards of 1.6 million visitors. These areas are underserved by mass transit access, and as a result automobile-based visitation causes massive parking problems that affect surrounding neighborhoods. Furthermore, inadequate mass transit access makes it difficult for transit-dependent San Franciscans to enjoy the cultural and educational events offered at Fort Mason Center.

*Development of Alternatives:* The core team for development of the Draft EIS includes the NPS as the lead federal agency, and San Francisco Municipal Transportation Agency and Federal Transit Administration as cooperating agencies. A Technical Advisory Committee (TAC) was also convened to meet periodically to provide technical support during the various stages of the study and preparation of the EIS. In addition to the cooperators, members of the TAC include representatives from Fort Mason Center, Golden Gate National Parks Conservancy, Market Street Railway, San Francisco Department of Recreation and Parks, and San Francisco County Transportation Authority.

Public notification at the onset of the EIS process was made through direct mail to approximately 4,000 persons, organizations, and agencies. Media publicity included announcements in the San Francisco Examiner (May 3, 2006) and San Francisco Chronicle (May 6, 2006). The Notice of Intent formally initiating the conservation planning and environmental impact analysis process was published in the **Federal Register** on March 29, 2006. Public and agency scoping meetings were held at Fort Mason Officer's Club on May 9, 2006. During the 60-day public scoping period, the NPS received over 100 comments from individuals, organizations representing environmental and recreational interests, and governmental agencies. Based on information obtained during the scoping phase, analysis focused on land use, socioeconomics, transportation and circulation, air quality, noise and vibration, cultural resources, recreation and visitor use, visual and aesthetic resources, night sky visibility and light pollution, geological resources, biological resources, public health and safety, and public services and utilities. The public's primary concerns focused on changes in traffic and parking, impacts on parklands and recreational facilities, noise and vibration, visual impacts, and cultural resources. Information to inform preparation of the Draft EIS was also solicited from the TAC.

A total of six preliminary alignments and seven turnaround alternatives were developed as a result of the comments received. This included consideration of other transit modes such as diesel bus and trolley coach. Four additional turnaround alternatives were subsequently developed during the project's TAC meetings.

The Draft EIS identifies and analyzes potential consequences of implementing two alternatives. In addition, several preliminary alternatives were considered but dismissed from detailed analysis. Alternative 1, the No-Action "baseline alternative" would provide no changes from the existing historic

streetcar line and would not provide transit connections to the Fort Mason Center.

Alternative 2 (agency-preferred) would extend the existing F–Line from Fisherman's Wharf to the Fort Mason Center. Included are new rail track and associated new platforms and designated stops; retrofitting of the historic State Belt Railroad tunnel; and a turnaround loop. The track extension would include a street-running segment along Beach Street, a transition zone between the street-running segment and the Fort Mason Tunnel segment. Two "turnaround segment" options for the terminus—North Loop (Fort Mason parking lot) and South Loop (Great Meadow)—were analyzed during a Value Analysis (VA) workshop held in August of 2010. The VA team focused on: (1) Identifying a "preferred" alternative for the streetcar extension turnaround; (2) identifying opportunities to improve value for the project; and (3) confirming sustainable project goals for the NPS. The VA team rated the North Loop turnaround option higher than three variations of the South Loop turnaround option. Other specific project elements include constructing streetcar track for approximately 0.85 miles, construction of 8–9-station platforms, upgrades to the existing Fort Mason Tunnel, and installation of signals, crossings, wires and poles.

*Comments:* This notice serves to formally open the public review and comment phase for the Draft EIS. The public and interested organizations are encouraged to provide written comments on issues and concerns, refinements in alternatives, potential environmental effects and appropriate mitigation measures that would reduce potential impacts. To afford an opportunity to obtain information, a public open house will be hosted on April 20, 2011 from 7–9 p.m. in the Golden Gate Room, Building A, Fort Mason (for directions or information about public transit, please consult the project Web site or contact the Muni Railway Extension Project Manager at (415) 561–2872). All written comments must be postmarked or transmitted not later than 60 days after publication of the EPA's notice of filing in the **Federal Register**—as soon as this ending date is confirmed it will be announced on the project Web site.

The project Web site *http://parkplanning.nps.gov/StreetcarExtension* provides the most up-to-date information regarding the project, including electronic version of the Draft EIS, planning process updates, meeting notices, reports and documents, and useful links associated with the project. Written comments on the Draft EIS should be mailed to the following address: Superintendent—GGNRA, *Attn:* Rick Foster, Muni Railway Extension Project Manager, Fort Mason, Bldg. 201, San Francisco, CA 94123. In addition to the project Web site, requests for printed copy of the Draft EIS or to be included on the project mailing list can be accommodated by contacting the Muni Railway Extension Project Manager at (415) 561–2872.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

*Decision Process:* Availability of the Draft EIS for a 60-days public review will be formally announced through publication of this Notice of Availability, through local and regional news media, via the project Web site, and direct mailing to the project mailing list. Following due consideration of all public and agency comments, a Final EIS will be prepared. As a delegated EIS the official responsible for the final decision regarding the proposed extension is the Regional Director, Pacific West Region. Subsequently the officials responsible for implementation will be the Superintendents of Golden Gate National Recreation Area and San Francisco Maritime National Historical Park.

Dated: March 15, 2011.

**Christine S. Lehnertz,**

*Regional Director, Pacific West Region.*

[FR Doc. 2011–6704 Filed 3–21–11; 8:45 am]

**BILLING CODE 4312–FN–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Reclamation

### Information Collection Activities; Proposed Information Collection; Comment Request

**AGENCY:** Bureau of Reclamation, Interior.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Bureau of Reclamation (we, our, or us) intends to seek renewal of the following approved information collection set to expire on August 31, 2011: Recreation Visitor Use Surveys. We will use several distinct forms to collect different types of recreation information. Before submitting the information collection request—OMB No. 1006–0028—to the Office of Management and Budget (OMB) for renewal, we are soliciting comments on specific aspects of the information collection.

**DATES:** Comments on this notice must be received by *May 23, 2011.*

**ADDRESSES:** Send all comments concerning this notice to Bureau of Reclamation, Office of Policy and Administration, Attention: Jerome Jackson (84–53000), P.O. Box 25007, Denver, CO 80225–0007, or via e-mail at *jljackson@usbr.gov.*

**FOR FURTHER INFORMATION CONTACT:** For further information or a copy of the proposed collection of information forms, contact Jerome Jackson at 303–445–2712.

**SUPPLEMENTARY INFORMATION:** In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that we are requesting approval for the collection of data from recreational users of our lands and waterbodies.

To meet our needs for the collection of visitor use data, we will be requesting that OMB reauthorize a two-part request.

The first part of the request provides us with a set of 11 pre-approved questionnaires to be administered as approved by OMB. The second part of the request consists of OMB and the Bureau of Reclamation agreeing upon a process whereby we custom design a survey instrument to fit a specific situation or area. The custom designed survey would be created by extracting questions from the approved questionnaires as applicable to the area and issue being evaluated. Only questions included in the pre-approved questionnaires will be used. We will then submit the new survey form to OMB for expedited approval.

*Title:* Recreation Visitor Use Surveys.

*Abstract:* The Bureau of Reclamation is responsible for recreation development at all of its reservoirs. Presently, there are 289 designated recreation areas on our lands within the 17 Western States. We must be able to respond to emerging trends, changes in the demographic profile of users, changing values, needs, wants, desires, and conflicts between user groups. Statistically valid and up-to-date data derived from users is essential to developing and providing recreation programs relevant to today's visitor.

*Respondents:* Respondents to the surveys will be members of the public engaged in recreational activities on our

lands. Several surveys target people engaged in various activities such as boating on a specific lake or camping at a developed campground.

Visitors will primarily consist of local residents, those from large metropolitan areas in the vicinity of the lake/reservoir, and those from out of state.

*Frequency:* Varies by survey.

*Estimated Total Number of Respondents:* 7,531

*Estimated Number of Responses per Respondent:* 1.0

*Estimated Total of Annual Responses:* 7,531

*Estimated Total Annual Burden Hours on Respondents:* 2,043

ESTIMATE OF BURDEN FOR EACH FORM

| Survey instrument | Burden estimate per survey (in minutes) | Number of surveys (times/yr.) | Number of respondents per survey | Total estimated number of respondents | Total annual hour burden |
|---|---|---|---|---|---|
| Marina Survey | 10 | 2 | 278 | 556 | 93 |
| Campground Survey | 25 | 2 | 278 | 556 | 232 |
| River Instream Flow Survey | 20 | 2 | 278 | 556 | 185 |
| Reservoir Preferred Water Level Survey | 15 | 2 | 278 | 556 | 139 |
| Lake/River Visit Expenditure Survey | 15 | 2 | 278 | 556 | 139 |
| Recreation Activities Survey | 15 | 2 | 278 | 556 | 139 |
| Recreation Management Survey | 15 | 2 | 278 | 556 | 139 |
| Recreation Fee Survey | 10 | 1 | 581 | 581 | 97 |
| Recreation Development Survey | 15 | 2 | 278 | 556 | 139 |
| Water Level Impacts on Recreation Boating Use | 10 | 2 | 278 | 556 | 93 |
| River Recreation Quality Survey | 20 | 2 | 278 | 556 | 185 |
| Customized Surveys | 20 | 5 | 278 | 1,390 | 463 |
| Totals | ..... | ..... | ..... | 7,531 | 2,043 |

*Comments:*

Comments are invited on:

(a) Whether the proposed collection of information is necessary for the proper performance of our functions, including whether the information will have practical use;

(b) The accuracy of our estimated time and cost burdens of the proposed

collection of information, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, use, and clarity of the information to be collected; and

(d) Ways to minimize the burden of the collection of information on respondents, including increased use of automated collection techniques or other forms of information technology.

We will summarize all comments received regarding this notice. We will publish that summary in the **Federal Register** after the information collection is submitted to OMB for review and renewal.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: March 9, 2011.

**Roseann Gonzales,**

*Director, Policy and Administration.*

[FR Doc. 2011–6631 Filed 3–21–11; 8:45 am]

**BILLING CODE 4310–MN–P**

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Under the Clean Water Act

Notice is hereby given that on March 14, 2011, a proposed consent decree in *United States* v. *Consol Energy, Inc., et al.,* Civil Action No. 1:11–cv–00028, was lodged with the United States District Court for the Northern District of West Virginia.

The proposed Consent Decree will resolve claims alleged in this action by the United States and the State of West Virginia as a plaintiff-intervenor against Consol Energy, Inc., Consolidation Coal Company, and Windsor Coal Company, for the discharge of pollutants into waters of the United States in violation of Section 301 of the Act, 33 U.S.C. 1311, and in violation of the conditions and limitations of National Pollutant Discharge Elimination System ("NPDES") permits issued by the State pursuant to Section 402 of the Act, 33 U.S.C. 1342. Under the proposed Consent Decree, Defendants will perform injunctive relief with two components. To address four mines with discharges into the Monongahela Basin, Defendants will construct a wastewater treatment system, including a pipeline system, treatment plant, and landfill. To address two mines with discharges into the Ohio River Basin, Defendants will relocate the discharges pursuant to the appropriate permitting process. In addition, Consol will pay a civil penalty of $5.5 million.

The Department of Justice will accept comments relating to the proposed consent decree for a period of thirty (30) days from the date of publication of this notice. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and mailed either electronically to *pubcomment-ees.enrd@usdoj.gov* or in hard copy to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611. Comments should refer to *United States* v. *Consol Energy, Inc., et al.,* Civil No. 1:11–cv–00028 (N.D.W.Va.) and D.J. Reference No. 90–5–1–1–09916/1.

The proposed consent decree may be examined at the United States Environmental Protection Agency (Region 3), 1650 Arch Street, Philadelphia, PA 19103. During the comment period, the proposed consent decree may also be examined on the following Department of Justice Web site: *http://www.justice.gov/enrd/Consent_Decrees.html.* A copy of the proposed consent decree may also be obtained by mail from the Department of Justice Consent Decree Library, P.O. Box 7611, 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 refer to the referenced case and D.J. Reference 90–5–1–1–09916/1, and enclose a check in the amount of $14.50 for the consent decree (58 pages at 25 cents per page reproduction costs), made payable to the U.S. Treasury.

**Robert Brook,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 2011–6591 Filed 3–21–11; 8:45 am]

**BILLING CODE 4410–15–P**

## DEPARTMENT OF JUSTICE

### Notice of Proposed Consent Decree Under the Clean Water Act, the Comprehensive Environmental Response, Compensation and Liability Act, and the Emergency Planning and Community Right-To-Know Act

Notice is hereby given that on March 9, 2011, a proposed Consent Decree in *United States of American and State of Alaska* v. *Unisea, Incorporated,* Civil Action No. 3:11–cv–00037–JWS, was lodged with the United States District Court for the District of Alaska.

The proposed Consent Decree will settle the United States' claims on behalf of the U.S. Environmental Protection Agency ("EPA") for violations of the Clean Water Act, the Comprehensive Environmental Response, Compensation and Liability Act, and the Emergency Planning and Community Right-to-Know Act alleged in the Complaint in the lawsuit mentioned above. The claims arose from discharges of ammonia and other pollutants from Unisea's facility in Unalaska. The Consent Decree also will settle certain claims of the State of Alaska.

The Consent Decree resolves the United States claims alleged in the Complaint in return for payment by Unisea of civil penalties totaling $1,405,250 to the United States, and performance by Unisea of injunctive relief specified in the Consent Decree. (Unisea will also pay a $504,125 civil assessment to the State of Alaska.)

The Department of Justice will receive comments relating to the proposed Consent Decree for a period of 30 days from the date of this publication. Comments on the Consent Decree 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 and Alaska* v. *Unisea, Inc.,* Civil Action No. 3:11–cv–00037–JWS (D. Alaska), D.J. Ref. No. 90–5–1–1–10121.

The proposed Consent Decree may be examined at the Office of the United States Attorney, District of Alaska, Federal Building & U.S. Courthouse, 222 W. 7th Avenue, Anchorage, Alaska 99513–7567. During the public comment period, the proposed Consent Decree may also be examined on the following Department of Justice Web site: *http://www.justice.gov/enrd/Consent_Decrees.html.* A copy of the proposed Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax number (202) 514–0097, phone number (202) 514–1547. If requesting a copy by mail from the Consent Decree Library, please enclose a check in the amount of $16.50 ($0.25 per page reproduction cost) payable to the United States Treasury or, if requesting by e-mail or fax, forward the check in that amount to the Consent Decree Library at the address stated above.

**Robert E. Maher, Jr.,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 2011–6581 Filed 3–21–11; 8:45 am]

**BILLING CODE 4410–15–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 extension of the Quarterly Census of Employment and Wages Program. 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 May 23, 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, 202–691–7628 (this is not a toll free number). (*See* **ADDRESSES** SECTION.)

**SUPPLEMENTARY INFORMATION:**

#### I. Background

The Quarterly Census of Employment and Wages (QCEW) program, a Federal/State cooperative effort, produces monthly employment and quarterly wage information. It is a by-product of quarterly reports submitted to State Workforce Agencies (SWAs) by employers subject to State Unemployment Insurance (UI) laws. The collection of these data is authorized by 29 USC 1, 2. The QCEW data, which are compiled for each calendar quarter, provide a comprehensive business name and address file with employment and wage information for employers subject to State UI laws. Similar data for Federal Government employers covered by the Unemployment Compensation for Federal Employees program also are included. These data are submitted to the BLS by all 50 States, the District of Columbia, Puerto Rico, and the Virgin Islands. The BLS summarizes these data to produce totals for all counties, Metropolitan Statistical Areas (MSAs), the States, and the nation. The QCEW program provides a virtual census of nonagricultural employees and their wages, with about 55 percent of the workers in agriculture covered as well.

The QCEW program is a comprehensive and accurate source of data on the number of establishments, monthly employment, and quarterly wages, by industry, at the six-digit North American Industry Classification System (NAICS) level, and at the national, State, MSA, and county levels. The QCEW series has broad economic significance in measuring labor trends

and major industry developments, in time series analyses and industry comparisons, and in special studies such as analyses of establishments, employment, and wages by size of establishment.

**II. Current Action**

Office of Management and Budget clearance is being sought for the Quarterly Census of Employment and Wages (QCEW) program.

The QCEW program is the only Federal statistical program that provides information on establishments, wages, tax contributions and the number of employees subject to State UI laws and the Unemployment Compensation for the Federal Employees program. The consequences of not collecting QCEW data would be grave to the Federal statistical community. The BLS would not have a sampling frame for its establishment surveys; it would not be able to publish as accurate current estimates of employment for the U.S., States, and metropolitan areas; and it would not be able to publish quarterly census totals of local establishment counts, employment, and wages. The Bureau of Economic Analysis would not be able to publish as accurate personal income data in a timely manner for the U.S., States, and local areas. Finally, the Department of Labor's Employment Training Administration would not have the information it needs to administer the Unemployment Insurance Program.

**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:* Extension of a currently approved collection.

*Agency:* Bureau of Labor Statistics.

*Title:* Quarterly Census of Employment and Wages (QCEW) Program.

*OMB Number:* 1220–0012.

*Affected Public:* State Governments.

*Total Respondents:* 53.

*Frequency:* Quarterly.

*Total Responses:* 212.

*Average Time per Response:* 4,866 hours.

*Estimated Total Burden Hours:* 1,031,680 hours.

*Total Burden Cost (capital/startup):* $0.

*Total Burden Cost (operating/maintenance):* $0.

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 16th day of March 2011.

**Kimberley Hill,**

*Chief, Division of Management Systems, Bureau of Labor Statistics.*

[FR Doc. 2011–6600 Filed 3–21–11; 8:45 am]

**BILLING CODE 4510–24–P**

## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

**[Docket No. OSHA–2011–0056]**

### Voluntary Protection Programs Information; Extension of the Office of Management and Budget's (OMB's) Approval of Information Collection (Paperwork) Requirements

**AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.

**ACTION:** Request for public comments.

**SUMMARY:** OSHA solicits public comments concerning its proposal to extend the Office of Management and Budget's (OMB's) approval of the information collection requirements contained in Voluntary Protection Programs Information.

**DATES:** Comments must be submitted (postmarked, sent, or received) by May 23, 2011.

**ADDRESSES:** *Electronically:* You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

*Facsimile:* If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

*Mail, hand delivery, express mail, messenger, or courier service:* When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, OSHA Docket No. OSHA–2011–0056, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue, NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

*Instructions:* All submissions must include the Agency name and OSHA docket number for the Information Collection Request (ICR) (OSHA–2011–0056). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments *see* the "Public Participation" heading in the section of this notice titled "**SUPPLEMENTARY INFORMATION.**"

*Docket:* To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

**FOR FURTHER INFORMATION CONTACT:** Patrick Showalter, Acting Director, Office of Partnerships and Recognition, Directorate of Cooperative and State Programs, OSHA, U.S. Department of Labor, Room N–3700, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2213.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (i.e., employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA 95) [44 U.S.C. 3506(c)(2)(A)]. This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and

OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

The Voluntary Protection Programs (VPP) [47 FR 29025], adopted by OSHA, established the efficacy of cooperative action among government, industry, and labor to address employee safety and health issues and to expand employee protection. To qualify, employers must meet OSHA's safety and health management criteria which focus on comprehensive management programs and active employee involvement to prevent or control worksite safety and health hazards. Employers who qualify generally view OSHA standards as a minimum level of safety and health performance, and set their own more stringent standards, wherever necessary, to improve employee protection. Prospective VPP worksites must submit an application that includes:

General applicant information (*e.g.,* site, corporate, and collective bargaining contact information).

Injury and illness rate performance information (*i.e.,* number of employees and/or applicable contractors on-site, type of work performed and products produced, North American Industry Classification System (NAICS) codes, and Recordable Injury and Illness Case Incidence Rate information).

Safety and health management program information (*i.e.,* description of the applicant's safety and health management programs including how the programs successfully address management leadership and employee involvement, worksite analysis, hazard prevention and control, and safety and health training).

OSHA uses this information to determine whether an applicant is ready for a VPP on-site evaluation and as a verification tool during VPP on-site evaluations. Without this information, OSHA would be unable to determine which sites are ready for VPP status.

Each current VPP applicant is also required to submit an annual evaluation which addresses how that applicant is continuing its adherence to programmatic requirements.

In 2008, OSHA modified procedures for VPP applicants, OSHA on-site evaluations, and annual participant self-evaluations for applicants/participants subject to OSHA's Process Safety Management (PSM) Standard. Applicants that perform work that use or produce highly hazardous chemicals exceeding specified limits covered under the PSM standard must submit responses to the PSM application supplement along with their VPP application.

Once in the VPP, the participant is required to submit an annual evaluation detailing its continued adherence to programmatic requirements. Applicants covered under the PSM standard are required to submit a PSM questionnaire, a supplemental document, as part of their annual submission. OSHA needs this information to ensure that the participant remains qualified to participate in the VPP between on-site evaluations. Without this information, OSHA would be unable to determine whether applicants are maintaining excellent safety and health management programs during this interim period.

In 2009, with the publication of the **Federal Register** Notice (FRN) (74 FR 927, January 9, 2009), VPP revised its traditional focus on individual fixed worksites (site-based) by adding two new ways to participate: Mobile workforce and corporate. A significant reorganization of the program helped clarify the multiple participation options now available.

Employees of VPP participants may apply to participate in the Special Government Employee (SGE) Program. The SGE Program offers private and public sector safety and health professionals and other qualified participants the opportunity to exchange ideas, gain new perspectives, and grow professionally while serving as full-fledged team members on OSHA's VPP on-site evaluations. In that capacity, SGEs may review company documents, assist with worksite walkthroughs, interview employees, and assist in preparing VPP on-site evaluation reports. Potential SGEs must submit an application that includes:

- SGE Eligibility Information Sheet (*i.e.,* applicant's name, professional; credentials, site/corporate contact information, *etc.*);
- Current Resume;
- Confidential Financial Disclosure Report (OGE Form 450).

OSHA uses the SGE Eligibility Information Sheet to ensure that the potential SGE works at a VPP site and meets the minimum eligibility qualifications. The resume is required to provide a detailed description of their current duties and responsibilities as they relate to safety and health and the implementation of an effective safety and health management program. The OGE Form 450 is used to ensure that SGEs do not participate on on-site evaluations at VPP sites in-which they have a financial interest.

OSHA Challenge is designed to reach and guide employers and companies in all major industry groups who are strongly committed to improving their safety and health management programs and possibly pursuing recognition in the VPP. The Challenge Administrator's application is used to: (1) Conduct a preliminary analysis of the applicant's knowledge of safety and health management programs; and (2) make a determination regarding the applicant's qualifications to become a Challenge Administrator. Once a Challenge Administrator is approved, the program's Administrator will review each Challenge candidate's application/annual submissions to ensure that all necessary information is provided, prior to forwarding them to OSHA's National Office for analysis and acceptance.

## II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of the Agency's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

## III. Proposed Actions

OSHA proposes to extend OMB's approval of the collection of information (paperwork) requirements necessitated by the Voluntary Protection Programs. The Agency is requesting an adjustment in the burden hours from 105,965 to 115,359; a total increase of 9,394 hours. The Agency will summarize the comments submitted in response to this notice, and will include this summary in its request to OMB to extend the approval of these information collection requirements.

*Type of Review:* Extension of a currently approved collection.

*Title:* Voluntary Protection Programs Information.

*OMB Number:* 1218–0239.

*Affected Public:* Business or other for-profits; individuals or households; Federal government; state, local or tribal government.

*Number of Respondents:*

*VPP*

300 Applications
75 Process Safety Management Applications
1,700 Annual Evaluations
425 (PSM) Annual Evaluations/ Supplemental Questionnaire

*Challenge*

14 Challenge Administrator's Applications
210 Challenge Participant's Applications
210 Challenge Quarterly Reports
210 Challenge Annual Evaluations

*Special Government Employees*

900 SGE Eligibility Information Sheets
900 Resumes
300 Confidential Financial Disclosure Forms (OGE- Form 450)

*Total Respondents:* 5,244.

*Frequency:* VPP applications and Challenge Administrator's and Participant's applications are submitted once;

VPP and Challenge Annual Evaluations are submitted annually, and SGE applications are submitted once every three years.

*Average Time Per Response:*

*VPP General*

200 hours for VPP Applications
20 hours for VPP Annual Evaluations

*Process Safety Management*

40 hours for Applications
20 hours for Annual Evaluations

*Challenge*

5 hours for Challenge Administrator's Applications
10 hours for Challenge Candidate Applications
5 hours for Challenge Quarterly Reports
20 hours for Challenge Annual Evaluations

*Special Government Employees (SGE)*

8 minutes (.13 hour) for SGE Eligibility Information Sheet
30 minutes (.50 hour) for SGE Resume
30 minutes (.50 hour) for Confidential Financial Disclosure Form

*Estimated Total Burden Hours:* 115,359.

*Estimated Cost (Operation and Maintenance):* $0.

## IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for the ICR (Docket No. OSHA–2011–0056). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (*see* the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Web site to submit comments and access the docket is available at the Web site's "User Tips" link. Contact the OSHA Docket Office for information about materials not available through the Web site, and for assistance in using the Internet to locate docket submissions.

## V. Authority and Signature

David Michaels, PhD, MPH, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 4–2010 (75 FR 55355).

Signed at Washington, DC, on March 17, 2011.

**David Michaels,**

*Assistant Secretary of Labor for Occupational Safety and Health.*

[FR Doc. 2011–6654 Filed 3–21–11; 8:45 am]

**BILLING CODE 4510–26–P**

## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Records Schedules; Availability and Request for Comments

**AGENCY:** National Archives and Records Administration (NARA).

**ACTION:** Notice of availability of proposed records schedules; request for comments.

**SUMMARY:** The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

**DATES:** Requests for copies must be received in writing on or before April 21, 2011. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

**ADDRESSES:** You may request a copy of any records schedule identified in this notice by contacting the Life Cycle Management Division (NWML) using one of the following means:

*Mail:* NARA (NWML), 8601 Adelphi Road, College Park, MD 20740–6001

*E-mail: request.schedule@nara.gov.*

*FAX:* 301–837–3698

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

**FOR FURTHER INFORMATION CONTACT:** Laurence Brewer, Director, Life Cycle Management Division (NWML), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: 301–837–1539. E-mail: *records.mgt@nara.gov.*

**SUPPLEMENTARY INFORMATION:** Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval, using the Standard Form (SF) 115, Request for Records Disposition Authority. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

The schedules listed in this notice are media neutral unless specified otherwise. An item in a schedule is media neutral when the disposition instructions may be applied to records regardless of the medium in which the records are created and maintained. Items included in schedules submitted to NARA on or after December 17, 2007, are media neutral unless the item is limited to a specific medium. (*See* 36 CFR 1225.12(e).)

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it too includes information about the records. Further information about the disposition process is available on request.

**Schedules Pending**

1. Department of Agriculture, Agricultural Marketing Service (N1–136–10–1, 2 items, 2 temporary items). Records of the agency Web sites, including site content that is not unique, site management documentation, and operations records. Web content that is unique is either covered by previously approved schedules or will be scheduled in the future.

2. Department of Agriculture, Grain Inspection, Packers, and Stockyards Administration (N1–545–07–1, 19 items, 15 temporary items). Administrative records pertaining to management services such as procurement and property, budget and payroll, accounting and finance, information and communications, personnel administration, data processing, records management, and records on the development of administrative procedures. Proposed for permanent retention are statistical reports, organizational charts, and projects having precedential significance.

3. Department of Commerce, Bureau of the Census (N1–29–10–2, 10 items, 7 temporary items). Records of an electronic information system containing lists of business establishments and their domestic parent enterprises. Records include system and program code files, data input files, parameter files, audit trail files, system test, research and query files, and special tabulations, and system backup files. Proposed for permanent retention are final data files, economic census data capture staging tables, and data documentation.

4. Department of Defense, Missile Defense Agency (N1–565–08–28, 18 items, 13 temporary items). Records relating to research and development for missile defense systems. Included are interim program reviews, project files, laboratory notebooks, interim technical reports, engineering drawings of minor components, scientific data, engineering change proposals, and preliminary threat assessments. Proposed for permanent retention are formal program reviews, final technical reports, engineering drawings of major components, final threat assessments, and final reports on advanced technology.

5. Department of Health and Human Services, Agency for Healthcare Research and Quality (N1–510–09–9, 3 items, 3 temporary items). Master files of an electronic information system containing citations and summaries of resources on patient safety, as well as articles and resources for a web-based morbidity and mortality rounds community.

6. Department of Homeland Security, Transportation Security Administration (N1–560–10–1, 6 items, 6 temporary items). Administrative records including contact lists, internal and external management surveys, hand receipts for property issuances, access requests, and documents assigning employee roles.

7. Department of the Interior, Office of the Secretary (N1–48–10–3, 6 items, 5 temporary items). Office of the Inspector General files consisting of investigative records, review report summaries, action files, compliance reviews, and other supporting documents. Proposed for permanent retention are investigative records of continuing historical value.

8. Department of the Interior, Office of the Secretary (N1–48–11–4, 1 item, 1 temporary item). Suspension and debarment files of the Acquisition and Property Management Office consisting of memorandums, correspondence, case submissions, transcripts, administrative agreements, and other related documents.

9. Department of the Interior, Office of the Special Trustee for American Indians (N1–75–09–6, 7 items, 1 temporary item). Records of the Office of Appraisal Services. Including non-archival quality scanned images of appraisal request documents. Proposed for permanent retention are program correspondence files, policy and directives, case and work files, data compilation reports, and archival quality scanned images of appraisal requests.

10. Department of Justice, Federal Bureau of Investigation (N1–65–10–35, 3 items, 3 temporary items). Master files, audit logs, and related records of an electronic information system

containing information on collected and seized software applications used to facilitate a criminal act.

11. Department of Justice, Federal Bureau of Investigation (N1–65–10–40, 3 items, 2 temporary items). Master files of an electronic information system used to manage case workflow, including electronic versions of case files and indices for cases previously approved as temporary. Proposed for permanent retention are electronic versions of case files and indices for cases previously approved as permanent

12. Department of Justice, Justice Management Division (N1–60–10–24, 4 items, 4 temporary items). Program files of the Office of General Counsel, including opinions issued regarding issues such as government contracts, appropriations, human resources, property, records management, and procurement protest case files.

13. Department of Justice, Office of the Inspector General (N1–60–11–1, 1 item, 1 temporary item). Master files of an electronic information system used to track employee security information.

14. Department of Justice, Office of the Inspector General (N1–60–11–2, 5 items, 5 temporary items). Master files and outputs of an electronic information system containing current and historical employment data, complete personnel directories, and on duty and promotion date reports.

15. Department of Justice, Office of the Inspector General (N1–60–11–3, 2 items, 2 temporary items). Master files of an electronic information system used to monitor accepted and rejected proposals for evaluations and inspections.

16. Department of Justice, Office of Public Affairs (N1–60–10–13, 4 items, 2 temporary items). Records include press release materials and public awareness reports. Proposed for permanent retention are master copies of press releases and related indices.

17. Department of Labor, Employee Benefits Security Administration (N1–317–09–2, 13 items, 13 temporary items). Records of the Office of Enforcement, including investigative case files, application files, and miscellaneous records documenting intelligence efforts. Also included are inputs, master files, outputs, and system documentation of an electronic information system used to track case management operations.

18. Department of Labor, Employee Benefits Security Administration (N1–317–11–1, 8 items, 7 temporary items). Records of an electronic information system used to process annual reports of private pension and welfare plans. Records include inputs, master files, outputs, reports, web portal records, administrative and management records, and communication letters. Proposed for permanent retention are annual XML archive files of the system.

19. Department of Labor, Human Resources Center (N1–174–09–3, 36 items, 31 temporary items). Records used to provide guidance for administrative, program management, and information technology related functions. Proposed for permanent retention are organizational charts, architectural drawings, and major correspondence of the Secretary of Labor and senior-level officials.

20. Department of State, Bureau of East Asian and Pacific Affairs (N1–59–11–1, 2 items, 2 temporary items). Records of the Office of Public Diplomacy including subject and program files and annual small grant competition files.

21. Department of State, Bureau of Diplomatic Security (N1–59–10–11, 6 items, 6 temporary items). Records of the Office of Investigations and Counterintelligence Criminal Investigation Division, consisting of criminal investigation case files, internal and external MOAs and MOUs, program files, status reports, budget records related to the Department of Justice's asset forfeiture program, and records related to the Department of the Treasury's financial crimes enforcement program. The criminal investigations case files are related to an electronic system covered by N1–059–09–36. If the Department of State becomes aware of any significant or precedent-setting cases that warrant preservation, the Department will notify NARA and an independent appraisal of these cases will be conducted.

22. Department of State, Bureau of Diplomatic Security (N1–59–10–27, 1 item, 1 temporary item). Web site records of the Overseas Security Advisory Council, used to share information on overseas security issues such as travel warnings, critical incident reports, and current updates on country or regional events.

23. Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau (N1–564–09–8, 2 items, 2 temporary items). Master files of an electronic information system used to track beverage samples and test results.

24. Department of the Treasury, Internal Revenue Service (N1–58–10–16, 3 items, 3 temporary items). Master files and system documentation of an electronic information system used to monitor staff productivity and customer service in the field.

25. Department of the Treasury, Internal Revenue Service (N1–58–11–5, 2 items, 2 temporary items). Master files and system documentation of an electronic information system used to track requests for technical support for agency computer systems.

26. Federal Maritime Commission, Agency-wide (N1–358–10–2, 3 items, 3 temporary items). Reading files and subject files relating to operational or managerial activities for the Office of the Managing Director.

27. Federal Maritime Commission, Agency-wide (N1–358–11–1, 1 item, 1 temporary item). Master files of an electronic information system that collects and reports information concerning training employees have taken.

28. Federal Trade Commission, Bureau of Economics (N1–122–98–1, 2 items, 1 temporary item). Records of the Division of Industry Analysis, including working papers of analyses of cigarettes and the cigarette industry. Proposed for permanent retention are published and unpublished reports.

29. Department of Commerce, Patent and Trademark Office (N1–241–09–1, 35 items, 19 temporary items). Records of the Intellectual Property Administration, including rulemaking files, routine correspondence, subject files, administrative files for outreach programs, public advisory committees and operational legal activities. Proposed for permanent retention are the Director's action and subject files, Management Council records, successful nominations for the National Medal of Technology and Innovation Award, official records of public advisory committees, precedential court cases, patent appeal cases, Trademark Trial and Appeal Board case files, and attorney enrollment examinations.

Dated: March 16, 2011.

**Sharon G. Thibodeau,**

*Deputy Assistant Archivist for Records Services—Washington, DC.*

[FR Doc. 2011–6832 Filed 3–21–11; 8:45 am]

**BILLING CODE 7515–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2011–0061]**

## Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

### I. Background

Pursuant to section 189a.(2) of the Atomic Energy Act of 1954, as amended

(the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from February 24, 2011, to March 9, 2011. The last biweekly notice was published on March 8, 2011 (76 FR 12763).

**Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing**

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in Title 10 of the *Code of Federal Regulations* (10 CFR), Section 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules, Announcements and Directives Branch (RADB), TWB–05–B01M, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be faxed to the RADB at 301–492–3446. 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 O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the requestor/petitioner seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding

the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at 866–672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/EHD/,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from the date of publication of this notice. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

For further details with respect to this license amendment application, see the application for amendment which is available for public inspection at the

Commission's PDR, located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* 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 at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

*Dominion Nuclear Connecticut Inc., et al., Docket No. 50–423, Millstone Power Station, Unit No. 3, New London County, Connecticut*

*Date of amendment request:* July 21, 2010.

*Description of amendment request:* The amendment would relocate Millstone Power Station, Unit No. 3 (MPS3) Technical Specification (TS) 3/4.7.14, "Area Temperature Monitoring," and the associated Table 3.7–6, "Area Temperature Monitoring," to the MPS3 Technical Requirements Manual (TRM).

*Basis for proposed no significant hazards consideration determination:* As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

*Criterion 1*

Will operation of the facility in accordance with the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The provisions of TS 3/4.7.14 for area temperature monitoring of the TS specified or selected areas are neither part of an initial condition of a design basis accident or transient that either assumes the failure of or presents a challenge to the integrity of a fission product barrier, nor are they relied upon as a primary success path to mitigate such events. The provisions for area temperature monitoring are not related to events which are considered frequent or dominant contributors to plant risk. Area temperature monitoring is not considered a design feature or an operating restriction which is an initial condition of a design basis accident or transient analysis, nor does it provide a function or actuate any accident mitigation feature in order to mitigate the consequences of a design basis accident or transient.

The environmental qualification and operability of the safety-related equipment will not be adversely affected by the proposed changes to the area temperature monitoring program. The relocation of the TS to the TRM will not increase the probability that the area temperature design limits will be exceeded or result in a loss of qualified life of safety-related equipment. In addition, the consequences of exceeding the temperature limits will not significantly differ from the existing program since an evaluation of qualified life and operability will continue to be performed as part of the EQ [Environmental Qualification] program in accordance with the requirements of 10 CFR 50.49 [Title 10 of the *Code of Federal Regulations,* Section 50.49].

Relocating TS 3/4.7.14 to the TRM will still provide adequate controls for area temperature monitoring in those areas designated in TS Table 3.7–6. Changes to the TRM require 10 CFR 50.59 safety evaluations and are reviewed and approved by the Facility Safety Review Committee prior to implementation.

Based on the reasons presented above, operation of the facility in accordance with the proposed amendment would not involve a significant increase in the probability or consequences of an accident previously evaluated.

*Criterion 2*

Will operation of the facility in accordance with this proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change will not create the possibility of a new or different kind of accident from any accident previously evaluated. No new accident will be created as a result of relocating TS 3/4.7.14 to the TRM. This change is administrative in nature and does not change the level of programmatic and procedural control necessary to assure operation of the facility in a safe manner. Plant operation will not be affected by the proposed change and no new failure modes will be created.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

*Criterion 3*

Will operation of the facility in accordance with this proposed change involve a significant reduction in [a] margin of safety?

Response: No.

There is no adverse impact on equipment design or operation and there are no changes being made to the TS required safety limits or safety system settings that would adversely affect plant safety. The proposed change is administrative in nature and does not change the level of programmatic and procedural control necessary to ensure that environmentally qualified equipment will not be exposed to temperatures beyond that which they were originally qualified. The relocated requirements will continue to ensure that environmental qualification temperature limits of safety-related equipment will not be exceeded without an evaluation of equipment operability; therefore, the margin of safety is unchanged.

The NRC staff has reviewed the licensee's analysis, and has the following comments regarding the licensee's analysis of Criterion 1:

While DNC accurately states that the temperature monitoring of the TS identified areas is not part of an initial condition of a design basis accident, some of the TS identified areas have temperatures limits that are initial conditions assumed in selected accident analyses. The proposed change relocates TS 3/4.7.14 to the TRM, thereby changing the administrative controls and regulatory process used to modify the requirements of this former TS.

The proposed change dose not revise the station design, the response of the station to transients nor the manner in which the station is operated; therefore, these changes have no adverse affect on the safe operation of the station.

Based on the NRC staff's review of the licensee's analysis and the additional analysis performed by the NRC staff, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

*Attorney for licensee:* Lillian M. Cuoco, Senior Counsel, Dominion Resource Services, Inc., 120 Tredegar Street, RS–2, Richmond, VA 23219.

*NRC Branch Chief:* Harold K. Chernoff.

*Nine Mile Point Nuclear Station, LLC, (NMPNS) Docket No. 50–220, Nine Mile Point Nuclear Station Unit No. 1 (NMP1), Oswego County, New York*

*Date of amendment request:* November 2, 2010, as supplemented January 27, 2011.

*Description of amendment request:* The proposed amendment would revise Technical Specification (TS) Section 3.6.2, "Protective Instrumentation," by modifying the operability requirements for the average power range monitoring (APRM) instrumentation system. The proposed amendment would eliminate the requirements that the APRM "Upscale" and "Inoperative" scram and control rod withdrawal block functions be operable when the reactor mode switch is in the Refuel position, and would clarify the operability requirements for the APRM "Downscale" control rod withdrawal block function when the reactor mode switch is in the Startup and Refuel positions.

*Basis for proposed no significant hazards consideration determination:* As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or

consequences of an accident previously evaluated?

Response: No.

The APRM system is not an initiator of or a precursor to any accident or transient. The APRM system monitors the neutron flux level in the power operating range from a few percent to greater than rated thermal power and provides automatic protective signals for postulated at-power reactivity insertion events. Thus, the proposed changes to the TS operability requirements for the APRM system will not significantly impact the probability of any previously evaluated accident.

The design of plant equipment is not being modified by the proposed amendment. The TSs will continue to require operability of the APRM system "Upscale" and "Inoperative" scram and control rod withdrawal block functions when the reactor mode switch is in the Startup and Run positions to provide core protection for postulated reactivity insertion events occurring during power operating conditions. Thus, the consequences of previously evaluated at-power reactivity insertion events are not affected by the proposed amendment.

The proposed elimination of the TS requirements that the APRM system "Upscale" and "Inoperative" scram and control rod withdrawal block functions be operable when the reactor mode switch is in the Refuel position does not increase the consequences of an accident previously evaluated. The NMP1 Updated Final Safety Analysis Report (UFSAR) does not provide analyses of reactivity insertion events occurring during the refueling operating condition. The possibility of inadvertent criticality due to a control rod withdrawal error during refueling is minimized by design features and procedural controls that are not affected by the proposed amendment. In addition, since reactor neutron flux levels during refueling are below the APRM indicating range, the APRM system does not provide any meaningful core monitoring or protection in the refueling operating condition. The source range and intermediate range neutron monitoring systems provide adequate neutron flux monitoring during refueling and automatically initiate protective actions (scram or control rod withdrawal block) when required during refueling.

The change to the TS operability requirements for the APRM "Downscale" control rod withdrawal block function is a clarification to more simply and clearly indicate that this function is not required when the reactor mode switch is in the Startup and Refuel positions. This change is consistent with plant design and does not change the actual TS operability requirements; thus, previously evaluated accidents are not affected by this proposed change.

Based on the above discussion, it is concluded that the proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes to the TS operability requirements for the APRM system do not introduce any new accident precursors and do not involve any physical plant alterations or changes in the methods governing normal plant operation that could initiate a new or different kind of accident. The proposed amendment does not alter the intended function of the APRM system and does not adversely affect the ability of the system to provide core protection for at-power reactivity insertion events.

Therefore, the proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

Margin of safety is related to confidence in the ability of the fission product barriers (fuel cladding, reactor coolant system, and primary containment) to perform their design functions during and following postulated accidents. The proposed amendment does not alter setpoints or limits established or assumed by the accident analyses. The proposed TS changes to eliminate the requirements that the APRM system "Upscale" and "Inoperative" scram and control rod withdrawal block functions be operable when the reactor mode switch is in the Refuel position have no impact on the performance of the fission product barriers since these APRM functions do not provide any meaningful core monitoring or protection in the Refueling operating condition. The TSs will continue to require operability of these APRM functions when the reactor mode switch is in the Startup and Run positions to provide core protection for postulated reactivity insertion events occurring during power operating conditions, consistent with the plant safety analyses.

The change to the TS operability requirements for the APRM "Downscale" control rod withdrawal block function is a clarification to more simply and clearly indicate that this function is not required when the reactor mode switch is in the Startup and Refuel positions. This change is consistent with plant design and does not change the actual TS operability requirements; thus, previously evaluated accidents are not affected by this proposed change.

Based on the above discussion, it is concluded that the proposed amendment does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

*Attorney for licensee:* Carey W. Fleming, Senior Counsel, Constellation Energy Nuclear Group, LLC, 100 Constellation Way, Suite 200C, Baltimore, MD 21202.

*NRC Branch Chief:* Nancy L. Salgado.

*Northern States Power Company—Minnesota, Docket Nos. 50–282 and 50–306, Prairie Island Nuclear Generating Plant, Units 1 and 2, Goodhue County, Minnesota*

*Date of amendment request:* February 4, 2011.

*Description of amendment request:* The proposed amendments would revise the Technical Specifications (TS) to make administrative changes which will: (1) in TS Section 5.2.1, allow certain requirements of onsite and offsite organizations to be documented in the Quality Assurance Topical Report (QATR); and (2) in TS Section 5.3, remove reference to specific education and experience requirements for operator license applicants.

*Basis for proposed no significant hazards consideration determination:* As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No

This license amendment request proposes to (1) revise Technical Specification 5.2.1(a) by addition of the Quality Assurance Topical Report (QATR) as an allowed location for documentation of requirements for lines of authority, responsibility, and communication; and (2) revise Technical Specification 5.3.1 by removal of an exception for operator license applicants' education and experience requirements, and the reference to a letter which references a specific industry guidance document. These are administrative changes.

The proposed changes are administrative and therefore do not significantly affect any system that is a contributor to initiating events for previously evaluated accidents. Nor do the changes significantly affect any system that is used to mitigate any previously evaluated accidents. Therefore, the proposed changes do not involve a significant increase in the probability or consequence of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

This license amendment request proposes to (1) revise Technical Specification 5.2.1(a) by addition of the Quality Assurance Topical Report (QATR) as an allowed location for documentation of requirements for lines of authority, responsibility, and communication; and (2) revise Technical Specification 5.3.1 by removal of an exception for operator license applicants' education and experience requirements, and the reference to a letter which references a

specific industry guidance document. These are administrative changes.

The proposed administrative changes do not alter the design, function, or operation of any plant component, nor do they involve installation of any new or different equipment. Therefore, the possibility of a new or different kind of accident from those previously evaluated has not been created.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

This license amendment request proposes to (1) revise Technical Specification 5.2.1(a) by addition of the Quality Assurance Topical Report (QATR) as an allowed location for documentation of requirements for lines of authority, responsibility, and communication; and (2) revise Technical Specification 5.3.1 by removal of an exception for operator license applicants' education and experience requirements, and the reference to a letter which references a specific industry guidance document. These are administrative changes.

The proposed changes are administrative and therefore do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment requests involve no significant hazards consideration.

*Attorney for licensee:* Peter M. Glass, Assistant General Counsel, Xcel Energy Services, Inc., 414 Nicollet Mall, Minneapolis, MN 55401

*NRC Branch Chief:* Robert J. Pascarelli.

**Previously Published Notices of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing**

The following notices were previously published as separate individual notices. The notice content was the same as above. They were published as individual notices either because time did not allow the Commission to wait for this biweekly notice or because the action involved exigent circumstances. They are repeated here because the biweekly notice lists all amendments issued or proposed to be issued involving no significant hazards consideration.

For details, see the individual notice in the **Federal Register** on the day and page cited. This notice does not extend the notice period of the original notice.

*NextEra Energy Seabrook, LLC, Docket No. 50–443, Seabrook Station, Unit No. 1, Rockingham County, New Hampshire.*

*Date of application for amendments:* January 27, 2011.

*Brief description of amendment request:* The proposed amendment would modify Technical Specification (TS) 6.7.6.k, "Steam Generator," and TS 6.8.1.7, "Steam Generator Tube Inspection Report," to allow implementation of alternate repair criteria.

*Date of publication of individual notice in* ***Federal Register:*** March 1, 2011 (FR 76 11291).

*Expiration date of individual notice:* March 31, 2011 (public comments) and May 2, 2011 (hearing requests).

**Notice of Issuance of Amendments to Facility Operating Licenses**

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for A Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20850–2738. Publicly available records will be accessible from the ADAMS Public Electronic Reading Room on the internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr.resource@nrc.gov.*

*Carolina Power and Light Company, Docket No. 50–261, H. B. Robinson Steam Electric Plant, Unit No. 2, Darlington County, South Carolina*

*Date of application for amendment:* March 5, 2010, as supplemented November 1, 2010.

*Brief description of amendment:* The amendment revised Technical Specifications (TS) Section 3.3.2, "Engineered Safety Feature Actuation System (ESFAS) Instrumentation," to allow the performance of maintenance activities for an inoperable Containment Pressure—High High channel. TS 3.3.6, "Containment Ventilation Isolation Instrumentation," was revised to correct an error related to table references.

*Date of issuance:* March 7, 2011.

*Effective date:* As of the date of issuance and shall be implemented within 60 days.

*Amendment No.* 225.

*Renewed Facility Operating License No. DPR–23.* Amendment revised the Technical Specifications.

*Date of initial notice in Federal Register:* June 1, 2010 (75 FR 30443). The supplement dated June 8 and August 26, 2004, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register.**

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 7, 2011.

No significant hazards consideration comments received: No.

*Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., Docket No. 50–271, Vermont Yankee Nuclear Power Station, Vernon, Vermont*

*Date of amendment request:* April 13, 2010.

*Description of amendment request:* The amendment would revise Technical Specification to institute a requirement to perform a Logic System Functional Test of the Control Rod Block actuation instrumentation trip functions once every Operating Cycle.

*Date of Issuance:* February 23, 2011.

*Effective date:* As of the date of issuance, and shall be implemented within 60 days.

*Amendment No.:* 246.

*Facility Operating License No. DPR–28:* Amendment revised the License and Technical Specifications.

*Date of initial notice in* ***Federal Register:*** June 29, 2010 (75 FR 37474).

The Commission's related evaluation of this amendment is contained in a Safety Evaluation dated February 23, 2011.

No significant hazards consideration comments received: No.

*Entergy Operations, Inc., Docket No. 50–382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana*

*Date of amendment request:* February 22, 2010, as supplemented by letters dated August 12, November 23, and December 21, 2010, and January 24, 2011.

*Brief description of amendment:* Entergy Operations, Inc. (the licensee), was planning to replace the two Waterford Steam Electric Station, Unit 3 (Waterford 3) steam generators (SGs) during the forthcoming spring 2011 refueling outage. Based on design changes in the replacement SGs, piping systems will require rerouting in the SG cavity area. The rerouting of SG blowdown line cannot be effectively performed without removing the existing dynamic protection associated with the pressurizer surge line. The amendment approved revision of the Waterford 3 Final Safety Analysis Report (FSAR) to allow the removal of pipe break dynamic protection associated with the pressurizer surge line using leak-before-break methodologies. The licensee will include the revised information in the FSAR in the next periodic update in accordance with paragraph 50.71(e) of Title 10 of the *Code of Federal Regulations.* The licensee deferred its planned SG replacement until the fall 2012 refueling outage.

*Date of issuance:* February 28, 2011.

*Effective date:* As of the date of issuance and shall be implemented 90 days from the date of issuance.

*Amendment No.:* 232.

*Facility Operating License No. NPF–38:* The amendment revised the Facility Operating License and the Final Safety Analyses Report.

*Date of initial notice in* ***Federal Register:*** April 20, 2010 (75 FR 20632). The supplemental letters dated August 12, November 23, and December 21, 2010, and January 24, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated February 28, 2011.

No significant hazards consideration comments received: No.

*Exelon Generation Company, LLC, Docket Nos. STN 50–456 and STN 50–457, Braidwood Station, Units 1 and 2, Will County, Illinois*

*Date of application for amendment:* February 15, 2010, as supplemented by letter dated August 19, 2010.

*Brief description of amendment:* The amendment relocates selected Surveillance Requirement frequencies from the Braidwood Station, Units 1 and 2 Technical Specifications (TSs) to a licensee-controlled program. This change is based on the NRC-approved Industry Technical Specifications Task Force (TSTF) change TSTF–425, "Relocate Surveillance Frequencies to Licensee Control—Risk Informed Technical Specification Task Force (RITSTF) Initiative 5b," Revision 3, (ADAMS Accession Package No. ML090850642).

*Date of issuance:* February 24, 2011.

*Effective date:* As of the date of issuance and shall be implemented within 120 days.

*Amendment Nos.:* 165/165.

*Facility Operating License Nos. NPF–72 and NPF–77:* The amendment revised the Technical Specifications and License.

*Date of initial notice in* ***Federal Register:*** April 20, 2010 (75 FR 20635).

The August 19, 2010, supplement contained clarifying information and did not change the NRC staff's initial proposed finding of no significant hazards consideration.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated February 24, 2011.

No significant hazards consideration comments received: No.

*Exelon Generation Company, LLC, Docket Nos. STN 50–454 and STN 50–455, Byron Station, Unit Nos. 1 and 2, Ogle County, Illinois*

*Date of application for amendment:* February 15, 2010, as supplemented by letter dated August 19, 2010.

*Brief description of amendment:* The amendment relocates selected Surveillance Requirement frequencies from the Byron Station, Unit Nos. 1 and 2 Technical Specifications (TSs) to a licensee-controlled program. This change is based on the NRC-approved Industry Technical Specifications Task Force (TSTF) change TSTF–425, "Relocate Surveillance Frequencies to Licensee Control—Risk Informed Technical Specification Task Force (RITSTF) Initiative 5b," Revision 3, (ADAMS Accession Package No. ML090850642).

*Date of issuance:* February 24, 2011.

*Effective date:* As of the date of issuance and shall be implemented within 120 days.

*Amendment Nos.:* 171/171.

*Facility Operating License Nos. NPF–37 and NPF–66:* The amendment revised the Technical Specifications and License.

*Date of initial notice in* ***Federal Register:*** April 20, 2010 (75 FR 20634). The August 19, 2010, supplement contained clarifying information and did not change the NRC staff's initial proposed finding of no significant hazards consideration.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated February 24, 2011.

No significant hazards consideration comments received: No.

*Exelon Generation Company, LLC, Docket Nos. 50–237 and 50–249, Dresden Nuclear Power Station (DNPS), Units 2 and 3, Grundy County, Illinois*

*Date of amendment request:* February 16, 2010, as supplanted by letter dated June 22, 2010.

*Description of amendment request:* The proposed amendments would modify the DNPS Units 2 and 3, Technical Specifications (TSs) by relocating specific surveillance frequencies to a licensee-controlled program with the adoption of Technical Specification Task Force (TSTF)–425, "Relocate Surveillance Frequencies to Licensee Control—Risk Informed Technical Specification Task Force (RITSTF) Initiative 5b," Revision 3. Additionally, the change would add a new program, the "Surveillance Frequency Control Program [SFCP]," to TS Section 5, "Administrative Controls."

*Date of issuance:* February 25, 2011.

*Effective date:* As of the date of issuance and shall be implemented within 120 days.

*Amendment Nos.:* 237/230.

*Facility Operating License Nos. DPR–19 and DPR–25:* The amendment revised the Technical Specifications and License.

*Date of initial notice in* ***Federal Register:*** April 20, 2010 (75 FR 20636).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated February 25, 2011.

No significant hazards consideration comments received: No.

*Exelon Generation Company, LLC, Docket Nos. 50–373 and 50–374, LaSalle County Station, Units 1 and 2, LaSalle County, Illinois*

*Date of application for amendments:* February 15, 2010, as supplemented by letters dated April 26, June 23, and August 3, 2010.

*Brief description of amendments:* The amendments relocate selected Surveillance Requirement frequencies from the LaSalle County Station Units 1 and 2 Technical Specifications (TSs) to a licensee-controlled program. This change is based on the NRC-approved Industry Technical Specifications Task Force (TSTF) change TSTF–425, "Relocate Surveillance Frequencies to Licensee Control—Risk Informed Technical Specification Task Force (RITSTF) Initiative 5b," Revision 3, (ADAMS Accession Package No. ML090850642).

*Date of issuance:* February 24, 2011.

*Effective date:* As of the date of issuance and shall be implemented within 120 days.

*Amendment Nos.:* 200/187.

*Facility Operating License Nos. NPF–11 and NPF–18:* The amendments revised the Technical Specifications and License.

*Date of initial notice in* ***Federal Register:*** April 20, 2010 (75 FR 20636).

The April 26, June 23, and August 3, 2010, supplements contained clarifying information and did not change the NRC staff's initial proposed finding of no significant hazards consideration.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated February 24, 2011.

No significant hazards consideration comments received: No.

*FirstEnergy Nuclear Operating Company, et al., Docket No. 50–412, Beaver Valley Power Station, Unit No. 2, Beaver County, Pennsylvania*

*Date of application for amendment:* February 26, 2010, as supplemented November 10, 2010 and January 26, 2011.

*Brief description of amendment:* The amendment revised the scope of the steam generator tubesheet inspections and subsequent repair using the F* inspection methodology.

*Date of issuance:* February 24, 2011.

*Effective date:* As of the date of issuance to be implemented within 60 days.

*Amendment No:* 172.

*Facility Operating License No. NPF–73:* The amendment revised the License and Technical Specifications.

*Date of initial notice in* ***Federal Register:*** January 11, 2011 (76 FR 1648). The supplements dated November 10, 2010 and January 27, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated February 24, 2011.

No significant hazards consideration comments received: No.

*Florida Power and Light Company, Docket Nos. 50–250 and 50–251, Turkey Point Plant, Units 3 and 4, Miami-Dade County, Florida*

*Date of application for amendments:* February 16, 2010, as supplemented September 21, and December 2, 2010, and February 2, 2011.

*Brief description of amendments:* The amendments revised the Technical Specifications (TSs) by deleting TS 3/4.9.7, "Crane Travel—Spent Fuel Storage Areas," retaining the operational limits associated with TS 3/4.9.7 in licensee controlled documents, and deleting TS 3/4.9.12, "Handling of Spent Fuel Cask." Part of the basis for the change is the proposed installation of a new single-failure-proof spent fuel cask handling crane meeting the requirements of NUREG–0554, "Single-Failure-Proof Cranes for Nuclear Power Plants," May 1979.

*Date of issuance:* February 25, 2011.

*Effective date:* As of the date of issuance and shall be implemented within 60 days of issuance.

*Amendment Nos:* 243 (Unit 3) and 239 (Unit 4).

*Renewed Facility Operating License Nos. DPR–31 and DPR–41:* Amendments revised the TSs.

*Date of initial notice in* ***Federal Register:*** May 18, 2010 (75 FR 27831).

The supplements dated September 21, 2010, December 2, 2010, and February 2, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated February 25, 2011.

No significant hazards consideration comments received: No.

*Nebraska Public Power District, Docket No. 50–298, Cooper Nuclear Station, Nemaha County, Nebraska*

*Date of amendment request:* February 25, 2010.

*Brief description of amendment:* The amendment revised Technical Specification (TS) Surveillance Requirement (SR) 3.8.1.9, Diesel Generator (DG) Load Test, in TS 3.8.1, "AC [Alternating Current] Sources—Operating," to correct a non-conservative power factor value. In addition, this amendment added a new note to SR 3.8.1.9 consistent with Technical Specifications Task Force (TSTF) change traveler TSTF–276–A, Revision 2, "Revise DG full load rejection test." This note allows the DG Load Test to be performed at the specified power factor with clarifications addressing situations when the power factor cannot be achieved.

*Date of issuance:* February 28, 2011.

*Effective date:* As of the date of issuance and shall be implemented within 60 days of issuance.

*Amendment No.:* 237.

*Renewed Facility Operating License No. DPR–46:* Amendment revised the Facility Operating License and Technical Specifications.

*Date of initial notice in* ***Federal Register:*** April 20, 2010 (75 FR 20639).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated February 28, 2011.

No significant hazards consideration comments received: No.

*NextEra Energy Duane Arnold, LLC, Docket No. 50–331, Duane Arnold Energy Center, Linn County, Iowa*

*Date of application for amendment:* August 12, 2010.

*Brief description of amendment:* The amendment modifies the Duane Arnold Energy Center (DAEC) Technical Specification (TS) requirements for unavailable barriers in accordance with the adoption of Technical Specification Task Force (TSTF) Traveler TSTF–427.

*Date of issuance:* February 28, 2011.

*Effective date:* As of the date of issuance and shall be implemented within 60 days.

*Amendment No.:* 277.

*Renewed Facility Operating License No. DPR–49:* The amendment revised the Technical Specifications.

*Date of initial notice in* ***Federal Register:*** December 14, 2010 (75 FR 77914).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated February 28, 2011.

No significant hazards consideration comments received: No.

*PSEG Nuclear LLC, Docket No. 50–354, Hope Creek Generating Station, Salem County, New Jersey.*

*Date of application for amendment:* March 19, 2010, as supplemented by letters dated July 28, 2010, and January 10, 2011.

*Brief description of amendment:* The amendment modifies the Technical Specifications (TSs) by relocating specific surveillance frequencies to a licensee-controlled program. The changes are based on Nuclear Regulatory Commission-approved TS Task Force (TSTF) change TSTF–425, Revision 3, "Relocate Surveillance Frequencies to Licensee Control—RITSTF [Risk-Informed TSTF] Initiative 5b."

*Date of issuance:* February 25, 2011.

*Effective date:* As of the date of issuance, to be implemented within 120 days.

*Amendment No.:* 187.

*Facility Operating License No. NPF–57:* The amendment revised the TSs and the License.

*Date of initial notice in* ***Federal Register:*** June 15, 2010 (75 FR 33842).

The letters dated July 28, 2010, and January 10, 2011, provided clarifying information that did not change the initial proposed no significant hazards consideration determination or expand the application beyond the scope of the original **Federal Register** notice.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated February 25, 2011.

No significant hazards consideration comments received: No.

*Tennessee Valley Authority, Docket No. 50–390, Watts Bar Nuclear Plant (WBN), Unit 1, Rhea County, Tennessee*

*Date of application for amendment:* May 28, 2010, as supplemented December 1, 2010.

*Brief description of amendment:* The amendment revised Technical Specification (TS) 4.2.2 "Control Rod Assemblies," to include silver-indium-cadmium material in addition to the boron carbide control rod material.

*Date of issuance:* February 25, 2011.

*Effective date:* As of the date of issuance and shall be implemented no later than 90 days from date of issuance.

*Amendment No.:* 86.

*Facility Operating License No. NPF–90:* Amendment revised the License and TSs.

*Date of initial notice in* ***Federal Register:*** July 27, 2010 (75 FR 44026). TVA's supplement dated December 1, 2010, provided additional information that clarified the application, did not expand the scope of the application as originally noticed proposed and did not change the staff's original proposed no significant hazards determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated February 25, 2011.

No significant hazards consideration comments received: No.

*Wolf Creek Nuclear Operating Corporation, Docket No. 50–482, Wolf Creek Generating Station (WCGS), Coffey County, Kansas*

*Date of amendment request:* April 13, 2010, as supplemented by letters dated June 1, 2010, and February 17, 2011.

*Brief description of amendment:* The amendment revised the approved fire protection program, as described in the response to Question Q280.5 of the WCGS Updated Safety Analysis Report, by removing the high/low pressure interface designation of the pressurizer power-operated relief valves and their associated block valves. The amendment also revised license condition 2.C.(5)(a) to include the change approved by this amendment request.

*Date of issuance:* March 9, 2011.

*Effective date:* As of its date of issuance and shall be implemented within 90 days of the date of issuance.

*Amendment No.:* 193.

*Renewed Facility Operating License No. NPF–42:* The amendment revised the operating license and approved fire protection program, as described in the WCGS Updated Safety Analysis Report.

*Date of initial notice* in ***Federal Register:*** June 29, 2010 (75 FR 37477). The supplemental letter dated February 17, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**. The supplemental letter dated June 1, 2010, was included in the original notice.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 9, 2011.

No significant hazards consideration comments received: No.

Dated at Rockville, Maryland, this 11th day of March 2011.

For the Nuclear Regulatory Commission.

**Joseph G. Giitter,**

*Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2011–6825 Filed 3–21–11; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2011–0063; Docket Nos. 50–498 And 50–499]**

## STP Nuclear Operating Company, et al. South Texas Project, Units 1 and 2 Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of license amendment request, opportunity to comment, opportunity to request a hearing.

**DATES:** Comments must be filed by April 21, 2011. A request for a hearing must be filed by May 23, 2011.

**ADDRESSES:** Please include Docket ID NRC–2011–0063 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 *http://www.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.

You may submit comments by any one of the following methods.

*Federal Rulemaking Web Site:* Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2011–0063. Comments may be submitted electronically through this Web site. Address questions about NRC dockets to Carol Gallagher 301–492–3668; e-mail *Carol.Gallagher@nrc.gov.*

*Mail comments to:* Chief, Rules, Announcements and Directives Branch (RADB), 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, Room O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. These documents may also be viewed electronically on the public computers located at the NRC's PDR at 11555 Rockville Pike, Rockville, Maryland 20852.

*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 site, 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.*

The application for amendment, dated May 18, 2010, is available electronically under ADAMS Accession No. ML101450414, as supplemented by application dated March 1, 2011, under ADAMS Accession No. ML110690223.

*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–2011–0063.

**FOR FURTHER INFORMATION CONTACT:** Balwant K. Singal, Senior Project Manager, Plant Licensing Branch IV, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555. *Telephone:* 301–415–3016; *fax number:* 301–415–1222; *e-mail: balwant.singal@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Introduction

The U.S. Nuclear Regulatory Commission (NRC, the Commission) is considering issuance of an amendment to Facility Operating License Nos. NPF–76 and NPF–80 issued to STP Nuclear Operating Company, et al. (the licensee) for operation of the South Texas Project (STP), Units 1 and 2, located in Matagorda County, Texas.

The notice is being reissued in its entirety due to the re-submittal by the licensee to address NRC staff concerns. It was previously published in the **Federal Register** on September 21, 2010 (75 FR 57529). The proposed amendment would revise Technical Specification (TS) 6.8.3.I, "Containment Post-Tensioning System Surveillance Program." TS 6.8.3.I states that the containment post-tensioning system surveillance program shall be in accordance with American Society of Mechanical Engineers (ASME) Code, Section XI, Subsection IWL, 1992 Edition with 1992 Addenda, as supplemented by 10 CFR 50.55a(b)(2)(viii). The proposed amendment removes the specific year of the applicable Code edition consistent with Revision 3.1 of NUREG–1431, "Standard Technical Specifications, Westinghouse Plants" and will allow for future updates to the surveillance program when the applicable code edition changes without requiring additional TS changes.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in Title 10 of the *Code of Federal Regulations* (10 CFR), Section 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

*Response:*

No. Inspection practices and acceptance standards will continue to be consistent with the approved ASME code edition as specified by 10 CFR 50.55a.

Therefore, the proposed changes will not increase the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

*Response:*

No. The proposed changes will not alter the plant configuration (no new or different type of equipment will be installed) or require any unusual operator actions. The proposed changes will not alter the way any structure, system, or component functions, and will not significantly alter the manner in which the plant is operated. The response of the plant and the operators following an accident will not be different. In addition, the proposed change does not introduce any new failure modes.

Therefore, the proposed changes will not create the possibility of a new or different kind of accident from any accident previously analyzed.

3. Does the proposed change involve a significant reduction in a margin of safety?

*Response:*

No. Containment tendon inspection practices and acceptance standards will continue to be consistent with the applicable ASME code edition. There is no change in surveillance acceptance criteria.

Therefore, the proposed changes will not result in a reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received by April 21, 2011 will be considered in making any final determination. You may submit comments using any of the methods discussed under the **ADDRESSES** caption.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

## II. Opportunity To Request a Hearing

Requirements for hearing requests and petitions for leave to intervene are

found in 10 CFR 2.309, "Hearing requests, petitions to intervene, requirements for standing, and contentions." Interested persons should consult 10 CFR Part 2, Section 2.309, which is available at the NRC's Public Document Room (PDR), located at O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852 (or call the PDR at 800–397–4209 or 301–415–4737). NRC regulations are also accessible electronically from the NRC's Electronic Reading Room on the NRC Web site at *http://www.nrc.gov.*

**III. Petitions for Leave To Intervene**

Any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the requestor/petitioner in the proceeding and how that interest may be affected by the results of the proceeding. The petition must provide the name, address, and telephone number of the requestor or petitioner and specifically explain the reasons why the intervention should be permitted with particular reference to the following factors: (1) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the requestor/petitioner seeks to have litigated at the proceeding.

A petition for leave to intervene must also include a specification of the contentions that the petitioner seeks to have litigated in the hearing. For each contention, the requestor/petitioner must provide a specific statement of the issue of law or fact to be raised or controverted, as well as a brief explanation of the basis for the contention. Additionally, the requestor/petitioner must demonstrate that the issue raised by each contention is within the scope of the proceeding and is material to the findings the NRC must make to support the granting of a license amendment in response to the application. The petition must include a concise statement of the alleged facts or expert opinions which support the position of the requestor/petitioner and on which the requestor/petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely. Finally, the petition must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact, including references to specific portions of the application for amendment that the requestor/petitioner disputes and the supporting reasons for each dispute, or, if the requestor/petitioner believes that the application for amendment fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the requestor's/petitioner's belief. Each contention must be one which, if proven, would entitle the requestor/petitioner to relief.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that person's admitted contentions, including the opportunity to present evidence and to submit a cross-examination plan for cross-examination of witnesses, consistent with NRC regulations, policies, and procedures. The Licensing Board will set the time and place for any prehearing conferences and evidentiary hearings, and the appropriate notices will be provided.

Non-timely petitions for leave to intervene and contentions, amended petitions, and supplemental petitions will not be entertained absent a determination by the Commission, the Licensing Board or a Presiding Officer that the petition should be granted and/or the contentions should be admitted based upon a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

A State, county, municipality, Federally-recognized Indian tribe, or agencies thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(d)(2). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission by May 23, 2011. The petition must be filed in accordance with the filing instructions in the section below entitled "Electronic Submissions (E-Filing)," and should meet the requirements for petitions for leave to intervene set forth in this section, except that State and Federally-recognized Indian tribes do not need to address the standing requirements in 10 CFR 2.309(d)(1) if the facility is located within its boundaries. The entities listed above could also seek to participate in a hearing as a nonparty pursuant to 10 CFR 2.315(c).

Any person who does not wish, or is not qualified, to become a party to this proceeding may request permission to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of position on the issues, but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to such limits and conditions as may be imposed by the Licensing Board. Persons desiring to make a limited appearance are requested to inform the Secretary of the Commission by May 23, 2011.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

**IV Electronic Submissions (E-Filing)**

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or

representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at 866–672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First-class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, *Attention:* Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/EHD/* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from March 22, 2011. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

## V. Further Information

For further details with respect to this license amendment application, *see* the application for amendment dated May 18, 2010, as supplemented by application dated March 1, 2011, which are available for public inspection at the Commission's PDR, located at One White Flint North, File Public Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* 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, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

*Attorney for licensee:* A. H. Gutterman, Esq., Morgan, Lewis & Bockius, 1111 Pennsylvania Avenue, NW., Washington, DC 20004.

Dated at Rockville, Maryland, this 15th day of March 2011.

For The Nuclear Regulatory Commission.

**Balwant K. Singal,**

*Senior Project Manager, Plant Licensing Branch IV, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2011–6667 Filed 3–21–11; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

### Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on Future Plant Designs

The ACRS Subcommittee on Future Plant Designs will hold a meeting on April 5, 2011, at 11545 Rockville Pike, Room T–2B1, Rockville, Maryland.

The entire meeting will be open to public attendance, with the exception of a portion that may be closed to protect information that is proprietary pursuant to 5 U.S.C. 552b(c)(4).

The agenda for the subject meeting shall be as follows:

*Tuesday, April 5, 2011, 10 a.m. until 5 p.m.*

The Subcommittee will review the NRC Staff's High Temperature Gas Cooled Reactor (HTGE) NRC Research Plan. The Subcommittee will hear presentations by and hold discussions with representatives of the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Maitri Banerjee (Telephone 301–415–6973 or E-mail *Maitr.Banerjee@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 21, 2010 (75 FR 65038–65039).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

Dated: *March 16, 2011.*

**Cayetano Santos,**

*Chief, Reactor Safety Branch A, Advisory Committee on Reactor Safeguards.*

[FR Doc. 2011–6652 Filed 3–21–11; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

### Advisory Committee on Reactor Safeguards (ACRS); Meeting of The ACRS Subcommittee on Materials, Metallurgy And Reactor Fuels; Notice of Meeting

The ACRS Subcommittee on Materials, Metallurgy and Reactor Fuels will hold a meeting on April 6, 2011, Room T–2B3, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

*Wednesday, April 6, 2011—1:30 p.m. until 5 p.m.*

The Subcommittee will review on-going research activities associated with consequential steam generator tube rupture (C–SGTR). The Subcommittee will hear presentations by and hold discussions with representatives of the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Christopher L. Brown (Telephone 301–415–7111 or E-mail *Christopher.Brown@nrc.gov)* five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 21, 2010, (75 FR 65038–65039).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the website cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

Dated: March 15, 2011.

**Cayetano Santos,**

*Chief, Reactor Safety Branch A, Advisory Committee on Reactor Safeguards.*

[FR Doc. 2011–6653 Filed 3–21–11; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2011–0006]**

### Sunshine Federal Register Notice

**AGENCY HOLDING THE MEETINGS:** Nuclear Regulatory Commission, [NRC–2011–0006].

**DATE:** Weeks of March 21, 28, April 4, 11, 18, 25, 2011.

**PLACE:** Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

**STATUS:** Public and closed.

*Week of March 21, 2011*

Thursday, March 24, 2011

9 a.m.

Briefing on the 50.46a Risk-Informed Emergency Core Cooling System (ECCS) Rule (Public Meeting) (Contact: Richard Dudley, 301–415–1116)

This meeting will be webcast live at the Web address—*http://www.nrc.gov*

*Week of March 28, 2011—Tentative*

Tuesday, March 29, 2011

9 a.m.

Briefing on Small Modular Reactors (Public Meeting) (Contact: Stephanie Coffin, 301–415–6877)

This meeting will be webcast live at the Web address—*http://www.nrc.gov*

Thursday, March 31, 2011

2:30 p.m.
Discussion of Management Issues (Closed-Ex. 2)

*Week of April 4, 2011—Tentative*

There are no meetings scheduled for the week of April 4, 2011.

*Week of April 11, 2011—Tentative*

There are no meetings scheduled for the week of April 11, 2011.

*Week of April 18, 2011—Tentative*

Tuesday, April 19, 2011

9 a.m.
Briefing on Source Security—Part 37 Rulemaking—Physical Protection of Byproduct Material (Public Meeting) (Contact: Merri Horn, 301–415–8126)

This meeting will be webcast live at the Web address—*http://www.nrc.gov*

*Week of April 25, 2011—Tentative*

Thursday, April 28, 2011

9 a.m.
Information Briefing on Inspections, Tests, Analyses, and Acceptance Criteria (ITAAC) (Public Meeting) (Contact: Aida Rivera-Varona, 301–415–4001)

This meeting will be webcast live at the Web address—*http://www.nrc.gov*

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*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Rochelle Bavol, (301) 415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at:*http://www.nrc.gov/public-involve/public-meetings/schedule.html*.

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The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.* braille, large print), please notify Bill Dosch, Chief, Work Life and Benefits Branch, at 301–415–6200, TDD: 301–415–2100, or by e-mail at *william.dosch@nrc.gov*. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an e-mail to *darlene.wright@nrc.gov*.

Dated: March 17, 2011.

**Rochelle C. Bavol,**

*Policy Coordinator, Office of the Secretary.*

[FR Doc. 2011–6824 Filed 3–18–11; 4:15 pm]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2011–0062]**

## Withdrawal of Regulatory Guide 8.5

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Withdrawal of Regulatory Guide 8.5, "Criticality and Other Interior Evacuation Signals."

**FOR FURTHER INFORMATION CONTACT:** Sheena A. Whaley, U.S. Nuclear Regulatory Commission, Office of Nuclear Material Safety and Safeguards, Division of Fuel Cycle Safety and Safeguards, Technical Support Branch, Washington, DC 20555–0001, *telephone:* 301–492–3200; or by e-mail to *Sheena.Whaley@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is withdrawing Regulatory Guide 8.5, "Criticality and Other Interior Evacuation Signals," Revision 1, issued March 1981. Regulatory Guide 8.5 endorses the American National Standards Institute/American Nuclear Society (ANSI/ANS) Standard N2.3–1979 "Immediate Evacuation Signal for Use in Industrial Installations," published September 13, 1979.

In 1986, the ANS Standards Subcommittee combined ANSI/ANS–N2.3–1979 with ANSI/ANS–8.3–1986, "Criticality Accident Alarm System" and withdrew ANSI/ANS–N2.3–1979. In December 2010 the NRC issued Revision 2 of Regulatory Guide 3.71, "Nuclear Criticality Safety Standards for Fuels and Material Facilities" which endorses multiple ANSI/ANS standards including ANSI/ANS–8.3–1997, (Reaffirmed in 2003).

The combining of ANSI/ANS–N2.3 and ANSI/ANS–8.3 by the ANS and the endorsement of ANSI/ANS–8.3 by the NRC in Revision 2 of Regulatory Guide 3.71 has made Regulatory Guide 8.5 unnecessary. Consequently, the NRC is withdrawing it and recommends using the guidance in ANSI/ANS–8.3–1997 as endorsed with exceptions by Revision 2 of Regulatory Guide 3.71 instead.

### II. Further Information

The withdrawal of Regulatory Guide 8.5 does not alter any prior or existing licensing commitments based on their use. The guidance provided in this regulatory guide is no longer necessary. Regulatory guides may be withdrawn when their guidance no longer provides useful information, or is superseded by technological, congressional actions, or other events.

Guides are revised for a variety of reasons, and the withdrawal of a regulatory guide should be thought of as the final revision of the guide. Although a regulatory guide is withdrawn, current licensees may continue to use it, and withdrawal does not affect any existing licenses or agreements. Withdrawal means that the guide should not be used for future NRC licensing activities. Changes to existing licenses can be accomplished using other regulatory products.

Regulatory guides and publicly available NRC documents are available electronically through the Electronic Reading Room on the NRC's public Web site at: *http://www.nrc.gov/reading-rm/doc-collections/*. The documents can also be viewed on-line for free or printed for a fee in the NRC's Public Document Room (PDR) at 11555 Rockville Pike, Rockville, MD; the mailing address is USNRC PDR, Washington, DC 20555–0001; *telephone:* 301–415–4737, or 1–800–397–4209; fax 301–415–3548; or by e-mail to *pdr.resource@nrc.gov*.

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

Dated at Rockville, Maryland, this 3rd day of February, 2011.

For the Nuclear Regulatory Commission.

**Thomas H. Boyce,**

*Branch Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.*

[FR Doc. 2011–6665 Filed 3–21–11; 8:45 am]

**BILLING CODE 7590–01–P**

## SECURITIES AND EXCHANGE COMMISSION

### Proposed Collection; Comment Request

*Upon Written Request, Copies Available From:* U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

*Extension:*

Rule 17a–22; SEC File No. 270–202; OMB Control No. 3235–0196.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comments on the collection of information provided for in the following rule: Rule 17a–22 (17 C.F.R. 240.17a–22) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*). The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 17a–22 requires all registered clearing agencies to file with the Commission three copies of all materials they issue or make generally available to their participants or other entities with whom they have a significant relationship. The filings with the Commission must be made within ten days after the materials are issued or made generally available. When the Commission is not the clearing agency's appropriate regulatory agency, the clearing agency must file one copy of the material with its appropriate regulatory agency.

The Commission is responsible for overseeing clearing agencies and uses the information filed pursuant to Rule 17a–22 to determine whether a clearing agency is implementing procedural or policy changes. The information filed aides the Commission in determining whether such changes are consistent with the purposes of Section 17A of the Exchange Act. Also, the Commission uses the information to determine whether a clearing agency has changed its rules without reporting the actual or prospective change to the Commission as required under Section 19(b) of the Exchange Act.

The respondents to Rule 17a–22 are registered clearing agencies. The frequency of filings made by clearing agencies pursuant to Rule 17a–22 varies but on average there are approximately 200 filings per year per active clearing agency. There are four active registered clearing agencies. The Commission staff estimates that each response requires approximately .25 hour (fifteen minutes), which represents the time it takes for a staff person at the clearing agency to properly identify a document subject to the rule, print and makes copies, and mail that document to the Commission. Thus, the total annual burden for all active clearing agencies is 200 hours (4 clearing agencies multiplied by 200 filings per clearing agency multiplied by .25 hours) and a total of 50 hours (800 responses multiplied by .25 hours, divided by 4 active clearing agencies) per year are expended by each respondent to comply with the rule.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

The Commission may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

Please direct your written comments to: Thomas Bayer, Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an e-mail to: *PRA_Mailbox@sec.gov.*

Dated: March 16, 2011.

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–6655 Filed 3–21–11; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

### Proposed Collection; Comment Request

*Upon Written Request, Copies Available From:* U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

*Extension:*

Rule 102, SEC File No. 270–409, OMB Control No. 3235–0467.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval for the Rule 102 of Regulation M (17 CFR 242.102), defined as Activities by Issuers and Selling Security Holders During a Distribution.

Rule 102 prohibits distribution participants, issuers, and selling security holders from purchasing activities at specified times during a distribution of securities. Persons otherwise covered by these rules may seek to use several applicable exceptions such as exclusion for actively traded reference securities and the maintenance of policies regarding information barriers between their affiliates.

There are approximately 895 respondents per year that require an aggregate total of 1,795 hours to comply with this rule. Each respondent makes an estimated 1 annual response. Each response takes on average approximately 2.006 hours to complete. Thus, the total compliance burden per year is 1,795 burden hours. The total compliance cost for the respondents is approximately $102,261.15, resulting in a cost of compliance for the respondent per response of approximately $114.26 (*i.e.,* $102,261.15/895 responses). These are internal labor costs and there are no other costs.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

The Commission may not conduct or sponsor a collection of information unless it displays a currently valid

control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

Please direct your written comments to: Thomas Bayer, Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, Virginia 22312 or send an e-mail to: *PRA_Mailbox@sec.gov.*

Dated: March 16, 2011.

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–6656 Filed 3–21–11; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64088; File No. SR–NYSE–2011–10]**

## Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Rule 36 To Permit Written Communications To Be Sent Electronically Between the Designated Market Maker Unit's Post Location on the Floor and the DMM Unit's Off-Floor Offices and to Persons Permitted To Provide Non-Trading Related Services to the DMM Under Rule 98

March 17, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b-4 thereunder,[2] notice is hereby given that, on March 11, 2011, New York Stock Exchange LLC (the "Exchange" or "NYSE") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NYSE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Rule 36 to permit written communications to be sent electronically between the Designated Market Maker ("DMM") unit's post location on the Floor and the DMM unit's off-Floor offices and to persons permitted to provide non-trading related services to the DMM under Rule 98. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to amend NYSE Rule 36 to (i) expand the persons with whom DMM unit personnel on the Exchange Floor may communicate to include persons providing "non-trading related services" (as defined in Rule 98) to the DMM Unit; and (ii) to expand the means of permissible communication to include written electronic communications between the DMM unit's [3] post location on the Floor and specified off-Floor personnel.[4] The Exchange believes that expanding the persons with whom and the means by which DMMs [5] on the Floor of the Exchange may communicate will both allow DMMs to operate more efficiently and enhance the audit trail associated with DMM communications, thus strengthening the regulatory program associated with reviewing such communications.

Current NYSE Rule 36

NYSE Rule 36 broadly provides that no member or member organization shall establish or maintain any telephonic or electronic communication between the Floor and any other location without Exchange approval. NYSE Rule 36.30 provides a limited exception for DMM units. Specifically, the Rule provides that:

> [w]ith the approval of the Exchange, a DMM unit may maintain a telephone line at its stock trading post location to the off-Floor offices of the DMM unit or the unit's clearing firm. Such telephone connection shall not be used for the purpose of transmitting to the Floor orders for the purchase or sale of securities, but may be used to enter options or futures hedging orders through the unit's off-Floor office or the unit's clearing firm, or through a member (on the floor) of an options or futures exchange as permitted under NYSE Rules 98 and 105.

All DMM units currently have Exchange-approved telephone connections between the Trading Floor post locations and the off-Floor offices of the DMM unit. On behalf of NYSE Regulation, FINRA regularly examines DMM units for compliance with Rule 36.30, and in particular, whether the DMM unit has appropriate policies and procedures governing the use of such telephone lines and to confirm that the telephone lines only connect to the approved locations.

Proposed Amendments to NYSE Rule 36

The Exchange proposes to amend Supplementary Material .30 to update the rule to reflect how DMM units are permitted to operate pursuant to Rule 98. Specifically, Rule 98(e) permits a DMM unit to share non-trading related services with its member organization or approved person. Pursuant to Rule 98(e), when sharing such non-trading related services, the DMM unit and approved person must have written procedures and guidelines to protect non-public order information to ensure that such information is not used for any purpose other than to provide non-trading related services to the DMM unit.

The Exchange believes that because Rule 98(e) sets forth protections for non-public order information, Rule 36.30 should be amended to permit DMM units on the Trading Floor to maintain specified telephone and other permitted communication devices (as discussed more fully below) to persons providing non-trading related services permitted under Rule 98. This will enable DMM units to permit their Floor-based personnel to communicate directly with persons providing operational support services, such as a technology help desk that may be located within an approved person.

The Exchange further proposes to amend NYSE Rule 36 to add

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] "DMM unit" means any member organization, aggregation unit within a member organization, or division or department within an integrated proprietary aggregation unit of a member organization that (i) has been approved by NYSE Regulation pursuant to NYSE Rule 98(c), (ii) is eligible for allocations under NYSE Rule 103B as a DMM unit in a security listed on the Exchange, and (iii) has met all registration and qualification requirements for DMM units assigned to such unit.

[4] The Exchange notes that its affiliate, NYSE Amex LLC, has proposed parallel changes its rules. *See* SR–NYSEAmex–2011–16.

[5] "DMM" means any individual qualified to act as a DMM on the Floor of the Exchange.

Supplementary Material .31 that would permit a DMM unit to install and maintain certain written electronic communication applications. Specifically, proposed Supplementary Material .31(a) would permit a DMM unit, with the approval of the Exchange and subject to the conditions set forth in Supplementary Material .31, to establish and maintain a wired or wireless device capable of sending and receiving written communications electronically through an Exchange-approved connection (a "Permitted Communications Device").[6]

Except as specified in the amendment to Supplementary Material .30, the proposed addition of Supplementary Material .31 would not alter in any way the universe of off-Floor individuals with whom Floor-based personnel may communicate or the content of such communications; rather, it would only expand the means by which such communications may be transmitted. Accordingly, under proposed Supplementary Material .31(b), DMM units would be permitted to connect Floor-based personnel via the Permitted Communications Device to persons with whom they are otherwise permitted to communicate pursuant to Rules 36.30 and 98, i.e., certain personnel in the off-Floor offices of the DMM unit, the DMM unit's clearing operations, and persons who are permitted to provide non-trading related services to the DMM unit under Rule 98. Once connected, the on-Floor and off-Floor personnel would be permitted to use the Permitted Communications Device for two-way written electronic communications.

The Exchange further notes that nothing in proposed Supplementary Material .31 would alter the obligations of a DMM unit to meet existing requirements under Rule 98 to, among other things, protect non-public order information and maintain appropriate information barriers in accordance with Rule 98. Because DMM units would continue to be subject to Rule 98, while on the Floor, DMM unit personnel could not use the Permitted Communications Device to communicate with off-Floor personnel in violation of Rule 98. For example, DMM units will continue to be subject to provisions of Rule 98 governing restrictions on communications with off-Floor individuals or systems responsible for making trading decisions in related products.[7]

A DMM unit would be obligated to program its communications system so that a Permitted Communications Device would not operate in a manner that enables written electronic communications to or from any location or individual other than as described in the proposed Supplementary Material. Among other things, the DMM unit would be required to program its communications system to ensure that messages cannot be forwarded to individuals with whom Floor personnel are not permitted to communicate. As part of the approval process, DMM units would need to identify to the Exchange who would have access to the Permitted Communications Devices and the basis for why any proposed off-Floor persons are permitted to communicate with individuals located on the Trading Floor.

Under proposed Supplementary Material .31(c), a DMM unit's member organization would be required to maintain records of all written communications sent from or to the DMM unit's Floor-based employees via the Permitted Communications Device in accordance with NYSE Rule 440 and SEC Rule 17a–4(b)(4) and in such format as may be prescribed by the Exchange.

Under proposed Supplementary Material .31(d), a DMM unit's member organization would be required to establish policies and procedures reasonably designed to ensure that use of the Permitted Communications Device is consistent with all SEC rules and Exchange rules, policies and procedures. In particular, pursuant to NYSE Rule 342, DMM units would be required to implement appropriate procedures of supervision and control and to provide for the review of the written electronic communications sent to and from the DMM unit's post location on the Floor via the Permitted Communications Device. Among other things, the written procedures should address the regulatory requirements associated with the program, including what measures the DMM unit will follow to ensure that only those individuals permitted to communicate via the Permitted Communications Device have access to it.

The Exchange believes that allowing DMM units to use a Permitted Communications Device would provide an effective way for DMMs to communicate with their member organization and promote more efficient supervision, compliance, and operations. For example, a DMM unit could use a Permitted Communications Device to obtain permission from senior management to exceed risk limits to facilitate a block trade or otherwise meet an affirmative obligation, to more quickly correct a technological issue with the DMM unit's algorithms, to meet business continuity obligations by providing an additional means of communication in the event of a wide-ranging telephone outage or other Exchange system outage, and to confirm that a stock could be borrowed to cover a short position.

The Exchange further believes that the use of such written communications and the related retention requirements not only would enable the DMM unit to monitor communications to and from the Floor, but also would enable FINRA to enhance its regulatory program associated with reviewing such communications. In particular, FINRA would be able to review the email system operating the connections between the Trading Floor and off-Floor locations and related written supervisory procedures. The regulatory program would be further strengthened because with the use of auditable written electronic communications, FINRA would also be able to review both the content of communications and the parties to such communications. The Exchange believes that the enhanced regulatory program associated with the more robust audit trail would benefit the markets by providing a better manner by which to review DMM compliance with Federal and Exchange rules.

Finally, the Exchange proposes a technical change to Rule 36.30 to conform Rule 36 to changes made to Rule 104 that deleted the requirement that DMM units obtain annual certifications for their algorithms. The Exchange added the relevant provision to Rule 36.30 in connection with the Hybrid Market changes to Rule 104, when the then specialist algorithm had an advance "look" at incoming orders.[8] In connection with the adoption of the New Market Model, the Exchange eliminated the algorithmic order-by-order look, which rendered the need for an annual certification moot.[9] Accordingly, Rule 104 no longer includes a requirement that DMM units annually certify their algorithms. The Exchange therefore proposes to amend Rule 36 to conform to the changes to

[6] Except as provided in Rule 36, no other type of communication application may be used by a DMM or DMM unit to communicate between the DMM unit's post location on the Floor and the off-Floor offices of the DMM unit and any other location, and the use of cell phones, Blackberrys, and similar devices by DMM's while on the Trading Floor would continue to be prohibited.

[7] *See, e.g.,* Rules 98(d)(2)(B)(iii) and (f)(1)(A)(ii).

[8] *See* Securities Exchange Act Release No. 53539 (March 22, 2006), 71 FR 16353 (March 31, 2006) (SR–NYSE–2004–05).

[9] *See* Securities Exchange Act Release No. 58845 (Oct. 24, 2008), 73 FR 64379 (Oct. 29. 2008) (SR–NYSE–2008–46).

Rule 104 and similarly delete the requirement for an annual certification.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and further the objectives of Section 6(b)(5) of the Act,[11] in particular, in that they are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change supports the objectives of the Act by permitting greater and more effective communication between DMMs and DMM unit's on the Floor and their upstairs offices, while at the same time providing for a more robust audit trail that would enable FINRA to enhance the regulatory program associated with reviewing DMM communications from the Trading Floor. The Exchange believes that these regulatory enhancements will benefit the market by protecting investors and the public interest.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [12] and Rule 19b–4(f)(6) thereunder.[13] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6) [14] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[15] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such 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–NYSE–2011–10 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–NYSE–2011–10. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2011–10 and should be submitted on or before April 12, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

**Cathy H. Ahn,**

*Deputy Secretary.*

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[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(3)(A)(iii).

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6)(iii).

[16] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64086; File No. SR–NYSEArca–2011–09]**

## Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Adopting Rules Related to Qualified Contingent Cross Orders

March 17, 2011.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the "Act") [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on March 14, 2011, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change**

The Exchange proposes to adopt rules related to Qualified Contingent Cross Orders ("QCCs"). The text of the

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

proposed rule change is available at the Exchange, the Exchange's Web site at *http://www.nyse.com,* on the Commission's Web site at *http://www.sec.gov,* and at the Commission's Public Reference Room.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of this filing is to adopt rules related to QCCs. The proposed rule change is based on an International Securities Exchange ("ISE") proposal recently approved by the Securities and Exchange Commission ("Commission").[4]

Background

The Exchange is currently a party to the Options Order Protection and Locked/Crossed Market Plan ("Distributive Linkage Plan"),[5] and has implemented Exchange rules in conjunction with that plan (the "Distributive Linkage Rules").[6] Similar to Regulation NMS under the Securities Exchange Act of 1934 ("Exchange Act" or "Act"), the Distributive Linkage Plan requires, among other things, that the Exchange establish, maintain and enforce written policies and procedures that are reasonably designed to prevent "Trade-Throughs."[7] A Trade-Through is a transaction in an options series at a price that is inferior to the best price available in the market.[8]

The Distributive Linkage Plan replaced the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage ("Old Linkage Plan"), and the Distributive Linkage Rules replaced the then-existing NYSE Arca rules implementing the Old Linkage Plan (the "Old Linkage Rules"). The Old Linkage Plan and the Old Linkage Rules provided a limited Trade-Through exemption for "Block Trades," defined to be trades of 500 or more contracts with a premium value of at least $150,000.[9] However, as with Regulation NMS, the Distributive Linkage Plan does not provide a Block Trade exemption.

The ISE Proposal stated that the loss of the Block Trade exemption, among other things, adversely affects the ability of its members to effect large trades that are tied to stock,[10] and therefore proposed the QCC as a limited substitute for the Block Trade exemption. While our views with respect to the potential impact that the ISE Proposal may have on market structure remain unchanged,[11] we nonetheless are proposing to adopt rules related to QCCs based on those approved for ISE. In particular, we believe that such a rule change would permit the Exchange to remain competitive with ISE, and the other options exchanges that may also adopt rules for QCCs, by making QCCs available to OTP Holders and their customers through the Exchange.

Discussion

While Regulation NMS does not provide a block trade exemption from trade-through liability for stocks, the Commission, by order, has provided trade-through relief for "Qualified Contingent Trades" ("QCTs").[12] The QCT Release provides an exemption from trade-through liability in the equity market for multi-component, fully-hedged trades where one order is contingent on the execution of one or more additional orders. Building on this concept, and as approved for ISE, the Exchange proposes that when an NYSE Arca OTP Holder effects a QCT trade in a Regulation NMS Stock, that OTP Holder be permitted to cross the options leg of the trade on the Exchange immediately upon entry if the order is for at least 1,000 contracts, is part of a QCT, is executed at a price at least equal to the national best bid or offer ("NBBO"), and there are no Customer Orders on the Exchange's Consolidated Book at the same price.[13]

The QCC would permit OTP Holders to provide their customers a net price for the entire trade, and then allow the OTP Holder to execute the options leg of the trade on NYSE Arca at a price at least equal to the NBBO while using the QCT exemption to effect the trade in the equities leg at a price necessary to achieve the net price.[14] Under the proposal, the Exchange would not permit the options component of a stock-option order to trade through the NBBO.[15] However, there are times when the quotation spread for the option on the Exchange would not permit an execution of the options component

[4] *See* Securities Exchange Act Release No. 62523 (July 16, 2010), 75 FR 43211 (July 23, 2010) (SR–ISE–2010–73) ("ISE Proposal"). *See also* Securities Exchange Act Release No. 63955 (February 24, 2011), 76 FR 11533 (March 2, 2011) (SR–ISE–2010–73) ("ISE Approval"). The Exchange notes that letters commenting on the ISE Proposal were submitted on its behalf by the Exchange's parent company, NYSE Euronext. *See e.g.,* letters dated August 9, 2010 and October 21, 2010 from Janet L. McGinness, Senior Vice President—Legal & Corporate Secretary, Legal & Government Affairs, NYSE Euronext ("NYSE Euronext Comment Letters").

[5] *See* Securities Exchange Act Release No. 60405 (July 30, 2009), 74 FR 39362 (August 6, 2009) (File No. 4–546).

[6] *See* Securities Exchange Act Release No. 60527 (August 18, 2009), 74 FR 43178 (August 26, 2009) (SR–NYSEArca–2009–45).

[7] Section 5(a) of the Distributive Linkage Plan.

[8] Section 2(21) of the Distributive Linkage Plan.

[9] Old Linkage Plan Sections 2(3) and 8(c)(i)(C); and former NYSE Arca Options Rule 6.94(d)(2).

[10] *See* ISE Proposal at 43212.

[11] *See* NYSE Euronext Comment Letters, *supra* note 1 [sic].

[12] *See* Securities Exchange Act Release No. 57620 (April 4, 2008), 73 FR 19271 (April 9, 2008) (the "QCT Release"). That release superseded a release initially granting the Qualified Contingent Trade exemption. *See* Securities Exchange Act Release No. 54389 (August 31, 2006), 71 FR 52829 (September 7, 2006).

[13] We propose to define a QCC trade substantively identical to the Commission's definition in the QCT release as well as that in the ISE Proposal. A QCC trade must meet the following conditions: (i) At least one component must be an NMS Stock; (ii) all the components must be effected with a product price contingency that either has been agreed to by all the respective counterparties or arranged for by a broker-dealer as principal or agent; (iii) the execution of one component must be contingent upon the execution of all other components at or near the same time; (iv) the specific relationship between the component orders (*e.g.,* the spread between the prices of the component orders) must be determined by the time the contingent order is placed; (v) the component orders must bear a derivative relationship to one another, represent different classes of shares of the same issuer, or involve the securities of participants in mergers or with intentions to merge that have been announced or cancelled; and (vi) the transaction must be fully hedged (without regard to any prior existing position) as a result of other components of the contingent trade. Consistent with the QCT Release and the ISE Proposal, OTP Holders must demonstrate that the transaction is fully hedged using reasonable risk-valuation methodologies. *See* QCT Release, *supra* note 9 [sic], at footnote 9.

[14] NYSE Arca will adopt policies and procedures to ensure that OTP Holders use the Qualified Contingent Cross Order properly. First, we will require OTP Holders to properly mark all Qualified Contingent Cross Orders as such. In addition, FINRA, on behalf of NYSE Arca, will implement an examination and surveillance program to assess OTP Holder compliance with the requirements applicable to Qualified Contingent Cross Orders, including the requirement that the stock leg of the transaction be executed at or near the same time as the options leg.

[15] While the QCC would not provide exposure for price improvement for the options leg of a stock-option order, the options leg must be executed at the NBBO or better. The Commission has previously approved crossing transactions with no opportunity for price improvement. *See e.g.,* ISE Rule 721(a) and Chicago Board Options Exchange ("CBOE") Rule 6.74A, Interpretations and Policies .08.

between the Exchange BBO, particularly in options that trade in increments greater than $0.01. In those cases, the Exchange proposes to permit an execution of the options component at a price that matches the Exchange BBO. Moreover, under the proposal, the Exchange would not permit the execution of a QCC at the same price as a Customer Order on the Consolidated Book. In such a case, the QCC will be rejected.[16]

Furthermore, under this proposal, the Exchange would only permit QCCs to be submitted electronically from off the Floor through the NYSE Arca System. In this regard, an OTP Holder located on the Floor of the Exchange would not be allowed to enter QCCs into the NYSE Arca System, or otherwise effect them in open outcry. In this way, our proposal provides for the same means to effect QCCs on the Exchange as that of the ISE. We plan to file a separate proposed rule change to address effecting QCCs in open outcry on the Floor of the Exchange.

To provide a mechanism for the Exchange to surveil for whether QCCs were entered from off of the Floor, the Exchange proposes to adopt Commentary .01 to Rule 6.90. This provision would require OTP Holders to maintain books and records demonstrating that each Qualified Contingent Cross Order was routed to the NYSE Arca System from off of the Floor. Any Qualified Contingent Cross Order that does not have a corresponding record required by this provision would be deemed to have been entered from on the Floor in violation of Rule 6.90.

The Exchange's proposal addresses the mechanics of executing the stock and options components of a net-price transaction. The Exchange believes that it is necessary that it provide OTP Holders and their customers with the same trading capabilities available on other exchanges with respect to QCCs, including the change proposed herein, which would permit OTP Holders to execute the options legs of their customers' large complex orders on the Exchange.

The Exchange also proposes a minor non-substantive correction to the numbering convention within NYSE Arca Options Rule 6.62.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act[17] in general, and furthers the objectives of Section 6(b)(5) of the Act,[18] in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rules are consistent with the protection of investors in that they are designed to prevent Trade-Throughs. In addition, the proposed rule change would promote a free and open market by permitting the Exchange to compete with ISE for these types of orders. In this regard, competition would result in benefits to the investing public, whereas a lack of competition would serve to limit the choices that the public has for execution of their options business.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, the proposed rule change would prevent the otherwise significant burden on competition that would arise if ISE were permitted to implement QCCs without a similar functionality being made available to market participants across all U.S. markets for listed options, including OTP Holders on the Exchange.

*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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[19] and Rule 19b-4(f)(6) thereunder.[20] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

At any time within 60 days of the filing of such 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–NYSEArca–2011–09 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–NYSEArca-2011–09. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for 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

[16] The Commission has previously approved the rejection of crossing transactions when there is a priority customer order on the book at the same price. *See e.g.,* ISE Rule 721(a); and CBOE Rule 6.74A, Interpretations and Policies .08.

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(5).

[19] 15 U.S.C. 78s(b)(3)(A)(iii).

[20] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived this requirement.

a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–NYSEArca-2011–09 and should be submitted on or before April 12, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

**Cathy H. Ahn,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64085; File No. SR–NYSEAmex–2011–14]**

## Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Adopting Rules Related to Qualified Contingent Cross Orders

March 17, 2011.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on March 14, 2011, NYSE Amex LLC (the "Exchange" or "NYSE Amex") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt rules related to Qualified Contingent Cross Orders ("QCCs"). The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of this filing is to adopt rules related to QCCs. The proposed rule change is based on an International Securities Exchange ("ISE") proposal recently approved by the Securities and Exchange Commission ("Commission").[4]

Background

The Exchange is currently a party to the Options Order Protection and Locked/Crossed Market Plan ("Distributive Linkage Plan"),[5] and has implemented Exchange rules in conjunction with that plan (the "Distributive Linkage Rules").[6] Similar to Regulation NMS under the Securities Exchange Act of 1934 ("Exchange Act or "Act"), the Distributive Linkage Plan requires, among other things, that the Exchange establish, maintain and enforce written policies and procedures that are reasonably designed to prevent "Trade-Throughs."[7] A Trade-Through is a transaction in an options series at a price that is inferior to the best price available in the market.[8]

The Distributive Linkage Plan replaced the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage ("Old Linkage Plan"), and the Distributive Linkage Rules replaced the then-existing NYSE Amex rules implementing the Old Linkage Plan (the "Old Linkage Rules"). The Old Linkage Plan and the Old Linkage Rules provided a limited Trade-Through exemption for "Block Trades," defined to be trades of 500 or more contracts with a premium value of at least $150,000.[9] However, as with Regulation NMS, the Distributive Linkage Plan does not provide a Block Trade exemption.

The ISE Proposal stated that the loss of the Block Trade exemption, among other things, adversely affects the ability of its members to effect large trades that are tied to stock,[10] and therefore proposed the QCC as a limited substitute for the Block Trade exemption. While our views with respect to the potential impact that the ISE Proposal may have on market structure remain unchanged,[11] we nonetheless are proposing to adopt rules related to QCCs based on those approved for ISE. In particular, we believe that such a rule change would permit the Exchange to remain competitive with ISE, and the other options exchanges that may also adopt rules for QCCs, by making QCCs available to ATP Holders and their customers through the Exchange.

Discussion

While Regulation NMS does not provide a block trade exemption from trade-through liability for stocks, the Commission, by order, has provided trade-through relief for "Qualified Contingent Trades" ("QCTs").[12] The QCT Release provides an exemption from trade-through liability in the equity market for multi-component, fully-hedged trades where one order is contingent on the execution of one or more additional orders. Building on this concept, and as approved for ISE, the Exchange proposes that when an NYSE Amex ATP Holder effects a QCT trade in a Regulation NMS Stock, that ATP Holder be permitted to cross the options leg of the trade on the Exchange immediately upon entry if the order is

[21] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 62523 (July 16, 2010), 75 FR 43211 (July 23, 2010) (SR–ISE–2010–73) ("ISE Proposal"). *See also* Securities Exchange Act Release No. 63955 (February 24, 2011), 76 FR 11533 (March 2, 2011) (SR–ISE–2010–73) ("ISE Approval"). The Exchange notes that letters commenting on the ISE Proposal were submitted on its behalf by the Exchange's parent company, NYSE Euronext. *See e.g.,* letters dated August 9, 2010 and October 21, 2010 from Janet L. McGinness, Senior Vice President—Legal & Corporate Secretary, Legal & Government Affairs, NYSE Euronext ("NYSE Euronext Comment Letters").

[5] *See* Securities Exchange Act Release No. 60405 (July 30, 2009), 74 FR 39362 (August 6, 2009) (File No. 4–546).

[6] *See* Securities Exchange Act Release No. 60526 (August 18, 2009), 74 FR 43185 (August 26, 2009) (SR–NYSEAmex–2009–19).

[7] Section 5(a) of the Distributive Linkage Plan.

[8] Section 2(21) of the Distributive Linkage Plan.

[9] Old Linkage Plan Sections 2(3) and 8(c)(i)(C); and former NYSE Amex Options Rule 991NY.

[10] *See* ISE Proposal at 43212.

[11] *See* NYSE Euronext Comment Letters, *supra* note 1[sic].

[12] *See* Securities Exchange Act Release No. 57620 (April 4, 2008), 73 FR 19271 (April 9, 2008) (the "QCT Release"). That release superseded a release initially granting the Qualified Contingent Trade exemption. *See* Securities Exchange Act Release No. 54389 (August 31, 2006), 71 FR 52829 (September 7, 2006).

for at least 1,000 contracts, is part of a QCT, is executed at a price at least equal to the national best bid or offer ("NBBO"), and there are no Customer Orders on the Exchange's Consolidated Book at the same price.[13]

The QCC would permit ATP Holders to provide their customers a net price for the entire trade, and then allow the ATP Holder to execute the options leg of the trade on NYSE Amex at a price at least equal to the NBBO while using the QCT exemption to effect the trade in the equities leg at a price necessary to achieve the net price.[14] Under the proposal, the Exchange would not permit the options component of a stock-option order to trade through the NBBO.[15] However, there are times when the quotation spread for the option on the Exchange would not permit an execution of the options component between the Exchange BBO, particularly in options that trade in increments greater than $0.01. In those cases, the Exchange proposes to permit an execution of the options component at a price that matches the Exchange BBO. Moreover, under the proposal, the Exchange would not permit the execution of a QCC at the same price as a Customer Order on the Consolidated Book. In such a case, the QCC will be rejected.[16]

Furthermore, under this proposal, the Exchange would only permit QCCs to be submitted electronically from off the Floor through the NYSE Amex System. In this regard, an ATP Holder located on the Floor of the Exchange would not be allowed to enter QCCs into the NYSE Amex System, or otherwise effect them in open outcry. In this way, our proposal provides for the same means to effect QCCs on the Exchange as that of the ISE. We plan to file a separate proposed rule change to address effecting QCCs in open outcry on the Floor of the Exchange.

To provide a mechanism for the Exchange to surveil for whether QCCs were entered from off of the Floor, the Exchange proposes to adopt Commentary .01 to Rule 985NY. This provision would require ATP Holders to maintain books and records demonstrating that each Qualified Contingent Cross Order was routed to the NYSE Amex System from off of the Floor. Any Qualified Contingent Cross Order that does not have a corresponding record required by this provision would be deemed to have been entered from on the Floor in violation of Rule 985NY.[17]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent withSection 6(b) of the Act[18] in general, and furthers the objectives of Section 6(b)(5) of the Act,[19] in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rules are consistent with the protection of investors in that they are designed to prevent Trade-Throughs. In addition, the proposed rule change would promote a free and open market by permitting the Exchange to compete with ISE for these types of orders. In this regard, competition would result in benefits to the investing public, whereas a lack of competition would serve to limit the choices that the public has for execution of their options business.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, the proposed rule change would prevent the otherwise significant burden on competition that would arise if ISE were permitted to implement QCCs without a similar functionality being made available to market participants across all U.S. markets for listed options, including ATP Holders on the Exchange.

*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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[20] and Rule 19b–4(f)(6) thereunder.[21] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A)

[13] We propose to define a QCC trade substantively identical to the Commission's definition in the QCT release as well as that in the ISE Proposal. A QCC trade must meet the following conditions: (i) At least one component must be an NMS Stock; (ii) all the components must be effected with a product price contingency that either has been agreed to by all the respective counterparties or arranged for by a broker-dealer as principal or agent; (iii) the execution of one component must be contingent upon the execution of all other components at or near the same time; (iv) the specific relationship between the component orders (*e.g.,* the spread between the prices of the component orders) must be determined by the time the contingent order is placed; (v) the component orders must bear a derivative relationship to one another, represent different classes of shares of the same issuer, or involve the securities of participants in mergers or with intentions to merge that have been announced or cancelled; and (vi) the transaction must be fully hedged (without regard to any prior existing position) as a result of other components of the contingent trade. Consistent with the QCT Release and the ISE Proposal, ATP Holders must demonstrate that the transaction is fully hedged using reasonable risk-valuation methodologies. *See* QCT Release, *supra* note 9[sic], at footnote 9.

[14] NYSE Amex will adopt policies and procedures to ensure that ATP Holders use the Qualified Contingent Cross Order properly. First, we will require ATP Holders to properly mark all Qualified Contingent Cross Orders as such. In addition, FINRA, on behalf of NYSE Amex, will implement an examination and surveillance program to assess ATP Holder compliance with the requirements applicable to Qualified Contingent Cross Orders, including the requirement that the stock leg of the transaction be executed at or near the same time as the options leg.

[15] While the QCC would not provide exposure for price improvement for the options leg of a stock-option order, the options leg must be executed at the NBBO or better. The Commission has previously approved crossing transactions with no opportunity for price improvement. *See e.g.,* ISE Rule 721(a) and Chicago Board Options Exchange ("CBOE") Rule 6.74A, Interpretations and Policies .08.

[16] The Commission has previously approved the rejection of crossing transactions when there is a priority customer order on the book at the same price. *See, e.g.,* ISE Rule 721(a); and CBOE Rule 6.74A, Interpretations and Policies .08.

[17] The Commission notes that the Exchange inadvertently omitted the following paragraph from its filing and requested that the Commission include it in this notice: The Exchange's proposal addresses the mechanics of executing the stock and options components of a net-price transaction. The Exchange believes that it is necessary that it provide ATP Holders and their customers with the same trading capabilities available on other exchanges with respect to QCCs, including the change proposed herein, which would permit ATP Holders to execute the options legs of their customers' large complex orders on the Exchange. *See* e-mail from Joseph P. Corcoran, Chief Counsel, Legal and Government Affairs, New York Stock Exchange LLC, to Jennifer L. Colihan, Special Counsel, Division of Trading and Markets, Commission, dated March 16, 2011.

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(5).

[20] 15 U.S.C. 78s(b)(3)(A)(iii).

[21] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived this requirement.

of the Act and Rule 19b–4(f)(6)(iii) thereunder.

At any time within 60 days of the filing of such 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–NYSEAmex–2011–14 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–NYSEAmex–2011–14. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549–1090 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *http://www.nyse.com.* 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–NYSEAmex–2011–14 and should be submitted on or before April 12, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–6709 Filed 3–21–11; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64089; File No. SR–NYSEAmex–2011–16]**

## Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Amex Equities Rule 36 To Permit Written Communications To Be Sent Electronically Between the Designated Market Maker Unit's Post Location on The Floor and the DMM Unit's Off-Floor Offices and to Persons Permitted To Provide Non-Trading Related Services to the DMM Under NYSE Amex Equities Rule 98

March 17, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on March 11, 2011, NYSE Amex LLC (the "Exchange" or "NYSE Amex") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by NYSE Amex. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend NYSE Amex Equities Rule 36 to permit written communications to be sent electronically between the Designated Market Maker ("DMM") unit's post location on the Floor and the DMM unit's off-Floor offices and to persons permitted to provide non-trading related services to the DMM under NYSE Amex Equities Rule 98. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to amend NYSE Amex Equities Rule 36 to (i) expand the persons with whom DMM unit personnel on the Exchange Floor may communicate to include persons providing "non-trading related services" (as defined in NYSE Amex Equities Rule 98) to the DMM Unit; and (ii) to expand the means of permissible communication to include written electronic communications between the DMM unit's[3] post location on the Floor and specified off-Floor personnel.[4] The Exchange believes that expanding the persons with whom and the means by which DMMs[5] on the Floor of the Exchange may communicate will both allow DMMs to operate more efficiently and enhance the audit trail associated with DMM communications, thus strengthening the regulatory program associated with reviewing such communications.

*Current NYSE Amex Equities Rule 36*

NYSE Amex Equities Rule 36 broadly provides that no member or member

[22] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] "DMM unit" means any member organization, aggregation unit within a member organization, or division or department within an integrated proprietary aggregation unit of a member organization that (i) has been approved by NYSE Regulation pursuant to NYSE Amex Equities Rule 98(c), (ii) is eligible for allocations under NYSE Amex Equities Rule 103B as a DMM unit in a security listed on the Exchange, and (iii) has met all registration and qualification requirements for DMM units assigned to such unit.

[4] The Exchange notes that its affiliate, New York Stock Exchange LLC ("NYSE"), has proposed parallel changes its rules. *See* SR–NYSE–2011–10.

[5] "DMM" means any individual qualified to act as a DMM on the Floor of the Exchange.

organization shall establish or maintain any telephonic or electronic communication between the Floor and any other location without Exchange approval. Rule 36.30 provides a limited exception for DMM units. Specifically, the Rule provides that:

> [w]ith the approval of the Exchange, a DMM unit may maintain a telephone line at its stock trading post location to the off-Floor offices of the DMM unit or the unit's clearing firm. Such telephone connection shall not be used for the purpose of transmitting to the Floor orders for the purchase or sale of securities, but may be used to enter options or futures hedging orders through the unit's off-Floor office or the unit's clearing firm, or through a member (on the floor) of an options or futures exchange as permitted under Rules 98—NYSE Amex Equities and 105—NYSE Amex Equities.

All DMM units currently have Exchange-approved telephone connections between the Trading Floor post locations and the off-Floor offices of the DMM unit. On behalf of NYSE Regulation, FINRA regularly examines DMM units for compliance with Rule 36.30, and in particular, whether the DMM unit has appropriate policies and procedures governing the use of such telephone lines and to confirm that the telephone lines only connect to the approved locations.

*Proposed Amendments to NYSE Amex Equities Rule 36*

The Exchange proposes to amend Supplementary Material .30 to update the rule to reflect how DMM units are permitted to operate pursuant to NYSE Amex Equities Rule 98. Specifically, Rule 98(e) permits a DMM unit to share non-trading related services with its member organization or approved person. Pursuant to Rule 98(e), when sharing such non-trading related services, the DMM unit and approved person must have written procedures and guidelines to protect non-public order information to ensure that such information is not used for any purpose other than to provide non-trading related services to the DMM unit.

The Exchange believes that because Rule 98(e) sets forth protections for non-public order information, Rule 36.30 should be amended to permit DMM units on the Trading Floor to maintain specified telephone and other permitted communication devices (as discussed more fully below) to persons providing non-trading related services permitted under Rule 98. This will enable DMM units to permit their Floor-based personnel to communicate directly with persons providing operational support services, such as a technology help desk that may be located within an approved person.

The Exchange further proposes to amend NYSE Amex Equities Rule 36 to add Supplementary Material .31 that would permit a DMM unit to install and maintain certain written electronic communication applications. Specifically, proposed Supplementary Material .31(a) would permit a DMM unit, with the approval of the Exchange and subject to the conditions set forth in Supplementary Material .31, to establish and maintain a wired or wireless device capable of sending and receiving written communications electronically through an Exchange-approved connection (a "Permitted Communications Device").[6]

Except as specified in the amendment to Supplementary Material .30, the proposed addition of Supplementary Material .31 would not alter in any way the universe of off-Floor individuals with whom Floor-based personnel may communicate or the content of such communications; rather, it would only expand the means by which such communications may be transmitted. Accordingly, under proposed Supplementary Material .31(b), DMM units would be permitted to connect Floor-based personnel via the Permitted Communications Device to persons with whom they are otherwise permitted to communicate pursuant to Rules 36.30 and 98, *i.e.,* certain personnel in the off-Floor offices of the DMM unit, the DMM unit's clearing operations, and persons who are permitted to provide non-trading related services to the DMM unit under Rule 98. Once connected, the on-Floor and off-Floor personnel would be permitted to use the Permitted Communications Device for two-way written electronic communications.

The Exchange further notes that nothing in proposed Supplementary Material .31 would alter the obligations of a DMM unit to meet existing requirements under Rule 98 to, among other things, protect non-public order information and maintain appropriate information barriers in accordance with Rule 98. Because DMM units would continue to be subject to Rule 98, while on the Floor, DMM unit personnel could not use the Permitted Communications Device to communicate with off-Floor personnel in violation of Rule 98. For example, DMM units will continue to be subject to provisions of Rule 98 governing restrictions on communications with off-Floor individuals or systems responsible for making trading decisions in related products.[7]

A DMM unit would be obligated to program its communications system so that a Permitted Communications Device would not operate in a manner that enables written electronic communications to or from any location or individual other than as described in the proposed Supplementary Material. Among other things, the DMM unit would be required to program its communications system to ensure that messages cannot be forwarded to individuals with whom Floor personnel are not permitted to communicate. As part of the approval process, DMM units would need to identify to the Exchange who would have access to the Permitted Communications Devices and the basis for why any proposed off-Floor persons are permitted to communicate with individuals located on the Trading Floor.

Under proposed Supplementary Material .31(c), a DMM unit's member organization would be required to maintain records of all written communications sent from or to the DMM unit's Floor-based employees via the Permitted Communications Device in accordance with NYSE Amex Equities Rule 440 and SEC Rule 17a–4(b)(4) and in such format as may be prescribed by the Exchange.

Under proposed Supplementary Material .31(d), a DMM unit's member organization would be required to establish policies and procedures reasonably designed to ensure that use of the Permitted Communications Device is consistent with all SEC rules and Exchange rules, policies and procedures. In particular, pursuant to NYSE Amex Equities Rule 342, DMM units would be required to implement appropriate procedures of supervision and control and to provide for the review of the written electronic communications sent to and from the DMM unit's post location on the Floor via the Permitted Communications Device. Among other things, the written procedures should address the regulatory requirements associated with the program, including what measures the DMM unit will follow to ensure that only those individuals permitted to communicate via the Permitted Communications Device have access to it.

The Exchange believes that allowing DMM units to use a Permitted

[6] Except as provided in Rule 36, no other type of communication application may be used by a DMM or DMM unit to communicate between the DMM unit's post location on the Floor and the off-Floor offices of the DMM unit and any other location, and the use of cell phones, Blackberrys, and similar devices by DMM's while on the Trading Floor would continue to be prohibited.

[7] *See, e.g.,* NYSE Amex Equities Rules 98(d)(2)(B)(iii) and (f)(1)(A)(ii).

Communications Device would provide an effective way for DMMs to communicate with their member organization and promote more efficient supervision, compliance, and operations. For example, a DMM unit could use a Permitted Communications Device to obtain permission from senior management to exceed risk limits to facilitate a block trade or otherwise meet an affirmative obligation, to more quickly correct a technological issue with the DMM unit's algorithms, to meet business continuity obligations by providing an additional means of communication in the event of a wide-ranging telephone outage or other Exchange system outage, and to confirm that a stock could be borrowed to cover a short position.

The Exchange further believes that the use of such written communications and the related retention requirements not only would enable the DMM unit to monitor communications to and from the Floor, but also would enable FINRA to enhance its regulatory program associated with reviewing such communications. In particular, FINRA would be able to review the e-mail system operating the connections between the Trading Floor and off-Floor locations and related written supervisory procedures. The regulatory program would be further strengthened because with the use of auditable written electronic communications, FINRA would also be able to review both the content of communications and the parties to such communications. The Exchange believes that the enhanced regulatory program associated with the more robust audit trail would benefit the markets by providing a better manner by which to review DMM compliance with Federal and Exchange rules.

Finally, the Exchange proposes a technical change to Rule 36.30 to conform Rule 36 to NYSE Amex Equities Rule 104, which does not include a requirement that DMM units annually certify their algorithms.[8] Because Rule 104 does not include a requirement that DMM units annually certify their algorithms, the Exchange proposes to amend Rule 36 to similarly delete the requirement for an annual certification.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and further the objectives of Section 6(b)(5) of the Act,[10] in particular, in that they are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change supports the objectives of the Act by permitting greater and more effective communication between DMMs and DMM unit's on the Floor and their upstairs offices, while at the same time providing for a more robust audit trail that would enable FINRA to enhance the regulatory program associated with reviewing DMM communications from the Trading Floor. The Exchange believes that these regulatory enhancements will benefit the market by protecting investors and the public interest.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[11] and Rule 19b–4(f)(6) thereunder.[12] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6)[13] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[14] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such 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–NYSEAmex–2011–16 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–NYSEAmex–2011–16. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the

[8] The Exchange's rules are based on NYSE rules, including the NYSE's New Market Model rule changes. *See* 59022 (Nov. 26, 2008), 73 FR 73683 (Dec. 3, 2008) (SR–NYSEALTR–2008–10). The NYSE included the relevant provision to Rule 36.30 in connection with the Hybrid Market changes to Rule 104, when the then specialist algorithm had an advance "look" at incoming orders. *See* Securities Exchange Act Release No. 53539 (March 22, 2006), 71 FR 16353 (March 31, 2006) (SR–NYSE–2004–05). In connection with the adoption of the New Market Model, the NYSE eliminated the algorithmic order-by-order look, which rendered the need for an annual certification moot and the NYSE deleted the requirement for an annual certification in Rule 104. *See* Securities Exchange Act Release No. 58845 (Oct. 24, 2008), 73 FR 64379 (Oct. 29. 2008) (SR–NYSE–2008–46).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A)(iii).

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6)(iii).

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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAmex–2011–16 and should be submitted on or before April 12, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–6707 Filed 3–21–11; 8:45 am]

**BILLING CODE 8011–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #12490 and #12491]**

### CALIFORNIA Disaster #CA–00165

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Notice.

**SUMMARY:** This is a notice of an Administrative declaration of a disaster for the State of CALIFORNIA dated 03/16/2011.

*Incident:* Garden Breeze Apartment Complex Fire.

*Incident Period:* 02/20/2011.

**DATES:** *Effective Date:* 03/16/2011.

*Physical Loan Application Deadline Date:* 05/16/2011.

*Economic Injury (EIDL) Loan Application Deadline Date:* 12/16/2011.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties

San Bernardino.

Contiguous Counties: California

Inyo, Kern, Los Angeles, Orange, Riverside.

Arizona

La Paz, Mohave.

Nevada

Clark.

The Interest Rates are:

| | Percent |
|---|---|
| *For Physical Damage:* | |
| Homeowners with Credit Available Elsewhere | 5.125 |
| Homeowners without Credit Available Elsewhere | 2.563 |
| Businesses with Credit Available Elsewhere | 6.000 |
| Businesses without Credit Available Elsewhere | 4.000 |
| Non-Profit Organizations with Credit Available Elsewhere | 3.250 |
| Non-Profit Organizations without Credit Available Elsewhere | 3.000 |
| *For Economic Injury:* | |
| Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere | 4.000 |
| Non-Profit Organizations without Credit Available Elsewhere | 3.000 |

The number assigned to this disaster for physical damage is 12490 5 and for economic injury is 12491 0.

The States which received an EIDL Declaration # are California, Arizona, Nevada.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: March 16, 2011.

**Karen G. Mills,**

*Administrator.*

[FR Doc. 2011–6671 Filed 3–21–11; 8:45 am]

**BILLING CODE 8025–01–P**

## DEPARTMENT OF STATE

**[Public Notice: 7380]**

### 60-Day Notice of Proposed Information Collection: Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division: Sports & Culture Evaluation Envoys Survey, OMB Control Number 1405–xxxx

**ACTION:** Notice of request for public comments.

**SUMMARY:** The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

- Title of Information Collection: Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division: Sports & Culture Evaluation Envoys Survey
- OMB Control Number: None
- Type of Request: New Collection
- Originating Office: Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division (ECA/P/V)
- Form Number: Survey numbers (SV–yyyy–####) will be generated as needed
- Respondents: Envoy participants of the Sports Envoys Program conducted by ECA from 2005 through 2009.
- Estimated Number of Respondents: 28 annually
- Estimated Number of Responses: 28 annually
- Average Hours per Response: 20 minutes
- Total Estimated Burden: 9 hours annually
- Frequency: On occasion
- Obligation to Respond: Voluntary

**DATES:** The Department will accept comments from the public up to 60 days from March 22, 2011.

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

- E-mail: *HaleMJ2@state.gov.*
- Mail (paper, disk, or CD–ROM submissions): ECA/P/V, SA–5, C2 Floor, Department of State, Washington, DC 20522–0505
- Fax: 202–632–6320
- Hand Delivery or Courier: ECA/P/V, SA–5, C2 Floor, Department of State, 2200 C Street, NW., Washington, DC 20037.

You must include the DS form number (if applicable), information collection title, and OMB control number in any correspondence.

[15] 17 CFR 200.30–3(a)(12).

**FOR FURTHER INFORMATION CONTACT:** Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed information collection and supporting documents, to Michelle Hale, ECA/P/V, SA–5, C2 Floor, Department of State, Washington, DC 20522–0582, who may be reached on 202–632–6312 or at *HaleMJ2@state.gov.*

**SUPPLEMENTARY INFORMATION:** We are soliciting public comments to permit the Department to:

• Evaluate whether the proposed information collection is necessary for the proper performance of our functions.

• Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.

• Enhance the quality, utility, and clarity of the information to be collected.

• Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

*Abstract of proposed collection*:

To meet OMB and Congressional reporting requirements, this request for a new information collection clearance will allow ECA/P/V as part of their larger Sports and Culture Evaluation to conduct a survey of the envoys who participated in the Sports Envoys Program. Collecting this data will help ECA/P/V assess and measure the program's effectiveness and impact, as well as provide valuable feedback on the program from these participants' perspective. The respondents will be envoys that participated in the Sports Envoys Program between the years of 2005 and 2009.

*Methodology*:

Evaluation data will be entirely collected through an electronic survey conducted via Zoomerang, an on-line surveying tool.

Dated: March 4, 2011.

**Julianne Paunescu,**

*Acting Director of the Office of Policy and Evaluation, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2011–6725 Filed 3–21–11; 8:45 am]

**BILLING CODE 4710–05–P**

## DEPARTMENT OF STATE

**[Public Notice: 7376]**

### 60-Day Notice of Proposed Information Collection: Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division: Sports & Culture Evaluation Kennedy Center Mentor Survey, OMB Control Number 1405–xxxx

**ACTION:** Notice of request for public comments.

**SUMMARY:** The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

• *Title of Information Collection:* Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division: Sports & Culture Evaluation Kennedy Center Mentor Survey.

• *OMB Control Number:* None.

• *Type of Request:* New Collection.

• *Originating Office:* Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division (ECA/P/V).

• *Form Number:* Survey numbers (SV–yyyy–####) will be generated as needed.

• *Respondents:* Kennedy Center (KC) Fellowship Mentoring Program participants conducted by ECA from 2005 through 2009.

• *Estimated Number of Respondents:* 30 annually.

• *Estimated Number of Responses:* 30 annually.

• *Average Hours Per Response:* 35 minutes.

• *Total Estimated Burden:* 18 hours annually.

• *Frequency:* On-occasion.

• *Obligation to Respond:* Voluntary.

**DATES:** The Department will accept comments from the public up to 60 days from March 22, 2011.

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

• *E-mail: HaleMJ2@state.gov.*

• *Mail (paper, disk, or CD–ROM submissions):* ECA/P/V, SA–5, C2 Floor, Department of State, Washington, DC 20522–0505.

• *Fax:* 202–632–6320.

• *Hand Delivery or Courier:* ECA/P/V, SA–5, C2 Floor, Department of State, 2200 C Street, NW., Washington, DC 20037.

You must include the DS form number (if applicable), information collection title, and OMB control number in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed information collection and supporting documents, to Michelle Hale, ECA/P/V, SA–5, C2 Floor, Department of State, Washington, DC 20522–0582, who may be reached on 202–632–6312 or at *HaleMJ2@state.gov.*

**SUPPLEMENTARY INFORMATION:**

We are soliciting public comments to permit the Department to:

• Evaluate whether the proposed information collection is necessary for the proper performance of our functions.

• Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.

• Enhance the quality, utility, and clarity of the information to be collected.

• Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

*Abstract of proposed collection:*

To meet OMB and Congressional reporting requirements, this request for a new information collection clearance will allow ECA/P/V as part of their larger Sports and Culture Evaluation to conduct a survey of exchange participants who participated in the KC Fellowship Mentoring Program. Collecting this data will help ECA/P/V assess and measure the program's effectiveness and impact, as well as provide valuable feedback on the program from the participants' perspective. The respondents will be exchange program participants that came on the Fellowship Mentoring program between the years of 2005 and 2009.

*Methodology:*

Evaluation data will be entirely collected through an electronic survey conducted via Zoomerang, an on-line surveying tool.

Dated: March 4, 2011.

**Julianne Paunescu,**

*Acting Director of the Office of Policy and Evaluation, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2011–6695 Filed 3–21–11; 8:45 am]

**BILLING CODE 4710–05–P**

## DEPARTMENT OF STATE

**[Public Notice: 7374]**

### 60-Day Notice of Proposed Information Collection: Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division: Sports & Culture Evaluation Sports Surveys, OMB Control Number 1405–xxxx

**ACTION:** Notice of request for public comments.

**SUMMARY:** The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division: Sports & Culture Evaluation Sports Surveys.
- *OMB Control Number:* None.
- *Type of Request:* New Collection.
- *Originating Office:* Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division (ECA/P/V)
- *Form Number:* Survey numbers (SV-yyyy-####) will be generated as needed.
- *Respondents:* Sports Visitors Program and the International Sports Grants Initiative participants conducted by ECA from 2008 through 2009.
- *Estimated Number of Respondents:* 235 annually (Sports Grants:140, Sports Visitors:95)
- *Estimated Number of Responses:* 235 annually (Sports Grants: 140, Sports Visitors: 95)
- *Average Hours Per Response:* 35 minutes (Sports Grants: 35, Sports Visitors: 35)
- *Total Estimated Burden:* 137 hours annually (Sports Grants: 82, Sports Visitors: 55)
- *Frequency:* On-occasion.
- *Obligation to Respond:* Voluntary.

**DATES:** The Department will accept comments from the public up to 60 days from March 22, 2011.

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

- *E-mail: HaleMJ2@state.gov*.
- *Mail (paper, disk, or CD–ROM submissions):* ECA/P/V, SA–5, C2 Floor, Department of State, Washington, DC 20522–0505.
- *Fax:* 202–632–6320.
- *Hand Delivery or Courier:* ECA/P/V, SA–5, C2 Floor, Department of State, 2200 C Street, NW., Washington, DC 20037.

You must include the DS form number (if applicable), information collection title, and OMB control number in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed information collection and supporting documents, to Michelle Hale, ECA/P/V, SA–5, C2 Floor, Department of State, Washington, DC 20522–0582, who may be reached on 202–632–6312 or at *HaleMJ2@state.gov.*

**SUPPLEMENTARY INFORMATION:**

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper performance of our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

*Abstract of proposed collection:*

To meet OMB and Congressional reporting requirements, this request for a new information collection clearance will allow ECA/P/V as part of their larger Sports and Culture Evaluation to conduct a survey of exchange participants who participated in either the Sports Visitors Program or the International Sports Grants Initiative. Collecting this data will help ECA/P/V assess and measure these programs' effectiveness and impact, as well as provide valuable feedback on the programs from the participants' perspective. The respondents will be exchange program participants that came on either the Sports Visitors Program or the International Sports Grants Initiative program between the years of 2008 and 2009.

*Methodology:*

Evaluation data will be entirely collected through an electronic survey conducted via Zoomerang, an on-line surveying tool.

Dated: March 4, 2011.

**Julianne Paunescu,**

*Acting Director of the Office of Policy and Evaluation, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2011–6698 Filed 3–21–11; 8:45 am]

**BILLING CODE 4710–05–P**

## DEPARTMENT OF STATE

**[Public Notice: 7375]**

### 60-Day Notice of Proposed Information Collection: Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division: Sports & Culture Evaluation Kennedy Center Visitors Survey, OMB Control Number 1405–xxxx

**ACTION:** Notice of request for public comments.

**SUMMARY:** The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division: Sports & Culture Evaluation Kennedy Center Visitors Survey.
- *OMB Control Number:* None.
- *Type of Request:* New Collection.
- *Originating Office:* Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division (ECA/P/V).
- *Form Number:* Survey numbers (SV–yyyy–####) will be generated as needed.
- *Respondents:* Kennedy Center (KC) Cultural Visitors Program participants conducted by ECA from 2005 through 2009.
- *Estimated Number of Respondents:* 65 annually.
- *Estimated Number of Responses:* 65 annually.
- *Average Hours Per Response:* 35 minutes.
- *Total Estimated Burden:* 38 hours annually.
- *Frequency:* On-occasion.
- *Obligation to Respond:* Voluntary.

**DATES:** The Department will accept comments from the public up to 60 days from March 22, 2011.

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

- *E-mail: HaleMJ2@state.gov*.
- *Mail (paper, disk, or CD–ROM submissions):* ECA/P/V, SA–5, C2 Floor, Department of State, Washington, DC 20522–0505.
- *Fax:* 202–632–6320.
- *Hand Delivery or Courier:* ECA/P/V, SA–5, C2 Floor, Department of State, 2200 C Street, NW., Washington, DC 20037.

You must include the DS form number (if applicable), information collection title, and OMB control number in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed information collection and supporting documents, to Michelle Hale, ECA/P/V, SA–5, C2 Floor, Department of State, Washington, DC 20522–0582, who may be reached on 202–632–6312 or at *HaleMJ2@state.gov*.

**SUPPLEMENTARY INFORMATION:** We are soliciting public comments to permit the Department to:

• Evaluate whether the proposed information collection is necessary for the proper performance of our functions.

• Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.

• Enhance the quality, utility, and clarity of the information to be collected.

• Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

**Abstract of Proposed Collection**

To meet OMB and Congressional reporting requirements, this request for a new information collection clearance will allow ECA/P/V as part of their larger Sports and Culture Evaluation to conduct a survey of exchange participants who participated in the KC Cultural Visitors Program. Collecting this data will help ECA/P/V assess and measure the program's effectiveness and impact, as well as provide valuable feedback on the program from the participants' perspective. The respondents will be exchange program participants that came on the Cultural Visitors program between the years of 2005 and 2009.

**Methodology**

Evaluation data will be entirely collected through an electronic survey conducted via Zoomerang, an on-line surveying tool.

Dated: March 4, 2011.

**Julianne Paunescu,**

*Acting Director of the Office of Policy and Evaluation, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2011–6696 Filed 3–21–11; 8:45 am]

**BILLING CODE 4710–05–P**

## DEPARTMENT OF STATE

**[Public Notice: 7377]**

### 60-Day Notice of Proposed Information Collection: Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division: Sports & Culture Evaluation IWP Survey, OMB Control Number 1405–xxxx

**ACTION:** Notice of request for public comments.

**SUMMARY:** The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

• *Title of Information Collection:* Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division: Sports & Culture Evaluation IWP Survey.

• *OMB Control Number:* None.

• *Type of Request:* New Collection.

• *Originating Office:* Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division (ECA/P/V)

• *Form Number:* Survey numbers (SV–yyyy–####) will be generated as needed.

• *Respondents:* International Writing Program (IWP) Fall Residency exchange program participants from 2005 through 2009.

• *Estimated Number of Respondents:* 110 annually.

• *Estimated Number of Responses:* 110 annually.

• *Average Hours per Response:* 35 minutes.

• *Total Estimated Burden:* 64 hours annually.

• *Frequency:* On-occasion.

• *Obligation to Respond:* Voluntary.

**DATES:** The Department will accept comments from the public up to 60 days from March 22, 2011.

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

• *E-mail: HaleMJ2@state.gov.*

• *Mail (paper, disk, or CD–ROM submissions):* ECA/P/V, SA–5, C2 Floor, Department of State, Washington, DC 20522–0505.

• *Fax:* 202–632–6320.

• *Hand Delivery or Courier:* ECA/P/V, SA–5, C2 Floor, Department of State, 2200 C Street, NW., Washington, DC 20037.

You must include the DS form number (if applicable), information collection title, and OMB control number in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed information collection and supporting documents, to Michelle Hale, ECA/P/V, SA–5, C2 Floor, Department of State, Washington, DC 20522–0582, who may be reached on 202–632–6312 or at *HaleMJ2@state.gov.*

**SUPPLEMENTARY INFORMATION:** We are soliciting public comments to permit the Department to:

• Evaluate whether the proposed information collection is necessary for the proper performance of our functions.

• Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.

• Enhance the quality, utility, and clarity of the information to be collected.

• Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

*Abstract of proposed collection:*

To meet OMB and Congressional reporting requirements, this request for a new information collection clearance will allow ECA/P/V as part of their larger Sports and Culture Evaluation to conduct a survey of exchange participants who participated in the IWP fall residency program. Collecting this data will help ECA/P/V assess and measure the program's effectiveness and impact, as well as provide valuable feedback on the program from the participants' perspective. The respondents will be exchange program participants that came on the IWP program between the years of 2005 and 2009.

*Methodology:*

Evaluation data will be entirely collected through an electronic survey conducted via Zoomerang, an on-line surveying tool.

Dated: March 4, 2011.

**Julianne Paunescu,**

*Acting Director of the Office of Policy and Evaluation, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2011–6693 Filed 3–21–11; 8:45 am]

**BILLING CODE 4710–05–P**

## DEPARTMENT OF STATE

**[Public Notice 7379]**

### 60-Day Notice of Proposed Information Collection: Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division: Sports & Culture Evaluation BTL Survey, OMB Control Number 1405–xxxx.

**ACTION:** Notice of request for public comments.

**SUMMARY:** The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division: Sports & Culture Evaluation BTL Survey.
- *OMB Control Number:* None.
- *Type of Request:* New Collection.
- *Originating Office:* Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division (ECA/P/V).
- *Form Number:* Survey numbers (SV–yyyy–####) will be generated as needed
- *Respondents:* Between the Lines (BTL) Program exchange participants from 2008 through 2009.
- *Estimated Number of Respondents:* 31 annually.
- *Estimated Number of Responses:* 31 annually.
- *Average Hours per Response:* 35 minutes.
- *Total Estimated Burden:* 18 hours annually.
- *Frequency:* On occasion.
- *Obligation to Respond:* Voluntary.

**DATES:** The Department will accept comments from the public up to 60 days from March 22, 2011.

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

- *E-mail: HaleMJ2@state.gov*.
- *Mail (paper, disk, or CD–ROM submissions):* ECA/P/V, SA–5, C2 Floor, Department of State, Washington, DC 20522–0505.
- *Fax:* 202–632–6320.
- *Hand Delivery or Courier:* ECA/P/V, SA–5, C2 Floor, Department of State, 2200 C Street, NW., Washington, DC 20037.

You must include the DS form number (if applicable), information collection title, and OMB control number in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed information collection and supporting documents, to Michelle Hale, ECA/P/V, SA–5, C2 Floor, Department of State, Washington, DC 20522–0582, who may be reached on 202–632–6312 or at *HaleMJ2@state.gov*.

**SUPPLEMENTARY INFORMATION:** We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper performance of our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

*Abstract of proposed collection:*

To meet OMB and Congressional reporting requirements, this request for a new information collection clearance will allow ECA/P/V as part of their larger Sports and Culture Evaluation to conduct a survey of exchange participants who participated in the BTL Program. Collecting this data will help ECA/P/V assess and measure the program's effectiveness and impact, as well as provide valuable feedback on the program from the participants' perspective. The respondents will be exchange participants that came on the BTL Program between the years of 2008 and 2009.

*Methodology:*

Evaluation data will be entirely collected through an electronic survey conducted via Zoomerang, an on-line surveying tool.

*Dated: March 4, 2011.*

**Julianne Paunescu,**

*Acting Director of the Office of Policy and Evaluation, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2011–6690 Filed 3–21–11; 8:45 am]

**BILLING CODE 4710–05–P**

## DEPARTMENT OF STATE

**[Public Notice: 7378]**

### 60–Day Notice of Proposed Information Collection: Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division: Sports & Culture Evaluation IVLP Survey, OMB Control Number 1405–xxxx

**ACTION:** Notice of request for public comments.

**SUMMARY:** The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division: Sports & Culture Evaluation IVLP Survey.
- *OMB Control Number:* None.
- *Type of Request:* New Collection.
- *Originating Office:* Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division (ECA/P/V).
- *Form Number:* Survey numbers (SV-yyyy–####) will be generated as needed.
- *Respondents:* International Visitor Leadership Program (IVLP) exchange program participants from selected cultural programs conducted by ECA from 2000 through 2009.
- *Estimated Number of Respondents:* 845 annually.
- *Estimated Number of Responses:* 845 annually.
- *Average Hours per Response:* 35 minutes.
- *Total Estimated Burden:* 493 hours annually.
- *Frequency:* On occasion.
- *Obligation to Respond:* Voluntary.

**DATES:** The Department will accept comments from the public up to 60 days from March 22, 2011.

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

- *E-mail: HaleMJ2@state.gov*.
- *Mail (paper, disk, or CD–ROM submissions):* ECA/P/V, SA–5, C2 Floor, Department of State, Washington, DC 20522–0505.
- *Fax:* 202–632–6320.
- *Hand Delivery or Courier:* ECA/P/V, SA–5, C2 Floor, Department of State, 2200 C Street, NW., Washington, DC 20037.

You must include the DS form number (if applicable), information collection title, and OMB control number in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed information collection and supporting documents, to Michelle Hale, ECA/P/V, SA–5, C2 Floor, Department of State, Washington, DC 20522–0582, who may be reached on 202–632–6312 or at *HaleMJ2@state.gov*.

**SUPPLEMENTARY INFORMATION:**

We are soliciting public comments to permit the Department to:

• Evaluate whether the proposed information collection is necessary for the proper performance of our functions.

• Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.

• Enhance the quality, utility, and clarity of the information to be collected.

• Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

**Abstract of Proposed Collection**

To meet OMB and Congressional reporting requirements, this request for a new information collection clearance will allow ECA/P/V as part of their larger Sports and Culture Evaluation to conduct a survey of exchange participants who participated in IVLP programs that focused on arts and culture. Collecting this data will help ECA/P/V assess and measure the program's effectiveness and impact, as well as provide valuable feedback on the program from the participants' perspective. The respondents will be exchange program participants that came on IVLP programs that focused on cultural themes between the years of 2000 and 2009.

**Methodology**

Evaluation data will be entirely collected through an electronic survey conducted via Zoomerang, an on-line surveying tool.

Dated: March 4, 2011.

**Julianne Paunescu,**

*Acting Director of the Office of Policy and Evaluation, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2011–6691 Filed 3–21–11; 8:45 am]

**BILLING CODE 4710–05–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

**[Docket No. FMCSA–2008–0224]**

### Parts and Accessories Necessary for Safe Operation; Exemption Renewal for Greyhound Lines, Inc.

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of renewal of exemption; request for comments.

**SUMMARY:** FMCSA announces its renewal of the exemption for Greyhound Lines, Inc. (Greyhound) regarding the placement of video event recorders at the top of the windshields on its buses. Greyhound will continue to use the video event recorders to increase safety through (1) identification and remediation of risky driving behaviors such as distracted driving and drowsiness; (2) enhanced monitoring of passenger behavior; and (3) enhanced collision review and analysis. The Agency believes that granting this exemption renewal will maintain a level of safety that is equivalent to, or greater than, the level of safety achieved without the exemption. However, the Agency requests comments on this issue, particularly from parties who believe the Greyhound exemption would not meet that standard.

**DATES:** This decision is effective March 21, 2011. Comments must be received on or before April 21, 2011.

**ADDRESSES:** You may submit comments bearing the Federal Docket Management System (FDMS) number FMCSA–2008–0224 by any of the following methods:

• *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail:* Docket Management Facility, U.S. Department of Transportation, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

• *Hand Delivery:* Ground Floor, Room W12–140, DOT Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m. e.t., Monday through Friday, except Federal holidays.

• *Fax:* 1–202–493–2251.

*Instructions:* Each submission must include the Agency name and docket number for this notice. For detailed instructions on submitting comments and additional information on the exemption process, see the "Public Participation" heading below. 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 for further information.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or to Room W12–140, DOT Building, New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgement that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

*Privacy Act:* Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement for the FDMS published in the **Federal Register** published on January 17, 2008 (73 FR 3316) or you may visit *http://edocket/access.gpo.gov/2008/pdf/E8-785.pdf.*

**FOR FURTHER INFORMATION CONTACT:** Mr. Luke W. Loy, Vehicle and Roadside Operations Division, Office of Bus and Truck Standards and Operations, MC–PSV, (202) 366–0676, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

**SUPPLEMENTARY INFORMATION:**

**Background**

Under 49 U.S.C. 31136(e) and 31315(b)(1), FMCSA may renew an exemption from the Federal Motor Carrier Safety Regulations for a two-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." Greyhound has requested a two-year extension for its exemption from 49 CFR 393.60(e). The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

**Exemption Decision**

This notice addresses Greyhound's requested renewal of an exemption in accordance with FMCSA procedures. FMCSA has evaluated the application for renewal on its merit and determined to extend the exemption for a two-year period. The exemption is extended

subject to the requirements that video event recorders installed in Greyhound vehicles must be mounted not more than 50 mm (2 inches) below the upper edge of the area swept by the windshield wipers, and located outside the driver's sight lines to the road and highway signs and signals. The exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) Greyhound fails to comply with the terms and conditions of the exemption; (2) commenters demonstrate persuasively, or the Agency learns, that the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b)(1).

**Basis for Renewing Exemption**

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two-year periods. On March 19, 2008, Greyhound applied for an exemption from 49 CFR 393.60(e)(1) to allow it to install video event recorders on some or all of its bus fleet—which totals approximately 1,650 buses. FMCSA published a notice of the application, and requested public comments, in the **Federal Register** on August 11, 2008 (73 FR 46704). On March 19, 2009, FMCSA published a notice of final disposition in the Federal Register granting the exemption (74 FR 11807).

FMCSA is not aware of any evidence showing that the installation of video event recorders on Greyhound's buses, in accordance with the conditions of the original exemption, has resulted in any degradation in safety. The Agency believes that extending the exemption for a period of two years will likely achieve a level of safety that is equivalent to, or greater than, the level of safety achieved without the exemption because: (1) The video event recorders will not obstruct drivers' views of the roadway, highway signs and surrounding traffic due to the fact that the panoramic windshields installed on Greyhound's buses encompass a large percentage of the front of buses and extend well above the driver's sight lines; (2) larger windshield wipers installed on Greyhound's buses increase the swept area well beyond that which is recommended by the Society of Automotive Engineers guidelines for commercial vehicles; and (3) placement of video event recorders just below the larger swept area of the wipers will be well outside of the driver's useable sight lines.

**Request for Comments**

FMCSA requests comments on the decision to renew Greyhound's exemption by April 21, 2011. The Agency will also review comments received at any time indicating that Greyhound's safety record has been adversely affected by the use of video event recorders.

Interested parties or organizations possessing information showing that Greyhound is not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b)(1), FMCSA will take immediate steps to revoke the Greyhound's exemption.

Issued on: March 16, 2011.

**Larry W. Minor,**

*Associate Administrator for Policy and Program Development.*

[FR Doc. 2011–6710 Filed 3–21–11; 8:45 am]

**BILLING CODE 4910–EX–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. NHTSA–2011–0022]**

### Reports, Forms, and Recordkeeping Requirements

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

**ACTION:** Request for extension of a currently approved collection of information.

**SUMMARY:** This notice solicits public comments on continuation of the requirements for the collection of information on safety standards. Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatement of previously approved collections.

This document describes a collection of information with respect to the phase-in of the upgraded requirements of Federal Motor Vehicle Safety Standard No. 214, "Side impact protection," for which NHTSA intends to seek OMB approval.

**DATES:** Comments must be received on or before May 23, 2011.

**ADDRESSES:** You may submit comments (identified by the DOT Docket ID Number above) by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility; M–30, U.S. Department of Transportation, West Building Ground Floor, Rm. W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590 between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Regardless of how you submit your comments, you should mention the docket number of this document. You may call the Docket at (202) 366–9324. Please identify the proposed collection of information for which a comment is provided, by referencing its OMB clearance number. It is requested, but not required, that two copies of the comment be provided.

Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or the street address listed above. Follow the online instructions for accessing the dockets.

**FOR FURTHER INFORMATION CONTACT:** Complete copies of each request for collection of information may be obtained at no charge from Mr. Chris Wiacek, U.S. Department of Transportation, NHTSA, Room W43–419, 1200 New Jersey Avenue, SE., Washington, DC 20590. Mr. Wiacek's telephone number is (202) 366–4801 and fax number is (202) 366–7002.

**SUPPLEMENTARY INFORMATION:** Under the Paperwork Reduction Act of 1995, before a proposed collection of information is submitted to OMB for

approval, Federal agencies must first publish a document in the **Federal Register** providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulation (at 5CFR 1320.8(d)), an agency must ask for public comment on the following:

(i) 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;

(ii) 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;

(iii) How to enhance the quality, utility, and clarity of the information to be collected;

(iv) How 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, *e.g.* permitting electronic submission of responses.

In compliance with these requirements, NHTSA asks for public comments on the following proposed collection of information:

*Title:* Side Impact Phase-in Reporting Requirements—Part 597.

*OMB Control Number:* 2127–0558.

*Requested Expiration Date of Approval:* Three years from the approval date.

*Type of Request:* Extension of a currently approved collection.

*Affected Public:* Businesses.

*Summary of the Collection of Information:* 49 U.S.C. 30111 authorizes the issuance of Federal motor vehicle safety standards (FMVSS) and regulations. The agency, in prescribing a FMVSS or regulation, considers available relevant motor vehicle safety data, and consults with other agencies, as it deems appropriate. Further, the statute mandates that in issuing any FMVSS or regulation, the agency considers whether the standard or regulation is "reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed," and whether such a standard will contribute to carrying out the purpose of the Act.

The Secretary is authorized to invoke such rules and regulations, as deemed necessary to carry out these requirements. Using this authority, on September 11, 2007, the agency published a final rule (73 FR 51908) upgrading the requirements of FMVSS No. 214, "Side impact protection." The final rule contained a collection of information because of the proposed phase-in reporting requirements. The collection of information requires manufacturers of passenger cars and of trucks, buses and multipurpose passenger vehicles with a gross vehicle weight rating (GVWR) of 4,536 kg (10,000 lb) or less, to annually submit a report, and maintain records related to the report, concerning the number of such vehicles that meet the vehicle-to-pole and moving deformable barrier (MDB) test requirements of FMVSS No. 214 during the three year phase-in of those requirements. In response to petitions for reconsideration the agency published a final rule (73 FR 32473) extending the phase-in of both the pole and MDB test requirements to four years. The purpose of the reporting and recordkeeping requirements is to assist the agency in determining whether a manufacturer of vehicles has complied with the requirements during the phase-in period.

This notice requests comments on the phase-in reporting requirements of FMVSS No. 214.

*Description of the Likely Respondents (Including Estimated Number and Proposed Frequency of Response to the Collection of Information):* NHTSA estimates that there are 21 manufacturers of passenger cars, multipurpose passenger vehicles, trucks, and buses with a GVWR of 4,536 kg (10,000 lb) or less. During the phase-in reporting period, this information collection requires a simple written report on the respondent's annual vehicle production and the percent of that production meeting the new vehicle-to-pole and vehicle to MDB test requirements of FMVSS No. 214. There is no burden to the general public.

*Estimate of the Total Annual Reporting and Recordkeeping Burden Resulting from the Collection of Information:* NHTSA estimates that the total annual reporting and recordkeeping burden resulting from the collection of information is 1,260 hours and estimates that the total annual cost burden, in U.S. dollars, will be $44,100. No additional resources will be expended by vehicle manufacturers to gather annual production information because they already compile this data for their own use.

*Comments are invited on:* Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

**Authority:** 44 U.S.C. 3506(c); delegation of authority at 49 CFR 1.50.

Issued on: March 17, 2011.

**Joseph S. Carra,**

*Acting Associate Administrator for Rulemaking.*

[FR Doc. 2011–6722 Filed 3–21–11; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[Docket No. EP 670 (Sub-No. 1)]**

### Notice of Rail Energy Transportation Advisory Committee Meeting

**AGENCY:** Surface Transportation Board, Department of Transportation.

**ACTION:** Notice of Rail Energy Transportation Advisory Committee meeting.

**SUMMARY:** Notice is hereby given of a meeting of the Rail Energy Transportation Advisory Committee (RETAC), pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, Public Law 92–463, as amended (5 U.S.C., App. 2).

**DATES:** The meeting will be held on Wednesday, April 6, 2011, at 9 a.m., E.D.T.

**ADDRESSES:** The meeting will be held in the Hearing Room on the first floor of the Surface Transportation Board's headquarters at Patriot's Plaza, 395 E Street, SW., Washington, DC 20423–0001.

**FOR FURTHER INFORMATION CONTACT:** Scott M. Zimmerman (202) 245–0386. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at: (800) 877–8339.

**SUPPLEMENTARY INFORMATION:** RETAC arose from a proceeding instituted by the Board, in *Establishment of a Rail Energy Transportation Advisory Committee,* EP 670. RETAC was formed to provide advice and guidance to the Board, and to serve as a forum for discussion of emerging issues regarding the transportation by rail of energy resources, particularly, but not necessarily limited to, coal, ethanol, and

other biofuels. The purpose of this meeting is to continue discussions regarding issues such as rail performance, capacity constraints, infrastructure planning and development, and effective coordination among suppliers, carriers, and users of energy resources. Potential agenda items include updates from the RETAC subcommittees, a briefing by the Energy Information Administration on its Annual Energy Outlook 2011, a Congressional legislative update and discussion, and a discussion of industry perspectives on the Environmental Protection Agency's proposed Transport Rule.

The meeting, which is open to the public, will be conducted pursuant to RETAC's charter and Board procedures. Further communications about this meeting may be announced through the Board's Web site at "*www.stb.dot.gov.*"

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

**Authority:** 49 U.S.C. 721, 49 U.S.C. 11101; 49 U.S.C. 11121.

Decided: March 16, 2011.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

**Jeffrey Herzig,**

*Clearance Clerk.*

[FR Doc. 2011–6522 Filed 3–21–11; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[Docket No. EP 290 (Sub–No. 5) (2011–2)]**

### Quarterly Rail Cost Adjustment Factor

**AGENCY:** Surface Transportation Board, DOT.

**ACTION:** Approval of rail cost adjustment factor.

**SUMMARY:** The Board has approved the second quarter 2011 Rail Cost Adjustment Factor (RCAF) and cost index filed by the Association of American Railroads. The second quarter 2011 RCAF (Unadjusted) is 1.176. The second quarter 2011 RCAF (Adjusted) is 0.523. The second quarter 2011 RCAF–5 is 0.495.

**DATES:** *Effective Date:* April 1, 2011.

**FOR FURTHER INFORMATION CONTACT:** Pedro Ramirez, (202) 245–0333. Federal Information Relay Service (FIRS) for the hearing impaired: (800) 877–8339.

**SUPPLEMENTARY INFORMATION:** Additional information is contained in the Board's decision, which is available on our Web site, *http://www.stb.dot.gov.* Copies of the decision may be purchased by contacting the Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0236. Assistance for the hearing impaired is available through FIRS at (800) 877–8339.

This action will not significantly affect either the quality of the human environment or energy conservation.

Decided: March 16, 2011.

By the Board, Chairman Elliott, Vice Chairman Nottingham, and Commissioner Mulvey.

**Jeffrey Herzig,**

*Clearance Clerk.*

[FR Doc. 2011–6632 Filed 3–21–11; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF THE TREASURY

### Community Development Financial Institutions Fund

### Proposed Collection; Comment Request

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork 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, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the Community Development Financial Institutions Fund (the "CDFI Fund"), the Department of the Treasury, is soliciting comments concerning data collection to support the Capacity Building Initiative.

The CDFI Fund intends to collect data on the CDFI industry's needs for different training and technical assistance topics. The CDFI Fund (and its provider firms) will assess the demand for capacity-building on specific topics, the type of content to be provided, and the target audience for specific training courses. Additionally, the CDFI Fund (and its provider firms) will conduct capacity assessments of program participants to further refine course content. Data collection will be used to evaluate the services being provided through the Capacity Building Initiative as well.

Data collection is expected to take place via online surveys, survey forms submitted electronically to the CDFI Fund, in-person and remote focus groups, phone questionnaires, or similar methods. In general, the CDFI Fund does not anticipate publishing the results of these data collections; however, should this information be useful the public, the CDFI Fund will ensure that no information of a sensitive or proprietary nature is released.

**DATES:** Written comments should be received on or before May 23, 2011 to be assured of consideration.

**ADDRESSES:** Direct all comments to Ruth Jaure, CDFI Program Manager, at the Community Development Financial Institutions Fund, U.S. Department of the Treasury, 601 13th Street, NW., Suite 200 South, Washington, DC 20005, by e-mail to *cdfihelp@cdfi.treas.gov* or by facsimile to (202) 622–7754. Please note that this is not a toll free number.

**FOR FURTHER INFORMATION CONTACT:** An overview of the Capacity Building Initiative may be found on the CDFI Fund's Web site at *http://www.cdfifund.gov.* Requests for additional information should be directed to Ruth Jaure, Program Manager, Community Development Financial Institutions Fund, U.S. Department of the Treasury, 601 13th Street, NW., Suite 200 South, Washington, DC 20005, or call (202) 622–9156. Please note that this is not a toll free number.

**SUPPLEMENTARY INFORMATION:**

*Title:* Capacity Building Initiative.

*Abstract:* Pursuant to the Community Development Banking and Financial Institutions Act of 1994 (the Act), as amended (12 U.S.C. 4701 *et seq.*), the CDFI Fund provides training and technical assistance to Community Development Financial Institutions (CDFIs) and similar entities in order to enhance their ability to make loans and investments and provide services for the benefit of designated investment areas and targeted populations. The information collected will be used to identify specific topics for training and technical assistance and develop course content which will be tailored to the needs and capacity levels of recipients. The requested information is necessary to support effective use of Federal resources.

*Current Actions:* New collection.

*Type of Review:* Regular review.

*Affected Public:* Certified CDFIs, entities seeking CDFI certification and similar entities.

*Estimated Number of Respondents:* 300.

*Estimated Annual Time per Respondent:* 30 hours.

*Estimated Total Annual Burden Hours:* 9,000 hours.

*Requests for Comments:* Comments submitted in response to this notice will be summarized and/or included in the

request for Office of Management and Budget approval. All comments will become a matter of public record and may be published on the CDFI Fund Web site at *http://www.cdfifund.gov.* Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the CDFI Fund, including whether the information shall have practical utility; (b) the accuracy of the CDFI Fund's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

**Authority:** 12 U.S.C. 1834a, 4703, 4703 note, 4713, 4717; 31 U.S.C. 321; 12 CFR part 1806.

Dated: March 8, 2011.

**Donna J. Gambrell,**

*Director, Community Development Financial Institutions Fund.*

[FR Doc. 2011–6610 Filed 3–21–11; 8:45 am]

**BILLING CODE 4810–70–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Prepaid Card Marketing Customer Survey, CS–10–251.

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, 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, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Prepaid Card Marketing Customer Survey, CS–10–251

**DATES:** Written comments should be received on or before May 23, 2011 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the form and instructions should be directed to Ralph Terry at (202) 622–8144, at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *Ralph.M.Terry@irs.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* Prepaid Card Marketing Customer Survey, CS–10–251.

*OMB Number:* 1545–2204.

Abstract In Fiscal Year (FY) 2009, the IRS initiated a formal effort to collaborate with financial institutions (banks) and Volunteer Income Tax Assistance (VITA) sites to encourage taxpayers who do not request direct-deposited refunds to opt for a prepaid card sponsored by the financial institutions. These taxpayers are likely to be unbanked and without means of freely cashing their refund check. The perceived benefits of the prepaid card program are (1) faster transfer of refunds to the taxpayer compared to the paper check mode, and (2) low-cost transactions to use the refund amount. To help improve participation, IRS is hoping to leverage the theory and principles of social marketing. Social marketing principles and practices apply marketing principles to social programs. This data will provide the IRS with practical information to be used to determine the value of offering the prepaid card to taxpayers in the future.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Individual and households.

*Estimated Number of Respondents:* 5734.

*Estimated Total Annual Burden Hours:* 542 hours.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: March 15, 2011.

**Yvette B. Lawrence,**

*IRS Reports Clearance Officer.*

[FR Doc. 2011–6602 Filed 3–21–11; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0623]**

### Agency Information Collection (VAAR Clause 852.236.91, Special Notes) Under OMB Review

**AGENCY:** Office of Management, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Office of Management (OM), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before April 21, 2011.

**ADDRESSES:** Submit written comments on the collection of information through *http://www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0623" in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 461–0966 or e-mail: *denise.mclamb@va.gov.* Please refer to "OMB Control No. 2900–0623."

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, OM invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of OM's functions, including whether the information will have practical utility; (2) the accuracy of OM's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

*Title:* Department of Veterans Affairs Acquisition Regulation (VAAR) Clause 852.236.91, Special Notes.

*OMB Control Number:* 2900–0623.

*Type of Review:* Extension of a currently approved collection.

*Abstract:* VAAR Clause 852.236.91 requires bidders to furnish information on previous experience, technical qualifications, financial resources, and facilities available to perform the work. The clause also requires contractors submitting a claim for price adjustment due to severe weather delay to provide climatologically data covering the period of the claim and covering the same period for the ten preceding years. VA uses the data collected to evaluate the bidder's qualification and responsibility, and to evaluate the contractor's claims for contract price adjustment due to weather-related delays.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on January 14, 2011, at page 2762.

*Affected Public:* Business or other for-profit and not-for-profit institutions.

*Estimated Annual Burden:*

a. Qualifications Data: 758 hours.

b. Weather Data: 20 hours.

*Estimated Average Burden Per Respondent:*

a. Qualifications Data: 30 min.

b. Weather Data: 1 hour.

*Frequency of Response:* On occasion.

*Estimated Number of Respondents:*

a. Qualifications Data: 1,516.

b. Weather Data: 20.

Dated: March 17, 2011.

By direction of the Secretary:

**Denise McLamb,**

*Program Analyst, Enterprise Records Service.*

[FR Doc. 2011–6675 Filed 3–21–11; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0059]**

### Agency Information Collection (Statement of Person Claiming To Have Stood in Relation of a Parent) Under OMB Review

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before April 21, 2011.

**ADDRESSES:** Submit written comments on the collection of information through *http://www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0059" in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 461–0966 or e-mail *denise.mclamb@va.gov*. Please refer to "OMB Control No. 2900–0059."

**SUPPLEMENTARY INFORMATION:**

*Title:* Statement of Person Claiming to Have Stood in Relation of a Parent, VA Form 21–524.

*OMB Control Number:* 2900–0059.

*Type of Review:* Extension of a currently approved collection.

*Abstract:* VA Form 21–524 is used to gather information from claimants seeking service-connected death benefits as persons who stood in the relationship of the natural parent of a deceased veteran. The information is used to determine the claimant's eligibility for such benefits.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on January 14, 2011, at page 2755.

*Affected Public:* Individuals or households.

*Estimated Annual Burden:* 800 hours.

*Estimated Average Burden Per Respondent:* 2 hours.

*Frequency of Response:* One–time.

*Estimated Number of Respondents:* 400.

Dated: March 17, 2011.

By direction of the Secretary.

**Denise McLamb,**

*Program Analyst, Enterprise Records Service.*

[FR Doc. 2011–6676 Filed 3–21–11; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0659]**

### Agency Information Collection (Statement in Support of Claim for Service Connection for PTSD) Under OMB Review

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before April 21, 2011.

**ADDRESSES:** Submit written comments on the collection of information through *http://www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0659" in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 461–0966 or e-mail *denise.mclamb@va.gov.* Please refer to "OMB Control No. 2900–0659."

**SUPPLEMENTARY INFORMATION:**

*Titles:*

a. Statement in Support of Claim for Service Connection for Post-Traumatic Stress Disorder (PTSD), VA Form 21–0781.

b. Statement in Support of Claim for Service Connection for Post-Traumatic Stress Disorder (PTSD) Secondary to Personal Assault, VA Form 21–0781a.

*OMB Control Number:* 2900–0659.

*Type of Review:* Extension of a currently approved collection.

*Abstract:* Veterans seeking compensation for post-traumatic stress disorder and need VA's assistance in obtaining evidence from military records and other sources to substantiate their claims of in-service stressors must complete VA Forms 21–0781 and 21–0791a. Veterans who did not serve in combat or were not a prisoner of war and are claiming compensation for post-traumatic stress disorder due to in-service stressors, he or she must provide credible supporting evidence that the claimed in-service stressor occurred.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on January 14, 2011, at pages 2755–2756.

*Affected Public:* Individuals or households.

*Estimated Annual Burden:*

a. Statement in Support of Claim for Service Connection for Post-Traumatic Stress Disorder (PTSD), VA Form 21–0781—16,800 hours.

b. Statement in Support of Claim for Service Connection for Post-Traumatic Stress Disorder (PTSD) Secondary to Personal Assault, VA Form 21–0781a—980 hours.

*Estimated Average Burden Per Respondent:*

a. Statement in Support of Claim for Service Connection for Post-Traumatic Stress Disorder (PTSD), VA Form 21–0781—70 minutes.

b. Statement in Support of Claim for Service Connection for Post-Traumatic Stress Disorder (PTSD) Secondary to Personal Assault, VA Form 21–0781a—70 minutes.

*Frequency of Response:* On occasion.

*Estimated Number of Respondents:*

a. Statement in Support of Claim for Service Connection for Post-Traumatic Stress Disorder (PTSD), VA Form 21–0781—14,400.

b. Statement in Support of Claim for Service Connection for Post-Traumatic Stress Disorder (PTSD) Secondary to Personal Assault, VA Form 21–0781a—840.

Dated: March 17, 2011.

By direction of the Secretary.

**Denise McLamb,**

*Program Analyst, Enterprise Records Service.*

[FR Doc. 2011–6677 Filed 3–21–11; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0393]**

## Agency Information Collection (VAAR Part 813) Under OMB Review

**AGENCY:** Office of Management, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Office of Management (OM), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before April 21, 2011.

**ADDRESSES:** Submit written comments on the collection of information through *http://www.Regulations.gov*; or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0393" in any correspondence

**FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT:** Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 461–0966 or e-mail: *denise.mclamb@va.gov*. Please refer to "OMB Control No. 2900–0393."

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, OM invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of OM's functions, including whether the information will have practical utility; (2) the accuracy of OM's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

*Title:* Department of Veterans Affairs Acquisition Regulation (VAAR) Part 813.

*OMB Control Number:* 2900–0393.

*Type of Review:* Extension of a currently approved collection.

*Abstract:* VA collects acquisition information from firms and individuals who wish to sell supplies, services, and construction or who wish to establish blanket purchase agreements (BPA) or other contractually related agreements with VA. VA uses the information collected to determine to whom to award contracts or with whom to enter into BPAs or other contractually related agreements.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on January 14, 2011, at pages 2758–2759.

*Affected Public:* Business or other for-profit, and Not-for-profit institutions.

*Estimated Annual Burden:* 20,845 hours.

*Estimated Average Burden Per Respondent:* 1 hour.

*Frequency of Response:* On occasion.

*Estimated Number of Respondents:* 20,845.

Dated: March 17, 2011.

By direction of the Secretary.

**Denise McLamb,**

*Program Analyst, Enterprise Records Service.*

[FR Doc. 2011–6679 Filed 3–21–11; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0418]**

### Agency Information Collection (VAAR Sections 809.106–1, 809.504(d), and Clause 852.209–70) Under OMB Review

**AGENCY:** Office of Management, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Office of Management (OM), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before April 21, 2011.

**ADDRESSES:** Submit written comments on the collection of information through *http://www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0418" in any correspondence.

**FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT:** Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 461–0966 or e-mail: *denise.mclamb@va.gov.* Please refer to "OMB Control No. 2900–0418."

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, OM invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of OM's functions, including whether the information will have practical utility; (2) the accuracy of OM's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

*Title:* Department of Veterans Affairs Acquisition Regulation (VAAR) Sections 809.106–1, 809.504(d), and Clause 852.209–70.

*OMB Control Number:* 2900–0418.

*Type of Review:* Extension of a currently approved.

*Abstract:*

a. VAAR section 809.106–1 requires VA to contact a firm being considered for a contract award for bakery, dairy, or ice cream products or for laundry or dry cleaning services whether or not the firm's facility has recently been inspected by another Federal agency and, if so, which agency. The information is used to determine whether a separate inspection of the facility should be conducted by VA prior to award contract.

b. VAAR section 809.504(d) and Clause 852.209–70 requires VA to determine whether or not to award a contract to a firm that might involve or result in a conflict of interest. VA uses the information to determine whether additional contract terms and conditions are necessary to mitigate the conflict.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on January 14, 2011, at page 2759.

*Affected Public:* Business or other for-profit and Not-for-profit institutions.

*Estimated Annual Burden:*

a. VAAR section 809.106–1–30 hours.

b. VAAR section 809.504(d)–500 hours.

c. and VAAR clause 852.209–7–500 hours.

*Estimated Average Burden Per Respondent:*

a. VAAR section 809.106–1–3 minutes.

b. VAAR section 809.504(d)–30 minutes

c. Clause 852.209–7–30 minutes.

*Frequency of Response:* On occasion.

*Estimated Number of Respondents:*

a. VAAR section 809.106–1–600.

b. VAAR section 809.504(d)–500.

c. Clause 852.209–7–500.

Dated: March 17, 2011.

By direction of the Secretary.

**Denise McLamb,**

*Program Analyst, Enterprise Records Service.*

[FR Doc. 2011–6680 Filed 3–21–11; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0422]**

### Agency Information Collection (VAAR Clauses 852.236–72, 852.236–82, 852.236–83, 852.236–84 and 852.236–88) Under OMB Review

**AGENCY:** Office of Management, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501—3521), this notice announces that the Office of Management (OM), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before April 21, 2011.

**ADDRESSES:** Submit written comments on the collection of information through *http://www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0422" in any correspondence

**FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT:** Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 461–0966 or e-mail: *denise.mclamb@va.gov.* Please refer to "OMB Control No. 2900–0422."

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, OM invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of OM's functions, including whether the information will have practical utility; (2) the accuracy of OM's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the

collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

*Titles:*

a. Department of Veterans Affairs Acquisition Regulation (VAAR) Clause 852.236–72, Performance of Work by the Contractor.

b. Department of Veterans Affairs Acquisition Regulation (VAAR) Alternate I to Clause 852.236–80, Subcontracts and Work Coordination.

c. Department of Veterans Affairs Acquisition Regulation (VAAR) Clause 852.236–82, Payments Under Fixed-Price Construction Contracts (without NAS), including Alternate 1.

d. Department of Veterans Affairs Acquisition Regulation (VAAR) Clause 852.236–83, Payments Under Fixed-Price Construction Contracts (with NAS), including Alternate 1.

e. Department of Veterans Affairs Acquisition Regulation (VAAR) Clause 852.236–84, Schedule of Work Progress.

f. Department of Veterans Affairs Acquisition Regulation (VAAR) Clause 852.236–88, Contract Changes, Supplements FAR Clause 52.243–4, Changes.

*OMB Control Number:* 2900–0422.

*Type of Review:* Extension of a currently approved collection.

*Abstract:* The information contained Department of Veterans Acquisition Regulation (VAAR) Clauses 852.236–72, Alternate I to 852.236–80, 852.236–82, 852.236–83, 852.236–84, and 852.236–88 is necessary for VA to administer construction contracts, and to carry out its responsibility to construct, maintain and repair real property for the Department.

a. VAAR Clause 852.236–72, Performance of Work by the Contractor, requires contractors awarded a construction contract containing Federal Acquisition Regulation (FAR) clause 52.236–1, to submit a statement designating the branch or branches of contract work to be performed by the contractor's own forces. The VAAR clause implements the FAR clause by requiring the contractor to provide information to the contracting officer on how the contractor intends to fulfill this contractual obligation. The contracting officer uses this information to ensure that the contractor complies with the contract requirements.

b. Alternate I to Clause 852.236–80, Work Coordination, require construction contractors, on contracts involving complex mechanical-electrical work, to furnish coordination drawings showing the manner in which utility lines will fit into available spaces and relate to each other and to the existing building elements. The information is used by the contracting officer and VA engineer assigned to the project to resolve any problems relating to the installation of utilities on construction contract.

c. VAAR Clause 852.236–82, Payments Under Fixed-Price Construction Contracts (without NAS), requires construction contractors to submit a schedule of costs for work to be performed under the contract. If the contract includes guarantee period services, Alternate I requires contractor to submit information on the total and itemized costs of the guarantee period services and to submit a performance plan/program. The information is needed to allow the contracting officer to determine the correct amount to pay the contractor as work progresses and to properly proportion the amount paid for guarantee period services.

d. VAAR Clause 852.236–83, Payments Under Fixed-Price Construction Contracts (with NAS), requires construction contractors to submit a schedule of costs for work to be performed under the contract. If the contract includes guarantee period services, Alternate I requires contractor to submit information on the total and itemized costs of the guarantee period services and to submit a performance plan/program. The information is needed to allow the contracting officer to determine the correct amount to pay the contractor as work progresses and to properly proportion the amount paid for guarantee period services. The difference between this clause and the one above 852.236–82 is that this clause requires the contractor to use a computerized Network Analysis System (NAS) to prepare the cost estimate.

e. VAAR Clause 852.236–84, Schedule of Work Progress, requires construction contractors, on contracts that do not require the use of a NAS, to submit a progress schedule. The information is used by the contracting officer to track the contractor's progress under the contract and to determine whether or not the contractor is making satisfactory progress.

f. VAAR Clause 852.236–88, Contract Changes, Supplements FAR Clause 52.243–4, Changes. FAR Clause 52.243–4 authorizes the contracting officer to order changes to a construction contract but does not specifically require the contractor to submit cost proposals for those changes. VAAR Clause 852.236–88 requires contractors to submit cost proposal for changes ordered by the contracting officer or for changes proposed by the contractor. This information is needed to allow the contracting officer and the contractor to reach a mutually acceptable agreement on how much to pay the contractor for the proposed changes to the contract. It is also used by the contracting officer to determine whether or not to authorize the proposed changes or whether or not additional or alternate cost proposals for changes are needed.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on January 14, 2011, at pages 2759–2761.

*Affected Public:* Business or other for-profit and Not-for-profit institutions.

*Estimated Annual Burden:*

a. VAAR Clause 852.236–72, Performance of Work by the Contractor—36 hours.

b. VAAR Alternate I to Clause 852.236–80, Subcontracts and Work Coordination—1,190 hours.

c. VAAR Clause 852.236–82, Payments Under Fixed-Price Construction Contracts (without NAS), including Alternate 1—1,397 hours.

d. VAAR Clause 852.236–83, Payments Under Fixed-Price Construction Contracts (with NAS), including Alternate 1—59 hours.

e. VAAR Clause 852.236–84, Schedule of Work Progress—2,095 hours.

f. VAAR Clause 852.236–88, Contract Changes, Supplements FAR Clause 52.243–4, Changes—807 hours.

*Estimated Average Burden Per Respondent:*

a. VAAR Clause 852.236–72, Performance of Work by the Contractor—1 hour.

b. VAAR Alternate I to Clause 852.236–80, Subcontracts and Work Coordination—10 hours.

c. VAAR Clause 852.236–82, Payments Under Fixed-Price Construction Contracts (without NAS), including Alternate 1—1 hour.

d. VAAR Clause 852.236–83, Payments Under Fixed-Price Construction Contracts (with NAS), including Alternate 1—30 minutes.

e. VAAR Clause 852.236–84, Schedule of Work Progress—1 hour.

f. VAAR Clause 852.236–88, Contract Changes, Supplements FAR Clause 52.243–4, Changes—3 hours.

*Frequency of Response:* On occasion.

*Estimated Number of Respondents:*

a. VAAR Clause 852.236–72, Performance of Work by the Contractor—36.

b. VAAR Alternate I to Clause 852.236–80, Subcontracts and Work Coordination—119.

c. Department of Veterans Affairs Acquisition Regulation (VAAR) Clause 852.236–82, Payments Under Fixed-Price Construction Contracts (without NAS), including Alternate 1—1,397.

d. VAAR Clause 852.236–83, Payments Under Fixed-Price Construction Contracts (with NAS), including Alternate 1—119.

e. VAAR Clause 852.236–84, Schedule of Work Progress—1,397.

f. VAAR Clause 852.236–88, Contract Changes, Supplements FAR Clause 52.243–4, Changes—269.

Dated: March 17, 2011.

By direction of the Secretary.

**Denise McLamb,**

*Program Analyst, Enterprise Records Service.*

[FR Doc. 2011–6682 Filed 3–21–11; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0590]**

## Agency Information Collection (Department of Veterans Affairs Acquisition Regulations Clause 852.237–7, Indemnification and Medical Liability Insurance) Under OMB Review

**AGENCY:** Office of Management, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Office of Management (OM), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before April 21, 2011.

**ADDRESSES:** Submit written comments on the collection of information through *http://www.Regulations.gov*; or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0590" in any correspondence

**FOR FURTHER INFORMATION CONTACT:** Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 461–0966 or e-mail: *denise.mclamb@va.gov*. Please refer to "OMB Control No. 2900–0590."

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, OM invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of OM's functions, including whether the information will have practical utility; (2) the accuracy of OM's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

*Titles:*

a. Veterans Affairs Acquisition Regulation Clause 852.237–7, Indemnification and Medical Liability Insurance.

b. Veterans Affairs Acquisition Regulation Clause 852.228–71 (formerly 852.237.71), Indemnification and Insurance.

c. Veterans Affairs Acquisition Regulation Clause 852.207–70, Report of Employment Under Commercial Activities.

*OMB Control Number:* 2900–0590.

*Type of Review:* Extension of a currently approved collection.

*Abstracts:*

a. VA Acquisition Regulation Clause 852.237–7 is used in solicitations and contracts for the acquisition of non-personal health care services. It requires the bidder/offeror prior to contract award to furnish evidence of insurability of the offeror and/or all healthcare providers who will perform under the contract. The information provided is used to ensure that VA will not be held liable for any negligent acts of the contractor or it employees and that VA and VA beneficiaries are protected by adequate insurance coverage.

b. Clause 852.228–71 (formerly 852.237.71) is used in solicitations for vehicle or aircraft services. It requires the bidder/offeror prior to contract award to furnish evidence that the firm possesses the types and amounts of insurance required by the solicitation. The information is necessary to ensure that VA beneficiaries and the public are protected by adequate insurance coverage.

c. Clause 852.207–70 is used in solicitations for commercial items and services where the work is currently being performed by VA employees and where those employees might be displaced as a result of an award to a commercial firm. The clause requires the contractor to report the names of the affected Federal employees offered employment opening and the names of employees who applied for but not offered employment and the reasons for withholding offers to those employees. The information collected is used by contracting officers to monitor and ensure compliance by the contractor under the requirements of Federal Acquisition Regulation Clause 52.207–3, Right of First Refusal of Employment.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on January 14, 2011, at pages 2761–2762.

*Affected Public:* Business or other for-profit; Individuals and households; Not-for-profit institutions, and State, Local or Tribal Government.

*Estimated Annual Burden:*

a. Veterans Affairs Acquisition Regulation Clause 852.237–7, Indemnification and Medical Liability Insurance—750 hours

b. Veterans Affairs Acquisition Regulation Clause 852.228–71 (formerly 852.237.71), Indemnification and Insurance—250 hours.

c. Veterans Affairs Acquisition Regulation Clause 852.207–70, Report of Employment under Commercial Activities—15 hours.

*Estimated Average Burden Per Respondent:*

a. Veterans Affairs Acquisition Regulation Clause 852.237–7, Indemnification and Medical Liability Insurance—30 minutes.

b. Veterans Affairs Acquisition Regulation Clause 852.228–71 (formerly 852.237.71), Indemnification and Insurance—30 minutes.

c. Veterans Affairs Acquisition Regulation Clause 852.207–70, Report of Employment under Commercial Activities—30 minutes.

*Frequency of Response:* On occasion.

*Estimated Number of Respondents:*

a. Veterans Affairs Acquisition Regulation Clause 852.237–7, Indemnification and Medical Liability Insurance—1,500.

b. Veterans Affairs Acquisition Regulation Clause 852.228–71 (formerly

852.237.71), Indemnification and Insurance—500.

c. Veterans Affairs Acquisition Regulation Clause 852.207–70, Report of Employment Under Commercial Activities—30.

Dated: March 17, 2011.

By direction of the Secretary.

**Denise McLamb,**

*Program Analyst, Enterprise Records Service.*

[FR Doc. 2011–6683 Filed 3–21–11; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0622]**

## Agency Information Collection (VAAR Clause 852.236.89, Buy American Act) Under OMB Review

**AGENCY:** Office of Management, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Office of Management (OM), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before April 21, 2011.

**ADDRESSES:** Submit written comments on the collection of information through *http://www.Regulations.gov*; or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0622" in any correspondence

**FOR FURTHER INFORMATION CONTACT:** Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail: *denise.mclamb@va.gov*. Please refer to "OMB Control No. 2900–0622."

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501—3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, OM invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of OM's functions, including whether the information will have practical utility; (2) the accuracy of OM's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

*Title:* Department of Veterans Affairs Acquisition Regulation (VAAR) Clause 852.236–89, Buy American Act.

*OMB Control Number:* 2900–0622.

*Type of Review:* Extension of a currently approved collection.

*Abstract:* The Buy American Act requires that only domestic construction material shall be used to perform domestic Federal contracts for construction, with certain exceptions. Despite the allowable exceptions, it is VA policy not to accept foreign construction material. VAAR clause 852.236–89 advises bidders of these provisions and requires bidders who choose to submit a bid that includes foreign construction material to identify and list the price of such material. VA uses the information to determine whether to accept or not accept a bid that includes foreign construction material.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on January 14, 2011, at pages 2762–2763.

*Affected Public:* Business or other for-profit, and Not-for-profit institutions.

*Estimated Annual Burden:* 20 hours.

*Estimated Average Burden Per Respondent:* 30 min.

*Frequency of Response:* On occasion.

*Estimated Number of Respondents:* 40.

Dated: March 17, 2011.

By direction of the Secretary.

**Denise McLamb,**

*Program Analyst, Enterprise Records Service.*

[FR Doc. 2011–6684 Filed 3–21–11; 8:45 am]

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# FEDERAL REGISTER

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Part II

## Department of the Interior

50 CFR Part 17
Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Pacific Coast Population of the Western Snowy Plover; Proposed Rule

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**[Docket No. FWS–R8–ES–2010–0070; MO 92210–0–0009]**

**RIN 1018–AX10**

## Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Pacific Coast Population of the Western Snowy Plover

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

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to revise the designated critical habitat for the Pacific Coast population of the Western Snowy Plover (Pacific Coast WSP) (*Charadrius alexandrinus nivosus*) under the Endangered Species Act of 1973, as amended (Act). The areas identified in this proposed rule constitute a revision of the areas designated as critical habitat for the Pacific Coast WSP, published in the **Federal Register** on September 29, 2005. In the final rule, we designated a total of 12,145 acres (ac) (4,915 hectares (ha)) of critical habitat range-wide in 32 units in Washington, Oregon, and California. We are now proposing to revise the existing critical habitat to a total of 68 units totaling approximately 28,261 ac (11,436 ha). The area breakdown by State is as follows: Washington: 6,265 ac (2,497 ha) in 4 units; Oregon: 5,219 ac (2,112 ha) in 13 units; and California: 16,777 ac (6,789 ha) in 51 units.

**DATES:** We will consider comments from all interested parties until May 23, 2011. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by May 6, 2011.

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

(1) *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments to Docket No. FWS–R8–ES–2010–0070.

(2) *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–R8–ES–2010–0070; Division of Policy and Directives Management; U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Suite 222, Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (*see* Public Comments section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Jim Watkins, U.S. Fish and Wildlife Service, Arcata Fish and Wildlife Office, 1655 Heindon Road, Arcata, CA 95521; telephone (707) 822–7201; facsimile (707) 822–8411. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at (800) 877–8339.

**SUPPLEMENTARY INFORMATION:**

### Public Comments

We intend that any final action resulting from this proposed revised critical habitat rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from governmental agencies, the scientific community, industry, or other interested parties concerning this proposed revised rule. We particularly seek comments concerning:

(1) The reasons why we should or should not revise the designation of "critical habitat" under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(2) Specific information on:

(a) Areas that provide habitat for the Pacific Coast WSP that we did not discuss in this proposed revised critical habitat rule,

(b) Areas within the geographical area occupied by the species at the time of listing that contain elements of the physical and biological features essential to the conservation of the species which may require special management considerations or protection and that we should include in the designation, and reason(s) why (*see Physical and Biological Features* section).

(3) Specific information on our proposed designation of back-dune systems and other habitats in an attempt to offset the anticipated effects of sea-level rise caused by a warming trend associated with climate change (*see Critical Habitat Units* section).

(4) Specific information on the Pacific Coast WSP, habitat conditions, and the presence of physical and biological features essential to the conservation of the species at any of the critical habitat units proposed in this revised rule (*see Critical Habitat Units* section and previous rules (64 FR 68508, December 7, 1999; 70 FR 56970, September 29, 2005)).

(5) Comments or information that may assist us in identifying or clarifying the physical and biological features essential to the conservation of the species.

(6) How the proposed revised critical habitat boundaries could be refined to more closely circumscribe the areas identified as containing the features essential to the species' conservation.

(7) How we mapped the water's edge and whether any alternative methods could be used to better determine the critical habitat boundaries.

(8) Any probable economic, national-security, or other impacts of designating particular areas as critical habitat, and, in particular, any impacts on small entities (*e.g.,* small businesses or small governments), and the benefits of including or excluding areas that exhibit these impacts.

(9) Whether any specific areas being proposed as revised critical habitat should be excluded under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any particular area outweigh the benefits of including that area under section 4(b)(2) of the Act (*see* Exclusions section for further discussion).

(10) Any information regarding the areas exempted from this proposed revised rule (*see* Exemptions section for exempted units and further discussion).

(11) Information on any quantifiable economic costs or benefits of the proposed revised designation of critical habitat.

(12) Information on Tribal lands within the proposed revised designation.

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

Our final determination concerning critical habitat for the Pacific Coast WSP will take into consideration all written comments we receive during the comment period, including comments we have requested from peer reviewers, comments we receive during a public hearing should we receive a request for one, and any additional information we receive during the 60-day comment period. Our final determination will also consider all written comments and any additional information we receive during the comment period for the draft economic analysis. All comments will be included in the public record for this rulemaking. On the basis of peer reviewer and public comments, we may, during the development of our final determination, find that areas included

in this proposal do not meet the definition of critical habitat, that some modifications to the described boundaries are appropriate, or that some areas may be excluded from the final determination under section 4(b)(2) of the Act based on Secretarial discretion.

You may submit your comments and materials concerning this proposed revised rule by one of the methods listed in the **ADDRESSES** section. Please include sufficient information with your comment to allow us to verify any scientific or commercial data you submit. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

We will post your entire comment—including your personal identifying information—on *http://www.regulations.gov.* If your written comments provide personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as a list of supporting documentation we used in preparing this proposed revised rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Arcata Fish and Wildlife Office (*see* **FOR FURTHER INFORMATION CONTACT**).

You may obtain copies of this proposed revised rule by mail from the Arcata Fish and Wildlife Office (*see* **FOR FURTHER INFORMATION CONTACT**) or by visiting the Federal eRulemaking Portal at *http://www.regulations.gov.*

## Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat in this proposed revised rule. For more information on the Pacific Coast WSP, refer to the final rule listing the species as threatened that was published in the **Federal Register** on March 5, 1993 (58 FR 12864). *See also* the discussion of habitat in the sections below.

### *Species Description*

The western snowy plover, one of two subspecies of snowy plover recognized by the American Ornithologists' Union to nest in North America, is a small shorebird with pale brown to gray upperparts, gray to black legs and bill, and dark patches on the forehead, behind the eyes, and on either side of the upper breast (Page *et al.* 1995, p. 2). The species was first described in 1758 by Linnaeus (American Ornithologists' Union 1957). The Pacific Coast distinct population segment of the western snowy plover (Pacific Coast WSP) is defined as those individuals nesting adjacent to tidal waters within 50 miles (mi) (80 kilometers (km)) of the Pacific Ocean, including all nesting birds on the mainland coast, peninsulas, offshore islands, adjacent bays, estuaries and coastal rivers. For a more complete discussion of the ecology and life history of this population, please *see* the final rule for listing the Pacific Coast WSP as a threatened species, which was published in the **Federal Register** on March 5, 1993 (58 FR 12864), or the Service's April 21, 2006, 12-month finding on a petition to delist the Pacific Coast WSP (71 FR 20607).

### *Life History*

Pacific Coast WSPs typically forage for small invertebrates in wet or dry beach sand, tide-cast kelp (*Macrocystis* sp.), low foredune vegetation (vegetation along the coastal dune or ridge that is parallel to the shoreline), and near water seeps in salt pans. Prey species include mole crabs (*Emerita analoga*), crabs (*Pachygrapsus crassipes*), polychaete worms (Neridae, *Lumbrineris zonata, etc.*), amphipods (*Corophium* spp., *etc.*), sand hoppers (Orchestoidea), flies (Ephydridae, Dolichopodidae), and beetles (Carabidae, *etc.*). Accordingly, beach-cleaning activities that remove kelp and rake sand can harm plover foraging success (Page *et al.* 1995, p. 15; Dugan 2003, p. 138; Dugan & Hubbard 2009, p. 72).

Generally, the breeding season for Pacific Coast WSP extends from early March to late September, with birds at more southerly locations nesting earlier in the season than birds located farther north (Page *et al.* 1995, p. 10). Courtship behavior and pair bonding can occur in February, and in the southern portion of the range, a few nests have been initiated as early as late-January. Males establish nesting territories from which they advertise for mates using calls and behavioral displays. Territory sizes can vary from about 0.25 to 2.5 ac (0.1 to 1.0 ha) at interior sites (Page *et al.* 1995, p. 7). A study of coastal plovers found a maximum territory size of 1.2 ac (0.5 ha) in coastal salt pan habitat, but speculated in the absence of observational data that beach territories may have been larger (Warriner *et al.* 1986, p. 21). After pair formation, both sexes defend the nesting territory from other plovers. The purpose of such defense is apparently unrelated to protection of food resources within the territory, since both sexes frequently forage in nonterritorial areas up to 5 mi (8 km) from the nest when not incubating, and since the chicks and attending adults typically leave the nesting territory shortly after hatching (Page *et al.* 1995, p. 10).

Clutches normally consist of three eggs laid in a shallow depression scraped in the sand by the male. Such "nests" are typically located in open flat areas, often near some conspicuous feature such as a piece of driftwood (Page and Stenzel 1981, p. 2; Page *et al.* 1995, p. 10). They are usually located within 328 feet (ft) (100 meters (m)) of the shore, but may be farther where shore access remains unblocked by dense vegetation (Page and Stenzel 1981, p. 2; Page *et al.* 1995, p. 7). Pacific Coast WSPs also tend to nest in relatively higher densities near fresh water or brackish wetlands such as river mouths, estuaries, and tidal marshes (Page and Stenzel 1981, p. 2). They use these areas both as foraging sites, and in the case of freshwater sources, for drinking water (Page and Stenzel 1981, p. 2; Page *et al.* 1995, p. 10). They may also be capable of functioning for long-periods without freshwater by subsisting on water obtained from insect prey (Purdue 1976, p. 352; Page *et al.* 1995, p. 5).

Both sexes incubate the eggs; typically females during daylight hours, and males during night. The male may relieve the female for a period during the day. Females often desert the chicks approximately 1 week after hatching (Warriner *et al.* 1986, p. 27; Page *et al.* 1995, p. 10). The last brood of the season may be raised by both the male and female. Leaving the brood for the male to raise allows females to nest up to three times in a season, particularly in more southern areas where nesting seasons are longer in duration. Males typically stay with the chicks until they fledge (take their first flight) about 30 days after hatching. Newly hatched chicks are capable of running and foraging almost immediately; from this point, parental behavior consists of defending chicks from other plovers, brooding them in cold weather, leading them to suitable feeding areas, and warning of approaching predators. Adults may also employ distraction displays to lead predators away from their young (Page *et al.* 1995, p. 9).

After their first chicks fledge, males may attempt to raise a new brood with a new partner. Both sexes will also readily attempt to renest if they lose an entire clutch of eggs or brood of chicks, assuming enough time remains in the nesting season (Page *et al.* 1995, p. 12). Clutches and broods may be lost to predators, tides and storms, and human recreational activities. Examples of the latter include both repeated flushings of incubating adult plovers and direct

damage to nests or young, as a result of humans, dogs, horses, or vehicles that either approach plover nests too closely or actually overrun plovers and nests (Service 1993, p. 12872; Ruhlen *et al.* 2003, p. 303).

*Habitat, Geographic Range, and Status*

The Pacific Coast WSP breeds primarily on coastal beaches from southern Washington to southern Baja California, Mexico. Sand spits, dune-backed beaches, beaches at creek and river mouths, and salt pans at lagoons and estuaries are the preferred habitats for nesting plovers (Wilson 1980, p. 4; Stenzel *et al.* 1981, p. 14). Additional Pacific Coast WSP nesting habitats include bluff-backed beaches, dredged material disposal sites, salt ponds and their adjacent levees, and river bars (Wilson 1980, p. 4; Page and Stenzel 1981, p. 14; Powell *et al.* 1996, p. 16; Tuttle *et al.* 1997, p. 174). This habitat is variable because of unconsolidated soils, high winds, storms, wave action, and colonization by plants.

Small changes in the adult survival rate can have relatively large effects on population stability (Nur *et al.* 1999, p. 14), so the maintenance of quality overwintering habitat is important to conservation. In western North America, both coastal and inland-nesting western snowy plovers winter along the coast (Page *et al.* 1995, p. 4). Some coastal plovers migrate up or down the coast to wintering locations, while others remain at their nesting beaches. Coastal individuals may also migrate some years and not others (Warriner *et al.* 1986, p. 18; Page *et al.* 1995, p. 2). Beaches used for nesting are also often used for wintering, but birds will also winter at several beaches where nesting does not occur (Service 2007, p. 19). Pacific Coast WSPs also visit or nest at other non-beach habitats such as human-made salt ponds, and estuarine sand and mud flats (Page *et al.* 1986, p. 4). Sites that have historically supported nesting, but which currently support only wintering plovers, have the potential to attract new nesters with appropriate management. This has been successfully carried out at Coal Oil Point and Hollywood Beach in southern California (Lafferty 2001). These management successes are important to conservation, since the loss of numerous historical nesting sites was a major consideration in the plover's original listing. *See* the final listing rule (58 FR 12864, March 5, 1993) and the Special Management Considerations or Protection section below for additional discussion of the current threats to the species in areas included in this proposed revised critical habitat designation.

*Previous Federal Actions*

The Pacific Coast WSP was listed as a threatened species on March 5, 1993 (58 FR 12864). A 5-year status review of the population under section 4(c)(2) of the Act was completed June 8, 2006, based on the analysis conducted for the section 4(b)(3)(B) status review for the 12-month finding on a petition to delist the Pacific Coast WSP (71 FR 20607, April 21, 2006). Because the Pacific Coast WSP was listed prior to our 1996 policy published in the **Federal Register** on February 7, 1996 (61 FR 4721) regarding recognition of distinct population segments, in our 12-month finding, we reviewed and confirmed our determination that the Pacific Coast WSP constituted a valid distinct population segment. For a complete discussion of previous Federal actions regarding the Pacific Coast WSP, please *see* the September 29, 2005, final rule to designate critical habitat for the Pacific Coast WSP (70 FR 56969).

We are revising our 2005 critical habitat designation as a result of legal action initiated by the Center for Biological Diversity on October 2, 2008, and the subsequent settlement of that action (*Center for Biological Diversity* v. *Kempthorne, et al.,* No. C–08–4594 PJH). The complaint raised several challenges to the 2005 critical habitat designation. Under the settlement agreement that resolved this action, the Service agreed to conduct a rulemaking to consider potential revisions to the designated critical habitat for Pacific Coast WSP, to submit for publication to the **Federal Register** a proposed regulation setting forth any proposed revisions to critical habitat by December 1, 2010, and to submit a final determination on any proposed revisions to the **Federal Register** by June 5, 2012. By order dated November 30, 2010, the district court approved a modification to the settlement agreement that extends the deadline to March 1, 2011, for submission of the proposed revised critical habitat designation to the **Federal Register**. The deadline for submission of a final revised critical habitat designation to the **Federal Register** is June 5, 2012.

This proposal relies upon the best scientific and commercial data available to us, including the biological and habitat information described in the previous final rules, the Recovery Plan for the Pacific Coast WSP (Service 2007) which was released September 24, 2007 (72 FR 54279), and recognized principles of conservation biology. Similar to the previous critical habitat designations for the Pacific Coast WSP, this proposal includes units that were occupied at the time of listing that have habitat features essential to the conservation of the species. This proposal differs from the previous designations in that it includes units that may not have been occupied at the time of listing, but that have areas considered to be essential for the conservation of the species, such as those that contain degraded habitat requiring restoration. Restored habitat is essential to the species' conservation in order to offset anticipated loss of current habitat resulting from effects of sea-level rise associated with climate change.

**Critical Habitat**

*Background*

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features:

(a) Essential to the conservation of the species and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided under the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, transplantation, and in the extraordinary case where population pressures within a given ecosystem cannot otherwise be relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such

designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) would apply, but even in the event of a destruction or adverse modification finding, the landowner's obligation is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

For inclusion in a critical habitat designation, the habitat within the geographical area occupied by the species at the time it was listed must contain physical and biological features which are essential to the conservation of the species and which may require special management considerations or protection. Critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical and biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat), focusing on the principal biological or physical constituent elements (primary constituent elements) within an area that are essential to the conservation of the species (such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type). Primary constituent elements are the elements of physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species.

Under the Act, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. We designate critical habitat in areas outside the geographical area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species. When the best available scientific data do not demonstrate that the conservation needs of the species require such additional areas, we will not designate critical habitat in areas outside the geographical area occupied by the species. An area currently occupied by the species but that was not occupied at the time of listing may, however, be essential to the conservation of the species and may be included in the critical habitat designation.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we determine which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all habitat areas that we may eventually determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not promote the recovery of the species.

Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to insure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) the prohibitions of section 9 of the Act if actions occurring in these areas may affect the species. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, Habitat Conservation Plans (HCPs), or other species conservation planning efforts if information available at the time of these planning efforts calls for a different outcome.

*Methods*

As required by section 4(b) of the Act, we used the best scientific and commercial data available in determining areas that contain the features essential to the conservation of the Pacific Coast WSP. We reviewed the approach to the conservation of the Pacific Coast WSP provided in the December 7, 1999, final critical habitat designation for the Pacific Coast WSP (64 FR 68507); the September 29, 2005, final revised critical habitat designation (70 FR 56969); the Recovery Plan (Service 2007); information from Federal, State, and local government agencies; and information from academia and private organizations that collected scientific data on the species. Other information used for this proposed revised critical habitat includes: Published and unpublished papers, reports, academic theses, species and habitat surveys; Geographic Information System (GIS) data (such as species occurrence data, habitat data, land use, topography, digital aerial photography, and ownership maps); correspondence to the Service from recognized experts; site visits by Service biologists; and other information as available. Mapping for this proposed revised critical habitat designation was completed using ESRI ArcMap 9.3.1 (ESRI, Inc. 2009). Specifically, the most recent National Agriculture Imagery Program images (2009 NAIP Imagery) were used to delineate unit boundaries.

The water's edge comprises the westernmost boundary of each proposed unit. Although the images were taken at different tide levels, we believe these images represent the best mapping information as beach and river habitats change seasonally, and from year to year. In part, the dynamic nature of beach and river habitats is one reason for the differences in the size of past designated critical habitat units and those units being proposed for designation in this revised rule. Additionally, the unit boundaries were extended eastward in anticipation of sea-level rise expected as a result of climate change. We used widely accepted models to help predict the amount of sea-level rise that is likely to

occur (Baker *et al.* 2006; Overpeck *et al.* 2006; Pfeffer *et al.* 2008; Fletcher 2009; Grinsted *et al.* 2009; Mitrovica *et al.* 2009; Vermeer and S. Rahmstorf 2009). Biologists used Light Detection and Ranging (LiDAR) data to help determine the extent of potential habitat loss at the water's edge resulting from future sea-level rise. As a consequence, they then extended the eastern unit boundary where appropriate to compensate for this future habitat degradation and loss.

Pacific Coast WSPs are expected to adjust their use of nesting habitat as sea level rises, provided that ample habitat is available at higher elevations. Pacific Coast WSPs have evolved to modify their use of areas due to these areas being dynamic changing habitats and are, therefore, expected to use the inland areas which we propose be restored to constitute habitat.

Maps in this revised rule use shoreline data derived from U.S. Geological Survey 7.5 minute series digital raster graphics (DRGs). Although the DRGs may not represent the exact location of the dynamic shoreline environment, they are considered to be the best vector mapping product for that purpose in common use, and are easily referenced. As a result, the depicted shoreline on the maps may not correspond directly to the proposed critical habitat unit boundaries, which were digitized using 2009 NAIP imagery. Reference information is available at: *http://topomaps.usgs.gov/drg/drg_overview.html,* 7.5-minute DRG series, U.S. Geological Survey.

*Physical and Biological Features*

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the physical and biological features essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, and rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

We derive the specific physical and biological features required for the Pacific Coast WSP from studies of this species' habitat, ecology, and life history as described below, in the Background section in this proposed revised rule, in the final listing rule published in the **Federal Register** on March 5, 1993 (58 FR 12864), in the designation of critical habitat published in the **Federal Register** on September 29, 2005 (70 FR 56969), and in the 12-month finding on a petition to delist the Pacific Coast WSP (71 FR 20607; April 21, 2006). On the basis of the biological needs of the population, and on the relationship of those needs to the population's habitat, as indicated by the best scientific data available and summarized below, we have determined that the Pacific Coast WSP requires the following physical and biological features:

Habitats That Are Representative of the Historical Geographical and Ecological Distribution of the Species

The Pacific Coast WSP typically utilizes flat, open areas with sandy or saline substrates; vegetation and driftwood are usually sparse or absent (Stenzel *et al.* 1981, p. 18), such as sandy beaches, dune systems, salt flats, mud flats, and dredge spoil sites. They also regularly nest on gravel bars along the Eel River in northern California. Salt ponds in San Francisco Bay, and elsewhere, have become important habitat for the Pacific Coast WSP. These areas provide space for individual and population growth and for normal behavior and may provide micro-topographic relief offering refuge from high winds and cold weather and sites for nesting.

Space for Individual and Population Growth and for Normal Behavior

Pacific Coast WSPs require space for foraging and establishment of nesting territories. These areas vary widely in size depending on habitat type, habitat availability, life-history stage and activity. As stated in the Background section above, males establish nesting territories that vary from about 0.25 to 2.5 ac (0.1 to 1.0 ha) at interior sites (Page *et al.* 1995, p.10) and 1.2 ac (0.5 ha) in coastal salt pan habitat, with beach territories perhaps larger (Warriner *et al.* 1986, p. 18). The birds forage in nonterritorial areas up to 5 mi (8 km) from the nesting sites when not incubating. Critical habitat must, therefore, extend beyond nesting territories to include space for foraging during the nesting season, and space for overwintering, and to provide for connectivity with other portions of the Pacific Coast WSPs range. Pacific Coast WSPs may overwinter at locations where there is no current breeding, but which are historical breeding locations (*e.g.,* Dillon Beach, CA–9). Designating wintering areas as critical habitat provides essential areas for overwinter survival, provides protections for historical nesting areas, and allows connectivity between sites. Sandy beaches, dune systems immediately inland of an active beach face, salt flats, mud flats, seasonally exposed gravel bars, salt ponds and adjoining levees, and dredge spoil sites are areas that provide space for individual and population growth and for normal behavior.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Pacific Coast WSPs typically forage in open areas by locating prey visually and then running to seize it with their beaks (Page *et al.* 1995, p. 12). They may also probe in the sand for burrowing invertebrates, or charge flying insects that are resting on the ground, snapping at them as they flush. Accordingly they need open areas in which to forage, to facilitate both prey location and capture. Deposits of tide-cast wrack such as kelp or driftwood tend to attract certain invertebrates, and so provide important foraging sites for plovers (Page *et al.* 1995, p. 12). Pacific Coast WSPs forage both above and below high tide, but not while those areas are underwater. Foraging areas will, therefore, typically be limited by water on their shoreward side, and by dense vegetation or development on their landward sides. These areas that are subject to inundation but not currently under water support essential small invertebrate food sources such as crabs, worms, flies, beetles, spiders, sand hoppers, clams, and ostracods.

Pacific Coast WSPs use sites of freshwater for drinking where available, but some historical nesting sites, particularly in southern California, have no obvious nearby freshwater sources. Adults and chicks in those areas must be assumed to obtain their necessary water from the food they eat. Accordingly we have not included freshwater sites among the essential features of habitat for the population.

Cover or Shelter

Pacific Coast WSPs and their eggs are well camouflaged against light-colored, sandy, or pebbly backgrounds (Page *et al.* 1995, p. 12). Open areas with these substrates actually constitute shelter for purposes of nesting and foraging. Such areas provide little cover to predators, and allow plovers to fully utilize their

camouflage and running speed. Pacific Coast WSPs are visually oriented and rely on open landscapes to detect predators. Chicks and adults may also crouch amongst the sand and pebbles or near driftwood, dune plants, and piles of kelp in an attempt to blend into their surroundings in plain sight (crypsis) as a means to hide from predators (Page and Stenzel 1981, p. 7; Stevens and Merilaita 2009, p. 423). Open areas do not provide shelter from winds, storms, and the extreme high tides associated with such events, and these conditions cause many nest losses. Pacific Coast WSP readily scrape blown sand out of their nests, but there is little they can do to protect their nests against serious storms or flooding other than to attempt to lay a new clutch if the old one is lost (Page *et al.* 1995, p. 8).

Sandy beaches, dune systems immediately inland of an active beach face, salt flats, mud flats, seasonally exposed gravel bars, salt ponds and adjoining levees, and dredge spoil sites are areas that may provide micro-topographic relief offering refuge from high winds and cold weather and sites for nesting. Surf- or water-deposited organic debris such as seaweed or driftwood located on open substrates supports and attracts small invertebrates that plovers eat, provides cover or shelter from predators and weather, and assists in avoidance of detection (crypsis) for nests, chicks, and incubating adults.

No studies have quantified the amount of vegetation cover that would make an area unsuitable for nesting or foraging, but coastal nesting and foraging locations typically have relatively well-defined boundaries between open sandy substrate favorable to Pacific Coast WSPs and unfavorably dense vegetation inland. These bounds show up well in aerial and satellite photographs, which we used to map essential habitat features.

Undisturbed Areas

Disturbance of nesting or brooding plovers by humans and domestic animals is a major factor affecting nesting success. Pacific Coast WSPs leave their nests when humans or pets approach too closely. Dogs may also deliberately chase plovers and may trample nests, while vehicles may directly crush adults, chicks, or nests, separate chicks from brooding adults, and interfere with foraging and mating activities (Warriner *et al.* 1986, p. 25; Service 1993, p. 12871; Ruhlen *et al.* 2003, p. 303). Repeated flushing of incubating plovers exposes the eggs to the weather and depletes energy reserves needed by the adult, which may result in reductions in nesting success. Surveys at Vandenberg Air Force Base, California, from 1994 to 1997, found the rate of nest loss on southern beaches at the Base to be consistently higher than on northern beaches where recreational use was much lower (Persons and Applegate 1997, p. 8). Ruhlen *et al.* (2003, p. 303) found that increased human activities on Point Reyes beaches resulted in a lower chick survival rate.

Recent efforts in various areas along the Pacific Coast that have been implemented to isolate nesting plovers from recreational beach users through the use of docents, symbolic fencing (post and signage or single rope fencing), and public outreach, have correlated with higher nesting success in those areas (Page *et al.* 2003, p. 3). The level of acceptable disturbance varies by site and is partially dependent upon the level of human use when Pacific Coast WSPs initiate courtship and nesting. Pacific Coast WSPs have had reproductive success in both highly disturbed areas (*e.g.,* Oceano Dunes State Vehicular Recreation Area), and areas that for the most part have been off-limits to direct human-related activities (*e.g.,* Vandenberg Air Force Base). Predators at some sites can provide a significant level of disturbance, as well as loss of eggs, chicks, and adults.

Sites for Breeding, Reproduction, and Rearing (or Development) of Offspring

Pacific Coast WSPs nest in depressions in open, relatively flat areas, near to tidal waters but far enough away to avoid being inundated by daily tides. Typical substrate is beach sand, but plovers may also lay their eggs in existing depressions in harder ground, such as salt pan, cobblestones, or dredge tailings. Where available, dune systems with numerous flat areas and easy access to the shore are particularly favored for nesting. Plover nesting areas must provide shelter from predators and human disturbance, as discussed above. Unfledged chicks forage with one or both parents, using the same foraging areas and behaviors as adults.

Primary Constituent Elements for the Pacific Coast Western Snowy Plover

Under the Act and its implementing regulations, we are required to identify the physical and biological features essential to the conservation of the Pacific Coast WSP in areas occupied at the time of listing, focusing on the features' primary constituent elements. We consider primary constituent elements to be the elements of physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species. We are proposing to designate critical habitat in areas within the geographical areas that were occupied by the species at the time of listing, that contain the primary constituent elements in the quantity and spatial arrangement to support life-history functions essential to the conservation of the species, and that may require special management considerations or protection. We are also proposing to designate areas outside the geographical area occupied by the species at the time of listing because we consider these areas essential for the conservation of the species. These sites are within the range of the Pacific Coast WSP, and were used by the species prior to listing. Due to habitat degradation and loss resulting from rising sea level, human development, and encroachment, we believe it prudent to include these additional sites in our designation to allow an expanding Pacific Coast WSP population to adjust to natural occurring dynamic conditions and threats. *See Criteria Used To Identify Critical Habitat* section below for a discussion of the species' geographic range.

We are proposing critical habitat designation of areas that provide some or all of the elements of physical or biological features essential to the conservation of this species. The conservation of the Pacific Coast WSP is dependent upon multiple factors, including the conservation and management of areas to maintain normal ecological functions, where existing populations survive and reproduce. The areas proposed as critical habitat in this rule contain the quantity and arrangement of elements of physical and biological features we believe are essential for the conservation and recovery of the Pacific Coast WSP. The amount and distribution of areas proposed to be designated allow for the Pacific Coast WSP populations to be distributed throughout the area currently occupied and to return to areas formerly occupied within their range, to support recovery criteria outlined for each recovery unit, and, consequently, to support recovery range-wide (*see* recovery criteria in Service 2007). Based on the best available information, the primary constituent elements essential to conservation of the Pacific Coast WSP are the following:

Sandy beaches, dune systems immediately inland of an active beach face, salt flats, mud flats, seasonally exposed gravel bars, artificial salt ponds

and adjoining levees, and dredge spoil sites, with:

(1) Areas that are below heavily vegetated areas or developed areas and above the daily high tides,

(2) Shoreline habitat areas for feeding, with no or very sparse vegetation, that are between the annual low tide or low-water flow and annual high tide or high-water flow, subject to inundation but not constantly under water,

(3) Surf- or water-deposited organic debris located on open substrates, and

(4) Minimal disturbance from the presence of humans, pets, vehicles, or human-attracted predators.

The proposed critical habitat in this revised proposed rule contains the primary constituent elements in the appropriate quantity and spatial arrangement essential to the conservation of the Pacific Coast WSP, and supports multiple life processes for the species. Portions of some proposed critical habitat units may be currently degraded; however, these areas could be restored with special management, thereby providing suitable habitat to offset habitat loss from anticipated sea-level rise resulting from climate change. Additional areas are proposed as critical habitat to allow a recovering Pacific Coast WSP population to occupy its former range, and allow adjustment to changing conditions (*e.g.,* shifting sand dunes), expected sea-level rise, and human encroachment.

*Special Management Considerations or Protection*

When designating critical habitat, we assess whether the physical and biological features within the geographical area occupied by the species at the time of listing that are essential to the conservation of the species may require special management considerations or protection.

All areas included in our proposed revision of critical habitat will require some level of management to address the current and future threats to the physical and biological features essential to the conservation of the Pacific Coast WSP. Special management considerations or protection may be required to minimize habitat destruction, degradation, and fragmentation associated with the following threats, among others: Water diversions, stabilized dunes and watercourses associated with urban development, human recreational activities, off-highway vehicle (OHV) use, beach raking, pets, nonnative vegetation, resource extraction, and fishing.

Water diversions reduce the transport of sediments which contribute to suitable nesting and foraging substrates. Stabilized dunes and watercourses associated with urban development alter the dynamic processes of beach and river systems, thereby reducing the open nature of suitable habitat needed for predator detection. Human recreational activities disturb foraging or nesting activities, or may attract and provide cover for approaching predators. The use of OHVs has been documented to crush plover nests and strike plover adults. Beach raking or grooming can remove wrack, reducing food resources and cover, and contributing to beach erosion. Pets (leashed and unleashed) can cause incubating adults to leave the nest and establish trails in the sand that can lead predators to the nest. Nonnative vegetation reduces visibility plovers need to detect predators, and occupies otherwise suitable habitat. Resource extraction can disturb incubating, brooding, or foraging plovers. Fishing can disturb Pacific Coast WSPs and can attract predators by the presence of fish offal and bait (Lafferty 2001, p. 2222; Dugan 2003, p. 134; Schlacher *et al.* 2007, p. 557; Service 2007, p. 33; Dugan and Hubbard 2010, p. 67).

For discussion of the threats to the Pacific Coast WSP and its habitat, please *see* the Summary of Comments and Recommendations and Summary of Factors Affecting the Species sections of the 12-Month Finding on the Petition to Delist the Pacific Coast WPS (71 FR 20607, April 21, 2006), the final listing rule (58 FR 12864, March 5, 1993) and the Public Comments and Critical Habitat Unit Descriptions sections of the final critical habitat rule (70 FR 56970, September 29, 2005). Please also *see Critical Habitat Units* section below for a discussion of the threats in each of the proposed revised critical habitat units.

*Criteria Used To Identify Critical Habitat*

As required by section 4(b)(1)(A) of the Act, we use the best scientific and commercial data available to designate critical habitat. We review available information pertaining to the habitat requirements of the species. In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we consider whether designating additional areas—outside those currently occupied as well as those occupied at the time of listing—are necessary to ensure the conservation of the species. We are proposing to designate critical habitat in areas within the geographical area occupied by the species at the time of listing in 1993. We also are proposing to designate specific areas outside the geographical area occupied by the species at the time of listing because such areas are essential for the conservation of the species. We have determined that limiting the designation of critical habitat to those areas that were considered occupied at the time of listing is no longer sufficient to conserve the species because:

(1) There has been considerable loss and degradation of habitat throughout the species range since the time of listing;

(2) We anticipate a further loss of habitat in the future due to sea-level rise resulting from climate change, and;

(3) The species needs habitat areas that are arranged spatially in a way that will maintain connectivity and allow dispersal within and between units.

The amount and distribution of critical habitat being proposed for designation will allow populations of Pacific Coast WSP to:

(1) Maintain their existing distribution;

(2) Increase their distribution into previously occupied areas (needed to offset habitat loss and fragmentation);

(3) Move between areas depending on resource and habitat availability (response to changing nature of coastal beach habitat) and support genetic interchange;

(4) Increase the size of each population to a level where the threats of genetic, demographic, and normal environmental uncertainties are diminished; and

(5) Maintain their ability to withstand local or unit level environmental fluctuations or catastrophes.

All areas proposed for critical habitat designation are within the historical range of the species. We have identified areas to include in this proposed designation by applying Criteria 1 through 6 below. In an effort to update our 2005 final designation of critical habitat for the Pacific Coast WSP, we used the best available information on occupancy and habitat conditions of areas that were analyzed in 2005 and considered other areas throughout the species historical range to determine whether to add areas to or remove areas from this proposal to revise critical habitat.

We used the following criteria to select appropriate units for this proposed revised rule:

(1) *Areas throughout the range of the Pacific Coast WSP located to allow the species to move and expand:* The dynamic nature of beach, dune, and similar habitats necessitates that Pacific Coast WSPs move to adjust for changes in habitat availability, food sources, and

pressures on survivorship or reproductive success (Colwell *et al.* 2009; p. 5). Designating units in sufficient amount and in spatially appropriate areas throughout the range of the Pacific Coast WSP allows for seasonal migration, year-to-year movements, and expansion of the Pacific Coast WSP to its historical boundaries. We consider this necessary to conserve the species because it assists in counterbalancing catastrophes, such as extreme climatic events, oil spills, or disease that might depress regional survival or productivity. Having units across the species' range helps in maintaining a robust, well distributed population and enhances survival and productivity of the Pacific Coast WSP as a whole, facilitates interchange of genetic material between units, and promotes recolonization of any sites that experience declines or local extirpations due to low productivity or temporary habitat loss. By way of example, Recovery Unit 2 in northern California (Service 2007; p. 129) currently relies on the immigration of breeding adults from other units to maintain its population as reproductive success remains low (Colwell *et al.* 2009; p. 4). Maintaining good habitat distribution is essential to maintaining a healthy range-wide population, reducing the potential for a gap in the Pacific Coast WSP's range to develop. Within this designation, we focused on areas within the six recovery units identified in the Recovery Plan (Service 2007, Appendix A).

(2) *Breeding areas:* Areas identified in the Recovery Plan (Service 2007) known to support breeding Pacific Coast WSP were selected. Selected sites include historical breeding areas and areas currently being used by breeding plovers. These areas are essential to the conservation of the species because they contain the physical and biological features necessary for Pacific Coast WSPs to breed and produce offspring and ensure that population increases are distributed throughout the Pacific Coast WSP's range. By selecting breeding areas across the Pacific Coast WSP's range, we can assist in conserving the species' genetic and demographic robustness and important life-history stages for long-term sustainability of the entire listed species. Some breeding areas are occupied year-round and also are used as wintering areas by a portion of the population.

(3) *Wintering areas:* Major wintering sites not already selected under criterion 2 above were added. A "major" wintering site is defined as one that supports more wintering birds than average for the geographical region based on current or historical numbers. We believe these areas are necessary to provide sufficient habitat for the survival of Pacific Coast WSPs during the nonbreeding season as they allow for dispersal of adults or juveniles to nonbreeding sites and provide roosting and foraging opportunities and shelter during inclement weather.

(4) *Diverse habitat:* Additional sites were added that provide diverse habitat (mud flats, gravel bars, or salt ponds and salt pond levees), or that are situated to facilitate interchange between otherwise widely separated units. This criterion is based on standard conservation biology principles; by protecting a variety of habitats and facilitating interchange between them, we increase the ability of the species to adjust to various limiting factors that affect the population, such as predators, disease, major storms, habitat loss and degradation, and rise in sea level.

(5) *Areas to maintain connectivity of habitat:* Some areas that may be seasonally lacking in certain elements of essential physical and biological features and that contain marginal habitat were included if they were contiguous with areas containing one or more of those elements and if they contribute to the hydrologic and geologic processes essential to the ecological function of the system. These areas are essential to the conservation of the species because they maintain connectivity within populations, allow for species movement throughout the course of a given year, and allow for population expansion.

(6) *Restoration areas:* We have selected some areas within occupied units that, once restored, would be able to support the Pacific Coast WSP. These areas generally are upland habitats, adjacent to beach and other areas used by the species, and contain introduced vegetation such as European beach grass (*Ammophila arenaria*) that currently limits use of the area by the species. These areas would provide habitat to off-set the anticipated loss and degradation of habitat due to sea-level rise expected from the effects of climate change or due to development. These areas previously contained and would still contain the features essential to the conservation of the species once removal of the beachgrass and restoration of the area has occurred.

In order to translate the criteria above to the areas on the ground, we used the following methodology to identify the mapped boundaries of critical habitat for the Pacific Coast WSP:

(1) We digitally mapped occurrence data within the range of the Pacific Coast WSP at the time and subsequent to the time of listing in the form of polygons and points using ArcMap 9.3.1 (ESRI 2009). An attempt was made to consider site-specific survey data that was both current and historical. Survey information used in this designation was compiled from several sources during various timeframes as identified in the Recovery Plan (Service 2007, Appendix B);

(2) We utilized National Agriculture Imagery Program (NAIP 2009) aerial imagery with a 3.3 ft (1 m) resolution to determine the lateral extent (width) between the water and upland areas of habitat. The western (seaward) boundary of the coastal units is the water's edge, which varies daily with each changing tide, and will vary seasonally with storm surges, and sand erosion and deposition. For mapping purposes, the western boundary of the coastal units is the water's edge based on the 2009 NAIP imagery. Given the dynamic nature of coastal beaches, riparian areas, and salt pond management, we also delineated the lateral extent to encompass the entire area up to the lower edge of permanent upland vegetation or to the edge of a permanent barrier, such as a bluff, levee, sea wall, human development, *etc.* Using aerial imagery (NAIP 2009), we also delineated the northern and southern extents of the proposed units to include the beach areas associated with the occurrence information identified above.

When determining proposed revised critical habitat boundaries, we made every effort to avoid including developed areas, such as lands covered by buildings, sea walls, pavement, and other structures, because these areas lack physical and biological features for the Pacific Coast WSP. The scale of maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed revised critical habitat have been excluded by text in this proposed revised rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical and biological features in adjacent critical habitat.

In this proposed rule to revise critical habitat, we are proposing to designate lands that we have determined were within the geographic area occupied at the time of listing and contain sufficient

elements of physical and biological features to support life-history processes essential to the conservation of the species. We are also proposing to designate lands outside of the geographical area occupied at the time of listing that we have determined are essential for the conservation of the Pacific Coast WSP. Units are proposed for revised designation based on the presence of elements of physical and biological features essential to the conservation of the species, not all of which are present in each unit, but which are contained in levels that support Pacific Coast WSP life-history processes. Some units contain all of the identified elements of physical and biological features and thus support multiple life-history processes. Some units contain only some elements of the physical and biological features and thus support the Pacific Coast WSP's particular use of that habitat.

**Summary of Changes From Previously Designated Critical Habitat**

The areas identified in this proposed revised rule constitute a revision of the areas designated as critical habitat for the Pacific Coast WSP on September 29, 2005 (70 FR 56969). In the 2005 final rule, we designated approximately 12,145 ac (4,921 ha) of critical habitat in a total of 32 units within the States of Washington, Oregon, and California. Refer to that final rule to compare critical habitat designations in 2005 with those being proposed here. Table 1 below outlines the changes in areas in each unit or subunit between the 2005 final critical habitat rule and this proposed revised critical habitat rule. This proposed revision contains significant changes to the number of units and amount of acreage compared to the designation in 2005. These changes are based on updated information, changes to our criteria and methodologies for determining areas essential to the conservation of the Pacific Coast WSP, or exclusions based on section 4(b)(2) of the Act.

A total of 39 new units and 16,116 ac (6,522 ha) are being proposed that were not designated in 2005. Of these, three (3) units in Washington are new or have new extensions; 8 units are new in Oregon; and 28 units are newly proposed in California. One (1) unit was designated as critical habitat in 2005 (San Onofre Beach, then designated as Unit CA 24), but is being exempted under section 4(a)(3) of the Act and is not being proposed in this revised rule (*see* Application of Section 4(a)(3) of the Endangered Species Act section below).

TABLE 1—A COMPARISON OF THE AREAS (IN ACRES AND HECTARES) IDENTIFIED AS CONTAINING FEATURES ESSENTIAL TO THE CONSERVATION OF THE PACIFIC COAST WSP IN THE 2005 FINAL CRITICAL HABITAT DESIGNATION AND THIS 2010 PROPOSED REVISED CRITICAL HABITAT DESIGNATION

[Values in this table may not sum due to rounding]

| Unit No. | Unit name | 2005 | | 2010 | |
|---|---|---|---|---|---|
| | | Acres | Hectares | Acres | Hectares |
| **Washington** | | | | | |
| WA 1 | Copalis Spit | 0 | 0 | 407 | 165 |
| WA 2 | Damon Point | 908 | 367 | 673 | 272 |
| WA 3A | Midway Beach | 786 | 318 | 697 | 282 |
| WA 3B | Shoalwater/Graveyard | 0 | 0 | 1,121 | 454 |
| WA Unit 3 Totals | | 786 | 318 | 1,818 | 736 |
| WA 4A | Ledbetter Spit | 832 | 337 | 2,463 | 997 |
| WA 4B | Gunpowder Sands Island | 0 | 0 | 904 | 366 |
| WA Unit 4 Totals | | 832 | 337 | 3,367 | 1,363 |
| WASHINGTON STATE TOTALS | | 2,526 | 1,023 | 6,265 | 2,535 |
| **Oregon** | | | | | |
| OR 1 | Columbia River Spit | 0 | 0 | 169 | 69 |
| OR 2 | Necanicum River Spit | 0 | 0 | 211 | 85 |
| OR 3 | Nehalem River Spit | 0 | 0 | 299 | 121 |
| OR 4 | Bayocean Spit | 207 | 83.5 | 367 | 148 |
| OR 5 | Netarts Spit | 0 | 0 | 541 | 219 |
| OR 6 | Sand Lake South | 0 | 0 | 200 | 81 |
| OR 7 | Sutton/Baker Beaches | 260 | 105 | 372 | 151 |
| OR 8A | Siltcoos Breach | 8 | 3 | 15 | 6 |
| OR 8B | Siltcoos River Spit | 0 | 0 | 241 | 97 |
| OR 8C | Dunes Overlook/Tahkenitch Creek Spit | 527 | 213 | 716 | 290 |
| OR 8D | North Umpqua River Spit | 0 | 0 | 236 | 95 |
| Unit OR–8 Totals | | 535 | 217 | 1,208 | 489 |
| OR 9 | Tenmile Creek Spit | 234.5 | 95 | 244 | 99 |
| OR 10 | Coos Bay North Spit | 278 | 113 | 308 | 125 |
| OR 11 | Bandon to New River | 632 | 256 | 1,016 | 411 |
| OR 12* | Elk River Spit | 0 | 0 | 167 | 68 |
| OR 13 | Euchre Creek | 0 | 0 | 116 | 47 |
| OREGON STATE TOTALS | | 2,146.5 | 868.5 | 5,219 | 2,112 |

TABLE 1—A COMPARISON OF THE AREAS (IN ACRES AND HECTARES) IDENTIFIED AS CONTAINING FEATURES ESSENTIAL TO THE CONSERVATION OF THE PACIFIC COAST WSP IN THE 2005 FINAL CRITICAL HABITAT DESIGNATION AND THIS 2010 PROPOSED REVISED CRITICAL HABITAT DESIGNATION—Continued

[Values in this table may not sum due to rounding]

| Unit No. | Unit name | 2005 | | 2010 | |
|---|---|---|---|---|---|
| | | Acres | Hectares | Acres | Hectares |
| | **California** | | | | |
| CA 1 | Lake Earl | 57 | 24 | 74 | 30 |
| CA 2 | Gold Bluffs Beach | 0 | 0 | 144 | 58 |
| CA 3a | Humboldt Lagoons—Stone Lagoon | 0 | 0 | 52 | 21 |
| CA 3b | Humboldt Lagoons—Big Lagoon | 280 | 113 | 212 | 86 |
| Unit CA–3 Totals | | 280 | 113 | 264 | 107 |
| CA 4a | Clam Beach/Little River | 155 | 63 | 194 | 79 |
| CA 4b | Mad River | 377 | 153 | 456 | 185 |
| Unit CA–4 Totals | | 532 | 215 | 650 | 263 |
| CA 5a | Humboldt Bay South Spit | 375 | 152 | 419 | 170 |
| CA 5b | Eel River North Spit/Beach | 283 | 114 | 259 | 105 |
| CA 5c | Eel River South Spit/Beach | 402 | 163 | 339 | 137 |
| Unit CA–5 Totals | | 1,060 | 429 | 1,017 | 412 |
| CA 6 | Eel River Gravel Bars | 1,193 | 483 | 1,139 | 461 |
| CA 7 | MacKerricher Beach | 1,048 | 424 | 1,176 | 476 |
| CA 8 | Manchester Beach | 341 | 138 | 482 | 195 |
| CA 9 | Dillon Beach | 0 | 0 | 39 | 16 |
| CA 10A | Pt Reyes | 462 | 187 | 460 | 186 |
| CA 10B | Limantour | 124 | 50 | 156 | 63 |
| Unit CA–10 Totals | | 586 | 237 | 617 | 250 |
| CA 11 | Napa | 0 | 0 | 618 | 250 |
| CA 12 | Hayward | 0 | 0 | 1 | 0 |
| CA 13A | Eden Landing | 0 | 0 | 237 | 96 |
| CA 13B | Eden Landing | 0 | 0 | 171 | 69 |
| CA 13C | Eden Landing | 0 | 0 | 609 | 246 |
| Unit CA–13 Totals | | 0 | 0 | 1,016 | 411 |
| CA 14 | Ravenswood | 0 | 0 | 89 | 36 |
| CA 15 | Warm Springs | 0 | 0 | 168 | 68 |
| CA 16 | Half Moon Bay | 37 | 15 | 36 | 15 |
| CA 17 | Waddell Creek Beach | 9 | 4 | 25 | 10 |
| CA 18 | Scott Creek Beach | 19 | 8 | 23 | 9 |
| CA 19 | Wilder Creek Beach | 10 | 4 | 15 | 6 |
| CA 20 | Jetty Road to Aptos | 0 | 0 | 399 | 161 |
| CA 21 | Elkhorn Slough Mudflats | 281 | 114 | 281 | 114 |
| CA 22 | Monterey to Moss Landing | 0 | 0 | 967 | 391 |
| CA 23 | Point Sur Beach | 61 | 25 | 72 | 29 |
| CA 24 | San Carpoforo Creek | 0 | 0 | 24 | 10 |
| CA 25 | Arroyo Laguna Creek | 0 | 0 | 28 | 11 |
| CA 26 | San Simeon State Beach | 28 | 11 | 24 | 10 |
| CA 27 | Villa Creek Beach | 17 | 7 | 20 | 8 |
| CA 28 | Toro Creek | 0 | 0 | 34 | 14 |
| CA 29 | Atascadero Beach/Morro Strand SB | 0 | 0 | 213 | 86 |
| CA 30 | Morro Bay Beach | 0 | 0 | 1,076 | 435 |
| CA 31 | Pismo Beach/Nipomo Dunes | 0 | 0 | 1,652 | 669 |
| CA 32 | Vandenberg North | 0 | 0 | 711 | 288 |
| CA 33 | Vandenberg South | 0 | 0 | 423 | 171 |
| CA 34 | Devereaux Beach | 36 | 15 | 52 | 21 |
| CA 35 | Santa Barbara Beaches | 0 | 0 | 65 | 26 |
| CA 36 | Santa Rosa Island Beaches | 0 | 0 | 586 | 237 |
| CA 37 | San Buenaventura Beach | 0 | 0 | 70 | 28 |
| CA 38 | Mandalay to Santa Clara River | 350 | 142 | 672 | 272 |
| CA 39 | Ormond Beach | 175 | 71 | 320 | 130 |
| CA 40 | Mugu Lagoon South | 87 | 35 | 0 | 0 |
| CA 43 | Zuma Beach | 68 | 28 | 73 | 30 |
| CA 44 | Malibu Beach | 0 | 0 | 13 | 5 |
| CA 45A | Santa Monica Beach | 25 | 10 | 48 | 19 |

TABLE 1—A COMPARISON OF THE AREAS (IN ACRES AND HECTARES) IDENTIFIED AS CONTAINING FEATURES ESSENTIAL TO THE CONSERVATION OF THE PACIFIC COAST WSP IN THE 2005 FINAL CRITICAL HABITAT DESIGNATION AND THIS 2010 PROPOSED REVISED CRITICAL HABITAT DESIGNATION—Continued

[Values in this table may not sum due to rounding]

| Unit No. | Unit name | 2005 | | 2010 | |
|---|---|---|---|---|---|
| | | Acres | Hectares | Acres | Hectares |
| CA 45B | Dockweiler North | 43 | 17 | 34 | 14 |
| CA 45C | Dockweiler South | 24 | 10 | 65 | 26 |
| CA 45D | Hermosa State Beach | 10 | 4 | 27 | 11 |
| Unit CA–45 Totals | | 102 | 41 | 173 | 70 |
| CA 46A | Bolsa Chica Reserve | 591 | 239 | 484 | 196 |
| CA 46B | Bolsa Chica Reserve | 0 | 0 | 2 | 1 |
| CA 46C | Bolsa Chica Reserve | 0 | 0 | 21 | 9 |
| CA 46D | Bolsa Chica Reserve | 0 | 0 | 3 | 1 |
| CA 46E | Bolsa Chica State Beach | 4 | 2 | 8 | 3 |
| Unit CA–46 Totals | | 595 | 241 | 518 | 210 |
| CA 47 | Santa Ana River Mouth | 13 | 5 | 19 | 8 |
| CA 48 | Balboa Beach | 0 | 0 | 25 | 10 |
| | San Onofre Beach (Unit CA–24 in 2005) | 49 | 20 | 0 | 0 |
| CA 50A | Batiquitos Lagoon | 21 | 9 | 24 | 10 |
| CA 50B | Batiquitos Lagoon | 23 | 9 | 23 | 9 |
| CA 50C | Batiquitos Lagoon | 21 | 8 | 19 | 8 |
| Unit CA–50 Totals | | 65 | 26 | 66 | 27 |
| CA 51A | San Elijo Lagoon Ecological Reserve | 0 | 0 | 3 | 1 |
| CA 51B | San Elijo Lagoon Ecological Reserve | 0 | 0 | 5 | 2 |
| CA 51C | San Elijo Lagoon Ecological Reserve | 0 | 0 | 7 | 3 |
| Unit CA–51 Totals | | 0 | 0 | 15 | 6 |
| CA 52A | San Dieguito Lagoon | 0 | 0 | 4 | 2 |
| CA 52B | San Dieguito Lagoon | 0 | 0 | 3 | 1 |
| CA 52C | San Dieguito Lagoon | 0 | 0 | 4 | 2 |
| Unit CA–52 Totals | | 0 | 0 | 11 | 5 |
| CA 53 | Los Penasquitos Lagoon | 24 | 10 | 32 | 13 |
| CA 54A | Fiesta Island | 0 | 0 | 2 | 1 |
| CA 54B | Mariner's Point | 0 | 0 | 7 | 3 |
| CA 54C | South Mission Beach | 0 | 0 | 38 | 15 |
| CA 54D | San Diego River Channel | 0 | 0 | 51 | 21 |
| Unit CA–54 Totals | | 0 | 0 | 98 | 39 |
| CA 55B | Coronado Beach | 44 | 18 | 74 | 30 |
| CA 55E | Sweetwater Marsh National Wildlife Refuge and D Street Fill. | 128 | 52 | 132 | 53 |
| CA 55F | Silver Strand State Beach | 0 | 0 | 82 | 33 |
| CA 55G | Chula Vista Wildlife Reserve | 0 | 0 | 10 | 4 |
| CA 55I | San Diego National Wildlife Refuge, South Bay Unit. | 0 | 0 | 5 | 2 |
| CA 55J | Tijuana Estuary and Beach | 182 | 73 | 150 | 61 |
| Unit CA–55 Totals | | 354 | 143 | 453 | 183 |
| CALIFORNIA TOTALS | | 7,477 | 3,029 | 16,777 | 6,789 |
| WASHINGTON, OREGON, CALIFORNIA GRAND TOTALS. | | 12,145 | 4,921 | 28,261 | 11,437 |

Some areas being proposed as revised critical habitat were omitted from the 2005 final rule. We have subsequently concluded that they are essential to the conservation of the species based on our current criteria for determining critical habitat (*see Criteria Used To Identify Critical Habitat* section and information outlined below). Most of the units excluded between the 2004 proposed rule and the 2005 final rule were excluded for economic reasons under section 4(b)(2) of the Act. The economic analysis for that rule quantified coextensive economic impacts of both

the listing and critical habitat for the Pacific Coast WSP. We now analyze economic impacts of proposed critical habitat designations by comparing scenarios both "with critical habitat" and "without critical habitat." The "without critical habitat" scenario represents the baseline for the analysis, considering protections already in place for the species (*e.g.,* under the Federal listing and other Federal, State, and local regulations), and representing the costs incurred regardless of whether critical habitat is designated. The "with critical habitat" scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species, the costs of which are solely attributable to the designation of critical habitat, above and beyond the baseline costs. Incremental impacts are the costs we now consider in the final designation of critical habitat when evaluating the benefits of excluding particular areas under section 4(b)(2) of the Act. We are currently in the process of conducting a new economic analysis on this proposed designation (*see* Economic Impacts section below).

**Proposed Revised Critical Habitat Designation**

We are proposing 28,261 ac (11,437 ha) in 68 units as revised critical habitat for the Pacific Coast WSP: 6,265 ac (2,535 ha) in 4 units in Washington; 5,219 ac (2,112 ha) in 13 units in Oregon; and 16,777 ac (6,789 ha) in 51 units in California. The critical habitat areas described below constitute our current assessment of areas that meet the definition of critical habitat for the Pacific Coast WSP. Table 2 shows the occupied units. The approximate area and ownership of each proposed revised critical habitat unit is shown in Table 3. These units, if finalized, will replace the current critical habitat designation for the Pacific Coast WSP in 50 CFR 17.95.

TABLE 2—OCCUPANCY OF PACIFIC COAST WSP BY PROPOSED REVISED CRITICAL HABITAT UNITS

| Unit | Name | Occupied at time of listing? | Currently occupied |
|---|---|---|---|
| WA 1 | Copalis Spit | No | No. |
| WA 2 | Damon Point | Yes | Yes. |
| WA 3A | Midway Beach | Yes | Yes. |
| WA 3B* | Shoalwater/Graveyard | Yes | Yes. |
| WA 4A | Leadbetter Spit | Yes | Yes. |
| WA 4B | Gunpowder Sands Island | Yes | No. |
| OR 1 | Columbia River Spit | No | No. |
| OR 2 | Necanicum River Spit | No | No. |
| OR 3 | Nehalem River Spit | No | Yes. |
| OR 4 | Bayocean Spit | Yes | Yes. |
| OR 5 | Netarts Spit | No | No. |
| OR 6 | Sand Lake South | No | No. |
| OR 7 | Sutton/Baker Beaches | Yes | Yes. |
| OR 8A | Siltcoos Breach | Yes | Yes. |
| OR 8B | Siltcoos River Spit | Yes | Yes. |
| OR 8C | Dunes Overlook/Tahkenitch Creek Spit | Yes | Yes. |
| OR 8D | North Umpqua River Spit | No | No. |
| OR 9 | Tenmile Creek Spit | Yes | Yes. |
| OR 10 | Coos Bay North Spit | Yes | Yes. |
| OR 11 | Bandon to New River | Yes | Yes. |
| OR 12* | Elk River Spit | No | No. |
| OR 13 | Euchre Creek | No | No. |
| CA 1 | Lake Earl | Yes | Yes. |
| CA 2 | Gold Bluffs Beach | Yes | Yes. |
| CA 3a | Humboldt Lagoons—Stone Lagoon | Yes | Yes. |
| CA 3b | Humboldt Lagoons—Big Lagoon | Yes | Yes. |
| CA 4a | Clam Beach/Little River | Yes | Yes. |
| CA 4b | Mad River | Yes | Yes. |
| CA 5a | Humboldt Bay South Spit | Yes | Yes. |
| CA 5b | Eel River North Spit/Beach | Yes | Yes. |
| CA 5c | Eel River South Spit/Beach | Yes | Yes. |
| CA 6 | Eel River Gravel Bars | Yes | Yes. |
| CA 7 | MacKerricher Beach | Yes | Yes. |
| CA 8 | Manchester Beach | No | Yes. |
| CA 9 | Dillon Beach | Yes | Yes. |
| CA 10A | Pt Reyes | Yes | Yes. |
| CA 10B | Limantour | Yes | Yes. |
| CA 11 | Napa | Yes | Yes. |
| CA 12 | Hayward | Yes | Yes. |
| CA 13A | | Yes | Yes. |
| CA 13B | Eden Landing | Yes | Yes. |
| CA 13C | | Yes | Yes. |
| CA 14 | Ravenswood | Yes | Yes. |
| CA 15 | Warm Springs | Yes | Yes. |
| CA 16 | Half Moon Bay | Yes | Yes. |
| CA 17 | Waddell Creek Beach | Yes | No. |
| CA 18 | Scott Creek Beach | Yes | Yes. |
| CA 19 | Wilder Creek Beach | Yes | Yes. |
| CA 20 | Jetty Road to Aptos | Yes | Yes. |
| CA 21 | Elkhorn Slough Mudflats | Yes | Yes. |

TABLE 2—OCCUPANCY OF PACIFIC COAST WSP BY PROPOSED REVISED CRITICAL HABITAT UNITS—Continued

| Unit | Name | Occupied at time of listing? | Currently occupied |
|---|---|---|---|
| CA 22 | Monterey to Moss Landing | Yes | Yes. |
| CA 23 | Point Sur Beach | Yes | Yes. |
| CA 24 | San Carpoforo Creek | Yes | Yes. |
| CA 25 | Arroyo Laguna Creek | Yes | Yes. |
| CA 26 | San Simeon State Beach | Yes | Yes. |
| CA 27 | Villa Creek Beach | Yes | Yes. |
| CA 28 | Toro Creek | Yes | Yes. |
| CA 29 | Atascadero Beach/Morro Strand SB | Yes | Yes. |
| CA 30 | Morro Bay Beach | Yes | Yes. |
| CA 31 | Pismo Beach/Nipomo Dunes | Yes | Yes. |
| CA 32 | Vandenberg North | Yes | Yes. |
| CA 33 | Vandenberg South | Yes | Yes. |
| CA 34 | Devereaux Beach | Yes | Yes. |
| CA 35 | Santa Barbara Beaches | Yes | Yes. |
| CA 36 | Santa Rosa Island Beaches | Yes | Yes. |
| CA 37 | San Buenaventura Beach | Yes | Yes. |
| CA 38 | Mandalay to Santa Clara River | Yes | Yes. |
| CA 39 | Ormond Beach | Yes | Yes. |
| CA 43 | Zuma Beach | Yes | Yes. |
| CA 44 | Malibu Beach | Yes | Yes. |
| CA 45A | Santa Monica Beach | Yes | Yes. |
| CA 45B | Dockweiler North | Yes | Yes. |
| CA 45C | Dockweiler South | Yes | Yes. |
| CA 45D | Hermosa State Beach | Yes | Yes. |
| CA 46A | | Yes | Yes. |
| CA 46B | Bolsa Chica Reserve | Yes | Yes. |
| CA 46C | | Yes | Yes. |
| CA 46D | | Yes | Yes. |
| CA 46E | Bolsa Chica State Beach | Yes | Yes. |
| CA 47 | Santa Ana River Mouth | No | No. |
| CA 48 | Balboa Beach | Yes | Yes. |
| CA 50A | | Yes | Yes. |
| CA 50B | Batiquitos Lagoon | Yes | Yes. |
| CA 50C | | Yes | Yes. |
| CA 51A | | Yes | Yes. |
| CA 51B | San Elijo Lagoon Ecological Reserve | Yes | Yes. |
| CA 51C | | Yes | Yes. |
| CA 52A | | Yes | Yes. |
| CA 52B | San Dieguito Lagoon | Yes | Yes. |
| CA 52C | | Yes | Yes. |
| CA 53 | Los Penasquitos Lagoon | Yes | Yes. |
| CA 54A | Fiesta Island | Yes | No. |
| CA 54B | Mariner's Point | Yes | Yes. |
| CA 54C | South Mission Beach | Yes | Yes. |
| CA 54D | San Diego River Channel | Yes | Yes. |
| CA 55B | Coronado Beach | Yes | Yes. |
| CA 55E | Sweetwater Marsh National Wildlife Refuge | Yes | Yes. |
| CA 55F | Silver Strand State Beach | Yes | Yes. |
| CA 55G | Chula Vista Wildlife Reserve | Yes | No. |
| CA 55I | San Diego National Wildlife Refuge, South Bay Unit | Yes | Yes. |
| CA 55J | Tijuana Estuary and Beach | Yes | Yes. |

*Unit or portions of unit may be considered for exclusion in the final critical habitat rule under section 4(b)(2) of the Act.

TABLE 3—PROPOSED REVISED CRITICAL HABITAT FOR THE PACIFIC COAST WSP SHOWING FEDERAL, STATE, TRIBAL, AND OTHER (PRIVATE AND LOCAL GOVERNMENT) LAND OWNERSHIP

| Unit No. | Unit name | Total | | Federal | | Tribal | | State | | Other | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | ac | ha | ac | ha | ac | ha | ac | ha | ac | ha |
| **Washington** | | | | | | | | | | | |
| WA 1 | Copalis Spit | 407 | 165 | 0 | 0 | 0 | 0 | 407 | 165 | 0 | 0 |
| WA 2 | Damon Point | 673 | 272 | 0 | 0 | 0 | 0 | 648 | 262 | 25 | 10 |

TABLE 3—PROPOSED REVISED CRITICAL HABITAT FOR THE PACIFIC COAST WSP SHOWING FEDERAL, STATE, TRIBAL, AND OTHER (PRIVATE AND LOCAL GOVERNMENT) LAND OWNERSHIP—Continued

| Unit No. | Unit name | Total | | Federal | | Tribal | | State | | Other | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | ac | ha | ac | ha | ac | ha | ac | ha | ac | ha |
| WA 3A | Midway Beach | 697 | 282 | 0 | 0 | 0 | 0 | 697 | 282 | 0 | 0 |
| WA 3B* | Shoalwater/Graveyard | 1,121 | 454 | 0 | 0 | 336 | 136 | 505 | 204 | 280 | 113 |
| Unit WA–3 Totals | | 1,818 | 735 | 0 | 0 | 336 | 136 | 1,202 | 486 | 280 | 113 |
| WA 4A | Leadbetter Spit | 2,463 | 997 | 2,026 | 820 | 0 | 0 | 437 | 177 | 0 | 0 |
| WA 4B | Gunpowder Sands Island | 904 | 366 | 904 | 366 | 0 | 0 | 0 | 0 | 0 | 0 |
| Unit WA–4 Totals | | 3,367 | 1,363 | 2,930 | 1,186 | 0 | 0 | 437 | 177 | 0 | 0 |
| WASHINGTON STATE TOTALS | | 6,265 | 2,535 | 2,930 | 1,186 | 336 | 136 | 2,694 | 1,090 | 305 | 123 |
| **Oregon** | | | | | | | | | | | |
| OR 1 | Columbia River Spit | 169 | 69 | 169 | 69 | 0 | 0 | 0 | 0 | 0 | 0 |
| OR 2 | Necanicum River Spit | 211 | 85 | 0 | 0 | 0 | 0 | 161 | 65 | 50 | 20 |
| OR 3 | Nehalem River Spit | 299 | 121 | 0 | 0 | 0 | 0 | 299 | 121 | 0 | 0 |
| OR 4 | Bayocean Spit | 367 | 148 | 279 | 113 | 0 | 0 | 0 | 0 | 88 | 36 |
| OR 5 | Netarts Spit | 541 | 219 | 0 | 0 | 0 | 0 | 541 | 219 | 0 | 0 |
| OR 6 | Sand Lake South | 200 | 81 | 0 | 0 | 0 | 0 | 0 | 0 | 200 | 81 |
| OR 7 | Sutton/Baker Beaches | 372 | 151 | 372 | 151 | 0 | 0 | 0 | 0 | 0 | 0 |
| OR 8A | Siltcoos Breach | 15 | 6 | 15 | 6 | 0 | 0 | 0 | 0 | 0 | 0 |
| OR 8B | Siltcoos River Spit | 241 | 97 | 241 | 97 | 0 | 0 | 0 | 0 | 0 | 0 |
| OR 8C | Dunes Overlook/Tahkenitch Creek Spit. | 716 | 290 | 716 | 290 | 0 | 0 | 0 | 0 | 0 | 0 |
| OR 8D | North Umpqua River Spit | 236 | 95 | 151 | 61 | 0 | 0 | 85 | 34 | 0 | 0 |
| Unit OR–8 Totals | | 1,208 | 489 | 1,123 | 454 | 0 | 0 | 85 | 34 | 0 | 0 |
| OR 9 | Tenmile Creek Spit | 244 | 99 | 244 | 99 | 0 | 0 | 0 | 0 | 0 | 0 |
| OR 10 | Coos Bay North Spit | 308 | 125 | 308 | 125 | 0 | 0 | 0 | 0 | 0 | 0 |
| OR 11 | Bandon to New River | 1,016 | 411 | 459 | 186 | 0 | 0 | 267 | 108 | 290 | 117 |
| OR 12* | Elk River Spit | 167 | 68 | 0 | 0 | 0 | 0 | 0 | 0 | 167 | 68 |
| OR 13 | Euchre Creek | 116 | 47 | 0 | 0 | 0 | 0 | 0 | 0 | 116 | 47 |
| OREGON STATE TOTALS | | 5,219 | 2,112 | 2,955 | 1,196 | 0 | 0 | 1,353 | 547 | 911 | 369 |
| **California** | | | | | | | | | | | |
| CA 1 | Lake Earl | 74 | 30 | 0 | 0 | 0 | 0 | 22 | 9 | 52 | 21 |
| CA 2 | Gold Bluffs Beach | 144 | 58 | 0 | 0 | 0 | 0 | 144 | 58 | 0 | 0 |
| CA 3A | Humboldt Lagoons—Stone Lagoon. | 52 | 21 | 0 | 0 | 0 | 0 | 52 | 21 | 0 | 0 |
| CA 3B | Humboldt Lagoons—Big Lagoon | 212 | 86 | 0 | 0 | 0 | 0 | 174 | 70 | 38 | 15 |
| Unit CA–3 Totals | | 264 | 107 | 0 | 0 | 0 | 0 | 226 | 92 | 38 | 15 |
| CA 4A | Clam Beach/Little River | 194 | 79 | 0 | 0 | 0 | 0 | 79 | 32 | 115 | 47 |
| CA 4B | Mad River | 456 | 185 | 0 | 0 | 0 | 0 | 152 | 62 | 304 | 123 |
| Unit CA–4 Totals | | 650 | 263 | 0 | 0 | 0 | 0 | 231 | 93 | 419 | 170 |
| CA 5A | Humboldt Bay South Spit | 419 | 170 | 20 | 8 | 0 | 0 | 383 | 155 | 16 | 7 |
| CA 5B | Eel River North Spit/Beach | 259 | 105 | 0 | 0 | 0 | 0 | 252 | 102 | 7 | 3 |
| CA 5C | Eel River South Spit/Beach | 339 | 137 | 0 | 0 | 0 | 0 | 317 | 128 | 22 | 9 |
| Unit CA–5 Totals | | 1,017 | 412 | 20 | 8 | 0 | 0 | 952 | 385 | 45 | 18 |
| CA 6 | Eel River Gravel Bars | 1,139 | 461 | 0 | 0 | 0 | 0 | 82 | 33 | 1,057 | 428 |
| CA 7 | MacKerricher Beach | 1,176 | 476 | 0 | 0 | 0 | 0 | 1,102 | 446 | 74 | 30 |
| CA 8 | Manchester Beach | 482 | 195 | 68 | 28 | 0 | 0 | 402 | 163 | 12 | 5 |
| CA 9 | Dillon Beach | 39 | 16 | 0 | 0 | 0 | 0 | 0 | 0 | 39 | 16 |
| CA 10A | Pt Reyes | 460 | 186 | 460 | 186 | 0 | 0 | 0 | 0 | 0 | 0 |
| CA 10B | Limantour | 156 | 63 | 156 | 63 | 0. | 0 | 0 | 0 | 0 | 0 |
| Unit CA–10 Totals | | 617 | 250 | 617 | 250 | 0 | 0 | 0 | 0 | 0 | 0 |
| CA 11 | Napa | 618 | 250 | 0 | 0 | 0 | 0 | 618 | 250 | 0 | 0 |
| CA 12 | Hayward | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 |
| CA 13A | Eden Landing | 237 | 96 | 0 | 0 | 0 | 0 | 228 | 92 | 8 | 3 |
| CA 13B | Eden Landing | 171 | 69 | 0 | 0 | 0 | 0 | 171 | 69 | 0 | 0 |
| CA 13C | Eden Landing | 609 | 247 | 0 | 0 | 0 | 0 | 602 | 244 | 7 | 3 |
| Unit CA–13 Totals | | 1,016 | 411 | 0 | 0 | 0 | 0 | 1,001 | 405 | 15 | 6 |
| CA 14 | Ravenswood | 89 | 36 | 0 | 0 | 0 | 0 | 0 | 0 | 89 | 36 |
| CA 15 | Warm Springs | 168 | 68 | 168 | 68 | 0 | 0 | 0 | 0 | 0 | 0 |
| CA 16 | Half Moon Bay | 36 | 15 | 0 | 0 | 0 | 0 | 36 | 15 | 0 | 0 |
| CA 17 | Waddell Creek Beach | 25 | 10 | 0 | 0 | 0 | 0 | 19 | 8 | 7 | 3 |

TABLE 3—PROPOSED REVISED CRITICAL HABITAT FOR THE PACIFIC COAST WSP SHOWING FEDERAL, STATE, TRIBAL, AND OTHER (PRIVATE AND LOCAL GOVERNMENT) LAND OWNERSHIP—Continued

| Unit No. | Unit name | Total | | Federal | | Tribal | | State | | Other | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | ac | ha | ac | ha | ac | ha | ac | ha | ac | ha |
| CA 18 | Scott Creek Beach | 23 | 9 | 0 | 0 | 0 | 0 | 15 | 6 | 8 | 3 |
| CA 19 | Wilder Creek Beach | 15 | 6 | 0 | 0 | 0 | 0 | 15 | 6 | 0 | 0 |
| CA 20 | Jetty Road to Aptos | 399 | 161 | 0 | 0 | 0 | 0 | 369 | 149 | 30 | 12 |
| CA 21 | Elkhorn Slough Mudflats | 281 | 114 | 0 | 0 | 0 | 0 | 281 | 114 | 0 | 0 |
| CA 22 | Monterey to Moss Landing | 967 | 391 | 423 | 171 | 0 | 0 | 285 | 115 | 260 | 105 |
| CA 23 | Point Sur Beach | 72 | 29 | 0 | 0 | 0 | 0 | 38 | 15 | 34 | 14 |
| CA 24 | San Carpoforo Creek | 24 | 10 | 4 | 2 | 0 | 0 | 18 | 7 | 3 | 1 |
| CA 25 | Arroyo Laguna Creek | 28 | 11 | 0 | 0 | 0 | 0 | 18 | 7 | 10 | 4 |
| CA 26 | San Simeon State Beach | 24 | 10 | 0 | 0 | 0 | 0 | 24 | 10 | 0 | 0 |
| CA 27 | Villa Creek Beach | 20 | 8 | 0 | 0 | 0 | 0 | 20 | 8 | 0 | 0 |
| CA 28 | Toro Creek | 34 | 14 | 0 | 0 | 0 | 0 | 11 | 4 | 23 | 9 |
| CA 29 | Atascadero Beach/Morro Strand SB. | 213 | 86 | 0 | 0 | 0 | 0 | 65 | 26 | 149 | 60 |
| CA 30 | Morro Bay Beach | 1,076 | 435 | 0 | 0 | 0 | 0 | 948 | 384 | 129 | 52 |
| CA 31 | Pismo Beach/Nipomo Dunes | 1,652 | 669 | 242 | 98 | 0 | 0 | 552 | 223 | 858 | 347 |
| CA 32 | Vandenberg North | 711 | 288 | 711 | 288 | 0 | 0 | 0 | 0 | 0 | 0 |
| CA 33 | Vandenberg South | 423 | 171 | 373 | 151 | 0 | 0 | 0 | 0 | 50 | 20 |
| CA 34 | Devereaux Beach | 52 | 21 | 0 | 0 | 0 | 0 | 43 | 17 | 9 | 4 |
| CA 35 | Santa Barbara Beaches | 65 | 26 | 0 | 0 | 0 | 0 | 30 | 12 | 35 | 14 |
| CA 36 | Santa Rosa Island Beaches | 586 | 237 | 586 | 237 | 0 | 0 | 0 | 0 | 0 | 0 |
| CA 37 | San Buenaventura Beach | 70 | 28 | 0 | 0 | 0 | 0 | 70 | 28 | 0 | 0 |
| CA 38 | Mandalay to Santa Clara River | 672 | 272 | 0 | 0 | 0 | 0 | 459 | 186 | 213 | 86 |
| CA 39 | Ormond Beach | 320 | 130 | 0 | 0 | 0 | 0 | 159 | 65 | 161 | 65 |
| CA 43 | Zuma Beach | 73 | 30 | 0 | 0 | 0 | 0 | 1 | 1 | 72 | 29 |
| CA 44 | Malibu Beach | 13 | 5 | 0 | 0 | 0 | 0 | 13 | 5 | 0 | 0 |
| CA 45A | Santa Monica Beach | 48 | 19 | 0 | 0 | 0 | 0 | 29 | 12 | 19 | 8 |
| CA 45B | Dockweiler North | 34 | 14 | 0 | 0 | 0 | 0 | 34 | 14 | 0 | 0 |
| CA 45C | Dockweiler South | 65 | 26 | 0 | 0 | 0 | 0 | 54 | 22 | 11 | 4 |
| CA 45D | Hermosa State Beach | 27 | 11 | 0 | 0 | 0 | 0 | 8 | 3 | 19 | 8 |
| Unit CA–45 Totals | | 173 | 70 | 0 | 0 | 0 | 0 | 124 | 50 | 496 | 20 |
| CA 46A | Bolsa Chica Reserve | 484 | 196 | 0 | 0 | 0 | 0 | 484 | 196 | 0 | 0 |
| CA 46B | Bolsa Chica Reserve | 2 | 1 | 0 | 0 | 0 | 0 | 2 | 1 | 0 | 0 |
| CA 46C | Bolsa Chica Reserve | 21 | 9 | 0 | 0 | 0 | 0 | 21 | 9 | 0 | 0 |
| CA 46D | Bolsa Chica Reserve | 3 | 1 | 0 | 0 | 0 | 0 | 3 | 1 | 0 | 0 |
| CA 46E | Bolsa Chica State Beach | 8 | 3 | 0 | 0 | 0 | 0 | 8 | 3 | 0 | 0 |
| Unit CA–46 Totals | | 518 | 210 | 0 | 0 | 0 | 0 | 8 | 3 | 510 | 205 |
| CA 47 | Santa Ana River Mouth | 19 | 8 | 0 | 0 | 0 | 0 | 18 | 7 | 1 | 1 |
| CA 48 | Balboa Beach | 25 | 10 | 0 | 0 | 0 | 0 | 0 | 0 | 25 | 10 |
| CA 50A | Batiquitos Lagoon | 24 | 10 | 0 | 0 | 0 | 0 | 18 | 7 | 6 | 3 |
| CA 50B | Batiquitos Lagoon | 23 | 9 | 0 | 0 | 0 | 0 | 15 | 6 | 8 | 3 |
| CA 50C | Batiquitos Lagoon | 19 | 8 | 0 | 0 | 0 | 0 | 0 | 0 | 19 | 8 |
| Unit CA–50 Totals | | 66 | 27 | 0 | 0 | 0 | 0 | 32 | 13 | 33 | 14 |
| CA 51A | San Elijo Lagoon Ecological Reserve. | 3 | 1 | 0 | 0 | 0 | 0 | 3 | 1 | 0 | 0 |
| CA 51B | San Elijo Lagoon Ecological Reserve. | 5 | 2 | 0 | 0 | 0 | 0 | 1 | 0 | 4 | 2 |
| CA 51C | San Elijo Lagoon Ecological Reserve. | 7 | 3 | 0 | 0 | 0 | 0 | 7 | 3 | 0 | 0 |
| Unit CA–51 Totals | | 15 | 6 | 0 | 0 | 0 | 0 | 11 | 4 | 4 | 2 |
| CA 52A | San Dieguito Lagoon | 4 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 4 | 2 |
| CA 52B | San Dieguito Lagoon | 3 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 3 | 1 |
| CA 52C | San Dieguito Lagoon | 4 | 1 | 0 | 0 | 0 | 0 | 4 | 2 | 0 | 0 |
| Unit CA–52 Totals | | 11 | 5 | 0 | 0 | 0 | 0 | 4 | 2 | 7 | 3 |
| CA 53 | Los Penasquitos Lagoon | 32 | 13 | 0 | 0 | 0 | 0 | 32 | 13 | 1 | 0 |
| CA 54A | Fiesta Island | 2 | 1 | 0 | 0 | 0 | 0 | 1 | 1 | 1 | 0 |
| CA 54B | Mariner's Point | 7 | 3 | 0 | 0 | 0 | 0 | 1 | 0 | 6 | 2 |
| CA 54C | South Mission Beach | 38 | 15 | 0 | 0 | 0 | 0 | 8 | 3 | 30 | 12 |
| CA 54D | San Diego River Channel | 51 | 21 | 0 | 0 | 0 | 0 | 38 | 15 | 13 | 5 |
| Unit CA–54 Totals | | 98 | 40 | 0 | 0 | 0 | 0 | 48 | 19 | 50 | 20 |
| CA 55B | Coronado Beach | 74 | 30 | 0 | 0 | 0 | 0 | 74 | 30 | 0 | 0 |
| CA 55E | Sweetwater Marsh National Wildlife Refuge and D Street Fill. | 132 | 54 | 77 | 31 | 0 | 0 | 1 | 0 | 54 | 22 |
| CA 55F | Silver Strand State Beach | 82 | 33 | 74 | 30 | 0 | 0 | 8 | 3 | 0 | 0 |
| CA 55G | Chula Vista Wildlife Reserve | 10 | 4 | 0 | 0 | 0 | 0 | 10 | 4 | 0 | 0 |
| CA 55I | San Diego National Wildlife Refuge, South Bay Unit. | 5 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 5 | 2 |

TABLE 3—PROPOSED REVISED CRITICAL HABITAT FOR THE PACIFIC COAST WSP SHOWING FEDERAL, STATE, TRIBAL, AND OTHER (PRIVATE AND LOCAL GOVERNMENT) LAND OWNERSHIP—Continued

| Unit No. | Unit name | Total | | Federal | | Tribal | | State | | Other | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | ac | ha | ac | ha | ac | ha | ac | ha | ac | ha |
| CA 55J | Tijuana Estuary and Beach | 150 | 61 | 71 | 29 | 0 | 0 | 58 | 23 | 21 | 9 |
| Unit CA–55 Totals (does not include exempt sub-units). | | 453 | 183 | 222 | 90 | 0 | 0 | 151 | 61 | 81 | 33 |
| CALIFORNIA TOTALS | | 16,777 | 6,789 | 3,434 | 1,390 | 0 | 0 | 8,693 | 3,518 | 4,650 | 1,882 |
| WASHINGTON, OREGON, CALIFORNIA GRAND TOTALS. | | 28,261 | 11,437 | 9,040 | 3,658 | 336 | 136 | 12,740 | 5,156 | 6,145 | 2,487 |

*Unit or portions of unit may be considered for exclusion in the final critical habitat rule under section 4(b)(2) of the Act. Values in this table may not sum due to rounding.

*Critical Habitat Units*

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for the Pacific Coast WSP below.

Washington

*WA 1, Copalis Spit, 407 ac (165 ha):*

Copalis Spit is located along the central Washington coast, approximately 20 mi (32 km) northwest of the Community of Hoquiam in Grays Harbor County. Copalis Spit is a 2-mi (3-km) long sand spit bounded by the Copalis River on the northern and landward sides. The Copalis Beach access road off State Route 109 and State Park property line demark the southern boundary. The unit is entirely within Griffiths-Priday Ocean State Park (Washington State Parks and Recreation Commission).

This unit is the northernmost unit in the range of the species and historically supported 6 to 12 nesting pairs of Pacific Coast WSPs, but no use has been documented since 1984 (Service 2007, p. 21). This unit was not occupied at the time of listing and is not currently occupied. The unit consists of a long sandy beach with sparsely vegetated dunes that extend to the river, providing nesting and foraging opportunities, as well as protection from the weather. The northward shift of Connor Creek washed out the beach access road at the southern end, effectively closing the area to motorized vehicles. Because of its relatively remote location, the area receives little human use. Although currently unoccupied, the unit is considered essential for the conservation of the species as it allows for population expansion into the northern extent of the Pacific Coast WSP's historical range from adjacent occupied areas and has high quality habitat, including a long sandy beach with sparsely vegetated dunes that extend to the river, providing nesting and foraging opportunities for the species.

*WA 2, Damon Point/Oyhut Wildlife Area, 673 ac (272 ha):*

This unit is located at the southern end of the City of Ocean Shores in Grays Harbor County and is a sandy spit that extends into Grays Harbor. The unit boundary begins at the Damon Point parking area off Marine View Drive. The western boundary generally follows the property line for the Oyhut Wildlife Area.

This unit was occupied at the time of listing and we consider this unit to be currently occupied. Research in the mid-1980s indicated that up to 20 Pacific Coast WSPs have used Damon Point for nesting. However, use has declined significantly at this site, with only six adult birds documented using the area during the breeding season in 2005. A historic shipwreck (S.S. Catala) was exposed during winter storms in 2006, and the vessel was removed from the spit due to oil spill and other hazardous materials concerns over a period of 17 months (State of Washington, Department of Ecology 2007). The opportunity to view the shipwreck and removal operation drew media attention, and hundreds of visitors visited the site on weekends. Visitation of the area has dropped off since the clean-up. Even though no plover nesting has been documented at Damon Point since 2006, we consider this unit occupied by the species based on previous use of the area, on the fluctuating use of areas in general by the species as a response to habitat and resource availability, and because breeding surveys are not conclusive as to the presence or absence of a species as they only provide information during the breeding season. We have determined that the unit contains the physical and biological features essential to the conservation of the species which may require special management considerations or protection. The unit includes sandy beaches that are relatively undisturbed by human or tidal activity (nesting habitat), large expanses of sparsely vegetated barren terrain, and mudflats and sheltered bays that provide ample foraging areas.

The majority (648 ac (262 ha)) of the unit is administered by the State of Washington (Department of Fish and Wildlife and Department of Natural Resources). There are over 7 mi (11 km) of sandy beaches and shoreline at Damon Point, and the shape of the spit changes constantly with winter storms and nearshore sand drift. In recent years, some of the lower elevation areas have been overwashed, and coastal erosion may result in separation of the spit from the mainland in the near future. The western edge of the unit lies adjacent to a municipal wastewater treatment facility that is managed by the City of Ocean Shores, with a few undevelopable private parcels in the tidelands near the parking area. Similar to Copalis Spit, the access road has washed out, and the area is currently inaccessible to motorized vehicles.

The primary threats to Pacific Coast WSPs that may require special management at this time are recreational use, including pedestrians and unleashed pets, habitat loss from European beach grass, and potential reopening of the vehicle access road. Special management in the form of developing and enforcing regulations to address the recreation issues may be needed. Management to remove and control beach grass will prevent further spread of nonnative vegetation, thereby maintaining and expanding the elements of essential physical and biological features identified above.

*WA 3A, Midway Beach, 697 ac (282 ha):*

Located adjacent to the Community of Grayland, this subunit extends from the northern boundary of Grayland Beach State Park, through South Beach State Park to Cape Shoalwater at the southern end in Pacific County. Midway Beach is

an expansive beach and is nearly 0.5 mi (0.8 km) wide at the widest point. This subunit was occupied at the time of listing and is currently occupied. This subunit includes the following physical and biological features essential to the conservation of the species: large areas of sand dune habitat that is relatively undisturbed, areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates, and close proximity to tidally influenced estuarine mud flats.

Beach accretion since 1998 has greatly improved habitat conditions, resulting in this beach becoming a primary nesting area in the State. From 1998 to 2005, an average of 18 plovers nested annually at Midway, and from 2003 to 2006, between 23 and 28 Pacific Coast WSPs nested at Midway Beach.

Primary threats at this subunit that may require special management include motorized vehicle use on the beaches and human activity. The recent closure of the Midway Beach Access Road due to safety concerns, *e.g.,* vehicles getting stuck in deep sand, has reduced impacts in the nesting area, but may not be permanent. Therefore, the physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats associated with human-related recreation and other activities. Developing and enforcing regulations to address the recreation issues may be needed. Management to remove and control beach grass will prevent further spread of nonnative vegetation, thereby maintaining and expanding the elements of essential physical and biological features identified above.

*WA 3B, Shoalwater (Graveyard Spit), 1,121 ac (454 ha):*

This unit is located in Pacific County at Shoalwater Beach (Graveyard Spit), which is an extension of Midway Beach, and extends south into the entrance of Willapa Bay. The unit starts at a narrow strip of beach adjacent to State Route 105, continuing in a southwesterly direction to the Community of Tokeland. The landward extent of the Graveyard Beach addition is State Route 105, and the sea-ward extent of the unit is the Pacific Ocean's water's edge.

This subunit was occupied at the time of listing, is currently occupied and includes the recently discovered nesting area at Graveyard Spit (since 2006). The State recovery plan for the WSP (WDFW 1995) defines the geographic area from Grayland Beach State Park south to Toke Point as "South Beach." Based on documented sightings and records of WSP use for the South Beach geographic area (WDFW 1995, Appendix C), Shoalwater Beach/Graveyard Spit was occupied at the time of listing and is a known or presumed historical nesting area (WDFW 1995, Figure 2, p. 3). Pacific Coast WSPs have nested successfully at Shoalwater/Graveyard Spit for several years. Although fledging success is relatively high at this location, plover use of the Shoalwater/Graveyard Spit area is sporadic.

The subunit includes the following features essential to the conservation of the species: Large areas of sand dune habitat that is relatively undisturbed; areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates; and close proximity to tidally influenced estuarine mud flats. Special management that may be required includes management of human-related activities to reduce disturbance to breeding Pacific Coast WSPs, and maintenance of the physical and biological features within the subunit.

Based on interpretation of aerial imagery, the Cape Shoalwater area has experienced extensive erosion over the past 15 years. A nearly 0.3 mi-wide (0.5 km-wide) by 1.5 mi-long (2.4 km-long) section of the coastline, including roads and residences, has been reclaimed by the ocean, resulting in the accretion of Midway Beach. The accretion of beach improves elements of essential physical and biological features. The county ownership layer for this subunit is ambiguous and could not be used for precise acreage calculations, however it is estimated that approximately 280 ac (113 ha) of the subunit are in private ownership, 336 ac (136 ha) are managed by the Shoalwater Bay Tribe, and the rest of the area is managed by the State of Washington (505 ac (204 ha).

*WA 4A, Leadbetter Spit, 2,463 ac (997 ha):*

The Leadbetter Spit subunit is located in Pacific County at the northern tip of the Long Beach Peninsula; a 26-mi-long (42 km-long) spit that defines the west side of Willapa Bay and extends down to the mouth of the Columbia River. The subunit is located just north of the community of Ocean Park and includes Leadbetter Point State Park (SP) and the Willapa National Wildlife Refuge (NWR) at the northern end of the spit. The main portion of this subunit is on the ocean side, and includes the coastal beaches from the tip of the peninsula, and the habitat restoration area down to Oysterville Road, approximately 1.8 mi (3 km) south of Leadbetter Point SP. The subunit includes approximately 8 mi (13 km) of coastal beaches and sheltered bays. The vast majority of the subunit is on lands that are managed by the Willapa NWR (2,026 ac (820 ha)). The remaining beaches (437 ac (177 ha)) are managed by the Washington State Parks and Recreation Commission. The State jurisdiction on the Long Beach Peninsula extends well up into the foredunes.

Leadbetter Spit was occupied at the time of listing, is currently occupied, and is the largest subunit in Washington. Approximately 25 to 30 Pacific Coast WSPs nest and overwinter on the spit annually, with most of the nesting occurring in the snowy plover habitat restoration area within the Willapa NWR. Between 10 and more than 40 breeding adults were recorded between 2005 and 2009 (WDFW 2009, p. 12). A few pairs nest along the ocean beaches and on State Park lands just south of the Willapa NWR. The 2007 Recovery Plan lists a management goal of 30 breeding adults for this subunit (Service 2007, Appendix B).

The subunit includes the following features essential to the conservation of the species: Relatively undisturbed sandy beaches above and below the high-tide line and sparsely vegetated dunes for nesting, as well as miles of coastal wrackline supporting small invertebrates; and close proximity to tidally influenced estuarine mud flats and sheltered bays for foraging. The combined dynamics of weather and surf cause large quantities of wood and shell material to accumulate on the spit, providing prime nesting habitat, hiding areas from predators, foraging opportunities, and shelter from inclement weather.

European beach grass threatens the habitat quality of the subunit. Special management that may be needed includes restoration and maintenance of degraded habitat to ensure the reinfestation of nonnative vegetation does not occur. Doing so will ensure that elements of essential physical and biological features within this subunit remain intact.

*WA 4B, Gunpowder Sands Island, 904 ac (366 ha):*

The subunit includes Gunpowder Sands Island just off the northern tip of the Long Beach Peninsula. The island is Federally owned and is administered by the Willapa NWR.

Because the island is only accessible by boat, breeding surveys for Pacific Coast WSP at this location are sporadic. It is unknown if this Gunpowder Sands Island was occupied at the time the Pacific Coast WSP was listed in 1993, but two successful nests and one failed nest were documented on the island in

1995 (WDFW heritage data). Although nesting has not been recently confirmed for this area, we consider this unit essential for the conservation of the species because it provides a safe nesting, resting and foraging area free of human disturbance and connectivity between two currently occupied areas. We consider that it is important for the species' use, based on the proximity of the site to the occupied nesting area on Leadbetter Spit, and on fluctuating habitat and resource availability.

Gunpowder Sands Island also has physical and biological features essential to the conservation of the species: Relatively undisturbed sandy beaches above and below the high-tide line, sparsely vegetated dunes for nesting, and coastal wrackline supporting small invertebrates. The island is periodically overwashed during winter storms, resulting in dry sand and beach habitat with little or no vegetation.

Primary threats to essential physical and biological features that may require special management include the State's management of the spring razor clam season, which opens beaches to motorized vehicle and provides access into Pacific Coast WSP nesting areas that normally receive limited human use. Beaches south of the Willapa NWR are open to public use. The State Parks and Recreation Commission posts areas where plovers nest, has increased enforcement of the wet sand driving regulations, and is conducting habitat restoration on State Park lands. Controlling human-related activities will ensure that disturbance remains minimal.

Oregon

*OR 1, Columbia River Spit, 169 ac (69 ha):*

This unit is on the northwestern coast of Clatsop County, about 9 mi (15 km) northwest of the City of Astoria. It is bounded by the Columbia River south jetty and the Pacific Ocean to the west. The mouth of the Columbia River constitutes the northern and eastern boundaries, and Fort Stevens State Park lies along the unit's southern edge. The Columbia River Spit is managed by the U.S. Army Corps of Engineers (USACE), but is under lease to the Oregon Parks and Recreation Department (OPRD) as part of Fort Stevens State Park. Inland, the beach is overgrown with shore pine (*Pinus contorta*), European beach grass, and some alder (*Alnus* spp). Sea-level rise and overwashing of this area during the winter months is anticipated to result in vegetation removal and the creation of additional habitat for Pacific Coast WSP.

Pacific Coast WSPs were observed breeding on Clatsop Spit in 1965. Throughout the 1980s, they were observed nesting on ocean beaches directly south of the spit to the City of Gearhart. Winter use has been confirmed for this area as recently as 2008. We consider this unit essential for the conservation of the species because it provides connectivity between two currently occupied areas, dispersal habitat between units, and habitat for resting and foraging. We consider that it is likely occupied at times, based on the fluctuating use of areas by the species as a response to habitat and resource availability. The unit is comprised of a wide sand spit adjacent to mud flats and an estuary and provides habitat for foraging and resting and would facilitate interchange between otherwise widely separated units.

*OR 2, Necanicum River Spit, 211 ac (85 ha):*

This unit is on the western coast of Clatsop County, adjacent to the City of Gearhart, and less than 1 mi (2 km) north of the City of Seaside. It is bounded by the Necanicum River estuary on the south, City of Gearhart to the north and east, and the Pacific Ocean to the west. The mouth of the river changes periodically. The northern inland portion of the unit is overgrown with European beach grass; sea-level rise and overwashing of this area during the winter months is anticipated to result in vegetation removal and the creation of additional Pacific Coast WSP breeding habitat.

This unit was not considered occupied at the time the Pacific Coast WSP was listed in 1993. Two breeding Pacific Coast WSPs were documented in this unit in 2002 (Service unpublished data). Although the unit is not confirmed to be currently occupied, we consider this unit essential for the conservation of the species because it provides connectivity between occupied areas, dispersal habitat between units, and habitat for resting and foraging. This unit consists of 161 State-owned ac (65 ha) and 50 city-owned ac (20 ha). The OPRD is the primary land manager.

The unit is characteristic of a dune-backed beach adjacent to mud flats and an estuary. This unit includes wide sand spits or overwashes relatively undisturbed by tidal activity and sparsely vegetated; areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates; and close proximity to tidally influenced estuarine mud flats.

*OR 3, Nehalem River Spit, 299 ac (121 ha):*

This unit is on the northwestern coast of Tillamook County, next to the City of Manzanita and about 15 mi (24 km) northwest of the City of Tillamook. It is bounded by Nehalem Bay on the east, the southern boundary of the Nehalem Bay State Park campground to the north, and the Nehalem River south jetty to the south. The Pacific Ocean forms the western boundary. The southern portion of the unit extends behind a relatively low foredune into an area overgrown with European beach grass; sea-level rise and overwashing of this area during the winter months is anticipated to result in vegetation removal and creation of additional Pacific Coast WSP breeding habitat.

This unit was not considered occupied at the time the Pacific Coast WSP was listed in 1993. One breeding Pacific Coast WSP was documented in this unit in 1984 (ODFW *in litt.* 1995, Appendix, Table 2), therefore, the unit is a historical breeding site within the species' range. Winter use was documented as recently as 2009. Although nesting has not been recently confirmed for this area, we consider this unit essential for the conservation of the species because it provides connectivity between two currently occupied areas, dispersal habitat between units, and habitat for resting and foraging. We consider that it is likely occupied at times, based on record of past use and the fluctuating use of areas by the species as a response to habitat and resource availability. This unit provides habitat to support breeding plovers and would facilitate interchange between otherwise widely separated units and helps provide habitat within Recovery Unit 1 in Oregon and Washington. The unit consists of 299 State-owned ac (121 ha) and is managed by the OPRD as part of the Nehalem Bay State Park.

The unit is representative of a dune-backed beach and sand spit adjacent to mud flats and an estuary. It includes the following features essential to the conservation of the species: A wide sand spit or overwash area relatively undisturbed by human or tidal activity and sparsely vegetated; areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates; and close proximity to tidally influenced estuarine mud flats.

*OR 4, Bayocean Spit, 367 ac (148 ha):*

This unit is on the western coast of Tillamook County, and about 9 mi (15 km) northwest of the City of Tillamook. It is bounded by Tillamook Bay on the east, the Tillamook Bay South Jetty to the north, the northern boundary of Bayocean Peninsula County Park 1.4 mi (2.3 km) to the south, and the Pacific

Ocean to the west. Approximately 279 ac (113 ha) are Federally owned, and 88 ac (36 ha) are owned by local governments or private parties. The northern half of the unit extends behind a relatively low foredune. Sea-level rise and overwashing of this area during the winter months is anticipated to result in vegetation removal and creation of additional Pacific Coast WSP breeding habitat.

This unit was occupied at the time of listing, and is likely currently occupied. Two Pacific Coast WSPs were documented in 1993 and six plovers in 1995 in this unit during the breeding season (ODFW *in litt.* 1995, Appendix, Table 2). Prior to 2001, winter use of the area by plovers was documented consistently. Recent records indicate use by wintering plovers in 2007 and 2008. Although nesting has not been recently confirmed for this area, we consider that it is likely occupied at times, and is needed by the species for use in response to fluctuating habitat and resource availability. This unit provides habitat to support breeding plovers, facilitates interchange between otherwise widely separated units under intensive management, and helps provide habitat within Recovery Unit 1 in Oregon and Washington.

The unit is characteristic of a dune-backed beach in close proximity to mud flats and an estuary. It includes the following features essential to the conservation of the species: Large areas of sandy dune relatively undisturbed by tidal activity; areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates; and close proximity to tidally influenced estuarine mud flats.

Primary threats to essential physical and biological features that may require special management in this unit are introduced European beach grass that encroaches on the available nesting and foraging habitat; disturbance from humans, pets, and horses in important foraging and nesting areas; and predators.

*OR 5, Netarts Spit, 541 ac (219 ha):*

The unit is on the western coast of Tillamook County, about 5.5 mi (9 km) southwest of the City of Tillamook. It is bounded by Netarts Bay to the east and the north, Cape Lookout State Park campground 2.6 mi to the south, and the Pacific Ocean to the west. The unit extends behind a low foredune with a large expanse of European beach grass. Sea-level rise and overwashing of this area during the winter months is anticipated to result in vegetation removal and creation of additional Pacific Coast WSP breeding habitat.

This unit was not considered occupied at the time the Pacific Coast WSP was listed in 1993; however, three breeding Pacific Coast WSPs were documented in this unit in 1982 (ODFW *in litt.* 1995, Appendix, Table 2). Although nesting and wintering have not been recently confirmed for this area, we consider this unit essential for the conservation of the species because it provides connectivity between two currently occupied areas, dispersal habitat between units, and habitat for resting and foraging. It is needed by the species for use in response to fluctuating habitat and resource availability. This unit provides habitat to support breeding plovers, facilitates interchange between otherwise widely separated units under intensive management, and helps provide habitat within Recovery Unit 1 in Oregon and Washington. The unit consists of 541 State-owned ac (219 ha) managed by OPRD as Cape Lookout State Park.

The unit is characteristic of a dune-backed beach and sand spit in close proximity to mud flats. It includes the following features essential to the conservation of the species: Wide sand spits or overwashes and large areas of sandy dune relatively undisturbed by tidal activity and sparsely vegetated; areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates; and close proximity to tidally influenced mud flats.

*OR 6, Sand Lake South, 200 ac (81 ha):*

This unit is on the southwestern coast of Tillamook County, about 4.5 mi (7 km) north of Pacific City. It is bounded by Sand Lake estuary to the north and east, the northern limit of development in the town of Tierra Del Mar to the south, and the Pacific Ocean to the west. The unit is characteristic of a dune-backed beach and sand spit in close proximity to mud flats and an estuary. The mouth of the lake changes periodically. The unit extends into a small upland portion of the spit. Sea-level rise and overwashing of this area during the winter months is anticipated to result in vegetation removal and the creation of additional Pacific Coast WSP breeding habitat.

This unit was not considered occupied at the time the Pacific Coast WSP was listed in 1993. However, four snowy plovers were observed during the breeding season at Sand Lake in 1986 (ODFW, *in litt.* 1995, Appendix, Table 2). Although nesting and wintering has not been recently confirmed for this area, the unit is a historical breeding site within the species' range, and we consider this unit essential for the conservation of the species because it provides connectivity between two currently occupied areas, dispersal habitat between units, and habitat for resting and foraging. We consider the area is needed by the species for use in response to fluctuating habitat and resource availability. This unit provides habitat to support breeding plovers, facilitates interchange between otherwise widely separated units under intensive management, and helps provide habitat within Recovery Unit 1 in Oregon and Washington. The unit consists of 200 privately owned ac (81 ha).

The unit includes the following features essential to the conservation of the species: Wide sand spits or overwashes and sparsely vegetated areas of sandy dune relatively undisturbed by tidal activity; areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates; and close proximity to tidally influenced mud flats.

*OR 7, Sutton/Baker Beaches, 372 ac (151 ha):*

This unit is on the western coast of Lane County, about 5 mi (8 km) north of the City of Florence. It is bounded by Sutton Creek to the south, Heceta Head to the north, the Oregon Dunes National Recreation Area (NRA) to the east, and the Pacific Ocean to the west.

This unit was occupied at the time of listing and is currently occupied. The most recently documented Pacific Coast WSPs for this unit include four breeding plovers in 2007 (Lauten *et al.* 2007, p. 5). We have determined that the unit contains the physical and biological features essential to the conservation of the species which may require special management considerations or protection. This unit provides habitat to support breeding plovers and would facilitate interchange between otherwise widely separated units under intensive management. The unit consists of 372 Federally owned ac (151 ha) managed by the U.S. Forest Service's (USFS) Siuslaw National Forest. The unit extends behind a relatively low foredune in several places into areas overgrown with beach grass. Sea-level rise and overwashing of these areas during the winter months is anticipated to result in vegetation removal and the creation of additional plover breeding habitat.

The unit is characteristic of a dune-backed beach and wide sand spits with overwash areas and contains an interdune flat created through habitat restoration. It includes the following features essential to the conservation of the species: Large areas of sandy dunes or overwashes relatively undisturbed by

tidal activity and areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates.

Primary threats to essential physical and biological features that may require special management in this unit are introduced European beach grass that encroaches on the available nesting and foraging habitat; disturbance from humans, pets, and horses in important foraging and nesting areas; and predators.

*OR 8A, Siltcoos Breach, 15 ac (6 ha):*

This subunit is on the southwestern coast of Lane County, about 7 mi (11 km) southwest of the City of Florence. It is an important wintering area that includes a large opening in the foredune 1.2 mi (2 km) north of the Siltcoos River. The southern boundary is located 0.6 mi (1 km) north of the Siltcoos River, with the Oregon Dunes NRA to the east and the Pacific Ocean to the west. The subunit consists of 15 Federally owned ac (6 ha) managed by the USFS as the Oregon Dunes NRA in the Siuslaw National Forest.

This subunit was occupied at the time of listing and is currently occupied with recently documented wintering Pacific Coast WSPs in 2005, 2006, and 2007, and 2010 (Service unpublished data). As many as 59 plovers were documented during the winter of 2005 (C. Burns, pers. comm. 2006) and 26, 36, and 24 in 2006, 2007 and 2010 respectively (Service unpublished data).

The subunit is characteristic of a dune-backed beach and sand spit in close proximity to a tidally influenced river mouth. It includes the following features essential to the conservation of the species: sparsely vegetated areas of sandy dune relatively undisturbed by tidal activity; areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates; and close proximity to tidally influenced freshwater areas.

Primary threats to essential physical and biological features that may require special management in this subunit are introduced European beach grass that encroaches on the available roosting habitat, disturbance from vehicles, and predators.

*OR 8B, Siltcoos River Spit, 241 ac (97 ha):*

This subunit is on the southwestern coast of Lane County, about 7 mi (11 km) southwest of the City of Florence. It includes the sand spits to the north and south of the Siltcoos River and is bounded by the Wax Myrtle Trail and campground to the east, and Pacific Ocean to the west.

This subunit was occupied at the time of listing and is currently occupied. Most recently documented Pacific Coast WSPs for this subunit include 24 breeding plovers in 2009 (Lauten *et al.* 2009, p. 26). Subunit OR 8B consists of 241 Federally owned ac (97 ha) managed by the USFS as the Oregon Dunes NRA in the Siuslaw National Forest.

The subunit is characteristic of a dune-backed beach and sand spit in close proximity to a tidally influenced river mouth. It includes the following features essential to the conservation of the species: wide sand spits or overwashes and sparsely vegetated areas of sandy dune relatively undisturbed by tidal activity; areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates; and close proximity to tidally influenced freshwater areas.

Primary threats to essential physical and biological features that may require special management in this subunit are introduced European beach grass that encroaches on the available nesting and foraging habitat; disturbance from humans, pets, and OHVs in important foraging and nesting areas; and predators such as the American crow and common raven.

*OR 8C, Dunes Overlook/Tahkenitch Creek Spit, 716 ac (290 ha):*

This subunit is primarily in Douglas County, about 9 mi (15 km) southwest of the City of Florence. The southern boundary of the unit is about 5.3 mi (9 km) northwest of the City of Reedsport. It is bounded by the subunit 8A to the north, an OHV open ride area (part of the Oregon Dunes NRA) to the south, Oregon Dunes NRA to the east, and the Pacific Ocean to the west.

This subunit was occupied at the time of listing and is currently occupied. Documented Pacific Coast WSPs for this subunit include 12 breeding plovers in 2009 (Lauten *et al.* 2009, p. 26). Subunit OR 8C consists of 716 Federally managed ac (290 ha) managed by the USFS as the Oregon Dunes NRA in the Siuslaw National Forest.

The subunit is characteristic of a dune-backed beach and sand spit in close proximity to a tidally influenced river mouth and contains interdune flats created through habitat restoration. It includes the following features essential to the conservation of the species: wide sand spits or overwashes and sparsely vegetated areas of sandy dune relatively undisturbed by tidal activity; areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates; and close proximity to tidally influenced freshwater areas.

Primary threats to essential physical and biological features that may require special management in this subunit are introduced European beach grass that encroaches on the available nesting and foraging habitat; disturbance from humans, pets, and vehicles in important foraging and nesting areas; and predators.

*OR 8D, North Umpqua River Spit, 236 ac (95 ha):*

This subunit is on the western coast of Douglas County, about 4 mi (5 km) west of the City of Reedsport. It is bounded by the Umpqua River North Jetty to the south, Oregon Dunes NRA land to the north and east, and the Pacific Ocean to the west. The subunit consists of 151 ac (61 ha) of Federally owned land and 85 ac (34 ha) of State-owned land. The primary land manager is the USFS for the Oregon Dunes NRA.

Nesting Pacific Coast WSPs were documented in this unit in the 1980s. The last documented winter use of this area was in 1993. Although use of the area has not been recently documented, it contains features essential to the conservation of the species and is needed by the species for use in response to fluctuating habitat and resource availability. The subunit is located adjacent to currently occupied areas and provides dispersal habitat between units. The subunit also contains physical and biological features essential to the conservation of the species which may require special management considerations or protection. The subunit is characteristic of a dune-backed beach and includes the following features essential to the conservation of the species: areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging).

Threats to essential physical and biological features that may require special management in this subunit are introduced European beach grass that encroaches on the available nesting and foraging habitat; disturbance from vehicles in important foraging and nesting areas; and predators.

*OR 9, Tenmile Creek Spit, 244 ac (99 ha):*

This unit is on the northwestern coast of Coos County, about 11 mi (18 km) southwest of the City of Reedsport. It includes the sand spits and beaches to the north and south of the Tenmile River. The unit is bounded to the north, east, and south by OHV riding areas, part of the Oregon Dunes (NRA), and by the Pacific Ocean to the west.

This unit was occupied at the time of listing and is currently occupied. Documented Pacific Coast WSPs for this unit include 23 breeding plovers in 2009 (Lauten *et al.* 2009, p. 26). Unit OR

9 consists of 244 Federally owned ac (99 ha) managed as the Oregon Dunes NRA by the USFS.

The unit is characteristic of a dune-backed beach and sand spit. It includes the following features essential to the conservation of the species: Wide sand spits or overwashes and sparsely vegetated areas of sandy dune relatively undisturbed by tidal activity; areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates; and close proximity to tidally influenced freshwater areas.

Primary threats to essential physical and biological features that may require special management in this subunit are introduced European beach grass that encroaches on the available nesting and foraging habitat; disturbance from humans and pets in important foraging and nesting areas; and predators.

*OR 10, Coos Bay North Spit, 308 ac (125 ha):*

This unit is on the western coast of Coos County, about 3 mi (5 km) west of the City of Coos Bay. It is bounded by Coos Bay to the east, the Coos Bay North Jetty to the south, an OHV riding area to the north, and the Pacific Ocean to the west.

This unit was occupied at the time of listing and is currently occupied. Documented Pacific Coast WSPs for this unit include 45 breeding plovers in 2009 (Lauten *et al.* 2009, p. 26). The unit consists of 308 Federally owned ac (125 ha) primarily managed by the U.S. Bureau of Land Management (BLM).

The unit is characteristic of a dune-backed beach and interior interdune flats created through dredge material disposal or through habitat restoration. It includes the following features essential to the conservation of the species: Expansive, sparsely vegetated interdune flats; areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates; and close proximity to tidally influenced estuarine areas.

Threats to essential physical and biological features that may require special management in this unit are introduced European beach grass that encroaches on the available nesting and foraging habitat; disturbance from humans, pets, and vehicles in important foraging and nesting areas; and predators.

*OR 11, Bandon to New River, 1,016 ac (411 ha):*

This unit is on the southwestern coast of Coos County, about 3 mi (5 km) south of the City of Bandon. It is bounded by China Creek to the north, the New River to the east, north of the Floras Creek outlet to the south, and the Pacific Ocean to the west. The unit encompasses all of New River Spit and extends behind a relatively low foredune north of Floras Creek. Sea-level rise and overwashing of these areas during the winter months is anticipated to result in vegetation removal and the creation of additional Pacific Coast WSP breeding habitat.

This unit was occupied at the time of listing and is currently occupied. Documented Pacific Coast WSPs for this unit include 49 breeding plovers in 2009 (Lauten *et al.* 2009, p. 26). The unit consists of 459 ac (186 ha) of Federally owned land, 267 ac (108 ha) of State-owned land, 290 ac (117 ha) of county and private land. The BLM and OPRD are the unit's primary land managers.

The subunit is characteristic of a dune-backed beach and barrier spit and contains interdune flats created through habitat restoration. It includes the following features essential to the conservation of the species: Wide sand spits or overwashes and sparsely vegetated areas of sandy dune relatively undisturbed by tidal activity; areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates; and close proximity to tidally influenced freshwater areas.

Threats to essential physical and biological features that may require special management in this unit are introduced European beach grass that encroaches on the available nesting and foraging habitat; disturbance from humans, pets, horses, and vehicles in important foraging and nesting areas; and predators.

*OR 12, Elk River Spit, 167 ac (68 ha):*

This unit is on the northwestern coast of Curry County, about 4 mi (6 km) northwest of the City of Port Orford and 2.3 mi (4 km) southeast of Cape Blanco. It is bounded by the Elk River to the east and north, private land to the south, and the Pacific Ocean to the west. Unit OR 12 consists of 167 privately owned ac (68 ha).

There are no documented occurrences of Pacific Coast WSPs for this unit. Since this unit is largely on private land, it was not surveyed prior to listing of the Pacific Coast WSP. As a consequence, its occupancy at the time of listing is unknown. However, we have determined that this unit is essential for the conservation of the Pacific Coast WSP because it provides habitat to support breeding or wintering plovers and would facilitate interchange between otherwise widely separated units under intensive management (*see Criteria Used to Identify Critical Habitat* section for a detailed discussion). The Recovery Plan identifies this area as a Recovery Site (OR–17) (Service 2007, Appendix B) that could support four breeding birds as it includes a dune-backed beach and wide sand spits or overwashes with sparsely vegetated areas of undisturbed sandy dunes.

*OR 13, Euchre Creek Spit, 116 ac (47 ha):*

This unit is on the western coast of Curry County, approximately 10 mi (6 km) north of the City of Gold Beach. It includes the sand spits to the north and south of the Euchre Creek and is bounded by the Pacific Ocean to the west. The unit consists of 116 privately owned ac (47 ha).

The unit extends into low-elevation areas on the north and south side of Euchre Creek. Sea-level rise and overwashing of these areas during the winter months is anticipated to result in vegetation removal and the creation of additional Pacific Coast WSP breeding habitat.

Although this area was not considered occupied at the time the Pacific Coast WSP was listed in 1993, this beach is a historical nesting site. The most recently documented Pacific Coast WSP in the area was one wintering plover in 1989 (ODFW *in litt.* 1994, Appendix, Table 3). Although nesting and wintering has not been recently confirmed for this area, we consider this unit essential for the conservation of the species because it provides connectivity between two currently occupied areas, dispersal habitat between units, and habitat for resting and foraging. We consider the area is needed by the species for use in response to fluctuating habitat and resource availability. This unit provides habitat to support breeding plovers and would facilitate interchange between otherwise widely separated units and helps provide habitat within Recovery Unit 1 in Oregon and Washington.

The unit is characteristic of a dune-backed beach and sand spit in close proximity to a tidally influenced river mouth and includes wide sand spits or overwashes and sparsely vegetated areas of sandy dune relatively undisturbed by tidal activity; areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates; and close proximity to tidally influenced freshwater areas.

California

*CA 1, Lake Earl; 74 ac (30 ha):*

This unit is located directly west of the Lake Earl/Lake Tolowa lagoon system in Del Norte County about 4 mi (7 km) north of Crescent City. The Lake Earl Lagoon spit is approximately 3 mi (5 km) in length, encompasses approximately 74 ac (30 ha), and lies approximately 2 mi (3 km) north of

Point Saint George and the McNamara Airfield.

This unit was occupied at the time of listing and is currently occupied. This unit is a historical breeding site (Yocom and Harris 1975, p. 30), and has harbored a small population of wintering Pacific Coast WSP in recent years (Service unpublished data). This unit is capable of supporting 10 breeding plovers with adaptive management (Service 2007, Appendix B). Although 22 ac (9 ha) are State-owned, all 74 ac (24 ha) are managed by the State under the jurisdiction of the California Department of Fish and Game (CDFG), and California Department of Parks and Recreation (CDPR).

Essential features of the unit for Pacific Coast WSP conservation include sandy beaches above and below the mean high-tide line, wind-blown sand in dune systems immediately inland of the active beach face, and the wash-over area at the lagoon mouth.

Threats to the species requiring special management include the following: degradation of the sand dune system due to encroachment of European beach grass; destruction of habitat and loss of wintering and nesting plovers from OHV use; and destruction of habitat from annual mechanical breaching (as authorized by the U.S. Army Corps of Engineers (USACE)) of the spit between the Lake Earl/Lake Tolowa Lagoon and the Pacific Ocean. Monitoring indicates that the practice of breaching has only temporary, short-term effects to wintering Pacific Coast WSPs (Service unpublished data).

*CA 2, Gold Bluffs Beach, 144 ac (58 ha):*

This unit is located in Humboldt County about 5 mi (6 km) north of the Town of Orick within Prairie Creek State Park (north of Gold Bluffs Beach campground), and is managed cooperatively with Redwood National Park, collectively known as Redwood National and State Parks (RNSP). This unit was occupied at the time of listing, is currently occupied, incorporates the primary use area of a pair of Pacific Coast WSPs that nested in Prairie Creek State Park during the summer of 2005, and is commonly used by wintering plovers.

Although not considered a main breeding location, unit CA 2 provides a fairly undisturbed location for breeding Pacific Coast WSP that lose nests to predation or other causes at various nest sites, and could offset habitat loss as sea-level rise prevents nesting at sites currently being used by plovers. One chick was fledged from the unit during 2004. Up to five Pacific Coast WSPs were observed within the unit in March 2007. The unit's primary value is as a wintering site (Service 2007, Appendix B). The site is often used as wintering habitat on an irregular basis (Service unpublished data). The RNSP are actively managing the area for Pacific Coast WSP.

The northeast portion of the unit is currently vegetated with European beach grass, and is, therefore, currently unsuitable for nesting. However, with restoration, that portion of the unit would be considered suitable nesting habitat. We include that portion of the unit to help offset the anticipated effects of sea-level rise over time and thus have determined it is essential for conservation of the species so as to provide replacement habitat for habitat that may be lost. RNSP have restored beach habitat by removing nonnative vegetation on other portions of Gold Bluffs Beach. We anticipate similar restoration within the proposed unit to occur sometime in the future.

The unit contains the following features essential to the conservation of the Pacific Coast WSP: low-lying sandy dunes; open sandy areas that are relatively undisturbed by humans; and sandy beach above and below the high-tide line that supports small invertebrates.

Threats to essential physical and biological features that may require special management include human-related use from recreation and OHV use associated with commercial fishing. Most visitor use in the area is in Fern Canyon, which is to the east of the unit and outside of suitable Pacific Coast WSP habitat. Visitation is light relative to other State and National Parks within the Pacific Coast WSP's range. Limited vehicle use of the beach is allowed for commercial and Tribal fishing, and park administrative use.

*CA 3A, Stone Lagoon, 52 ac, (21 ha):*

This subunit is approximately 0.9 mi (1.5 km) in length, and is located on the Stone Lagoon spit. Stone Lagoon borders the subunit on the east, and the Pacific Ocean makes up the subunit's western edge. Subunit CA 3A is located in Humboldt County, approximately 3 mi (5 km) south of the Town of Orick. It is entirely State-owned.

The subunit was occupied at the time of listing and is currently occupied. Nesting has recently occurred within the subunit. In 2009 a single nest hatched three chicks, all of which fledged (Colwell, *et al.* 2009, p. 9). The Recovery Plan estimates that up to 16 Pacific Coast WSPs can be supported within Unit CA 3; however, all are attributed to subunit CA 3B. Recent data indicates that the population management potential for subunit CA 3A is underestimated by the Recovery Plan (Service 2007, Appendix B), as it does contribute towards the reproductive success in northern California (Colwell *et al.* 2009, p. 9; Service unpublished data).

The subunit contains the following features essential to the conservation of the Pacific Coast WSP: low-lying sandy dunes; open sandy areas that are relatively undisturbed by humans; and sandy beach above and below the high-tide line that supports small invertebrates. Special management may be needed to control nonnative vegetation and enforce existing regulations to ensure the physical or biological features are maintained within the subunit. With time, we anticipate that the entire subunit will be inundated with sea-level rise associated with climate change.

*CA 3B, Big Lagoon, 212 ac (86 ha):*

This subunit consists of a large sand spit that divides the Pacific Ocean from Big Lagoon. The northern extent of Big Lagoon Spit is located in Humboldt County and is approximately 6 mi (10 km) south of the Town of Orick. This subunit was occupied at the time of listing and is currently occupied. Big Lagoon Spit is historical nesting habitat (Page and Stenzel 1981, p. 9), and currently maintains a winter population of fewer than 10 Pacific Coast WSPs (Service unpublished data). Recent nesting occurred within the subunit during 2005, in which a single nest hatched and fledged three chicks. We estimate the subunit can support 16 breeding plovers (Service 2007, Appendix B). The subunit is located on the Big Lagoon Spit, which is approximately 4 mi (7 km) in length. Although only 174 ac (70 ha) are owned by the State, most of the subunit is managed by the CDPR. Approximately 0.6 ac (0.3 ha) are managed by Humboldt County.

Essential features of the subunit that contribute towards the conservation of the Pacific Coast WSP include: low-lying sandy dunes and open sandy areas that are relatively undisturbed by humans; and sandy beach above and below the high-tide line that supports small invertebrates.

CDPR has conducted habitat restoration at this unit through the hand-removal of nonnative vegetation. The primary threat to wintering and breeding Pacific Coast WSPs that may require special management is disturbance from humans and pets from walking through winter flocks and potential nesting areas. In addition, control of nonnative vegetation and enforcement of existing human-use

regulations are needed to ensure the physical or biological features are maintained within the subunit. With time, we anticipate that the entire subunit will be inundated with sea-level rise associated with climate change.

*CA 4A, Clam Beach/Little River, 194 ac (79 ha):*

The subunit is located in Humboldt County immediately east and north of the Town of McKinleyville. The Clam Beach/Little River subunit's northern boundary is directly across from the south abutment of the U.S. Highway 101 Bridge that crosses the Little River. The southern subunit boundary is aligned with the north end of the southernmost, paved Clam Beach parking area. The length of the subunit is approximately 2 mi (3 km). Approximately 79 ac (32 ha) are State owned.

This subunit was occupied at the time of listing and is currently occupied. During 2003, the subunit supported a breeding population of approximately 12 Pacific Coast WSPs, and a winter population of up to 55 plovers (Service unpublished data). This subunit is one of four primary nesting locations within northern California. Based on the Recovery Plan, we expect the subunit to be capable of supporting six pairs of breeding plovers (Service 2007, Appendix B).

Essential features of the subunit that contribute towards the conservation of the Pacific Coast WSP include large areas of sandy dunes, areas of sandy beach above and below the high-tide line, and generally barren to sparsely vegetated terrain.

Primary threats to nests, chicks, and both wintering and breeding adult Pacific Coast WSPs that may require special management in this subunit are: nonnative vegetation, OHV use, predators, and disturbance caused by humans and pets. Special management is needed to control nonnative vegetation and enforcement of existing human-use regulations. With time, we anticipate that the lower portions of this subunit will be inundated with sea-level rise associated with climate change.

*CA 4B, Mad River Beach, 456 ac (184 ha):*

The subunit is located in Humboldt County immediately east of the Town of McKinleyville. This subunit was largely swept clean of European beach grass when the Mad River temporarily shifted north in the 1980s and 1990s. The Mad River Beach subunit is approximately 3 mi (5 km) long, and ranges from the U.S. Highway 101 Vista Point below the Arcata-Eureka Airport in the north, to School Road in the south. Approximately 152 ac (62 ha) are managed by the State, and the remaining 304 ac (123 ha) are owned and managed by Humboldt County, or are privately owned. This subunit was occupied at the time of listing and is currently occupied. We expect it to eventually support 12 breeding Pacific Coast WSPs with proper management (Service 2007, Appendix B). The current breeding population is believed to be less than 5 plovers, although plovers from this subunit readily intermix with plovers in CA 4A and elsewhere (Colwell *et al.* 2009, p. 9; Service unpublished data). Occasional winter use by plovers has been intermittently documented, with most wintering within the adjacent critical habitat subunit to the north (Service unpublished data).

Essential features of the subunit that contribute towards the conservation of the Pacific Coast WSP include large areas of sandy dunes, areas of sandy beach above and below the high-tide line, and generally barren to sparsely vegetated terrain.

Primary threats to nests, chicks, and both wintering and breeding adult Pacific Coast WSPs that may require special management are: nonnative vegetation, OHV use, and disturbance caused by equestrians (*i.e.,* people riding horses) and humans with accompanying pets. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the subunit. With time, we anticipate that the lower portions of this subunit will be inundated with sea-level rise associated with climate change.

*CA 5A, Humboldt Bay, South Spit Beach, 419 ac (170 ha):*

This subunit is located in Humboldt County adjacent to Humboldt Bay, less than 1 mi west of the City of Eureka, with the southern boundary being Table Bluff. Approximately 383 ac (155 ha) of the unit are owned by the CDFG, but are managed by BLM, 10.1 ac (4.1 ha) are owned and managed by Humboldt County, and 20.2 ac (8.2 ha) are owned by the USACE. The subunit is 5 mi (8 km) in total length.

This subunit was occupied at the time of listing and is currently occupied. The Pacific Coast WSP wintering population within the subunit is estimated at fewer than 15 individuals. Three nests, from four breeders, were attempted within the subunit in 2003 (Service unpublished data). This subunit is capable of supporting 30 breeding plovers (Service 2007, Appendix B). The BLM has conducted habitat restoration within the subunit, in consultation with us.

The following features essential to the conservation of the Pacific Coast WSP can be found within the unit: Large areas of sandy dunes, areas of sandy beach above and below the high-tide line, and generally barren to sparsely vegetated terrain.

Primary threats to adult Pacific Coast WSPs, chicks, and nests that may require special management are: nonnative vegetation, OHV use, and disturbance from equestrians and humans with pets. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 5B, Eel River North Spit and Beach, 259 ac (105 ha):*

This subunit is located in Humboldt County about 4 mi (7 km) east of the Town of Loleta and stretches from Table Bluff on the north to the mouth of the Eel River in the south. The subunit is estimated to be 3.9 mi (7 km) long, and is managed by the CDFG, except for 7 ac (3 ha) of private land.

This subunit was occupied at the time of listing and is currently occupied with a wintering population of Pacific Coast WSPs estimated at less than 20 (Service unpublished data). As many as 11 breeders have been observed during breeding season window surveys, with a breeding population estimated at less than 15 (Colwell *et al.* 2009, p. 9). We expect this subunit to eventually support 20 breeding plovers with proper management (Service 2007, Appendix B).

Essential features of the subunit include: Large areas of sandy, sparsely vegetated dunes for reproduction and normal behavior, and areas of sandy beach above and below the high-tide line supporting small invertebrates for foraging. Surf-cast organic debris is an important component of the habitat in this subunit, providing shelter from the wind both for nesting Pacific Coast WSPs and for invertebrate prey species.

Threats to essential physical and biological features that may require special management include nonnative vegetation, predators, OHVs, and disturbance from equestrians and humans with pets. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the subunit. With time, we anticipate that the lower portions of this subunit will be inundated with sea-level rise associated with climate change.

*CA 5C, Eel River South Spit and Beach, 339 ac (137 ha):*

This subunit, located in Humboldt County, encompasses the beach segment from the mouth of the Eel River, south to Centerville Road, approximately 4 mi (7 km) west of the City of Ferndale. The subunit is 5 mi (8 km) long, 317 ac (128 ha) are managed by the State, and the remaining 22 ac (9 ha) are managed by Humboldt County or are privately owned.

This subunit was occupied at the time of listing and is currently occupied and capable of supporting 20 breeding Pacific Coast WSPs. A single nest was found during the 2004 breeding season (Colwell *et al.* 2004, p. 7). The winter population is estimated at under 80 plovers, many of which breed on the Eel River gravel bars (CA 5) (Service unpublished data).

Essential physical and biological features of the subunit include: large areas of sandy dunes, areas of sandy beach above and below the high-tide line, and generally barren to sparsely vegetated terrain for foraging. Threats to essential features that may require special management include nonnative vegetation, predators, OHVs, and disturbance from equestrians and humans with pets. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the subunit. With time, we anticipate that the lower portions of this subunit will be inundated with sea-level rise associated with climate change.

*CA 6, Eel River Gravel Bars; 1,139 ac (461 ha):*

This unit, located in Humboldt County, is largely inundated during winter months due to high flows in the Eel River. The unit is 6.4 mi (8 km) from the City of Fernbridge, and includes gravel bars between Fernbridge and the confluence of the Van Duzen River. The Eel River is contained by levees in this section, and consists of gravel bars and wooded islands. The unit contains a total of 1,139 ac (461 ha), of which 176 ac (71 ha) are owned and managed by Humboldt County, 82 ac (33 ha) are under the jurisdiction of the California State Lands Commission, and 881 ac (357 ha) are privately owned.

This unit was occupied at the time of listing and is currently occupied and capable of supporting 40 breeding Pacific Coast WSPs. Breeding window surveys have documented 22 breeding birds in this unit; however, those numbers have dropped off in recent years (Colwell *et al.* 2009, p. 9; Service unpublished data).

Essential features of this unit include bare, open gravel bars comprised of both sand and cobble, which support reproduction and foraging. This unit harbors the most important breeding habitat in California north of San Francisco Bay, having the highest fledging success rate of any area from Mendocino County to the Oregon border. Threats to essential physical and biological features that may require special management include predators, OHVs, disturbance from gravel mining, and humans with pets. Gravel mining is managed through a Clean Water Act permit issued by the USACE. Monitoring of the unit is needed to ensure mining activities and recreational activities do not reduce the suitability of the habitat by reducing important elements of essential physical and biological features.

*CA 7, MacKerricher Beach, 1,176 ac (476 ha):*

This unit is approximately 3.5 mi (5.6 km) long. The unit is just south of the Ten Mile River, and approximately 4 mi (6 km) north of the City of Fort Bragg located in Mendocino County. CDPR manages approximately 1,102 ac (446 ha), and 74 ac (30 ha) are private. CDPR has been conducting removal of European beach grass to improve habitat for the Pacific Coast WSP and other sensitive dune species within the unit. This unit was occupied at the time of listing and is currently occupied and is capable of supporting 20 breeding plovers (Service 2007, Appendix B). The current breeding population is estimated at less than 10 (Colwell *et al.* 2009, p. 9). The winter population of plovers is under 45 (Service unpublished data).

Essential features of the unit include: Large areas of sandy dunes, areas of sandy beach above and below the high-tide line, and generally barren to sparsely vegetated terrain.

Threats to nests, chicks and both wintering and breeding adults that may require special management include nonnative vegetation, predators, and disturbance from equestrians and humans with pets. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 8, Manchester Beach, 482 ac (195 ha):*

The Manchester Beach unit is approximately 3.5 mi (6 km) long and located in Mendocino County about 1 mi (2 km) east of the Town of Manchester. The CDPR manages 402 ac (163 ha) of the unit, while the remaining 12 ac (5 ha) are private.

This unit is currently occupied and provides an important wintering site for Pacific Coast WSPs in the region (Service 2007, Appendix B). In 2003, a pair of Pacific Coast WSPs nested within the unit, and successfully hatched two chicks. However, those chicks did not survive (Colwell *et al.* 2004, p. 7). The current wintering population is estimated at less than 20 (Service unpublished data). Although occupancy at the time of listing has not been confirmed, we consider this unit essential for the conservation of the species because it provides connectivity between two currently occupied areas, dispersal habitat between units, and provides habitat for resting and foraging. This unit provides habitat to support breeding plovers and would facilitate interchange between otherwise widely separated units and helps provide habitat within a Recovery Unit. Essential features of the unit include: Large areas of sandy dunes, areas of sandy beach above and below the high-tide line, and generally barren to sparsely vegetated terrain.

*CA 9, Dillon Beach, 39 ac (16 ha):*

This unit is located at the mouth of Tomales Bay, in Marin County, just south of the Town of Dillon Beach. It stretches for about 0.7 mi (1 km) north from Sand Point. The unit was occupied at the time of listing, is currently occupied, and is an important wintering area for the species. Seventy-five wintering plovers were counted at this location during the January 2007 winter window survey (Service 2007, p. 4). The unit does not extend as far north as did the unit proposed for Dillon Beach in 2004 (69 FR 75607, December 17, 2004) because subsequent site visits and discussions with local surveyors have established that Pacific Coast WSPs only rarely used the area north of the presently proposed unit. The unit is entirely on private land.

Elements of essential physical and biological features provided by the unit include surf-cast debris supporting small invertebrates for foraging, and large stretches of relatively undisturbed, sparsely vegetated sandy beach, both above and below high-tide line, for foraging and potentially for nesting.

Potential threats to essential physical and biological features that may require special management include nonnative vegetation, predators, and disturbance by humans and their pets. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained

within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 10A, Point Reyes Beach, 460 ac (186 ha):*

This subunit is located in Marin County to the west of the unincorporated Community of Inverness and occupies most of the west-facing beach between Point Reyes and Tomales Point. It is located entirely within the Point Reyes National Seashore, and consists primarily of dune-backed beaches. This unit was occupied at the time of listing and is currently occupied and supports both nesting and wintering Pacific Coast WSPs, and has the potential to support 50 breeding birds with proper management (Service 2007, Appendix B).

The Point Reyes Beach unit includes the following elements of physical and biological features essential to Pacific Coast WSP conservation: Sparsely vegetated sandy beach above and below high tide for nesting and foraging, wind-blown sand dunes for nesting and predator avoidance, and tide-cast debris attracting small invertebrates for foraging.

Threats in the area that may require special management include nonnative vegetation, disturbance by humans and pets, and predators (particularly ravens and crows). Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the subunit. With time, we anticipate that the lower portions of this subunit will be inundated with sea-level rise associated with climate change.

*CA 10B, Limantour Spit, 156 ac (63 ha):*

Limantour Spit is a roughly 2.25-mi (4-km) sand spit at the north end of Drake's Bay located in Marin County to the west of the unincorporated Community of Olema. The subunit includes the end of the spit, and narrows to include only the south-facing beach towards the base of the spit. It is completely within the Point Reyes National Seashore. This unit was occupied at the time of listing and is currently occupied and can support both nesting and wintering Pacific Coast WSPs, although nesting has not been documented since 2000 (Stenzel *in litt.* 2004, p. 3; Service 2009, p. 3). Ninety-eight wintering plovers were counted at the site during the January 2007 window survey (Service 2007, p. 4). The subunit is expected to contribute significantly to plover conservation in the region by providing habitat capable of supporting 10 nesting birds (Service 2007, Appendix B).

Elements of essential physical and biological features at the subunit include sparsely vegetated beach sand, above and below high tide for nesting and foraging, and tide-cast debris supporting small invertebrates.

Threats to essential physical and biological features that may require special management include nonnative vegetation, disturbance by humans and pets, and nest predators such as crows and ravens. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the subunit. With time, we anticipate that the lower portions of this subunit will be inundated with sea-level rise associated with climate change.

*San Francisco Bay Units, (CA 11–CA 15) 1,892 ac (766 ha):*

Pacific Coast WSPs nesting along the shores of the San Francisco Bay typically do so on or near managed salt ponds, which were originally established, beginning in the mid-1800s, to support a solar salt industry (Service 2009, p. 11). Although some natural salt pans existed in the area prior to establishment of the industry, they have been modified to facilitate salt production, and no such natural pans remain (Service 2009, p. 9). The salt industry eventually converted over 27,000 ac (11,000 ha) of tidal marsh to managed salt pond, mostly in the South Bay, to the detriment of many species dependent on tidal marshlands, such as the California clapper rail (*Rallus longirostrus obsoletus*) and salt marsh harvest mouse (*Reithrodontomys raviventris*) (Service 2009, p. viii, 11). The Service is, therefore, working with the CDFG and the California State Coastal Conservancy (CSCC) to carry out the South Bay Salt Pond Restoration Project (SBSPRP), which will restore over 15,000 ac (6,070 ha) of salt ponds in the South Bay back to tidal marshland (SBSPRP 2010, p. 1). This restoration effort is closely coordinated with the Service's draft Recovery Plan for Tidal Marsh Ecosystems of Northern and Central California (Draft Tidal Marsh Recovery Plan; Service 2009). Because the restored areas will not provide suitable habitat for Pacific Coast WSPs, we are not proposing to designate areas in the South Bay that are either currently undergoing or soon to undergo restoration under the SBSPRP (SBSPRP 2007, p. 1), or that are likely to undergo restoration in the future based on restoration maps in the draft Tidal Marsh Recovery Plan (Service 2009, pp. 261, 263).

*CA 11, Napa-Sonoma Marshes, 618 ac (250 ha):*

This proposed unit encompasses salt evaporation ponds 7 and 7A, in the Napa-Sonoma Marshes Wildlife Area, owned by the CDFG. It is situated in Napa County, about 2.3 mi (4 km) west of the Napa County Airport, and about 1.5 mi (2.4 km) south of Las Amigas Rd. The unit was occupied at the time of listing and is currently occupied. Twelve Pacific Coast WSPs were identified at the location in the summer 2009 during window surveys (Service 2009, p. 2). This is the only location in the northern portion of the San Francisco Bay known to support nesting plovers.

Elements of essential physical and biological features provided by the unit include sparsely vegetated areas above daily high tides, such as salt pans, artificial salt ponds, and adjoining levees, for nesting and foraging.

Threats to essential physical and biological features that may require special management include flooding, and nest predators such as great egrets and common ravens (Robinson-Nilsen *et al.* 2009, p. 14). Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 12, Hayward, 1 ac (0 ha):*

This unit comprises Island 5 at the Hayward Regional Shoreline Park, located to the west of the City of Hayward in Alameda County. The area is managed by the East Bay Regional Park District (EBRPD) as a nesting area for shorebirds—primarily least terns (*Sterna antillarum browni*), but also Pacific Coast WSPs (Riensche 2007, p. 1). The unit was occupied at the time of listing and is currently occupied. Three plover chicks from one nest successfully fledged from the unit in 2008 (Robinson *et al.* 2008, pp. 19, 34; Riensche 2008, p. 2), but since then seven plover nesting attempts in the area have failed, primarily due to predation (Robinson-Nilsen *et al.* 2009, pp. 16, 32; Robinson-Nilsen 2010, pers. comm.). The most commonly observed avian predators at the site have been California gulls, although the only actual depredation observed was by a killdeer (*Charadrius vociferus*) (Robinson-Nilsen *et al.* 2009, pp. 14, 16).

Elements of essential physical and biological features provided by the unit include sparsely vegetated areas above daily high tides, such as salt pans,

artificial salt ponds, and adjoining levees, for nesting and foraging.

Threats to essential physical and biological features that may require special management focus on predation and salt pond management to control vegetation. The EBRPD is implementing a predator management program utilizing numerous volunteers as well as staff from the U.S. Department of Agriculture's (USDA) Wildlife Services program (Riensche 2008, p. 2) to reduce predation at this site.

*CA 13A, Eden Landing: 237 ac (96 ha):*

This subunit encompasses salt ponds E11, E15B, and E16B, just south of highway 92 and the San Mateo Bridge and west of Union City in Alameda County. This unit was occupied at the time of listing and is currently occupied and supported a total of 30 Pacific Coast WSP nests in 2009, 15 of which hatched (Robinson-Nilsen *et al.* 2009, p. 32). Approximately 228 ac (92 ha) are State owned.

Elements of essential physical and biological features provided by the unit include sparsely vegetated areas above daily high tides, such as salt pans, artificial salt ponds, and adjoining levees, for nesting and foraging.

Threats to essential physical and biological features that may require special management include flooding and avian nest predators such as California gulls (Robinson-Nilsen *et al.* 2009, p. 13).

*CA 13B, Eden Landing, 171 ac (69 ha):*

This subunit is located west of Union City in Alameda County and encompasses salt pond E14, just south of Eden Creek. This unit was occupied at the time of listing and is currently occupied and supported nine Pacific Coast WSP nests in 2009, three of which hatched young (Robinson-Nilsen *et al.* 2009, p. 32). The subunit does not include salt ponds E12 and E13 (just north of E14), because those are being converted to high salinity ponds for birds such as eared grebes (*Podiceps nigricollis*) and phalaropes (*Phalaropus* spp.) that forage well on such habitat (Strong 2010a, p. 1). Approximately 171 ac (69 ha) are State-owned.

Elements of essential physical and biological features provided by the unit include sparsely vegetated areas above daily high tides, such as salt pans, artificial salt ponds and adjoining levees, for nesting and foraging. Threats to essential features that may require special management include flooding and avian nest predators such as California gulls (Robinson-Nilsen *et al.* 2009, p. 13).

*CA 13C, Eden Landing, 609 ac (246 ha):*

This subunit encompasses salt ponds E6A and E6B, and is located just north of Old Alameda Creek and west of Union City in Alameda County. This unit was occupied at the time of listing and is currently occupied and supported a total of two Pacific Coast WSP nests in 2009, both of which hatched young (Robinson-Nilsen *et al.* 2009, p. 32). The subunit does not include a panhandle-shaped area of potential habitat just north of pond E6A because it is being converted to tidal marsh as part of a pre SBSPRP restoration project (Strong 2010b, p. 7; Strong 2010c, p. 1). Six hundred two (602) ac are State-owned.

Elements of essential physical and biological features provided by the subunit include sparsely vegetated areas above daily high tides, such as salt pans, artificial salt ponds, and adjoining levees, for nesting and foraging.

Threats to essential physical and biological features that may require special management include flooding and avian nest predators such California gulls (Robinson-Nilsen *et al.* 2009, p. 13).

*CA 14, Ravenswood, 89 ac (36 ha):*

This unit consists of the southwestern portion of salt pond SF2 located east of the City of East Palo Alto in San Mateo County near the western approach to the Dumbarton Bridge. Pond SF2 is undergoing renovations intended to provide ponded areas, islands, and salt pan for several species of shorebirds, including Pacific Coast WSPs (SBSPRP 2010, p. 3). The Ravenswood unit is drawn to encompass the salt pan area (Strong 2010b, pp. 3, 4). This unit was occupied at the time of listing and is currently occupied. In 2009, pond SF2 supported 23 plover nests, 17 of which hatched young (Robinson-Nilsen *et al.* 2009, p. 32). The entire unit is privately owned.

Elements of essential physical and biological features provided by the unit include sparsely vegetated areas above daily high tides, such as salt pans, artificial salt ponds, and adjoining levees, for nesting and foraging. Threats to essential features that may require special management include flooding and avian nest predators such as California gulls (Robinson-Nilsen *et al.* 2009, p. 13).

*CA 15, Warm Springs, 168 ac (68 ha):*

This unit encompasses the northeastern portion of salt evaporation ponds A22 and A23 in the Warm Springs area of the South San Francisco Bay near Foster City in San Mateo County. This unit was occupied at the time of listing and is currently occupied. Fourteen breeding Pacific Coast WSPs were identified at these ponds during the 2009 summer window surveys (Service unpublished data). Additionally, Robinson-Nilsen *et al.* (2009, p. 32) found a total of 21 plover nests at the ponds in 2009, 11 of which successfully hatched young. The southwestern portions of the ponds are excluded in keeping with tidal marsh restoration plans envisioned under the draft Tidal Marsh Recovery Plan (Service 2009, p. 266). The entire unit is Federally owned.

Elements of essential physical and biological features provided by the unit include sparsely vegetated areas above daily high tides, such as salt pans, artificial salt ponds, and adjoining levees, for nesting and foraging.

Threats to essential features that may require special management include flooding and avian nest predators such as California gulls (Robinson-Nilsen *et al.* 2009, p. 13).

*CA 16, Half Moon Bay, 36 ac (15 ha):*

This unit is located next to the City of Half Moon Bay in San Mateo County and stretches for about 1.25 mi (2 km) along Half Moon Bay State Beach, and is entirely within CDPR land. It includes sandy beach above and below the high-tide line for nesting and foraging, and surf-cast debris to attract small invertebrates. This unit was occupied at the time of listing and is currently occupied. Small numbers of breeding Pacific Coast WSPs have been found at the location in the past five surveys (Service 2009, p. 3). The unit also supports a sizeable winter flock, consisting of 50 plovers in 2007 (Service 2007, p. 4). We expect the unit to eventually support 10 breeding plovers in the unit under proper management (Service 2007).

Potential threats in the area that may require special management include nonnative vegetation, disturbance by humans and pets, and nest predators. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 17, Waddell Creek Beach, 25 ac (10 ha):*

This unit includes the mouth of Waddell Creek and is located about 20 mi (32 km) north of the City of Santa Cruz in Santa Cruz County. It extends about 0.6 mi (1 km) north along the coast from a point about 0.4 mi (0.6 km) south of the creek mouth to a point about 0.2 mi (1 km) north of the creek

mouth. Unit CA 17 encompasses approximately 19 ac (8 ha) of State land and 7 ac (3 ha) of private land.

This unit was occupied at the time of listing and the unit has historically (prior to 2004) been an important breeding and wintering site, supporting up to 11 breeding, and up to 50 wintering, Pacific Coast WSPs (Service unpublished data). Although Pacific Coast WSPs have not been documented in recent years, this unit contains features essential to the conservation of the species and is needed to allow use by the species in response to fluctuating habitat and resource availability. The unit is located between currently occupied areas and provides dispersal habitat between units. This unit provides habitat to support breeding plovers and would facilitate interchange between otherwise widely separated units and helps provide habitat within Recovery Unit 4 along the central California Coast.

This unit includes the following physical and biological features essential to the conservation of the species which may require special management considerations or protection: Wind-blown sand dunes, areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates, and generally barren to sparsely vegetated terrain.

The primary threats to essential physical and biological features that may require special management in this unit are nonnative vegetation and human disturbance. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 18, Scott Creek Beach, 23 ac (9 ha):*

This unit includes the mouths of Scott and Molino Creeks and is located about 13 mi (21 km) north of the City of Santa Cruz in Santa Cruz County. It extends about 0.7 mi (1 km) north along the coast from the southern end of the sandy beach, 0.3 mi (0.5 km) south of Molino Creek, to a point about 0.1 mi (0.2 km) north of Scott Creek. Unit CA 18 encompasses approximately 15 ac (6 ha) of State land and 8 ac (3 ha) of local jurisdictional land. This unit was occupied at the time of listing and is currently occupied and recent surveys have found up to 4 breeding Pacific Coast WSPs, while historical surveys (prior to 2004) have found up to 12 breeding plovers occupying the area (Service unpublished data). Unit CA 18 is an important wintering area, with up to 129 plovers recorded in a single season (Service unpublished data).

This unit is essential to the conservation of the species because, with proper management, and in conjunction with the other two relatively small units proposed for Santa Cruz County (CA 17 and 19), it can attract additional breeding Pacific Coast WSPs and thereby facilitate interchange between the larger units at Half Moon Bay (CA 16).

The unit includes the following habitat features essential to the species: areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this unit are nonnative vegetation, human disturbance, and predators. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 19, Wilder Creek Beach, 15 ac (6 ha):*

This unit is located at the mouth of Laguna Creek and is about 8 mi (13 km) north of the City of Santa Cruz in Santa Cruz County. It extends about 0.25 mi (0.4 km) north along the coast from the southern end of the sandy beach to the northern end of the beach across the mouth of Laguna Creek. The unit is entirely situated on State-owned land. This unit was occupied at the time of listing and is currently occupied. Although no breeding Pacific Coast WSPs have been observed in recent years, five breeding plovers were found in the area prior to 2004 (Service unpublished data). Unit CA 19 is capable of supporting 16 breeding plovers under proper management (Service 2007, Appendix B). Unit CA 19 is an important wintering area; up to 26 wintering plovers have been observed at one time between the 2004 and 2009 period.

This unit is essential to the conservation of the species because, with proper management, and in conjunction with the other two relatively small units proposed for Santa Cruz County (CA 17 and 18), it can attract additional breeding Pacific Coast WSPs and thereby facilitate interchange between the larger units at Half Moon Bay (CA 16). The unit includes the following habitat features essential to the species: areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this subunit are nonnative vegetation, human disturbance, development, OHV use, pets, and predators. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 20, Jetty Road to Aptos, 399 ac (161 ha):*

This unit is located about 5 mi (8 km) west of the City of Watsonville and includes Sunset State Beach located in Santa Cruz County and Zmudowski State Beach located in Monterey County. The mouth of the Pajaro River is located near the center of the subunit, and Elkhorn Slough is at the south end of the subunit. It extends about 8 mi (13 km) along the coast from Elkhorn Slough to Zils Road. Approximately 369 ac (149 ha) are State-owned. This unit was occupied at the time of listing and is currently occupied and is an important breeding area, with as many as 105 breeding Pacific Coast WSPs each year, and is also an important wintering area, with up to 250 plovers each winter (Service unpublished data).

The unit includes the following habitat features essential to the species: areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates, and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this unit are nonnative vegetation, human disturbance, development, horses, OHV use, pets, predators, and habitat changes resulting from exotic vegetation. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 21, Elkhorn Slough Mudflats, 281 ac (114 ha):*

This unit is located about 3.5 mi (6 km) north of the City of Castroville along the north side of Elkhorn Slough

east of Highway 1 located in Monterey County. This unit is 1.5 mi (2 km) long, extending about 1 mi (2 km) along the north shore of Elkhorn Slough east of Highway 1 and about 0.5 mi (1 km) north from Elkhorn Slough to Bennett Slough. The unit is situated entirely on State-owned land. This unit was occupied at the time of listing and is currently occupied and is an important breeding area, with as many as 41 breeding Pacific Coast WSPs each year, and is also an important wintering area, with up to 137 plovers each winter (Service unpublished data). This unit is capable of supporting 80 breeding plovers under proper management (Service 2007, Appendix B).

The unit includes the following habitat features essential to the species: areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this unit are human disturbance, development, horses, OHV use, pets, predators, and habitat changes resulting from exotic vegetation. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 22, Monterey to Moss Landing, 967 ac (391 ha):*

This unit includes the beaches along the southern half of Monterey Bay from the City of Monterey at the south end of the unit to Moss Landing and the mouth of Elkhorn Slough at the north end of the unit in Monterey County. The mouth of the Salinas River is located near the center of the unit. It extends about 15 mi (24 km) north along the coast from Monterey to Moss Landing. Unit CA 22 includes approximately 285 ac (115 ha) of State lands, 36 ac (14 ha) of local jurisdictional lands, and 423 ac (171 ha) of Federal land and the remainder is privately owned. This unit was occupied at the time of listing, is currently occupied, is an important breeding area, with as many as 162 breeding Pacific Coast WSPs each year, and is also an important wintering area, with up to 363 plovers each winter (Service unpublished data).

The unit includes the following habitat features essential to the species: areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this unit are human disturbance, development, horses, OHV use, pets, predators, and habitat changes resulting from exotic vegetation. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 23, Point Sur Beach, 72 ac (29 ha):*

This unit is about 17 mi (27 km) south of the City of Monterey and immediately north of Point Sur State Historic Park (SHP) in Monterey County. It extends about 0.7 mi (1 km) north along the coast from Point Sur SHP. This unit encompasses approximately 38 ac (15 ha) of State land and 34 ac (14 ha) of private land. This unit was occupied at the time of listing and is currently occupied and has supported up to 13 breeding Pacific Coast WSPs each year (Service unpublished data). This unit is capable of supporting 20 breeding plovers under proper management (Service 2007, Appendix B). Unit CA 23 is an important wintering area, historically supporting up to 65 plovers each winter (Service unpublished data).

The unit includes the following habitat features essential to the species: wind-blown sand dunes, areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates, and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this unit are human disturbance and habitat changes resulting from exotic vegetation. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 24, San Carpoforo Creek, 24 ac (10 ha):*

This unit is located approximately 20 mi (32 km) north of the Town of Cambria and 2.5 mi (4 km) south of the San Luis Obispo/Monterey County boundary in San Luis Obispo County. It extends approximately 0.57 mi (1 km) along the coast. This unit contains approximately 4 ac (2 ha) of land owned by the USFS, 18 ac (7 ha) owned by the CDPR, and 3 ac (1 ha) of private land. The unit was occupied at the time of listing and is currently occupied and has supported as many as nine breeding Pacific Coast WSPs; however, breeding does not occur here every year (Service unpublished data). This unit is capable of supporting 10 breeding plovers under proper management (Service 2007, Appendix B). This unit consistently supports 40 to 50 wintering plovers (Service unpublished data). San Carpoforo Creek is approximately 53 mi (84 km) south of the closest proposed unit to the north (CA 23, Point Sur), and approximately 11 mi (18 km) north of the closest proposed unit to the south (CA 25, Arroyo Laguna Creek). Therefore, this unit may facilitate interchange between widely separated habitats.

This unit includes the following physical and biological features essential to the conservation of the species: Areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this unit are human disturbance, pets, and dune-stabilizing vegetation. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 25, Arroyo Laguna Creek, 28 ac (11 ha):*

This unit is located 11 mi (8 km) south of San Carpoforo Creek and 10 mi (16 km) north of the Town of Cambria in San Luis Obispo County. It extends approximately 0.9 mi (2 km) along the coast from a rocky headland 0.2 mi (0.3 km) south of Adobe Creek to 0.2 mi (0.3 km) north of Oak Knoll Creek. This unit encompasses approximately 18 ac (72 ha) of land owned by the CDPR and 10 ac (4 ha) of private land. This unit was occupied at the time of listing and is currently occupied and Arroyo Laguna Creek has historically (prior to 2000) been an important site, supporting as many as 6 breeding and 91 wintering Pacific Coast WSPs; however, neither breeding nor wintering occurs here every year (Service unpublished data). This unit is capable of supporting six breeding plovers under proper management (Service 2007, Appendix B). This unit is roughly equidistant between CA 24 (San Carpoforo Creek)

and CA 26 (San Simeon State Beach) and may facilitate interchange between widely separated habitats.

This unit includes the following physical and biological features essential to the conservation of the species: Areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging) and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this unit are human disturbance, pets, and dune-stabilizing vegetation. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 26, San Simeon State Beach, 24 ac (10 ha):*

This unit is located about 2 mi (3 km) north of the Town of Cambria in San Luis Obispo County. It extends about 0.9 mi (2 km) along the coast from a point opposite the intersection of Highway 1 and Moonstone Beach Drive to the northwestern corner of San Simeon State Beach. Unit CA 26 is owned by the CDPR. The unit was occupied at the time of listing and is currently occupied. San Simeon State Beach has supported as many as seven breeding Pacific Coast WSPs; however, breeding does not occur here every year (Service unpublished data). This unit is an important wintering area with up to 143 plovers recorded in a single season over the last 7 years (Service unpublished data).

This unit includes the following physical and biological features essential to the conservation of the species: Areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this unit are human disturbance, pets, and dune-stabilizing vegetation. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 27, Villa Creek Beach, 20 ac (8 ha):*

This unit is located about 3.5 mi (6 km) northwest of the Community of Cayucos in San Luis Obispo County. It extends 0.3 mi (0.5 km) northwest along the beach from an unnamed headland 1.4 mi (2 km) north of Point Cayucos to an unnamed headland northwest of Villa Creek. This unit is owned by the CDPR. This unit was occupied at the time of listing and is currently occupied, and Villa Creek Beach is an important breeding and wintering site. This unit has supported as many as 33 breeding Pacific Coast WSPs in a single season (Service unpublished data). Wintering numbers vary widely from year to year, with 10 to 112 plovers recorded over the last 7 seasons (Service unpublished data).

This unit includes the following physical and biological features essential to the species: areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this unit are nonnative vegetation, human disturbance, pets, horses, and predators. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 28, Toro Creek, 34 ac (14 ha):*

This unit is located about 3 mi (5 km) north of the City of Morro Bay in San Luis Obispo County, extending from 0.4 mi (1 km) north of Toro Creek Road to 0.5 mi (1 km) south of Toro Creek Road (total length: 0.9 mi (1 km)). This unit was occupied at the time of listing and is currently occupied and Toro Creek Beach was historically (prior to 2000) an important breeding area, having supported as many as 16 breeding Pacific Coast WSPs (Service unpublished data). Breeding has not occurred at this unit in the last 5 seasons; however, the unit is capable of supporting 25 breeding plovers under proper management (Service 2007, Appendix B). This unit is an important wintering area with up to 121 plovers recorded in a single season (Service unpublished data). The unit encompasses approximately 11 ac (4 ha) of State land and 23 ac (9 ha) of private land.

This unit includes the following physical and biological features essential to the species: Areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this unit are nonnative vegetation, human disturbance, pets, and predators. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 29, Atascadero Beach/Morro Strand State Beach, 213 ac (86 ha):*

This unit is located at Morro Strand State Beach just north of the City of Morro Bay in San Luis Obispo County. It extends about 2.25 mi (4 km) north along the beach from the parking area northeast of Morro Rock to an unnamed rocky outcrop opposite the end of Yerba Buena Street at the north end of the City of Morro Bay. This unit encompasses approximately 64 ac (26 ha) of State land, 51 ac (21 ha) of local jurisdictional land, and 98 ac (40 ha) of private land. This unit was occupied at the time of listing and is currently occupied and is an important breeding area, having supported as many as 24 breeding Pacific Coast WSPs in a single season (Service unpublished data). It is capable of supporting 40 breeding plovers under proper management (Service 2007, Appendix B). This unit is also an important wintering area, with up to 249 plovers being recorded during a single season over the last seven years (Service unpublished data).

This unit includes the following physical and biological features essential to the species: areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this unit are nonnative vegetation, human disturbance, pets, and predators. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 30, Morro Bay Beach, 1,076 ac (435 ha):*

This unit is located at Morro Bay State Park south of Morro Rock and adjacent to the City of Morro Bay in San Luis Obispo County. It extends 5.5 mi (9 km) north along the beach from a rocky outcrop about 350 ft (105 m) north of Hazard Canyon to the northern tip of the sand spit. This unit encompasses approximately 948 ac (383 ha) of State land, 69 ac (28 ha) of local jurisdictional land, and 60 ac (24 ha) of private land. This unit was occupied at the time of listing and is currently occupied and is an important breeding area, supporting as many as 205 breeding Pacific Coast WSPs in a single season (Service unpublished data). Morro Bay Beach is also an important wintering area, supporting up to 104 plovers during a single season over the last seven seasons (Service unpublished data).

This unit includes the following physical and biological features essential to the species: wind-blown sand dunes, areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates, and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this unit are human disturbance, horses, pets, predators, and dune-stabilizing vegetation. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 31, Pismo Beach/Nipomo Dunes, 1,652 ac (669 ha):*

This unit is located south of the City of Grover Beach and west of the Town of Oceano and extends from San Luis Obispo County into northern Santa Barbara County west of the City of Guadalupe. The unit has approximately 242 ac (98 ha) of Federal land, 552 ac (223 ha) of State land, 377 ac (152 ha) of local jurisdictional land, and 481 ac (195 ha) of private land. This unit extends about 12 mi (19 km) along the beach from a point about 0.4 mi (1 km) north of Mussel Point to a point on the north side of Arroyo Grande Creek at the south end of Strand Way in the Town of Oceano. This unit was occupied at the time of listing and is currently occupied, and is an important breeding area, having supported as many as 162 breeding Pacific Coast WSPs in a single season (Service unpublished data). This unit is capable of supporting 350 breeding plovers under proper management (Service 2007, Appendix B). Pismo Beach/Nipomo Dunes is an important wintering area, having supported up to 287 plovers during a single season over the last 7 years (Service unpublished data). The unit includes portions of Pismo State Beach and Oceano Dunes State Vehicular Recreation Area, owned and managed by the CDPR; the Guadalupe-Nipomo Dunes National Wildlife Refuge, owned and managed by the Service; the Guadalupe Oil Field, owned and managed by the Chevron Corporation; and Rancho Guadalupe County Park, owned and managed by the County of Santa Barbara.

This unit includes the following physical and biological features essential to the species: wind-blown sand dunes, areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates, and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this unit are nonnative vegetation, human disturbance, OHVs, horses, pets, and predators. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 32, Vandenberg North, 711 ac (288 ha):*

This unit is located on Vandenberg Air Force Base about 14 mi (23 km) southwest of the City of Santa Maria in Santa Barbara County. It extends about 7 mi (11 km) along the coast from a point along the beach 0.6 mi (1 km) north of Purisima Point to an unnamed creek and canyon 0.6 mi (1 km) south of Lion's Head, an area of rocky outcrops. This unit was occupied at the time of listing and is currently occupied and is an important breeding area with as many as 103 breeding Pacific Coast WSPs recorded in a single season (Service unpublished data). This unit is capable of supporting 250 breeding plovers under proper management (Service 2007, Appendix B). This is also an important wintering area with up to 105 plovers recorded during a single season over the last seven years (Service unpublished data). The unit is entirely owned by the U.S. Air Force.

This unit includes the following physical and biological features essential to the conservation of the species: Wind-blown sand dunes, areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates, and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this unit are human disturbance, pets, military activities, predators, and the spread of dense vegetation. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 33, Vandenberg South, 423 ac (171 ha):*

This unit is located on Vandenberg Air Force Base about 9 mi (15 km) west of the City of Lompoc in Santa Barbara County. It extends about 6.7 mi (11 km) north along the coast from an unnamed rocky outcrop 0.3 mi (0.5km) north of Cañada la Honda Creek to the western terminus of New Beach Road, approximately 0.9 mi (2 km) north of the Santa Ynez River. This unit was occupied at the time of listing and is currently occupied and is capable of supporting 156 breeding plovers under proper management (Service unpublished data). This unit is also an important wintering area with up to 289 Pacific Coast WSPs recorded during a single season over the last seven years (Service unpublished data). Approximately 373 ac (151 ha) are Federally owned.

This unit includes the following physical and biological features essential to the conservation of the species: Wind-blown sand dunes, areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates, and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this unit are human disturbance, military activities, pets, predators, and the spread of dense-growing vegetation. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 34, Devereaux Beach, 52 ac (21 ha):*

This unit is located on the University of California's Coal Oil Point Natural

Reserve, about 7 mi (11 km) west along the coast from the City of Santa Barbara in Santa Barbara County. It extends about 1.8 mi (3 km) north along the coast from the western boundary of Isla Vista County Park to a point along the beach opposite the end of Santa Barbara Shores Drive. This unit consists of 43 ac (17 ha) of State land and 9 ac (4 ha) of local jurisdictional land. This unit was occupied at the time of listing and is currently occupied and is an important breeding area with as many as 39 breeding Pacific Coast WSPs recorded in a single season (Service unpublished data). This unit is also an important wintering area with up to 360 plovers recorded during a single season over the last seven years (Service unpublished data).

This unit includes the following physical and biological features essential to the conservation of the species: areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this unit are nonnative vegetation, human disturbance, pets, and predators. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 35, Santa Barbara Beaches, 65 ac (26 ha):*

This unit is located within the City of Santa Barbara in Santa Barbara County. It extends about 1.8 mi (3 km) along the coast from the Andree Clark Bird Refuge intersection with the Pacific Ocean to the Santa Barbara Harbor. This unit encompasses approximately 30 ac (12 ha) of State land, 35 ac (14 ha) of City of Santa Barbara lands and 0.3 ac (0.1 ha) of private land. The unit was occupied at the time of listing and is currently occupied. The unit is an important wintering area with up to 111 Pacific Coast WSPs recorded during a single season over the last seven years (Service unpublished data).

This unit includes the following physical and biological features essential to the conservation of the species: Areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this unit are nonnative vegetation, human disturbance, development, and pets. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 36, Santa Rosa Island, 586 ac (237 ha):*

This unit is located on Santa Rosa Island about 31 mi (50 km) southwest of the City of Santa Barbara in Santa Barbara County. This unit is comprised of 11 different beaches (subunits A–K) around the island. This unit encompasses approximately 586 ac (237 ha) of Channel Islands National Park land. This unit was occupied at the time of listing and is currently occupied and is an important breeding area with as many as 37 breeding Pacific Coast WSPs recorded in a single season (Service unpublished data). This unit is capable of supporting 130 breeding plovers under proper management (Service 2007, Appendix B). This is also an important wintering area with up to 242 plovers recorded during a single season over the last seven years (Service unpublished data).

This unit includes the following physical and biological features essential to the conservation of the species: Areas of sandy beach above and below the high-tide line with surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

The primary threats to essential physical and biological features that may require special management in this unit are nonnative vegetation, and direct disturbance from expanding marine mammal populations. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 37, San Buenaventura Beach, 70 ac (28 ha):*

This unit is located within the City of Ventura in Ventura County. It extends about 2 mi (3 km) north along the coast from rock groin immediately north of Marina Park to the Ventura Pier. San Buenaventura State Beach is a unit that is owned by the CDPR. This unit was occupied at the time of listing and is currently occupied and is an important wintering area with up to 72 Pacific Coast WSPs recorded during a single season over the last seven years (Service unpublished data).

This unit includes the following physical and biological features essential to the conservation of the species: Areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this unit are nonnative vegetation, human disturbance, and pets. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 38, Mandalay Beach to Santa Clara River, 672 ac (272 ha):*

This unit is located near the City of Oxnard in Ventura County. It extends about 6 mi (10 km) north along the coast from the north jetty of Channel Islands Harbor to a point about 0.5 mi (1 km) north of the Santa Clara River mouth. This unit encompasses approximately 213 ac (86 ha) of private land and 459 ac (186 ha) of State land. This unit was occupied at the time of listing and is currently occupied and is an important breeding area with as many as 70 breeding Pacific Coast WSPs recorded in a single season (Service unpublished data). This unit is also an important wintering area with up to 129 plovers recorded during a single season over the last seven years (Service unpublished data).

This unit includes the following physical and biological features essential to the conservation of the species: Wind-blown sand dunes, areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates, and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this unit are human disturbance, development, pets, and dune-stabilizing vegetation. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-

level rise associated with climate change.

*CA 39, Ormond Beach, 320 ac (130 ha):*

This unit is located near the cities of Port Hueneme and Oxnard in Ventura County. It extends about 3 mi (5 km) northwest along the coast from Arnold Road and the boundary of Naval Base Ventura County, Point Mugu (NBVC, Point Mugu) to the south jetty of Port Hueneme. This unit encompasses approximately 161 ac (65 ha) of private land and 159 ac (65 ha) of State land. This unit was occupied at the time of listing and is currently occupied and is an important breeding area with as many as 33 breeding Pacific Coast WSPs recorded in a single season (Service unpublished data). This unit is capable of supporting 50 breeding plovers under proper management (Service 2007, Appendix B). This unit is also an important wintering area with up to 117 plovers recorded during a single season over the last seven years (Service unpublished data).

This unit includes the following physical and biological features essential to the conservation of the species: Wind-blown sand dunes, areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates, and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this unit are nonnative vegetation, human disturbance, and pets. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 40, Mugu Lagoon North, 136 ac (55 ha):*

Under section 4(a)(3) of the Act, we have exempted approximately 136 ac (55 ha) of land containing features essential to the conservation of the Pacific Coast WSP in Unit CA 40 from critical habitat designation under section 4(a)(3) of the Act (*see Application of Section 4(a)(3) of the Act* section below).

*CA 41, Mugu Lagoon South, 72 ac (29 ha):*

Under section 4(a)(3) of the Act, we have exempted approximately 72 ac (29 ha) of land containing features essential to the conservation of the Pacific Coast WSP in Unit CA 41 from critical habitat designation under section 4(a)(3) of the Act (*see Application of Section 4(a)(3) of the Act* section below).

*CA 42, San Nicolas Island Beaches, 321 ac (130 ha):*

Under section 4(a)(3) of the Act, we have exempted approximately 321 ac (130 ha) of land containing features essential to the conservation of the Pacific Coast WSP in Unit CA 42 from critical habitat designation under section 4(a)(3) of the Act (*see Application of Section 4(a)(3) of the Act* section below).

*CA 43, Zuma Beach, 73 ac (30 ha):*

This unit is located about 8 mi (13 km) west of the City of Malibu in Los Angeles County. It extends about 3 mi (5 km) north along the coast from the north side of Point Dume to the base of Trancas Canyon. This unit encompasses approximately 72 ac (29 ha) of Los Angeles County lands, and 1 ac (0.5 ha) of State land. This unit was occupied at the time of listing and is currently occupied and is an important wintering area with up to 213 Pacific Coast WSPs recorded during a single season over the last seven years (Service unpublished data; Ryan *et al.* 2010, p. 19).

This unit includes the following physical and biological features essential to the conservation of the species: Areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this unit are nonnative vegetation, human disturbance, development, horses, and pets. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 44, Malibu Beach, 13 ac (5 ha):*

This unit is located within the City of Malibu in Los Angeles County. It extends about 0.5 mi (1 km) north along the coast from approximately 300 ft (94 m) north of the Malibu Pier to Malibu Point. This unit is owned by the CDPR. This unit was occupied at the time of listing and is currently occupied and is an important wintering area with up to 67 Pacific Coast WSPs recorded during a single season over the last seven years (Service unpublished data).

This unit includes the following physical and biological features for the conservation of the species: Areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

Primary threats to essential physical and biological features that may require special management in this unit are nonnative vegetation, human disturbance, and pets. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the physical or biological features are maintained within the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

*CA 45A, Santa Monica Beach, 48 ac (19 ha):*

This subunit is located between the cities of Santa Monica and Los Angeles in Los Angeles County. It stretches roughly 1 mi (2 km) from Montana Avenue to the mouth of Santa Monica Canyon. This subunit consists of 29 ac (12 ha) of State-owned land, and 19 ac (8 ha) are owned by the City of Santa Monica. This subunit was occupied at the time of listing and is currently occupied and annually supports a significant wintering flock of Pacific Coast WSPs (an average wintering flock of 36 from 2003 to 2010 (Service unpublished data)) in a location with high-quality breeding habitat. This location also facilitates interchange between wintering locations.

This location contains the physical and biological features essential to the conservation of the species, including a wide sandy beach with occasional surf-cast wrack supporting small invertebrates.

The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from human recreational disturbance, pets, and beach raking.

*CA 45B, Dockweiler North, 34 ac (14 ha):*

This subunit is located south of Ballona Creek and west of the El Segundo Dunes, and immediately west of the Los Angeles International Airport, in the City of Los Angeles, Los Angeles County. It stretches roughly 0.5 mi (0.8 km) centered at Sandpiper Street. This subunit is owned by the State of California. This subunit was occupied at the time of listing and is currently occupied and in conjunction with Subunits CA 45C and CA 45D, annually supports a significant wintering flock of Pacific Coast WSPs in a location with high quality breeding habitat (Page *in litt.* 2004) and facilitates interchange between wintering locations.

This location contains the physical and biological features essential to the conservation of the species, including a wide sandy beach with occasional surf-cast wrack supporting small invertebrates.

The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from human recreational disturbance, pets, and beach raking.

*CA 45C, Dockweiler South, 65 ac (26 ha):*

This subunit is located immediately west of the Hyperion Wastewater Treatment Plant between the cities of Los Angeles and El Segundo in Los Angeles County. It stretches approximately 1 mi (1.6 km) along Vista del Mar from W. Imperial Highway extending past E. Grand Avenue. This subunit consists of 54 ac (22 ha) of State land and 11 ac (5 ha) of privately owned land. This unit was occupied at the time of listing and is currently occupied and in conjunction with Subunits CA 45B and CA 45D, annually supports a significant wintering flock of Pacific Coast WSPs in a location with high quality breeding habitat (Page *in litt.* 2004) and facilitates interchange between wintering locations.

This location contains the physical and biological features essential to the conservation of the species, including a wide sandy beach with occasional surf-cast wrack supporting small invertebrates.

The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from human recreational disturbance, pets, and beach raking.

*CA 45D, Hermosa State Beach, 27 ac (11 ha):*

This subunit is located immediately west of the City of Hermosa Beach in Los Angeles County. This subunit stretches roughly 0.5 mi (1 km) from Eleventh Street to First Street. This subunit consists of 8 ac (3 ha) of State land and 19 ac (8 ha) of privately owned land. This unit was occupied at the time of listing and is currently occupied and supported an average wintering flock of 25 Pacific Coast WSPs from 2003 to 2010 (Service unpublished data). In conjunction with subunits CA 45B and CA 45C, this subunit annually supports a large and significant wintering flock of Pacific Coast WSP and facilitates interchange between wintering locations.

This location contains the physical and biological features essential to the conservation of the species, including a wide sandy beach with occasional surf-cast wrack supporting small invertebrates.

The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from human recreational disturbance, pets, and beach raking.

*CA 46 (Subunits A–D), Bolsa Chica Reserve, 510 ac (207 ha):*

These subunits are located east of the Pacific Coast Highway, in the City of Huntington Beach, Orange County. They consist of 510 ac (207 ha), all of which are owned by the State of California. Bolsa Chica Reserve contains significant nesting areas (which we are labeling as individual Subunits A, B, C, and D). This location supported 47 breeding adult Pacific Coast WSP in 2009 (Knapp and Peterson 2009, p. 8). These subunits were occupied at the time of listing and are currently occupied and annually support one of the largest breeding populations of Pacific Coast WSP in the region. The Recovery Plan for the Pacific Coast WSP states that this location contributes to the conservation goal for the region by providing a management potential of 70 breeding birds (Service 2007, Appendix B). This location also supported an average wintering flock of 14 Pacific Coast WSP from 2003 through 2010 (Service unpublished data). This reserve is an abandoned oil field that underwent significant reconstruction and restoration between 2004 and 2006, including the addition of three new nest sites and a new ocean inlet that allows the water level to rise and fall resembling the irregular semi-diurnal tidal range of southern California's ocean waters (Knapp and Peterson 2009, p. 1).

This location contains the physical and biological features essential to the conservation of the species, including tidally influenced estuarine mud flats supporting small invertebrates, and seasonally dry ponds that provide nesting and foraging habitat for Pacific Coast WSP.

The physical and biological features essential to the conservation of the species in these subunits may require special management considerations or protection to address threats from predation of chicks and eggs.

CA 46E, Bolsa Chica State Beach; 8 ac (3 ha):

This subunit is located south of CA 46A, in the City of Huntington Beach, Orange County. It stretches roughly 0.3 mi (0.5 km) from Seapoint Avenue north to the lagoon mouth channel into Bolsa Chica Ecological Reserve. This subunit consists of 8 ac (3 ha) owned by the State of California. This subunit was occupied at the time of listing and is currently occupied and supported an average wintering flock of 27 Pacific Coast WSPs from 2003 through 2010 (Service unpublished data). The subunit annually supports a significant wintering flock of Pacific Coast WSPs in a location with high quality breeding habitat.

This location contains the physical and biological features essential to the conservation of the species, including a wide sandy beach with occasional surf-cast wrack supporting small invertebrates.

The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from human recreational disturbance and beach raking.

CA 47, Santa Ana River Mouth, 19 ac (8 ha):

This unit is located north of the Santa Ana River mouth, immediately west of the City of Huntington Beach in Orange County. This unit consists of 19 ac (8 ha), of which 18 ac (7 ha) are owned by the State of California, and 1 ac (0.4 ha) is privately owned.

This unit was not occupied at the time of listing, and we have no current records of occupancy. However, we consider this unit essential for the conservation of the species because it provides connectivity between two currently occupied areas, dispersal habitat between units and provides habitat for resting and foraging. This unit provides habitat to support breeding plovers and would facilitate interchange between otherwise widely separated units and helps provide habitat within the Recovery Unit.

This location contains habitat such as a wide, sandy beach with surf-cast wrack supporting small invertebrates, and tidally influenced estuarine mud flats that provide nesting and foraging habitat for Pacific Coast WSPs.

*CA 48 Balboa Beach, 25 ac (10 ha):*

This unit is located on the Balboa Peninsula, immediately west of the City of Newport Beach in Orange County. This unit stretches roughly 0.3 mi (0.5 km) from A Street south to G Street, including a total of 25 ac (10 ha), all of which are owned by the City of Newport Beach. This unit was occupied at the time of listing and is currently occupied and supported two breeding adult Pacific Coast WSPs in 2009 (P. Knapp, pers. comm. 2010) and three breeding adult Pacific Coast WSPs in 2010 (T. Ryan, *in litt.* 2010). It also supported an

average wintering flock of 35 Pacific Coast WSPs from 2003 through 2010 (Service unpublished data).

This location contains elements of the physical and biological features essential to the conservation of the species, including a wide sandy beach with occasional surf-cast wrack supporting small invertebrates.

The physical and biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats from human recreational disturbance, predation of chicks and eggs, and beach raking.

*CA 49, Marine Corps Base Camp Pendleton, 441 ac (179 ha):*

Under section 4(a)(3) of the Act, we have exempted approximately 441 ac (179 ha) of land containing features essential to the conservation of the Pacific Coast WSP in Unit CA 49 from critical habitat designation under section 4(a)(3) of the Act (*see Application of Section 4(a)(3) of the Act* section below).

*CA 50 (Subunits A–C), Batiquitos Lagoon, 66 ac (27 ha):*

These subunits are located between the cities of Carlsbad and Encinitas, in San Diego County. These subunits consist of a total of 66 ac (27 ha), of which approximately 32 ac (13 ha) are owned by the State of California, and 33 ac (14 ha) are privately owned. Batiquitos Lagoon includes three nest sites (which we are labeling as individual Subunits CA 50A, CA 50B, and CA 50C) that were created during restoration of the lagoon in 1996 to create habitat for seabirds and shorebirds, including Pacific Coast WSP and California least tern. These subunits were occupied at the time of listing and are currently occupied. Also included in Unit CA 50 is a portion of South Carlsbad State Beach (Subunit CA 50A) that supports a significant wintering population of Pacific Coast WSPs. The Recovery Plan for the Pacific Coast WSP states that subunits A–C contribute significantly to the conservation goal for the region by providing a management potential of 70 breeding birds (Service 2007, Appendix B). Three breeding adults were recorded within this unit in 2009 (B. Foster, *in litt.* 2010a), and 2010 (Ryan, *in litt,* 2010). This unit also facilitates interchange between wintering locations.

These subunits contain elements of the physical and biological features essential to the conservation of the species, including sandy beaches and tidally influenced estuarine mud flats with tide-cast organic debris supporting small invertebrates.

The physical and biological features essential to the conservation of the species in these subunits may require special management considerations or protection to address threats from human recreational disturbance at South Carlsbad State Beach, vegetation encroachment in the intertidal zone, and predation of chicks and eggs.

*CA 51 (Subunits A–C), San Elijo Lagoon Ecological Reserve, 15 ac (6 ha):*

These subunits are located between the cities of Solana Beach and Encinitas in San Diego County. These subunits were occupied at the time of listing and are currently occupied and consist of 15 ac (6 ha), of which 11 ac (4 ha) are owned by the State of California, and 4 ac (2 ha) are privately owned. San Elijo Lagoon includes three nest sites (which we are labeling as individual Subunits CA 51A, CA 51B, and CA 51C). The San Elijo Lagoon Restoration Working Group is planning to restore habitat at the San Elijo Lagoon Ecological Reserve, which may include nest sites for nesting sea birds and shorebirds including Pacific Coast WSP and California least tern. Restoration and enhancement of coastal dune habitat at this site is ongoing, and the Service is currently participating in a cooperative agreement with the San Elijo Lagoon Conservancy to create suitable nesting areas for Pacific Coast WSPs, California least terns, and other shorebirds in the southwest corner of the West Basin of the lagoon. The Recovery Plan for the Pacific Coast WSP states that this location contributes significantly to the conservation goal for the region by providing a management potential of 20 breeding birds (Service 2007, Appendix B). This unit may facilitate interchange between wintering locations (*see Criteria Used to Identify Critical Habitat* section above).

These subunits contain elements of the physical and biological features essential to the conservation of the species, including sandy beaches and tidally influenced estuarine mud flats with tide-cast organic debris supporting small invertebrates. Restoration of degraded habitat within these subunits will improve the habitat.

The physical and biological features essential to the conservation of the species in these subunits may require special management considerations or protection to address threats from human recreational disturbance, vegetation encroachment in the intertidal zone, and predation of chicks and eggs.

*CA 52 (Subunits A–C) San Dieguito Lagoon, 11 ac (5 ha):*

These subunits are located at the west end of San Dieguito River Park between the cities of San Diego and Del Mar in San Diego County. These subunits were occupied at the time of listing and are currently occupied and consist of 11 ac (5 ha), of which 4 ac (2 ha) are owned by the State of California, and 7 ac (3 ha) are privately owned. San Dieguito Lagoon includes three nest sites (which we are labeling as individual Subunits CA 52A, CA 52B, and CA 52C) that were created for nesting seabirds and shorebirds including Pacific Coast WSP and California least tern. The Recovery Plan for the Pacific Coast WSP states that this location contributes significantly to the conservation goal for the region by providing a management potential of 20 breeding birds (Service 2007, Appendix B). This unit also facilitates interchange between wintering locations. Additionally, restoration of this site occurred in 2009, improving areas used by breeding and wintering shorebirds. Use of one nesting site by a pair of plovers was reported in 2010 (Foster, pers. comm. 2010b). Additional improvements to the nest sites are expected in the future.

These subunits contain elements of the physical and biological features essential to the conservation of the species, including wide sandy beaches and tidally influenced estuarine mud flats with tide-cast organic debris supporting small invertebrates.

The physical and biological features essential to the conservation of the species in these subunits may require special management considerations or protection to address threats from human recreational disturbance, vegetation encroachment in the intertidal zone, and predation of chicks and eggs.

*CA 53, Los Penasquitos Lagoon, 32 ac (13 ha):*

This unit is located immediately south of the City of Del Mar in the City of San Diego in San Diego County. This unit stretches roughly 0.6 mi (0.96 km) from South Camino del Mar to North Torrey Pines Road, and consists of 32 ac (13 ha), all of which are owned by the State of California. This unit was occupied at the time of listing and is currently occupied and consists of a portion of Torrey Pines State Beach that supports a wintering population of Pacific Coast WSPs. This unit contained an average wintering flock of 22 Pacific Coast WSPs from 2003 to 2010 (Service unpublished data). The Recovery Plan for the Pacific Coast WSP states that this location contributes significantly to the conservation goal for the region by providing a management potential of 10 breeding birds (Service 2007, Appendix B).

This unit contains the physical and biological features essential to the

conservation of the species, including a wide sandy beach with occasional surf-cast wrack supporting small invertebrates, as well as tidally influenced estuarine mud flats with tide-cast organic debris.

The physical and biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats from human recreational disturbance, vegetation encroachment in the intertidal zone, and predation of chicks and eggs.

*CA 54A, Fiesta Island, 2 ac (1 ha):*

This subunit is located on the northwest side of Fiesta Island in Mission Bay Park, within the City of San Diego in San Diego County. This subunit stretches roughly 0.5 mi (0.8 km) along the northwest side of the island from and includes approximately 1 ac (1 ha) of lands owned by the State of California, and 1 ac (0.4 ha) of land owned by the City of San Diego. This unit was occupied at the time of listing. Although occupancy is currently unconfirmed, this unit contains features essential to the conservation of the species and is needed by the species for use in response to fluctuating habitat and resource availability or use for migration between other nearby occupied sites. This subunit also facilitates interchange between wintering locations. The Recovery Plan for the Pacific Coast WSP states that this location contributes significantly to the conservation goal for the region by providing a management potential of 10 breeding birds (Service 2007, Appendix B).

This subunit contains the physical and biological features essential to the conservation of the species, including a wide sandy beach with tide-cast organic debris supporting small invertebrates.

The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from human recreational disturbance, off-leash pets, and predation of chicks and eggs.

*CA 54B, Mariner's Point, 7 ac (3 ha):*

This subunit is located on the west side of Mission Bay Park near the mouth of the Mission Bay Channel, within the City of San Diego in San Diego County. This subunit includes 7 ac (3 ha), of which 1 ac (0.4 ha) is owned by the State of California, and 6 ac (2 ha) are owned by the City of San Diego. This unit was occupied at the time of listing and is currently occupied and contains the physical and biological features essential to the conservation of the species. This subunit has supported an average wintering flock of 21 Pacific Coast WSPs from 2003 to 2010 (Service unpublished data). In conjunction with subunits CA 54C and CA 54D, it annually supports a large and significant wintering flock of Pacific Coast WSPs in high quality breeding habitat and facilitates interchange between wintering locations. Additionally, this location was a breeding site in 1995 (K. Forburger, pers. comm. 2010); thus, special management may encourage Pacific Coast WSPs to resume breeding in areas currently used by wintering birds.

This subunit contains the physical and biological features essential to the conservation of the species, including a wide sandy beach with tide-cast organic debris supporting small invertebrates.

The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from human recreational disturbance, off-leash pets, and predation of chicks and eggs.

*CA 54C, South Mission Beach, 38 ac (15 ha):*

This subunit is located immediately south of Mission Bay Park in the City of San Diego in San Diego County. This unit stretches roughly 0.5 mi (0.8 km) along the southern-most end of South Mission Beach, and includes 38 ac (15 ha), of which 8 ac (3 ha) are owned by the State of California, and 30 ac (12 ha) are owned by the City of San Diego. This unit was occupied at the time of listing and is currently occupied and contains the physical and biological features essential to the conservation of the species. This subunit has supported an average wintering flock of 50 Pacific Coast WSPs from 2003 to 2010 (Service unpublished data). In conjunction with subunits CA 54B and CA 54D, this subunit annually supports a large and significant wintering flock of Pacific Coast WSPs in high quality breeding habitat, and the area facilitates interchange between wintering locations.

This subunit contains the following habitat: wide sandy beach with surf-cast wrack supporting small invertebrates. The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from human recreational disturbance, off-leash pets, and predation of chicks and eggs.

*CA 54D, San Diego River Channel, 51 ac (21 ha):*

This subunit spans the mouth of the San Diego River Channel, including sandy accumulations created by the freshwater output of the river, in the City of San Diego in San Diego County. This unit was occupied at the time of listing and is currently occupied and contains the physical and biological features essential to the conservation of the species. This subunit consists of 51 ac (21 ha), of which 38 ac (15 ha) are owned by the State of California, and 13 ac (5 ha) are owned by the City of San Diego. In conjunction with subunits CA 54B and CA 54C, this location annually supports a large and significant wintering flock of Pacific Coast WSPs in high quality breeding habitat and facilitates interchange between wintering locations.

This subunit contains the following habitat: wide sandy beaches with occasional surf-cast wrack supporting small invertebrates, as well as tidally influenced estuarine mud flats with tide-cast organic debris. The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from human recreational disturbance, off-leash pets, and predation of chicks and eggs.

*CA 55A, Naval Air Station North Island, 142 ac (58 ha):*

Under section 4(a)(3) of the Act, we have exempted approximately 142 ac (58 ha) of land containing features essential to the conservation of the Pacific Coast WSP in Unit CA 55A from critical habitat designation under section 4(a)(3) of the Act (*see Application of Section 4(a)(3) of the Act* section below).

*CA 55B, Coronado Beach, 74 ac (30 ha):*

This subunit is located immediately west of the City of Coronado in San Diego County. This subunit stretches roughly 0.6 mi (0.96 km) from the boundary with Naval Air Station North Island (NASNI) to the south end of the natural sand dunes at Coronado Beach. This subunit includes a total of 74 ac (30 ha) owned by the State of California. This subunit was occupied at the time of listing and is currently occupied and is adjacent to the sizable Pacific Coast WSP population at NASNI, which contained an average wintering flock of 69 Pacific Coast WSPs from 2003 to 2010 (Service unpublished data). Additionally, biologists recorded 17 breeding adults at NASNI during 2009 surveys (Service unpublished data). The Recovery Plan for the Pacific Coast WSP states that this location (in conjunction with adjacent military lands)

contributes significantly to the conservation goal for the region by providing a management potential of 20 breeding birds (Service 2007, Appendix B). This unit also facilitates interchange between wintering locations.

This subunit contains the physical and biological features essential to the conservation of the species, including a wide sandy beach with occasional surf-cast wrack supporting small invertebrates, as well as wind-blown sand in dune systems immediately inland of the active beach face.

The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from human recreational disturbance and beach raking.

*CA 55C, Silver Strand Beach, 180 ac (73 ha):*

Under section 4(a)(3) of the Act, we have exempted approximately 180 ac (73 ha) of land containing features essential to the conservation of the Pacific Coast WSP in Unit CA 55C from critical habitat designation under section 4(a)(3) of the Act (*see Application of Section 4(a)(3) of the Act* section below).

*CA 55D, Delta Beach, 90 ac (36 ha):*

Under section 4(a)(3) of the Act, we have exempted approximately 90 ac (36 ha) of land containing features essential to the conservation of the Pacific Coast WSP in Unit CA 55D from critical habitat designation under section 4(a)(3) of the Act (*see* Application of Section 4(a)(3) of the Act section below).

*CA 55E, Sweetwater Marsh National Wildlife Refuge and D Street Fill, 132 ac (54 ha):*

This subunit is located on the east side of San Diego Bay in the City of Chula Vista in San Diego County. This subunit consists of approximately 132 ac (54 ha), of which 77 ac (31 ha) are owned by the Service, and 54 ac (22 ha) are owned by the Unified Port of San Diego. This subunit was occupied at the time of listing and is currently occupied and supported nesting Pacific Coast WSPs in 2000 (R. Patton, pers. comm. 2010), and two adult Pacific Coast WSPs in 2009 (Service unpublished data). The Recovery Plan for the Pacific Coast WSP states that this location contributes significantly to the conservation goal for the region by providing a management potential of 25 breeding birds (Service 2007, Appendix B). Additionally, this subunit annually supports a large and significant wintering flock of Pacific Coast WSPs and facilitates interchange between wintering locations.

This subunit contains the physical and biological features essential to the conservation of the species, including sandy beaches above and below mean high-tide line and tidally influenced estuarine mud flats that provide nesting and foraging habitat for Pacific Coast WSPs.

The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from vegetation encroachment in the intertidal zone, and predation of chicks and eggs.

*CA 55F, Silver Strand State Beach, 82 ac (33 ha):*

This subunit is located immediately north of the City of Imperial Beach, in the City of Coronado in San Diego County. This subunit was occupied at the time of listing and is currently occupied and stretches roughly 1.5 mi (2.4 km) west of Silver Strand Boulevard, and is centered roughly at Coronado Cays Park. This subunit, in conjunction with adjacent lands at Naval Amphibious Base Coronado supported at least 10 breeding adults in 2009 (Service unpublished data), and 8 breeding adults in 2010 (Ryan, *in litt.* 2010). The Recovery Plan for the Pacific Coast WSP states that this location contributes significantly to the conservation goal for the region by providing a management potential of 65 breeding birds (Service 2007, Appendix B). This subunit contained an average wintering flock of 13 Pacific Coast WSPs from 2003 to 2010 (Service unpublished data). This subunit also facilitates interchange between wintering locations. Approximately 8 ac (3 ha) are State-owned.

This subunit contains the physical and biological features essential to the conservation of the species, including a wide sandy beach with occasional surf-cast wrack supporting small invertebrates, as well as wind-blown sand in dune systems immediately inland of the active beach face.

The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from human recreational disturbance and predation of chicks and eggs.

*CA 55G, Chula Vista Wildlife Reserve, 10 ac (4 ha):*

This subunit is located on an island in south San Diego Bay in the City of Chula Vista in San Diego County. This location is centered in between the major wintering and breeding sites at Silver Strand State Beach (CA 55F), Sweetwater National Wildlife Refuge (CA 55E), Tijuana Estuary and Beach (CA 55K), the South Bay National Wildlife Refuge (CA 55I–J), and Navy lands (CA 55–A, D, H). The subunit consists of 10 ac (4 ha), all of which are owned by the State of California. This location was a significant breeding site in the 1980s, and was occupied at the time of listing with one nest being observed in 1998 (Patton, pers. comm. 2010). This subunit contains relatively undisturbed habitat and is centralized between other significant areas; however, it is not currently utilized by Pacific Coast WSPs for breeding or wintering. However, this unit contains features essential to the conservation of the species, is needed by the species for use in response to fluctuating habitat and resource availability or use for migration between other nearby occupied sites, and assists in maintaining habitat within Recovery Unit 6. Increased restoration and special management at this site could cause this wildlife reserve to become more useful to breeding and wintering Pacific Coast WSPs, and facilitate interchange between locations.

This subunit contains the physical and biological features essential to the conservation of the species, including sandy beach and sparsely vegetated areas above the daily high tide, as well as tidally influenced estuarine mud flat with tide-cast organic debris supporting small invertebrates.

The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from vegetation encroachment in the intertidal zone, shoreline revetment, and predation of chicks and eggs.

*CA 55H, Naval Radio Receiving Facility, 66 ac (27 ha):*

Under section 4(a)(3) of the Act, we have exempted approximately 66 ac (27 ha) of land containing features essential to the conservation of the Pacific Coast WSP in Unit CA 55H from critical habitat designation under section 4(a)(3) of the Act (*see Application of Section 4(a)(3) of the Act* section below).

*CA 55I, San Diego National Wildlife Refuge, South Bay Unit, 5 ac (2 ha):*

This subunit is located at the southernmost end of San Diego Bay in a location that is operated by Western Salt Works as salt evaporation ponds. This subunit is immediately north of the City of Imperial Beach, in the City of San Diego in San Diego County, and consists entirely of Federal land. This unit was occupied at the time of listing and is currently occupied and supported at least three breeding adults in 2009 (Collins, *in litt.* 2010), and seven breeding adults in 2010 (Ryan, *in litt.* 2010). The Recovery Plan for the Pacific

Coast WSP states that this location contributes significantly to the conservation goal for the region by providing a management potential of 30 breeding birds (Service 2007, Appendix B).

The subunit contains the physical and biological features essential to the conservation of the species, including sparsely vegetated areas on artificial salt flats and adjoining dikes, as well as tidally influenced estuarine mud flats with tide-cast organic debris supporting small invertebrates for foraging.

The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from egg and chick predation.

*CA 55J, Tijuana Estuary and Border Field State Park, 150 ac (61 ha):*

This subunit is located in the City of Imperial Beach in San Diego County. This subunit stretches roughly 2 mi (3.2 km) from the end of Seacoast Drive to the U.S./Mexico border, extending across both the Tijuana Slough National Wildlife Refuge and Border Field State Park. This unit was occupied at the time of listing and is currently occupied and supported at least 10 adult breeding Pacific Coast WSPs in 2009 (B. Collins, *in litt.* 2010), and 19 breeding adults in 2010 (Ryan, *in litt.* 2010). This location also supported an average wintering flock of 54 Pacific Coast WSPs from 2003 to 2010 (Service unpublished data). The Recovery Plan for the Pacific Coast WSP states that this location contributes significantly to the conservation goal for the region by providing a management potential of 40 breeding birds (Service 2007, Appendix B).

This subunit contains the physical and biological features essential to the conservation of the species, including a wide sandy beach with occasional surf-cast wrack supporting small invertebrates, as well as tidally influenced estuarine mud flats with tide-cast organic debris supporting small invertebrates for foraging.

The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from human recreational disturbance and predation of chicks and eggs.

**Effects of Critical Habitat Designation**

*Section 7 Consultation*

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our regulatory definition of "destruction or adverse modification" (50 CFR 402.02) (*see Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.,* 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not Federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, or are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define "reasonable and prudent alternatives" (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action;

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction;

(3) Are economically and technologically feasible; and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

*Application of the "Adverse Modification" Standard*

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical and biological features to an extent that appreciably reduces the conservation value of critical habitat for Pacific Coast

WSP. As discussed above, the role of critical habitat is to support life-history needs of the species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the Pacific Coast WSP. These activities include, but are not limited to:

(1) Actions and management efforts affecting Pacific Coast WSP on Federal lands such as national seashores, parks, and wildlife reserves. Such activities may include clearing and raking of tidal debris (seaweed, driftwood) from beaches causing a loss in cover and forage; high levels of visitor use, which can disturb and disrupt normal behavior; and utility corridors that require maintenance, which can lead to disturbance of Pacific Coast WSPs.

(2) Dredging and dredge spoil placement that permanently removes elements of essential physical and biological features to the extent Pacific Coast WSPs are affected for the foreseeable future.

(3) Construction and maintenance of roads, walkways, marinas, access points, bridges, culverts and other structures which interfere with Pacific Coast WSP nesting, breeding, or foraging or result in increases in predation.

(4) Storm water and wastewater discharge from communities, which could impact the abundance of invertebrates upon which Pacific Coast WSPs rely for food.

(5) Flood control actions that change the elements of essential physical and biological features to the extent that the habitat no longer contributes to the conservation of the species.

**Exemptions**

*Application of Section 4(a)(3) of the Endangered Species Act*

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resource management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.''

We consult with the military on the development and implementation of INRMPs for installations with listed species. We analyzed INRMPs developed by military installations located within the range of the proposed critical habitat designation for Pacific Coast WSP to determine if they are exempt under section 4(a)(3) of the Act. The following areas are Department of Defense lands with completed, Service-approved INRMPs within the proposed revised critical habitat designation.

Approved INRMPs

*Naval Base Ventura County Point Mugu (Units CA 40 and CA 41), 208 ac (84 ha)*

The Department of the Navy, Naval Base Ventura County, manages two facilities in Ventura County, California: Point Mugu and San Nicolas Island. Naval Base Ventura County, Point Mugu (NBVC, Point Mugu) was established in 1949 as the Naval Air Weapons Station to support a new U.S. Naval Air Missile Test Center, which provided material and Service support, including military personnel administration, air traffic control, and flight line functions. The NBVC, Point Mugu occupies approximately 4,490 ac (1,817 ha) of land on the coast of southern California, Ventura County. Currently, the installation is used for target drone launches, aircraft operations, beach missile launch operations, maintenance of the roads and perimeter fence, utilities maintenance, pest management, recreation, and natural resource management.

The NBVC, Point Mugu INRMP is a planning document that guides the management and conservation of natural resources under the installation's control. The INRMP was prepared to ensure that natural resources are managed in support of the Naval Base Ventura County's military command mission and that all activities are consistent with Federal stewardship requirements. The NBVC, Point Mugu INRMP was completed in 2002, and renewed and approved by the Service in 2008. The INRMP is Naval Base Ventura County's adaptive plan for managing natural resources to support and be consistent with the military mission, while protecting and enhancing the biological integrity of lands under its use (U.S. Navy 2002, p. ES–3). Naval Base Ventura County is committed to an ecosystem management approach for its natural resources program by integrating all components of natural resource management into a comprehensive and coordinated effort. An integrated approach to ecosystem management will help protect the biological diversity found at NBVC, Point Mugu.

The INRMP identifies the following management and protective measure goals for the Pacific Coast WSP:

(1) Monitor and manage breeding habitat of Pacific Coast WSPs;

(2) Monitor and manage wintering and migration areas to maximize Pacific Coast WSP population survival;

(3) Develop mechanisms for long-term management and protection of Pacific Coast WSPs and their breeding and wintering habitat;

(4) Undertake scientific investigations that facilitate recovery efforts;

(5) Undertake public information and education programs for Pacific Coast WSPs;

(6) Continue measures in place for Pacific Coast WSP protection, including beach closures;

(7) Protect and maintain natural coastal processes that perpetuate high-quality breeding habitat;

(8) Keep Pacific Coast WSP management areas closed to all pets, leashed or not, with the exception of NBVC security dogs on official duty (*e.g.,* apprehending a suspect);

(9) Monitor habitat to maintain the nesting substrates necessary for Pacific Coast WSP breeding success;

(10) Identify factors that limit the quality of wintering and breeding habitat;

(11) Clean and restore the eastern arm of Mugu Lagoon to sandy beach;

(12) Improve methods of monitoring Pacific Coast WSPs, such as color banding; and

(13) Develop and implement public information and education programs on Pacific Coast WSPs and recovery efforts at the proposed Mugu Lagoon Visitor Education Center.

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that conservation efforts identified in the 2008 INRMP for NBVC, Point Mugu have and will provide a benefit to the Pacific Coast WSP and features essential to its conservation, and will benefit Pacific Coast WSPs occurring in habitats on the installation. Therefore, lands subject to the INRMP for the NBVC, Point Mugu (Units CA 40 and CA 41) are exempt from critical habitat designation under section 4(a)(3)(B) of the Act, and we are not including approximately 208 ac (84 ha) of habitat in this proposed revised critical habitat designation because of this exemption.

*Department of the Navy, Naval Base Ventura County, San Nicolas Island (Unit CA 42), 321 ac (130 ha):*

San Nicolas Island is under the jurisdiction of Department of the Navy, Naval Base Ventura County. The 14,230–ac (5,759–ha) San Nicolas Island is located approximately 65 mi (105 km) south of NBVC, Point Mugu. Naval facilities on San Nicolas Island include a 10,000 ft (3,048 m) concrete and asphalt runway, radar tracking instrumentation, electro-optical devices, telemetry, communications equipment, missile and target launch areas, as well as personnel support. Currently, the island is used as the management launch platform for short- and medium-range missile testing, and an observation facility for missile testing. Primarily, San Nicolas Island's mission is to support the primary research, design, development, testing, and evaluation of air weapons and associated aircraft systems into anti-surface and anti-air warfare aircraft.

The San Nicolas Island INRMP (U.S. Navy 2005, pp. 1–129) is a planning document that guides the management and conservation of natural resources under the Navy Base Ventura County's control. The INRMP was prepared to ensure that natural resources are managed in support of the Naval Base Ventura County's military command mission and that all activities are consistent with Federal stewardship requirements. The San Nicolas Island INRMP was completed and approved by the Service in 2003 and renewed in 2005. The San Nicolas Island INRMP is Naval Base Ventura County's adaptive plan for managing natural resources to support and be consistent with the military mission while protecting and enhancing the biological integrity of lands under its use (U.S. Navy 2005, p. 5). Naval Base Ventura County is committed to an ecosystem management approach for its natural resources program by integrating all components of natural resource management into a comprehensive and coordinated effort. An integrated approach to ecosystem management will help protect the biological diversity found at San Nicolas Island.

The San Nicolas INRMP identifies the following management and protective measure goals for the Pacific Coast WSP:

(1) Monitor Pacific Coast WSP's nests during missile launches, barge landings, and other activities that may disturb nesting behaviors;

(2) Close Pacific Coast WSP nesting areas to recreational activity during the breeding season (March through September); and

(3) Monitor the effects of Navy activities on Pacific Coast WSPs by conducting island-wide Pacific Coast WSP censuses twice annually, once during the breeding season and once during the winter season;

(4) Educate island personnel regarding protected species regulations and responsibilities;

(5) Maintain signs around breeding sites to alert personnel of closures;

(6) Conduct site-specific Pacific Coast WSP surveys in potential or known breeding habitat prior to disturbance activities;

(7) Remove unnecessary structures in Pacific Coast WSP nesting areas and attach avian excluders to essential structures, if feasible;

(8) Conduct amphibious training exercises on beaches not harboring nesting Pacific Coast WSPs;

(9) Continue to implement a feral cat control/removal program;

(10) Develop and maintain a computer database for storing information on locations of nesting sites, incidental sightings and size and results of surveys for resource management purposes;

(11) Continue to participate with recovery planning and other efforts to help establish stable Pacific Coast WSP populations; and

(12) Support research to explore the effects of increasing pinniped (seal, sea lion) populations on nesting success of Pacific Coast WSPs.

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that conservation efforts identified in the 2005 INRMP for San Nicolas Island have and will provide a benefit to the Pacific Coast WSP and physical and biological features essential to its conservation. Therefore, lands subject to the INRMP for the San Nicolas Island (Unit CA 42) are exempt from critical habitat designation under section 4(a)(3)(B) of the Act, and we are not including approximately 321 ac (130 ha) of habitat in this proposed revised critical habitat designation because of this exemption. We request public comment regarding this exemption.

*Marine Corps Base (MCB) Camp Pendleton (Unit CA 49), 441 ac (179 ha):*

Marine Corps Base (MCB) Camp Pendleton is the Marine Corps' premier amphibious training installation and it is the only west coast amphibious assault training center. The installation has been conducting air, sea, and ground assault training since World War II. MCB Camp Pendleton occupies over 125,000 ac (50,586 ha) of coastal southern California in the northwest corner of San Diego County. Aside from nearly 10,000 ac (4,047 ha) that is developed, most of the installation is largely undeveloped land that is used for training. MCB Camp Pendleton is situated between two major metropolitan areas: the City of Los Angeles that is 82 mi (132 km) to the north, and the City of San Diego that is 38 mi (61 km) to the south. MCB Camp Pendleton is located north of the City of Oceanside, southeast of the City of San Clemente, and adjacent to the western side of the unincorporated community of Fallbrook, San Diego County, California. Aside from a portion of the installation's border that is shared with the Cleveland National Forest's San Mateo Wilderness Area and Fallbrook Naval Weapons Station, surrounding land use includes urban development, rural residential development, and farming and ranching. The largest single leaseholder on the installation is California Department of Parks and Recreation (CDPR), which possesses a 50-year real estate lease granted on September 1, 1971, for 2,000 ac (809 ha) that encompasses San Onofre State Beach.

The MCB Camp Pendleton INRMP is a planning document that guides the management and conservation of natural resources under the installation's control. The INRMP was prepared to assist installation staff and users in their efforts to conserve and

rehabilitate natural resources consistent with the use of MCB Camp Pendleton to train Marines and set the agenda for managing natural resources on MCB Camp Pendleton. Marine Corps Base Camp Pendleton completed its INRMP in 2001, followed by a revised and updated version in 2007 to address conservation and management recommendations within the scope of the installation's military mission, including conservation measures for Pacific Coast WSP (MCB Camp Pendleton 2007, Appendix F, Section F.23, pp. F85–F89). The Service provided concurrences in 2001 and 2007 for the respective INRMPs. Additionally, CDPR is required to conduct its natural resources management consistent with the philosophies and supportive of the objectives in the revised 2007 INRMP (MCB Camp Pendleton 2007, Chapter 2, p. 31).

The Pacific Coast WSP and its habitat are provided protection and management by the Estuarine and Beach Conservation Plan (MCB Camp Pendleton 2007, Appendix B, pp. B-1-B–20), which was addressed through the section 7 consultation process with a biological opinion issued by the Service on October 30, 1995 (Service 1995, Biological Opinion 1–6–95–F02), and is now implemented under the 2007 INRMP. Base-wide protection measures for avoidance and minimization of impacts to Pacific Coast WSP and its habitat, especially during the breeding season, are provided in both the conservation plan and Base Order P3500.1M. The base-wide protection measures for Pacific Coast WSP include, but are not limited to:

(1) Minimize reduction or loss of upland buffers surrounding coastal wetlands;

(2) Restore the dune system in the vicinity of the Santa Margarita Estuary following the guidance developed by The Nature Conservancy;

(3) Maintain integrity of listed species' habitat; and

(4) Promote growth of current population of Pacific Coast WSPs (MCB Camp Pendleton 2007, Appendix B, pp. B5–B7).

Annual management and protection measures for Pacific Coast WSPs identified in Appendix F of the INRMP include, but are not limited to:

(1) Installation of sign postings describing the sensitive nature of the breeding area/season;

(2) Installation of permanent/temporary fencing that directs military training away from sensitive nesting and foraging areas;

(3) Beach habitat enhancement (nonnative vegetation control and sand mobilization);

(4) Ant control (ants can cause incubating adults to abandon a nest, and can contribute towards chick mortality); and

(5) Focused predator control (MCB Camp Pendleton 2007, Appendix F, pp. F89).

Current environmental training regulations and restrictions are provided to all military personnel to maintain compliance with the terms of the INRMP. Training regulations guide activities to protect threatened and endangered species on the installation, including Pacific Coast WSP, and its habitat. First, specific conservation measures, outlined in the Instructions for Military Training Activities section of the Estuarine and Beach Conservation Plan are applied to Pacific Coast WSP and its habitat (MCB Camp Pendleton 2007, p. B–13). These include:

(1) Military activities are kept to a minimum within the Santa Margarita Management Zone (*i.e.,* the area on the base where the majority of nesting sites occur) and any nesting site outside the traditionally fenced nesting areas during the breeding/nesting season (1 March–31 August) for the Pacific Coast WSP. A buffer distance of 984 ft (300 m) away from fenced or posted nesting areas must be adhered to for all activities involving smoke, pyrotechnics, loud noises, blowing sand, and large groupings of personnel (14 or more). Aircraft are not authorized to land within 984 ft (300 m) of fenced nesting areas on Blue Beach or White Beach and are required to maintain an altitude of 300 ft (91 m) Above Ground Level (AGL) or more above nesting areas.

(2) Recreational activities within the Santa Margarita Management Zone and posted nest locations during the breeding season are to be kept to a minimum and camping at Cocklebur Canyon Beach is prohibited.

(3) Foot traffic within the Santa Margarita Management Zone is prohibited within 150 ft (46 m) of posted nesting areas during the breeding season.

(4) A 300-ft (91-m) buffer from posted nesting areas is required for surf fishermen, and no live baitfish or amphibians are allowed for fishing activities.

Additionally, MCB Camp Pendleton Environmental Security staff review projects and enforce existing regulations and orders that, through their implementation under NEPA requirements, avoid and minimize impacts to natural resources, including the Pacific Coast WSP and its habitat. MCB Camp Pendleton also provides training to personnel on environmental awareness for sensitive resources on the base, including the Pacific Coast WSP and its habitat. As a result of these regulations and restrictions, activities occurring on MCB Camp Pendleton are currently conducted in a manner that minimizes impacts to Pacific Coast WSPs and their habitat.

MCB Camp Pendleton's INRMP also benefits Pacific Coast WSP through ongoing monitoring and research efforts. To assess the effectiveness of MCB Camp Pendleton's Estuarine and Beach Conservation Plan, biennial monitoring is conducted to determine number of pairs, hatching success, and reproductive success (MCB Camp Pendleton 2007, Appendix B, p. B12). Annual monitoring of nests is conducted to track Pacific Coast WSP population trends (MCB Camp Pendleton 2007, Appendix F, p. F89). Data are provided to all necessary personnel through MCB Camp Pendleton's GIS database on sensitive resources and MCB Camp Pendleton's published resource atlas.

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that conservation efforts identified in the 2007 INRMP for MCB Camp Pendleton have and will continue to provide a benefit to Pacific Coast WSP and its habitat. This includes habitat located in the following areas: San Onofre Beach, Aliso/French Creek Mouth, and Santa Margarita River Estuary (names of areas follow those used in the draft recovery plan (Service 2001, Appendix B, p. B–16). Therefore, lands subject to the INRMP for MCB Camp Pendleton, which includes lands leased from the Department of Defense by other parties (such as CDPR for San Onofre State Beach) (Unit CA 49), are exempt from critical habitat designation under section 4(a)(3)(B) of the Act. CDPR is required to conduct its natural resources management consistent with the philosophies and supportive of the objectives of the INRMP (MCB Camp Pendleton 2007, p. 2–30). We are not including approximately 441 ac (179 ha) of habitat in this proposed revised critical habitat designation because of this exemption. We request public comment regarding this exemption.

*Naval Base Coronado, Naval Air Station (North Island Unit CA 55A, Silver Strand Beach Unit CA 55C, Delta Beach Unit CA 55D, and Naval Radio Receiving Facility Unit CA 55H), 734 ac (297 ha):*

Naval Base Coronado includes eight military facilities in San Diego County, California. Three of these facilities—

Naval Air Station North Island (Unit CA 55A); Naval Amphibious Base Coronado (Units CA 55C, and CA 55D); and Naval Radio Receiving Facility (Unit CA 55H)—include beach habitat that supports Pacific Coast WSPs. For planning and description purposes regarding these beaches and the military training that occurs here, the U.S. Navy describes these areas as:

(1) Naval Air Station North Island (NAS North Island),

(2) Naval Amphibious Base Coronado or Silver Strand Training Complex–North (SSTC–North), and

(3) Naval Radio Receiving Facility or Silver Strand Training Complex–South (SSTC–South).

NAS North Island is located north of the City of Coronado and encompasses 2,803 ac (1134 ha), of which approximately 95 ac (39 ha) is southern foredune/beach habitat. SSTC–North is located south of the City of Coronado and encompasses roughly 1,000 ac (405 ha), of which approximately 257 ac (104 ha) are beach-front habitat leased from CDPR for amphibious military training activities. SSTC–North, including the San Diego Bay-front beach referred to as Delta Beach, supports approximately 278 ac (113 ha) of southern foredune/beach habitat. SSTC–South is located north of the City of Imperial Beach, and encompasses 450 ac (182 ha), of which approximately 78 ac (32 ha) is southern foredune/beach habitat.

The U.S. Navy completed an INRMP in 2002 to provide a viable framework for the management of natural resources on lands controlled by Naval Base Coronado, which was approved by the Service. The U.S. Navy continues to implement the completed INRMP (which provides a benefit to the Pacific Coast WSP) as a revision is being drafted. The INRMP identifies conservation and management recommendations within the scope of the installation's military mission, including conservation measures for Pacific Coast WSP and its habitat (Naval Base Coronado 2002, Section 3, pp. 81–83). The management strategy outlines actions that would contribute to the recovery of Pacific Coast WSP through development of cooperative, ecosystem management-based strategies (Naval Base Coronado 2002, Section 4, pp. 56–58).

The U.S. Navy will continue to implement the 2002 INRMP, subject to modified management strategies identified in the 2010 Silver Strand Training Area BO until completion of a revised INRMP. The INRMP revision will reflect the management changes driven by the U.S. Navy's need for additional beach training. The revised INRMP will include the management strategy identified in the 2010 Silver Strand Training BO. The INRMP identifies conservation and management recommendations within the scope of the installation's military mission, including conservation measures for Pacific Coast WSP and its habitat (Naval Base Coronado 2002, Section 3, pp. 81–83). The management strategy outlines actions that would contribute to the recovery of Pacific Coast WSP through development of cooperative, ecosystem management-based strategies (Naval Base Coronado 2002, Section 4, pp. 56–58). Management actions that will benefit the Pacific Coast WSP to be implemented by the Navy on the U.S. Navy's Silver Strand Training Complex Operations, Naval Base, Coronado, in accordance with the 2002 INRMP as modified by the 2010 SSTC BO (08B0503–09F0517) include:

(1) Minimize the potential for take of nests and chicks at SSTC–N and SSTC–S Beaches during the breeding season;

(2) Monitor training activities to ascertain the impact on Pacific Coast WSP distribution and report any observed incidental take to the Service annually;

(3) Modify the beach to create hummocks to deter plovers from nesting in intensively used beach lanes;

(4) Schedule efforts to avoid beach lanes with higher nest numbers;

(5) Study the effects of military working dogs on plovers to develop additional conservation measures, if necessary;

(6) Require that dogs be on leashes.

(7) Annual nest site preparation;

(8) Mark and avoid up to 22 nests at SSTC–S, SSTC–N Beaches, plus any additional nests that exceed 22 that are initiated in beach lanes Orange 1 and Orange 2;

(9) Protect nesting and foraging areas at NAS North Island, SSTC–North, SSTC–South, and Delta Beach from predation by supporting consistent and effective predator management;

(10) Enhance and disallow mowing of remnant dune areas as potential nest sites in areas that can be protected from human disturbance and predators during nesting season;

(11) Conduct monitoring throughout Naval Base Coronado and establish a consistent approach to monitoring nesting attempts and hatching success to determine the success of predator management activities, and limit predator-prey interactions by fencing unless it conflicts with U.S. Navy training;

(12) Identify opportunities to use dredge material that has high sand content for expansion and rehabilitation of beach areas at NAS North Island and Delta Beach to create improved nesting substrate;

(13) Minimize activities that can affect invertebrate populations necessary for Pacific Coast WSP foraging by prohibiting beach raking on Naval Base Coronado beaches, with the exception of the area immediately in front of the Navy Lodge at NAS North Island and Camp Surf at SSTC–South;

(14) If any relocation of nest/eggs is necessary as a protective measure, each nest/egg will be relocated the shortest distance possible into suitable habitat by Service-approved monitors to increase the chance of nest success;

(15) Identify conflicts for immediate action and response;

(16) Public outreach to military residents of adjacent housing;

(17) Post signs to eliminate human trespassers during nesting season and possibly for nest avoidance as well; and,

(18) Work with the Service and others to develop a regional approach to managing and conserving the habitat needed to sustain Pacific Coast WSP.

The 2010 SSTC BO (08B0503–09F0517, p. 128) also specifies that if new information reveals that the increased training is affecting Pacific Coast WSP in a manner inconsistent with the conclusion of the Biological Opinion, then reinitiation of consultation may be warranted. If monitoring indicates that the western snowy plover numbers within the area of increased military training decline below the 5-year average, as determined by maximum active nest numbers—average of 18 plover pairs at SSTC (range of 11 to 22); 10 plover pairs at NASNI (range of 7 to 14); and 8 plover pairs at SSSB (range of 5 to 9)—reinitiation of consultation may be warranted. If snowy plover use of SSTC beaches declines, Service and Navy biologists will evaluate alternative explanations for any observed decline (such as continuation of low productivity associated with predation) and the need for additional conservation measures. This cooperative relationship allows the Service to work closely with the Navy for the continued implementation of beneficial measures to Pacific Coast WSP, while minimizing impacts associated with the increased training activities that are required for military readiness.

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that the conservation efforts identified in the existing Service approved INRMP Naval Base Coronado provide a benefit to Pacific Coast WSP and its habitat at NAS North Island,

SSTC–North, and SSTC–South. The Service also considers that the draft revised INRMP will provide a benefit to the Pacific Coast WSP and its habitat, but will revisit this exemption as necessary to evaluate the conservation efforts in Naval Base Coronado's final revised INRMP. Therefore, lands containing features essential to the conservation of Pacific Coast WSP on Naval Base Coronado (Units CA 55A, CA 55C, CA 55D, and CA 55H) are exempt under section 4(a)(3) of the Act, and we are not including approximately 734 ac (297 ha) of habitat in this proposed revised critical habitat designation because of this exemption. We request public comment on this exemption.

Table 3 below provides approximate areas (ac, ha) of lands that meet the definition of critical habitat but are exempt from designation under section 4(a)(3)(B) of the Act. Table 3 also provides our reasons for the exemptions.

TABLE 3—EXEMPTIONS FROM DESIGNATION BY CRITICAL HABITAT UNIT

| Unit | Specific area | Basis for exclusion/ exemption | Areas meeting the definition of critical habitat in Ac (Ha) | Areas exempted in Ac (Ha) |
|---|---|---|---|---|
| CA 40 | Naval Base Ventura County Point Mugu, Mugu Lagoon North. | 4(a)(3)(B) | 136 ac (55 ha) | 136 ac (55 ha). |
| CA 41 | Naval Base Ventura County Point Mugu, Mugu Lagoon South. | 4(a)(3)(B) | 72 ac (29 ha) | 72 ac (29 ha). |
| CA 42 | Naval Base Ventura County, San Nicolas Island | 4(a)(3)(B) | 321 ac (130 ha) | 321 ac (130 ha). |
| CA 49 | Marine Corps Base (MCB) Camp Pendleton | 4(a)(3)(B) | 441 ac (179 ha) | 441 ac (179 ha). |
| CA 55A | Naval Base Coronado, Naval Air Station North Island. | 4(a)(3)(B) | 142 ac (58 ha) | 142 ac (57 ha). |
| CA 55C | Naval Base Coronado Silver Strand Beach | 4(a)(3)(B) | 436 ac (176 ha) | 436 ac (176 ha). |
| CA 55D | Naval Base Coronado Delta Beach | 4(a)(3)(B) | 90 ac (36 ha) | 90 ac (36 ha). |
| CA 55H | Naval Base Coronado Naval Radio Receiving Facility. | 4(a)(3)(B) | 66 ac (27 ha) | 66 ac (27 ha). |
| Total | | | | 1,704 ac (690 ha). |

**Exclusions**

*Application of Section 4(b)(2) of the Act*

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, the Secretary may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise his discretion to exclude the area only if such exclusion would not result in the extinction of the species.

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we are preparing an analysis of the economic impacts of the proposed critical habitat designation and related factors.

An analysis of the economic impacts for the previous proposed critical habitat designation was conducted and made available to the public in the **Federal Register** on August 16, 2005 (70 FR 48094). The availability of that final economic analysis was announced in the final rule to designate critical habitat for the Pacific Coast WSP published on September 29, 2005 (70 FR 56969). The activities identified in the 2005 economic analysis that may have been affected by plover conservation included recreation, plover management, real estate development, military base operations, and gravel extraction. In the September 29, 2005, final designation of critical habitat (70 FR 56969), we excluded six subunits along the California Coast for economic reasons under section 4(b)(2) of the Act. The economic analysis prepared for the 2005 critical habitat designation included costs coextensive with the listing of the species; *i.e.,* costs attributable to the listing of the species, as well as costs attributable to the designation of critical habitat, and it did not distinguish between them. The new analysis will analyze the specific incremental costs attributable to designating all areas proposed in this revised rule as critical habitat, separate from the costs of those protections already accorded the species through Federal listing and other Federal, State, and local regulations.

We will announce the availability of the draft economic analysis on this proposed revised critical habitat designation as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at *http://www.regulations.gov,* or by contacting the Arcata Fish and Wildlife Office directly (*see* **FOR FURTHER INFORMATION CONTACT** section). During the development of a final designation, we will consider economic impacts, public comments, and other new information, and areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the Department of Defense where a national security impact might exist. In preparing this proposal, we have exempted from the designation of critical habitat those Department of Defense lands with completed INRMPs determined to provide a benefit to the Pacific Coast WSP. We have also determined that the remaining lands within the proposed designation of critical habitat for Pacific Coast WSP are not owned or managed by the Department of Defense, and, therefore, we anticipate no impact on national security. Consequently, the Secretary does not propose to exercise his discretion to exclude any areas from the final designation based on impacts on national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors, including whether the landowners have developed any HCPs or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any Tribal issues, and consider the government-to-government relationship of the United States with Tribal entities. We also consider any social impacts that might occur because of the designation.

We are not considering any exclusions at this time from the proposed revised designation under section 4(b)(2) of the Act based on partnerships, management, or protection afforded by cooperative management efforts. Some areas within the proposed revised designation are included in management plans or other large scale HCPs such as the Oregon State-wide Habitat Conservation Plan. In this proposed revised rule, we are seeking input from the public as to whether or not the Secretary should exclude habitat conservation plan areas or other such areas under management that benefit the Pacific Coast WSP from the final revised critical habitat designation. We are also seeking input on potential exclusion of Tribal lands within this proposed revised designation (Please *see Government-to-Government Relationship with Tribes* section below regarding Tribal lands within this proposed revised designation and the Public Comments section of this proposed revised rule for instructions on how to submit comments).

**Peer Review**

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed revised rule. The purpose of peer review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We will invite these peer reviewers to comment during this public comment period, on our specific assumptions and conclusions regarding the proposed revised designation of critical habitat.

We will consider all comments and information received during this comment period on this proposed revised rule during our preparation of a final determination. Accordingly, our final decision may differ from this proposal.

**Public Hearings**

Section 4(b)(5) of the Act provides for one or more public hearings on this proposal, if requested. Requests for public hearings must be received within 45 days after the date of publication of this proposed revised rule in the **Federal Register**. Such requests must be sent to the address shown in the **ADDRESSES** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the first hearing.

**Required Determinations**

*Regulatory Planning and Review—Executive Order 12866*

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this proposed rule revision under Executive Order 12866 (Regulatory Planning and Review). OMB bases its determination upon the following four criteria:

(1) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government;

(2) Whether the rule will create inconsistencies with other Federal agencies' actions;

(3) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients; and

(4) Whether the rule raises novel legal or policy issues.

*Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C. 801 *et seq.*), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

At this time, we lack the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, we defer the RFA finding until completion of the draft economic analysis prepared under section 4(b)(2) of the Act and Executive Order 12866. This draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, we will announce availability of the draft economic analysis of the proposed designation in the **Federal Register** and reopen the public comment period for the proposed designation. We will include with this announcement, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination.

An analysis of the economic impacts for the previous proposed critical habitat designation was conducted and made available to the public on August 16, 2005 (70 FR 48094). This economic analysis was finalized for the final rule to designate critical habitat for the Pacific Coast WSP as published in the **Federal Register** on September 29, 2005 (70 FR 56969). The costs associated with critical habitat for the Pacific Coast WSP, across the entire area considered for designation, were primarily a result of the potential effect of critical habitat

on recreation, plover management, development, military operations, and gravel extraction. Based on the 2005 economic analysis, we concluded that the designation of critical habitat for the Pacific Coast WSP would not result in significant small business impacts.

We have concluded that deferring the RFA finding until completion of the draft economic analysis on this proposed revised critical habitat designation is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this manner will ensure that we make a sufficiently informed determination based on adequate economic information and provide the necessary opportunity for public comment.

*Energy Supply, Distribution, or Use—Executive Order 13211*

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. We do not expect the designation of this proposed revised critical habitat to significantly affect energy supplies, distribution, or use. This is based on our previous analysis conducted for the previous designation of critical habitat. This analysis was finalized for the final rule to designate critical habitat for the Pacific Coast WSP as published in the **Federal Register** on September 29, 2005 (70 FR 56969). Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and we will review and revise this assessment as warranted.

*Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or Tribal governments" with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding," and the State, local, or Tribal governments "lack authority" to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) Based in part on an analysis conducted for the previous designation of critical habitat and extrapolated to this designation, we do not expect this rule to significantly or uniquely affect small governments. Small governments will be affected only to the extent that any programs having Federal funds, permits, or other authorized activities must ensure that their actions will not adversely affect the critical habitat. Therefore, a Small Government Agency Plan is not required. However, we will further evaluate these issues as we conduct our economic analysis, and review and revise this assessment as warranted.

*Takings—Executive Order 12630*

In accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the Pacific Coast WSP in a takings implications assessment. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. The takings implications assessment concludes that this designation of critical habitat for the Pacific Coast WSP does not pose significant takings implications for lands within or affected by the designation.

*Federalism—Executive Order 13132*

In accordance with Executive Order 13132 (Federalism), this proposed rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in Washington, Oregon, and California. The designation of critical habitat in areas currently occupied by the Pacific Coast WSP may impose nominal additional restrictions to those currently in place and, therefore, may have little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments because the areas that contain the physical and biological features essential to the conservation of the species are more clearly defined, and the elements of the features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what Federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required.

While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

*Civil Justice Reform—Executive Order 12988*

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the elements of physical and biological features essential to the conservation of the Pacific Coast WSP within the designated areas to assist the public in understanding the habitat needs of the species.

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

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act (42 U.S.C. 4321 et seq.)*

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

*Clarity of the Rule*

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, *etc.*

*Government-to-Government Relationship with Tribes*

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes.

The Shoalwater Bay Tribe in Washington is the only Tribe affected by this proposed revised critical habitat rule. Approximately 335 ac (136 ha) of Tribal lands within subunit 3B could be designated. The Lacey Fish and Wildlife Office has entered into discussion with the Tribe regarding the proposed revised designation in preparation of this revised rule. We will be contacting the Shoalwater Bay Tribe and requesting comments regarding the status of Pacific Coast WSPs on lands under Tribal ownership and management. The Tribe has stated that they are committed to continue with their efforts to manage their lands to benefit the Pacific Coast WSP, and are asking that their lands be excluded from designation.

**References Cited**

A complete list of all references cited in this rulemaking is available on the Internet at *http://wwww.regulations.gov* and upon request from the Field Supervisor, Arcata Fish and Wildlife Office (*see* **FOR FURTHER INFORMATION CONTACT** section).

**Authors**

The primary authors of this notice are the staff members of the Arcata Fish and Wildlife Office (*see* **FOR FURTHER INFORMATION CONTACT** section).

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

**Proposed Regulation Promulgation**

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

## PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.95(b), revise the entry for "Western Snowy Plover (*Charadrius alexandrinus nivosus*)—Pacific Coast Population" to read as follows:

**§ 17.95 Critical habitat—fish and wildlife.**

* * * * *

(b) *Birds.*

* * * * *

Western Snowy Plover (*Charadrius alexandrinus nivosus*)—Pacific Coast Population.

(1) Critical habitat units are depicted on the maps below for:

(i) Washington—Grays Harbor and Pacific Counties;

(ii) Oregon—Clatsop, Tillamook, Lane, Douglas, Coos, and Curry Counties; and

(iii) California—Del Norte, Humboldt, Mendocino, Marin, Napa, Alameda, San Mateo, Santa Cruz, Monterey, San Luis Obispo, Santa Barbara, Ventura, Los Angeles, Orange, and San Diego Counties.

(2) The primary constituent elements of physical and biological features essential to conservation of the Pacific Coast western snowy plover are sandy beaches, dune systems immediately inland of an active beach face, salt flats,

mud flats, seasonally exposed gravel bars, artificial salt ponds and adjoining levees, and dredge spoil sites, with:

(i) Areas that are below heavily vegetated areas or developed areas and above the daily high tides,

(ii) Shoreline habitat areas for feeding, with no or very sparse vegetation, that are between the annual low tide or low-water flow and annual high tide or high-water flow, subject to inundation but not constantly under water,

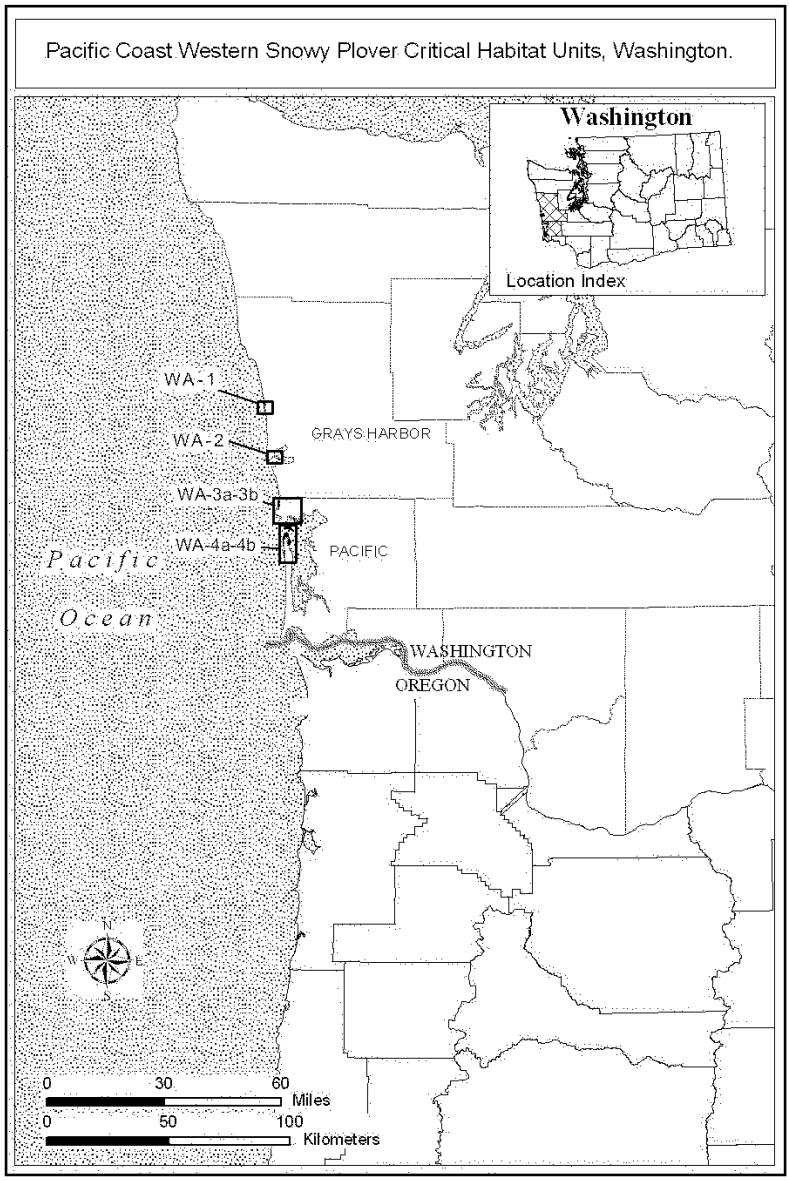
(iii) Surf- or water-deposited organic debris located on open substrates, and

(iv) Minimal disturbance from the presence of humans, pets, vehicles, or human-attracted predators.

(3) Critical habitat does not include existing features and structures, such as buildings, paved areas, boat ramps, and other developed areas not containing one or more of the primary constituent elements. Any such structures that were inside the boundaries of a critical habitat unit at the time it was designated are not critical habitat. The land on which such structures directly sit is also not critical habitat, so long as the structures remain in place.

(4) **Note:** Index map of critical habitat units for the Pacific Coast western snowy plover (*Charadrius alexandrinus nivosus*) in Washington follows:

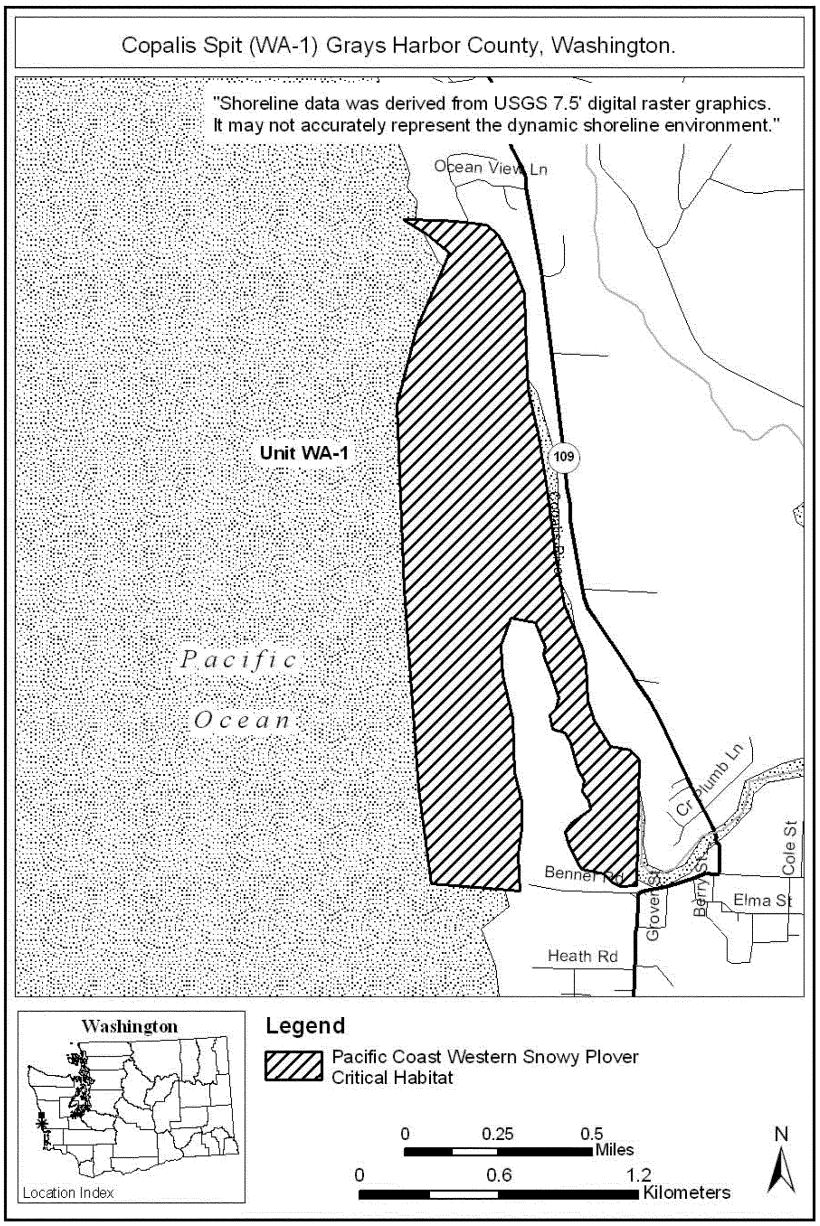
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(5) Unit WA 1: Copalis Spit, Grays Harbor County, Washington.

(i) [Reserved for textual description of Unit WA 1: Copalis Spit, Grays Harbor County, Washington]

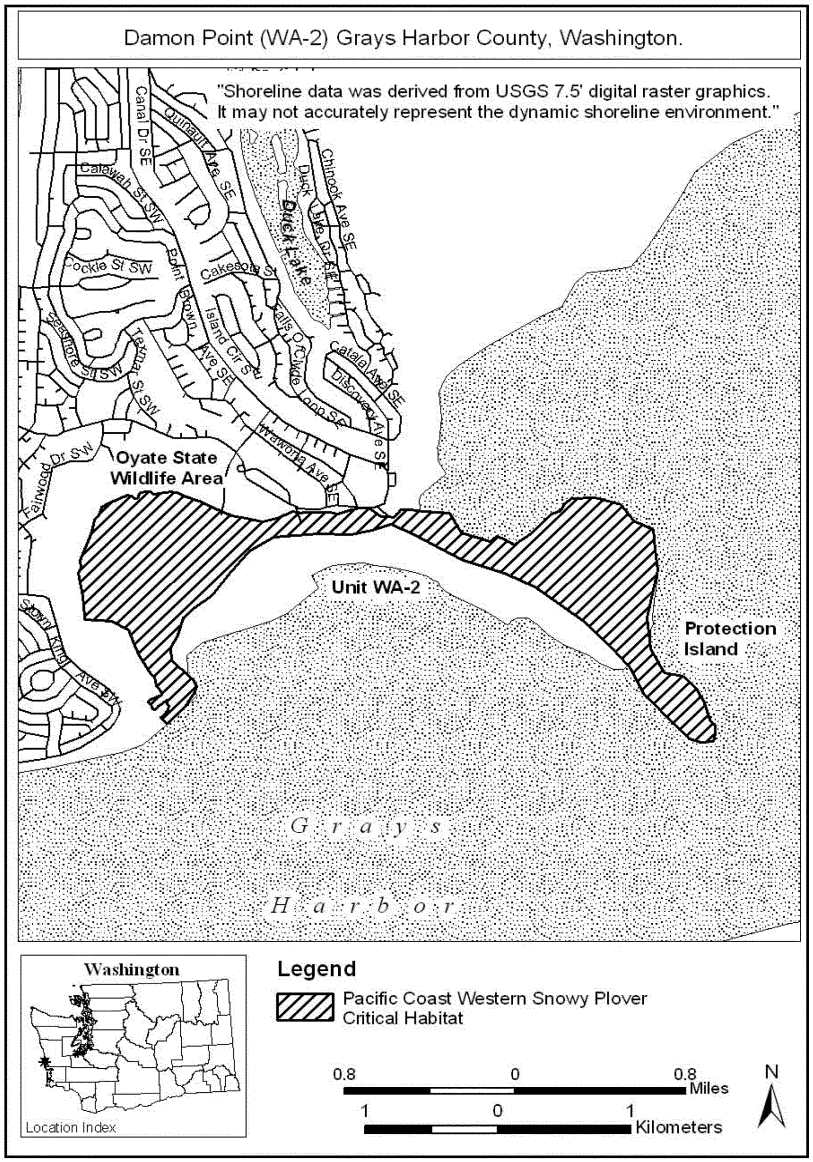
(ii) **Note:** Map of Unit WA 1: Copalis Spit, Grays Harbor County, Washington, follows:



(6) Unit WA 2: Damon Point, Grays Harbor County, Washington.

(i) [Reserved for textual description of Unit WA 2: Damon Point, Grays Harbor County, Washington]

(ii) **Note:** Map of Unit WA 2: Damon Point, Grays Harbor County, Washington, follows:



(7) Subunit WA 3A: Midway Beach, Pacific County, Washington.

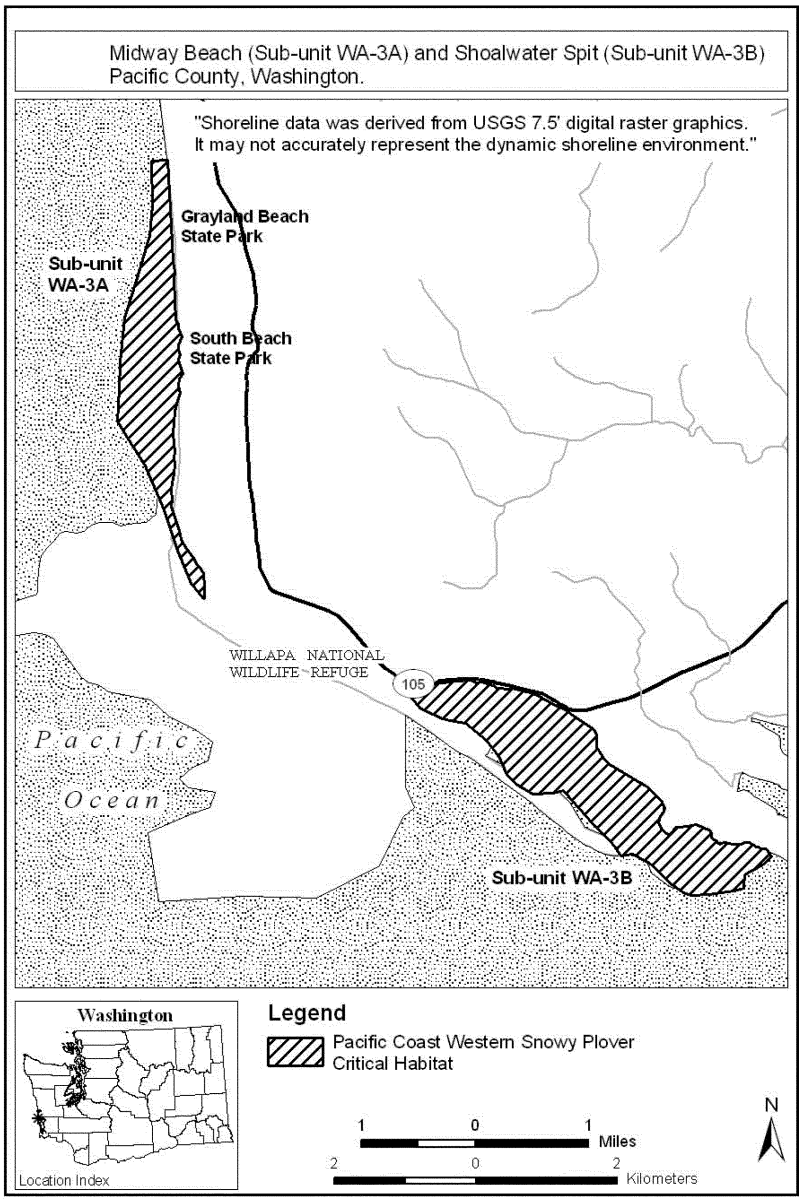
(i) [Reserved for textual description of Subunit WA 3A: Midway Beach, Pacific County, Washington]

(ii) **Note:** Subunit WA 3A: Midway Beach, Pacific County, Washington, is depicted on the map in paragraph (8)(ii) of this entry.

(8) Subunit WA 3B: Shoalwater/Graveyard, Pacific County, Washington.

(i) [Reserved for textual description of Subunit WA 3B: Shoalwater/Graveyard, Pacific County, Washington]

(ii) **Note:** Map of Subunits WA 3A Midway Beach and 3B Shoalwater/Graveyard, Pacific County, Washington, follows:



(9) Subunit WA 4A: Leadbetter Spit, Pacific County, Washington.

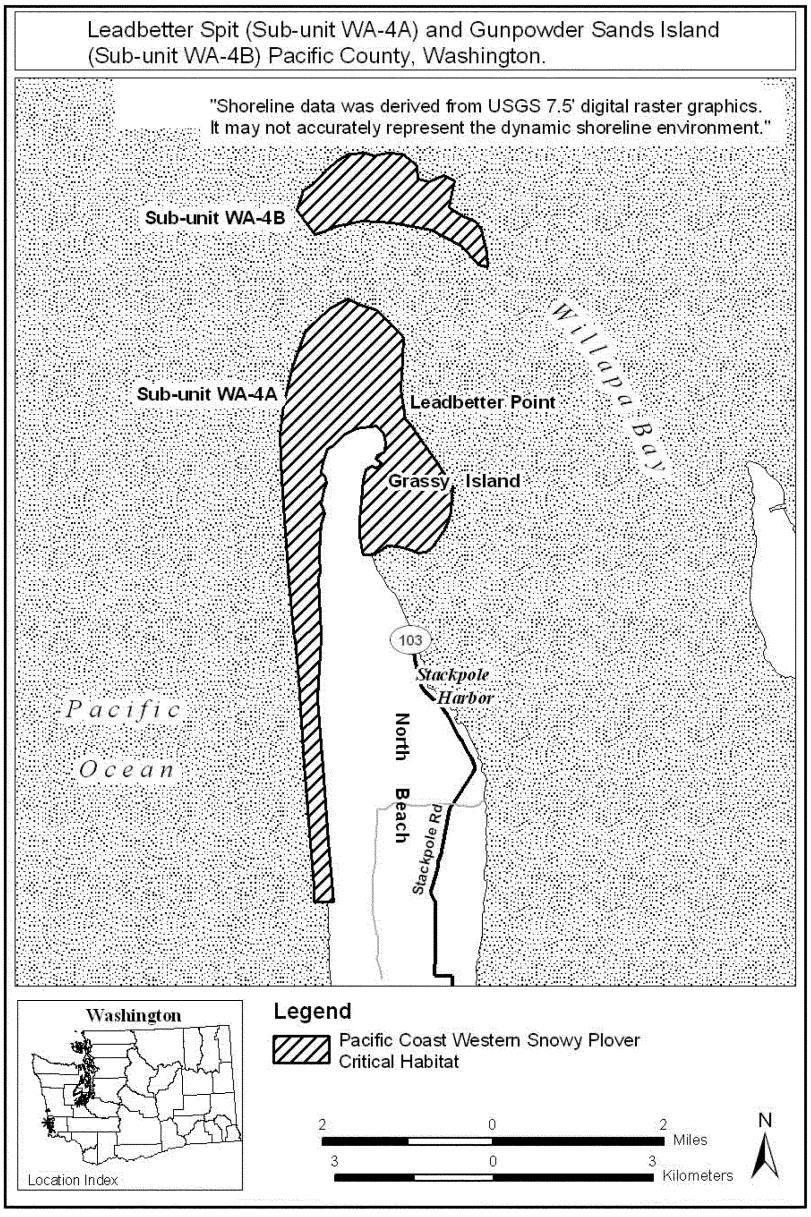
(i) [Reserved for textual description of Subunit WA 4A: Leadbetter Spit, Pacific County, Washington]

(ii) **Note:** Subunit WA 4A: Leadbetter Spit, Pacific County, Washington, is depicted on the map in paragraph (10)(ii) of this entry.

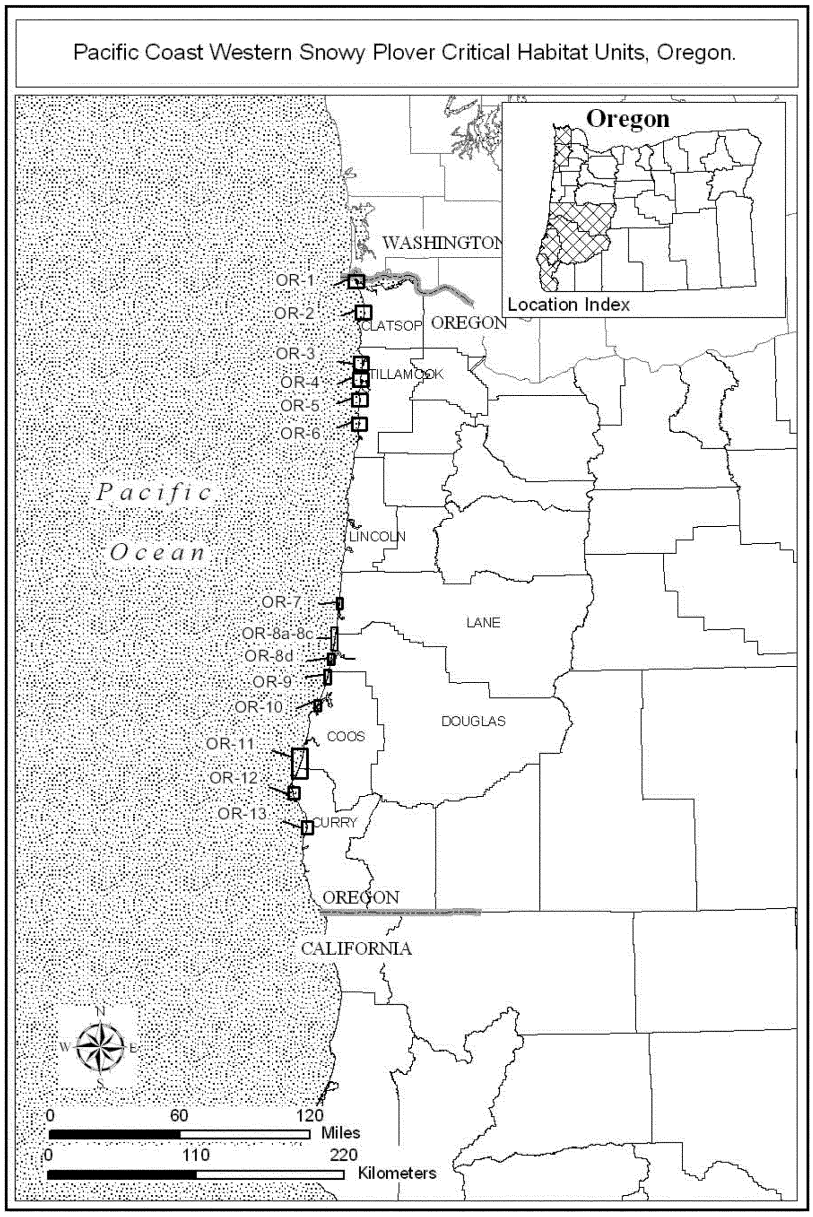
(10) Subunit WA 4B: Gunpowder Sands Island, Pacific County, Washington.

(i) [Reserved for textual description of Subunit WA 4B: Gunpowder Sands Island, Pacific County, Washington]

(ii) **Note:** Map of Subunits WA 4A: Leadbetter Spit and WA 4B: Gunpowder Sands Island, Pacific County, Washington, follows:



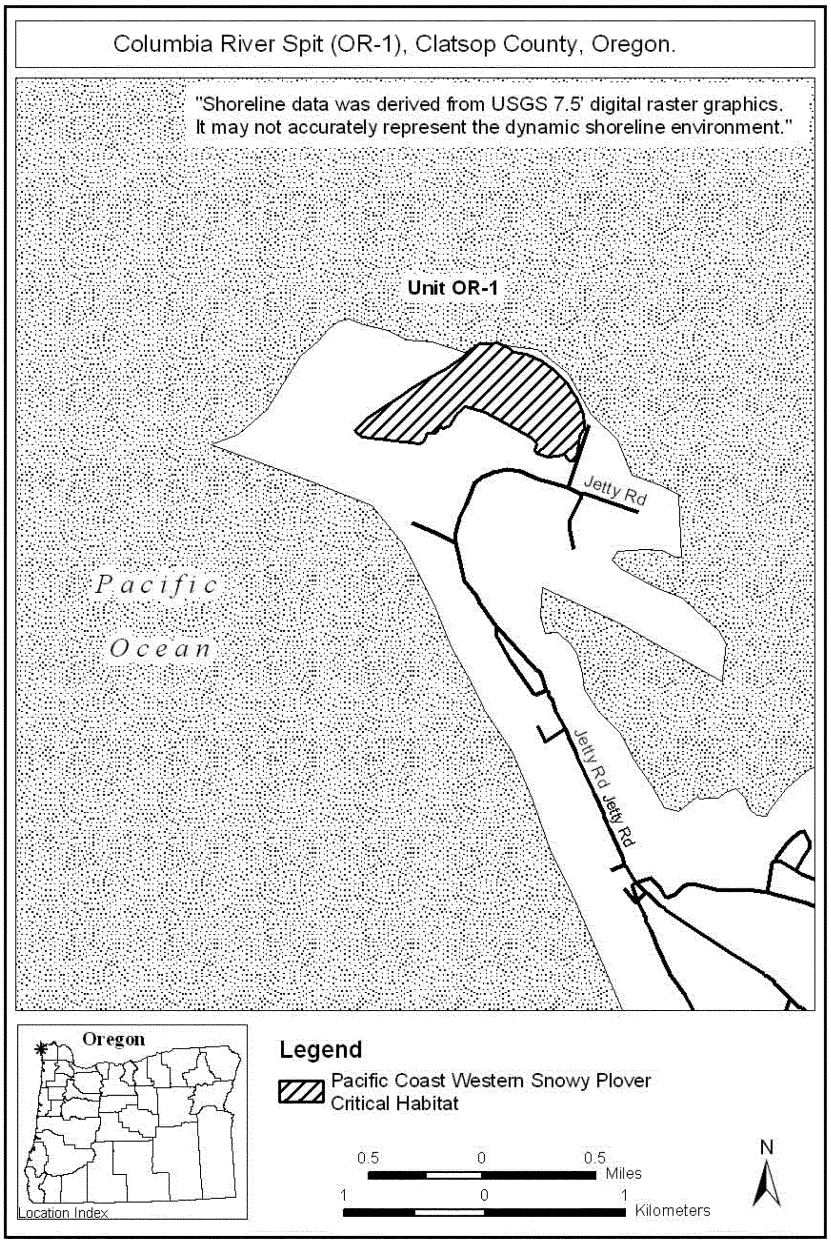
(11) **Note:** Index map of critical habitat units for the Pacific Coast western snowy plover (*Charadrius alexandrinus nivosus*) in Oregon follows:



(12) Unit OR 1: Columbia River Spit, Clatsop County, Oregon.

(i) [Reserved for textual description of Unit OR 1: Columbia River Spit, Clatsop County, Oregon]

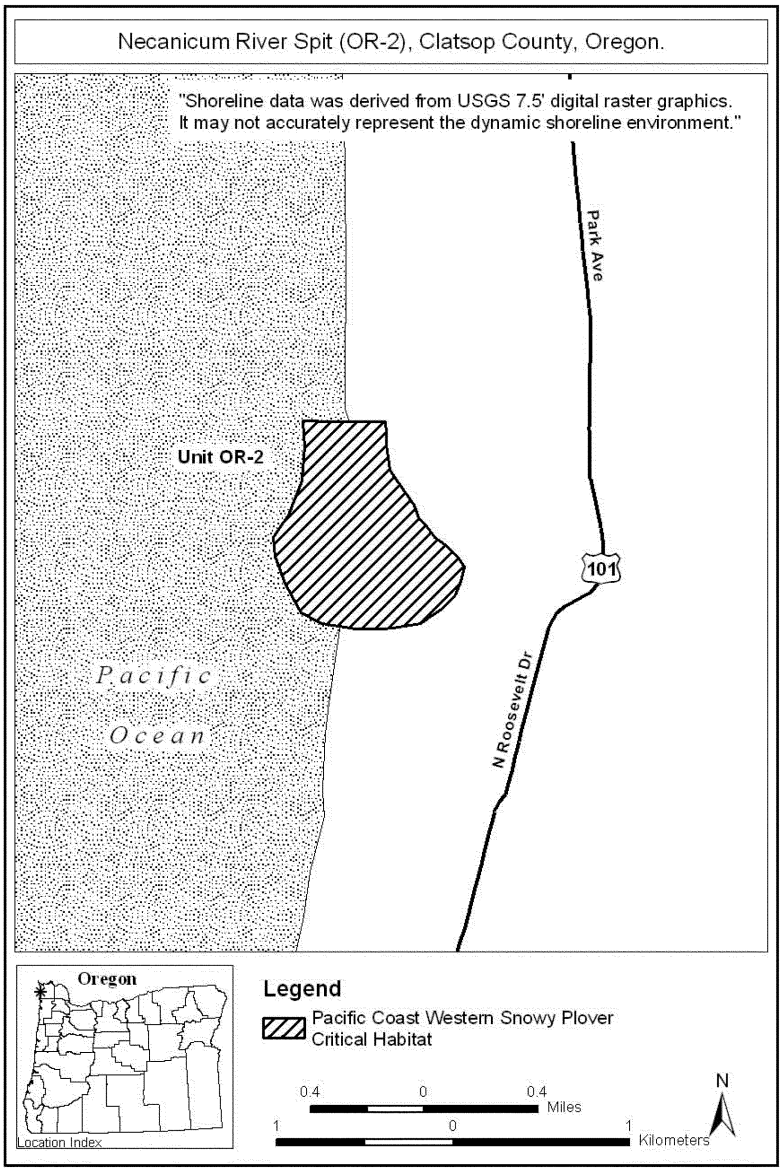
(ii) **Note:** Map of Unit OR 1: Columbia River Spit, Clatsop County, Oregon, follows:



(13) Unit OR 2: Necanicum River Spit, Clatsop County, Oregon.

(i) [Reserved for textual description of Unit OR 2: Necanicum River Spit, Clatsop County, Oregon]

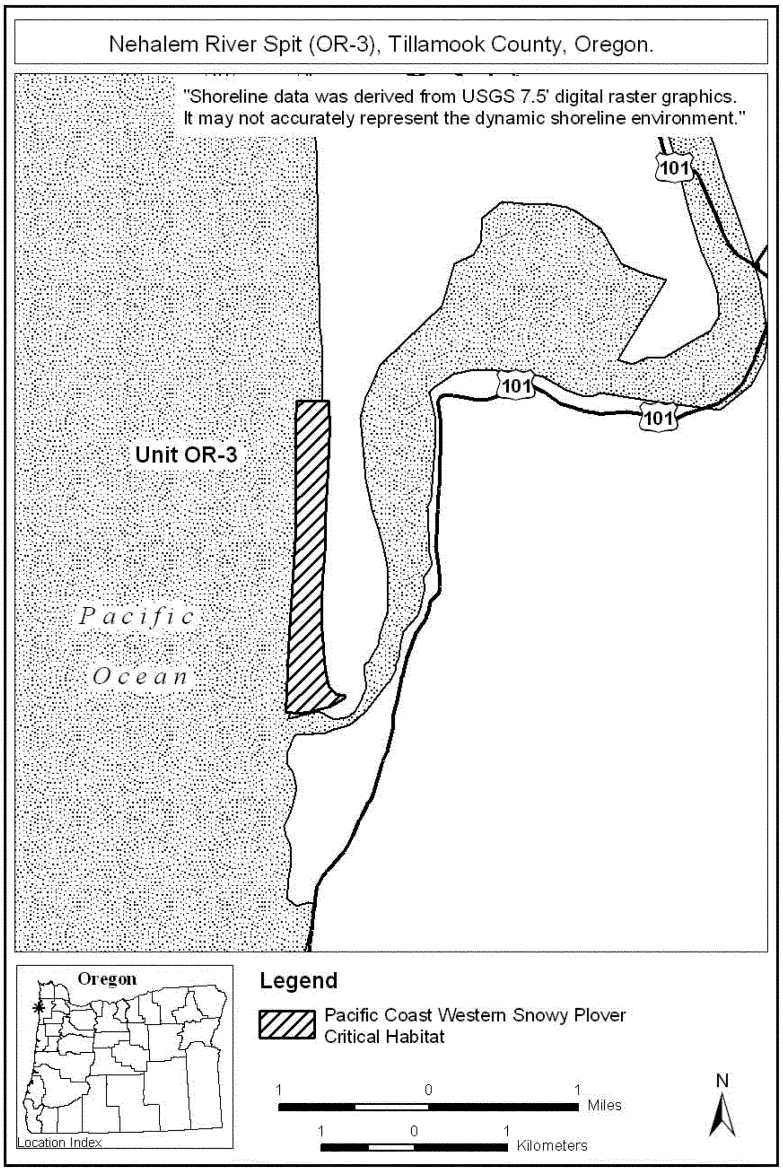
(ii) **Note:** Map of Unit OR 2: Necanicum River Spit, Clatsop County, Oregon, follows:



(14) Unit OR 3: Nehalem River Spit, Tillamook County, Oregon.

(i) [Reserved for textual description of Unit OR 3: Nehalem River Spit, Tillamook County, Oregon]

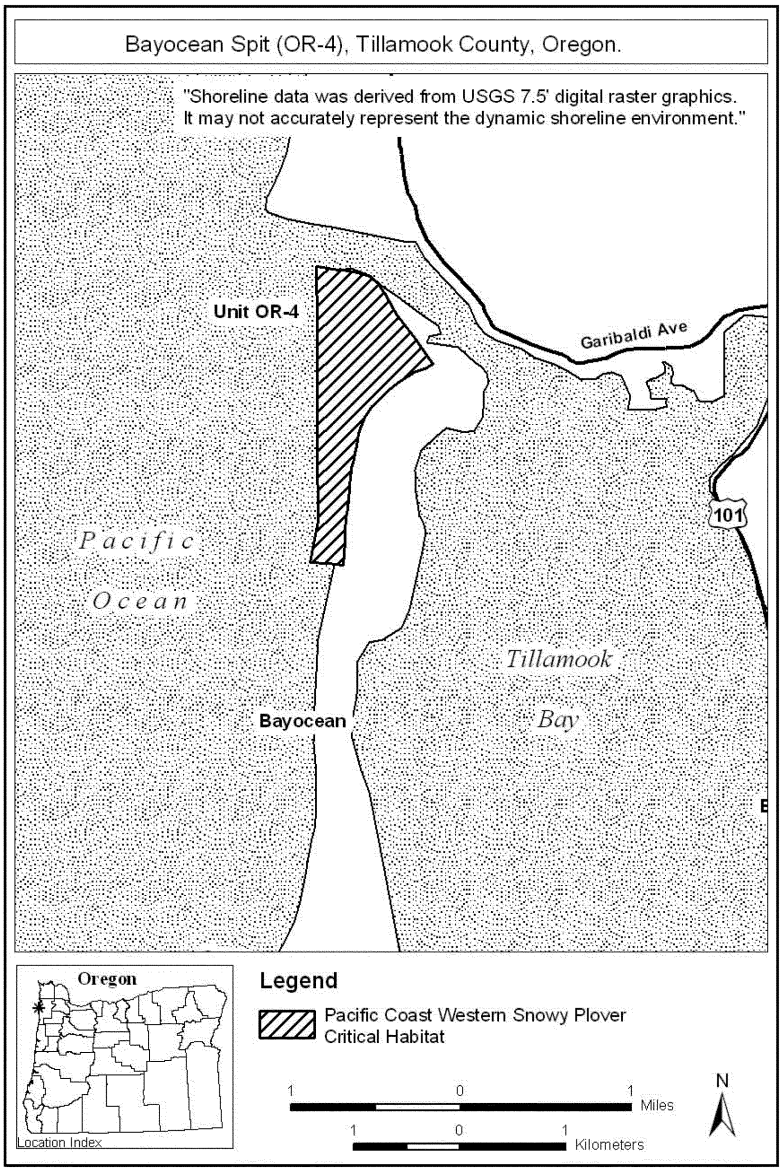
(ii) **Note:** Map of Unit OR 3: Nehalem River Spit, Tillamook County, Oregon, follows:



(15) Unit OR 4: Bayocean Spit, Tillamook County, Oregon.

(i) [Reserved for textual description of Unit OR 4: Bayocean Spit, Tillamook County, Oregon]

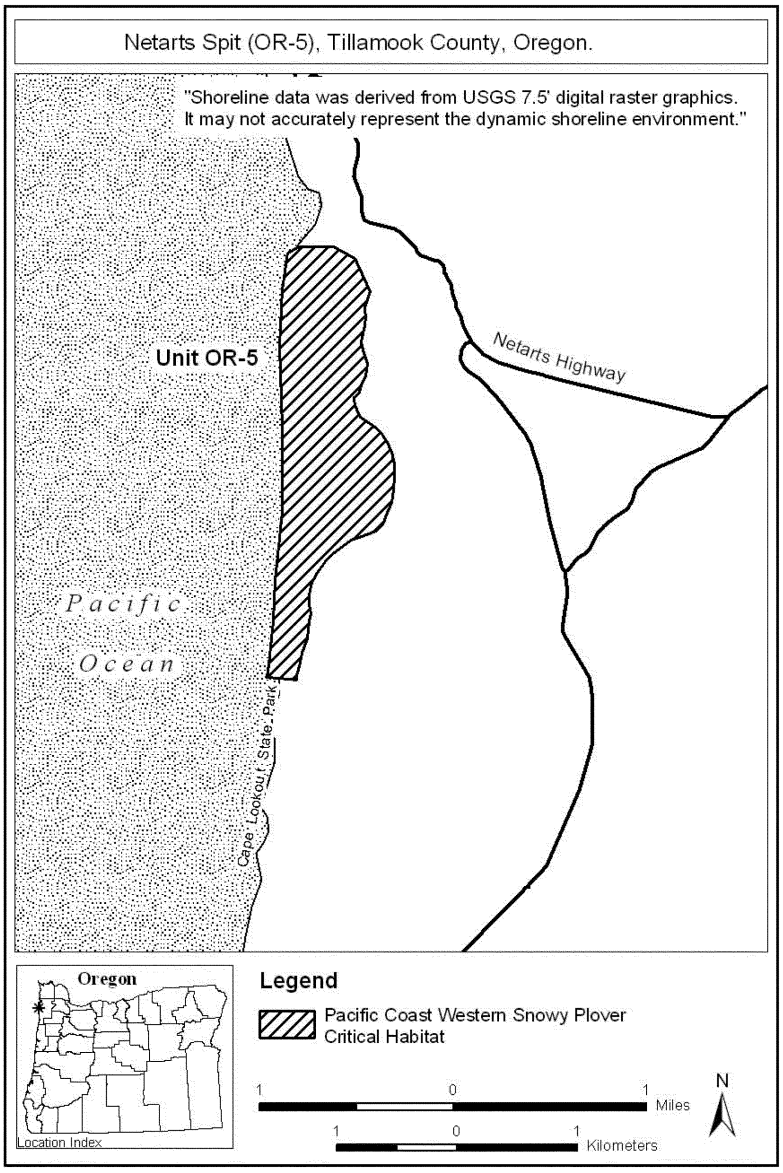
(ii) **Note:** Map of Unit OR 4: Bayocean Spit, Tillamook County, Oregon, follows:



(16) Unit OR 5: Netarts Spit, Tillamook County, Oregon.

(i) [Reserved for textual description of Unit OR 5: Netarts Spit, Tillamook County, Oregon]

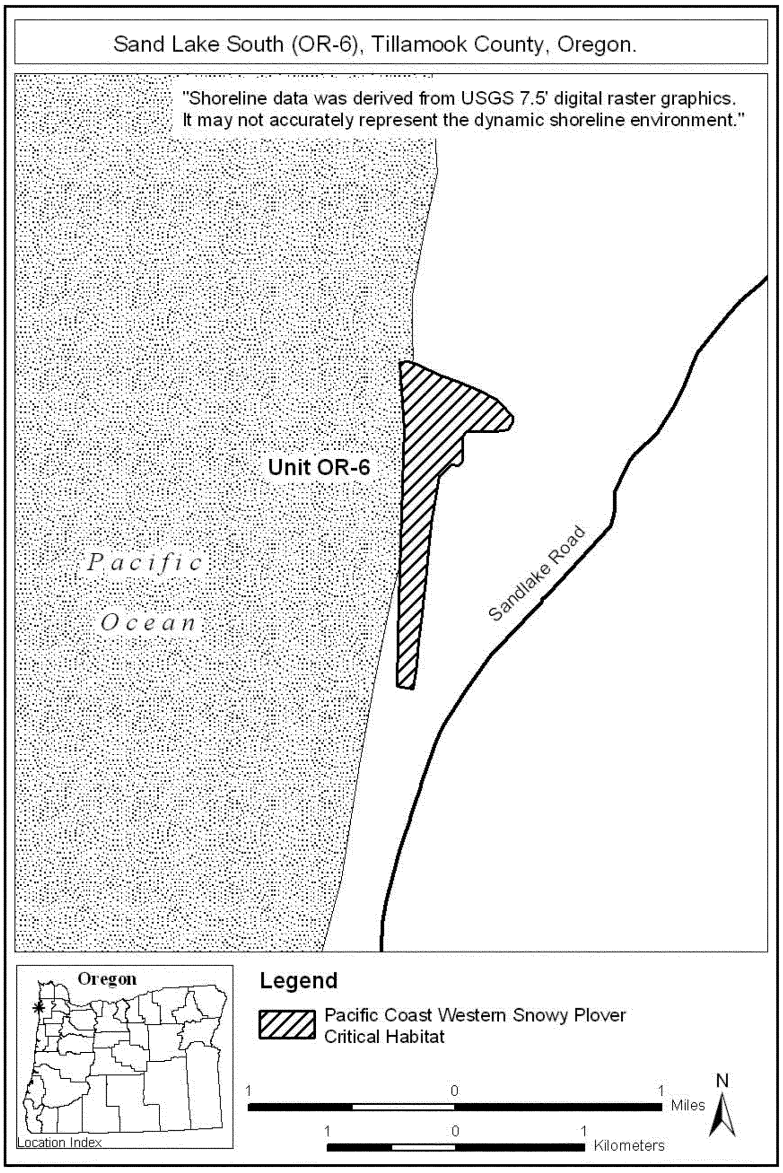
(ii) **Note:** Map of Unit OR 5: Netarts Spit, Tillamook County, Oregon, follows:



(17) Unit OR 6: Sand Lake South, Tillamook County, Oregon.

(i) [Reserved for textual description of Unit OR 6: Sand Lake South, Tillamook County, Oregon]

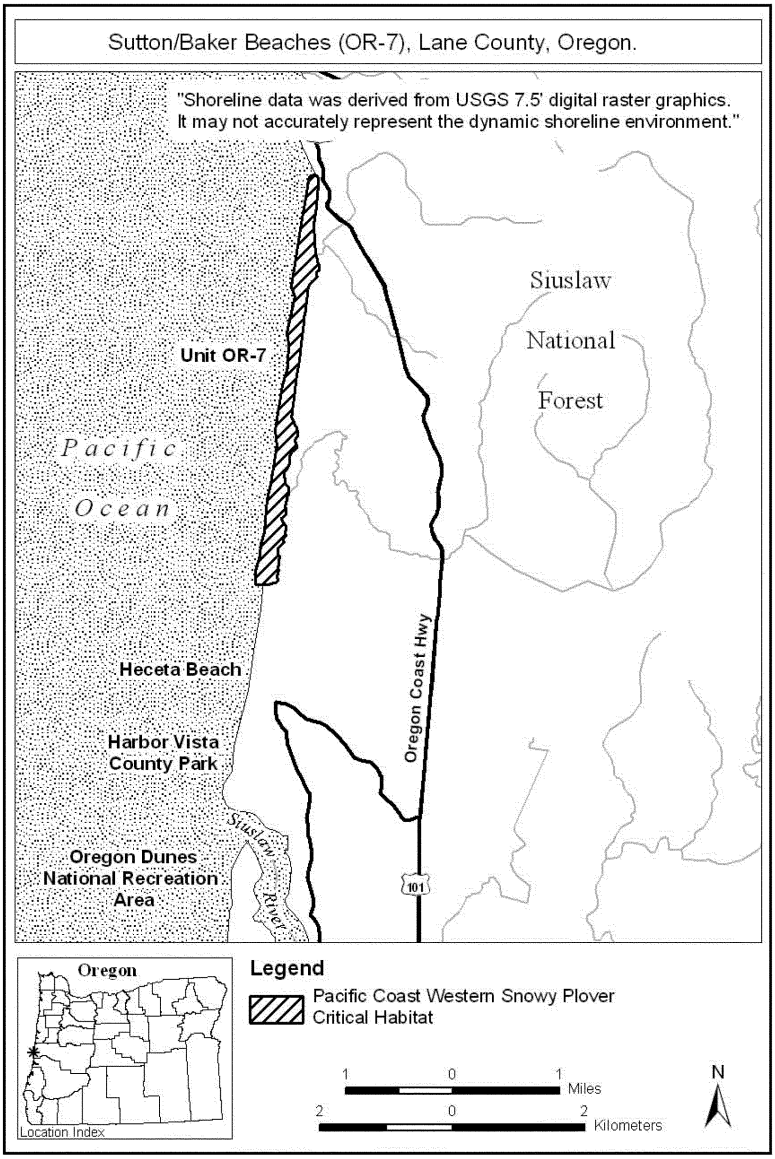
(ii) **Note:** Map of Unit OR 6: Sand Lake South, Tillamook County, Oregon, follows:



(18) Unit OR 7: Sutton/Baker Beaches, Lane County, Oregon.

(i) [Reserved for textual description of Unit OR 7: Sutton/Baker Beaches, Lane County, Oregon]

(ii) **Note:** Map of Unit OR 7: Sutton/Baker Beaches, Lane County, Oregon, follows:



(19) Subunit OR 8A: Siltcoos Breach, Lane County, Oregon.

(i) [Reserved for textual description of Subunit OR 8A: Siltcoos Breach, Lane County, Oregon]

(ii) **Note:** Subunit OR 8A: Siltcoos Breach, Lane County, Oregon, is depicted on the map in paragraph (21)(ii) of this entry.

(20) Subunit OR 8B: Siltcoos River Spit, Lane County, Oregon.

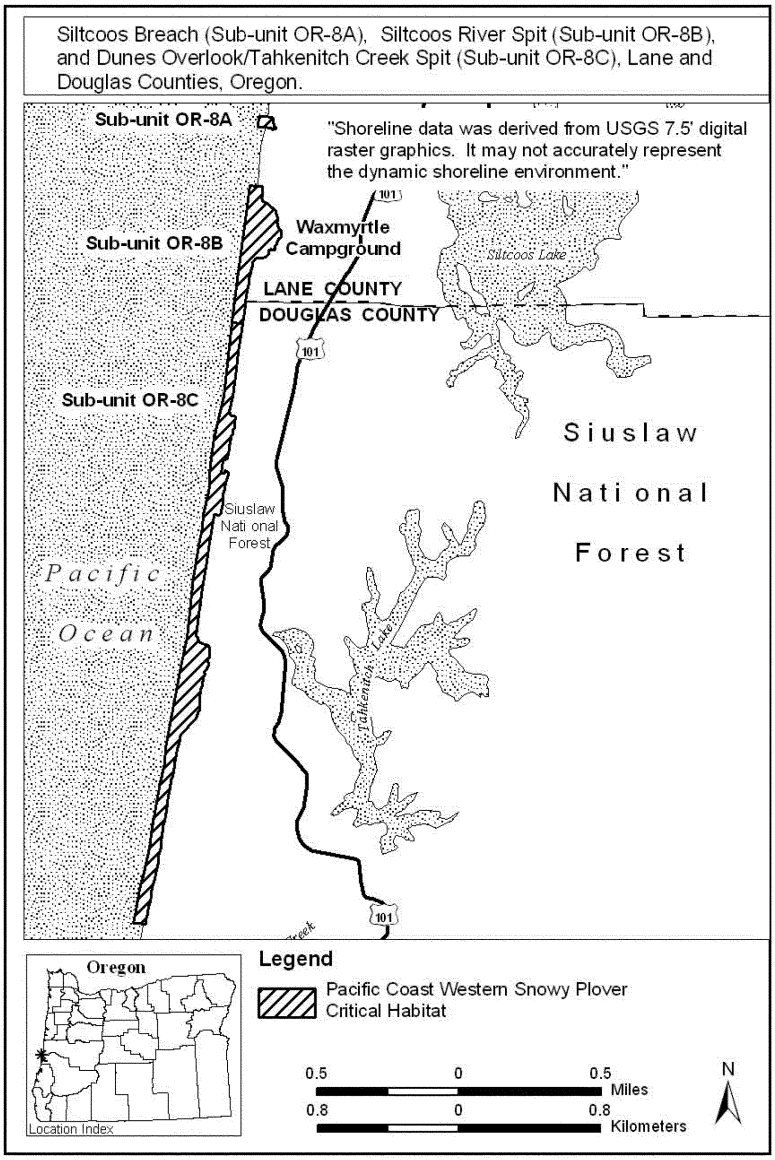
(i) [Reserved for textual description of Subunit OR 8B: Siltcoos River Spit, Lane County, Oregon]

(ii) **Note:** Subunit OR 8B: Siltcoos River Spit, Lane County, Oregon, is depicted on the map in paragraph (21)(ii) of this entry.

(21) Subunit OR 8C: Dunes Overlook/ Tahkenitch Creek Spit, Douglas County, Oregon.

(i) [Reserved for textual description of Subunit OR 8C: Dunes Overlook/ Tahkenitch Creek Spit, Douglas County, Oregon]

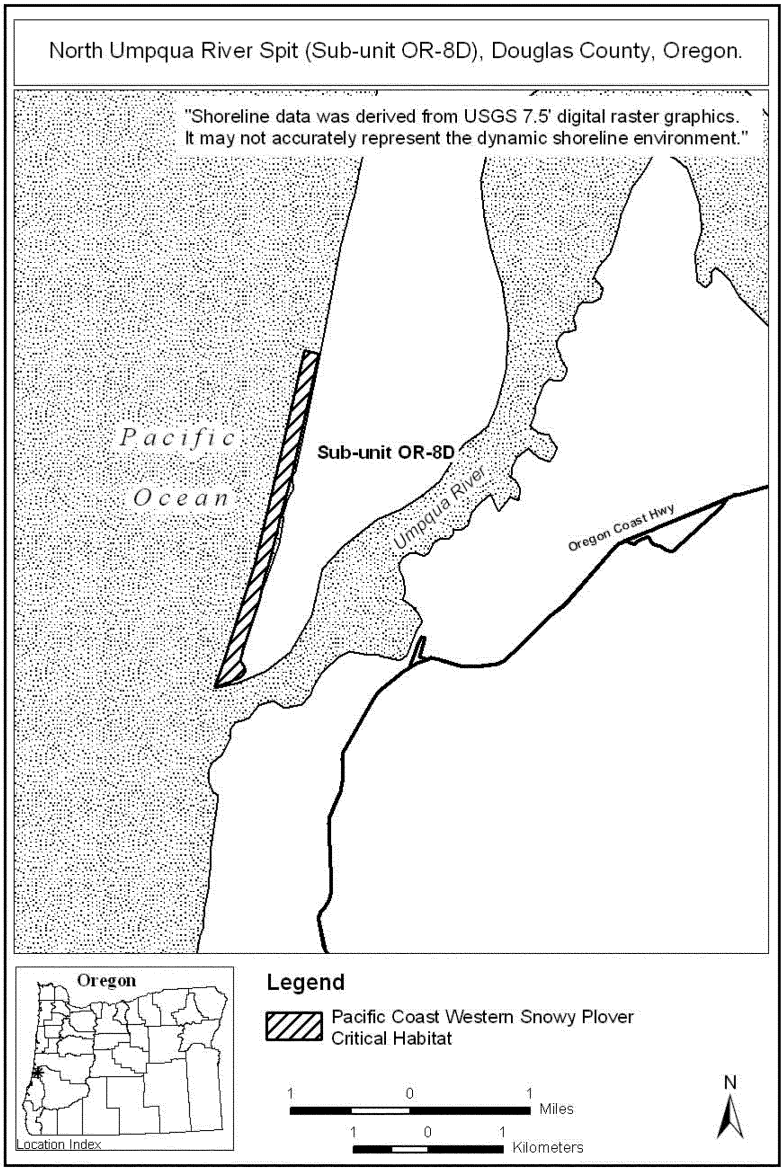
(ii) **Note:** Map of Subunits OR 8A: Siltcoos Breach, OR 8B: Siltcoos River Spit, and OR 8C: Dunes Overlook/ Tahkenitch Creek Spit, Douglas County, Oregon, follows:



(22) Subunit OR 8D: North Umpqua River Spit, Douglas County, Oregon.

(i) [Reserved for textual description of Subunit OR 8D: North Umpqua River Spit, Douglas County, Oregon]

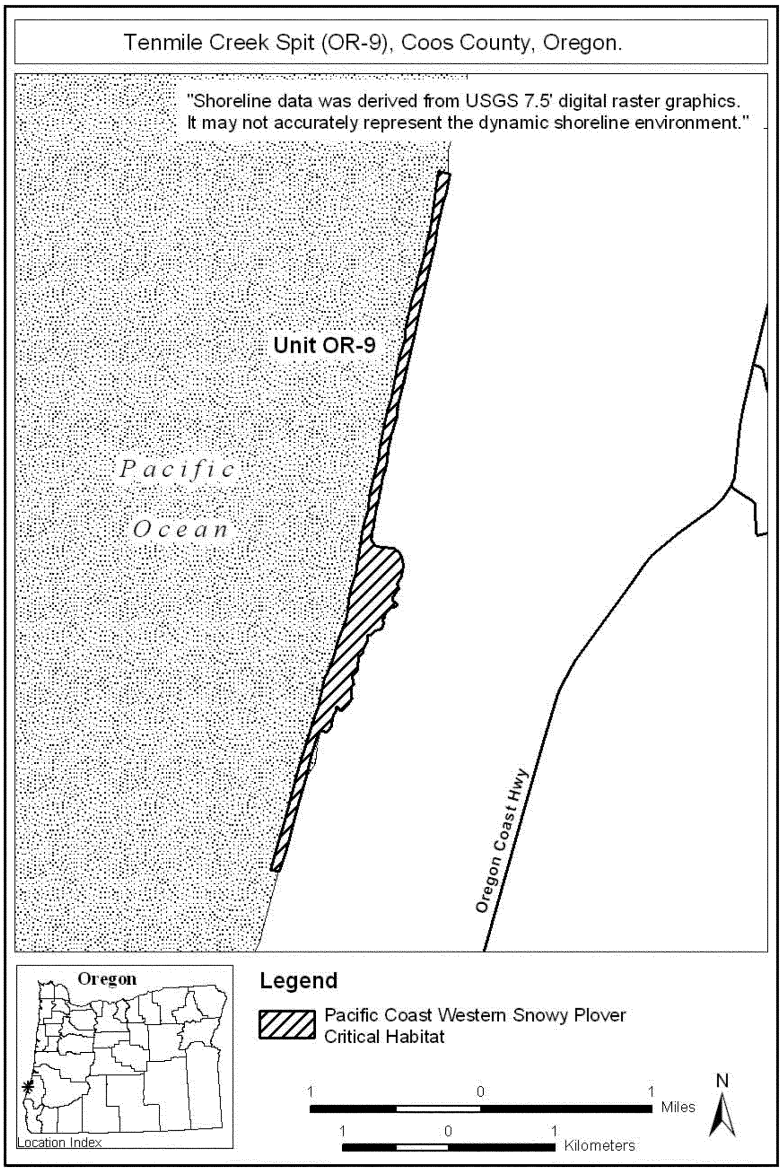
(ii) **Note:** Map of Subunit OR 8D: North Umpqua River Spit, Douglas County, Oregon, follows:



(23) Unit OR 9: Ten Mile Creek Spit, Coos County, Oregon.

(i) [Reserved for textual description of Unit OR 9: Ten Mile Creek Spit, Coos County, Oregon]

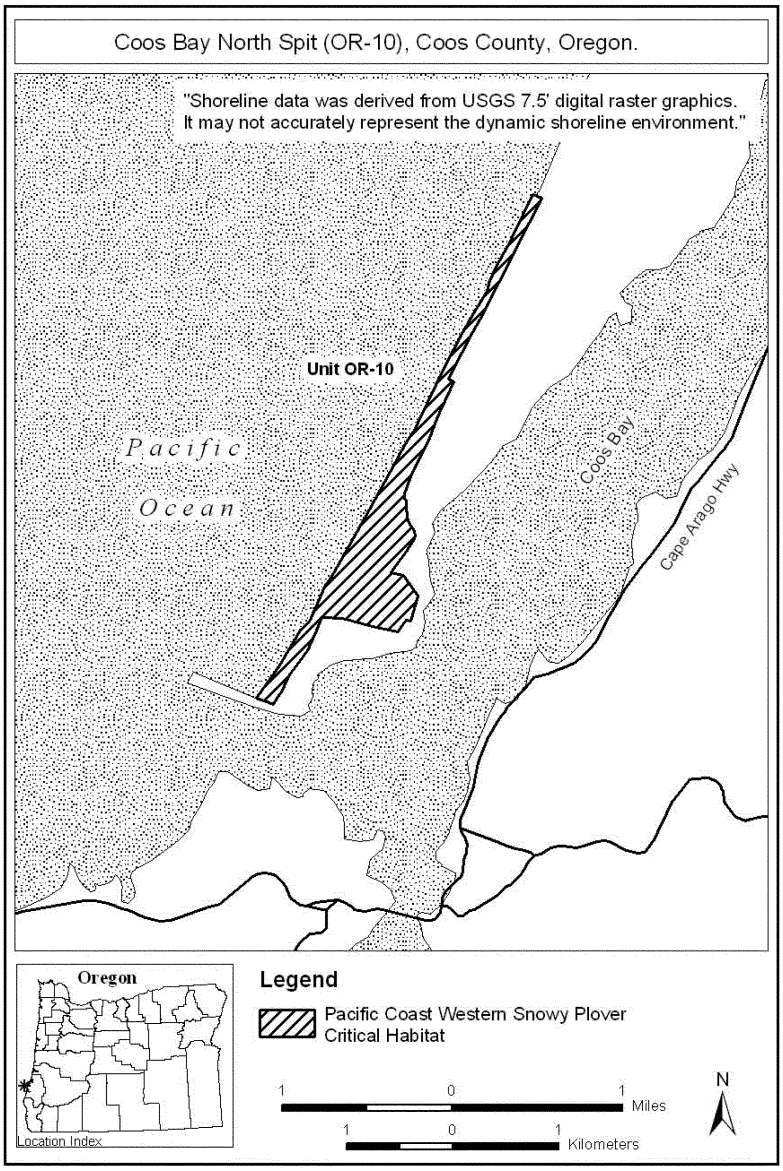
(ii) **Note:** Map of Unit OR 9: Ten Mile Creek Spit, Coos County, Oregon, follows:



(24) Unit OR 10: Coos Bay North Spit, Coos County, Oregon.

(i) [Reserved for textual description of Unit OR 10: Coos Bay North Spit, Coos County, Oregon]

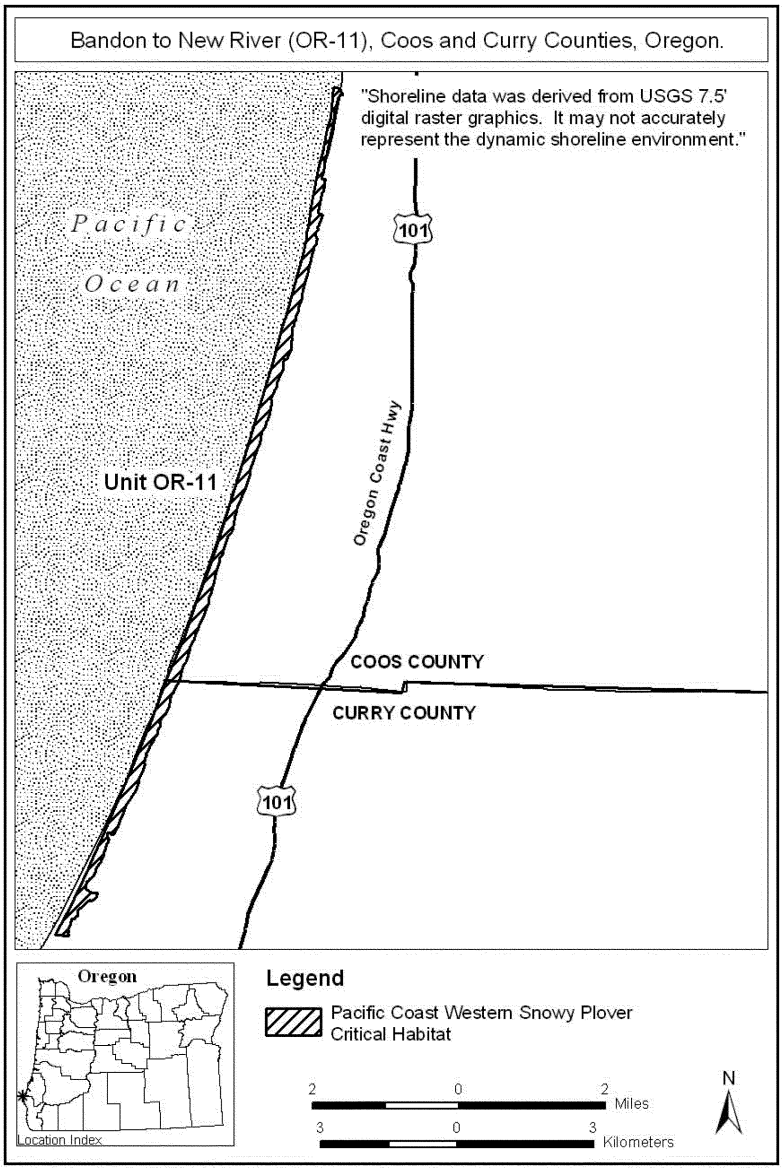
(ii) **Note:** Map of Unit OR 10: Coos Bay North Spit, Coos County, Oregon, follows:



(25) Unit OR 11 Bandon to New River, Coos County, Oregon.

(i) [Reserved for textual description of Unit OR 11 Bandon to New River, Coos County, Oregon]

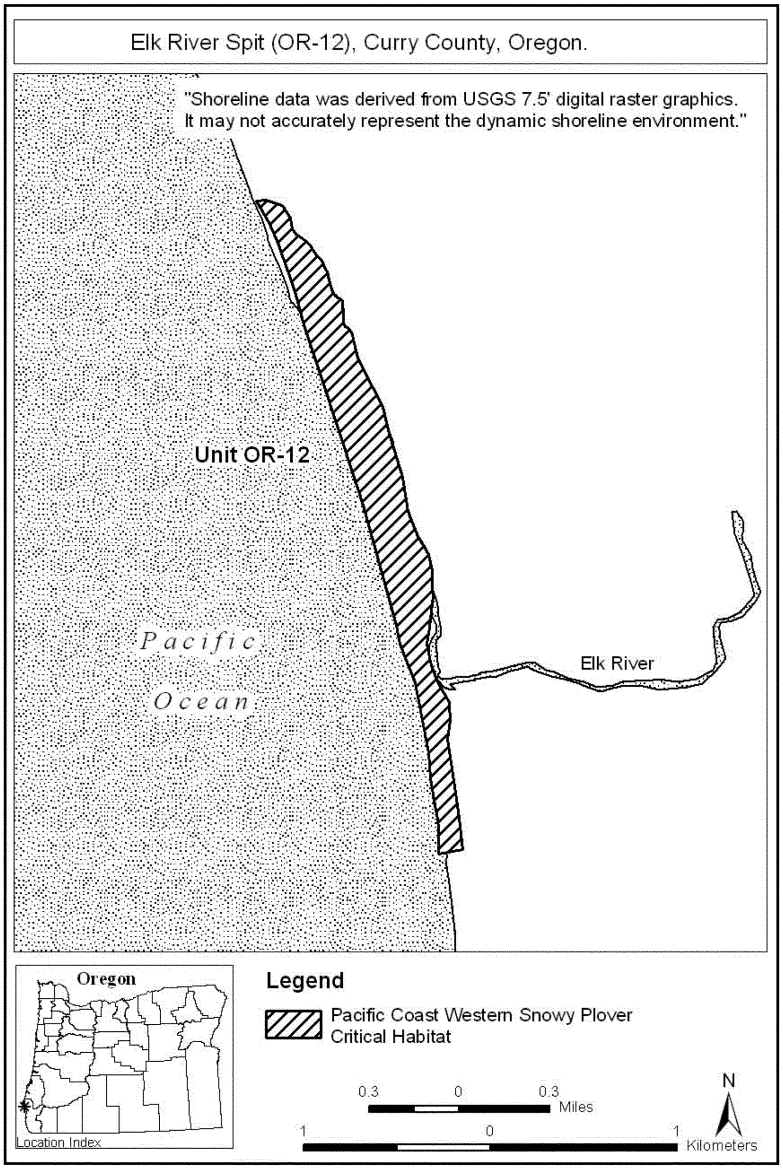
(ii) **Note:** Map of Unit OR 11 Bandon to New River, Coos County, Oregon, follows:



(26) Unit OR 12: Elk River Spit, Curry County, Oregon.

(i) [Reserved for textual description of Unit OR 12: Elk River Spit, Curry County, Oregon]

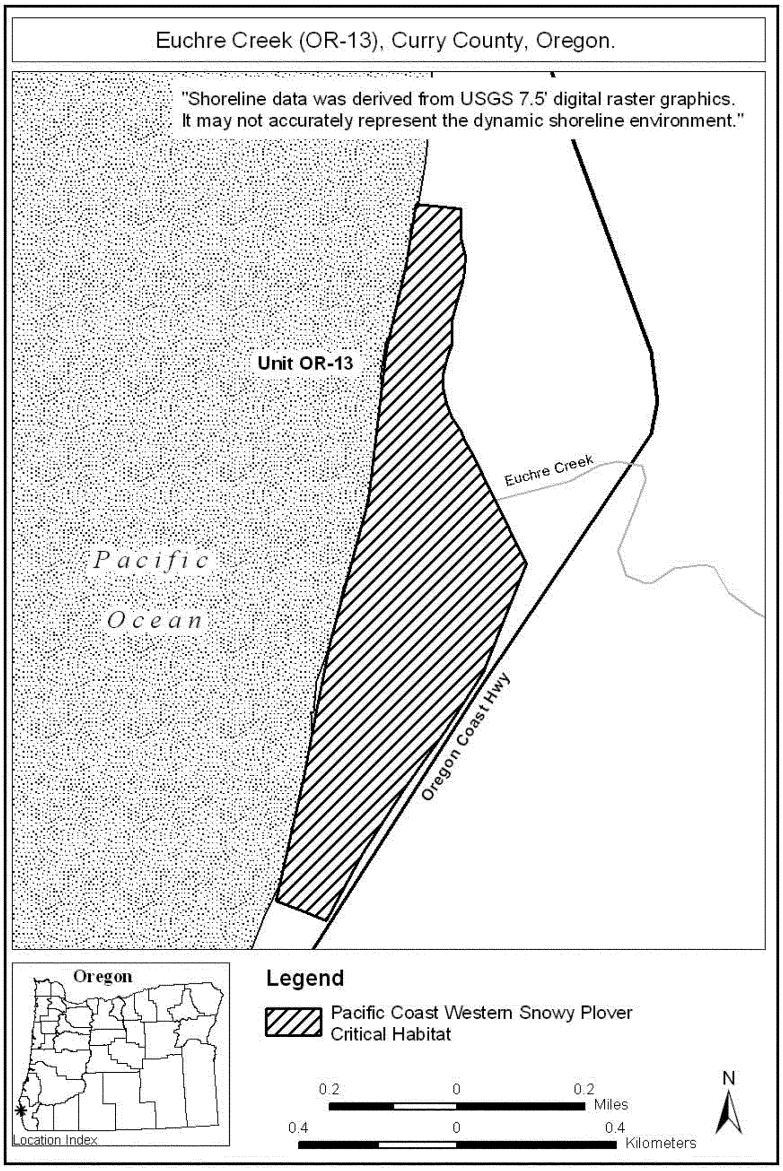
(ii) **Note:** Map of Unit OR 12: Elk River Spit, Curry County, Oregon, follows:



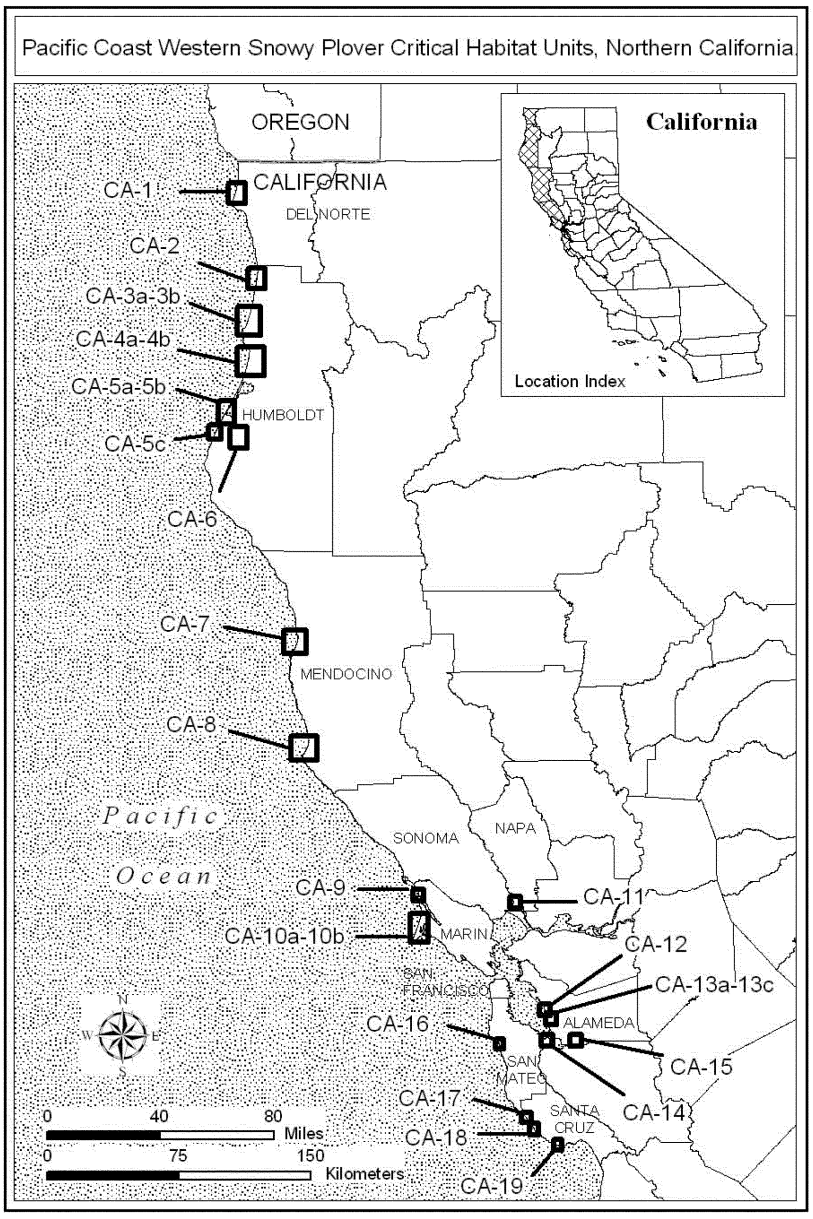
(27) Unit OR 13: Euchre Creek, Curry County, Oregon.

(i) [Reserved for textual description of Unit OR 13: Euchre Creek, Curry County, Oregon]

(ii) **Note:** Map of Unit OR 13: Euchre Creek, Curry County, Oregon, follows:



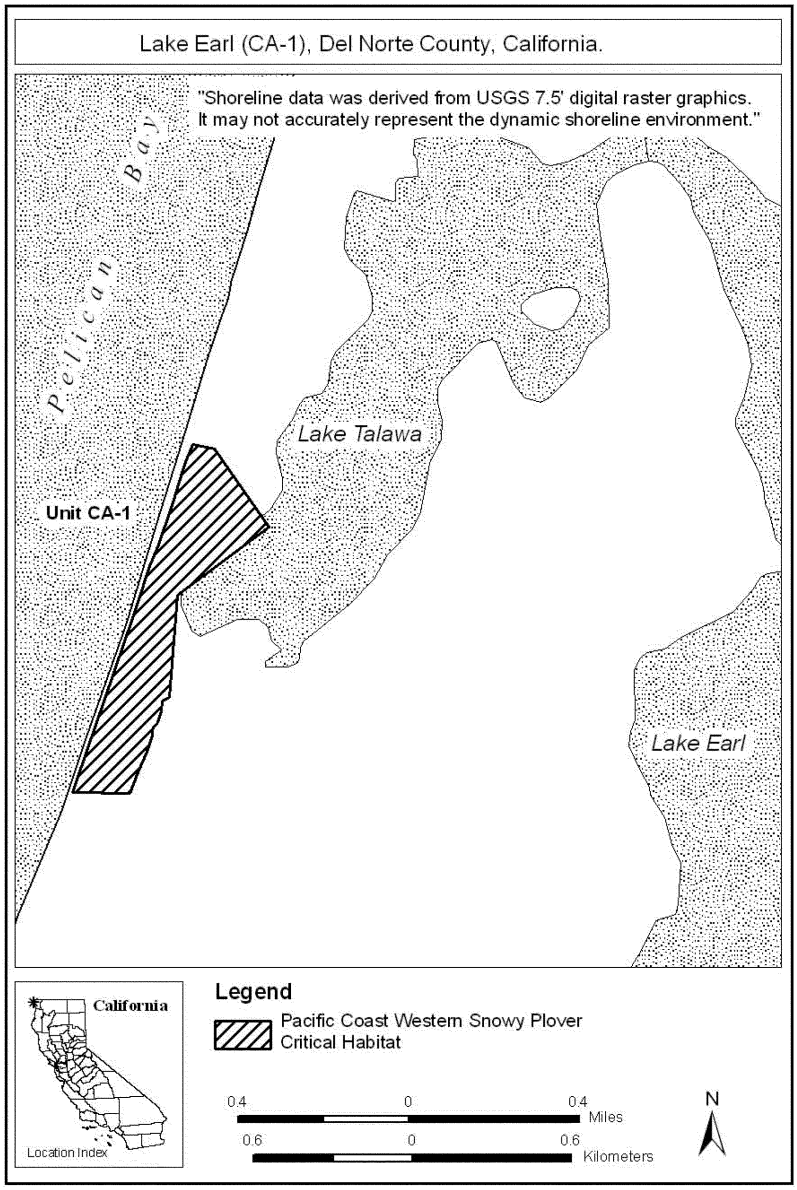
(28) **Note:** Index map of critical habitat units for the Pacific Coast western snowy plover (*Charadrius alexandrinus nivosus*) in Northern California, follows:



(29) Unit CA 1: Lake Earl, Del Norte County, California.

(i) [Reserved for textual description of Unit CA 1: Lake Earl, Del Norte County, California]

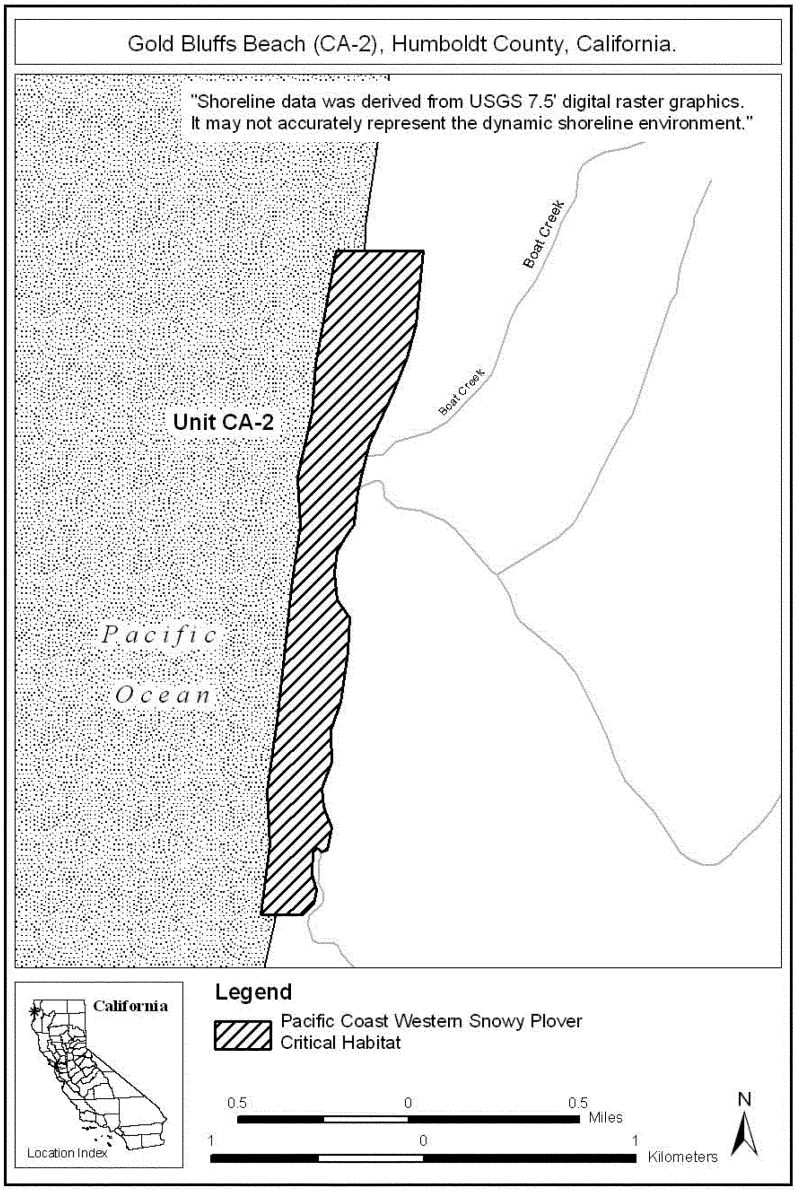
(ii) **Note:** Map of Unit CA 1: Lake Earl, Del Norte County, California, follows:



(30) Unit CA 2: Gold Bluffs Beach, Humboldt County, California.

(i) [Reserved for textual description of Unit CA 2: Gold Bluffs Beach, Humboldt County, California]

(ii) **Note:** Map of Unit CA 2: Gold Bluffs Beach, Humboldt County, California, follows:



(31) Subunit CA 3A: Humboldt Lagoons—Stone Lagoon, Humboldt County, California.

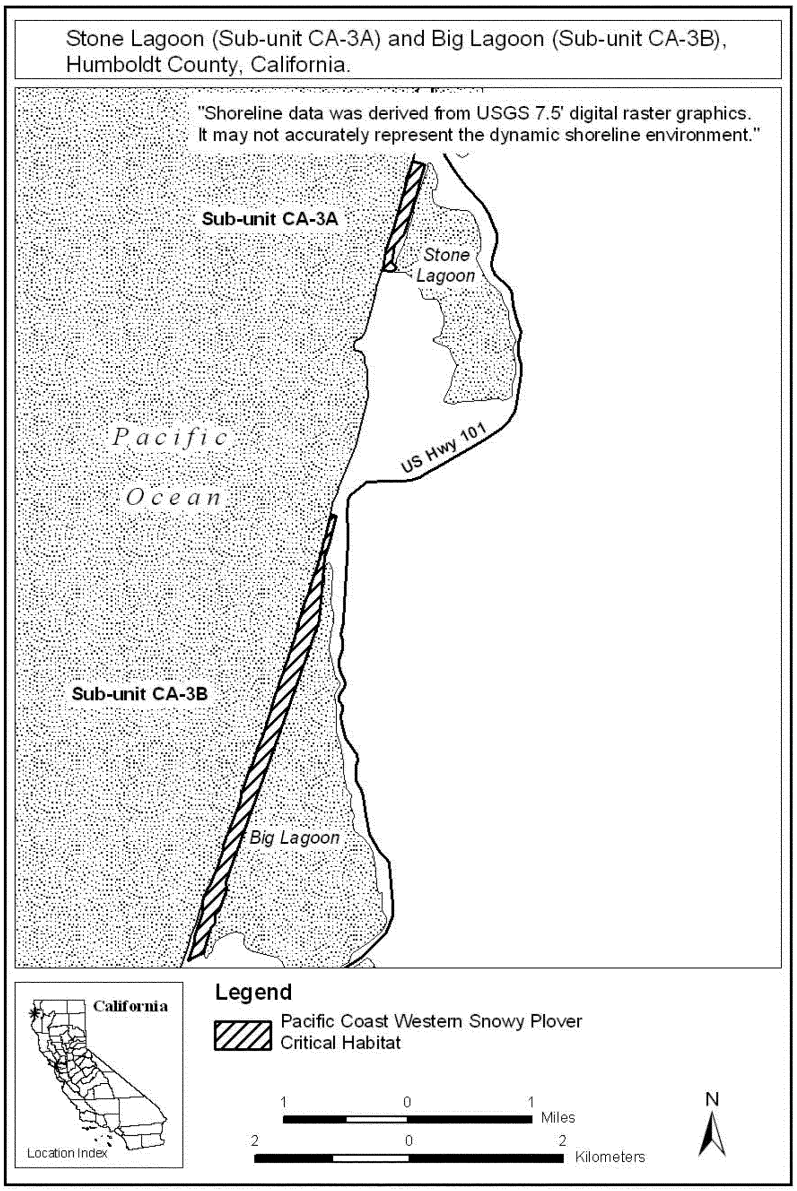
(i) [Reserved for textual description of Subunit CA 3A: Humboldt Lagoons—Stone Lagoon, Humboldt County, California]

(ii) **Note:** Subunit CA 3A: Humboldt Lagoons—Stone Lagoon, Humboldt County, California is depicted on the map in paragraph (32)(ii) of this entry.

(32) Subunit CA 3B: Humboldt Lagoons—Big Lagoon, Humboldt County, California.

(i) [Reserved for textual description of Subunit CA 3B: Humboldt Lagoons—Big Lagoon, Humboldt County, California]

(ii) **Note:** Map of Subunits CA 3A Humboldt Lagoons—Stone Lagoon and CA 3B: Humboldt Lagoons—Big Lagoon, Humboldt County, California, follows:



(33) Subunit CA 4A: Clam Beach/Little River, Humboldt County, California.

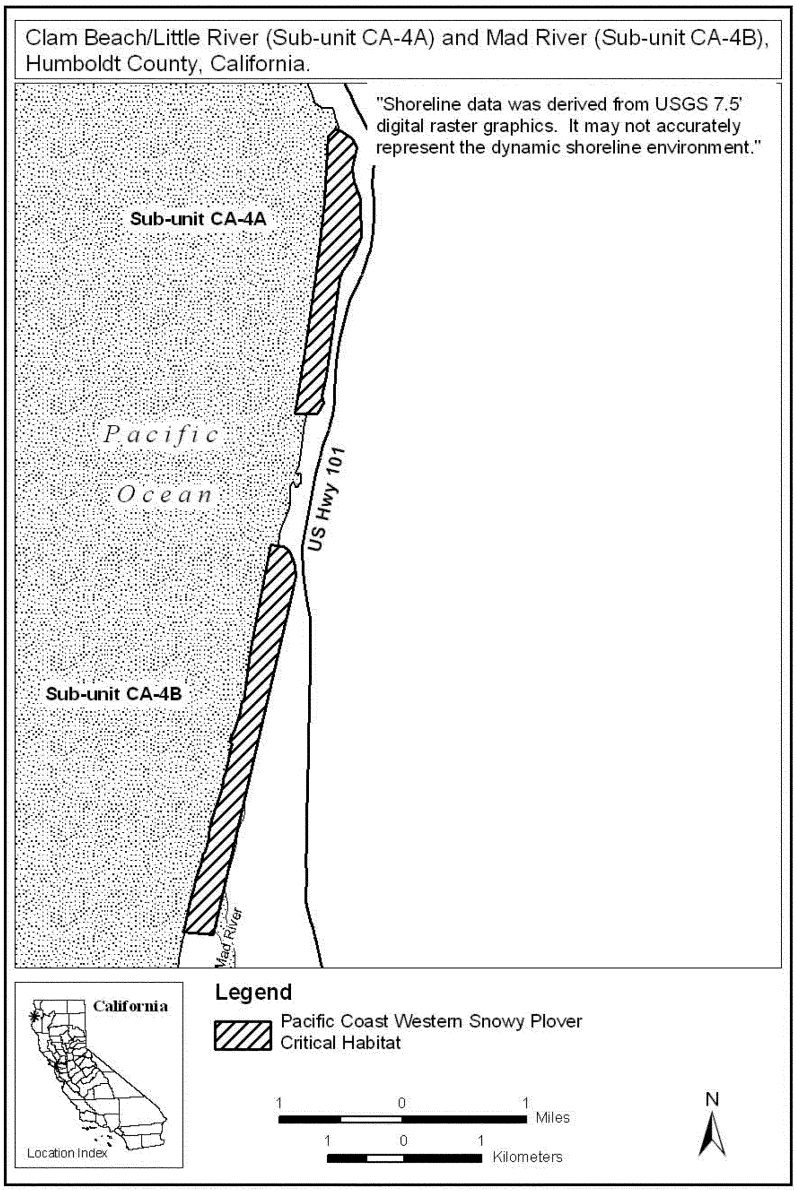
(i) [Reserved for textual description of Subunit CA 4A: Clam Beach/Little River, Humboldt County, California]

(ii) **Note:** Subunit CA 4A: Clam Beach/Little River, Humboldt County, California is depicted on the map in paragraph (34)(ii) of this entry:

(34) Subunit CA 4B: Mad River, Humboldt County, California.

(i) [Reserved for textual description of Subunit CA 4B: Mad River, Humboldt County, California]

(ii) **Note:** Map of Subunits CA 4A: Clam Beach/Little River and CA 4B: Mad River, Humboldt County, California, follows:



(35) Subunit CA 5A: Humboldt Bay South Spit, Humboldt County, California.

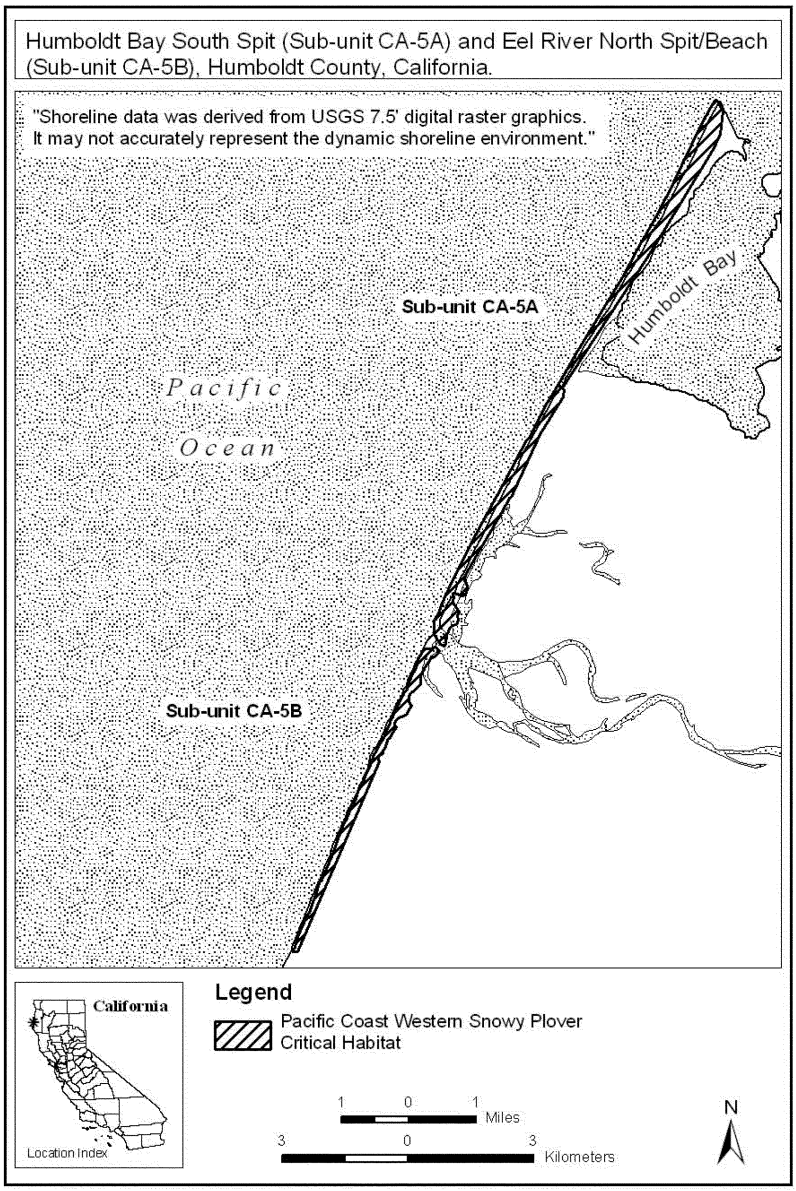
(i) [Reserved for textual description of Subunit CA 5A: Humboldt Bay South Spit, Humboldt County, California]

(ii) **Note:** Subunit CA 5A: Humboldt Bay South Spit, Humboldt County, California, is depicted on the map in paragraph (36)(ii) of this entry.

(36) Subunit CA 5B: Eel River North Spit/Beach, Humboldt County, California.

(i) [Reserved for textual description of Subunit CA 5B: Eel River North Spit/Beach, Humboldt County, California]

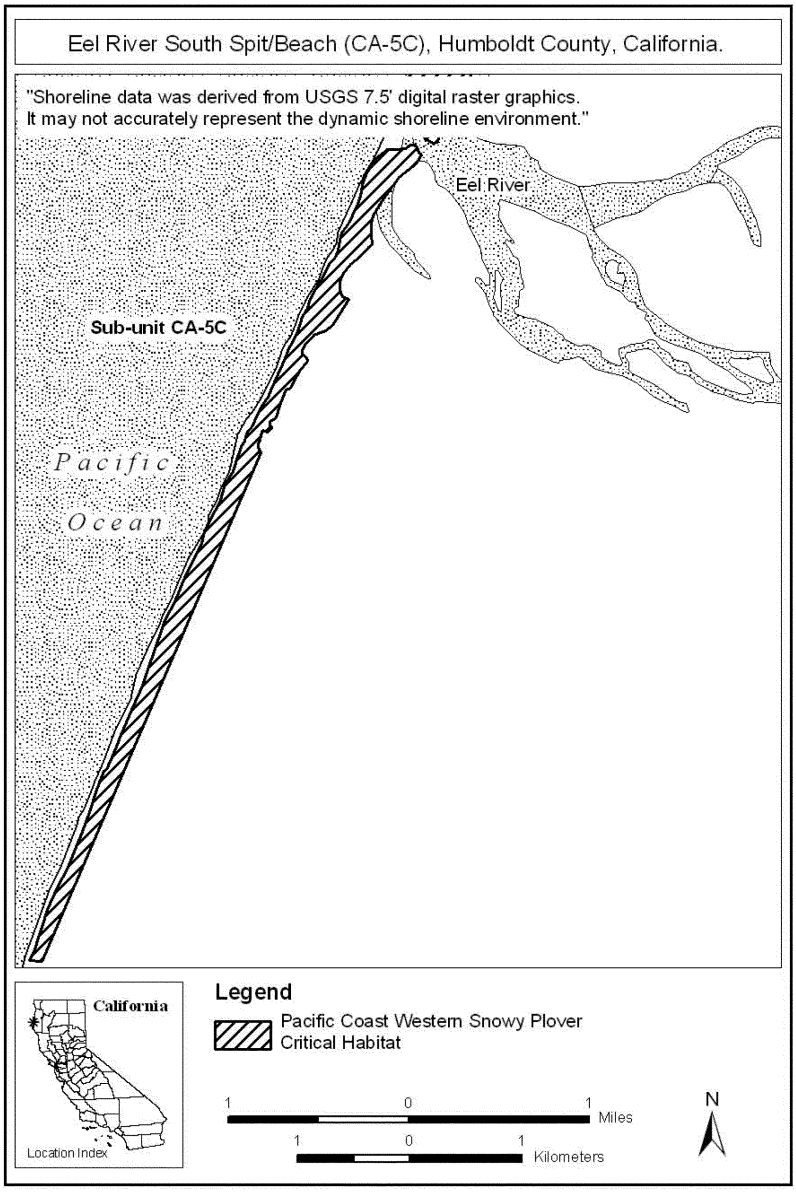
(ii) **Note:** Map of Subunit CA 5A: Humboldt Bay South Spit and CA 5B: Eel River North Spit/Beach, Humboldt County, California, follows:



(37) Subunit CA 5C: Eel River South Spit/Beach, Humboldt County, California.

(i) [Reserved for textual description of Subunit CA 5C: Eel River South Spit/Beach, Humboldt County, California]

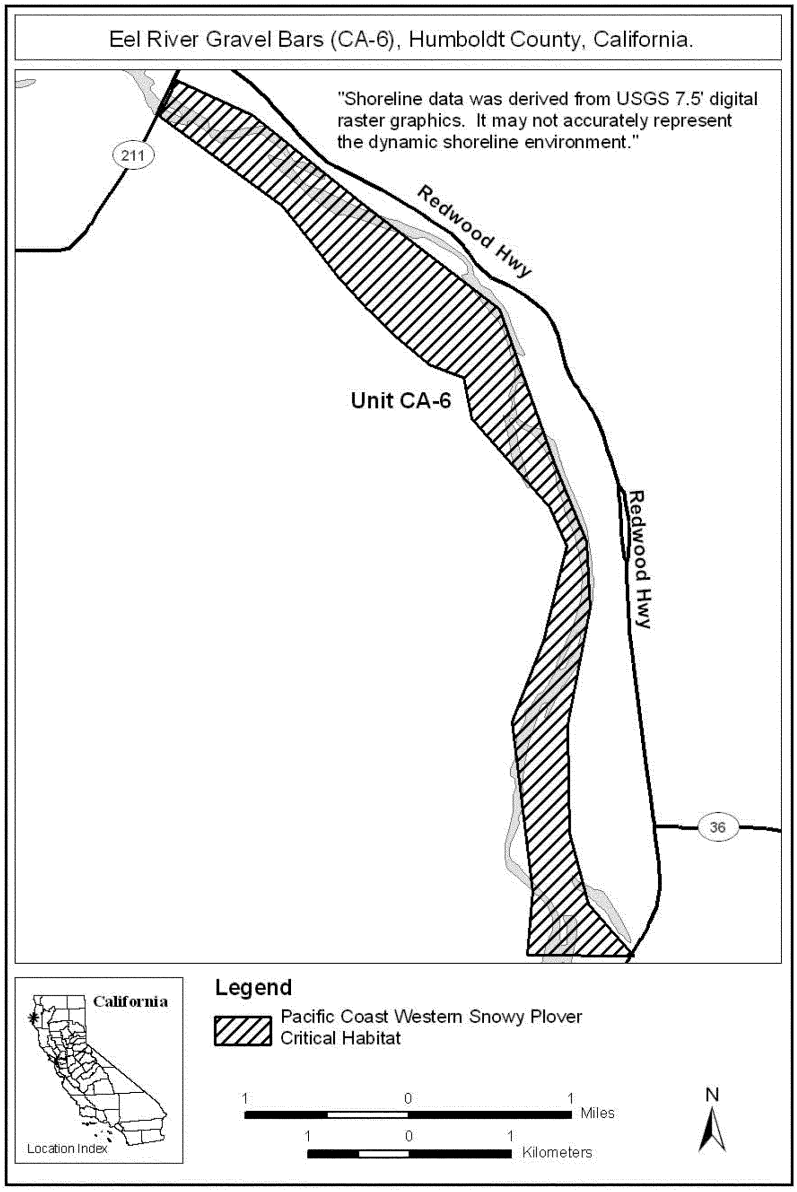
(ii) **Note:** Map of Subunit CA 5C: Eel River South Spit/Beach, Humboldt County, California, follows:



(38) Unit CA 6: Eel River Gravel Bars, Humboldt County, California.

(i) [Reserved for textual description of Unit CA 6: Eel River Gravel Bars, Humboldt County, California]

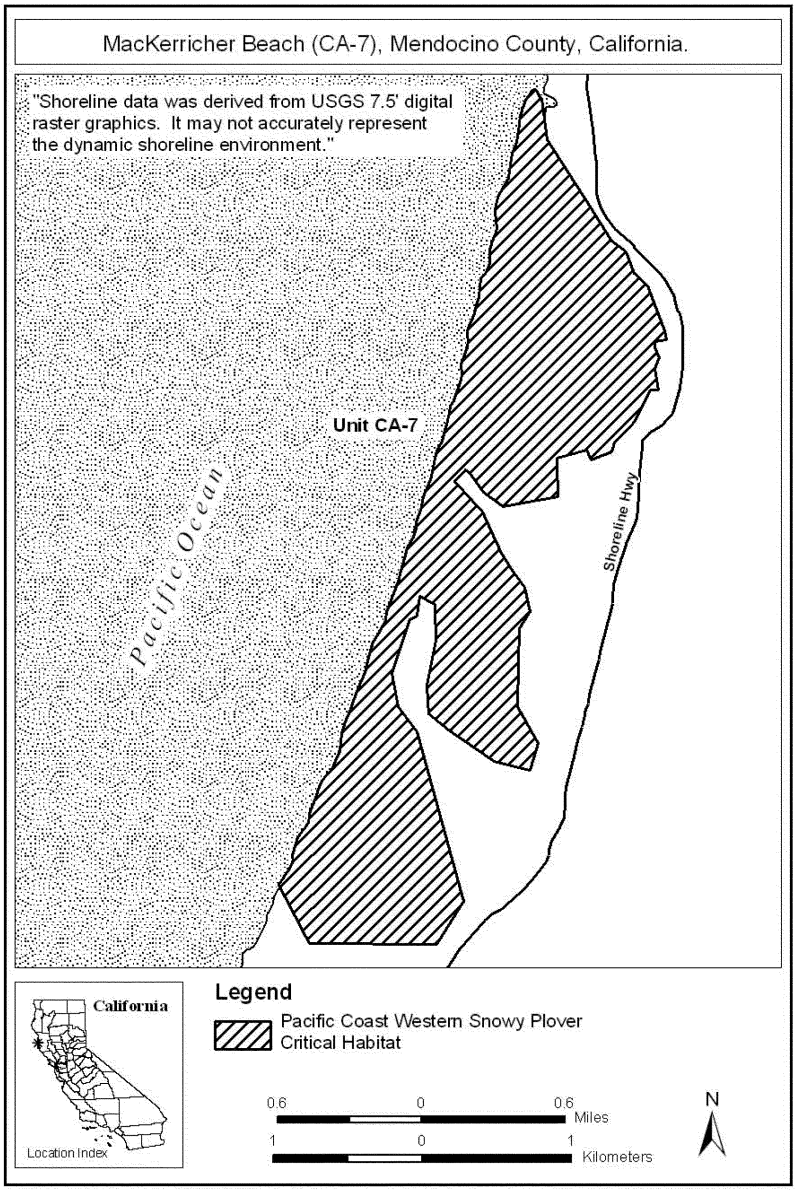
(ii) **Note:** Map of Unit CA 6: Eel River Gravel Bars, Humboldt County, California, follows:



(39) Unit CA 7: MacKerricher Beach, Mendocino County, California.

(i) [Reserved for textual description of Unit CA 7: MacKerricher Beach, Mendocino County, California]

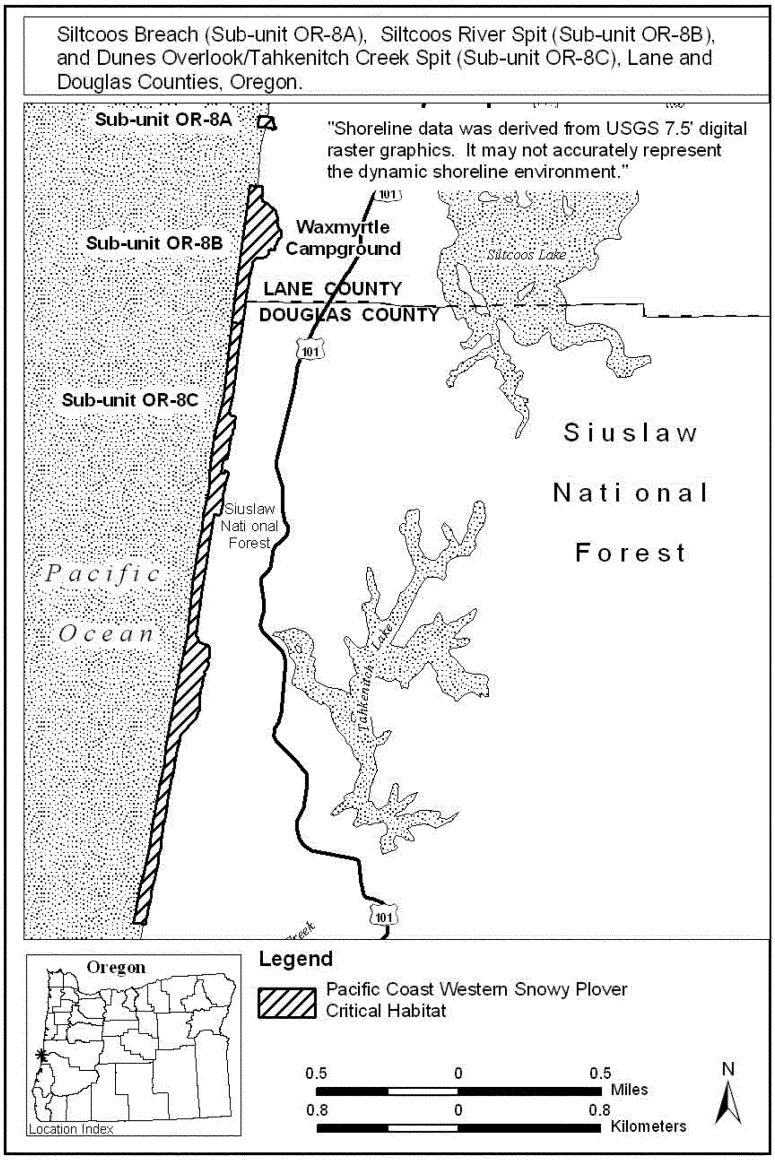
(ii) **Note:** Map of Unit CA 7: MacKerricher Beach, Mendocino County, California, follows:



(40) Unit CA 8: Manchester Beach, Mendocino County, California.

(i) [Reserved for textual description of Unit CA 8: Manchester Beach, Mendocino County, California]

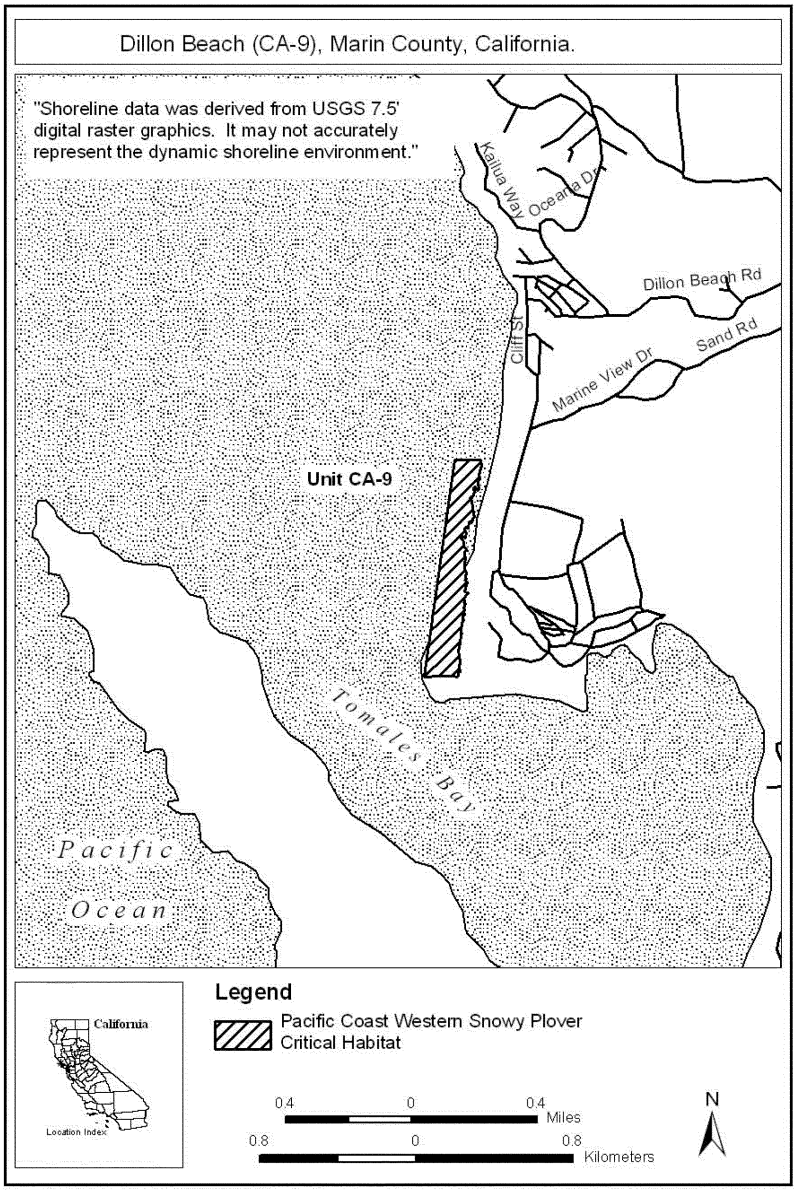
(ii) **Note:** Map of Unit CA 8: Manchester Beach, Mendocino County, California, follows:



(41) Unit CA 9: Dillon Beach, Marin County, California.

(i) [Reserved for textual description of Unit CA 9: Dillon Beach, Marin County, California]

(ii) **Note:** Map of Unit CA 9: Dillon Beach, Marin County, California, follows:



(42) Subunit CA 10A: Point Reyes, Marin County, California.

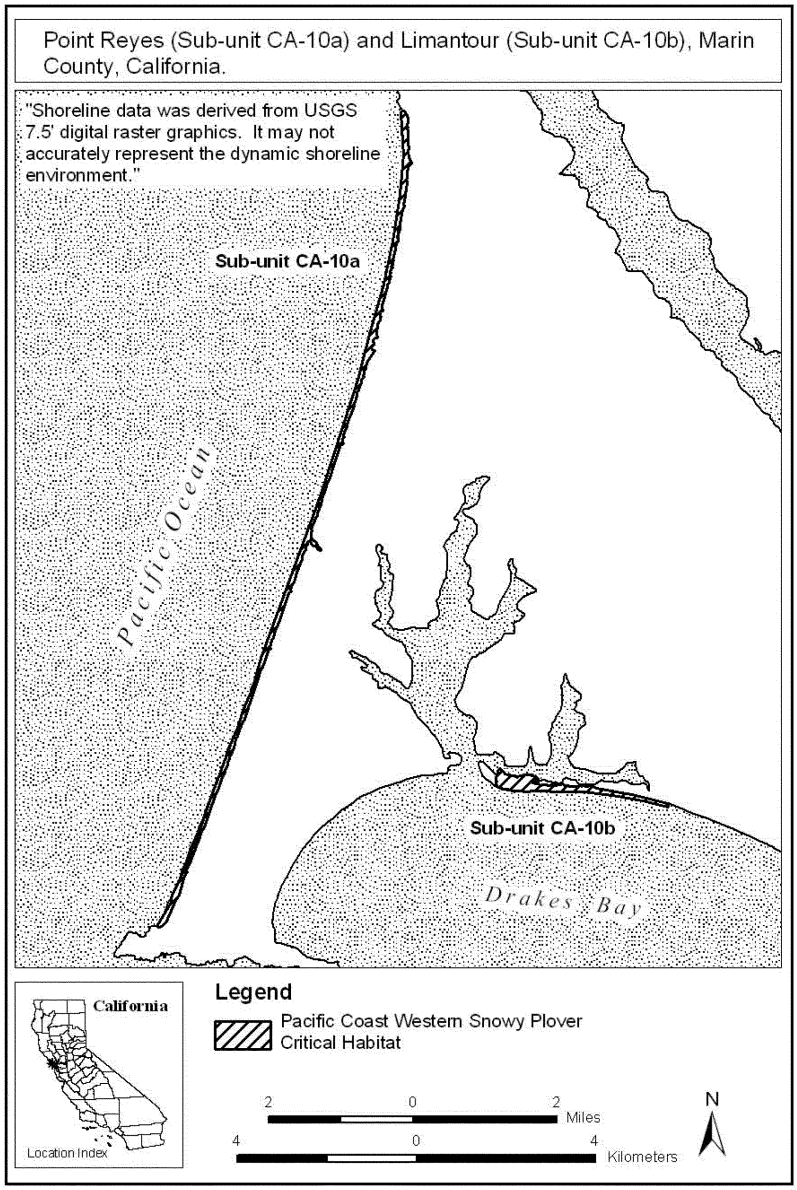
(i) [Reserved for textual description of Subunit CA 10A: Point Reyes, Marin County, California]

(ii) **Note:** Subunit CA 10A: Point Reyes, Marin County, California, is depicted on the map in paragraph (43)(ii) of this entry.

(43) Subunit CA 10B: Limantour, Marin County, California.

(i) [Reserved for textual description of Subunit CA 10B: Limantour, Point Reyes, Marin County, California]

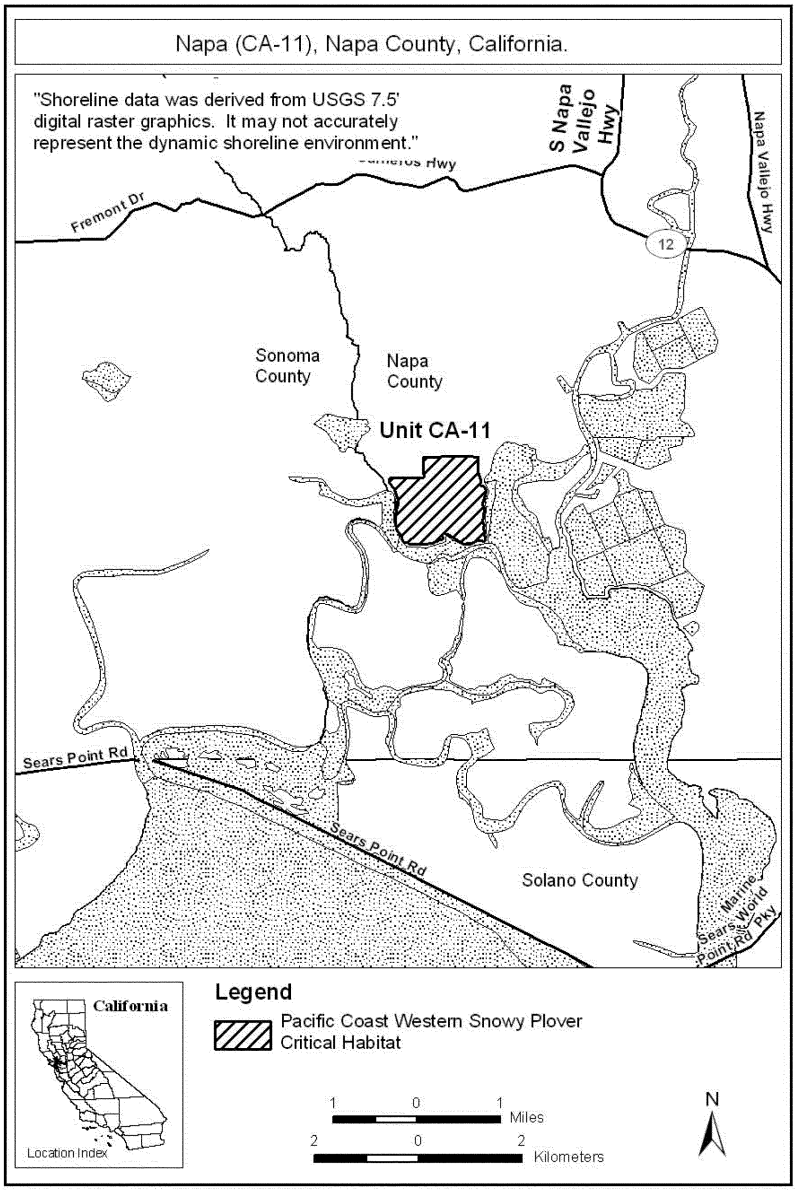
(ii) **Note:** Map of Subunits CA 10A: Point Reyes and CA 10B: Limantour, Marin County, California, follows:



(44) Unit CA 11: Napa, Napa County, California.

(i) [Reserved for textual description of Unit CA 11: Napa, Napa County, California]

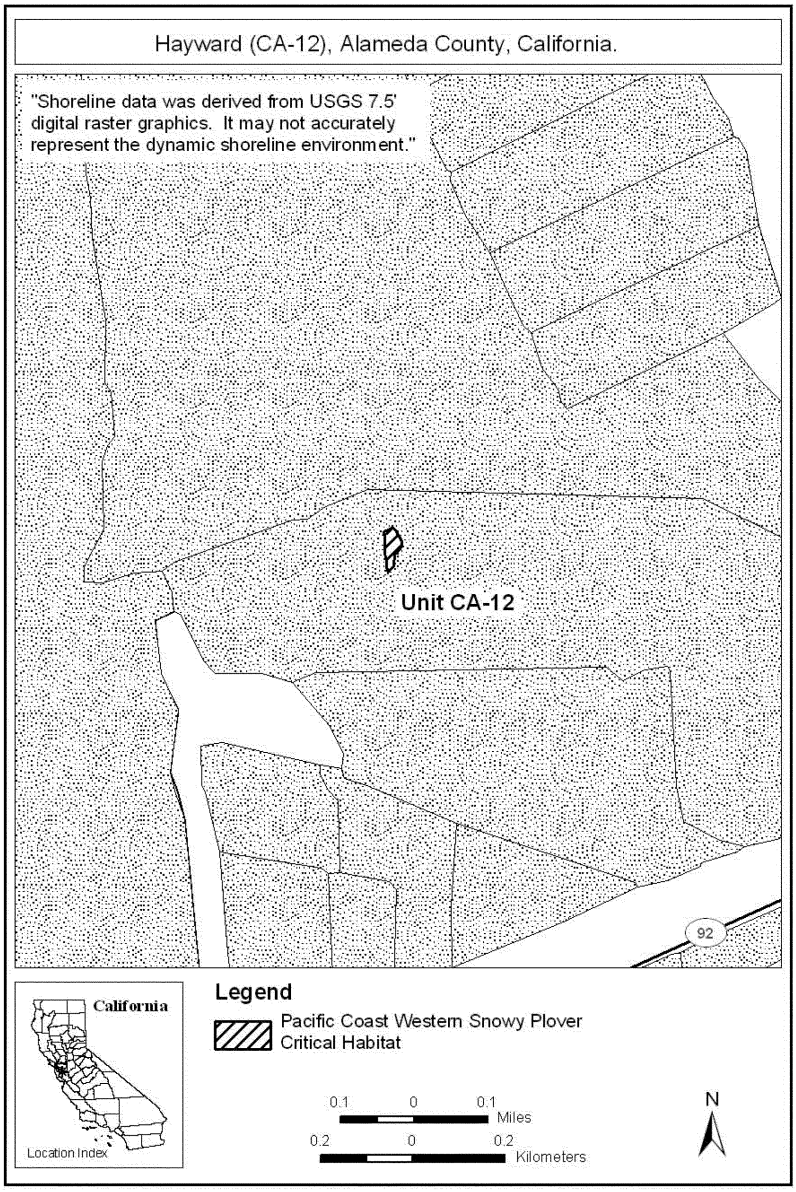
(ii) **Note:** Map of Unit CA 11: Napa, Napa County, California, follows:



(45) Unit CA 12: Hayward, Alameda County, California.

(i) [Reserved for textual description of Unit CA 12: Hayward, Alameda County, California]

(ii) **Note:** Map of Unit CA 12: Hayward, Alameda County, California, follows:



(46) Subunit CA 13A: Eden Landing, Alameda County, California.

(i) [Reserved for textual description of Subunit CA 13A: Eden Landing, Alameda County, California]

(ii) **Note:** Subunit CA 13A: Eden Landing, Alameda County, California, is depicted on the map in paragraph (48)(ii) of this entry.

(47) Subunit CA 13B: Eden Landing, Alameda County, California.

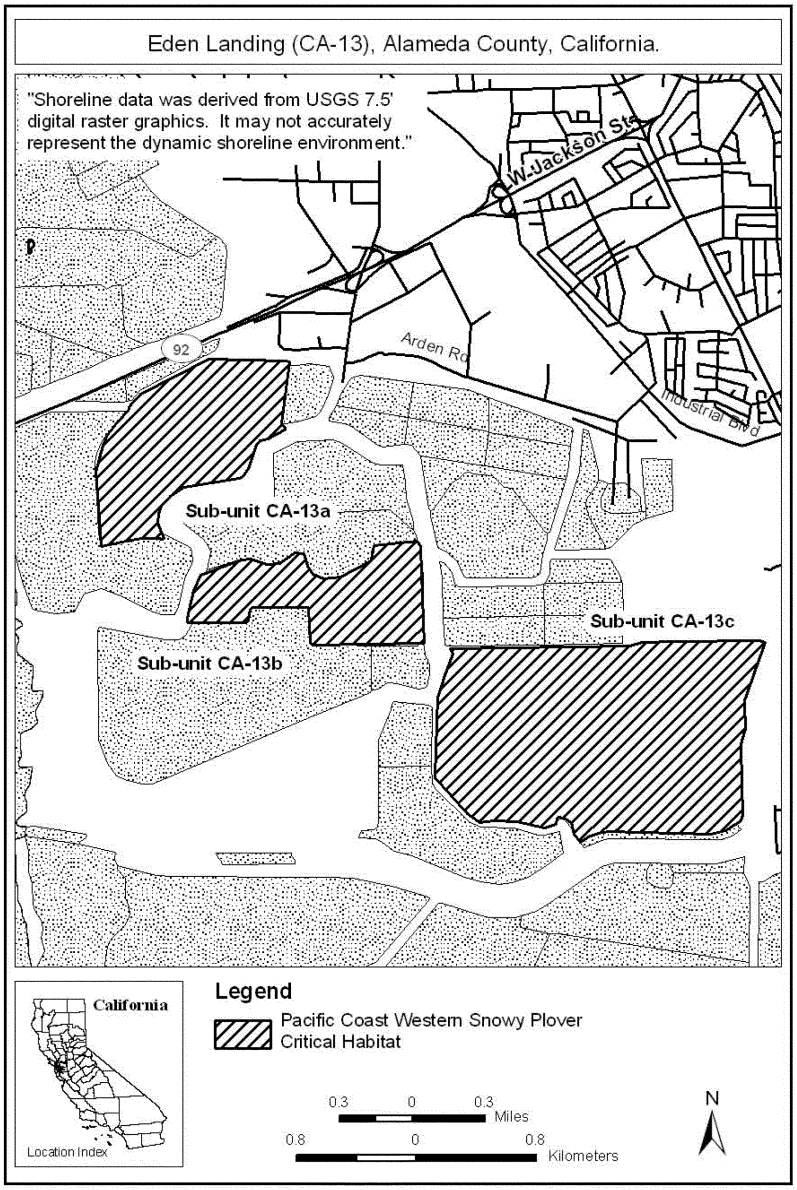
(i) [Reserved for textual description of Subunit CA 13B: Eden Landing, Alameda County, California]

(ii) **Note:** Subunit CA 13B: Eden Landing, Alameda County, California, is depicted on the map in paragraph (48)(ii) of this entry.

(48) Subunit CA 13C: Eden Landing, Alameda County, California.

(i) [Reserved for textual description of Subunit CA 13C: Eden Landing, Alameda County, California]

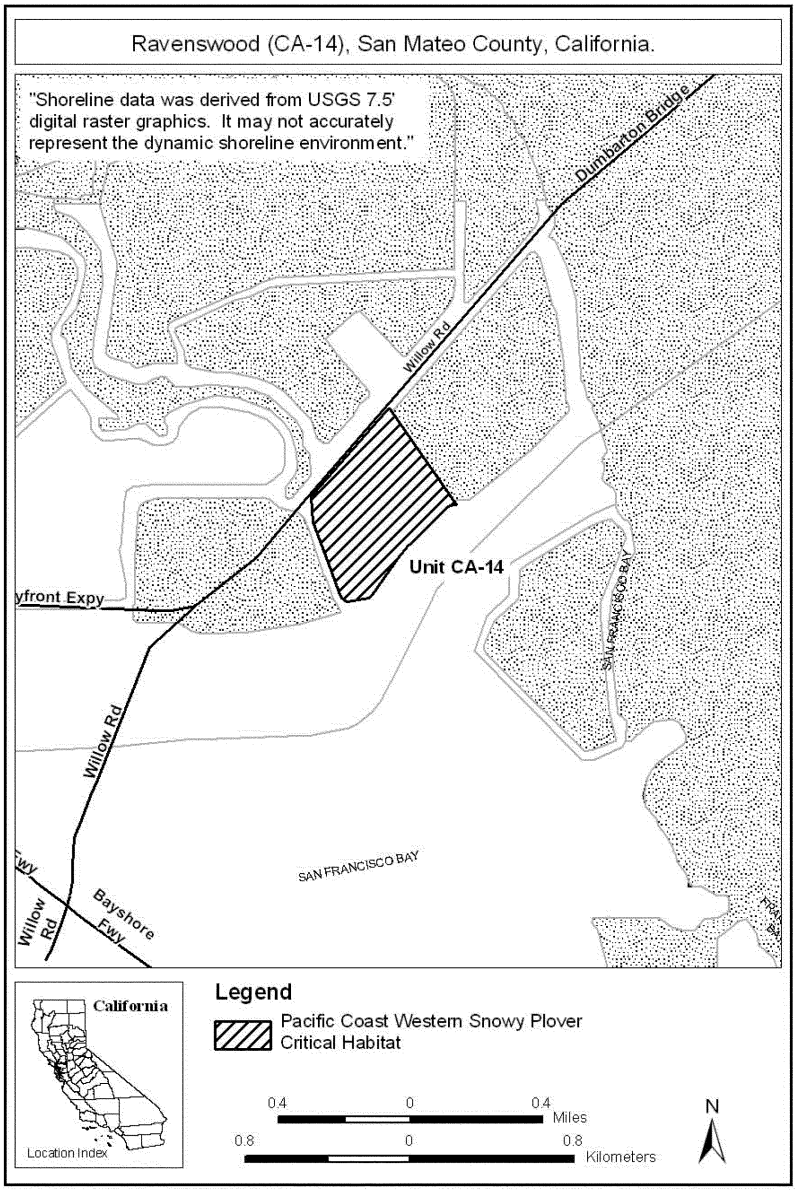
(ii) **Note:** Map of Subunits CA 13A, CA 13B, and CA 13C: Eden Landing, Alameda County, California, follows:



(49) Unit CA 14: Ravenswood, San Mateo County, California.

(i) [Reserved for textual description of Unit CA 14: Ravenswood, San Mateo County, California]

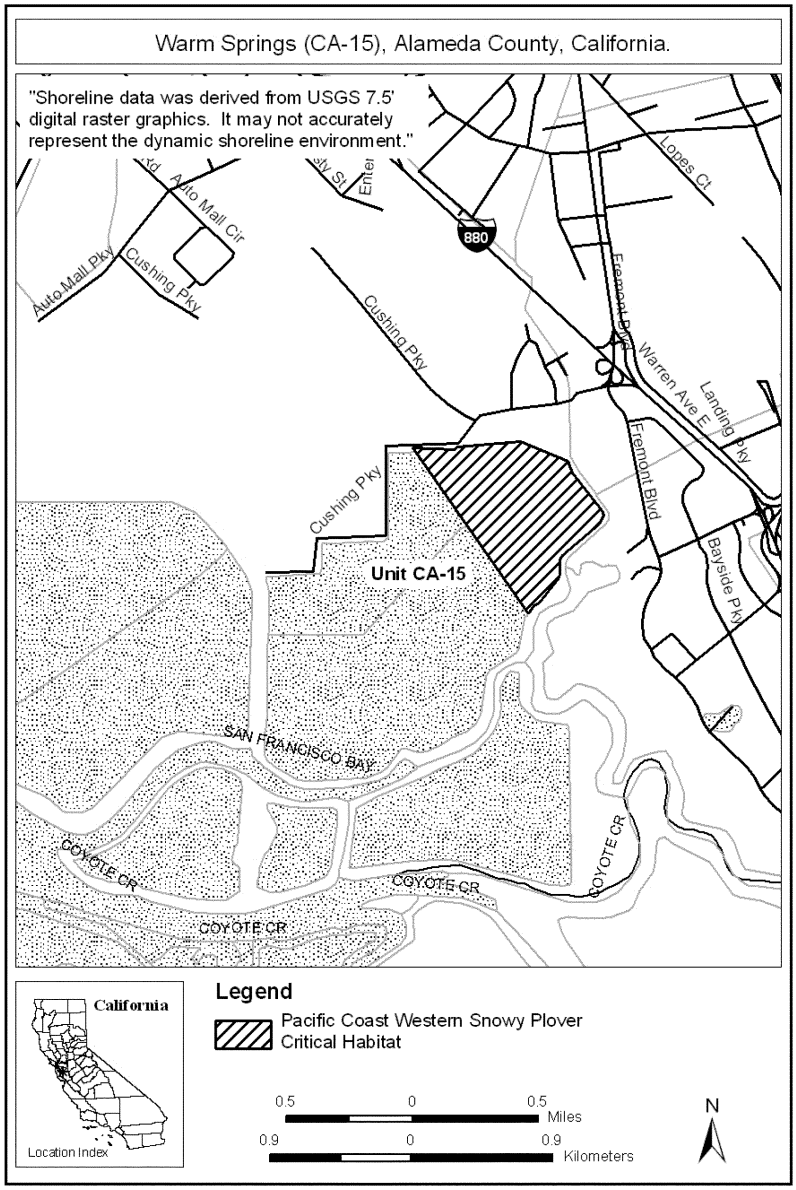
(ii) **Note:** Map of Unit CA 14: Ravenswood, San Mateo County, California, follows:



(50) Unit CA 15: Warm Springs, San Mateo County, California.

(i) [Reserved for textual description of Unit CA 15: Warm Springs, San Mateo County, California]

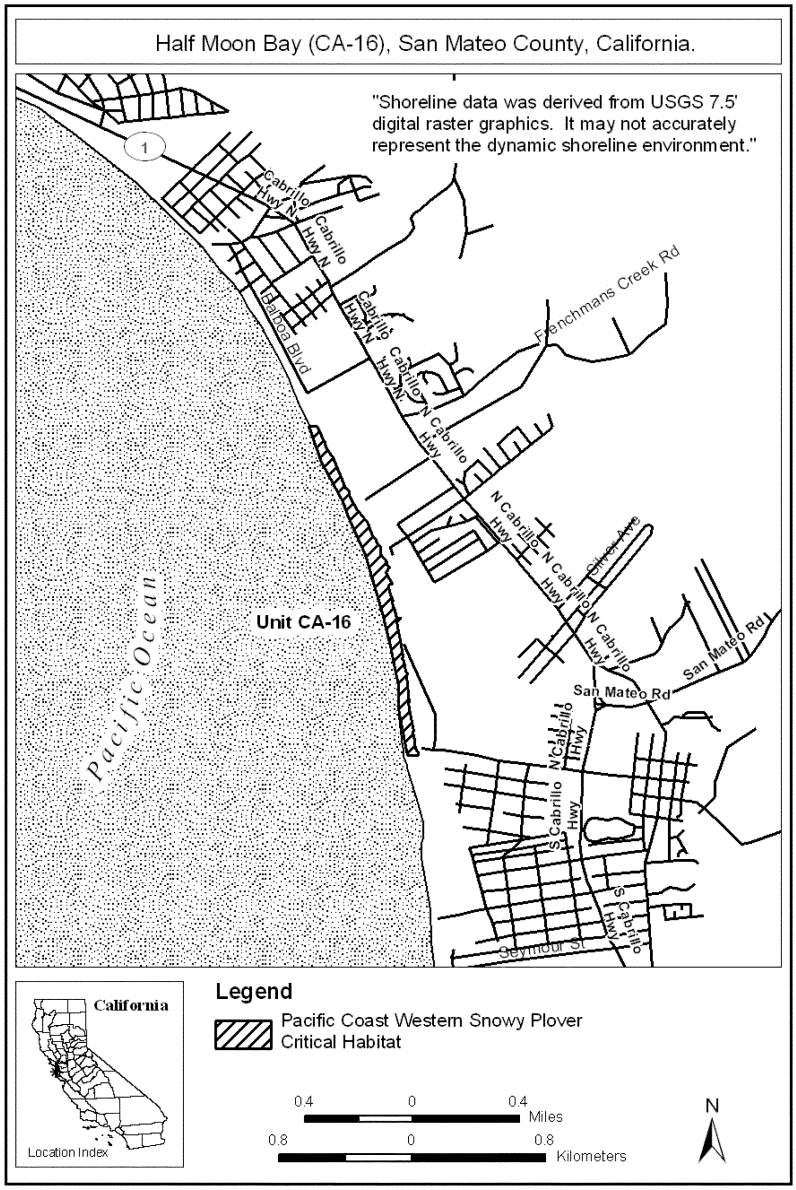
(ii) **Note:** Map of Unit CA 15: Warm Springs, San Mateo County, California, follows:



(51) Unit CA 16: Half Moon Bay, San Mateo County, California.

(i) [Reserved for textual description of Unit CA 16: Half Moon Bay, San Mateo County, California]

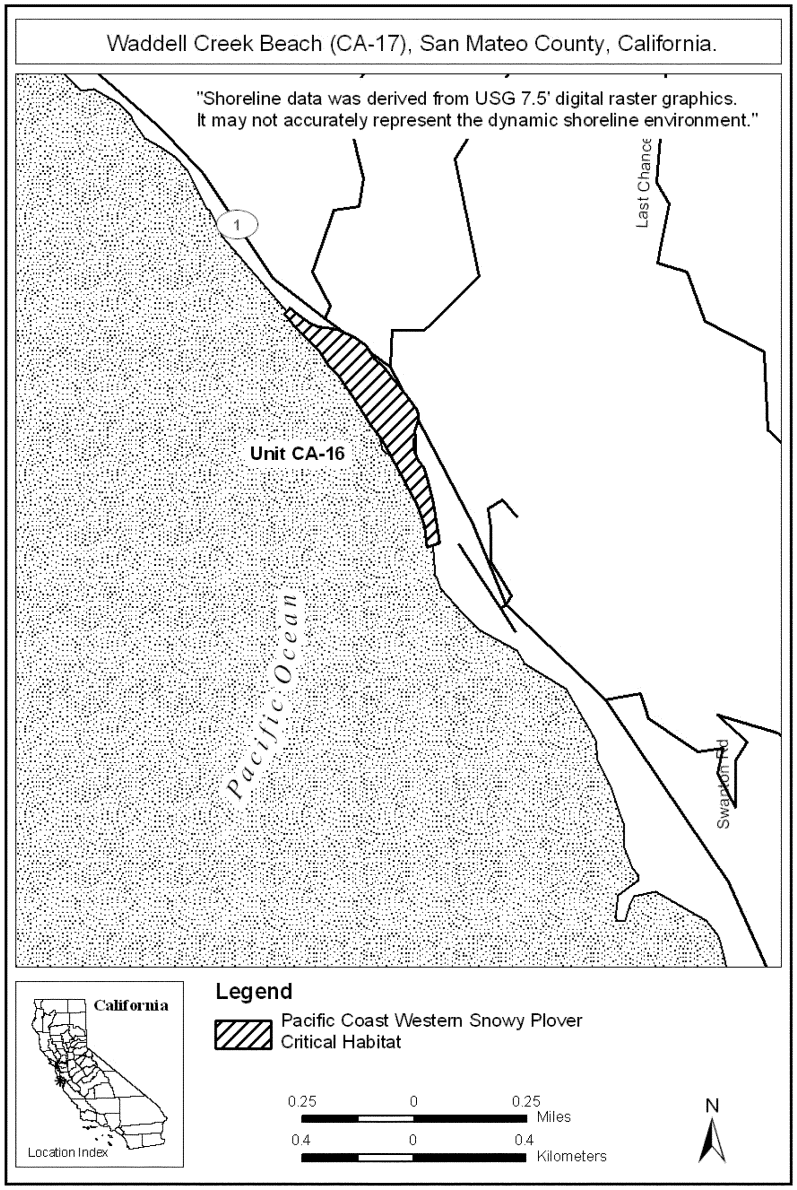
(ii) **Note:** Map of Unit CA 16: Half Moon Bay, San Mateo County, California, follows:



(52) Unit CA 17: Waddell Creek Beach, Santa Cruz County, California.

(i) [Reserved for textual description of Unit CA 17: Waddell Creek Beach, Santa Cruz County, California]

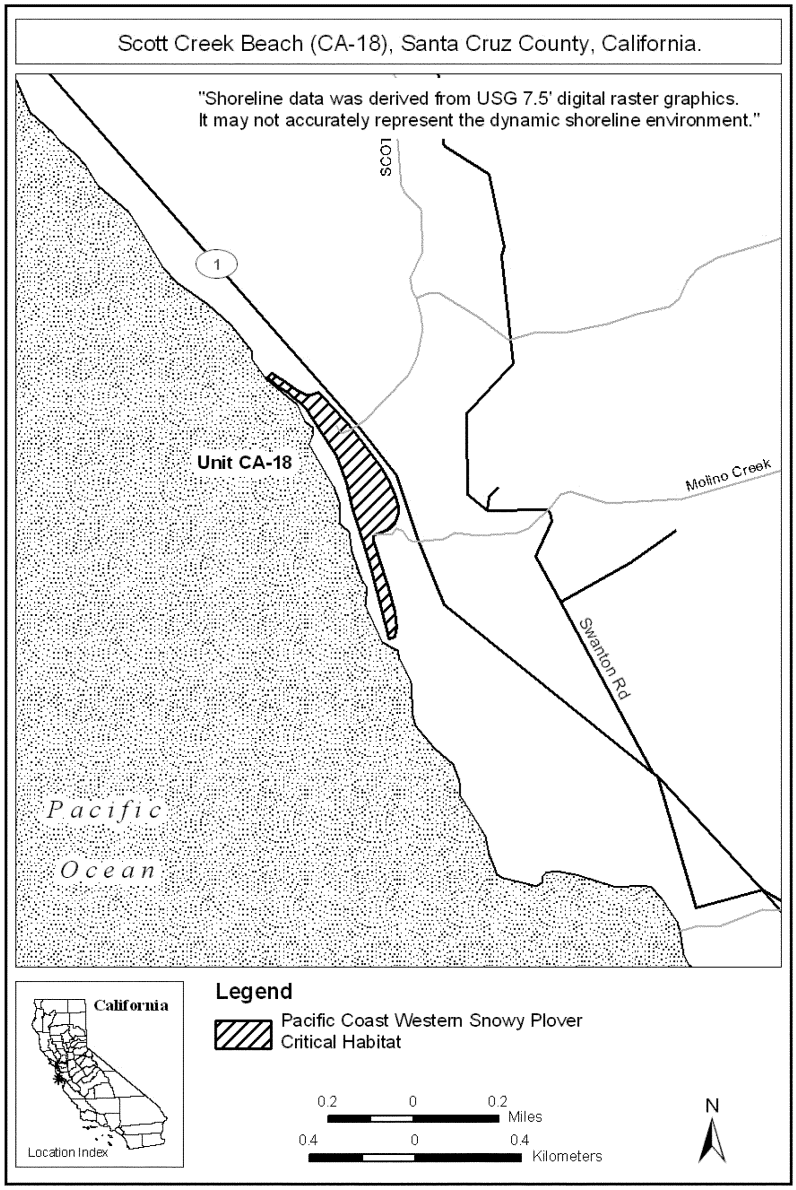
(ii) **Note:** Map of Unit CA 17: Waddell Creek Beach, Santa Cruz County, California, follows:



(53) Unit CA 18: Scott Beach Creek, Santa Cruz County, California.

(i) [Reserved for textual description of Unit CA 18: Scott Beach Creek, Santa Cruz County, California]

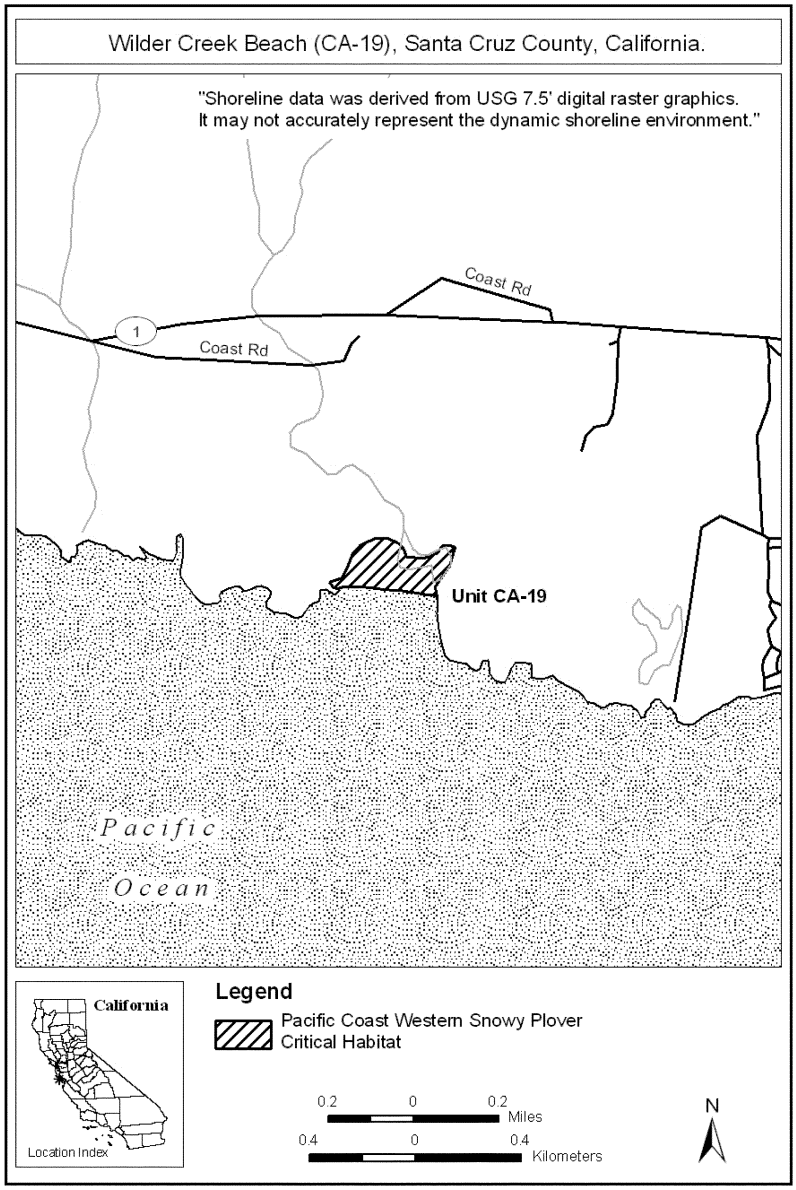
(ii) **Note:** Map of Unit CA 18: Scott Beach Creek, Santa Cruz County, California, follows:



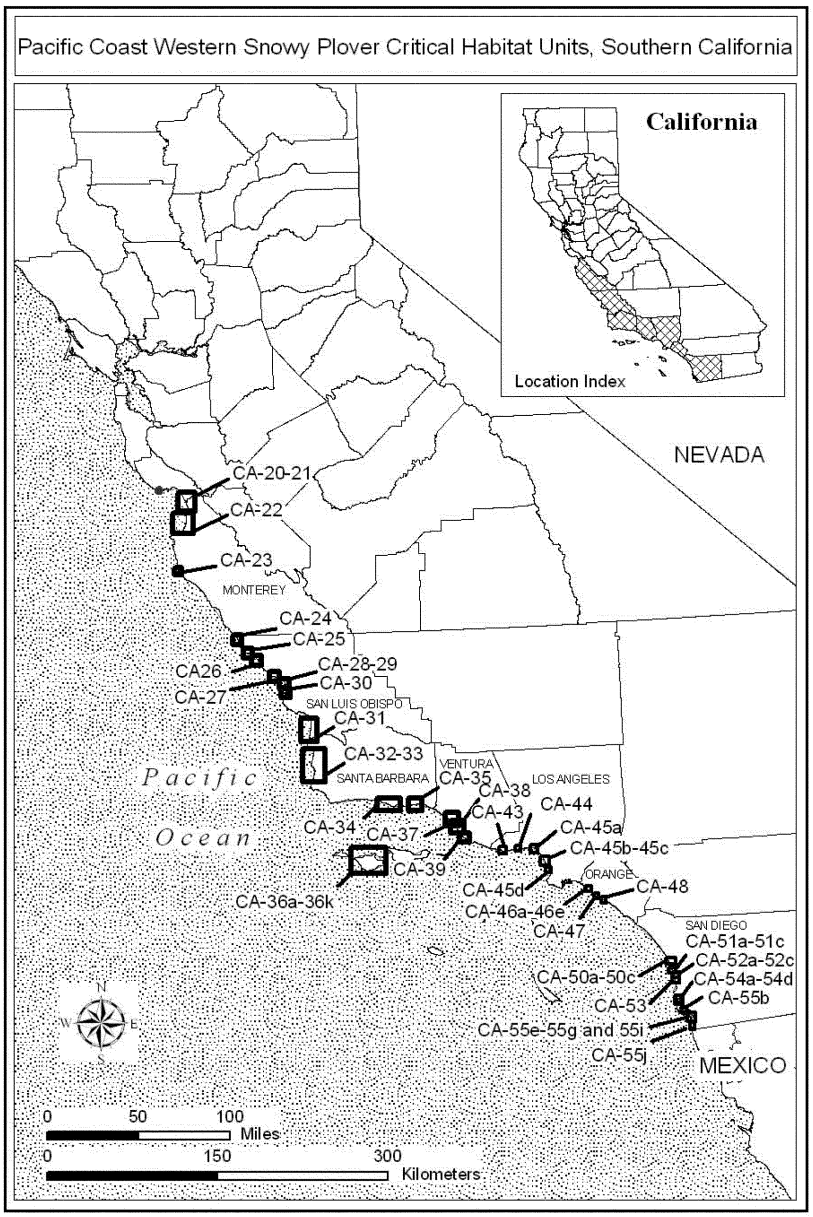
(54) Unit CA 19: Wilder Creek Beach, Santa Cruz County, California.

(i) [Reserved for textual description of Unit CA 19: Wilder Creek Beach, Santa Cruz County, California]

(ii) **Note:** Map of Unit CA 19: Wilder Creek Beach, Santa Cruz County, California, follows:



(55) **Note:** Index map of critical habitat units for the Pacific Coast western snowy plover (*Charadrius alexandrinus nivosus*) in Southern California, follows:



(56) Unit CA 20: Jetty Road to Aptos, Santa Cruz County, California.

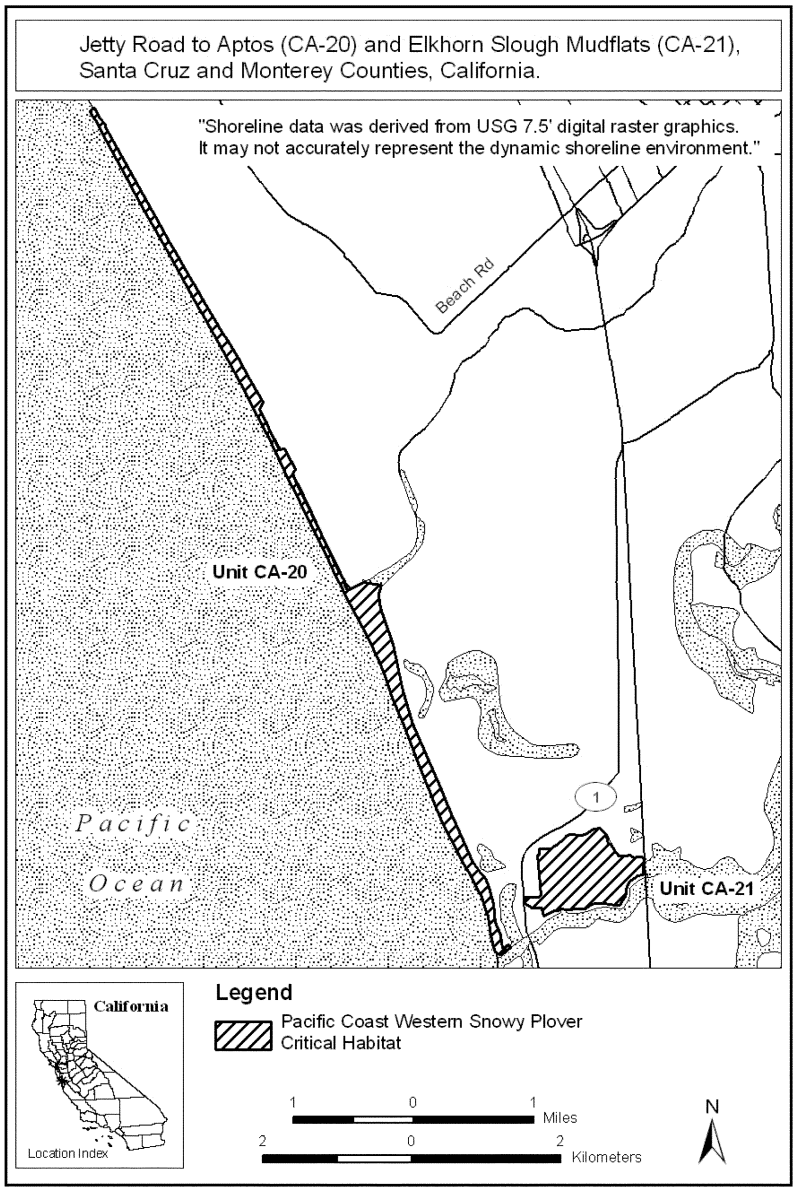
(i) [Reserved for textual description of Unit CA 20: Jetty Road to Aptos, Santa Cruz County, California]

(ii) **Note:** Unit CA 20: Jetty Road to Aptos, Santa Cruz County, California is depicted on the map in paragraph (57)(ii) of this entry.

(57) Unit CA 21: Elkhorn Slough Mudflats, Monterey County, California.

(i) [Reserved for textual description of Unit CA 21: Elkhorn Slough Mudflats, Monterey County, California]

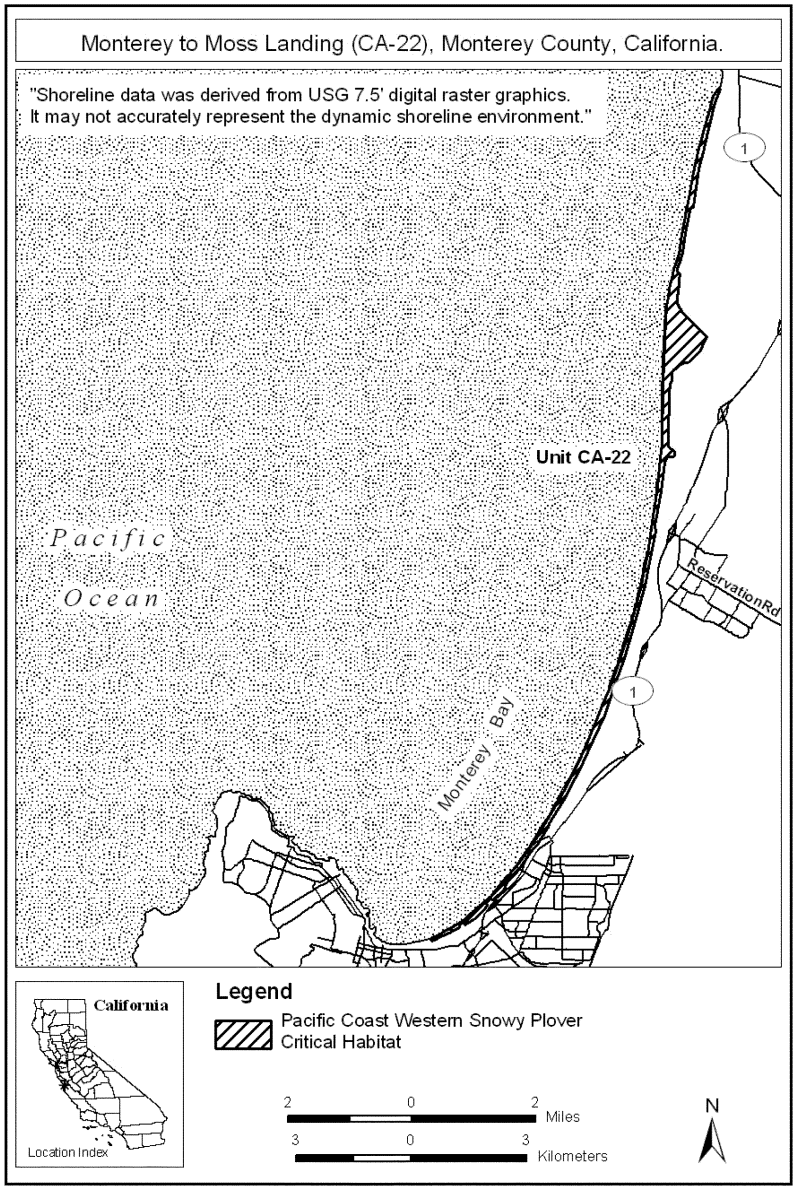
(ii) **Note:** Map of Unit CA 20: Jetty Road to Aptos and Unit CA 21: Elkhorn Slough Mudflats, Monterey County, California, follows:



(58) Unit CA 22: Monterey to Moss Landing, Monterey County, California.

(i) [Reserved for textual description of Unit CA 22: Monterey to Moss Landing, Monterey County, California]

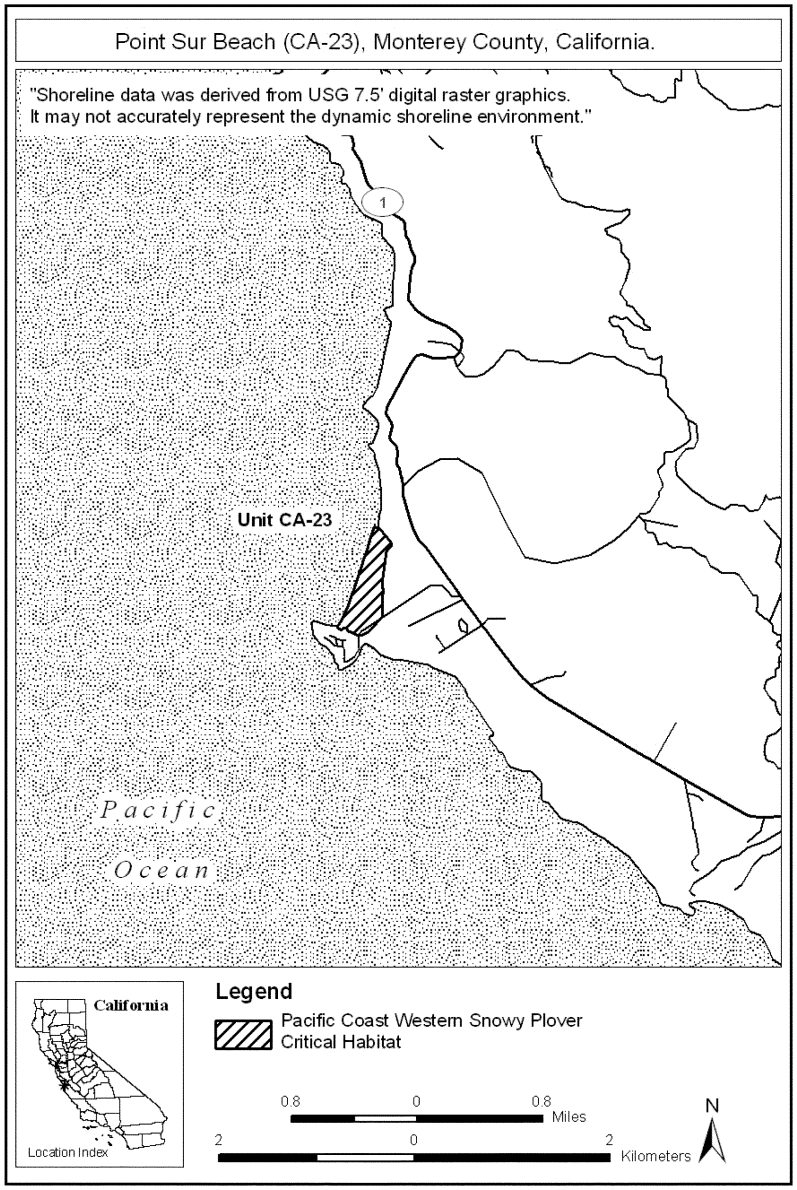
(ii) **Note:** Map of Unit CA 22: Monterey to Moss Landing, Monterey County, California, follows:



(59) Unit CA 23: Point Sur Beach, Monterey County, California.

(i) [Reserved for textual description of Unit CA 23: Point Sur Beach, Monterey County, California]

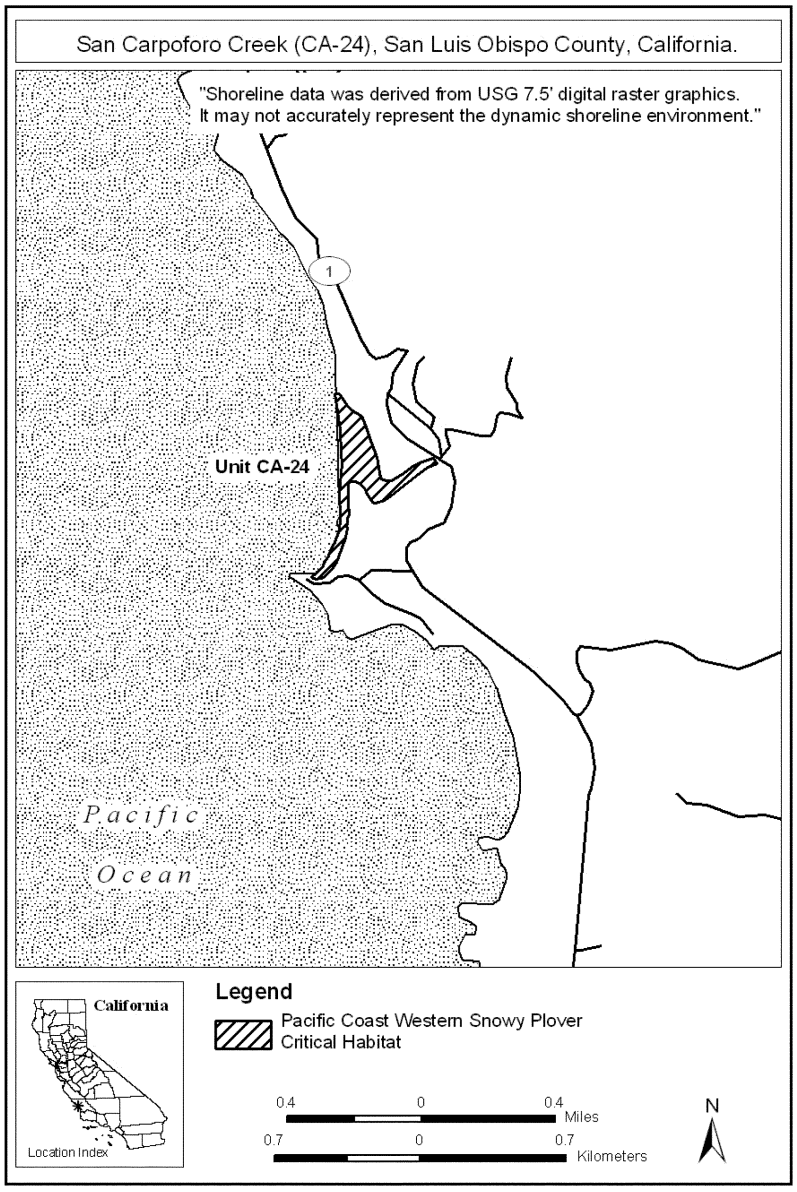
(ii) **Note:** Map of Unit CA 23: Point Sur Beach, Monterey County, California, follows:



(60) Unit CA 24: San Carpoforo Creek, Monterey and San Luis Obispo Counties, California.

(i) [Reserved for textual description of Unit CA 24: San Carpoforo Creek, Monterey and San Luis Obispo Counties]

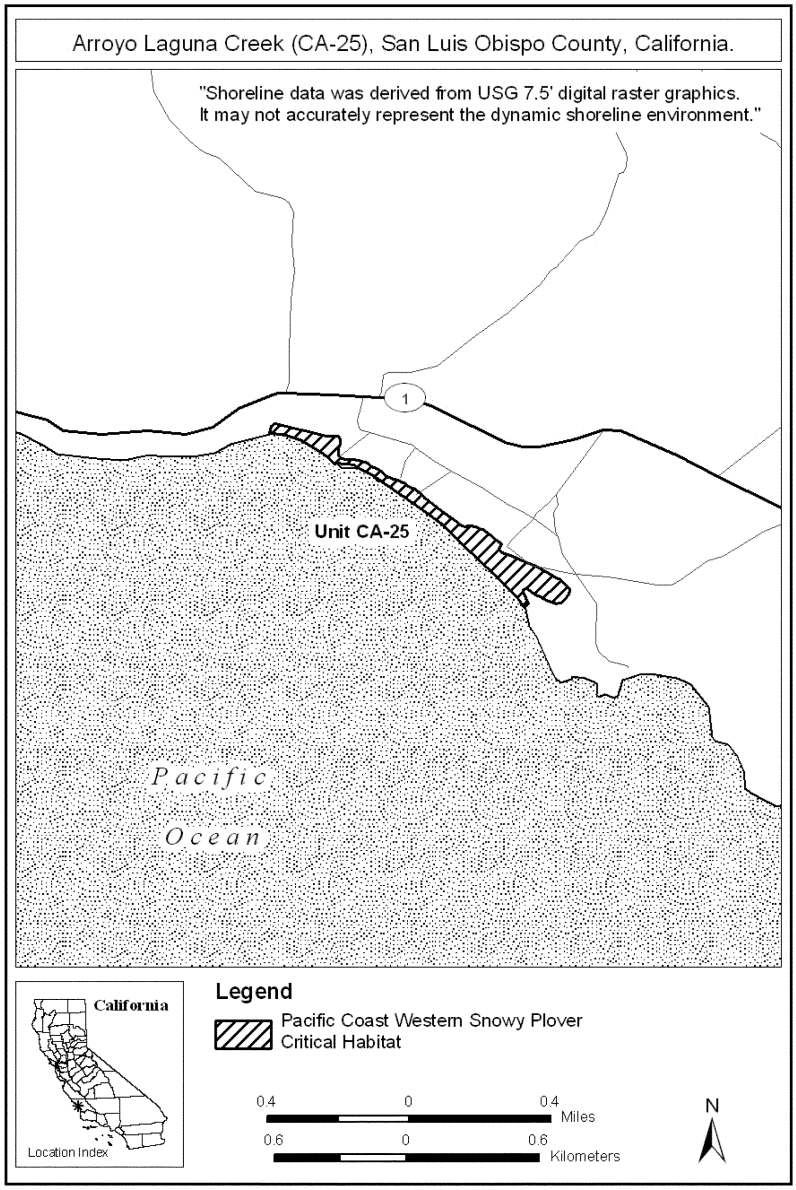
(ii) **Note:** Map of Unit CA 24: San Carpoforo Creek, Monterey and San Luis Obispo Counties, California, follows:



(61) Unit CA 25: Arroyo Laguna Creek, San Luis Obispo County, California.

(i) [Reserved for textual description of Unit CA 25: Arroyo Laguna Creek, San Luis Obispo County, California]

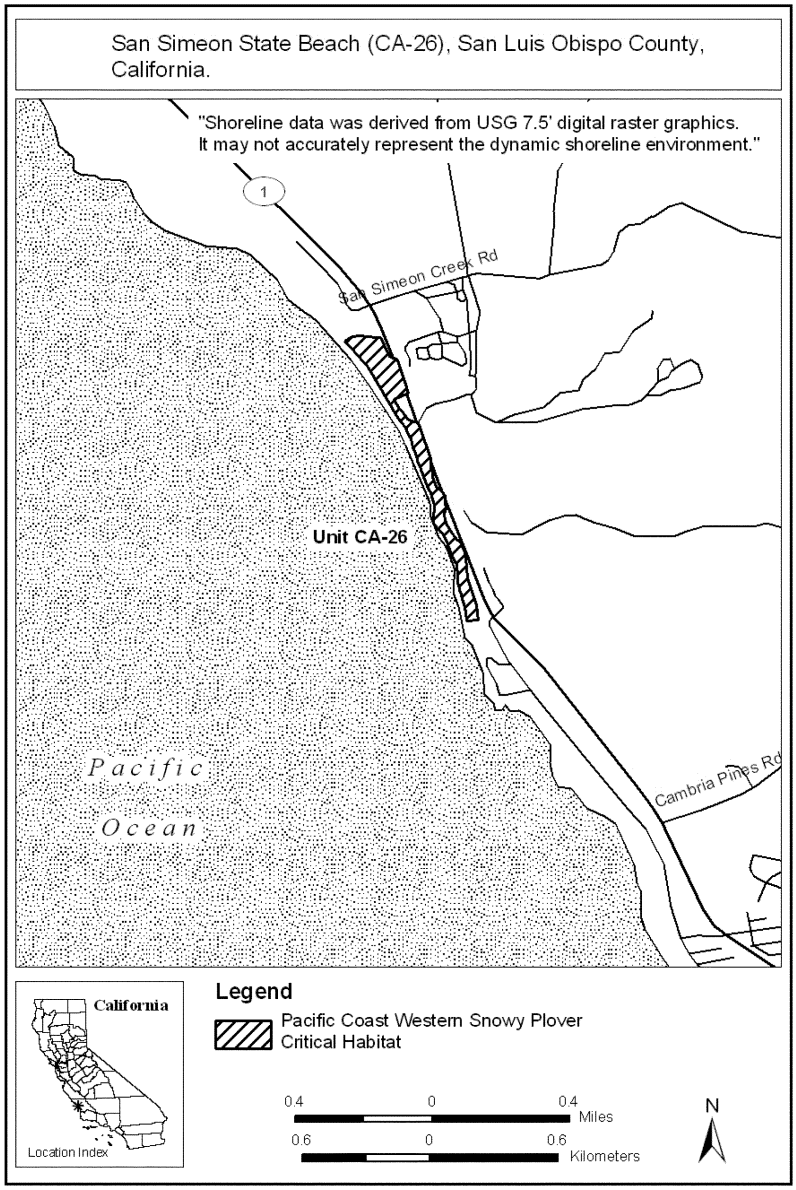
(ii) **Note:** Map of Unit CA 25: Arroyo Laguna Creek, San Luis Obispo County, California, follows:



(62) Unit CA 26: San Simeon State Beach, San Luis Obispo County, California.

(i) [Reserved for textual description of Unit CA 26: San Simeon State Beach, San Luis Obispo County, California]

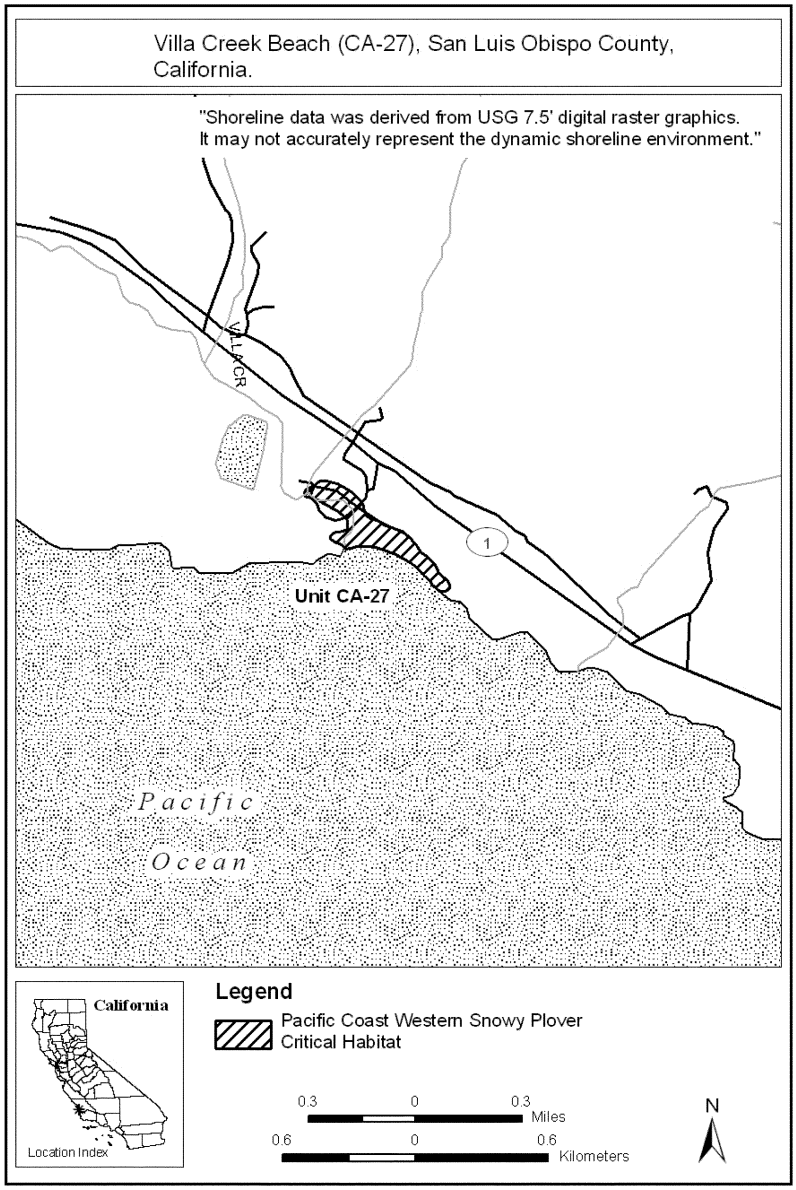
(ii) **Note:** Map of Unit CA 26: San Simeon State Beach, San Luis Obispo County, California, follows:



(63) Unit CA 27: Villa Creek Beach, San Luis Obispo County, California.

(i) [Reserved for textual description of Unit CA 27: Villa Creek Beach, San Luis Obispo County, California]

(ii) **Note:** Map of Unit CA 27: Villa Creek Beach, San Luis Obispo County, California, follows:



(64) Unit CA 28: Toro Creek, San Luis Obispo County, California.

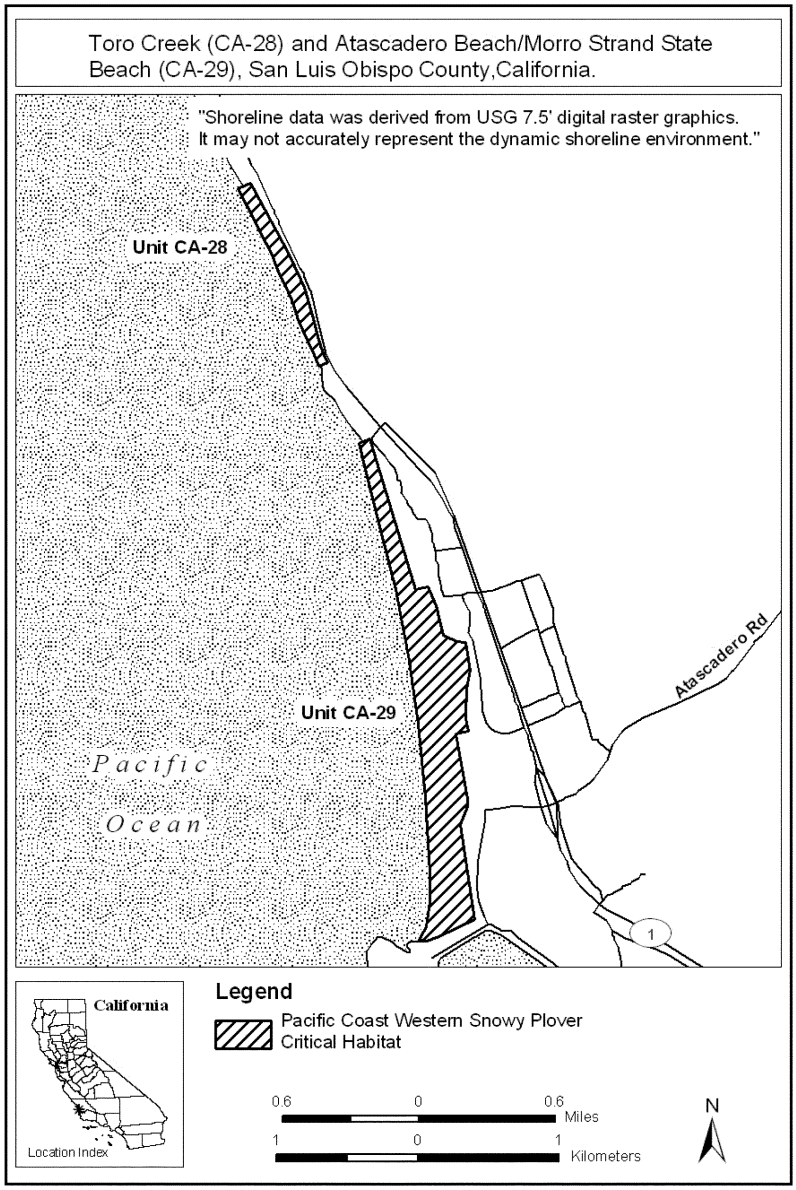
(i) [Reserved for textual description of Unit CA 28: Toro Creek, San Luis Obispo County, California]

(ii) **Note:** Unit CA 28: Toro Creek, San Luis Obispo County, California, is depicted on the map in paragraph (65)(ii) of this entry.

(65) Unit CA 29: Atascadero Beach/Moro Strands State Beach, San Luis Obispo County, California.

(i) [Reserved for textual description of Unit CA 29: Atascadero Beach/Moro Strands State Beach, San Luis Obispo County, California]

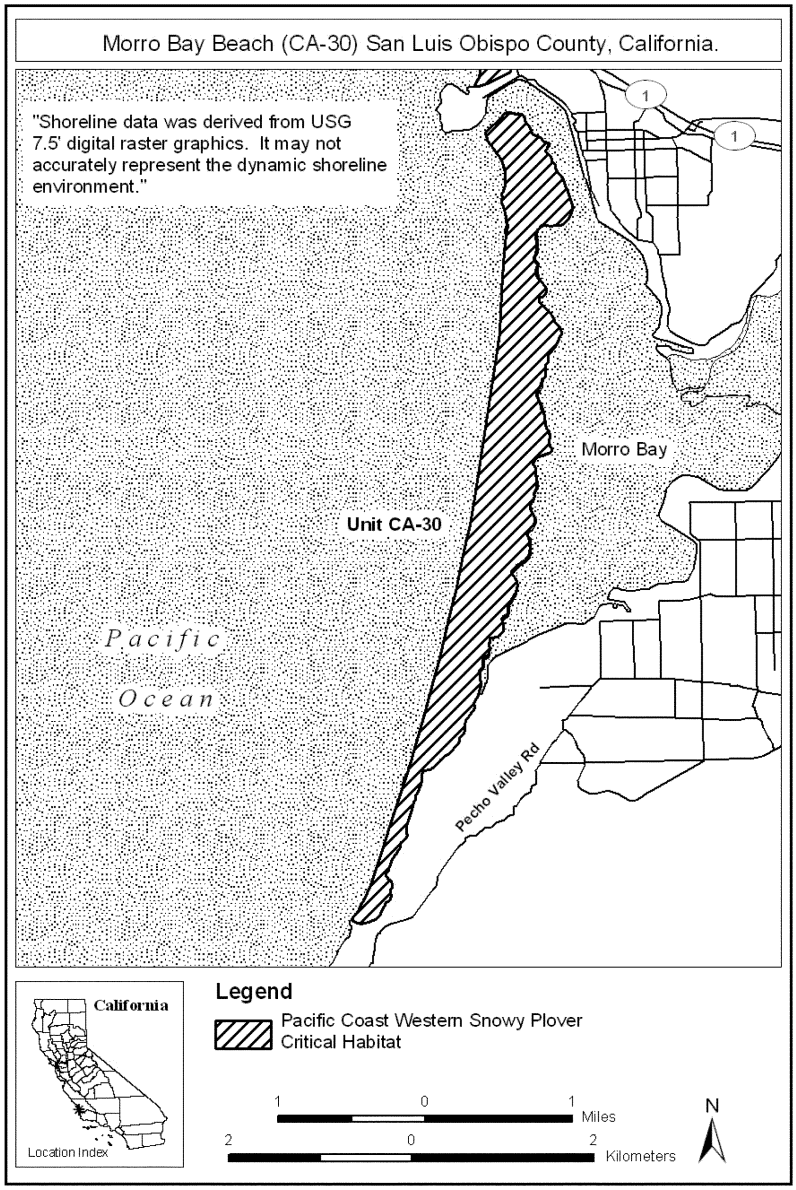
(ii) **Note:** Map of Units CA 28: Toro Creek and CA 29: Atascadero Beach/Moro Strands State Beach, San Luis Obispo County, California, follows:



(66) Unit CA 30: Moro Bay Beach, San Luis Obispo County, California.

(i) [Reserved for textual description of Unit CA 30: Moro Bay Beach, San Luis Obispo County, California]

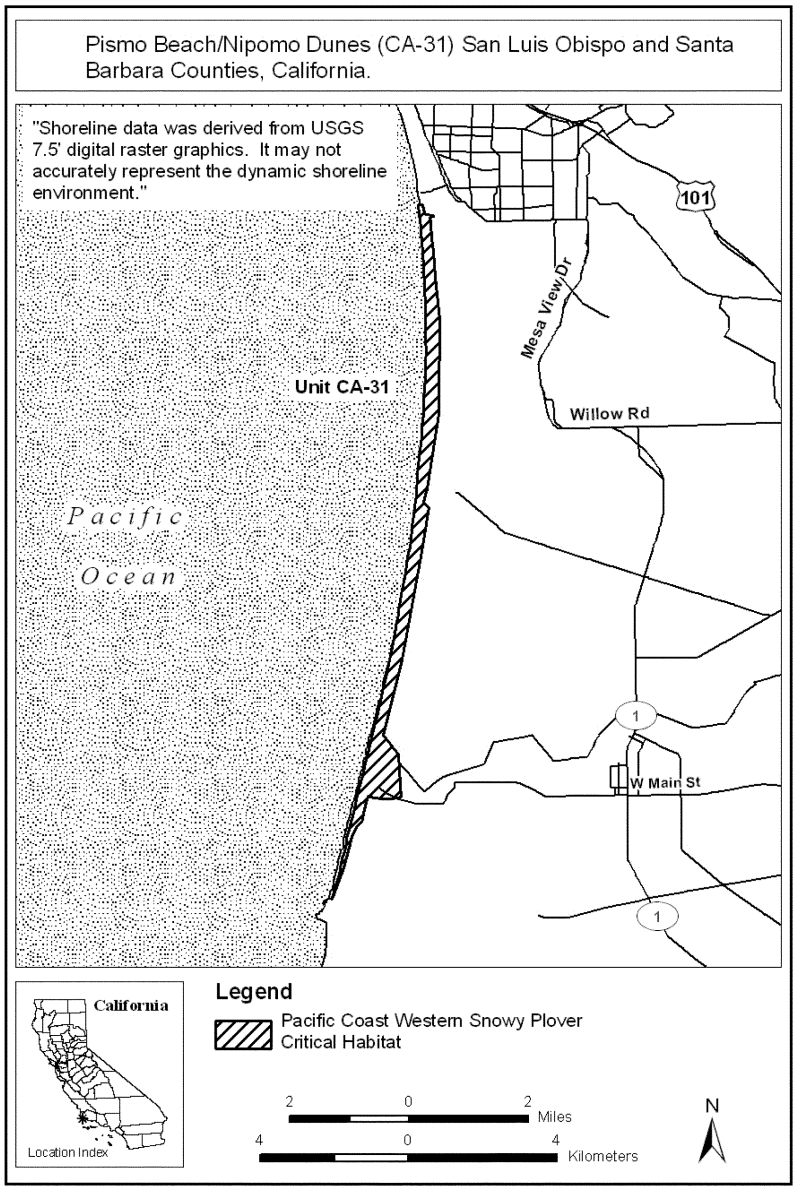
(ii) **Note:** Map of Unit CA 30: Moro Bay Beach, San Luis Obispo County, California, follows:



(67) Unit CA 31: Pismo Beach/Nipomo Dunes, San Luis Obispo and Santa Barbara Counties, California.

(i) [Reserved for textual description of Unit CA 31: Pismo Beach/Nipomo Dunes, San Luis Obispo and Santa Barbara Counties, California]

(ii) **Note:** Map of Unit CA 31: Pismo Beach/Nipomo Dunes, San Luis Obispo and Santa Barbara Counties, California, follows:



(68) Unit CA 32: Vandenberg North, Santa Barbara County, California.

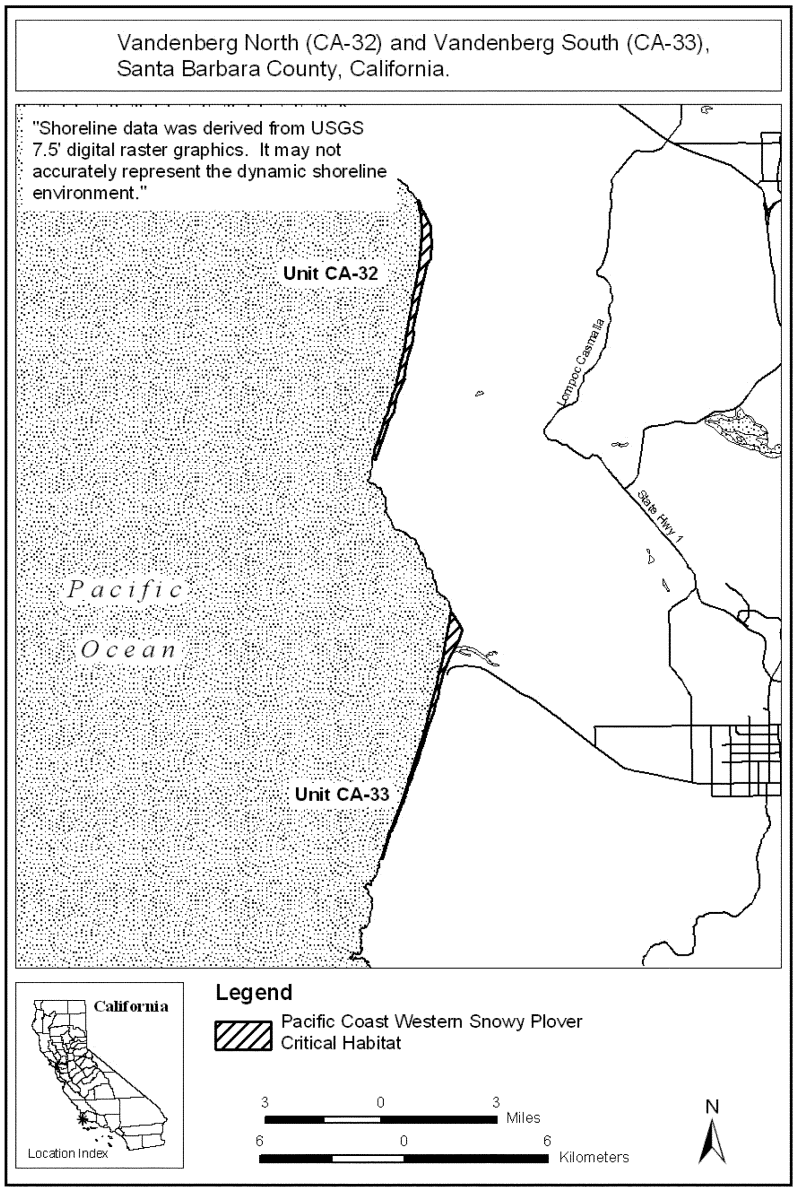
(i) [Reserved for textual description of Unit CA 32: Vandenberg North, Santa Barbara County, California]

(ii) **Note:** Unit CA 32: Vandenberg North, Santa Barbara County, California, is depicted on the map in paragraph (69)(ii) of this entry.

(69) Unit CA 33: Vandenberg South, Santa Barbara County, California.

(i) [Reserved for textual description of Unit CA 33: Vandenberg South, Santa Barbara County, California]

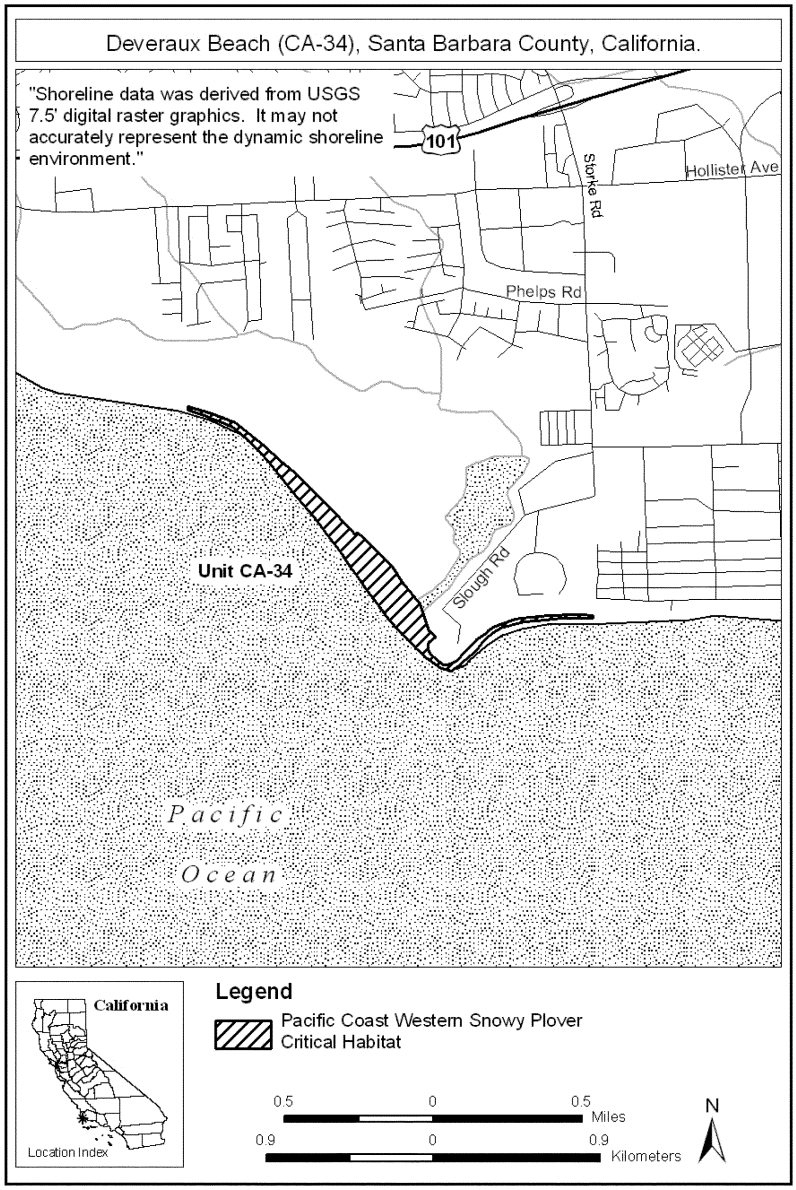
(ii) **Note:** Map of Unit CA 32: Vandenberg North and Unit CA 33: Vandenberg South, Santa Barbara County, California, follows:



(70) Unit CA 34: Devereaux Beach, Santa Barbara County, California.

(i) [Reserved for textual description of Unit CA 34: Devereaux Beach, Santa Barbara County, California]

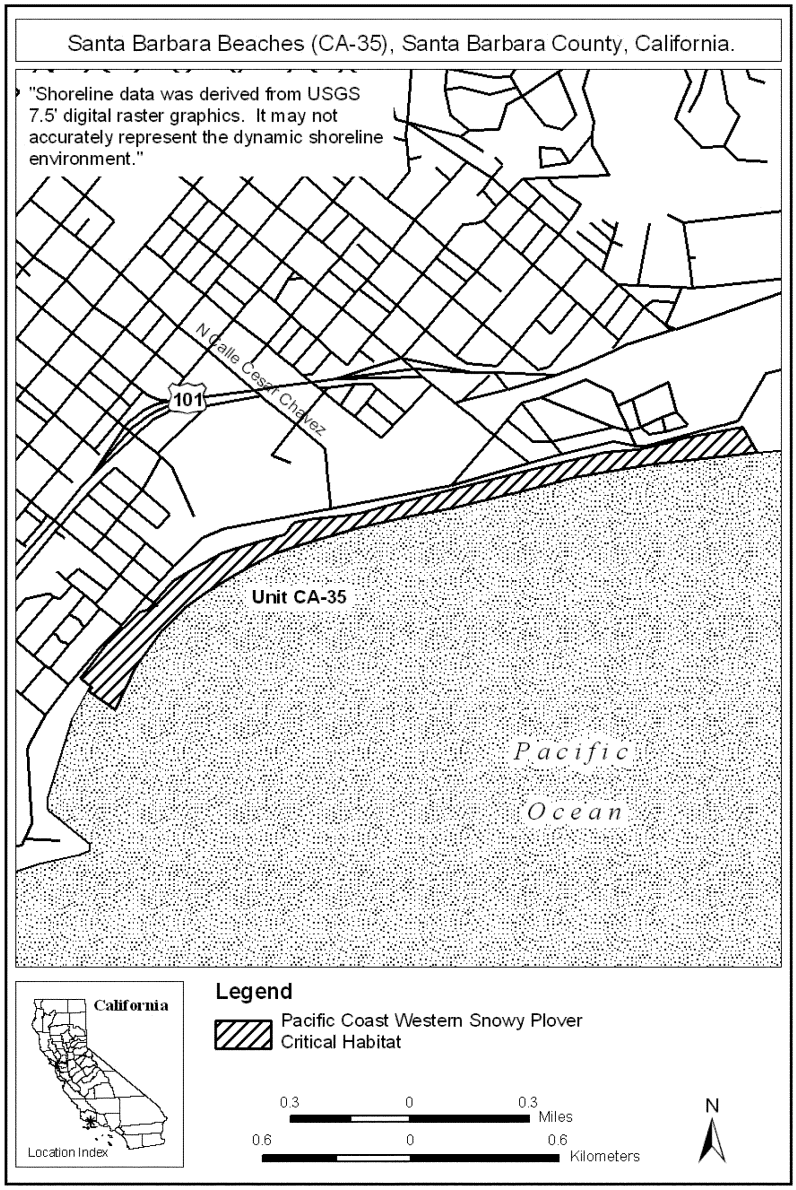
(ii) **Note:** Map of Unit CA 34: Devereaux Beach, Santa Barbara County, California, follows:



(71) Unit CA 35: Santa Barbara Beaches, Santa Barbara County, California.

(i) [Reserved for textual description of Unit CA 35: Santa Barbara Beaches, Santa Barbara County, California]

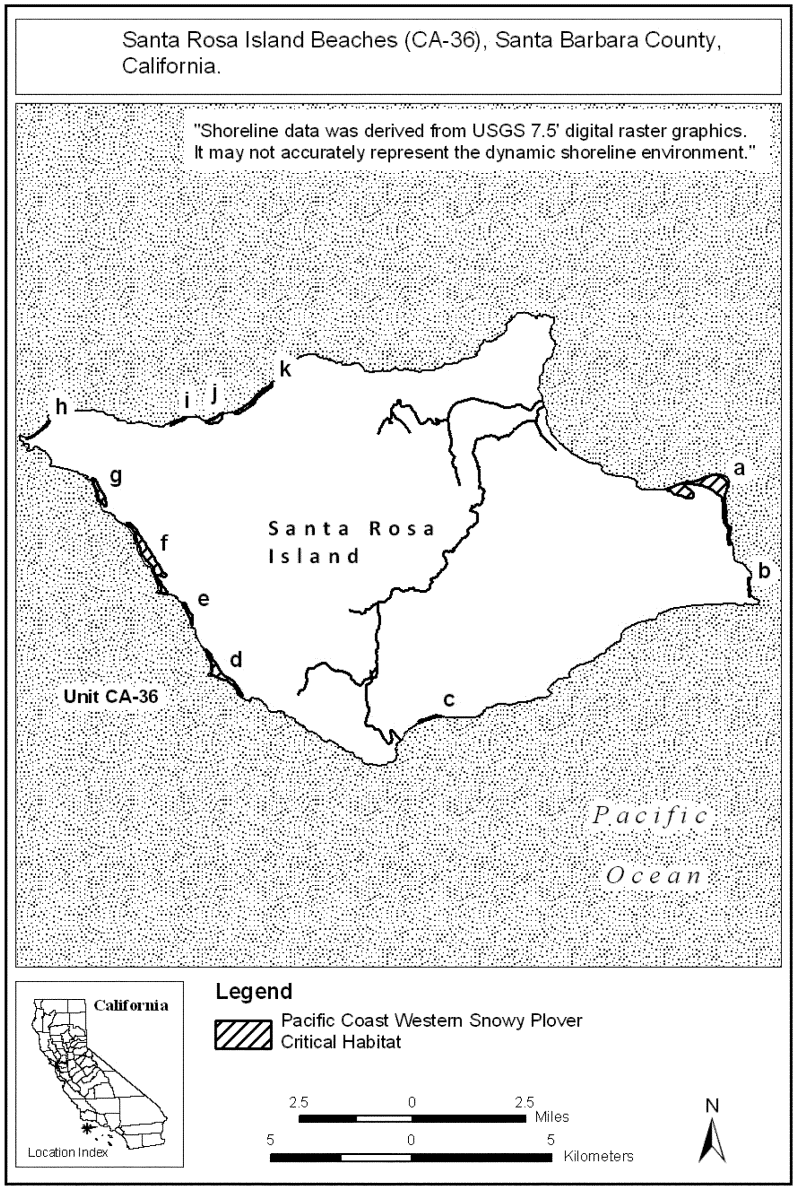
(ii) **Note:** Map of Unit CA 35: Santa Barbara Beaches, Santa Barbara County, California, follows:



(72) Unit CA 36: Santa Rosa Island Beaches, Santa Barbara County, California.

(i) [Reserved for textual description of Unit CA 36: Santa Rosa Island Beaches, Santa Barbara County, California]

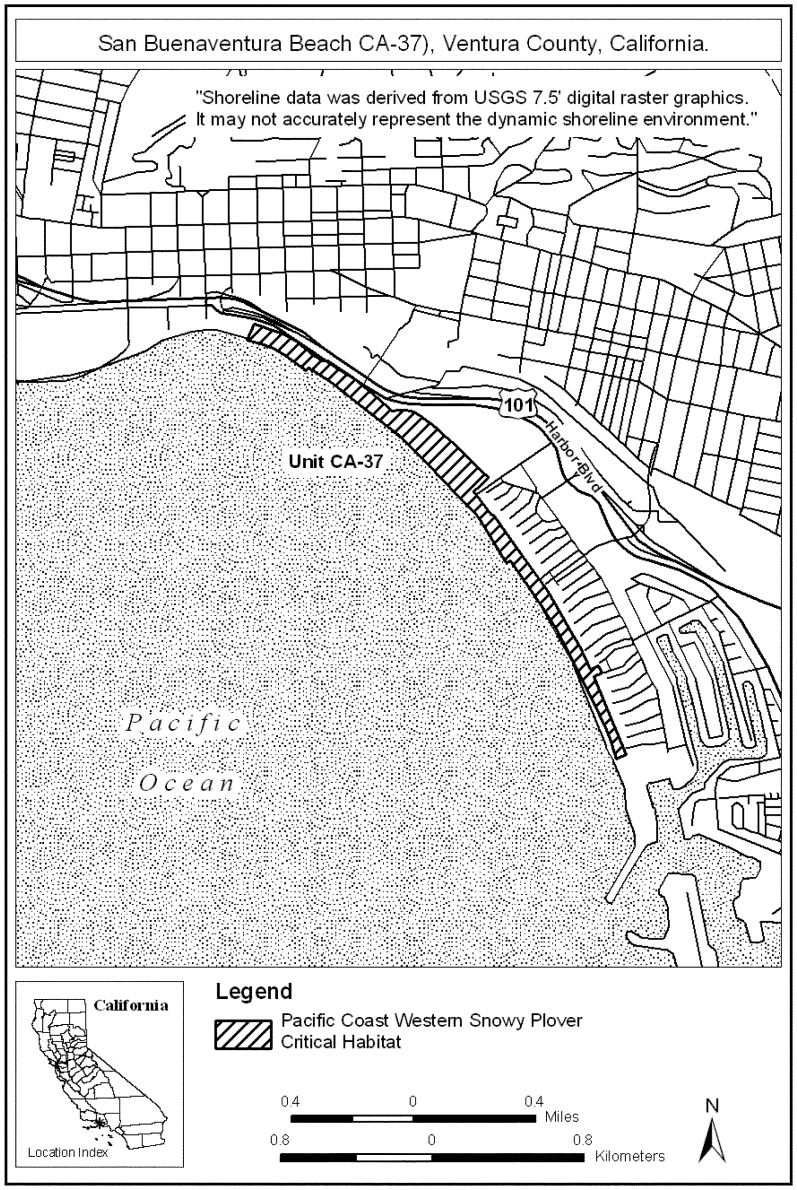
(ii) **Note:** Map of Unit CA 36: Santa Rosa Island Beaches, Santa Barbara County, California, follows:



(73) Unit CA 37: San Buenaventura Beach, Ventura County, California.

(i) [Reserved for textual description of Unit CA 37: San Buenaventura Beach, Ventura County, California]

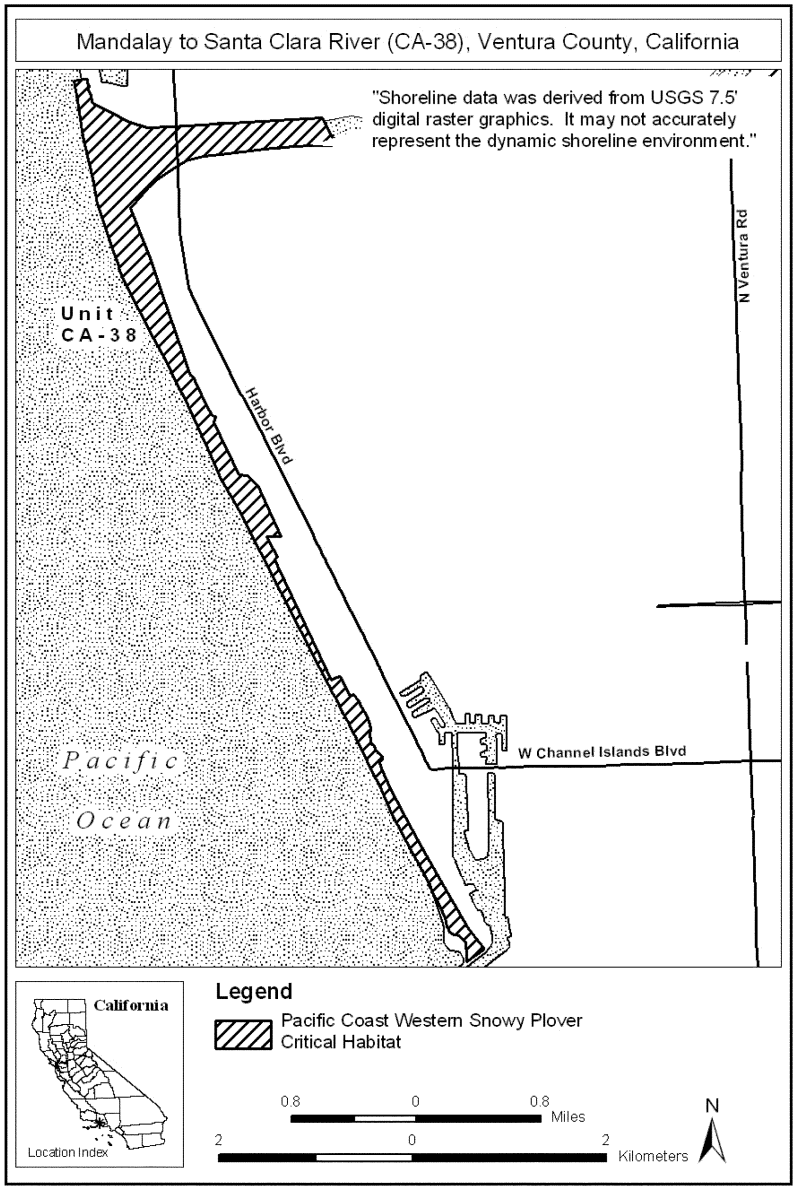
(ii) **Note:** Map of Unit CA 37: San Buenaventura Beach, Ventura County, California, follows:



(74) Unit CA 38: Mandalay to Santa Clara River, Ventura County, California.

(i) [Reserved for textual description of Unit CA 38: Mandalay to Santa Clara River, Ventura County, California]

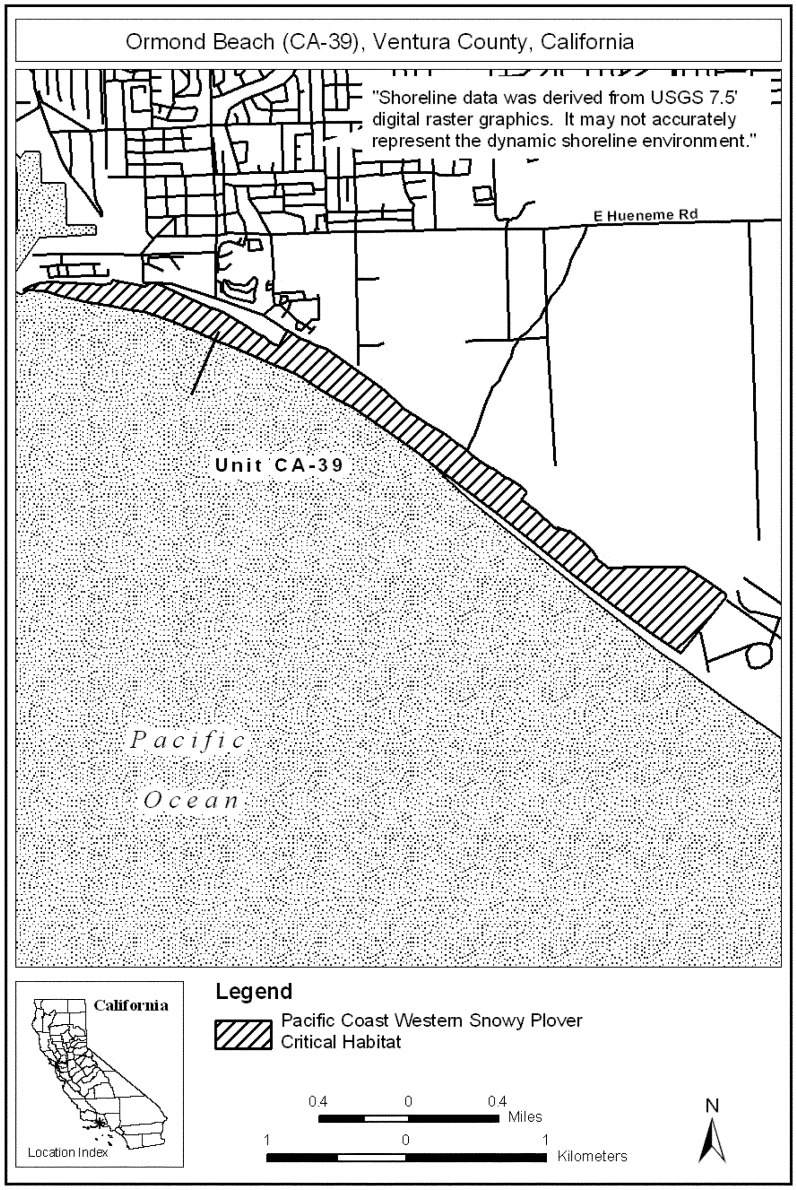
(ii) **Note:** Map of Unit CA 38: Mandalay to Santa Clara River, Ventura County, California, follows:



(75) Unit CA 39: Ormand Beach, Ventura County, California.

(i) [Reserved for textual description of Unit CA 39: Ormand Beach, Ventura County, California]

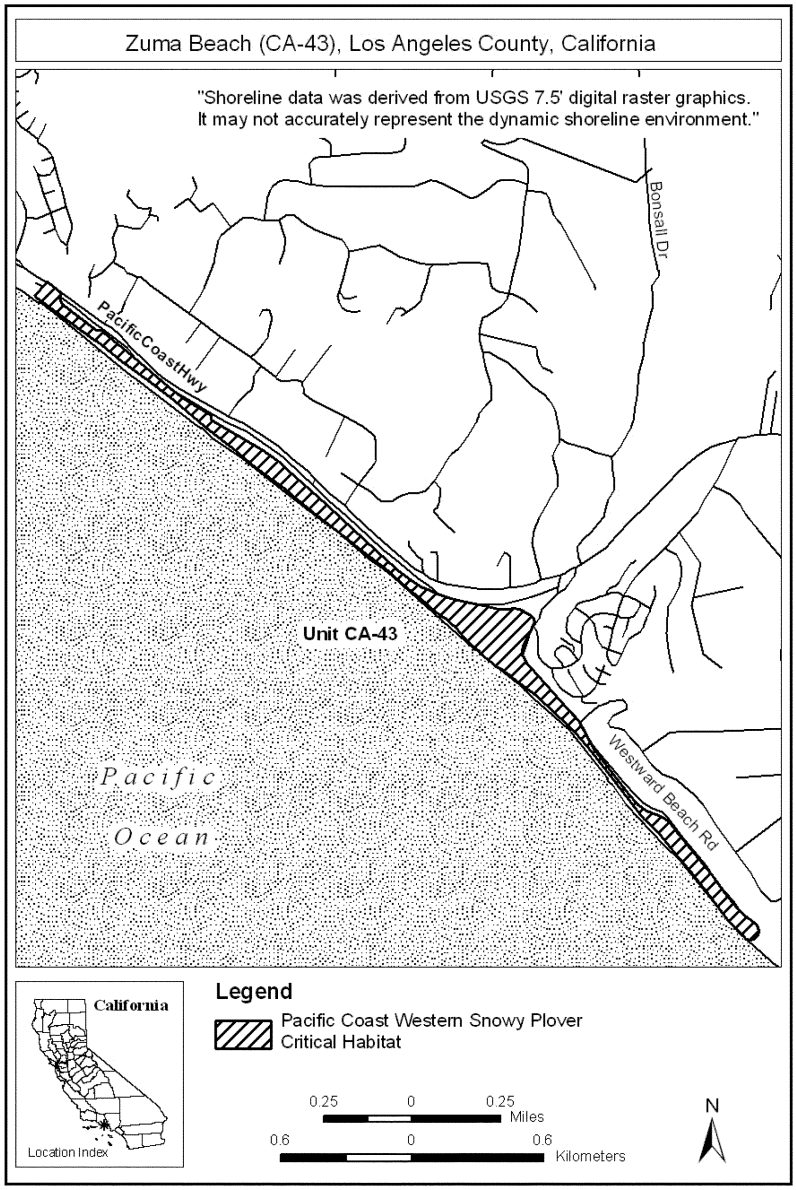
(ii) **Note:** Map of Unit CA 39: Ormand Beach, Ventura County, California, follows:



(76) Unit CA 43: Zuma Beach, Los Angeles County, California.

(i) [Reserved for textual description of Unit CA 43: Zuma Beach, Los Angeles County, California]

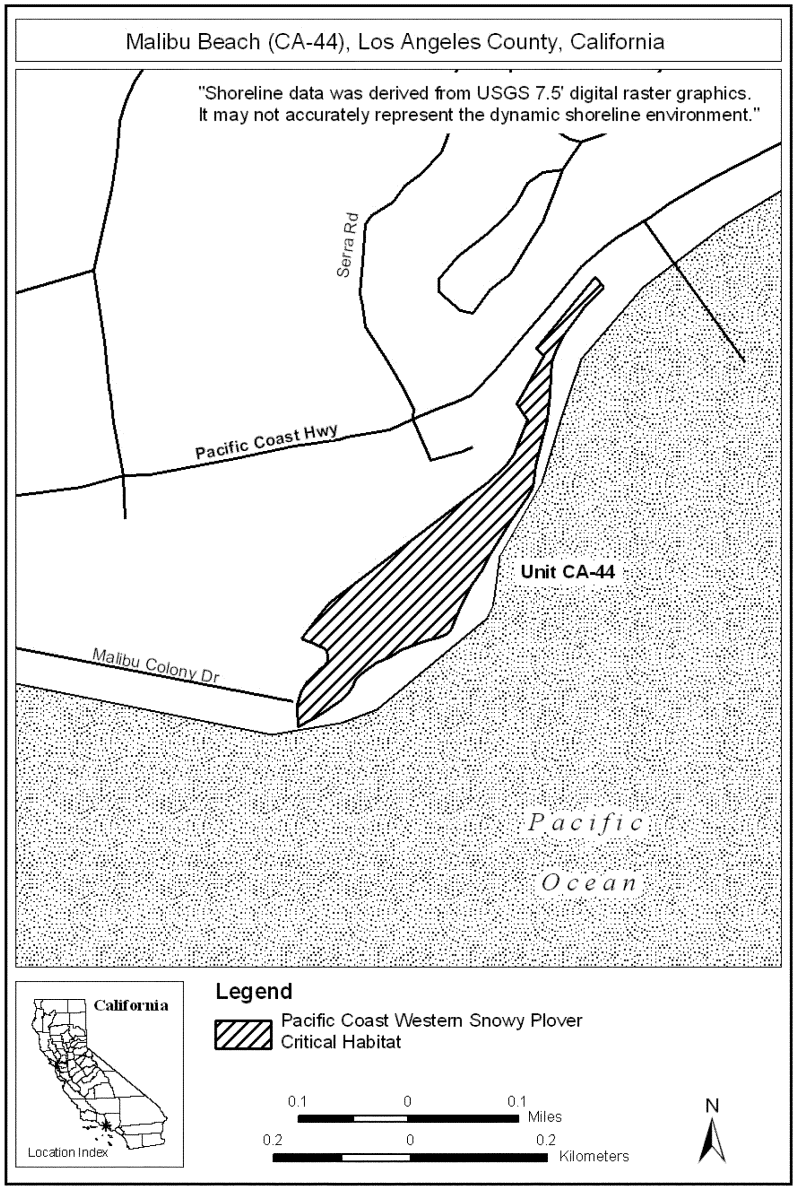
(ii) **Note:** Map of Unit CA 43: Zuma Beach, Los Angeles County, California, follows:



(77) Unit CA 44: Malibu Beach, Los Angeles County, California.

(i) [Reserved for textual description of Unit CA 44: Malibu Beach, Los Angeles County, California]

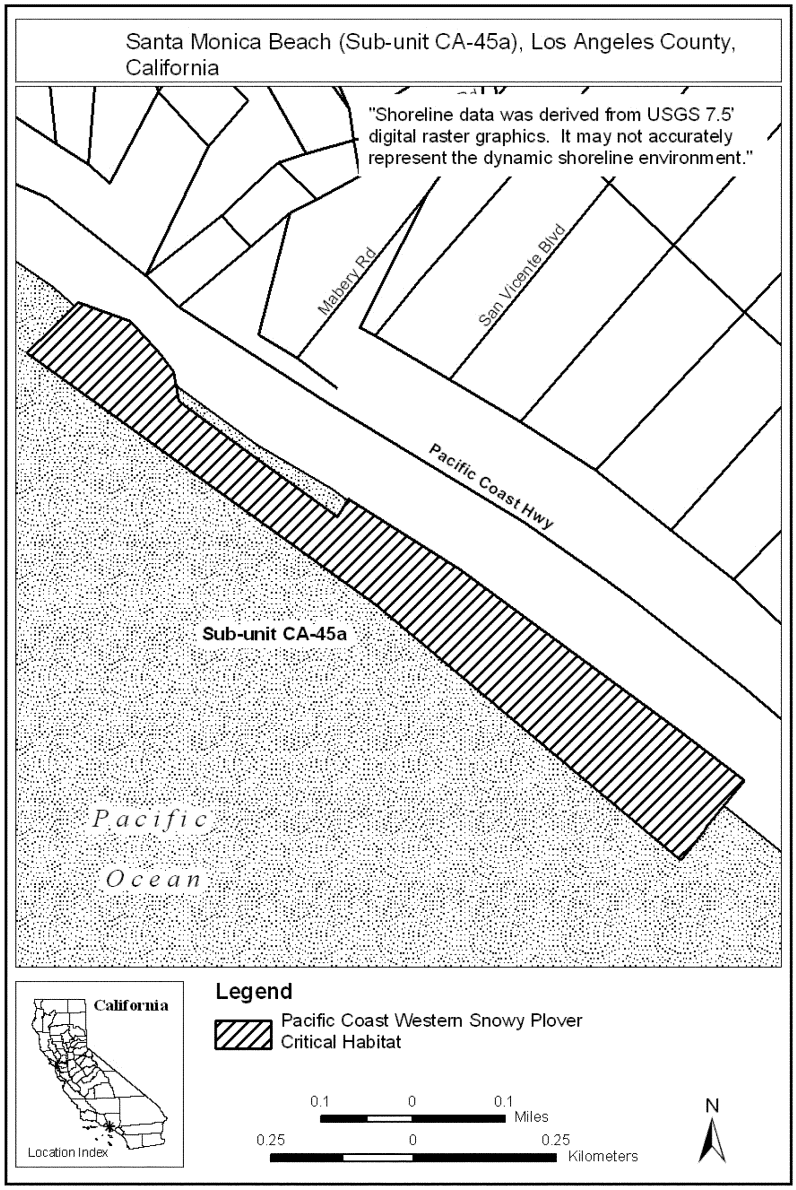
(ii) **Note:** Map of Unit CA 44: Malibu Beach, Los Angeles County, California, follows:



(78) Subunit CA 45A: Santa Monica Beach, Los Angeles County, California.

(i) [Reserved for textual description of Subunit CA 45A: Santa Monica Beach, Los Angeles County, California]

(ii) **Note:** Map of Subunit CA 45A: Santa Monica Beach, Los Angeles County, California, follows:



(79) Subunit CA 45B: Dockweiler North, Los Angeles County, California.

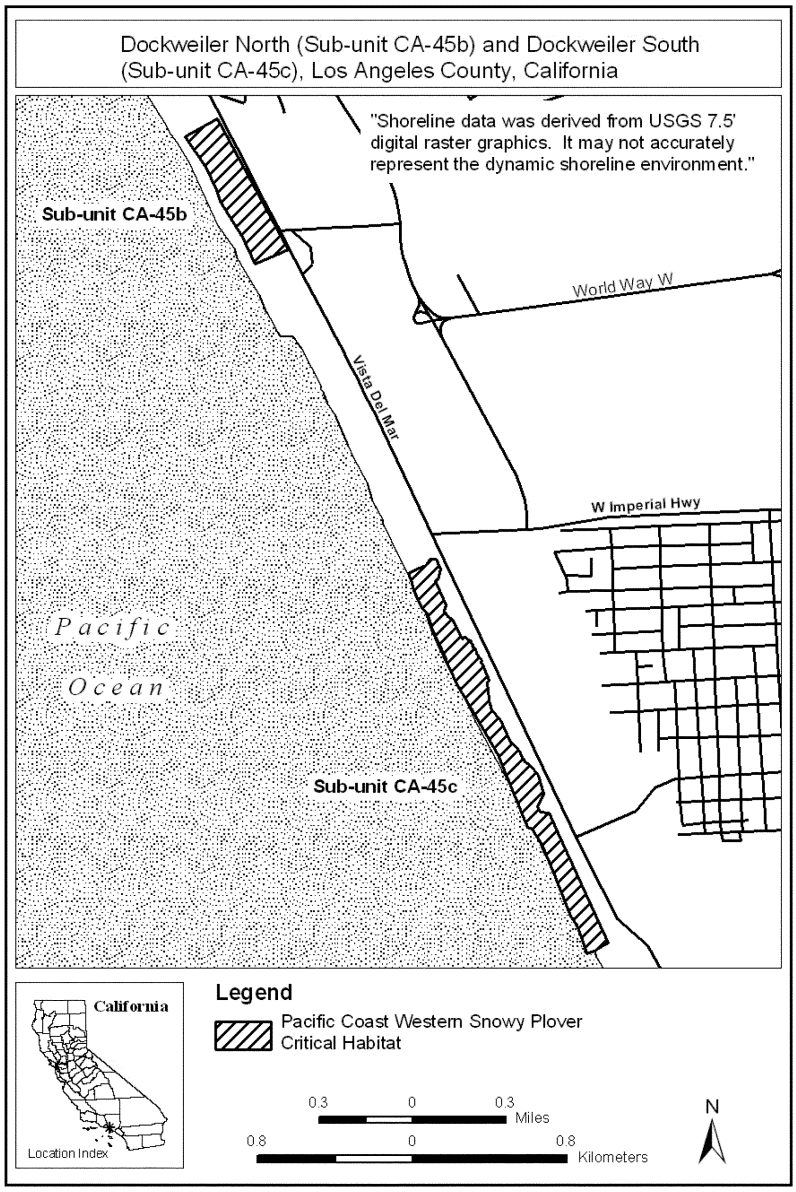
(i) [Reserved for textual description of Subunit CA 45B: Dockweiler North, Los Angeles County, California]

(ii) **Note:** Subunit CA 45B: Dockweiler North, Los Angeles County, California is depicted on the map in paragraph (80)(ii) of this entry.

(80) Subunit CA 45C: Dockweiler South, Los Angeles County, California.

(i) [Reserved for textual description of Subunit CA 45C: Dockweiler South, Los Angeles County, California]

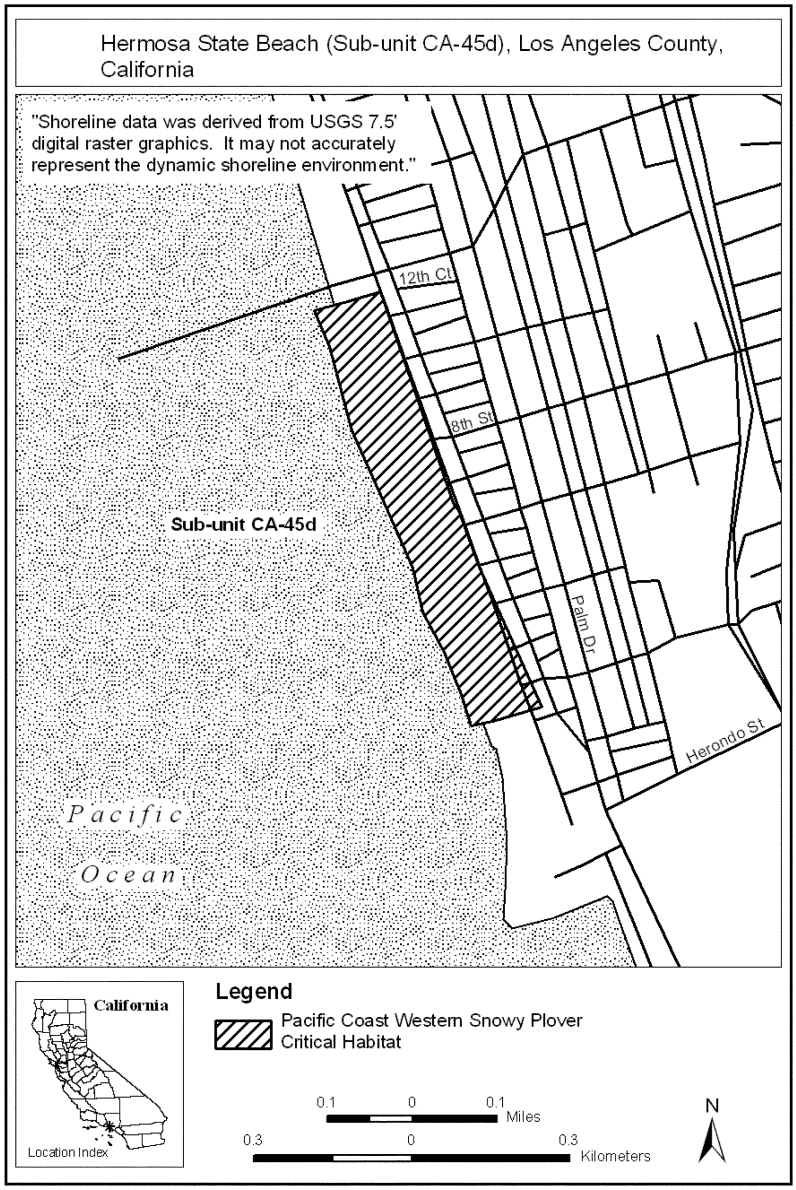
(ii) **Note:** Map of Subunit CA 45B: Dockweiler North and CA 45C: Dockweiler South, Los Angeles County, California, follows:



(81) Subunit CA 45D: Hermosa State Beach, Los Angeles County, California.

(i) [Reserved for textual description of Subunit CA 45D: Hermosa State Beach, Los Angeles County, California]

(ii) **Note:** Map of Subunit CA 45D: Hermosa State Beach, Los Angeles County, California, follows:



(82) Subunit CA 46A: Bolsa Chica Reserve, Orange County, California.

(i) [Reserved for textual description of Subunit CA 46A: Bolsa Chica Reserve, Orange County, California]

(ii) **Note:** Subunit CA 46A: Bolsa Chica Reserve, Orange County, California, is depicted on the map in paragraph (86)(ii) of this entry.

(83) Subunit CA 46B: Bolsa Chica Reserve, Orange County, California.

(i) [Reserved for textual description of Subunit CA 46B: Bolsa Chica Reserve, Orange County, California]

(ii) **Note:** Subunit CA 46B: Bolsa Chica Reserve, Orange County, California, is depicted on the map in paragraph (86)(ii) of this entry.

(84) Subunit CA 46C: Bolsa Chica Reserve, Orange County, California.

(i) [Reserved for textual description of Subunit CA 46C: Bolsa Chica Reserve, Orange County, California]

(ii) **Note:** Subunit CA 46C: Bolsa Chica Reserve, Orange County, California, is depicted on the map in paragraph (86)(ii) of this entry.

(85) Subunit CA 46D: Bolsa Chica Reserve, Orange County, California.

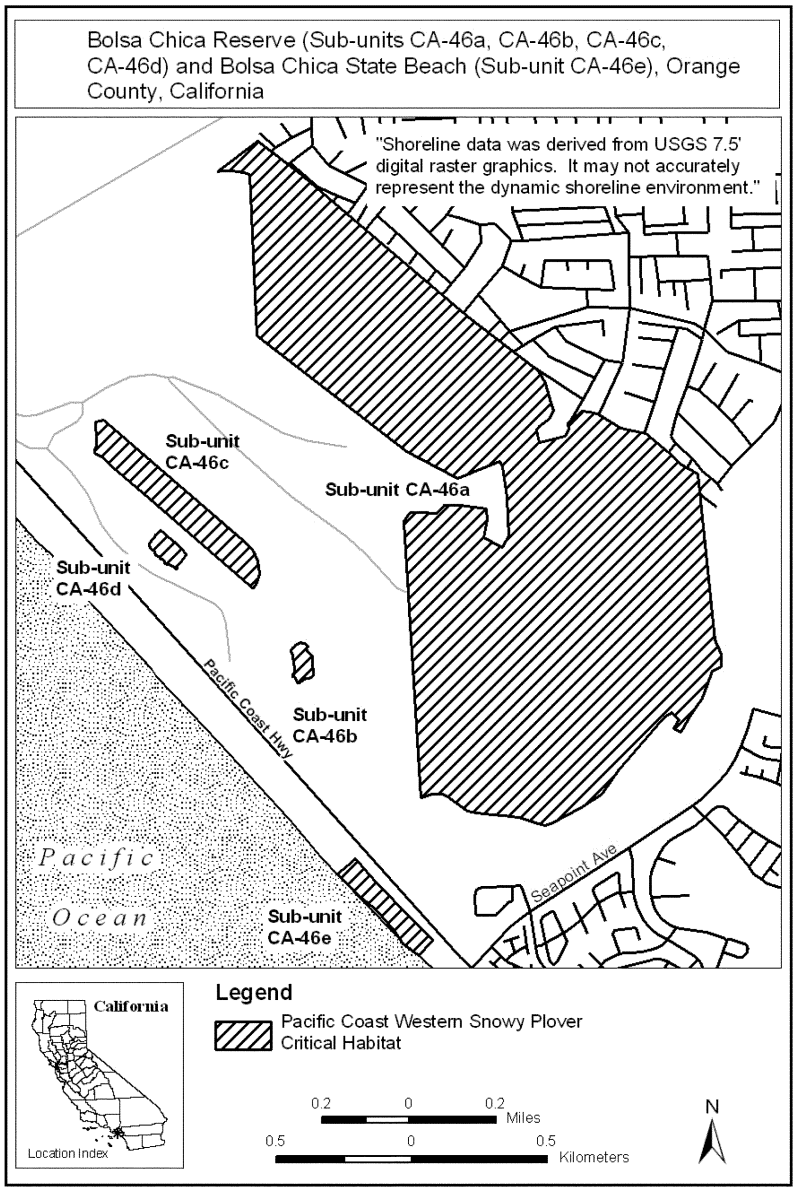
(i) [Reserved for textual description of Subunit CA 46D: Bolsa Chica Reserve, Orange County, California]

(ii) **Note:** Subunit CA 46D: Bolsa Chica Reserve, Orange County, California, is depicted on the map in paragraph (86)(ii) of this entry.

(86) Subunit CA 46E: Bolsa Chica State Beach, Orange County, California.

(i) [Reserved for textual description of Subunit CA 46E: Bolsa Chica State Beach, Orange County, California]

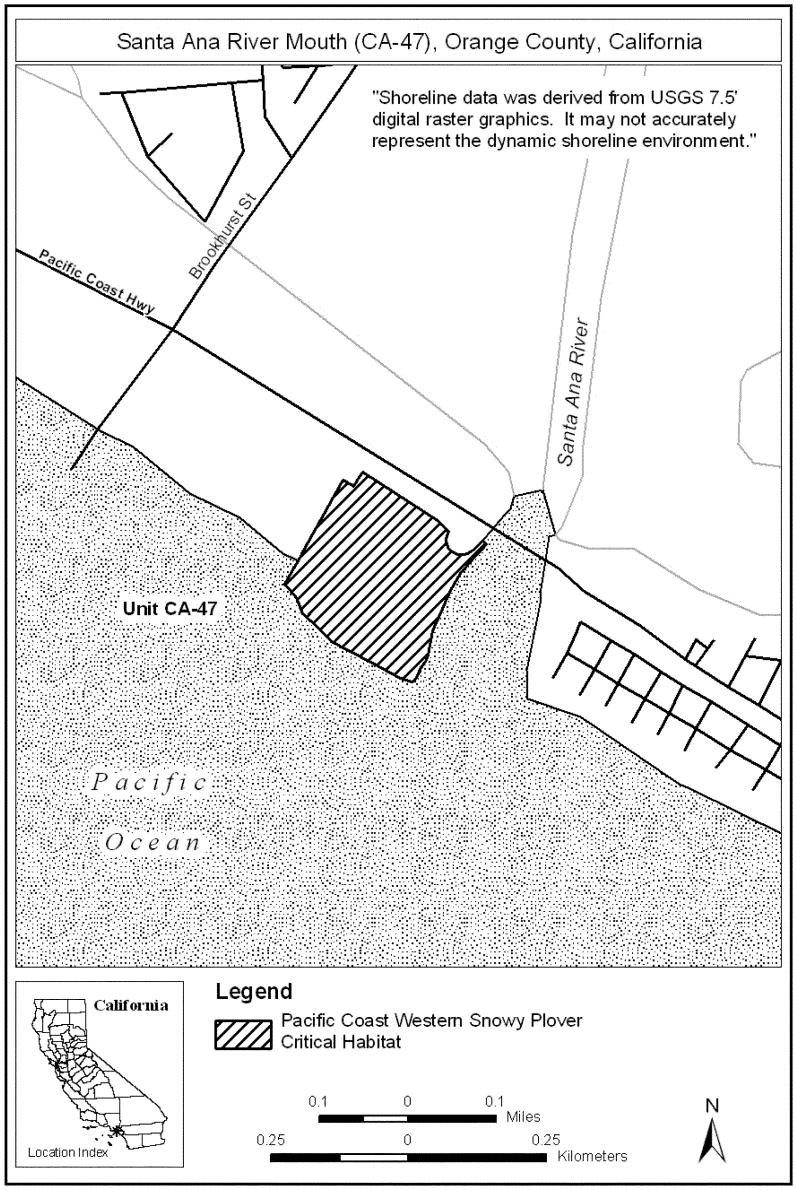
(ii) **Note:** Map of Subunits CA 46A–46E: Bolsa Chica Reserve, Orange County, California, follows:



(87) Unit CA 47: Santa Ana River Mouth, Orange County, California.

(i) [Reserved for textual description of Unit CA 47: Santa Ana River South, Orange County, California]

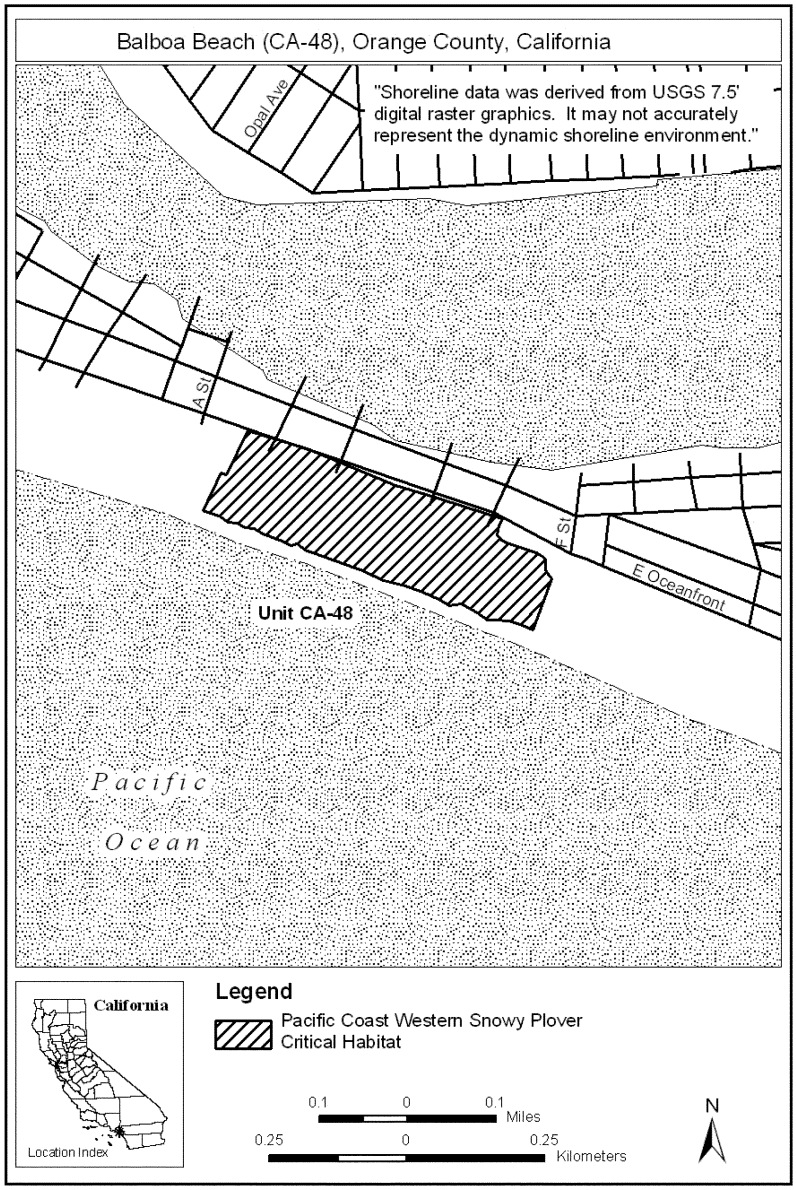
(ii) **Note:** Map of Unit CA 47: Santa Ana River Mouth, Orange County, California, follows:



(88) Unit CA 48: Balboa Beach, Orange County, California.

(i) [Reserved for textual description of Unit CA 48: Balboa Beach, Orange County, California.]

(ii) **Note:** Map of Unit CA 48: Balboa Beach, Orange County, California. follows:



(89) Subunit CA 50A: Batiquitos Lagoon, San Diego County, California.

(i) [Reserved for textual description of Subunit CA 50A: Batiquitos Lagoon, San Diego County, California.]

(ii) **Note:** Subunit CA 50A: Batiquitos Lagoon, San Diego County, California is depicted on the map in paragraph (91)(ii) of this entry.

(90) Subunit CA 50B: Batiquitos Lagoon, San Diego County, California.

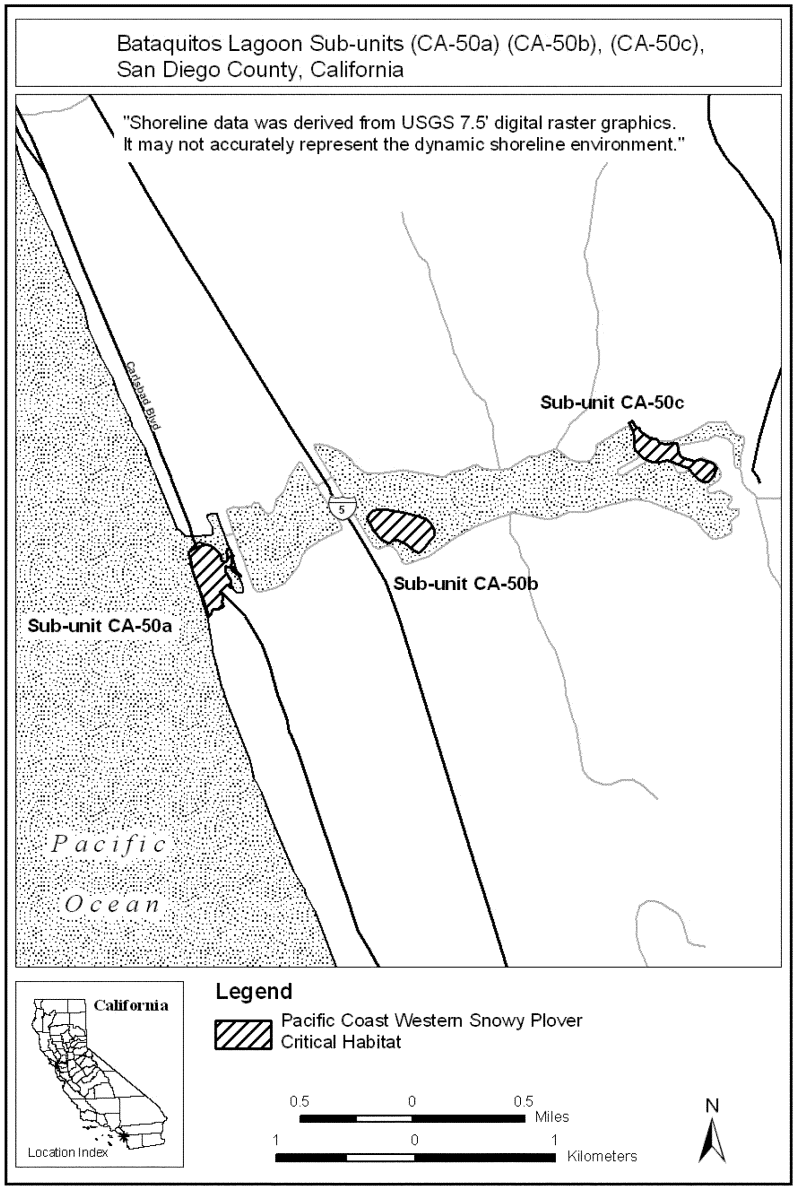
(i) [Reserved for textual description of Subunit CA 50B: Batiquitos Lagoon, San Diego County, California]

(ii) **Note:** Subunit CA 50B: Batiquitos Lagoon, San Diego County, California is depicted on the map in paragraph (91)(ii) of this entry.

(91) Subunit CA 50C: Batiquitos Lagoon, San Diego County, California.

(i) [Reserved for textual description of Subunit CA 50C: Batiquitos Lagoon, San Diego County, California]

(ii) **Note:** Map of Subunits CA 50A–50C: Batiquitos Lagoon, San Diego County, California, follows:



(92) Subunit CA 51A: San Elijo Lagoon Ecological Reserve, San Diego County, California.

(i) [Reserved for textual description of Subunit 51A: San Elijo Lagoon Ecological Reserve, San Diego County, California]

(ii) **Note:** Subunit 51A: San Elijo Lagoon Ecological Reserve, San Diego County, California, is depicted on the map in paragraph (94)(ii) of this entry.

(93) Subunit CA 51B: San Elijo Lagoon Ecological Reserve, San Diego County, California.

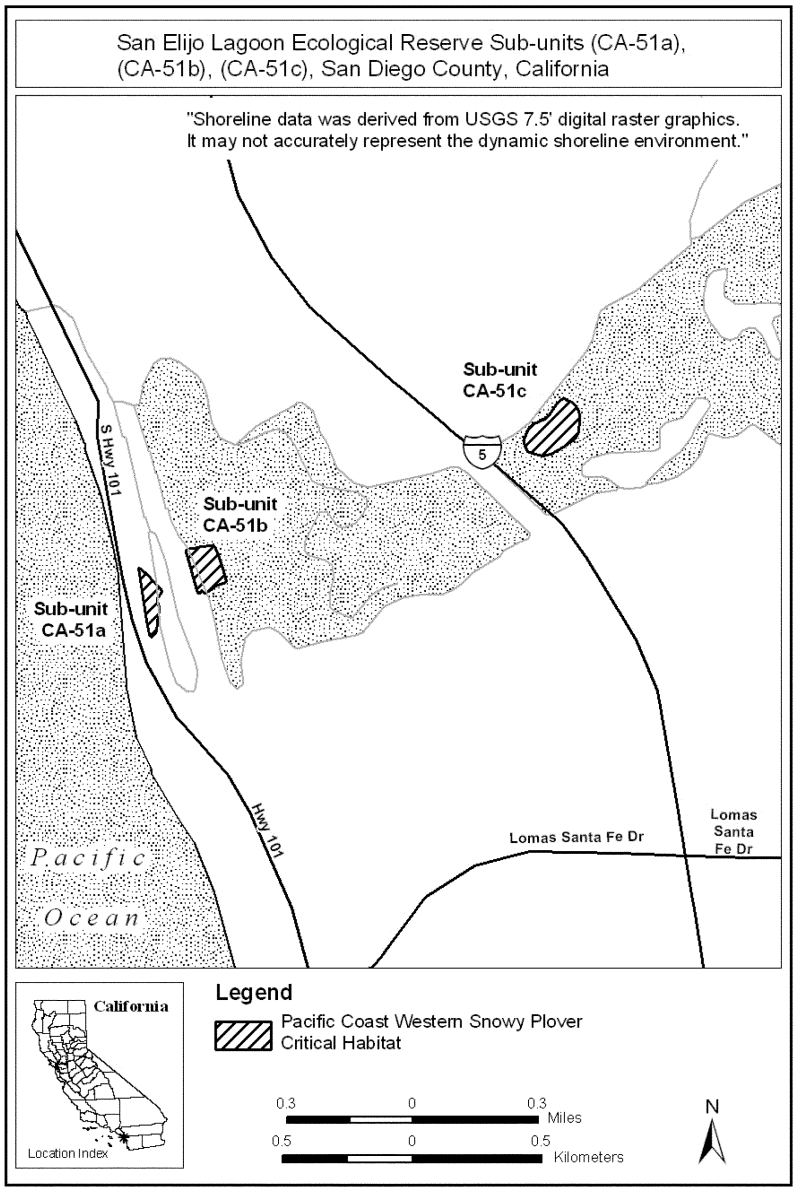
(i) [Reserved for textual description of Subunit CA 51B: San Elijo Lagoon Ecological Reserve, San Diego County, California]

(ii) **Note:** Subunit CA 51B: San Elijo Lagoon Ecological Reserve, San Diego County, California, is depicted on the map in paragraph (94)(ii) of this entry.

(94) Subunit CA 51C: San Elijo Lagoon Ecological Reserve, San Diego County, California.

(i) [Reserved for textual description of Subunit CA 51C: San Elijo Lagoon Ecological Reserve, San Diego County, California]

(ii) **Note:** Map of Subunits CA 51A–51C: San Elijo Lagoon Ecological Reserve, San Diego County, California, follows:



(95) Subunit CA 52A: San Dieguito Lagoon, San Diego County, California.

(i) [Reserved for textual description of Subunit CA 52A: San Dieguito Lagoon, San Diego County, California]

(ii) **Note:** Subunit CA 52A: San Dieguito Lagoon, San Diego County, California, is depicted on the map in paragraph (97)(ii) of this entry.

(96) Subunit CA 52B: San Dieguito Lagoon, San Diego County, California.

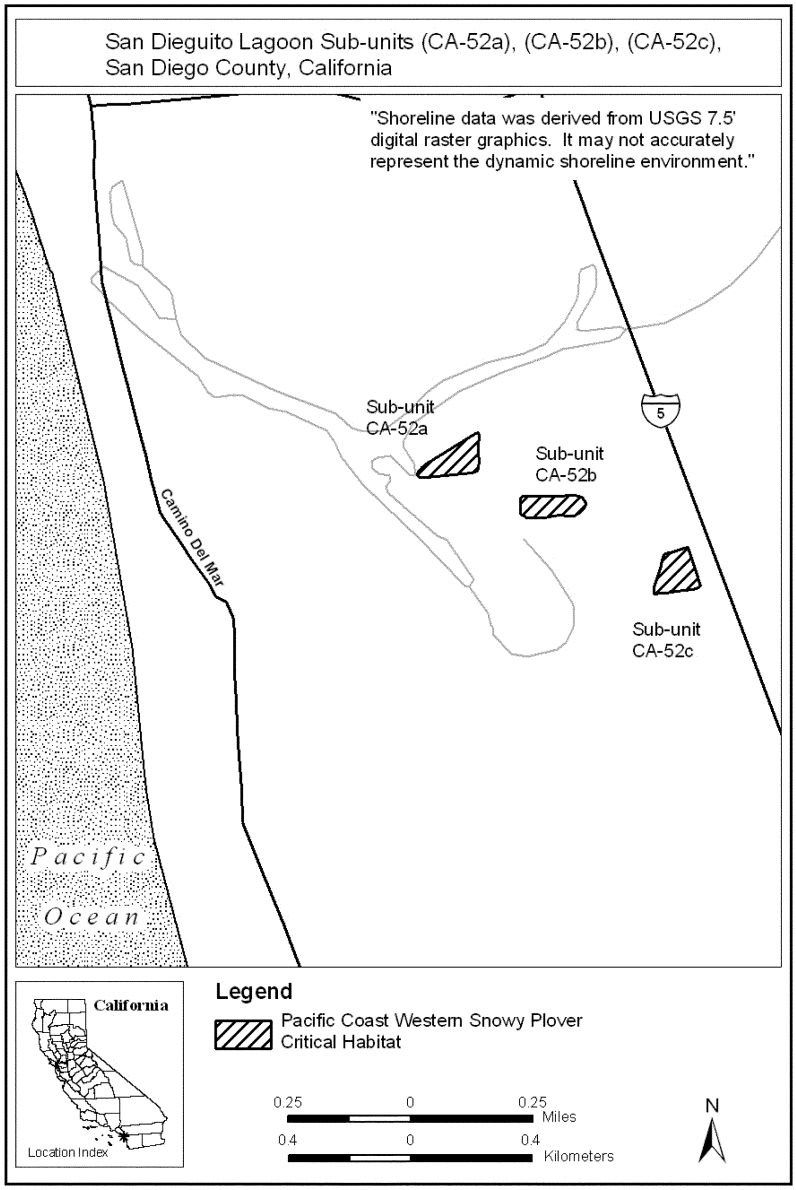
(i) [Reserved for textual description of Subunit CA 52B: San Dieguito Lagoon, San Diego County, California]

(ii) **Note:** Subunit CA 52B: San Dieguito Lagoon, San Diego County, California, is depicted on the map in paragraph (97)(ii) of this entry.

(97) Subunit CA 52C: San Dieguito Lagoon, San Diego County, California.

(i) [Reserved for textual description of Subunit CA 52C: San Dieguito Lagoon, San Diego County, California]

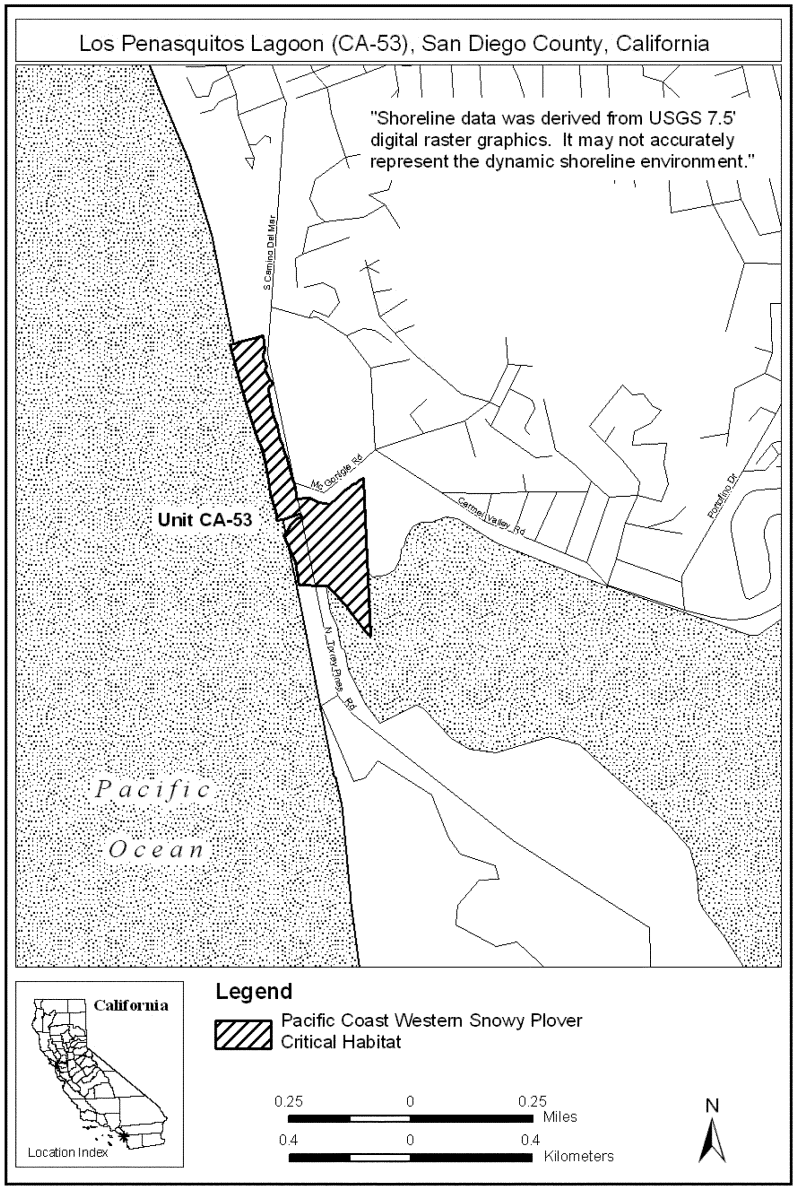
(ii) **Note:** Map of Subunits CA 52A–52C: San Dieguito Lagoon, San Diego County, California, follows:



(98) Unit CA 53: Los Penasquitos Lagoon, San Diego County, California.

(i) [Reserved for textual description of Unit CA 53: Los Penasquitos Lagoon, San Diego County, California.]

(ii) **Note:** Map of Unit CA 53: Los Penasquitos Lagoon, San Diego County, California, follows:



(99) Subunit CA 54A: Fiesta Island, San Diego County, California.

(i) [Reserved for textual description of Subunit CA 54A: Fiesta Island, San Diego County, California]

(ii) **Note:** Subunit CA 54A: Fiesta Island, San Diego County, California, is depicted on the map in paragraph (102)(ii) of this entry.

(100) Subunit CA 54B: Mariner's Point, San Diego County, California.

(i) [Reserved for textual description of Subunit CA 54B: Mariner's Point, San Diego County, California]

(ii) **Note:** Subunit CA 54B: Mariner's Point, San Diego County, California, is depicted on the map in paragraph (102)(ii) of this entry.

(101) Subunit CA 54C: South Mission Beach, San Diego County, California.

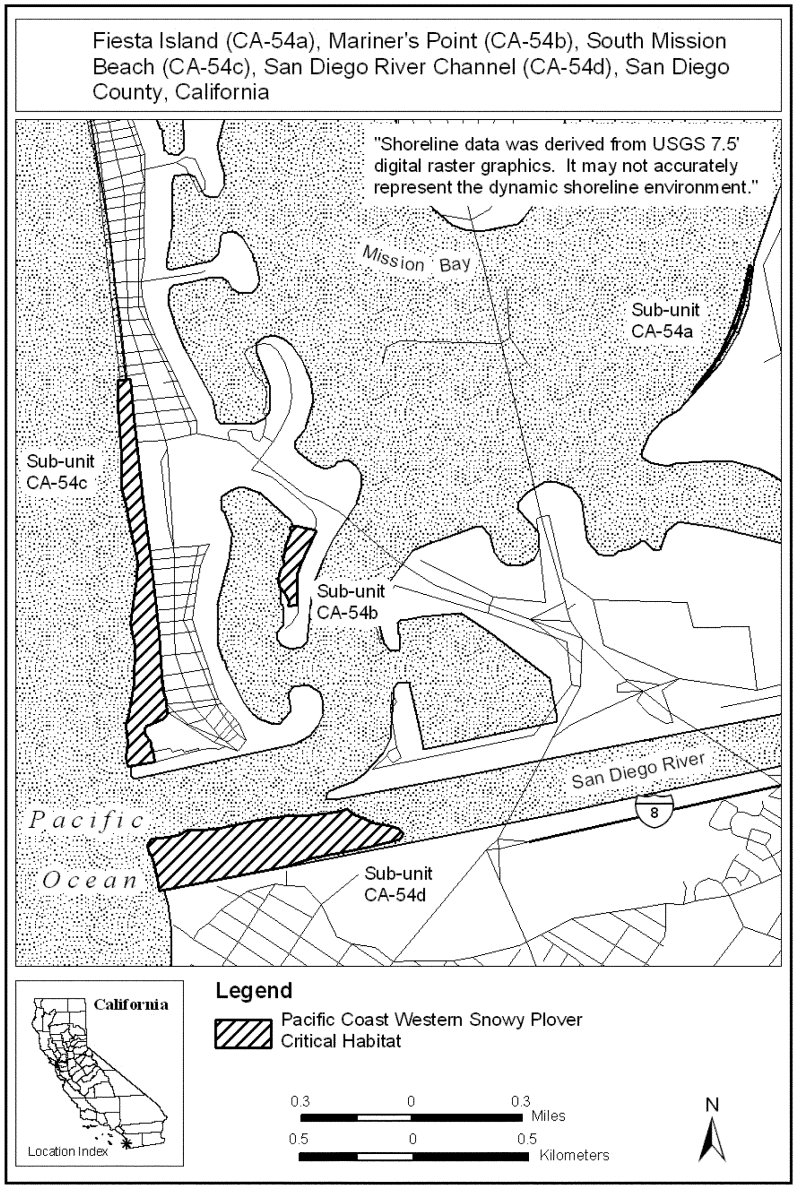
(i) [Reserved for textual description of Subunit CA 54C: South Mission Beach, San Diego County, California]

(ii) **Note:** Subunit CA 54C: South Mission Beach, San Diego County, California is depicted on the map in paragraph (102)(ii) of this entry.

(102) Subunit CA 54D: San Diego River Channel, San Diego County, California.

(i) [Reserved for textual description of Subunit CA 54D: San Diego River Channel, San Diego County, California]

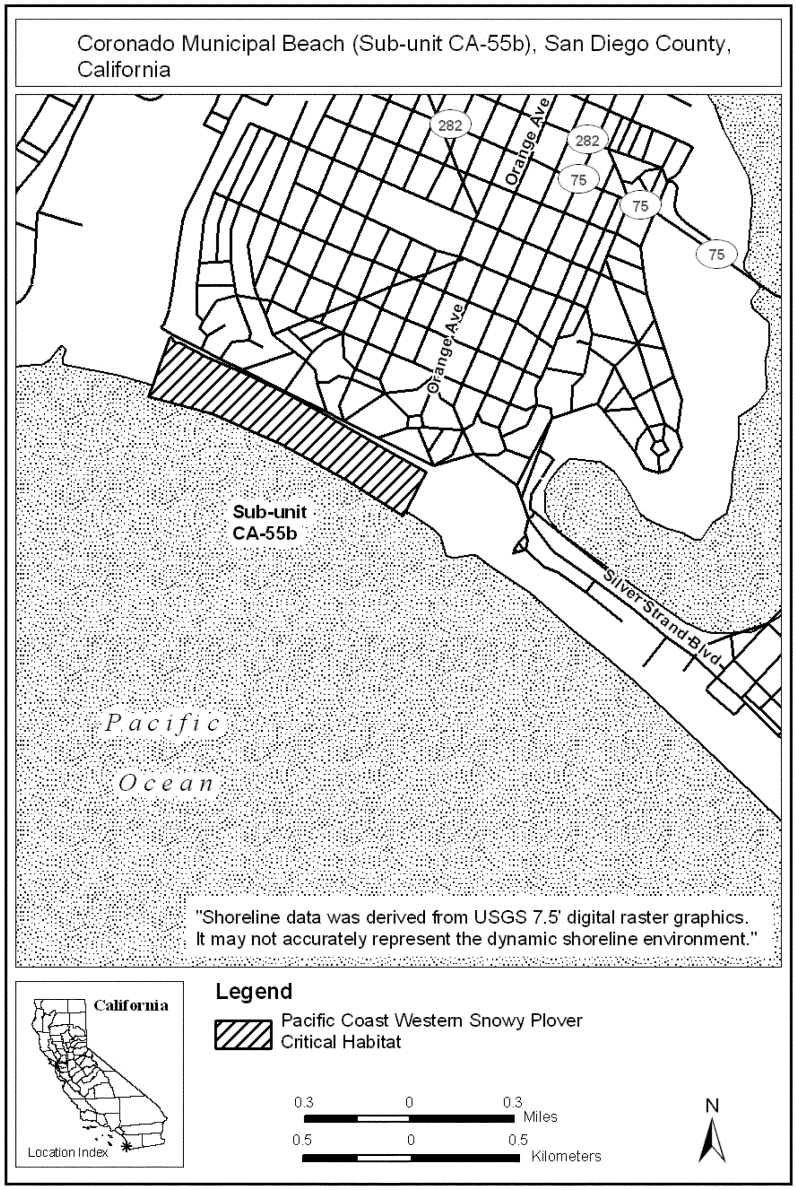
(ii) **Note:** Map of Subunits CA 54A–54D: San Diego River Channel, San Diego County, California, follows:



(103) Subunit CA 55B: Coronado Beach, San Diego County, California.

(i) [Reserved for textual description of Subunit CA 55B: Coronado Municipal Beach, San Diego County, California]

(ii) **Note:** Map of Subunit CA 55B: Coronado Beach, San Diego County, California follows:



(104) Subunit CA 55E: Sweetwater Marsh National Wildlife Refuge, San Diego County, California.

(i) [Reserved for textual description of Subunit CA 55E: Sweetwater Marsh National Wildlife Refuge, San Diego County, California]

(ii) **Note:** Subunit CA 55E: Sweetwater Marsh National Wildlife Refuge, San Diego County, California, is depicted on the map in paragraph (107)(ii) of this entry.

(105) Subunit CA 55F: Silver Strand State Beach, San Diego County, California.

(i) [Reserved for textual description of Subunit CA 55F: Silver Strand State Beach, San Diego County, San Diego County, California]

(ii) **Note:** Subunit CA 55F: Silver Strand State Beach, San Diego County, San Diego County, California, is depicted on the map in paragraph (107)(ii) of this entry.

(106) Subunit CA 55G: Chula Vista Wildlife Reserve, San Diego County, California.

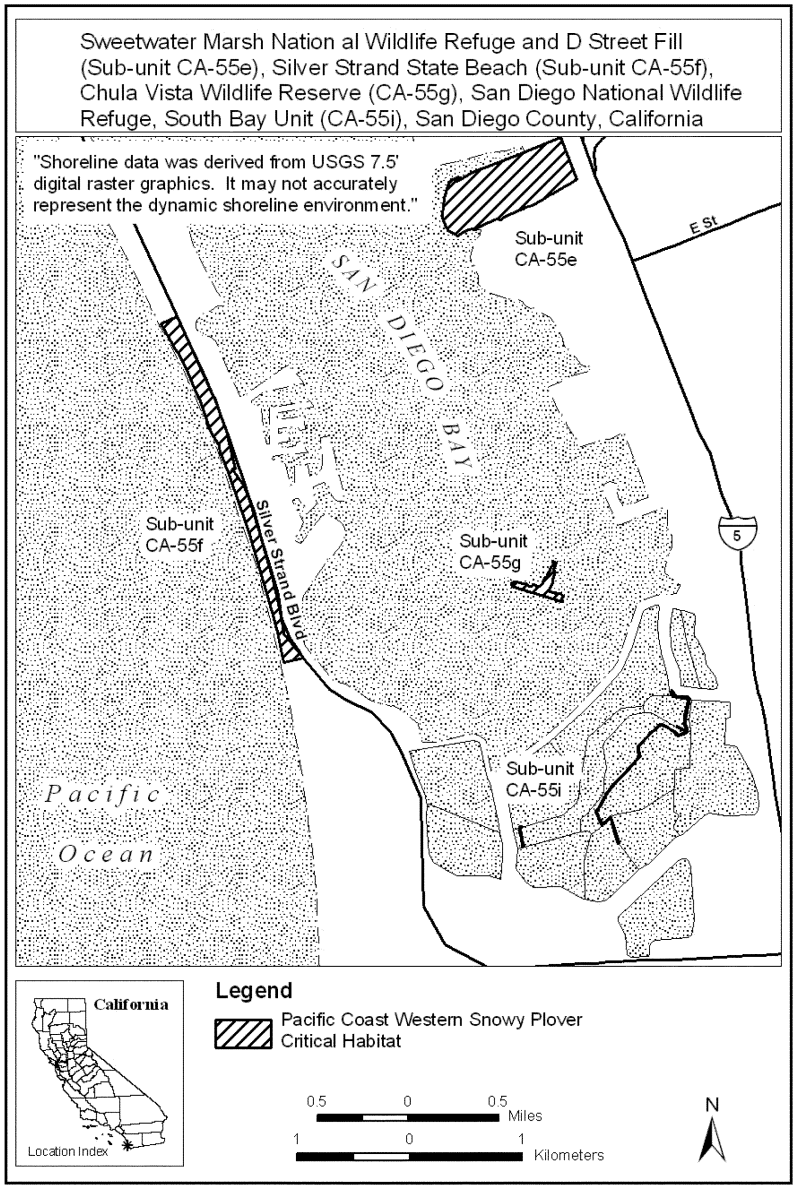
(i) [Reserved for textual description of Subunit CA 55G: Chula Vista Wildlife Reserve, San Diego County, California]

(ii) **Note:** Subunit CA 55G: Chula Vista Wildlife Reserve, San Diego County, California, is depicted on the map in paragraph (107)(ii) of this entry.

(107) Subunit CA 55I: San Diego National Wildlife Refuge—South Bay Unit, San Diego County, California.

(i) [Reserved for textual description of Subunit CA 55I: San Diego National Wildlife Refuge—South Bay Unit, San Diego County, California]

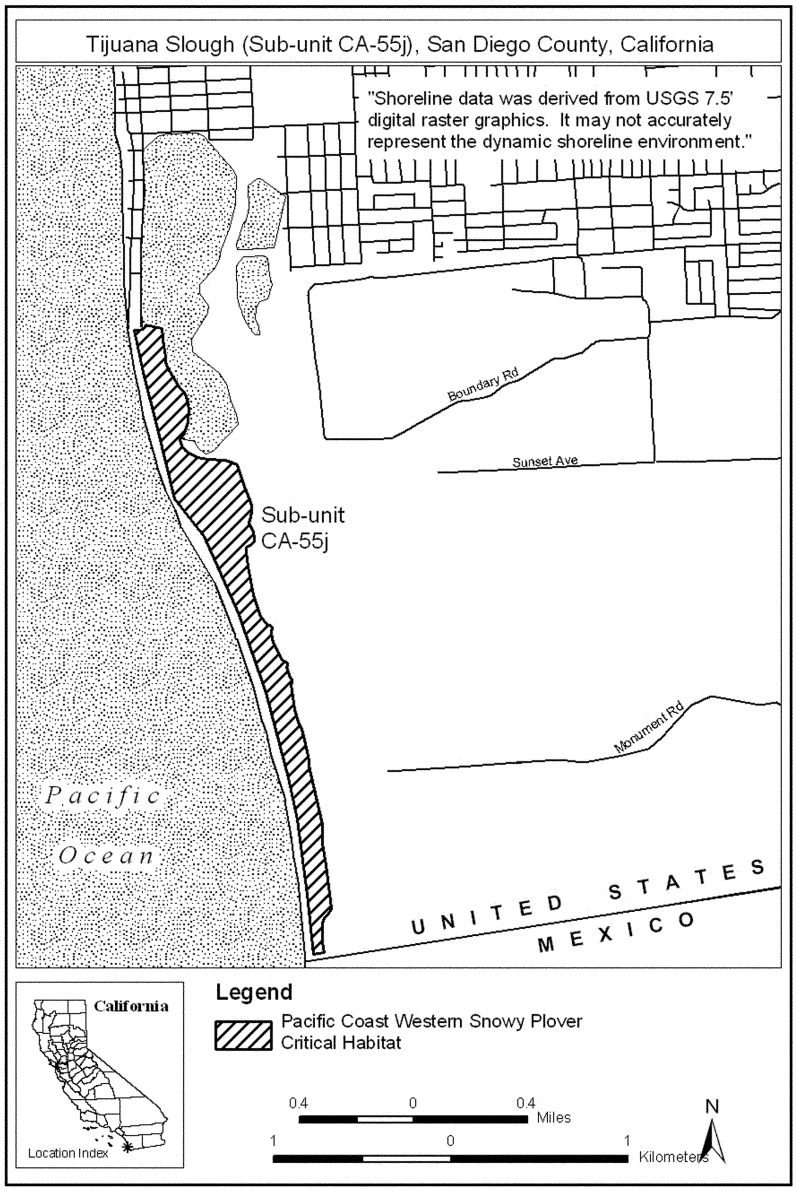
(ii) **Note:** Map of Subunit CA 55E: Sweetwater Marsh National Wildlife Refuge, CA 55F: Silver Strand State Beach, CA 55G: Chula Vista Wildlife Reserve, and CA 55I: San Diego National Wildlife Refuge—South Bay Unit, San Diego County, California, follows:



(108) Subunit CA 55J: Tijuana Estuary and Beach, San Diego County, California.

(i) [Reserved for textual description of Subunit CA 55J: Tijuana Estuary and Beach, San Diego County, California]

(ii) **Note:** Map of Subunit CA 55J: Tijuana Estuary and Beach, San Diego County, California, follows:




* * * * *

Dated: February 25, 2011.

**Will Shafroth,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 2011–4906 Filed 3–21–11; 8:45 am]

**BILLING CODE 4310–55–C**




# FEDERAL REGISTER

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Part III

## Environmental Protection Agency

40 CFR Part 52
Approval and Promulgation of Implementation Plans; Oklahoma; Regional Haze State Implementation Plan; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determinations; Proposed Rule

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R06–OAR–2010–0190; FRL–9279–7]**

### Approval and Promulgation of Implementation Plans; Oklahoma; Regional Haze State Implementation Plan; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determinations

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to partially approve and partially disapprove a revision to the Oklahoma State Implementation Plan (SIP) submitted by the State of Oklahoma through the Oklahoma Department of Environmental Quality (ODEQ) on February 19, 2010 that addresses regional haze for the first implementation period. This revision was submitted to address the requirements of the Clean Air Act (CAA or Act) and our rules that require states to prevent any future and remedy any existing man-made impairment of visibility in mandatory Class I areas caused by emissions of air pollutants from numerous sources located over a wide geographic area (also referred to as the "regional haze program"). States are required to assure reasonable progress toward the national goal of achieving natural visibility conditions in Class I areas. EPA is proposing to approve a portion of this SIP revision as meeting certain requirements of the regional haze program and to partially approve and partially disapprove those portions addressing the requirements for best available retrofit technology (BART) and the long-term strategy (LTS). EPA is proposing a Federal Implementation Plan (FIP) to implement sulfur dioxide ($SO_2$) emission limits on six sources to address these issues. EPA also is proposing to disapprove the State's submitted alternative to BART; EPA is taking no action on the submitted reasonable progress goals at this time. In addition, EPA is proposing to partially approve and partially disapprove a portion of a revision to the Oklahoma SIP submitted by the State of Oklahoma on May 10, 2007 and supplemented on December 10, 2007. We are taking action on that portion of the submittals addressing the requirements of CAA as it applies to visibility for the 1997 8-hour ozone and 1997 particulate matter ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS). This portion of the submittals addresses the requirement that Oklahoma's SIP contain adequate provisions to prohibit emissions from interfering with measures required in another state to protect visibility. In this action, we propose a FIP to address the deficiencies in this portion of Oklahoma's SIP submittals. The proposed FIP will prevent emissions from six Oklahoma sources from interfering with other states' measures to protect visibility and to implement sulfur dioxide emission limits on these six sources to prevent such interference.

**DATES:** *Comments:* Comments must be received on or before May 23, 2011.

*Public Hearing.* An open house and public hearing for this proposal is scheduled to be held on Wednesday April 13, 2011, at the Metro Technology Centers, Springlake Campus, Business Conference Center, Meeting Rooms H and I, 1900 Springlake Drive, Oklahoma City, OK 73111, (405) 424–8324. The Metro Technology Centers Springlake Campus is located at the intersection of Martin Luther King Ave. and Springlake Dr. between NE. 36th and NE. 50th just south of the Oklahoma City Zoo and Kirkpatrick Center. Parking for the Business Conference Center is available at no charge. The open house will begin at 1 p.m. and end at 3 p.m. local time. The public hearing will be held from 4 p.m. until 6 p.m., and again from 7 p.m. until 9 p.m.

The public hearing will provide interested parties the opportunity to present information and opinions to EPA concerning our proposal. Interested parties may also submit written comments, as discussed in the proposal. Written statements and supporting information submitted during the comment period will be considered with the same weight as any oral comments and supporting information presented at the public hearing. We will not respond to comments during the public hearing. When we publish our final action, we will provide written responses to all oral and written comments received on our proposal. To provide opportunities for questions and discussion, we will hold an open house prior to the public hearing. During the open house, EPA staff will be available to informally answer questions on our proposed action. Any comments made to EPA staff during the open house must still be provided formally in writing or orally during the public hearing in order to be considered in the record.

At the public hearing, the hearing officer may limit the time available for each commenter to address the proposal to 5 minutes or less if the hearing officer determines it to be appropriate. We will not be providing equipment for commenters to show overhead slides or make computerized slide presentations. Any person may provide written or oral comments and data pertaining to our proposal at the Public Hearing. Verbatim transcripts, in English, of the hearing and written statements will be included in the rulemaking docket.

*Addresses:* Submit your comments, identified by Docket No. EPA–R06–OAR–2010–0190, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *E-mail: r6air_okhaze@epa.gov.*
- *Mail:* Mr. Joe Kordzi, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.
- *Hand or Courier Delivery:* Mr. Joe Kordzi, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. Such deliveries are accepted only between the hours of 8 a.m. and 4 p.m. weekdays, and not on legal holidays. Special arrangements should be made for deliveries of boxed information.
- *Fax:* Mr. Joe Kordzi, Air Planning Section (6PD–L), at fax number 214–665–7263.

*Instructions:* Direct your comments to Docket No. EPA–R06–OAR–2010–0190. Our 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 www.regulations.gov or e-mail. The *http://www.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 comment directly to us without going through www.regulations.gov your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, 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 due to

technical difficulties and cannot contact you for clarification, we 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 *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 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 or Mr. Bill Deese at 214–665–7253 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 our Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The state submittal is also available for public inspection during official business hours, by appointment, at the Oklahoma Department of Environmental Quality, 707 N Robinson, Oklahoma City, OK 73102.

**FOR FURTHER INFORMATION CONTACT:** Joe Kordzi, EPA Region 6 Air Planning Section, telephone 214–665–7186, e-mail address *r6air_okhaze@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document wherever "we," "us," or "our" is used, we mean the EPA.

This action is being taken under section 110 and part C of the CAA.

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## I. Overview of Proposed Actions

### *A. Regional Haze*

We propose to partially approve and partially disapprove Oklahoma's regional haze (RH) SIP revision submitted on February 19, 2010. Specifically, we propose to disapprove the $SO_2$ BART determinations for Units 4 and 5 of the Oklahoma Gas and Electric (OG&E) Muskogee plant; Units 1 and 2 of the OG&E Sooner plant; and Units 3 and 4 of the American Electric Power/Public Service Company of Oklahoma (AEP/PSO) Northeastern plant. We propose to disapprove these $SO_2$ BART determinations because they do not comply with our regulations under 40 CFR 51.308(e).

We are also proposing to disapprove the long term strategy (LTS) under section 51.308(d)(3) because Oklahoma has not shown that the strategy is adequate to achieve the reasonable progress goals set by Oklahoma and by other nearby States. The visibility modeling used by Oklahoma in support of its SIP revision submittal assumed $SO_2$ reductions from the six sources [1] as identified above that Oklahoma did not secure when making its BART determinations for these sources. As we discuss elsewhere, ODEQ participated in the Central Regional Air Planning Association (CENRAP) visibility modeling development that assumed certain $SO_2$ reductions from these six BART sources. ODEQ also performed its consultations with other states with the understanding that these reductions would be secured. We propose a FIP to cure these defects in BART and the LTS.

[1] In this document, when we say "six BART sources," or "six sources," we mean Units 4 and 5 of the Oklahoma Gas and Electric Muskogee plant; Units 1 and 2 of the Oklahoma Gas and Electric Sooner plant; and Units 3 and 4 of the American Electric Power/Public Service Company of Oklahoma Northeastern plant.

We are also proposing to approve the remaining sections of the RH SIP submission, except as discussed below.

We propose to find that Units 4 and 5 of the OG&E Muskogee plant, Units 1 and 2 of the OG&E Sooner plant, and Units 3 and 4 of the AEP/PSO Northeastern plant are subject to BART under 40 CFR 51.308(e). Further, we propose a FIP that specifically imposes $SO_2$ BART emission limits on these sources. We propose that $SO_2$ BART for Units 4 and 5 of the OG&E Muskogee plant, Units 1 and 2 of the OG&E Sooner plant, and Units 3 and 4 of the AEP/PSO Northeastern plant is an $SO_2$ emission limit of 0.06 lbs/MMBtu that applies singly to each of these units on a 30 day rolling average. Additionally, we propose monitoring, recordkeeping, and reporting requirements to ensure compliance with these emission limitations.

We propose that compliance with the emission limits be within three (3) years of the effective date of our final rule. We solicit comments on alternative timeframes, of from two (2) years up to five (5) years from the effective date our final rule.

Should OG&E and/or AEP/PSO elect to reconfigure the above units to burn natural gas, as a means of satisfying their BART obligations under section 51.308(e), that conversion should be completed within the same time frame. We invite comments as to, considering the engineering and/or management challenges of such a fuel switch, whether the full 5 years allowed under section 308(e)(1)(iv) following our final approval would be appropriate.

We propose to disapprove section VI.E of the Oklahoma RH SIP entitled, "Greater Reasonable Progress Alternative Determination." We also propose to disapprove the separate executed agreements between ODEQ and OG&E, and ODEQ and AEP/PSO entitled "OG&E Regional Haze Agreement, Case No. 10–024, and "PSO Regional Haze Agreement, Case No. 10–025," housed within Appendix 6–5 of the RH SIP. We propose that these portions of the submittal are severable from the BART determinations and the LTS; therefore, no FIP is required.

We are taking no action on whether Oklahoma has satisfied the reasonable progress requirements of EPA's regional haze SIP requirements found at section 51.308(d)(1).

*B. Interstate Transport of Visibility*

We also propose to partially approve and partially disapprove a portion of a SIP revision we received from the State of Oklahoma on May 10, 2007, as supplemented on December 10, 2007, for the purpose of addressing the "good neighbor" provisions of the CAA section 110(a)(2)(D)(i) for the 1997 8-hour ozone NAAQS and the $PM_{2.5}$ NAAQS. Section 110(a)(2)(D)(i)(II) of the Act requires that states have a SIP, or submit a SIP revision, containing provisions "prohibiting any source or other type of emission activity within the state from emitting any air pollutant in amounts which will * * * interfere with measures required to be included in the applicable implementation plan for any other State under part C [of the CAA] to protect visibility." Because of the impacts on visibility from the interstate transport of pollutants, we interpret the "good neighbor" provisions of section 110 of the Act described above as requiring states to include in their SIPs measures to prohibit emissions that would interfere with the reasonable progress goals set to protect Class I areas in other states.

These SIP revisions were submitted to address the requirement that Oklahoma's SIP must have adequate provisions to prohibit emissions from adversely affecting another state's air quality through interstate transport. Oklahoma indicates in its May 10, 2007 submittal that it intended that its RH SIP be used to satisfy the requirements of section 110(a)(2)(D)(i)(II) that emissions from Oklahoma sources do not interfere with measures required in the SIP of any other state under part C of the CAA to protect visibility. Consistent with our proposed actions with regard to Oklahoma's RH SIP revision submittal, we also propose a partial approval and partial disapproval of the Oklahoma Interstate Transport SIP revision submittals that address the requirement of section 110(a)(2)(D)(i)(II).

Specifically, we propose a partial approval and partial disapproval of the Oklahoma Interstate Transport SIP revision submittals that address the requirement of section 110(a)(2)(D)(i)(II) that emissions from Oklahoma sources do not interfere with measures required in the SIP of any other state under part C of the CAA to protect visibility. We believe that the controls proposed under the proposed FIP, in combination with the controls required by the portion of the Oklahoma RH submittal that we propose to approve, will serve to prevent sources in Oklahoma from emitting pollutants in amounts which will interfere with efforts to protect visibility in other states.

## II. SIP and FIP Background

The CAA requires each state to develop a plan that provides for the implementation, maintenance, and enforcement of the NAAQS. CAA section 110(a). We establish NAAQS under section 109 of the CAA. Currently, the NAAQS address six criteria pollutants: Carbon monoxide; nitrogen dioxide; ozone; lead; particulate matter; and sulfur dioxide. The plan developed by a state is referred to as the SIP. The content of the SIP is specified in section 110 of the CAA, other provisions of the CAA, and applicable regulations. A primary purpose of the SIP is to provide the air pollution regulations, control strategies, and other means or techniques developed by the state to ensure that the ambient air within that state meets the NAAQS. However, another important aspect of the SIP is to ensure that emissions from within the state do not have certain prohibited impacts upon the ambient air in other states through the interstate transport of pollutants. CAA section 110(a)(2)(D). States are required to update or revise SIPs under certain circumstances. *See* CAA section 110(a)(1). One such circumstance is our promulgation of a new or revised NAAQS. *Id.* Each state must submit these revisions to us for approval and incorporation into the federally enforceable SIP.

If a state fails to make a required SIP submittal or if we find that, the state's submittal is incomplete or unapprovable, then we must promulgate a FIP to fill this regulatory gap. CAA section 110(c)(1). As discussed elsewhere in this notice, we have made findings related to Oklahoma SIP revisions needed to address interstate transport and the requirement that emissions from Oklahoma sources do not interfere with measures required in the SIP of any other state to protect visibility, pursuant to section 110(a)(2)(D)(i)(II) of the CAA. We propose a FIP to address the deficiencies in the Oklahoma Interstate Transport SIP.

## III. What is the background for our proposed actions?

*A. Regional Haze*

RH is visibility impairment that is produced by a multitude of sources and activities which are located across a broad geographic area and emit fine particles ($PM_{2.5}$) (*e.g.,* sulfates, nitrates, organic carbon, elemental carbon, and soil dust) and their precursors (*e.g.,* $SO_2$, nitrogen oxides ($NO_X$), and in some cases, ammonia ($NH_3$) and volatile organic compounds (VOCs)). Fine particle precursors react in the atmosphere to form $PM_{2.5}$ (*e.g.,* sulfates, nitrates, organic carbon, elemental carbon, and soil dust), which also impair visibility by scattering and

absorbing light. Visibility impairment reduces the clarity, color, and visible distance that one can see. $PM_{2.5}$ also can cause serious health effects and mortality in humans and contributes to environmental effects such as acid deposition and eutrophication.

Data from the existing visibility monitoring network, the "Interagency Monitoring of Protected Visual Environments" (IMPROVE) monitoring network, show that visibility impairment caused by air pollution occurs virtually all the time at most national park and wilderness areas. The average visual range [2] in many Class I areas (*i.e.,* national parks and memorial parks, wilderness areas, and international parks meeting certain size criteria) in the western United States is 100–150 kilometers, or about one-half to two-thirds of the visual range that would exist without anthropogenic air pollution. 64 FR 35714, 35715 (July 1, 1999). In most of the eastern Class I areas of the United States, the average visual range is less than 30 kilometers, or about one-fifth of the visual range that would exist under estimated natural conditions. *Id.*

In section 169A of the 1977 Amendments to the CAA, Congress created a program for protecting visibility in the nation's national parks and wilderness areas. This section of the CAA establishes as a national goal the "prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I Federal areas [3] which impairment results from manmade air pollution." CAA § 169A(a)(1). The terms "impairment of visibility" and "visibility impairment" are defined in the Act to include a reduction in visual range and atmospheric discoloration. *Id.* section 169A(g)(6). In 1980, we promulgated regulations to address visibility impairment in Class I areas that is "reasonably attributable" to a single source or small group of sources, *i.e.,* "reasonably attributable visibility impairment" (RAVI). 45 FR 80084 (December 2, 1980). These regulations represented the first phase in addressing visibility impairment. We deferred action on RH that emanates from a variety of sources until monitoring, modeling and scientific knowledge about the relationships between pollutants and visibility impairment were improved.

Congress added section 169B to the CAA in 1990 to address RH issues, and we promulgated regulations addressing RH in 1999. 64 FR 35714 (July 1, 1999), codified at 40 CFR part 51, subpart P. The Regional Haze Rule (RHR) revised the existing visibility regulations to integrate into the regulations provisions addressing RH impairment and established a comprehensive visibility protection program for Class I areas. The requirements for RH, found at 40 CFR 51.308 and 51.309, are included in our visibility protection regulations at 40 CFR 51.300–309. Some of the main elements of the RH requirements are summarized in section III. The requirement to submit a RH SIP applies to all 50 states, the District of Columbia and the Virgin Islands.[4] States were required to submit the first implementation plan addressing RH visibility impairment no later than December 17, 2007. 40 CFR 51.308(b).

### *B. Roles of Agencies in Addressing Regional Haze*

Successful implementation of the RH program will require long-term regional coordination among states, tribal governments and various federal agencies. As noted above, pollution affecting the air quality in Class I areas can be transported over long distances, even hundreds of kilometers. Therefore, to address effectively the problem of visibility impairment in Class I areas, states need to develop strategies in coordination with one another, taking into account the effect of emissions from one jurisdiction on the air quality in another.

Because the pollutants that lead to RH can originate from sources located across broad geographic areas, we have encouraged the states and tribes across the United States to address visibility impairment from a regional perspective. Five regional planning organizations (RPOs) were developed to address RH and related issues. The RPOs first evaluated technical information to better understand how their states and tribes impact Class I areas across the country, and then pursued the development of regional strategies to reduce emissions of particulate matter (PM) and other pollutants leading to RH.

CENRAP is an organization of states, tribes, federal agencies and other interested parties that identifies RH and visibility issues and develops strategies to address them. CENRAP is one of the five Regional Planning Organizations RPOs across the U.S. and includes the states and tribal areas of Nebraska, Kansas, Oklahoma, Texas, Minnesota, Iowa, Missouri, Arkansas, and Louisiana.

### *C. The 1997 NAAQS for Ozone and $PM_{2.5}$ and CAA 110(a)(2)(D)(i)*

On July 18, 1997, we promulgated new NAAQS for 8-hour ozone and for $PM_{2.5}$. 62 FR 38652. Section 110(a)(1) of the CAA requires states to submit SIPs to address a new or revised NAAQS within 3 years after promulgation of such standards, or within such shorter period as we may prescribe. Section 110(a)(2) of the CAA lists the elements that such new SIPs must address, as applicable, including section 110(a)(2)(D)(i), which pertains to the interstate transport of certain emissions.

On April 25, 2005, we published a "Finding of Failure to Submit SIPs for Interstate Transport for the 8-hour Ozone and $PM_{2.5}$ NAAQS." 70 FR 21147. This included a finding that Oklahoma and other states had failed to submit SIPs for interstate transport of air pollution affecting visibility, and started a 2-year clock for the promulgation of a FIP by us, unless a state made a submission to meet the requirements of section 110(a)(2)(D)(i) and we approved the submission. *Id.*

On August 15, 2006, we issued our "Guidance for State Implementation Plan (SIP) Submission to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards" (2006 Guidance). We developed the 2006 Guidance to make recommendations to states for making submissions to meet the requirements of section 110(a)(2)(D)(i) for the 1997 8-hour ozone standards and the 1997 $PM_{2.5}$ standards.

As identified in the 2006 Guidance, the "good neighbor" provisions in section 110(a)(2)(D)(i) of the CAA require each state to submit a SIP that prohibits emissions that adversely affect another state in the ways contemplated

[2] Visual range is the greatest distance, in kilometers or miles, at which a dark object can be viewed against the sky.

[3] Areas designated as mandatory Class I Federal areas consist of national parks exceeding 6000 acres, wilderness areas and national memorial parks exceeding 5000 acres, and all international parks that were in existence on August 7, 1977. *See* CAA section 162(a). In accordance with section 169A of the CAA, EPA, in consultation with the Department of Interior, promulgated a list of 156 areas where visibility is identified as an important value. *See* 44 FR 69122, November 30, 1979. The extent of a mandatory Class I area includes subsequent changes in boundaries, such as park expansions. CAA section 162(a). Although states and tribes may designate as Class I additional areas which they consider to have visibility as an important value, the requirements of the visibility program set forth in section 169A of the CAA apply only to "mandatory Class I Federal areas." Each mandatory Class I Federal area is the responsibility of a "Federal Land Manager" (FLM). *See* CAA section 302(i). When we use the term "Class I area" in this action, we mean a "mandatory Class I Federal area."

[4] Albuquerque/Bernalillo County in New Mexico must also submit a regional haze SIP to completely satisfy the requirements of section 110(a)(2)(D) of the CAA for the entire State of New Mexico under the New Mexico Air Quality Control Act (section 74–2–4).

in the statute. Section 110(a)(2)(D)(i) contains four distinct requirements related to the impacts of interstate transport. The SIP must prevent sources in the state from emitting pollutants in amounts which will: (1) Contribute significantly to nonattainment of the NAAQS in other states; (2) interfere with maintenance of the NAAQS in other states; (3) interfere with provisions to prevent significant deterioration of air quality in other states; or (4) interfere with efforts to protect visibility in other states.

The 2006 Guidance stated that states may make a simple SIP submission confirming that it is not possible at that time to assess whether there is any interference with measures in the applicable SIP for another state designed to "protect visibility" for the 8-hour ozone and $PM_{2.5}$ NAAQS until RH SIPs are submitted and approved. RH SIPs were required to be submitted by December 17, 2007. *See* 74 FR 2392 (January 15, 2009).

On May 10, 2007, we received a SIP revision from Oklahoma to address the interstate transport provisions of CAA 110(a)(2)(D)(i) for the 1997 ozone and $PM_{2.5}$ NAAQS. We received a supplement to this SIP revision on December 10, 2007. In a prior action we approved the Oklahoma SIP submittal for the "interfere with measures to prevent significant deterioration" prong of section 110(a)(2)(D)(i) of the CAA. 75 FR 72695, November 26, 2010. On February 19, 2010, Oklahoma submitted a RH SIP to address interstate transport of emissions that could interfere with efforts to protect visibility in other states. Because, for the reasons outlined below, we can only partially approve this RH SIP, we propose to partially approve and partially disapprove the Oklahoma Interstate Transport SIP revision submittals that address the requirement that emissions from Oklahoma sources do not interfere with measures required in the SIP of any other state to protect visibility. *See* CAA section 110(a)(2)(D)(i)(II). We propose to promulgate a FIP in order to cure this defect in the Oklahoma Interstate Transport SIP revision submittals.

## IV. What are the requirements for regional haze SIPs?

The following is a summary and basic explanation of the regulations covered under the RHR. See 40 CFR 51.308 for a complete listing of the regulations under which this SIP was evaluated.

### *A. The CAA and the Regional Haze Rule*

RH SIPs must assure reasonable progress towards the national goal of achieving natural visibility conditions in Class I areas. Section 169A of the CAA and our implementing regulations require states to establish long-term strategies for making reasonable progress toward meeting this goal. Implementation plans must also give specific attention to certain stationary sources that were in existence on August 7, 1977, but were not in operation before August 7, 1962, and require these sources, where appropriate, to install BART controls for the purpose of eliminating or reducing visibility impairment. The specific RH SIP requirements are discussed in further detail below.

### *B. Determination of Baseline, Natural, and Current Visibility Conditions*

The RHR establishes the deciview (dv) as the principal metric for measuring visibility. *See* 70 FR 39104. This visibility metric expresses uniform changes in the degree of haze in terms of common increments across the entire range of visibility conditions, from pristine to extremely hazy conditions. Visibility is sometimes expressed in terms of the visual range, which is the greatest distance, in kilometers or miles, at which a dark object can just be distinguished against the sky. The deciview is a useful measure for tracking progress in improving visibility, because each deciview change is an equal incremental change in visibility perceived by the human eye. Most people can detect a change in visibility of one deciview.[5]

The deciview is used in expressing Reasonable Progress Goals (RPGs) (which are interim visibility goals towards meeting the national visibility goal), defining baseline, current, and natural conditions, and tracking changes in visibility. The RH SIPs must contain measures that ensure "reasonable progress" toward the national goal of preventing and remedying visibility impairment in Class I areas caused by manmade air pollution by reducing anthropogenic emissions that cause RH. The national goal is a return to natural conditions, *i.e.,* manmade sources of air pollution would no longer impair visibility in Class I areas.

To track changes in visibility over time at each of the 156 Class I areas covered by the visibility program (40 CFR 81.401–437), and as part of the process for determining reasonable progress, states must calculate the degree of existing visibility impairment at each Class I area at the time of each RH SIP submittal and periodically review progress every five years midway through each 10-year implementation period. To do this, the RHR requires states to determine the degree of impairment (in deciviews) for the average of the 20 percent least impaired ("best") and 20 percent most impaired ("worst") visibility days over a specified time period at each of their Class I areas. In addition, states must also develop an estimate of natural visibility conditions for the purpose of comparing progress toward the national goal. Natural visibility is determined by estimating the natural concentrations of pollutants that cause visibility impairment and then calculating total light extinction based on those estimates. We have provided guidance to states regarding how to calculate baseline, natural and current visibility conditions.[6]

For the first RH SIPs that were due by December 17, 2007, "baseline visibility conditions" were the starting points for assessing "current" visibility impairment. Baseline visibility conditions represent the degree of visibility impairment for the 20 percent least impaired days and 20 percent most impaired days for each calendar year from 2000 to 2004. Using monitoring data for 2000 through 2004, states are required to calculate the average degree of visibility impairment for each Class I area, based on the average of annual values over the five-year period. The comparison of initial baseline visibility conditions to natural visibility conditions indicates the amount of improvement necessary to attain natural visibility, while the future comparison of baseline conditions to the then current conditions will indicate the amount of progress made. In general, the 2000–2004 baseline period is considered the time from which improvement in visibility is measured.

### *C. Determination of Reasonable Progress Goals*

The vehicle for ensuring continuing progress towards achieving the natural visibility goal is the submission of a series of RH SIPs from the states that establish two RPGs (*i.e.,* two distinct goals, one for the "best" and one for the "worst" days) for every Class I area for each (approximately) 10-year implementation period. *See* 70 FR 3915;

[5] The preamble to the RHR provides additional details about the deciview. 64 FR 35714, 35725 (July 1, 1999).

[6] *Guidance for Estimating Natural Visibility Conditions Under the Regional Haze Rule,* September 2003, EPA–454/B–03–005, *available* at *http://www.epa.gov/ttncaaa1/t1/memoranda/rh_envcurhr_gd.pdf* (hereinafter referred to as "our 2003 Natural Visibility Guidance"); and *Guidance for Tracking Progress Under the Regional Haze Rule,* EPA–454/B–03–004, September 2003, *available* at *http://www.epa.gov/ttncaaa1/t1/memoranda/rh_tpurhr_gd.pdf* (hereinafter referred to as our "2003 Tracking Progress Guidance").

*see also* 64 FR 35714. The RHR does not mandate specific milestones or rates of progress, but instead calls for states to establish goals that provide for "reasonable progress" toward achieving natural (*i.e.,* "background") visibility conditions. In setting RPGs, states must provide for an improvement in visibility for the most impaired days over the (approximately) 10-year period of the SIP, and ensure no degradation in visibility for the least impaired days over the same period. *Id.*

States have significant discretion in establishing RPGs, but are required to consider the following factors established in section 169A of the CAA and in our RHR at 40 CFR 51.308(d)(1)(i)(A): (1) The costs of compliance; (2) the time necessary for compliance; (3) the energy and non-air quality environmental impacts of compliance; and (4) the remaining useful life of any potentially affected sources. States must demonstrate in their SIPs how these factors are considered when selecting the RPGs for the best and worst days for each applicable Class I area. States have considerable flexibility in how they take these factors into consideration, as noted in our Reasonable Progress Guidance.[7] In setting the RPGs, states must also consider the rate of progress needed to reach natural visibility conditions by 2064 (referred to hereafter as the "Uniform Rate of Progress (URP)") and the emission reduction measures needed to achieve that rate of progress over the 10-year period of the SIP. Uniform progress towards achievement of natural conditions by the year 2064 represents a rate of progress, which states are to use for analytical comparison to the amount of progress they expect to achieve. In setting RPGs, each state with one or more Class I areas ("Class I State") must also consult with potentially "contributing states," *i.e.,* other nearby states with emission sources that may be affecting visibility impairment at the Class I State's areas. 40 CFR 51.308(d)(1)(iv).

*D. Best Available Retrofit Technology*

Section 169A of the CAA directs states to evaluate the use of retrofit controls at certain larger, often uncontrolled, older stationary sources with the potential to emit greater than 250 tons or more of any pollutant in order to address visibility impacts from these sources. Specifically, section 169A(b)(2)(A) of the Act requires states to revise their SIPs to contain such measures as may be necessary to make reasonable progress towards the natural visibility goal, including a requirement that certain categories of existing major stationary sources [8] built between 1962 and 1977 procure, install, and operate the "Best Available Retrofit Technology" (BART), as determined by the state or us in the case of a plan promulgated under section 110(c) of the CAA. Under the RHR, States are directed to conduct BART determinations for such "BART-eligible" sources that may be anticipated to cause or contribute to any visibility impairment in a Class I area. Rather than requiring source-specific BART controls, states also have the flexibility to adopt an emissions trading program or other alternative program as long as the alternative provides greater reasonable progress towards improving visibility than BART.

We promulgated regulations addressing RH in 1999, 64 FR 35714 (July 1, 1999), codified at 40 CFR part 51, subpart P.[9] These regulations require all states to submit implementation plans that, among other measures, contain either emission limits representing BART for certain sources constructed between 1962 and 1977, or alternative measures that provide for greater reasonable progress than BART. 40 CFR 51.308(e).

On July 6, 2005, we published the *Guidelines for BART Determinations Under the Regional Haze Rule* at Appendix Y to 40 CFR Part 51 ("BART Guidelines") to assist states in determining which of their sources should be subject to the BART requirements and in determining appropriate emission limits for each applicable source. 70 FR 39104. In making a BART determination for a fossil fuel-fired electric generating plant with a total generating capacity in excess of 750 megawatts, a state must use the approach set forth in the BART Guidelines. A state is encouraged, but not required, to follow the BART Guidelines in making BART determinations for other types of sources.

The process of establishing BART emission limitations can be logically broken down into three steps: first, states identify those sources which meet the definition of "BART-eligible source" set forth in 40 CFR 51.301; [10] second, states determine whether such sources "emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area" (a source which fits this description is "subject to BART") and; third, for each source subject to BART, states then identify the appropriate type and the level of control for reducing emissions.

States must address all visibility-impairing pollutants emitted by a source in the BART determination process. The most significant visibility impairing pollutants are $SO_2$, $NO_X$, and PM. We have stated that states should use their best judgment in determining whether VOC or ammonia compounds impair visibility in Class I areas.

Under the BART Guidelines, states may select an exemption threshold value for their BART modeling, below which a BART-eligible source would not be expected to cause or contribute to visibility impairment in any Class I area. The state must document this exemption threshold value in the SIP and must state the basis for its selection of that value. Any source with emissions that model above the threshold value would be subject to a BART determination review. The BART Guidelines acknowledge varying circumstances affecting different Class I areas. States should consider the number of emission sources affecting the Class I areas at issue and the magnitude of the individual sources' impacts. Any exemption threshold set by the state should not be higher than 0.5 dv.

In their SIPs, states must identify potential BART sources, described as "BART-eligible sources" in the RHR, and document their BART control determination analyses. The term "BART-eligible source" used in the BART Guidelines means the collection of individual emission units at a facility that together comprises the BART-eligible source. In making BART determinations, section 169A(g)(2) of the CAA requires that states consider the following factors: (1) The costs of compliance; (2) the energy and non-air quality environmental impacts of compliance; (3) any existing pollution control technology in use at the source; (4) the remaining useful life of the source; and (5) the degree of

[7] *Guidance for Setting Reasonable Progress Goals under the Regional Haze Program,* June 1, 2007, memorandum from William L. Wehrum, Acting Assistant Administrator for Air and Radiation, to EPA Regional Administrators, EPA Regions 1–10 (pp. 4–2, 5–1).

[8] The set of "major stationary sources" potentially subject to BART are listed in CAA section 169A(g)(7).

[9] In *American Corn Growers Ass'n* v. *EPA,* 291 F.3d 1 (DC Cir. 2002), the U.S Court of Appeals for the District of Columbia Circuit issued a ruling vacating and remanding the BART provisions of the regional haze rule. In 2005, we issued BART guidelines to address the court's ruling in that case. *See* 70 FR 39104 (July 6, 2005).

[10] BART-eligible sources are those sources that have the potential to emit 250 tons or more of a visibility-impairing air pollutant, were put in place between August 7, 1962 and August 7, 1977, and whose operations fall within one or more of 26 specifically listed source categories.

improvement in visibility which may reasonably be anticipated to result from the use of such technology. States are free to determine the weight and significance to be assigned to each factor. *See* 40 CFR 51.308(e)(1)(ii).

A RH SIP must include source-specific BART emission limits and compliance schedules for each source subject to BART. Once a state has made its BART determination, the BART controls must be installed and in operation as expeditiously as practicable, but no later than five years after the date of our approval of the RH SIP. CAA section 169(g)(4) and 40 CFR 51.308(e)(1)(iv). In addition to what is required by the RHR, general SIP requirements mandate that the SIP must also include all regulatory requirements related to monitoring, recordkeeping, and reporting for the BART controls on the source. *See* CAA section 110(a). As noted above, the RHR allows states to implement an alternative program in lieu of BART so long as the alternative program can be demonstrated to achieve greater reasonable progress toward the national visibility goal than would BART.

*E. Long-Term Strategy (LTS)*

Consistent with the requirement in section 169A(b) of the CAA that states include in their regional haze SIP a 10 to 15 year strategy for making reasonable progress, Section 51.308(d)(3) of the RHR requires that states include a LTS in their RH SIPs. The LTS is the compilation of all control measures a state will use during the implementation period of the specific SIP submittal to meet any applicable RPGs. The LTS must include "enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the reasonable progress goals" for all Class I areas within, or affected by emissions from, the state. 40 CFR 51.308(d)(3).

When a state's emissions are reasonably anticipated to cause or contribute to visibility impairment in a Class I area located in another state, the RHR requires the impacted state to coordinate with the contributing states in order to develop coordinated emissions management strategies. 40 CFR 51.308(d)(3)(i). In such cases, the contributing state must demonstrate that it has included, in its SIP, all measures necessary to obtain its share of the emission reductions needed to meet the RPGs for the Class I area. The RPOs have provided forums for significant interstate consultation, but additional consultations between states may be required to sufficiently address interstate visibility issues. This is especially true where two states belong to different RPOs.

States should consider all types of anthropogenic sources of visibility impairment in developing their LTS, including stationary, minor, mobile, and area sources. At a minimum, states must describe how each of the following seven factors listed below are taken into account in developing their LTS: (1) Emission reductions due to ongoing air pollution control programs, including measures to address RAVI; (2) measures to mitigate the impacts of construction activities; (3) emissions limitations and schedules for compliance to achieve the RPG; (4) source retirement and replacement schedules; (5) smoke management techniques for agricultural and forestry management purposes including plans as currently exist within the state for these purposes; (6) enforceability of emissions limitations and control measures; (7) the anticipated net effect on visibility due to projected changes in point, area, and mobile source emissions over the period addressed by the LTS. 40 CFR 51.308(d)(3)(v).

*F. Coordinating Regional Haze and Reasonably Attributable Visibility Impairment*

As part of the RHR, we revised 40 CFR 51.306(c) regarding the LTS for RAVI to require that the RAVI plan must provide for a periodic review and SIP revision not less frequently than every three years until the date of submission of the state's first plan addressing RH visibility impairment, which was due December 17, 2007, in accordance with 40 CFR 51.308(b) and (c). On or before this date, the state must revise its plan to provide for review and revision of a coordinated LTS for addressing RAVI and RH, and the state must submit the first such coordinated LTS with its first RH SIP. Future coordinated LTS and periodic progress reports evaluating progress towards RPGs, must be submitted consistent with the schedule for SIP submission and periodic progress reports set forth in 40 CFR 51.308(f) and 51.308(g), respectively. The periodic review of a state's LTS must report on both RH and RAVI impairment and must be submitted to us as a SIP revision.

*G. Monitoring Strategy and Other SIP Requirements*

Section 51.308(d)(4) of the RHR includes the requirement for a monitoring strategy for measuring, characterizing, and reporting of RH visibility impairment that is representative of all mandatory Class I Federal areas within the state. The strategy must be coordinated with the monitoring strategy required in section 51.305 for RAVI. Compliance with this requirement may be met through "participation" in the Interagency Monitoring of Protected Visual Environments (IMPROVE) network, *i.e.,* review and use of monitoring data from the network. The monitoring strategy is due with the first RH SIP, and it must be reviewed every five (5) years. The monitoring strategy must also provide for additional monitoring sites if the IMPROVE network is not sufficient to determine whether RPGs will be met.

The SIP must also provide for the following:

- Procedures for using monitoring data and other information in a state with mandatory Class I areas to determine the contribution of emissions from within the state to RH visibility impairment at Class I areas both within and outside the state;
- Procedures for using monitoring data and other information in a state with no mandatory Class I areas to determine the contribution of emissions from within the state to RH visibility impairment at Class I areas in other states;
- Reporting of all visibility monitoring data to the Administrator at least annually for each Class I area in the state, and where possible, in electronic format;
- Developing a statewide inventory of emissions of pollutants that are reasonably anticipated to cause or contribute to visibility impairment in any Class I area. The inventory must include emissions for a baseline year, emissions for the most recent year for which data are available, and estimates of future projected emissions. A state must also make a commitment to update the inventory periodically; and
- Other elements, including reporting, recordkeeping, and other measures necessary to assess and report on visibility.

The RHR requires control strategies to cover an initial implementation period extending to the year 2018, with a comprehensive reassessment and revision of those strategies, as appropriate, every 10 years thereafter. Periodic SIP revisions must meet the core requirements of section 51.308(d) with the exception of BART. The requirement to evaluate sources for BART applies only to the first RH SIP. Facilities subject to BART must continue to comply with the BART provisions of section 51.308(e), as noted above. Periodic SIP revisions will assure that the statutory requirement of reasonable progress will continue to be met.

*H. Consultation With States and Federal Land Managers*

The RHR requires that states consult with Federal Land Managers (FLMs) before adopting and submitting their SIPs. 40 CFR 51.308(i). States must provide FLMs an opportunity for consultation, in person and at least 60 days prior to holding any public hearing on the SIP. This consultation must include the opportunity for the FLMs to discuss their assessment of impairment of visibility in any Class I area and to offer recommendations on the development of the RPGs and on the development and implementation of strategies to address visibility impairment. Further, a state must include in its SIP a description of how it addressed any comments provided by the FLMs. Finally, a SIP must provide procedures for continuing consultation between the state and FLMs regarding the state's visibility protection program, including development and review of SIP revisions, five-year progress reports, and the implementation of other programs having the potential to contribute to impairment of visibility in Class I areas.

**V. Our Analysis of Oklahoma's Regional Haze SIP**

On February 19, 2010, we received a RH SIP revision from the State of Oklahoma for approval into the Oklahoma SIP. The following is a discussion of our evaluation of that submission. The parts of the submittal that are interrelated are discussed together, in order to provide the reader with a more ready understanding of our evaluation. See the Technical Support Document (TSD) for this proposal for a step-wise evaluation of ODEQ's submission in the order in which the regulations appear in 40 CFR 51.308, and a more comprehensive technical analysis.

*A. Affected Class I Areas*

In accordance with 40 CFR 51.308(d), ODEQ has identified one Class I area within its borders, the Wichita Mountains National Wildlife Refuge (Wichita Mountains). ODEQ has also determined that Oklahoma emissions have a small potential to impact visibility at Class I areas outside of Oklahoma. Based on projections of visibility in 2018 for the 20% worst visibility days, ODEQ has projected that Oklahoma emissions are responsible for visibility degradation at the Hercules Glades in Missouri of approximately 3.61%, the Salt Creek in New Mexico of approximately 2.53%, and the Guadalupe Mountains in Texas of approximately 2.0%.[11] We note that these projections are based on modeling done by CENRAP that assumed a certain level of reductions of $SO_2$ emissions from six sources that Oklahoma did not actually require in its submitted RH SIP revision. We expect that Oklahoma's projected impacts on visibility at Class I areas outside of Oklahoma would be greater had these controls and the associated $SO_2$ emission reductions not been included in CENRAP's visibility modeling.

*B. Determination of Baseline, Natural and Current Visibility Conditions*

As required by section 51.308(d)(2)(i) of the RHR and in accordance with EPA's 2003 Natural Visibility Guidance,[12] ODEQ calculated baseline/current and natural visibility conditions for its Class I area, the Wichita Mountains, on the most impaired and least impaired days, as summarized below (and further described in the TSD).

1. Estimating Natural Visibility Conditions

Natural background visibility, as defined in EPA's 2003 Natural Visibility Guidance, is estimated by calculating the expected light extinction using default estimates of natural concentrations of fine particle components adjusted by site-specific estimates of humidity. This calculation uses the IMPROVE equation, which is a formula for estimating light extinction from the estimated natural concentrations of fine particle components (or from components measured by the IMPROVE monitors). As documented in EPA's 2003 Natural Visibility Guidance, EPA allows states to use "refined" or alternative approaches to 2003 EPA guidance to estimate the values that characterize the natural visibility conditions of Class I areas. One alternative approach is to develop and justify the use of alternative estimates of natural concentrations of fine particle components. Another alternative is to use the "new IMPROVE equation" that was adopted for use by the IMPROVE Steering Committee in December 2005.[13] The purpose of this refinement to the "old IMPROVE equation" is to provide more accurate estimates of the various factors that affect the calculation of light extinction.

ODEQ opted to use the default estimates for the natural conditions combined with the "new Improve equation," for Wichita Mountains. This is an acceptable approach under our 2003 Natural Visibility Guidance. For the Wichita Mountains, the default natural visibility value for the 20 percent worst days is 11.07 deciviews and for the 20 percent best days it is 3.39 dv. For the Wichita Mountains, ODEQ also used the new IMPROVE equation to calculate the "refined" natural visibility value for the 20 percent worst days to be 7.53 deciviews and for the 20 percent best days to be 4.2 deciviews. We have reviewed ODEQ's estimate of the natural visibility conditions and propose to find it acceptable using the new IMPROVE equation.

The new IMPROVE equation takes into account the most recent review of the science [14] and it accounts for the effect of particle size distribution on light extinction efficiency of sulfate, nitrate, and organic carbon. It also adjusts the mass multiplier for organic carbon (particulate organic matter) by increasing it from 1.4 to 1.8. New terms are added to the equation to account for light extinction by sea salt and light absorption by gaseous nitrogen dioxide. Site-specific values are used for Rayleigh scattering (scattering of light due to atmospheric gases) to account for the site-specific effects of elevation and

[11] Unless otherwise noted, when we refer to visibility impacts, we mean the impacts due solely to the source or state named, which do not include natural conditions.

[12] Guidance for Estimating Natural Visibility Conditions Under the Regional Haze Rule, EPA–454/B–03–005, September 2003.

[13] The IMPROVE program is a cooperative measurement effort governed by a steering committee composed of representatives from Federal agencies (including representatives from EPA and the FLMs) and RPOs. The IMPROVE monitoring program was established in 1985 to aid the creation of Federal and State implementation plans for the protection of visibility in Class I areas. One of the objectives of IMPROVE is to identify chemical species and emission sources responsible for existing anthropogenic visibility impairment. The IMPROVE program has also been a key participant in visibility-related research, including the advancement of monitoring instrumentation, analysis techniques, visibility modeling, policy formulation and source attribution field studies.

[14] The science behind the revised IMPROVE equation is summarized in Appendix B.2 of the Tennessee Regional Haze submittal and in numerous published papers. See for example: Hand, J.L., and Malm, W.C., 2006, *Review of the IMPROVE Equation for Estimating Ambient Light Extinction Coefficients—Final Report.* March 2006. Prepared for Interagency Monitoring of Protected Visual Environments (IMPROVE), Colorado State University, Cooperative Institute for Research in the Atmosphere, Fort Collins, Colorado, *available* at *http://vista.cira.colostate.edu/improve/publications/GrayLit/016_IMPROVEeqReview/IMPROVEeqReview.htm* and Pitchford, Marc., 2006, *Natural Haze Levels II: Application of the New IMPROVE Algorithm to Natural Species Concentrations Estimates.* Final Report of the Natural Haze Levels II Committee to the RPO Monitoring/Data Analysis Workgroup. September 2006, available at *http://vista.cira.colostate.edu/improve/Publications/GrayLit/029_NaturalCondII/naturalhazelevelsIIreport.ppt.*

temperature. Separate relative humidity enhancement factors are used for small and large size distributions of ammonium sulfate and ammonium nitrate and for sea salt. The terms for the remaining contributors, elemental carbon (light-absorbing carbon), fine soil, and coarse mass terms, do not change between the original and new IMPROVE equations.

2. Estimating Baseline Visibility Conditions

As required by section 51.308(d)(2)(i) of the RHR and in accordance with EPA's 2003 Natural Visibility Guidance,[15] ODEQ calculated baseline visibility conditions for the Wichita Mountains. The baseline condition calculation begins with the calculation of light extinction, using the IMPROVE equation. The IMPROVE equation sums the light extinction [16] resulting from individual pollutants, such as sulfates and nitrates. As with the natural visibility conditions calculation, ODEQ chose to use the new IMPROVE equation.

The period for establishing baseline visibility conditions is 2000–2004, and baseline conditions must be calculated using available monitoring data. 40 CFR 51.308(d)(2). Although visibility monitoring only began at the Wichita Mountains in March 2001, ODEQ concluded that no other monitor provided a reasonable substitute that met our completeness criteria.[17] As a consequence, the Oklahoma RH SIP employed the incomplete visibility data for 2001, complete data for 2002–2004, and provisional data for 2005 and 2006. The resulting baseline conditions represent an average for 2002–2004. ODEQ calculated the baseline conditions at the Wichita Mountains as 23.81 deciviews on the 20 percent worst days, and 9.78 deciviews on the 20 percent best days. We have reviewed ODEQ's estimation of baseline visibility conditions at Wichita Mountains and propose to find it acceptable.

3. Natural Visibility Impairment

To address 40 CFR 51.308(d)(2)(iv)(A), ODEQ also calculated the number of deciviews by which baseline conditions exceed natural visibility conditions at the Wichita Mountains for the 20 percent worst days to be 16.28 dv (23.81 − 7.53). ODEQ calculated the baseline and natural visibility conditions on the 20 percent best days to be 9.78 and 4.2 dv, respectively. This results in a calculation in which baseline conditions exceed natural visibility conditions at the Wichita Mountains for the 20 percent best days to be 5.6 dv (9.78 − 4.2). We have reviewed ODEQ's estimate of the natural visibility impairment and propose to find it acceptable.

4. Uniform Rate of Progress

In setting the RPGs, ODEQ analyzed and determined the Uniform Rate of Progress (URP) needed to reach natural visibility conditions by the year 2064. In so doing, ODEQ compared the baseline visibility conditions in the Wichita Mountains to the natural visibility conditions in the Wichita Mountains (as described above) and determined the uniform rate of progress needed in order to attain natural visibility conditions by 2064. ODEQ constructed the URP consistent with our 2003 Tracking Progress Guidance by plotting a straight graphical line from the baseline level of visibility impairment for 2000–2004 to the level of visibility conditions representing no anthropogenic impairment in 2064 for the Wichita Mountains. Using a baseline visibility value of 23.81 dv and a "refined" natural visibility value of 7.53 dv for the 20 percent worst days, ODEQ calculated the URP to be approximately 0.27 dv per year. This results in a total reduction of 16.28 dv that are necessary to reach the natural visibility condition of 7.53 dv in 2064. The URP results in a visibility improvement of 3.80 dv for the period covered by this SIP revision submittal (up to and including 2018).

TABLE 1—SUMMARY OF UNIFORM RATE OF PROGRESS

| | |
|---|---|
| Baseline Conditions | 23.81 dv. |
| Natural Visibility | 7.53 dv. |
| Total Improvement by 2064 | 16.28 dv. |
| Improvement for this SIP by 2018. | 3.80 dv. |
| Uniform Rate of Progress | 0.27 dv/year. |

We propose to find that ODEQ has appropriately calculated the URP.

*C. Evaluation of Oklahoma's Reasonable Progress Goal*

We are not taking action on Oklahoma's submitted RPGs because, as described more fully below, we must first evaluate and act upon the RH SIP revision submitted by the State of Texas. We provide a short summary of the Oklahoma submittal for informational purposes only.

1. Establishment of the Reasonable Progress Goal

ODEQ calculated the RPG for the Wichita Mountains for 2018 for the 20% best days to be 9.23 dv, which is a 0.54 dv improvement over a baseline of 9.78 dv. ODEQ calculated the reasonable progress goal for 2018 for the 20% worst days to be 21.47 dv, which is a 2.3 deciview improvement over a baseline of 23.81 dv. ODEQ's RPG establishes a slower rate of progress than the URP. ODEQ has calculated that under its reasonable progress goal, it would attain natural visibility conditions in 2102. As we discuss elsewhere, ODEQ indicated that emissions from other states, especially Texas, impeded Oklahoma's ability to meet the URP.

2. ODEQ's Reasonable Progress "Four Factor" Analysis

ODEQ analyzed the largest sources of visibility impairing pollutants within the state, including sources of sulfur, nitrates, ammonia, VOCs, and directly emitted coarse and fine particles. ODEQ calculated (1) that sulfurous pollutants contribute approximately 44% and nitrate bearing pollutants contribute approximately 21% of the total light extinction (or visibility impairment) to the Wichita Mountains, and (2) sources within Oklahoma contribute only approximately 13% of the total pollutants that contribute to light extinction.

ODEQ initially relied on CENRAP modeling, based on an Alpine Geophysics evaluation of possible additional point-source controls for CENRAP states for 2018. That study relied on AirControlNet, an EPA cost-benefit tool for emissions of $NO_X$ and $SO_2$. CENRAP used a maximum estimated cost of $5,000 per ton of emissions of $NO_X$ or $SO_2$ reduced for sources over 100 tons of $SO_2$ or $NO_X$ in the year 2018. CENRAP further refined the analysis, considering controls only for those sources with emissions of $NO_X$ or $SO_2$ greater than or equal to five tons per year per kilometer of distance to the Wichita Mountains or the nearest other Class I area. This analysis resulted in the conclusion by ODEQ that visibility at the Wichita Mountains would be improved by an additional 0.5 dv, over what ODEQ projects as its reasonable progress goal of 21.47 deciview for 2018 if controls were implemented at the sources that met this combination of baseline emissions, potential for cost-effective reductions, and visibility impact.

[15] Guidance for Estimating Natural Visibility Conditions Under the Regional Haze Rule, EPA–454/B–03–005, September 2003.

[16] The amount of light lost as it travels over one million meters. The haze index, in units of deciviews (dv), is calculated directly from the total light extinction, $b_{ext}$ expressed in inverse megameters ($Mm^{-1}$), as follows: $HI = 10 \ln(b_{ext}/10)$.

[17] Guidance for Tracking Progress Under the Regional Haze Rule, EPA–454/B–03–004, September 2003, pages 2–8.

Following this analysis, ODEQ examined sources within Oklahoma that were not already being controlled via BART or consent decrees or other regulatory mechanisms. See the TSD for a listing of the sources considered. In so doing, ODEQ analyzed the cost of compliance by weighing the cost of potential pollution control equipment versus the visibility benefit. Based on this analysis, ODEQ concluded that no additional controls were required. ODEQ reasoned that most of the largest sources of $SO_2$ and $NO_X$ were already being controlled through BART, already had adequate controls in place, or were too far from the Wichita Mountains (too little visibility impact) to justify the cost of additional controls.

3. Reasonable Progress Consultation

ODEQ used CENRAP as its main vehicle for facilitating collaboration with FLMs and other states in developing its RH SIP. ODEQ was able to use CENRAP generated products, such as regional photochemical modeling results and visibility projections, and source apportionment modeling to assist in identifying neighboring states' contributions to the visibility impairment at the Wichita Mountains.

ODEQ invited those states projected through visibility modeling to contribute greater than 1 $Mm^{-1}$ of light extinction at the Wichita Mountains in 2018 to consultations. ODEQ conducted four consultations. ODEQ directed its first consultation, to the tribal leaders in Oklahoma and their environmental managers, on 14 August 2007. ODEQ held the next three consultations as conference calls and invited CENRAP member clean air agencies, EPA, and the tribes to participate.

ODEQ received responses from the Arkansas Department of Environmental Quality, the Iowa Department of Natural Resources, and the Missouri Department of Natural Resources. These states concluded that emissions from within their borders do not significantly impact visibility at the Wichita Mountains, and they did not offer any additional reductions from their anthropogenic sources.

ODEQ has indicated and we agree that sources in Texas significantly affect the visibility at the Wichita Mountains. We note ODEQ communicated this to Texas in the correspondence included in Appendix 10–1, and Texas agreed with that assertion. However, ODEQ did not request any emission reductions from Texas. As a result of its correspondence with Texas, Texas agreed to provide ODEQ the opportunity to comment on Best Available Control Technology determinations for Prevention of Significant Deterioration sources that have significant impact on the Wichita Mountains. Specifically, ODEQ will be afforded the opportunity to review applications for sources if modeling predicts a five percent or higher impact on light extinction in a given year and provide comments to Texas during its public review and comment period. Texas also agreed to notify ODEQ whenever modeling indicates that a proposed source may significantly impact the Wichita Mountains. ODEQ also requested that Class I impact reviews be required for all proposed PSD sources within 300 kilometers of a Class I area. However, this request was not agreed to by Texas, who cited the need for EPA to adopt significant impact levels for Class I reviews so that there is a consistent approach to requiring Class I reviews.

In establishing its RPG, ODEQ is required by 40 CFR 51.308(d)(1)(i)(B) to consider the emission reduction measures needed to achieve the URP for the period covered by this SIP. Our 1999 RHR [18] further illuminates this requirement:

> [T]he State must identify the amount of progress that would result if this uniform rate of progress were achieved during the period of the first regional haze implementation plan.
>
> [T]he State must identify and analyze the emissions measures that would be needed to achieve this amount of progress during the period covered by the first long-term strategy, and to determine whether those measures are reasonable based on the statutory factors. These factors are the costs of compliance with the measures, the time necessary for compliance with the measures, the energy and nonair quality environmental impacts of the compliance with the measures, and the remaining useful life of any existing source subject to the measures. In doing this analysis, the State must consult with other States which are anticipated to contribute to visibility impairment in the Class I area under consideration. Because haze is a regional problem, States are encouraged to work together to develop acceptable approaches for addressing visibility problems to which they jointly contribute. If a contributing State cannot agree with the State establishing the reasonable progress goal, the State setting the goal must describe the actions taken to resolve the disagreement.

[18] 64 FR 35732.

As further explained by the RHR,[19] Oklahoma was under an additional obligation to consider these controls as part of its reasonable progress analysis requirement:

> If the State determines that the amount of progress identified through the analysis is reasonable based upon the statutory factors, the State should identify this amount of progress as its reasonable progress goal for the first long-term strategy, unless it determines that additional progress beyond this amount is also reasonable. If the State determines that additional progress is reasonable based on the statutory factors, the State should adopt that amount of progress as its goal for the first long-term strategy.

We note that as part of its RH SIP submittal, Texas did consider the impact its sources have on the visibility of the Wichita Mountains. Therefore, we believe that to properly assess whether Oklahoma has satisfied the reasonable progress requirements of section 51.308(d)(1), we must review and evaluate Texas' submittal. We will do this in the course of processing the Texas RH SIP.

*D. Evaluation of Oklahoma's BART Determinations*

Oklahoma's submitted BART rule, OAC 252:100–8, Part 11, became effective on June 15, 2007. Definitions related to the BART rule were added in the Air Quality Rules general definitions section in OAC 252:100–8.1.1, and became effective as a permanent rule on June 15, 2006. These submitted rules also incorporate by reference 40 CFR part 51, appendix Y (our BART Guidelines). The rules further provide that the resulting source-specific requirements be incorporated into that source's air quality permit.

BART is an element of Oklahoma's LTS for the first implementation period. As discussed in more detail in section IV.D. of this preamble, the BART evaluation process consists of three components: (1) An identification of all the BART-eligible sources, (2) an assessment of whether those BART-eligible sources are in fact subject to BART and (3) a determination of any BART controls. ODEQ addressed these steps as follows:

1. Identification of BART-Eligible Sources

The first step of a BART evaluation is to identify all the BART-eligible sources within the state's boundaries. ODEQ identified the BART-eligible sources in Oklahoma by utilizing the three eligibility criteria in the BART Guidelines (70 FR 39158) and our

[19] Id.

regulations (40 CFR 51.301): (1) One or more emission units at the facility fit within one of the 26 categories listed in the BART Guidelines; (2) the emission unit(s) was constructed on or after August 6, 1962, and was in existence prior to August 6, 1977; and (3) potential emissions of any visibility-impairing pollutant from subject units are 250 tons or more per year. ODEQ initially screened its emissions inventory and permitting database to identify major facilities with emission units in one or more of the 26 BART categories. Following this, ODEQ used its databases and records to identify facilities in these source categories with potential emissions of 250 tons per year or more for any visibility-impairing pollutant from any unit that was in existence on August 7, 1977 and began operation after August 7, 1962. ODEQ contacted the sources, when necessary, to obtain or confirm this information.

The BART Guidelines direct states to address $SO_2$, $NO_X$ and direct PM (including both $PM_{10}$ and $PM_{2.5}$) emissions as visibility-impairment pollutants, and States must exercise their "best judgment to determine whether VOC or ammonia emissions from a source are likely to have an impact on visibility in an area." See 70 FR 39162. CENRAP modeling demonstrated that VOCs from anthropogenic sources are not significant visibility-impairing pollutants at the Wichita Mountains. Ammonia emissions in Oklahoma are primarily due to area sources, such as livestock and fertilizer application. Because these are not point sources, they are not subject to BART.[20] ODEQ did consider ammonia from point sources. The emissions inventory prepared for the CENRAP modeling demonstrates that ammonia from point sources are not significant visibility-impairing pollutants in Oklahoma. ODEQ further argued that because of the limiting role of $NO_X$ and $SO_2$ on $PM_{2.5}$ formation and the uncertainties in assessing the effect of an individual source's ammonia emissions reductions on visibility, it did not consider ammonia among visibility-impairing pollutants. We have reviewed this information and propose to agree with this decision.

Table 2 lists Oklahoma's BART-eligible sources:

TABLE 2: FACILITIES WITH BART-ELIGIBLE UNITS IN OKLAHOMA

| BART source category | Facility name | County | Number of units |
|---|---|---|---|
| Fossil fuel-fired boilers of more than 250 MMBTU/hr heat input. | Georgia Pacific Consumer Products (formerly Fort James Operating) Muskogee Mill. | Muskogee .... | 2 |
| Kraft pulp mill | International Paper (formerly Weyerhaeuser) Valliant Paper Mill. | McCurtain .... | 4 |
| Hydrofluoric, sulfuric, and nitric acid plants | Koch Nitrogen Enid Plant | Garfield ..... | 7 |
| | Terra International Oklahoma Woodward Complex | Woodward ... | 11 |
| | Terra Nitrogen Partnership Verdigris Plant | Rogers ..... | 12 |
| Petroleum refineries | Sinclair Oil Tulsa Refinery | Tulsa ..... | 7 |
| | Holly Refining and Marketing (formerly Sunoco) Tulsa Refinery. | Tulsa ..... | 25 |
| | Wynnewood Refining | Garvin ..... | 14 |
| | Valero Refinery (formerly TPI Petroleum Inc) Ardmore Refinery. | Carter ..... | 24 |
| Portland cement plants | Lafarge Building Materials Tulsa Rogers City Line | Rogers ..... | 10 |
| Fossil fuel-fired steam electric plants of more than 250 MMBTU/hr heat input. | OG&E Horseshoe Lake Generating Station | Oklahoma .... | 2 |
| | OG&E Muskogee Generating Station | Muskogee ... | 2 |
| | OG&E Seminole Generating Station | Seminole ..... | 3 |
| | OG&E Sooner Generating Station | Noble ..... | 2 |
| | PSO Comanche Power Station | Comanche ... | 2 |
| | PSO Northeastern Power Station | Rogers ..... | 3 |
| | PSO Riverside Jenks Power Station | Tulsa ..... | 2 |
| | PSO Southwestern Power Station | Caddo ..... | 1 |
| | Western Farmers Electric Coop Anadarko Plant | Caddo ..... | 3 |
| | Western Farmers Electric Coop Mooreland Station | Woodward ... | 3 |

2. Identification of Sources Subject to BART

The second step of the BART evaluation is to identify those BART-eligible sources that may reasonably be anticipated to cause or contribute to visibility impairment at any Class I area, *i.e.* those sources that are subject to BART. The BART Guidelines allow states to consider exempting some BART-eligible sources from further BART review because they may not reasonably be anticipated to cause or contribute to any visibility impairment in a Class I area. Consistent with the BART Guidelines, ODEQ required each of its BART-eligible sources to develop and submit dispersion modeling to assess the extent of their contribution to visibility impairment at surrounding Class I areas.

a. Modeling Methodology

The BART Guidelines provide that states may choose to use the CALPUFF[21] modeling system or another appropriate model to predict the visibility impacts from a single source on a Class I area and to therefore,

[20] ODEQ took the position, and we agree, that it is not practical at this time to control ammonia from these types of sources, for the purpose of improving visibility under the reasonable progress requirements of section 51.308(d)(1).

[21] Note that our reference to CALPUFF encompasses the entire CALPUFF modeling system, which includes the CALMET, CALPUFF, and CALPOST models and other pre and post processors. The different versions of CALPUFF have corresponding versions of CALMET, CALPOST, etc. which may not be compatible with previous versions (*e.g.,* the output from a newer version of CALMET may not be compatible with an older version of CALPUFF). The different versions of the CALPUFF modeling system are *available* from the model developer at *http://www.src.com/verio/download/download.htm.*

determine whether an individual source is anticipated to cause or contribute to impairment of visibility in Class I areas, *i.e.,* "is subject to BART". The Guidelines state that we believe CALPUFF is the best regulatory modeling application currently available for predicting a single source's contribution to visibility impairment (70 FR 39162). ODEQ, in coordination with CENRAP, used the CALPUFF modeling system to determine whether individual sources in Oklahoma were subject to or exempt from BART.

The BART Guidelines also recommend that states develop a modeling protocol for making individual source attributions, and suggest that states may want to consult with us and their RPO to address any issues prior to modeling. The CENRAP states, including Oklahoma, developed the "CENRAP BART Modeling Guidelines". [22] Stakeholders, including EPA, FLMs, industrial sources, trade groups, and other interested parties, actively participated in the development and review of the CENRAP protocol. CENRAP provided readily available modeling data bases for use by states to conduct their analyses. We note that the original meteorological databases generated by CENRAP did not include observations as EPA guidance indicates, therefore sources were evaluated using the 1st High values instead of the 8th High values. The use of the 1st High was agreed to by EPA, representatives of the Federal Land Managers, and CENRAP stakeholders. Some sources that did not screen out did later conduct refined CALPUFF modeling that incorporated meteorological data with observations and which allowed to them to compare 8th High modeling values with the 0.5 deciview threshold. We propose to find the chosen model and the general modeling methodology acceptable. However, we note a few additional deviations from modeling guidance that are discussed in the TSD and addressed in our remodeling of visibility impacts in support of the FIP for these six sources.

b. Contribution Threshold

For states using modeling to determine the applicability of BART to single sources, the BART Guidelines note that the first step is to set a contribution threshold to assess whether the impact of a single source is sufficient to cause or contribute to visibility impairment at a Class I area. The BART Guidelines state that, "[a] single source that is responsible for a 1.0 deciview change or more should be considered to 'cause' visibility impairment." 70 FR 39104, 39161. The BART Guidelines also state that "the appropriate threshold for determining whether a source contributes to visibility impairment' may reasonably differ across states," but, "[a]s a general matter, any threshold that you use for determining whether a source 'contributes' to visibility impairment should not be higher than 0.5 deciviews." *Id.* Further, in setting a contribution threshold, states should "consider the number of emissions sources affecting the Class I areas at issue and the magnitude of the individual sources' impacts. The Guidelines affirm that states are free to use a lower threshold if they conclude that the location of a large number of BART-eligible sources in proximity of a Class I area justifies this approach. ODEQ used a contribution threshold of 0.5 dv for determining which sources are subject to BART. There are a limited number of BART-eligible sources in close proximity to the State's Class I area and surrounding Class I areas, and the results of the visibility impacts modeling demonstrated that the majority of the individual BART-eligible sources had visibility impacts well below 0.5 dv. We agree with the State's rationale for choosing this threshold value.

c. BART Sources Exempted Due to Permit Modifications

When performing its initial BART screening modeling, ODEQ identified three sources with a contribution of greater than 0.5 deciviews in visibility impairment that desired to limit their emissions in order to avoid a BART determination. These sources were (1) the Georgia Pacific Consumer Products LP, Muskogee Mill; (2) the International Paper, Valliant Paper Mill; and (3) the Western Farmers Electric Coop, Anadarko Plant. An updated BART modeling analysis, assuming those controls were in place, demonstrated a contribution of less than 0.5 deciview of visibility impairment for each of these facilities. They are individually discussed below. ODEQ issued a Title V operating permit to each of the sources that imposed an emission limitation requiring the modeled controls. Since these three sources are voluntarily taking limits to avoid a full BART analysis, any future changes or relaxation of these limits at these specific BART-eligible units or in their permits that would allow for increases in $SO_2$, $NO_X$, or PM emissions would subject those sources to BART review, pursuant to the submitted ODEQ rules that we propose to approve as part of the Oklahoma RH SIP.

i. Georgia Pacific Consumer Products LP, Muskogee Mill

The Georgia Pacific, Muskogee Mill had two BART eligible boilers, Boiler B–1 and Boiler B–2. Georgia Pacific requested of ODEQ that an enforceable emission limit be imposed on Boiler B–1 to maintain emissions below the BART contribution threshold of 0.5 deciviews. Where previously Boiler B–1 was permitted to burn either No. 2 fuel oil or natural gas, Boiler B–1 is now restricted to burning natural gas, which will reduce its $NO_X$ emissions. ODEQ has determined that under the Title V operating permit modification, this facility will have a visibility impairment contribution of less than 0.5 deciviews at any Class I area, which is below the contribution threshold used by ODEQ in their BART analyses. This emission reduction is housed in a modification to the facility's Oklahoma Department of Environmental Quality, Air Quality Division operating Permit, No. 99–113–TV (M–5), issued January 5, 2011. This permit requires that this fuel switch be operational no more than five years following our final action on the Oklahoma RH SIP.

ii. International Paper, Valliant Paper Mill

The International Paper, Valliant Paper Mill has three BART eligible boilers: EUG D1, Bark Boiler; EUG D2, Power Boiler; and EUG D3, Package Boiler. It also has a BART eligible Lime Kiln, EUG E7a. The Valiant Paper Mill has accepted limits on the sulfur content of fuel to the Bark and Power boilers in order to reduce its visibility impact. ODEQ has determined that under this Title V operating permit modification, this facility will have a visibility impairment contribution of less than 0.5 deciviews at any Class I area, which is below the contribution threshold used by ODEQ in their BART analyses. This emission reduction is housed in a modification to the facility's Oklahoma Department of Environmental Quality, Air Quality Division operating Permit No. 97–057–TV (M–10), issued March 24, 2010. This permit requires these controls be operational no more than five years following our final action on the Oklahoma RH SIP.

iii. Western Farmers Electric Coop, Anadarko Plant

The Western Farmers Electric Coop (WFEC), Anadarko facility had three

[22] CENRAP BART Modeling Guidelines, T. W. Tesche, D. E. McNally, and G. J. Schewe (Alpine Geophysics LLC), December 15, 2005, *available* at *http://www.deq.state.ok.us/aqdnew/RulesAndPlanning/Regional_Haze/SIP/Appendices/index.htm.*

BART eligible combine cycle gas turbines, AN–Unit 4, AN–Unit 5, and AN–Unit 6. WFEC agreed to $NO_X$, $SO_2$, and PM–10 emission limits on the combined cycle gas turbines in order to reduce their visibility impact. ODEQ has determined that under this Title V operating permit modification, this facility will have a visibility impairment contribution of less than 0.5 deciviews at any Class I area, which is below the contribution threshold used by ODEQ in their BART analyses. This emission reduction is housed in a modification to the facility's Oklahoma Department of Environmental Quality, Air Quality Division operating Permit, No. 2005–037–TVR (M–1), issued July 9, 2010. This permit will require these controls be operational no more than five years following our final action on the Oklahoma RH SIP.

d. Sources Identified by ODEQ as Subject to BART

Following the elimination of those sources that were found to have visibility impacts below the 0.5 deciview threshold, or the three discussed in the previous section that received Title V permits limiting their visibility impact below the 0.5 deciview threshold, ODEQ identified the sources contained in Table 3 as being subject to BART.

TABLE 3—SOURCES IN OKLAHOMA SUBJECT TO BART

| Facility name | BART emission units | Source category | Pollutants evaluated |
|---|---|---|---|
| OG&E Seminole | Units 1, 2, and 3 | fossil fuel-fired steam electric plants | $NO_X$ |
| OG&E Sooner | Units 1 and 2 | fossil fuel-fired steam electric plants | $SO_2$ |
| | | | $NO_X$ |
| | | | $PM_{10}$ |
| OG&E Muskogee | Units 4 and 5 | fossil fuel-fired steam electric plants | $SO_2$ |
| | | | $NO_X$ |
| | | | $PM_{10}$ |
| AEP/PSO Comanche | Units 1 and 2 | fossil fuel-fired steam electric plants | $NO_X$ |
| AEP/PSO Northeastern | Unit 2 | fossil fuel-fired steam electric plants | $NO_X$ |
| AEP/PSO Northeastern | Units 3 and 4 | fossil fuel-fired steam electric plants | $SO_2$ |
| | | | $NO_X$ |
| | | | $PM_{10}$ |
| AEP/PSO Southwestern | Unit 3 | fossil fuel-fired steam electric plants | $NO_X$ |

3. BART Determinations

The third step of a BART evaluation is to perform the BART analysis. The BART Guidelines [23] describe the BART analysis as consisting of the following five basic steps:

- Step 1: Identify All Available Retrofit Control Technologies,
- Step 2: Eliminate Technically Infeasible Options,
- Step 3: Evaluate Control Effectiveness of Remaining Control Technologies,
- Step 4: Evaluate Impacts and Document the Results, and
- Step 5: Evaluate Visibility Impacts.

All of the sources that are subject to BART presented in Table 3 are fossil fuel fired electricity generating units. ODEQ performed BART determinations for all of these sources for $NO_X$, $SO_2$, and PM. For each BART determination, we find that ODEQ adequately considered Steps 1 through 5, above, except for the $SO_2$ BART determinations for Units 4 and 5 of the OG&E Muskogee plant, Units 1 and 2 of the OG&E Sooner plant, and Units 3 and 4 of the AEP/PSO Northeastern plants. The $SO_2$ BART determinations for these six units are the subject of our FIP and are treated separately in Section V.E. of this proposal. We agree with ODEQ's BART determinations for all remaining cases and summarize them below. For more details, please see the TSD.

a. OG&E Seminole Units 1, 2, and 3 BART Determinations

The OG&E Seminole Units 1, 2 and 3 are BART-eligible sources. These units are gas fired boilers with gross outputs of 567 MW each. ODEQ considered all $NO_X$ control technologies, including combustion controls such as Low $NO_X$ Burners (LNB) and Flue Gas Recirculation (FGR); and post combustion controls, such as Selective Catalytic Reduction (SCR), and Selective Noncatalytic Reduction (SNCR). ODEQ concluded that LNB/OFA +SCR, LNB/OFA +FGR, and LNB/OFA were technically feasible. ODEQ then evaluated the economic, environmental, and energy impacts associated with the three proposed control options. This included CALPUFF visibility modeling, based on a modeling protocol we find acceptable. ODEQ determined that the installation of new LNB with OFA and FGR was cost effective, with a capital cost of $16,977,200 per unit for units 1 and 2 and $9,468,600 for unit 3 and an average cost effectiveness of $1,554–$2,120 per ton of NOx removed for each unit over a twenty year operational life. ODEQ determined that $NO_X$ BART emission limits should be 30-day rolling averages of 0.203 lb/MMBtu for Unit 1, 0.212 lb/MMBtu for Unit 2 and 0.164 lb/MMBtu for Unit 3. The BART Guidelines do not specify a presumptive $NO_X$ BART limit for gas fired power plants. As Units 1, 2, and 3 are gas fired, ODEQ determined that $SO_2$ and PM BART for them are no additional control. We propose to approve ODEQ's determination of BART for the OG&E Seminole Units 1, 2, and 3.

b. OG&E Sooner Units 1 and 2 BART Determinations

The OG&E Sooner Units 1 and 2 are BART-eligible sources. Both units are coal fired with a gross output of 570 MW. We evaluate ODEQ's $SO_2$ BART determinations for Units 1 and 2 in section V.E. Here we discuss our review of ODEQ's $NO_X$ and PM BART determination for these units.

ODEQ considered all NOx control technologies, including combustion controls such as LNB and FGR; and post combustion controls, such as SCR, and SNCR. ODEQ concluded that LNB/OFA +SCR, and LNB/OFA were technically feasible. ODEQ noted that FGR control systems have been used as a retrofit $NO_X$ control strategy on natural gas-fired boilers, but have not generally been considered as a retrofit control technology on coal-fired units. ODEQ then evaluated the economic, environmental, and energy impacts associated with the two proposed control options. This included CALPUFF visibility modeling, based on a modeling protocol we find acceptable.

[23] 70 FR 39164.

For Units 1 and 2, ODEQ determined the installation of new LNB with OFA was cost effective, with a capital cost of $14,055,900 per unit for units 1 and 2 and an average cost effectiveness of $493–785 per ton of $NO_X$ removed for each unit over a twenty-five year operational life. ODEQ determined that $NO_X$ BART emission limits should be 30-day rolling averages of 0.15 lbs/MMBtu, which meets the BART presumptive limit.

For PM, ODEQ noted there are two generally recognized PM control devices that are used to control PM emission from coal fired boilers, which are Electrostatic Precipators (ESPs) and fabric filters (or baghouses). Sooner Units 1 & 2 are currently equipped with ESP control systems. ODEQ determined that although fabric filters offer a slight improvement in PM control (99.7 versus 99.3 percent control), their additional cost did not justify the modest improvement in PM control. ODEQ determined PM BART is the existing ESPs with an emission rate of 0.1 lbs/MMBtu on a 3-hour average. ODEQ specified additional BART emission limitations in lbs/hour and tons/year. We propose to approve ODEQ's PM and $NO_X$ BART determinations for the OG&E Sooner Units 1 and 2.

c. OG&E Muskogee Units 4 and 5 BART Determinations

The OG&E Muskogee Units 4 and 5 are BART-eligible sources. Both units are coal fired with a gross output of 572 MW. We evaluate ODEQ's $SO_2$ BART determinations for Units 4 and 5 in section V.E. Here we discuss our review of ODEQ's $NO_X$ and PM BART determination for these units.

ODEQ considered all $NO_X$ control technologies, including combustion controls such as LNB and FGR; and post combustion controls, such as SCR, and SNCR. ODEQ concluded that LNB/OFA +SCR, and LNB/OFA were technically feasible. ODEQ noted that FGR control systems have been used as a retrofit $NO_X$ control strategy on natural gas-fired boilers, but have not generally been considered as a retrofit control technology on coal-fired units. ODEQ then evaluated the economic, environmental, and energy impacts associated with the two proposed control options. This included CALPUFF visibility modeling, based on a modeling protocol we find acceptable. For Units 4 and 5, ODEQ determined the installation of new LNB with OFA was cost effective, with a capital cost of $14,113,700 per unit for units 4 and 5 and an average cost effectiveness of $260–$281 per ton of $NO_X$ removed for each unit over a twenty-five year operational life. ODEQ determined that $NO_X$ BART emission limits should be 30-day rolling averages of 0.15 lbs/MMBtu, which meets the BART presumptive limit.

For PM, ODEQ noted there are two generally recognized PM control devices that are used to control PM emission from coal fired boilers, which are Electrostatic Precipators ESPs and fabric filters (or baghouses). Muskogee Units 4 & 5 are currently equipped with ESP control systems. ODEQ determined that although fabric filters offer a slight improvement in PM control (99.7 versus 99.3 percent control), their additional cost did not justify the modest improvement in PM control. ODEQ determined PM BART is the existing ESPs with an emission rate of 0.1 lbs/MMBtu on a 3-hour average. ODEQ specified additional BART emission limitations in lbs/hour and tons/year. We propose to approve ODEQ's PM and $NO_X$ BART determinations for the OG&E Muskogee Units 4 and 5.

d. AEP/PSO Comanche Units 1 and 2 BART Determinations

The AEP/PSO Comanche Units 1 and 2 are BART-eligible sources. These units are gas fired turbines with duct burners and heat recovery steam generators with a gross output of 94 MW each.

For Units 1 and 2, ODEQ considered dry LNBs and SCR as being possibly applicable to gas fired turbines. ODEQ concluded that due to specific design considerations, only dry LNBs were technically feasible. ODEQ then evaluated the economic, environmental, and energy impacts associated with that proposed control option. This included CALPUFF visibility modeling, based on a modeling protocol we find acceptable. ODEQ determined that the installation of dry LNBs was cost effective, with a capital cost of $34,660,000 an average cost effectiveness of $2,600 per ton of $NO_X$ removed for each unit over a twenty year operational life. ODEQ determined that $NO_X$ BART emission limits should be 30-day rolling averages of 0.15 lbs/MMBtu. The BART Guidelines do not specify a presumptive $NO_X$ BART limit for gas fired power plants. As Units 1 and 2 are gas fired, ODEQ determined that $SO_2$ and PM BART for them are no additional control. We propose to approve ODEQ's determination of BART for the AEP/PSO Comanche Units 1 and 2.

e. AEP/PSO Northeastern Unit 2, 3, and 4 BART Determination

The AEP/PSO Northeastern Units 2, 3, and 4 are BART-eligible sources. Unit 2 is a gas fired boiler with a gross output of 495 MW. Units 3 and 4 are coal fired with gross outputs of 490 MW each. We evaluate ODEQ's $SO_2$ BART determinations for Units 3 and 4 in section V.E. Here we discuss our review of ODEQ's $NO_X$ and PM BART determination for these units.

For Unit 2, ODEQ considered all $NO_X$ control technologies, including combustion controls such as LNB and FGR; and post combustion controls, such as SCR, and SNCR. ODEQ concluded that LNB/OFA +SCR, LNB/OFA +FGR, and LNB/OFA were technically feasible. ODEQ then evaluated the economic, environmental, and energy impacts associated with the three proposed control options. This included CALPUFF visibility modeling, based on a modeling protocol we find acceptable. ODEQ determined that the installation of new LNB with OFA was cost effective, with a capital cost of $3,450,000 and an average cost effectiveness of $303 per ton of $NO_X$ removed over a twenty year operational life. ODEQ determined that $NO_X$ BART emission limits should be 30-day rolling averages of 0.28 lbs/MMBtu. ODEQ specified additional BART emission limitations in lbs/hour and tons/year. The BART Guidelines do not specify a presumptive $NO_X$ BART limit for gas fired power plants. As Unit 2 is gas fired, ODEQ determined that $SO_2$ and PM BART for it are no additional control. We propose to approve ODEQ's determination of BART for the AEP/PSO Northeastern Unit 2.

For Units 3 and 4, ODEQ considered all $NO_X$ control technologies, including combustion controls such as LNB and FGR; and post combustion controls, such as SCR, and SNCR. ODEQ concluded that LNB/OFA +SCR, LNB/OFA, were technically feasible. ODEQ noted difficulties posed by the installation of SNCR on Units 3 and 4 but did evaluate SNCR. ODEQ noted that FGR control systems have been used as a retrofit $NO_X$ control strategy on natural gas-fired boilers, but have not generally been considered as a retrofit control technology on coal-fired units. ODEQ then evaluated the economic, environmental, and energy impacts associated with the two proposed control options. This included CALPUFF visibility modeling, based on a modeling protocol we find acceptable. For Units 3 and 4, ODEQ determined the installation of new LNB with OFA was cost effective, with a capital cost of $17,000,000 and an average cost effectiveness of $313 per ton of $NO_X$ removed over a twenty-five year operational life. ODEQ determined that $NO_X$ BART emission limits should be 30-day rolling averages of 0.15 lbs/

MMBtu, which meets the BART presumptive limit.

For PM, ODEQ noted there are two generally recognized PM control devices that are used to control PM emission from coal fired boilers, which are ESPs and fabric filters (or baghouses). Northeastern Units 3 & 4 are currently equipped with ESP control systems. ODEQ determined that although fabric filters offer a slight improvement in PM control (99.7 versus 99.3 percent control), their additional cost did not justify the modest improvement in PM control. ODEQ determined PM BART is the existing ESPs with an emission rate of 0.1 lbs/MMBtu on a 3-hour average. ODEQ specified additional BART emission limitations in lbs/hour and tons/year. We propose to approve ODEQ's determination of BART for the AEP/PSO Northeastern Units 3 and 4.

f. AEP/PSO Southwestern Unit 3 BART Determination

The AEP/PSO Southwestern Unit 3 is a BART-eligible source. This unit is a gas fired boiler with a gross output of 332 MW. ODEQ considered all $NO_X$ control technologies, including combustion controls such as LNB and FGR; and post combustion controls, such as SCR, and SNCR. ODEQ concluded that LNB/OFA +SCR, and LNB/OFA were technically feasible. ODEQ then evaluated the economic, environmental, and energy impacts associated with the three proposed control options. This included CALPUFF visibility modeling, based on a modeling protocol we find acceptable. ODEQ determined that the installation of new LNB with OFA was cost effective, with a capital cost of $3,000,000 and an average cost effectiveness of $947 per ton of $NO_X$ removed over a twenty-year operational life. ODEQ determined that $NO_X$ BART emission limits should be 30-day rolling averages of 0.45 lbs/MMBtu on a 30-day average. ODEQ specified additional BART emission limitations in lbs/hour and tons/year.

The BART Guidelines do not specify a presumptive $NO_X$ BART limit for gas fired power plants. However, due to the relatively high $NO_X$ emission rate that ODEQ determined was BART, and the fact that it appeared the annual average emissions rates recorded with the Clean Air Markets Division indicates that the boiler can currently comply with the standard on an annual average basis, we asked for additional information. ODEQ responded with data detailing 9 years of emissions versus load, that indicate that the boiler operates through a range where emissions can reach as much as 1.4 lb/MMBtu at full load. This unit has historically operated as a "peaking unit" responding to increased demand for electricity. While technically feasible, LNB/OFA may not be as effective under all boiler operating conditions, especially during load changes and at low and high operating loads. After having examined the data, attached in our TSD, we accept ODEQ's explanation. As Unit 3 is gas fired, ODEQ determined that $SO_2$ and PM BART for it are no additional control. We propose to approve ODEQ's determination of BART for the AEP/PSO Southwestern Unit 3.

g. ODEQ BART Results and Summary

We have reviewed ODEQ's BART determinations for the sources listed in Table 3, above. We note that these BART determinations result in significant reductions in the amount of $NO_X$ that will be emitted by these sources, totaling 27,043 tons per year. This results in significant visibility benefits at the Wichita Mountains, Caney Creek, Upper Buffalo, and Hercules Glades Class I areas. Calculated as the 3-year average of the modeled visibility improvement at the 98th percentile, these $NO_X$ BART reductions result in a visibility improvement of 5.46 dv at the Wichita Mountains, 2.65 deciviews at Caney Creek, 1.79 dv at the Upper Buffalo, and 1.37 dv at Hercules Glades. This results in an 11.27 dv improvement over all these Class I areas. See the TSD for more details.

Oklahoma's BART rule requires each source subject to BART to install and operate BART no later than 5 years after we approve this RH SIP. OAC 252–100–8–75(e). Therefore, we believe this satisfies ODEQ's obligation under section 51.308(e)(1)(iv), that "each source subject to BART be required to install and operate BART as expeditiously as practicable, but in no event later than 5 years after approval of the implementation plan revision."

For the reasons discussed above, we propose to find that with the exception of the $SO_2$ BART determinations for Units 4 and 5 of the OG&E Muskogee plant, Units 1 and 2 of the OG&E Sooner plant, and Units 3 and 4 of the AEP/PSO Northeastern plants, ODEQ has satisfied the BART requirement of section 51.308(e).

*E. Evaluation of ODEQ's $SO_2$ BART Determinations for the OG&E and AEP/PSO Coal Fired Power Plant Units*

The discussion below is limited to the $SO_2$ BART assessments for Units 4 and 5 of the Oklahoma Gas and Electric Muskogee plant, Units 1 and 2 of the Oklahoma Gas and Electric Sooner plant (the "OG&E units"), and Units 3 and 4 of the American Electric Power/Public Service Company of Oklahoma Northeastern plant (the "AEP/PSO units"). ODEQ's other BART assessments are covered in Section V.D., above.

In the Oklahoma RH SIP submittal, ODEQ concluded that dry flue gas desulfurization with spray dryer absorbers ("dry scrubbers") and wet flue gas desulfurization ("wet scrubbers") were not cost effective for these units. ODEQ came to this decision after comparing the cost effectiveness in annualized dollars per ton of $SO_2$ removed ($/ton) to the visibility improvement at the nearest Class I areas. ODEQ determined that $SO_2$ BART for these units was no control and specified an $SO_2$ limit of 0.65 lbs/MMBtu on a 30-day rolling average. The OG&E units currently burn a low sulfur coal from the Powder River Basin (PRB) of Wyoming, and already have historical annual emission rates significantly below this limit. Therefore, it is possible the OG&E units would be able to actually increase their emissions slightly, and still be in compliance with ODEQ's $SO_2$ BART assessment. The AEP/PSO units have historical annual emission rates that have been steadily decreasing to a point where the imposition of ODEQ's proposed BART $SO_2$ emission rate of 0.65 lbs/MMBtu would result in very little reduction in emissions. Below we discuss ODEQ's BART evaluation and our assessment of that evaluation.

1. Cost Effectiveness

We propose to find that ODEQ properly identified these sources as BART eligible, in compliance with section 51.308(e)(1)(i). However, we propose to find that ODEQ did not properly follow the requirements of section 51.308(e)(1)(ii)(A) in determining BART. Specifically, we propose that ODEQ did not properly "take into consideration the costs of compliance" when it relied on cost estimates that greatly overestimated the costs of dry and wet scrubbing to conclude these controls were not cost effective. Given that scrubbers are typically considered to be highly cost-effective controls for power plants such as those at issue, we retained a consultant to independently assess the suitability and costs of installing these controls. We have thoroughly reviewed and evaluated the consultant's report and agree with its findings regarding the cost-effectiveness of dry and wet scrubbing at the BART units. Our

consultant's detailed report has been incorporated into the TSD.[24]

a. Dry Scrubbing Cost Analyses

Table 4, below, summarizes and contrasts the cost effectiveness of dry scrubbers estimated by ODEQ[25] versus our estimate. Both ODEQ and we used BART evaluations performed by OG&E and AEP/PSO as the starting points for the assessments.[26]

TABLE 4—CONTRAST OF DRY SCRUBBER COST EFFECTIVENESS

| Plant | ODEQ projected cost ($/ton $SO_2$ removed) | EPA's projected cost ($/ton $SO_2$ removed) |
|---|---|---|
| Sooner 1 | $6,348 | $1,291 |
| Sooner 2 | 7,147 | 1,291 |
| Muskogee 4 | 7,378 | 1,317 |
| Muskogee 5 | 7,493 | 1,317 |
| Northeastern 3 | 3,294 | 1,544 |
| Northeastern 4 | 3,294 | 1,544 |

Although our TSD provides a detailed comparison between the costing methodologies, a few general points can be made that explain why our costs differ with those from ODEQ. First, in the case of the OG&E analyses, a coal with a significantly higher sulfur content than is currently burned was assumed by OG&E's contractor in determining the design of the scrubber. This increased the capital cost of the scrubber over what would minimally be needed to scrub the coal currently being burned. However, the increased tonnage of $SO_2$ that would have been removed from the emissions resulting from the burning of that coal, and the high efficiency of the scrubber was not used in calculating the cost effectiveness ($/ton). Our cost analysis, assumed the same higher sulfur coal, but adjusted the cost effectiveness to account for the increased scrubber efficiency and the increased tonnage of sulfur that would be removed. Second, the companies did not follow the Air Pollution Control Cost Manual[27] when possible, as specified in the BART guidelines.[28] Our cost analysis does follow the Air Pollution Control Cost Manual. Third, some costs were significantly outside of the range of the actual costs. In our analysis these costs are adjusted accordingly. Fourth, the cost estimates contained double counting. In our analysis, the double counted costs are removed. Lastly, the cost estimates failed to evaluate the most cost effective options. Our analysis accounts for the more cost effective options and is referred to as "Option 1" in our consultant's report.

However, even though it appeared that costing the larger scrubber was OG&E's preferred option, we did not wish to propose our decision solely on that basis. We also considered whether it would be cost effective to scrub the type of coal currently burned at the units. Therefore, we also analyzed the cost of a dry scrubber for the OG&E units, assuming the scrubber would be sized to scrub the coal being currently burned. This approach, referred to as "Option 2" in our consultant's report, is summarized in Table 5, below. The estimates in Table 5 are not refined estimates and did not consider all of the issues considered in option 1.

TABLE 5—UNREFINED MINIMALLY-SIZED OG&E DRY SCRUBBER COST EFFECTIVENESS

| Plant | EPA's Projected Cost (Unrefined) ($/ton $SO_2$ removed) |
|---|---|
| Sooner 1 | $4,594 |
| Sooner 2 | 4,594 |
| Muskogee 4 | 5,102 |
| Muskogee 5 | 5,102 |

We further refined the cost of the smaller scrubber to account for the issues discussed above that were rectified in Option 1: not following the Air Pollution Control Cost Manual, adjusting costs that were outside of the range of the actual costs, eliminating double counted costs, and failing to evaluate the most cost effective options. Additional details concerning this refinement are covered in our TSD.

TABLE 6—REFINED MINIMALLY-SIZED OG&E DRY SCRUBBER COST EFFECTIVENESS

| Plant | EPA's Projected Cost (Refined) ($/ton $SO_2$ removed) |
|---|---|
| Sooner 1 | $2,048 |
| Sooner 2 | 2,048 |
| Muskogee 4 | 2,366 |
| Muskogee 5 | 2,366 |

In contrasting the results displayed in Tables 4 and 6, we conclude that based on a controlled emission limit of 0.06 lbs/MMBtu, a dry scrubber is cost effective at Units 4 and 5 of the OG&E Muskogee plant, Units 1 and 2 of the OG&E Sooner plant, and Units 3 and 4 of the AEP/PSO Northeastern plant. In OG&E's case, this is true regardless of whether the scrubber is sized to control the coal presently burned, or a significantly dirtier coal. Therefore, we propose to find that we cannot accept the cost estimates for dry scrubbers provided in the Oklahoma RH submission.

b. Wet Scrubbing Cost Analyses

Table 7, below summarizes and contrasts the cost effectiveness of wet scrubbers estimated by ODEQ versus our estimates:

[24] Dr. Phyllis Fox, Revised BART Cost-Effectiveness Analysis for Flue Gas Desulfurization at Coal-Fired Electric Generating Units in Oklahoma: Sooner Units 1 & 2 Muskogee Units 4 & 5 Northeastern Units 3 & 4. Report Prepared for U.S. EPA, RTI Project Number 0209897.004.085.

[25] ODEQ BART analyses housed in Appendix 6–4 of the OK RH SIP.

[26] Sargent & Lundy, Sooner Units 1 & 2, Muskogee Units 4 & 5 Dry FGD BART Analysis Follow-Up Report, Prepared for Oklahoma Gas & Electric, December 28, 2009.

Trinity Consultants, Best Available Retrofit Technology (BART) Determination, American Electric Power, Northeastern Power Plant, May 30, 2008.

[27] U.S. EPA, EPA Air Pollution Control Cost Manual, EPA/452/B–02–001, 6th Ed., January 2002. The EPA Air Pollution Control Cost Manual was formerly known as the OAQPS Control Cost Manual.

[28] As stated in the BART guidelines, "[i]n order to maintain and improve consistency, cost estimates should be based on the OAQPS Control Cost Manual, where possible." 70 FR 39104, 39166.

TABLE 7—CONTRAST OF WET SCRUBBER COST EFFECTIVENESS

| Plant | ODEQ projected cost ($/ton $SO_2$ removed) | EPA's projected cost ($/ton $SO_2$ removed) |
|---|---|---|
| Sooner 1 | $6,998 | $1,555 |
| Sooner 2 | 7,827 | 1,555 |
| Muskogee 4 | 8,724 | 1,417 |
| Muskogee 5 | 8,852 | 1,417 |
| Northeastern 3 | 3,625 | 1,699 |
| Northeastern 4 | 3,625 | 1,699 |

The ODEQ's BART analyses eliminated wet scrubbing, in part, because the dollars per ton cost effectiveness was calculated to be higher than for dry scrubbing; the incremental cost to go from dry to wet scrubbing was judged unacceptable; and wet scrubbing was alleged to have certain adverse impacts that dry scrubbing did not have. ODEQ determined that wet scrubbing was not BART for $SO_2$ for any of the subject units. This determination was based in part, on several alleged adverse collateral impacts including: (1) Increased sulfuric acid mist (SAM) in the flue gas; (2) excess particulate emitted due to the location of a scrubber downstream of the particulate control device; (3) the need for more reactant, which would generate more fugitive dust; (4) the need for significantly more water; (5) the generation of a wastewater stream that must be treated; and (6) the creation of a higher visibility impairment due to lower exit velocity, lower stack temperature, and higher SAM emissions. We have determined these claims are either wrong or overstated. Furthermore, we noted several benefits of wet scrubbing and some drawbacks to dry scrubbing, which were not evaluated by ODEQ. These issues are detailed in our consultant's report. Please see the TSD for further discussion of our evaluation of ODEQ's determination that wet scrubbing was not BART for $SO_2$.

Although OG&E's contractor did not evaluate wet scrubbing in its final updated BART analyses, ODEQ modified an earlier OG&E wet scrubber cost estimate as the basis for estimating the cost of wet scrubbing. The total capital requirement for wet scrubbers was carried forward from the previous cost estimate. ODEQ then modified other costing parameters to be consistent with OG&E's contractor's current dry scrubber cost estimate. These modifications included the capital recovery factor, the annual operating costs, and administrative costs. AEP/PSO's contractor did provide a wet scrubber cost analysis as part of its BART analyses, which was incorporated into ODEQ's BART analysis. However, ODEQ's wet scrubber BART analyses for the OG&E and AEP/PSO plants did not include the kind of detailed, line-by-line cost breakdown that is needed for a proper evaluation.

We approached this problem by comparing the cost of wet to dry scrubbing for 13 cost effectiveness analyses (including the earlier OG&E analyses and the AEP/PSO analyses). The results of this analysis indicated that the average calculated cost effectiveness of a wet scrubber is typically about 9% higher than for a dry scrubber, except in those cases where an existing ESP can substitute for a new baghouse. Although that specific option was not evaluated or assumed in our cost analyses, we note that the OG&E and AEP/PSO units in question all have existing ESPs, and we expect they could be retained to reduce the cost. After increasing the cost of our calculated dry scrubbing estimate by 9%, we propose to find that the cost of wet scrubbing for the OG&E and AEP units fall within the range of values found to be cost effective in other similar wet scrubber cost determinations. As we stated in the BART Rule, "[a] reasonable range would be a range that is consistent with the range of cost effectiveness values used in other similar permit decisions over a period of time." 70 FR 39104, 39168. Dry scrubbers are being successfully applied to many kinds of stationary sources worldwide, including many similar applications in the utility industry.[29] As explained in the preamble to the BART Guidelines in explaining the decision to establish presumptive BART limits for $SO_2$ based on the use of scrubbers, both wet and dry scrubbers are highly cost effective for power plants, with costs of $400 to $2000 per ton of $SO_2$ removed typically. 70 FR at 39132. Thus, dry scrubbing is clearly cost effective, barring an unusual, site specific condition. However, neither OG&E nor AEP/PSO identified any such conditions. Similarly, wet scrubbing has been employed in many coal fired power plants in the United States, and is in fact more widely used than dry scrubbing. This includes the Pleasant Prairie Units 1 and 2 in Wisconsin, which are similar to the OG&E and AEP/PSO units in question.[30] Therefore, because our cost effectiveness calculations for the BART units fall within the range for other similar scrubber installations, we propose to find that both dry and wet scrubbing are cost effective in terms of dollars per tons of $SO_2$ removed. Consequently, we propose to disapprove ODEQ's evaluation of the cost effectiveness of control.

2. Visibility Benefit

Having considered the cost effectiveness of wet and dry scrubbers for OG&E and AEP/PSO, we then considered the visibility improvement that would result from the installation of controls. As was done in assessing costs, OG&E and AEP assessed visibility on a facility basis. ODEQ[31] used the CALPUFF modeling system, which consists of a meteorological data pre-processor (CALMET), an air dispersion model (CALPUFF), and post-processor programs (POSTUTIL, CALSUM, CALPOST). The CALPUFF modeling system is the recommended model for conducting BART visibility analysis. The modeling analysis generally followed the BART protocol developed by CENRAP.[32] In ODEQ's modeling approach, CALPUFF visibility modeling for each pollutant was carried out separately so that only $NO_X$ emissions were modeled in support of the $NO_X$

[29] Electric Power Research Institute (EPRI), A Review of Literature Related to the Use of Spray Dryer Absorber Material: Production, Characterization, Utilization Applications, Barriers, and Recommendations, December 6, 2006, Table 1–2.

[30] These units are 620 MW pulverized coal fired boilers that burn similar low sulfur PRB coal (0.5–0.7 lb/MMBtu) that were placed into service in 1980 and 1985, respectively. They were retrofitted with wet scrubbers in 2006 and 2007, respectively.

[31] Throughout this document, any reference to "ODEQ modeling" refers to modeling performed or reviewed by ODEQ.

[32] CENRAP BART Modeling Guidelines, T. W. Tesche, D. E. McNally, and G. J. Schewe (Alpine Geophysics LLC), December 15, 2005, *available at* (*http://www.deq.state.ok.us/aqdnew/RulesAndPlanning/Regional_Haze/SIP/Appendices/index.htm*).

BART determination or only $SO_2/H_2SO_4$ emissions for $SO_2$ BART determinations. Due to the nonlinear nature and complexity of atmospheric chemistry and chemical transformation among pollutants, CALPUFF modeling on a pollutant-specific basis is not recommended.[33] Furthermore, this approach does not allow for predictions of total visibility impairment for different control scenarios at Class I area receptors and the determination of the 98th percentile day for visibility impairment. In the case of $NO_X$ BART determinations for gas-fired units performed by ODEQ, modeling results from this approach are informative because $SO_2$ and PM emissions are minimal.

Although we generally regard the visibility modeling analyses performed by ODEQ in support of BART determinations to be of high quality, some deviations from our guidance and errors in emission calculations were noted. We performed our own modeling analysis of the three facilities, incorporating changes to meet our guidance and correct errors in emission calculations. We note that refined CALPUFF modeling included in ODEQ's SIP used updated meteorological fields that included observations in accordance with EPA guidance (40 CFR Part 51, Appendix W) and we utilized this data in our own modeling analysis. In the ODEQ modeling, sulfuric acid emissions from the OG&E units were estimated based on an assumed 1% $SO_2$ to $SO_3$ conversion rate across the boiler. A control efficiency of 40% was assumed for the wet scrubbing control scenario and 90% for the dry scrubbing scenario. Emissions from the AEP/PSO units were calculated based on an assumed 3 ppm sulfur content conversion in the flue gas. As detailed in the TSD, we utilized a different approach based on the best current information from the Electric Power Research Institute (EPRI) [34] to estimate the sulfuric acid released from combustion in the boiler. ODEQ's speciation of PM emissions, estimated for use in PM only modeling, contained errors in the parameters used in the calculation of speciation factors. As discussed in the above sections, we concluded that the dry scrubber and the wet scrubber could achieve emission limits of 0.06 lb/MMbtu $SO_2$ and 0.04 lb/MMbtu $SO_2$, respectively, and these limits were used to calculate emissions for our visibility modeling. Our emission estimation methodology is detailed in the TSD.

We remodeled the visibility impacts of the OG&E and AEP/PSO units to correct these errors and to provide consistency with modeling guidance we have provided to the states. First, the model was run using the pre-BART conditions to establish a baseline. For all modeling runs, all relevant visibility-impairing pollutants were included. The model was then run to include the control technology selected as $NO_X$ BART, LNB with OFA, in order to evaluate the visibility benefit expected from this control and separate the benefit of installation of $NO_X$ BART from that due to $SO_2$ control technologies. Modeling results of the visibility impact due to installation of LNB show significant improvement in visibility over the baseline. These results in combination with review of the cost analysis and other factors considered in the ODEQ BART determination support the conclusion that LNB with OFA is $NO_X$ BART for these units. To evaluate the anticipated visibility improvement due to wet and dry scrubbers, these control technologies were modeled for each facility. These modeling control scenarios with scrubbers for $SO_2$ also included $NO_X$ emissions controlled by LNB with OFA. The modeled visibility impacts were then compared to the impact achieved with only LNB with OFA and no additional controls on $SO_2$ to evaluate the incremental visibility benefit of each $SO_2$ control technology (wet or dry scrubber).

The results of our visibility modeling analyses, for the maximum impacts of the 98th percentile delta-dv impacts from 2001–2003 are presented as Table 8. These results employ our revised emission calculations and methodology, and the new IMPROVE equation (Method 8). As can be seen from these results, despite employing an $SO_2$ emission limit of 0.04 lbs/MMBtu in the wet scrubber case (versus 0.06 lbs/MMBtu in the dry scrubber case), the visibility modeling does not show a consistent, clear benefit for wet scrubbing. A possible explanation for this is that by reducing the $SO_2$ emissions to the rate of 0.06 lb/MMbtu, the 98th percentile days are primarily winter days when nitrate particulates are responsible for the majority of visibility impairment. Additional controls of $SO_2$ do not yield a reduction in sulfate large enough to provide significant visibility improvement for the 98th percentile value. In some cases, the further reduction in sulfate on these days results in a small increase in available ammonia for reaction with $NO_X$ and leads to a slight increase in visibility impairment due to additional nitrate particulate that can offset the benefit due to less sulfate particulate.

TABLE 8—EPA MODELED MAXIMUM IMPACTS OF THE 98TH PERCENTILE DELTA-DV IMPACTS FROM 2001–2003

| Class I area | Visibility impact (Δ dv) | | | | Improvement over baseline due to LNB | Improvement over LNB due to DFGD | Improvement over LNB due to WFGD |
|---|---|---|---|---|---|---|---|
| | Baseline | LNB | LNB & DFGD | LNB & WFGD | | | |
| **Sooner Units 1&2** | | | | | | | |
| Caney Creek | 0.73 | 0.50 | 0.13 | 0.13 | 0.23 | 0.37 | 0.38 |
| Hercules-Glades | 0.71 | 0.43 | 0.13 | 0.12 | 0.28 | 0.30 | 0.31 |
| Upper Buffalo | 0.77 | 0.49 | 0.13 | 0.12 | 0.28 | 0.35 | 0.37 |
| Wichita Mountains | 2.08 | 1.46 | 0.41 | 0.35 | 0.62 | 1.05 | 1.11 |
| Total | 4.28 | 2.88 | 0.80 | 0.71 | 1.41 | 2.08 | 2.16 |
| **Muskogee Units 4&5** | | | | | | | |
| Caney Creek | 1.48 | 1.19 | 0.45 | 0.51 | 0.29 | 0.74 | 0.69 |
| Hercules-Glades | 1.07 | 0.92 | 0.19 | 0.19 | 0.14 | 0.74 | 0.73 |

[33] Memo from Joseph Paisie (Geographic Strategies Group, OAQPS) to Kay Prince (Branch Chief EPA Region 4) on Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations, July 19, 2006.

[34] Electric Power Research Institute, Estimating Total Sulfuric Acid Emissions from Stationary Power Plants, 1016384, technical Update, March 2008.

TABLE 8—EPA MODELED MAXIMUM IMPACTS OF THE 98TH PERCENTILE DELTA-DV IMPACTS FROM 2001–2003—Continued

| Class I area | Visibility impact (Δ dv) | | | | Improvement over baseline due to LNB | Improvement over LNB due to DFGD | Improvement over LNB due to WFGD |
|---|---|---|---|---|---|---|---|
| | Baseline | LNB | LNB & DFGD | LNB & WFGD | | | |
| Upper Buffalo | 1.52 | 1.20 | 0.37 | 0.33 | 0.31 | 0.84 | 0.87 |
| Wichita Mountains | 1.31 | 1.03 | 0.29 | 0.34 | 0.27 | 0.75 | 0.70 |
| Total | 5.37 | 4.35 | 1.29 | 1.37 | 1.02 | 3.06 | 2.98 |
| **Northeastern Units 3&4** | | | | | | | |
| Caney Creek | 1.70 | 0.99 | 0.29 | 0.30 | 0.71 | 0.70 | 0.69 |
| Hercules-Glades | 0.92 | 0.88 | 0.18 | 0.20 | 0.04 | 0.70 | 0.68 |
| Upper Buffalo | 1.52 | 0.85 | 0.28 | 0.28 | 0.67 | 0.57 | 0.57 |
| Wichita Mountains | 1.66 | 1.39 | 0.30 | 0.31 | 0.27 | 1.09 | 1.08 |
| Total | 5.80 | 4.11 | 1.05 | 1.09 | 1.69 | 3.06 | 3.02 |

In Table 9, we extract the results of our visibility modeling from Table 8 for the dry scrubbing case, and total the results across the OG&E and AEP/PSO facilities, and across Class I areas. This is again based on the maximum impacts 98th Percentile delta-dv impacts from 2001–2003.

TABLE 9—EPA MODELED MAXIMUM IMPACTS DUE TO DRY SCRUBBING OF THE 98TH PERCENTILE DELTA-DV IMPACTS FROM 2001–2003

| Class I area | Improvement over LNB + OFA due to dry scrubbing | | | |
|---|---|---|---|---|
| | Sooner | Muskogee | Northeastern | Total Sooner Muskogee Northeastern |
| Caney Creek | 0.37 | 0.74 | 0.70 | 1.81 |
| Hercules-Glades | 0.30 | 0.74 | 0.70 | 1.74 |
| Upper Buffalo | 0.35 | 0.84 | 0.57 | 1.76 |
| Wichita Mountains | 1.05 | 0.75 | 1.09 | 2.89 |
| Total All Class I Areas | 2.07 | 3.07 | 3.06 | 8.20 |

The visibility improvements documented in Table 9 are significant and will result in marked steps toward reaching natural background conditions.

3. Our Conclusion on Oklahoma's $SO_2$ BART Evaluations for the Six OG&E and AEP/PSO Units

As discussed above, ODEQ concludes that it is too expensive to control the $SO_2$ emissions from the OG&E and AEP/PSO units in question and that the potential visibility benefits are not substantial enough to justify additional control. As we have shown above, we disagree with ODEQ's conclusion on costs for $SO_2$ controls and we find that cost effective $SO_2$ controls are available and our modeling demonstrates that substantial visibility improvement is achievable based on the installation of these controls. In particular, our modeling indicates that dry scrubbing will result in a 2.89 deciview improvement in visibility at the Wichita Mountains. Furthermore, the addition of $SO_2$ scrubbers (wet or dry) on each of the three facilities (2 units at each facility) will reduce visibility impairment at Class I areas (Wichita Mountains and/or other surrounding Class I areas) from values that are above the 1 deciview impact that is a direct causation of visibility impairment to levels that are below the 0.5 deciview threshold that ODEQ used for determining if a source contributed to visibility impairment. We consider the reduction in visibility impairment at Wichita Mountains, Caney Creek, Upper Buffalo, and Hercules-Glades to be significant both for the RH SIP and also for reduction of visibility impairment on other states in meeting the requirements of the 110 (a)(2)(D) SIP. Therefore, we propose to disapprove Oklahoma's submitted $SO_2$ BART determinations for the six BART sources in question. Consequently, we propose a FIP to address this deficiency.

4. Alternative BART Determination

The RH submittal includes an alternative to BART for the six BART sources entitled "Greater Reasonable Progress Alternative Determination" (Alternative Determination). This Alternative Determination submittal includes executed agreements between ODEQ and OG&E, and ODEQ and AEP/PSO entitled, "OG&E Regional Haze Agreement, Case No. 10–024, and "PSO Regional Haze Agreement, Case No. 10–025." The submitted Alternative Determination provides for alternative control scenarios that would apply were we to disapprove ODEQ's $SO_2$ BART determinations for the OG&E and AEP/PSO units. Under the Alternative Determination, following the exhaustion of all administrative and judicial appeals of disapproval by us of the BART determinations for the six units, the BART determination would be superseded by a requirement that the OG&E and AEP/PSO units comply with either of the following requirements:

By January 1, 2018, install dry scrubbers (and fabric filters for PM control at the OG&E units) or otherwise meet $SO_2$ and PM emission limits specified by ODEQ.[35]

[35] These emission limits are a 30-day rolling average $SO_2$ emission limit of 0.10 lbs/MMBtu.

By December 31, 2026, meet a combined annual $SO_2$ emission limit that is equivalent to: (i) the $SO_2$ emission limits specified by ODEQ on half of the OG&E units and half of the AEP/PSO units; and (ii) being at or below the $SO_2$ emissions that would result from switching the remaining units to natural gas.

In other words, after having exhausted any rights to challenge our disapproval of ODEQ's BART determinations, OG&E and AEP/PSO could elect to either (1) install dry scrubbers at the beginning of 2018; or (2) scrub half of their units (again at the higher rate) and switch the other half (not specified as to plant for OG&E) to natural gas by the end of 2026. We find that neither of these alternatives would comport with the requirements of section 51.308, as explained below.

Our regulations do provide states with the flexibility to adopt alternatives to BART. Such alternatives, for example, could include fuel switching beyond the five-year window allowed for the installation of BART. Such alternatives, however, must be shown to provide for greater reasonable progress than BART does and must be fully implemented prior to the close of the planning period for the first regional haze SIP. 40 CFR 51.308(e)(2)(i) and (iii).

Even assuming that a contingent SIP provision triggered by the conclusion of all appeals regarding a related provision could be considered enforceable, we do not believe that the Alternative Determination is approvable. We propose to disapprove the Alternative Determination because neither of the set of contingent emission limitations meets the requirements of our RH regulations governing "better than BART" alternatives. As described above, ODEQ concluded that BART requires no additional controls at these units. The Alternative Determination would apply only where we have disagreed with this conclusion, disapproved the SIP, and prevailed in any ensuing litigation. It seems highly probable in such a situation that both the courts and we would have concluded that BART requires the use of scrubbers. Given this, the first potential requirement, that the BART units install scrubbers in January 2018, does not provide for greater reasonable progress than does BART. Rather, it allows OG&E and AEP/PSO to delay the installation of scrubbers beyond the time period allowed by the CAA.[36] In addition to the question of timing, the emission limits associated with the first potential requirement are substantially higher than what we have proposed as BART using the same controls, dry scrubbers. We have not seen any explanation from ODEQ as to how allowing OG&E and AEP/PSO additional time in which to meet less stringent emission limitations provides for greater reasonable progress.

The second potential requirement does not require any reduction in emissions from the BART units until 2026, near the end of the second long-term strategy period for RH. Again, we have seen no explanation of how such an extended compliance period would result in greater reasonable progress. More significantly, however, such an approach is not allowed by our regulations governing alternatives to BART, which require all necessary emission reductions to take place during the period of the first long-term strategy for RH, *i.e.* by 2018. 40 CFR 51.308(e)(2)(iii).

For the reasons discussed here, we propose to disapprove as part of the Oklahoma RH SIP, this submitted "Alternative Determination." If Oklahoma provides us with an alternative demonstration that complies with 40 CFR 51.308(e)(2)(i) and (iii), we will consider it under a future action.

### *F. Federal Implementation Plan To Address $SO_2$ BART for the Six Sources*

#### 1. Introduction

As discussed above, we propose to disapprove Oklahoma's BART determination for the six sources in question. In addition, as discussed in Section VI, we have determined that additional controls are necessary on these units to prevent emissions from Oklahoma from interfering with other states' plans to improve visibility, and we are partially disapproving the Oklahoma SIP as it pertains to that requirement. To correct the deficiencies identified in these proposed disapprovals, we are also proposing a FIP.

In proposing a FIP to address BART, we must consider the same factors as states. As discussed above, we agree with ODEQ's evaluation for pollutants other than $SO_2$, but disagree for $SO_2$ in two respects. First, we believe that dry scrubbing and wet scrubbing are both cost effective. Second, we have identified some concerns with ODEQ's estimation of visibility impacts and accordingly have re-evaluated the visibility impacts of these controls. Our modeling shows that the use of these controls will result in greater improvement in visibility than estimated by ODEQ.

We propose to find that both dry scrubbing and wet scrubbing provide cost effective reductions of $SO_2$. We also believe that implementation of these controls will provide substantial visibility improvement at four Class I areas.

#### 2. Appropriate Emission Limits

In our BART Guidelines, we established an $SO_2$ presumptive limit that applies to Electricity Generating Units (EGUs) at power plants with a total generating capacity in excess of 750 MW of either 0.15 lbs/MMBtu, or 95% control. 70 FR 39104, 39131. We required that states, as a general matter, must require owners and operators of greater than 750 MW power plants to meet these BART emission limits. In addition, we noted that the presumption does not limit the states' ability to consider whether a different level of control is appropriate in a particular case. We stated that "[i]f, upon examination of an individual EGU, a state determines that a different emission limit is appropriate based upon its analysis of the five factors, then the state may apply a more or less stringent limit." *Id.* Because we are making the BART determinations under our FIP, we are obligated to determine the appropriate level of control.

##### a. Dry Scrubber Emission Limit

As is detailed in our TSD, dry scrubber performance varies with the sulfur content of the coal. Our analysis indicates that a dry scrubber on the OG&E units can remove approximately 90% of the $SO_2$ when burning coal with an uncontrolled emission rate of approximately 0.51 lb/MMBtu, 91.5% when burning coal corresponding to ODEQ's proposed BART limit of 0.65 lb/MMBtu, and 95% when burning the coal used to size the scrubber, 1.18 lb/MMBtu. Similarly, our analysis indicates that a dry scrubber on the Northeastern units can remove approximately 93% of the $SO_2$ when burning coal with an uncontrolled emission rate of 0.9 lb/MMBtu, and 91.5% when burning coal corresponding to ODEQ's proposed BART limit of 0.65 lb/MMBtu. This information is summarized in Table 10:

TABLE 10—EXPECTED DRY SCRUBBER PERFORMANCE VS. UNCONTROLLED EMISSION RATES

| Control (percent) | Uncontrolled emission rate (lbs/MMBtu) | Controlled emission rate (lbs/MMBtu) |
|---|---|---|
| 90.0 ..... | 0.51 | 0.051 |
| 91.5 ..... | 0.65 | 0.055 |
| 93.0 ..... | 0.90 | 0.063 |
| 95.0 ..... | 1.18 | 0.059 |

[36] BART must be installed and operational as expeditiously as practicable, but in no event later than five years after approval of an implementation plan. CAA 169A(g)(4).

Based on this information, our analysis indicates that an $SO_2$ emission limit of 0.06 lbs/MMBtu can be met on the basis of a 30-day rolling average for the OG&E and AEP/PSO units, using dry scrubber technologies. As is noted in our TSD, there are already facilities operating below this emission rate, using dry scrubber technologies, and that burn similar coals.

b. Wet Scrubber Emission Limit

According to OG&E's contractor, "[w]et scrubbing is the predominant technology for large-scale utility applications in most parts of the world." In addition, "$SO_2$ removal guarantees of up to 99% (without additives) are available from the system suppliers and have been demonstrated in commercial applications, though there is a practical outlet limitation at 0.04 lb. $SO_2$/MBtu, which represents a lower percentage removal for the lowest sulfur coals."[37] However, as we note in our TSD, Pleasant Prairie Units 1 and 2, similar boilers that burn a similar low sulfur PRB coal, were retrofitted with wet scrubbers in 2006 and 2007. An examination of our Clean Air Markets Division $SO_2$ emissions data for Unit 1 for the period 2007 through June 2010 indicates this unit easily meets a 365-day rolling average of less than 0.03 lb/MMBtu. Similarly, the Minnesota Power Boswell 3 unit was recently retrofit with a wet scrubber (among other pollution control upgrades) and, based on our Clean Air Markets Division $SO_2$ emissions data, it appears to be achieving a monthly average emission rate of less than 0.03 lbs/MMBtu. This, along with other similar examples discussed in our TSD, indicates that wet scrubbing at the OG&E and AEP/PSO units could consistently result in an $SO_2$ removal efficiency of 98%, or meet an emission limit of 0.04 lbs/MMBtu on a 30-day rolling average.

3. Visibility Benefit From Dry and Wet Scrubbing

As discussed in our evaluation of ODEQ's BART evaluation, our modeling indicates substantial visibility benefit from the implementation of dry scrubbing. We did not find substantial additional visibility benefits on the 98th percentile value from the use of wet scrubbers even though we believe wet scrubbers would be expected to achieve lower emissions. As a result, we propose that the emission limit in the FIP be based on the emission levels that can be achieved by dry scrubbing.

4. EPA's $SO_2$ BART Determination for the Six Units

As described above, for the particular cases we are considering in this action, we have concluded there is a lack of a clear visibility advantage to wet scrubbing at the $SO_2$ emission rates we have considered. Other details concerning the input values we have assumed in our visibility modeling are contained in the TSD. We invite comment on all aspects of our visibility modeling. Given that wet scrubbing is approximately 9% higher in cost on a $/tons of $SO_2$ removed basis, we propose that $SO_2$ BART for the Units 4 and 5 of the OG&E Muskogee plant, Units 1 and 2 of the OG&E Sooner plant, and Units 3 and 4 of the AEP/PSO Northeastern plant should be based on dry scrubbing. We note there are significant advantages to wet scrubbing that OG&E and/or AEP/PSO may find attractive as a means of satisfying our proposed FIP.

As we note above, under section 51.308(e)(1)(iv), "each source subject to BART [is] required to install and operate BART as expeditiously as practicable, but in no event later than 5 years after approval of the implementation plan revision." Based on the retrofit of other scrubber installations we have reviewed, we find that three (3) years from the date our final determination becomes effective is adequate time for the installation and operation of these controls.[38] We solicit comments on alternative timeframes, of from two (2) years up to five (5) years from the effective date our final rule.

We do not wish to dissuade companies from exercising the option of switching to natural gas as a means of satisfying their BART obligations under section 51.308(e). Such an approach, for example, would be acceptable for satisfying $SO_2$ BART,[39] if it satisfies the requirement under section 51.308(e)(1)(iv) that, "each source subject to BART be required to install and operate BART as expeditiously as practicable, but in no event later than 5 years after approval of the implementation plan revision." Switching to natural gas would be an acceptable method of complying with the limits proposed in this FIP. In addition, we invite comments as to, considering the engineering and/or management challenges of such a fuel switch, whether the full 5 years allowed under section 308(e)(1)(iv) following our final action would be justified.

*G. Long-Term Strategy*

As described in section IV.E of this action, the LTS is a compilation of state-specific control measures relied on by the state for achieving its RPGs. Oklahoma's LTS for the first implementation period addresses the emissions reductions from federal, state, and local controls that take effect in the state from the end of the baseline period starting in 2004 until 2018. The Oklahoma LTS was developed by ODEQ, in coordination with the CENRAP RPO, through an evaluation of the following components: (1) Construction of a CENRAP 2002 baseline emission inventory; (2) construction of a CENRAP 2018 emission inventory, including reductions from CENRAP member state controls required or expected under federal and state regulations, (including BART); (3) modeling to determine visibility improvement and apportion individual state contributions; (4) state consultation; and (5) application of the LTS factors.

1. Emissions Inventory

Section 51.308(d)(3)(iii) requires that Oklahoma document the technical basis, including modeling, monitoring and emissions information, on which it relied upon to determine its apportionment of emission reduction obligations necessary for achieving reasonable progress in each mandatory Class I Federal area it affects. Oklahoma must identify the baseline emissions inventory on which its strategies are based. Section 51.308(d)(3)(iv) requires that Oklahoma identify all anthropogenic sources of visibility impairment considered by the state in developing its long-term strategy. This includes major and minor stationary sources, mobile sources, and area sources. Oklahoma met these requirements by relying on technical analyses developed by its RPO, CENRAP and approved by all state participants, as described below.

The emissions inventory used in the RH technical analyses was developed by CENRAP with assistance from Oklahoma. The 2018 emissions

[37] Sargent & Lundy, Flue Gas Desulfurization Technology, Dry Lime vs. Wet Limestone FGD, Prepared for National Lime Association, March 2007.

[38] Engineering and Economic Factors Affecting the Installation of Control Technologies for Multipollutant Strategies, EPA–600/R–02/073, October 2002, pdf pagination 5: "Conservatively high assumptions were made for the time, labor, reagents, and steel needed to install FGD systems. For LSFO installation timing, it is expected that one system requires about 27 months of total effort for planning, engineering, installation, and startup, with connections occurring during normally scheduled outages)," *available* at *http://www.epa.gov/clearskies/pdfs/multi102902.pdf.*

[39] We note that, as with the other fossil fuel fired power plant BART determinations contained within this proposal, separate NOx and PM BART determinations must also be made.

inventory was developed by projecting 2002 emissions and applying reductions expected from federal and state regulations affecting the emissions of the visibility-impairing pollutants $NO_X$, PM, $SO_2$, and VOCs.

a. Oklahoma's 2002 Emission Inventory

ODEQ and CENRAP developed an emission inventory for five inventory source classifications: Point, area, non-road and on-road mobile sources, and biogenic sources for the baseline year of 2002. Oklahoma's 2002 emissions inventory is summarized in Table 11:

TABLE 11—OKLAHOMA'S 2002 EMISSIONS INVENTORY

| | $SO_2$ | $NH_3$ | $NO_X$ | VOCs | $PM_{10}$–$PM_{2.5}$ | $PM_{2.5}$ |
|---|---|---|---|---|---|---|
| Point | 148,761 | 24,102 | 158,818 | 37,794 | 8,026 | 8,636 |
| Area | 11,779 | 114,363 | 115,407 | 201,758 | 304,560 | 109,279 |
| Non-road mobile | 4,773 | 280 | 49,396 | 47,863 | 433 | 4,580 |
| On-road mobile | 4,708 | 4,434 | 142,592 | 99,924 | 879 | 2,459 |
| Biogenic | 0 | 0 | 35,909 | 988,314 | 0 | 0 |
| Total | 170,021 | 143,179 | 502,122 | 1,375,653 | 313,898 | 124,954 |

See the TSD for details on how the 2002 emissions inventory was constructed. We propose that Oklahoma's 2002 emission inventory is acceptable.

b. Oklahoma's 2018 Emission Inventory

In general, ODEQ used a combination of our Economic Growth Analysis System (EGAS 5), our mobile emissions factor model (MOBILE 6), our off-road emissions factor model (NONROAD), and the Integrated Planning Model (IPM) for electric generating units in constructing its 2018 emission inventory. ODEQ modified the projected emissions from the IPM modeling for OG&E Sooner and Muskogee electric power plants and the PSO Northeast electric power plants to reflect the application of presumptive BART controls.[40] More specifically, CENRAP developed emissions for five inventory source classifications: point, area, non-road and on-road mobile sources, and biogenic sources. CENRAP used its 2002 emission inventory, described above, to estimate emissions in 2018. All control strategies expected to take effect prior to 2018 are included in the projected emission inventory. Oklahoma's 2018 emissions inventory is summarized in Table 12:

TABLE 12—OKLAHOMA'S 2018 EMISSIONS INVENTORY

| | $SO_2$ | $NH_3$ | $NO_X$ | VOCs | $PM_{10}$–$PM_{2.5}$ | $PM_{2.5}$ |
|---|---|---|---|---|---|---|
| Point | 106,701 | 35,215 | 140,298 | 125,648 | 8,935 | 13,989 |
| Area | 12,374 | 141,532 | 128,257 | 400,056 | 275,844 | 127,018 |
| Non-road mobile | 156 | 40 | 25,387 | 28,489 | 2,914 | 292 |
| On-road mobile | 545 | 5,818 | 39,397 | 39,281 | 0 | 953 |
| Biogenic | 0 | 0 | 35,909 | 988,314 | 0 | 0 |
| Total | 119,776 | 182,605 | 369,248 | 1,581,788 | 287,693 | 142,252 |

See the TSD for details on how the 2018 emissions inventory was constructed. CENRAP and ODEQ used this and other state's 2018 emission inventories to construct visibility projection modeling for 2018. We propose that Oklahoma's 2018 emission inventory is acceptable but for its inclusion of reductions from the OG&E and AEP/PSO coal fired units that were not ultimately required by Oklahoma. As discussed above, we propose a FIP to address this deficiency.

2. Visibility Projection Modeling

CENRAP performed modeling for the RH LTS for its member states, including Oklahoma. The modeling analysis is a complex technical evaluation that began with selection of the modeling system. CENRAP used (1) the Mesoscale Meteorological Model (MM5) meteorological model, (2) the Sparse Matrix Operator Kernel Emissions (SMOKE) modeling system to generate hourly gridded speciated emission inputs, (3) the Community Multiscale Air Quality (CMAQ) photochemical grid model and (4) the Comprehensive Air Quality model with extensions (CAMx), as a secondary corroborative model. CAMx was also utilized with its Particulate Source Apportionment Technology (PSAT) tool to provide source apportionment for both the baseline and future case visibility modeling.

The photochemical modeling of RH for the CENRAP states for 2002 and 2018 was conducted on the 36-km resolution national regional planning organization domain that covered the continental United States, portions of Canada and Mexico, and portions of the Atlantic and Pacific Oceans along the east and west coasts. The CENRAP states' modeling was developed consistent with our guidance.[41]

CENRAP examined the model performance of the regional modeling for the areas of interest before determining whether the CMAQ model results were suitable for use in the RH

[40] Note, our proposed FIP, discussed in section V.E, would require a stricter level of $SO_2$ for six units in these facilities.

[41] Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, PM2.5, and Regional Haze, (EPA–454/B–07–002), April 2007, located at *http://www.epa.gov/scram001/guidance/guide/final-03-pm-rh-guidance.pdf*. Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations, August 2005, updated November 2005 ("our Modeling Guidance"), located at *http://www.epa.gov/ttnchie1/eidocs/eiguid/index.html,* EPA–454/R–05–001.

assessment of the LTS and for use in the modeling assessment. The 2002 modeling efforts were used to evaluate air quality/visibility modeling for a historical episode—in this case, for calendar year 2002—to demonstrate the suitability of the modeling systems for subsequent planning, sensitivity, and emissions control strategy modeling. Model performance evaluation is performed by comparing output from model simulations with ambient air quality data for the same time period to determine whether the model's performance is sufficiently accurate to justify using the model for simulating future conditions. Once CENRAP determined the model performance to be acceptable, it used the model to determine the 2018 RPGs using the current and future year air quality modeling predictions, and compared the RPGs to the URP. Table 13, derived from Table VIII–9 of the Oklahoma RH SIP submittal, summarizes the projected contribution from Oklahoma emissions on visibility degradation at Class I areas for the 20 percent worst days in 2018. Note, this table only includes contributions of 0.15 deciviews or greater.

TABLE 13—PROJECTED CONTRIBUTION FROM OKLAHOMA EMISSIONS ON VISIBILITY DEGRADATION FOR THE 20 PERCENT WORST DAYS IN 2018

| Class I area | State | Contribution to light extinction (Mm-1) | Total light extinction (Mm-1) | Oklahoma contribution (percent) | Deciview contribution |
|---|---|---|---|---|---|
| Wichita Mountains | Oklahoma | 12.28 | 86.56 | 14.19 | 1.53 |
| Hercules-Glades | Missouri | 3.74 | 103.49 | 3.61 | 0.37 |
| Salt Creek | New Mexico | 1.46 | 57.67 | 2.53 | 0.26 |
| Caney Creek | Arkansas | 2.23 | 96.84 | 2.30 | 0.23 |
| Upper Buffalo | Arkansas | 1.97 | 97.16 | 2.03 | 0.21 |
| Guadalupe Mountains | Texas | 1.11 | 55.43 | 2.00 | 0.20 |
| Seney | Michigan | 1.74 | 95.27 | 1.83 | 0.18 |
| White Mountain | New Mexico | 0.69 | 40.8 | 1.70 | 0.17 |
| Isle Royale | Michigan | 1.08 | 73.71 | 1.46 | 0.15 |

3. Consultation and Emissions Reductions for Other States' Class I Areas

As in the development of Oklahoma's reasonable progress goal for the Wichita Mountains, ODEQ used CENRAP as its main vehicle for facilitating collaboration with FLMs and other states in satisfying its LTS consultation requirement. This helped ODEQ and other state environmental agencies analyze emission apportionments at Class I areas and develop coordinated RH SIP strategies.

Section 51.308(d)(3)(i) requires that Oklahoma consult with other states if its emissions are reasonably anticipated to contribute to visibility impairment at that state's Class I area(s), and that Oklahoma consult with other states if their emissions are reasonably anticipated to contribute to visibility impairment at the Wichita Mountains. ODEQ's consultations with other states are described in section V.C.3 above. After evaluating whether emissions from Oklahoma sources contribute to visibility impairment in other states' Class I areas, ODEQ concluded there was no contribution sufficient to require consultation. ODEQ's evaluation relied, however, upon $SO_2$ BART reductions from the six units of the OG&E and AEP/PSO three coal fired power plants but these reductions are not required. Regardless of its conclusions regarding the impacts of Oklahoma emissions on other states' Class I areas, however, Oklahoma did consult with other states and tribes, largely through the CENRAP process. We propose that those consultations adequately satisfy the requirement under Section 51.308(d)(3)(i).

Section 51.308(d)(3)(ii) requires that if Oklahoma emissions cause or contribute to impairment in another state's Class I area, Oklahoma must demonstrate that it has included in its RH SIP all measures necessary to obtain its share of the emission reductions needed to meet the progress goal for that Class I area. Section 51.308(d)(3)(ii) also requires that since Oklahoma participated in a regional planning process, it must ensure it has included all measures needed to achieve its apportionment of emission reduction obligations agreed upon through that process. As we state in the RHR[42], Oklahoma's commitments to participate in CENRAP bind it to secure emission reductions agreed to as a result of that process, unless it proposes a separate process and performs its consultations on the basis of that process:

While States are not bound by the results of a regional planning effort, nor can the content of their SIPs be dictated by a regional planning body, we expect that a coordinated regional effort will likely produce results the States will find beneficial in developing their regional haze implementation plans. Any State choosing not to follow the recommendations of a regional body would need to provide a specific technical basis that its strategy nonetheless provides for reasonable progress based on the statutory factors. At the same time, EPA cannot require States to participate in regional planning efforts if the State prefers to develop a long-term strategy on its own. We note that any State that acts alone in this regard must conduct the necessary technical support to justify their apportionment, which generally will require regional inventories and a regional modeling analysis. Additionally, any such State must consult with other States before submitting its long-term strategy to EPA.

Consequently, because Oklahoma accepted and incorporated the CENRAP-developed visibility modeling into its RH SIP, which assumed controls for the six units discussed above that were not subsequently secured, we propose to disapprove Oklahoma's long term strategy.

However, our proposed FIP does include controls for the six units that at least achieve the level of control assumed in the CENRAP modeling. In addition, as described above, Oklahoma has required controls on additional sources as part of its BART evaluation. Therefore, we propose to find that with the addition of our proposed FIP, the requirements in section 51.308(d)(3)(ii) have been met.

4. Mandatory Long Term Strategy Factors

Section 51.308(d)(3)(v) requires that Oklahoma minimally consider certain

[42] 64 FR 35735.

factors in developing its long-term strategy (the LTS factors). These include: (1) Emission reductions due to ongoing air pollution control programs, including measures to address RAVI; (2) measures to mitigate the impacts of construction activities; (3) emissions limitations and schedules for compliance to achieve the reasonable progress goal; (4) source retirement and replacement schedules; (5) smoke management techniques for agricultural and forestry management purposes including plans as currently exist within the state for these purposes; (6) enforceability of emissions limitations and control measures; and (7) the anticipated net effect on visibility due to projected changes in point, area, and mobile source emissions over the period addressed by the long-term strategy. For the reasons outlined below, we propose to find that Oklahoma has satisfied all the requirements of Section 51.308(d)(3)(v).

In addition to its BART determinations and by extension our proposed FIP, Oklahoma's LTS incorporates emission reductions due to a number of ongoing air pollution control programs. This includes the issuance and enforcement of permits limiting emissions (based on our National Ambient Air Quality Standards) from all major sources in Oklahoma (the SIP also includes permits for minor sources), state rules which specifically limit targeted emissions sources and categories, and other air pollution control programs that ODEQ administers. We note that fine and coarse particulate, of which construction-related activities are thought to be a small contributor, are themselves minor contributors to visibility impairment at the Wichita Mountains. ODEQ relies on fugitive dust control rules to control and minimize dust from construction activities. ODEQ has adopted rules to ensure the enforceability of these emission limitations. This includes rules that govern ODEQ's permitting process for major and minor sources, Prevention of Significant Deterioration (PSD) provisions, Best Available Control Technology (BACT), and BART requirements. These rules have corresponding compliance schedules and enforcement protocols and are summarized in the TSD.

ODEQ issues permits to all major and minor point sources in Oklahoma, and each permit contains enforceable limitations on emissions of various pollutants, including those which cause or contribute to RH at the Wichita Mountains. Unless those permits specify a different schedule for compliance, ODEQ requires permitted sources to comply with their permits immediately upon issuance. ODEQ also enforces compliance schedules of relevant administrative and judicial orders, including consent decrees that result in significant $SO_2$ and $NO_X$ reductions.

We approved ODEQ's SIP to address reasonably attributable visibility impairment at the Wichita Mountains on November 8, 1999. *See* 64 FR 60683. As we note in section V.H, the FLMs did not identify any integral vistas in Oklahoma. In addition, the Wichita Mountains is not experiencing RAVI, nor are any Oklahoma sources affected by the RAVI provisions. Therefore, the Oklahoma RH SIP does not incorporate any measures to specifically address RAVI.

ODEQ considered source retirement and replacement schedules in developing its long-term strategy of emissions reductions. ODEQ stated it cannot reliably predict the retirement or replacement of sources and consequently does not rely on source retirement to achieve any reasonable progress goal.

Fires are responsible for much of the directly emitted fine particulate matter in the Oklahoma emissions inventory. ODEQ considered smoke management techniques for the purposes of agricultural and forestry management in its LTS. As Tables IV–1 and IV–2 in the Oklahoma RH SIP revision submittal indicate, all types of fire sources (wildfire, agricultural burning, rangeland burning, etc.) are responsible for approximately 4.2% of the total $SO_2$, 4.1% of the total $NH_3$, 3.9% of the total $NO_X$, 2.1% of the total VOCs, and 3.6% of the total PM10 emissions. In contrast, fire is responsible for about 33.4% of the total $PM_{2.5}$ emissions. However, Table VIII–3 of the Oklahoma RH SIP indicates that all Oklahoma area sources combined, of which fire is only a part, account for less than 1% of the total visibility impact at the Wichita Mountains. Nevertheless, ODEQ states that it and the Oklahoma Department of Agriculture, Food, and Forestry intend to create a basic, voluntary smoke management program based on our Interim Air Quality Policy on Wildland and Prescribed Fires. We commend this effort and offer our assistance in the development of this plan.

Section 51.308(d)(3)(v)(F) requires that Oklahoma ensure the enforceability of emission limitations and control measures used to meet reasonable progress goals. ODEQ has issued enforceable Title V operating permits requiring BART-eligible sources subject to BART to install BART and achieve the associated BART emission limits. Similarly, any BART requirement in a FIP must be included by ODEQ in a Part 70 air quality permit. See 70 FR at 39172.

ODEQ has demonstrated it has the statutory authority to regulate air emissions from all facilities and sources subject to operating permit requirements under Title V of the CAA. ODEQ also has the authority to administratively and judicially enforce any provision of an ODEQ issued air quality permits. See the TSD for more details on Oklahoma laws that provide for this authority.

*H. Coordination of RAVI and Regional Haze Requirements*

Our visibility regulations direct states to coordinate their RAVI LTS and monitoring provisions with those for RH, as explained in section IV, above. Under our RAVI regulations, the RAVI portion of a state SIP must address any integral vistas identified by the FLMs pursuant to 40 CFR 51.304. *See* 40 CFR 51.302. An *integral vista* is defined in 40 CFR 51.301 as a "view perceived from within the mandatory Class I Federal area of a specific landmark or panorama located outside the boundary of the mandatory Class I Federal area." Visibility in any mandatory Class I Federal area includes any integral vista associated with that area. The FLMs did not identify any integral vistas in Oklahoma. In addition, the Wichita Mountains is not experiencing RAVI, nor are any Oklahoma sources affected by the RAVI provisions. Thus, the Oklahoma RH SIP submittal does not explicitly address the two requirements regarding coordination of RH with the RAVI LTS and monitoring provisions. However, Oklahoma previously made a commitment to address RAVI should the FLM certify visibility impairment from an individual source.[43] We propose to find that this RH submittal appropriately supplements and augments Oklahoma's RAVI visibility provisions to address RH by updating the monitoring and LTS provisions as summarized below in this section.

*I. Monitoring Strategy and Other SIP Requirements*

Section 51.308(d)(4) requires the SIP contain a monitoring strategy for measuring, characterizing, and reporting of RH visibility impairment that is representative of all mandatory Class I Federal areas within the state. This monitoring strategy must be coordinated with the monitoring strategy required in Section 51.305 for reasonably

[43] Oklahoma's Part 1 and Part II visibility SIP contained RAVI provisions and was previously approved by EPA (64 FR 60683).

attributable visibility impairment. As Section 51.308(d)(4) notes, compliance with this requirement may be met through participation in the IMPROVE network. Since the monitor at the Wichita Mountains is an IMPROVE monitor, we propose that ODEQ has satisfied this requirement. See the TSD for details concerning the IMPROVE network.

Section 51.308(d)(4)(i) requires the establishment of any additional monitoring sites or equipment needed to assess whether reasonable progress goals to address RH for all mandatory Class I Federal areas within the state are being achieved. Shortly after the creation of CENRAP, its monitoring workgroup noted the lack of a representative monitor for the Wichita Mountains. At that time, an IMPROVE site for Upper Buffalo, Arkansas, in a wetter climate several hundred miles to the east-northeast, provided the closest available visibility monitoring data. Because this monitoring data was deemed unrepresentative, a particle sampler monitor was established at the Wichita Mountains and began operating in March, 2001. As described in section V.B., above, baseline visibility conditions were calculated using data representative of 2002–2004 due to lack of data from previous years. With the addition of the monitor at the Wichita Mountains, we propose to find that ODEQ has satisfied this requirement.

Section 51.308(d)(4)(ii) requires that ODEQ establish procedures by which monitoring data and other information are used in determining the contribution of emissions from within Oklahoma to RH visibility impairment at mandatory Class I Federal areas both within and outside the state. The monitor at the Wichita Mountains is operated by Wichita Mountains personnel. The IMPROVE monitoring program is national in scope, and other states have similar monitoring and data reporting procedures, ensuring a consistent and robust monitoring data collection system. As section 51.308(d)(4) indicates, participation in the IMPROVE program constitutes compliance with this requirement. We therefore propose that ODEQ has satisfied this requirement.

Section 51.308(d)(4)(iv) requires that the SIP must provide for the reporting of all visibility monitoring data to the Administrator at least annually for each mandatory Class I Federal area in the state. To the extent possible, Oklahoma should report visibility monitoring data electronically. Section 51.308(d)(4)(vi) also requires that ODEQ provide for other elements, including reporting, recordkeeping, and other measures, necessary to assess and report on visibility. We propose that Oklahoma's participation in the IMPROVE network ensures the monitoring data is reported at least annually, is easily accessible, and therefore complies with this requirement.

Section 51.308(d)(4)(iv) requires that ODEQ maintain a statewide inventory of emissions of pollutants that are reasonably anticipated to cause or contribute to visibility impairment in any mandatory Class I Federal area. The inventory must include emissions for a baseline year, emissions for the most recent year for which data are available, and estimates of future projected emissions. The state must also include a commitment to update the inventory periodically. Please refer to section V.G., above, where we discuss ODEQ's emission inventory. ODEQ has stated that it intends to update the Oklahoma statewide emissions inventories periodically and review periodic emissions information from other states and future emissions projections. We propose that this satisfies the requirement.

*J. Federal Land Manager Coordination*

The Wichita Mountains is one of more than 546 refuges throughout the United States managed by the Fish and Wildlife Service, which is the Federal Land Manager (FLM) for this Class I area. Although the FLMs are very active in participating in the RPOs, the RH Rule grants the FLMs a special role in the review of the RH SIPs, summarized in section IV.H., above. We view both the FLMs and the state environmental agencies as our partners in the RH process.

Section 51.308(i)(1) requires that by November 29, 1999, Oklahoma must have identified in writing to the FLMs the title of the official to which the FLM of the Wichita Mountains can submit any recommendations on the implementation of section 51.308. We acknowledge this section has been satisfied by all states via communication prior to this SIP.

Under Section 51.308(i)(2), Oklahoma was obligated to provide the Fish and Wildlife Service with an opportunity for consultation, in person and at least 60 days prior to holding a public hearing on it RH SIP. In practice, state environmental agencies have usually provided all FLMs—the Forest Service, the Park Service, and the Fish and Wildlife Service, copies of their RH SIP, as the FLMs collectively have reviewed these RH SIPs. ODEQ followed this practice and sent its draft of this implementation plan revision to the federal land manager staff on October 1, 2009 and notified the federal land manager staff of the public hearing held on December 16, 2009. In its letter dated December 4, 2009, transmitting its comments, the Fish and Wildlife Service acknowledged having received Oklahoma's draft RH SIP on October 5, 2009.

The FLMs have communicated to us their dissatisfaction with the fact that the draft RH SIP they were provided by ODEQ was markedly different than the version ODEQ submitted to us as their final RH SIP. Specifically, the FLMs note that in the version of the SIP they reviewed, $SO_2$ BART for the six OG&E and AEP/PSO coal fired units that are the subject of our FIP was determined by ODEQ to be dry $SO_2$ scrubbers with an emission limit of 0.10 lbs/MMBtu for the OG&E units, and 0.153 lbs/MMBtu for the AEP–PSO units. When ODEQ submitted their final RH SIP to us, those $SO_2$ BART determinations were changed to replace the $SO_2$ scrubber requirements with an $SO_2$ limit of 0.65 lbs/MMBtu on a 30 day rolling average that corresponds to uncontrolled low sulfur coal. We note the Fish and Wildlife Service has not requested that ODEQ re-open their 60 day comment period. We would like to address any question as to whether section 51.308(i)(2) has been satisfied. We believe, however, that our proposed FIP, as described in section V.F., above, may alleviate these concerns. We invite the FLMs to provide comment on this or other aspects of our proposal.

Section 51.308(i)(3) requires that ODEQ provide in its RH SIP a description of how it addressed any comments provided by the FLMs. ODEQ has provided that information in Appendix 10–2 of its RH SIP.

Lastly, Section 51.308(i)(4) specifies the RH SIP must provide procedures for continuing consultation between the state and Federal Land Manager on the implementation of the visibility protection program required by section 51.308, including development and review of implementation plan revisions and 5-year progress reports, and on the implementation of other programs having the potential to contribute to impairment of visibility in the mandatory Class I Federal areas. ODEQ has stipulated in its RH SIP it will continue to coordinate and consult with the FLMs as required by section 51.308(i)(4). ODEQ states it intends to consult the FLMs in the development and review of implementation plan revisions; review of progress reports; and development and implementation of other programs that may contribute to impairment of visibility at the Wichita Mountains and other Class I areas. We

propose that ODEQ has satisfied section 51.308(i).

*K. Periodic SIP Revisions and Five-Year Progress Reports*

ODEQ affirmed its commitment to complete items required in the future under our RHR. ODEQ acknowledged its requirement under 40 CFR 51.308(f), to submit periodic progress reports and RH SIP revisions, with the first report due by July 31, 2018 and every ten years thereafter.

ODEQ also acknowledged its requirement under 40 CFR 51.308(g), to submit a progress report in the form of a SIP revision every five years following this initial submittal of the Oklahoma RH SIP. The report will evaluate the progress made towards the RPGs for each mandatory Class I area located within Oklahoma and in each mandatory Class I area located outside Oklahoma which may be affected by emissions from within Oklahoma.

If another state's RH SIP identifies that Oklahoma's SIP needs to be supplemented or modified, and if, after appropriate consultation Oklahoma agrees, today's action may be revisited, or the additional information and/or changes will be addressed in the five-year progress report SIP revision.

## VI. Our Analysis of Oklahoma's Interstate Visibility Transport SIP Provisions

We received a SIP from Oklahoma to address the interstate transport requirements of CAA 110(a)(2)(D)(i) for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS on May 10, 2007, as supplemented on December 10, 2007. Concerning such CAA requirements preventing sources in the state from emitting pollutants in amounts which will interfere with efforts to protect visibility in other states, Oklahoma stated that it was on track for the submission of its RH SIP by the December, 17, 2007 deadline.[44] Oklahoma states in its May 10, 2007 submittal that it intended that its RH SIP be used to satisfy the requirements of section 110(a)(2)(D)(i)(II) that emissions from Oklahoma sources do not interfere with measures required in the SIP of any other state under part C of the CAA to protect visibility. However, it did not establish that emissions from its sources would not interfere with the visibility programs of other states, nor did it as part of its February 19, 2010 RH SIP submittal. In order to evaluate whether Oklahoma's existing SIP adequately prevents interference with the visibility programs of other states, we propose to address this question using other available information.

As an initial matter, we note that section 110(a)(2)(D)(i)(II) does not explicitly specify how we should ascertain whether a state's SIP contains adequate provisions to prevent emissions from sources in that state from interfering with measures required in another state to protect visibility. Thus, the statute is ambiguous on its face, and we must interpret that provision.

Our 2006 Guidance recommended that a state could meet the visibility prong of the transport requirements of section 110(a)(2)(D)(i)(II) of the CAA by submission of the RH SIP, due in December 2007. Our reasoning was that the development of the RH SIPs was intended to occur in a collaborative environment among the states. In fact, in developing their respective reasonable progress goals, CENRAP states consulted with each other through CENRAP's work groups. As a result of this process, the common understanding was that each state would take action to achieve the emissions reductions relied upon by other states in their reasonable progress demonstrations under the RHR. CENRAP states consulted in the development of reasonable progress goals, using the products of this technical consultation process to co-develop their reasonable progress goals. In developing their visibility projections using photochemical grid modeling, CENRAP states assumed a certain level of emissions from sources within Oklahoma. As we discuss above in section V.G, this modeling assumed $SO_2$ reductions from the six OG&E and AEP/PSO coal fired units that are the subject of our FIP. Although we have not yet received all RH SIPs, we understand that the CENRAP states used the visibility projection modeling to establish their own respective reasonable progress goals. Thus, we believe that an implementation plan that provides for emissions reductions consistent with the assumptions used in those states' modeling will ensure that emissions from Oklahoma sources do not interfere with the measures designed to protect visibility in other states.

However, after the visibility projection modeling and all consultations were completed, Oklahoma revised its $SO_2$ BART determinations for these six units, as submitted in the RH SIP submittal of February 19, 2010, removing the requirement that they be controlled to ensure these agreed upon emissions limits would be met. Consistent with our proposed conclusion that Oklahoma has not obtained its needed share of emission reductions, as we discuss above in section V.G.3, we propose to find that the Oklahoma SIP revision submittals do not ensure that emissions from sources in Oklahoma do not interfere with other State's visibility programs as required by section 110(a)(2)(D)(i)(II) of the CAA.

Our proposed FIP does include controls for the six units that at least achieve the level of control assumed in the CENRAP modeling. In addition, as described in section V.D., above, Oklahoma has required controls on sources as part of its BART evaluation. Thus, we believe that the controls proposed under our FIP, plus the additional controls required by Oklahoma under its SIP that we propose to approve, constitute the assemblage of cost effective controls that are reasonable at this time, and serve to prevent sources in Oklahoma from emitting pollutants in amounts that will interfere with efforts to protect visibility in other states. In light of this, we propose to partially approve and partially disapprove the Oklahoma SIP revision submitted to address the requirements of section 110(a)(2)(D)(i)(II) of the CAA.

## VII. Proposed Actions

*A. Regional Haze*

We propose to partially approve and partially disapprove Oklahoma's RH SIP revision submitted on February 19, 2010. Specifically, we propose to disapprove the $SO_2$ BART determinations for Units 4 and 5 of the Oklahoma Gas and Electric Muskogee plant; Units 1 and 2 of the Oklahoma Gas and Electric Sooner plant; and Units 3 and 4 of the American Electric Power/Public Service Company of Oklahoma Northeastern plant. We propose to disapprove these $SO_2$ BART determinations because they do not comply with our regulations under 40 CFR 51.308(e). We are also proposing to disapprove Oklahoma's long term strategy under section 51.308(d)(3) because it does not incorporate these emission reductions. ODEQ participated in the CENRAP visibility modeling development that assumed certain $SO_2$ reductions from these six BART units. ODEQ also performed its consultations with other states with the understanding that these reductions would be secured. We propose a FIP to cure these defects in BART and the LTS.

We propose to find that Units 4 and 5 of the OG&E Muskogee plant, Units 1 and 2 of the OG&E Sooner plant, and Units 3 and 4 of the AEP/PSO

[44] *See* 40 CFR 51.308(b).

Northeastern plant are subject to BART under 40 CFR 51.308(e). Further, we propose a FIP that specifically imposes $SO_2$ BART on these six sources. We propose that $SO_2$ BART for Units 4 and 5 of the OG&E Muskogee plant, Units 1 and 2 of the OG&E Sooner plant, and Units 3 and 4 of the AEP/PSO Northeastern plant is an $SO_2$ emission limit of 0.06 lbs/MMBtu that applies singly to each of these units on a 30 day rolling average. Additionally, we propose monitoring, record-keeping, and reporting requirements to ensure compliance with these emission limitations.

We propose that compliance with the emission limits be within three (3) years of the effective date of our final rule. We solicit comments on alternative timeframes, of from two (2) years up to five (5) years from the effective date of our final rule.

Should OG&E and/or AEP/PSO elect to reconfigure the above units to burn natural gas, as a means of satisfying their BART obligations under section 51.308(e), that conversion should be completed by the same time frame. We invite comments as to, considering the engineering and/or management challenges of such a fuel switch, whether the full 5 years allowed under section 308(e)(1)(iv) following the effective date of our final rule would be appropriate.

We propose to disapprove section VI.E of the Oklahoma RH SIP entitled, "Greater Reasonable Progress Alternative Determination." We also propose to disapprove the separate executed agreements between ODEQ and OG&E, and ODEQ and AEP/PSO entitled "OG&E Regional Haze Agreement, Case No. 10–024," and "PSO Regional Haze Agreement, Case No. 10–025," housed within Appendix 6–5 of the RH SIP. We propose that these portions of the submittal are severable from the BART determinations and the LTS; therefore, no FIP is required.

We are taking no action on whether Oklahoma has satisfied the reasonable progress requirements of section 51.308(d)(1).

We propose to approve all other portions of the Oklahoma RH SIP. We note that all controls required as part of Oklahoma's BART determinations, not included as part of our proposed FIP, must be operational within five years from the effective date of our final rule.

*B. Interstate Transport of Visibility*

We are also proposing to partially approve and partially disapprove a portion of a SIP revision submitted by the State of Oklahoma for the purpose of addressing the "good neighbor" provisions of the CAA section 110(a)(2)(D)(i) for the 1997 8-hour ozone NAAQS and the $PM_{2.5}$ NAAQS. Specifically, we propose a partial approval and partial disapproval of the Oklahoma Interstate Transport SIP provisions that address the requirement of section 110(a)(2)(D)(i)(II) that emissions from Oklahoma sources do not interfere with measures required in the SIP of any other state under part C of the CAA to protect visibility. With regard to whether emissions from Oklahoma sources interfere with the visibility programs of other states, we are proposing to find that Oklahoma sources, except for Units 4 and 5 of the OG&E Muskogee plant, Units 1 and 2 of the OG&E Sooner plant, and Units 3 and 4 of the AEP/PSO Northeastern plant, are sufficiently controlled to eliminate interference with the visibility programs of other states, and for the six units we are proposing specific $SO_2$ emission limits that will eliminate such interstate interference.

## VIII. Statutory and Executive Order Reviews

*A. Executive Order 12866: Regulatory Planning and Review*

This proposed action is not a "significant regulatory action" under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), and is therefore not subject to review under the Executive Order. The proposed FIP applies to only three facilities and is not a rule of general applicability.

*B. Paperwork Reduction Act*

This proposed action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Under the Paperwork Reduction Act, a "collection of information" is defined as a requirement for "answers to * * * identical reporting or recordkeeping requirements imposed on ten or more persons * * *." 44 U.S.C. 3502(3)(A). Because the proposed FIP applies to just three facilities, the Paperwork Reduction Act does not apply. *See* 5 CFR 1320(c).

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

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 Office of Management and Budget (OMB) control number. The OMB control numbers for our regulations in 40 CFR are listed in 40 CFR part 9.

*C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed action on small entities, I certify that this proposed action will not have a significant economic impact on a substantial number of small entities. The FIP for the three Oklahoma facilities being proposed today does not impose any new requirements on small entities. The proposed partial approval of the SIP, if finalized, merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. *See Mid-Tex Electric Cooperative, Inc.* v. *FERC,* 773 F.2d 327 (D.C. Cir. 1985)

*D. Unfunded Mandates Reform Act (UMRA)*

Under sections 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule

that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more (adjusted to inflation). Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action proposed does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action proposes to approve pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

*E. Executive Order 13132: Federalism*

*Federalism* (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA 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" is 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, EPA may not issue a regulation that has 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, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely addresses the State not fully meeting its obligation to prohibit emissions from interfering with other states measures to protect visibility established in the CAA. Thus, Executive Order 13132 does not apply to this action. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

*F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." This proposed rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments. Thus, Executive Order 13175 does not apply to this rule. EPA specifically solicits additional comment on this proposed rule from tribal officials.

*G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks*

Executive Order 13045: *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be economically significant as defined under Executive Order 12866; and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. However, to the extent this proposed rule will limit emissions of $SO_2$, the rule will have a beneficial effect on children's health by reducing air pollution.

This rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks. However, to the extent this proposed rule will limit emissions of $SO_2$, the rule will have a beneficial effect on children's health by reducing air pollution.

*H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act*

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use "voluntary consensus standards" (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

*J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 (59 FR 7629, February 16, 1994), establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

We have determined that this proposed rule, if finalized, will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it 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. This proposed rule limits emissions of $SO_2$ from three facilities in Oklahoma. The partial approval of the SIP, if finalized, merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law.

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

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxides, Visibility, Interstate transport of pollution, Regional haze, Best available control technology.

Dated: March 4, 2011.

**Al Armendariz,**

*Regional Administrator, Region 6.*

Title 40, chapter I, of the Code of Federal Regulations is proposed to be 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.*

2. Part 52 is proposed to be amended by adding § 52.1923 to read as follows:

**§ 52.1923 Interstate pollutant transport provisions; What are the FIP requirements for Units 4 and 5 of the Oklahoma Gas and Electric Muskogee plant; Units 1 and 2 of the Oklahoma Gas and Electric Sooner plant; and Units 3 and 4 of the American Electric Power/Public Service Company of Oklahoma Northeastern plant affecting visibility?**

(a) *Applicability.* The provisions of this section shall apply to each owner or operator, or successive owners or operators, of the coal burning equipment designated as: Units 4 or 5 of the Oklahoma Gas and Electric Muskogee plant; Units 1 or 2 of the Oklahoma Gas and Electric Sooner plant; and Units 3 or 4 of the American Electric Power/Public Service Company of Oklahoma Northeastern plant.

(b) *Compliance Dates.* Compliance with the requirements of this section is required within 3 years of the effective date of this rule unless otherwise indicated by compliance dates contained in specific provisions.

(c) *Definitions.* All terms used in this part but not defined herein shall have the meaning given them in the Clean Air Act and in parts 51 and 60 of this title. For the purposes of this section:

*24-hour period* means the period of time between 12:01 a.m. and 12 midnight. *Air pollution control equipment* includes selective catalytic control units, baghouses, particulate or gaseous scrubbers, and any other apparatus utilized to control emissions of regulated air contaminants which would be emitted to the atmosphere.

*Daily average* means the arithmetic average of the hourly values measured in a 24-hour period.

*Heat input* means heat derived from combustion of fuel in a unit and does not include the heat input from preheated combustion air, recirculated flue gases, or exhaust gases from other sources. Heat input shall be calculated in accordance with 40 CFR part 75.

*Owner or Operator* means any person who owns, leases, operates, controls, or supervises any of the coal burning equipment designated as:

(i) Unit 4 of the Oklahoma Gas and Electric Muskogee plant; or

(ii) Unit 5 of the Oklahoma Gas and Electric Muskogee plant; or

(ii) Unit 1 of the Oklahoma Gas and Electric Sooner plant; or

(iv) Unit 2 of the Oklahoma Gas and Electric Sooner plant; or

(v) Unit 3 of the American Electric Power/Public Service Company of Oklahoma Northeastern plant; or

(vi) Unit 4 of the American Electric Power/Public Service Company of Oklahoma Northeastern plant.

*Regional Administrator* means the Regional Administrator of EPA Region 6 or his/her authorized representative.

*Unit* means one of the coal fired boilers covered under paragraph (a) of this section.

(d) *Emissions Limitations.* $SO_2$ *emission limit.* The individual sulfur dioxide emission limit for a unit shall be 0.06 pounds per million British thermal units (lb/MMBtu) as averaged over a rolling 30 calendar day period. For each unit, $SO_2$ emissions for each calendar day shall be determined by summing the hourly emissions measured in pounds of $SO_2$. For each unit, heat input for each calendar day shall be determined by adding together all hourly heat inputs, in millions of BTU. Each day the thirty-day rolling average for a unit shall be determined by adding together the pounds of $SO_2$ from that day and the preceding 29 days and dividing the total pounds of $SO_2$ by the sum of the heat input during the same 30-day period. The result shall be the 30-day rolling average in terms of lb/MMBtu emissions of $SO_2$. If a valid $SO_2$ pounds per hour or heat input is not available for any hour for a unit, that heat input and $SO_2$ pounds per hour shall not be used in the calculation of the 30-day rolling average for $SO_2$.

(e) *Testing and monitoring.* (1) No later than the compliance date of this regulation, the owner or operator shall install, calibrate, maintain and operate Continuous Emissions Monitoring Systems (CEMS) for $SO_2$ on Units 4 and 5 of the Oklahoma Gas and Electric Muskogee plant; Units 1 and 2 of the Oklahoma Gas and Electric Sooner plant; and Units 3 and 4 of the American Electric Power/Public Service Company of Oklahoma Northeastern plant in accordance with 40 CFR 60.8 and 60.13(e), (f), and (h), and Appendix B of Part 60. The owner or operator shall comply with the quality assurance procedures for CEMS found in 40 CFR part 75. Compliance with the emission limits for $SO_2$ shall be determined by using data from a CEMS.

(2) Continuous emissions monitoring shall apply during all periods of operation of the coal burning equipment, including periods of startup, shutdown, and malfunction, except for CEMS breakdowns, repairs, calibration checks, and zero and span adjustments. Continuous monitoring systems for measuring $SO_2$ and diluent gas shall complete a minimum of one cycle of operation (sampling, analyzing, and data recording) for each successive 15-minute period. Hourly averages shall be computed using at least one data point in each fifteen minute quadrant of an hour. Notwithstanding this requirement, an hourly average may be computed from at least two data points separated by a minimum of 15 minutes (where the unit operates for more than one quadrant in an hour) if data are unavailable as a result of performance of calibration, quality assurance, preventive maintenance activities, or backups of data from data acquisition and handling system, and recertification events. When valid $SO_2$ pounds per hour, or $SO_2$ pounds per million Btu emission data are not obtained because of continuous monitoring system breakdowns, repairs, calibration checks, or zero and span adjustments, emission data must be obtained by using other monitoring systems approved by the EPA to provide emission data for a minimum of 18 hours in each 24 hour period and at least 22 out of 30 successive boiler operating days.

(f) *Reporting and Recordkeeping Requirements.* Unless otherwise stated all requests, reports, submittals, notifications, and other communications to the Regional Administrator required by this section shall be submitted, unless instructed otherwise, to the Director, Multimedia Planning and Permitting Division, U.S. Environmental Protection Agency, Region 6, to the attention of Mail Code: 6PD, at 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. For each unit subject to the emissions limitation in this section and upon completion of the installation of

CEMS as required in this section, the owner or operator shall comply with the following requirements:

(1) For each emissions limit in this section, comply with the notification, reporting, and recordkeeping requirements for CEMS compliance monitoring in 40 CFR 60.7(c) and (d).

(2) For each day, provide the total $SO_2$ emitted that day by each emission unit. For any hours on any unit where data for hourly pounds or heat input is missing, identify the unit number and monitoring device that did not produce valid data that caused the missing hour.

(g) *Equipment Operations.* At all times, including periods of startup, shutdown, and malfunction, the owner or operator shall, to the extent practicable, maintain and operate the unit including associated air pollution control equipment in a manner consistent with good air pollution control practices for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the Regional Administrator which may include, but is not limited to, monitoring results, review of operating and maintenance procedures, and inspection of the unit.

(h) *Enforcement.* (1) Notwithstanding any other provision in this implementation plan, any credible evidence or information relevant as to whether the unit would have been in compliance with applicable requirements if the appropriate performance or compliance test had been performed, can be used to establish whether or not the owner or operator has violated or is in violation of any standard or applicable emission limit in the plan.

(2) Emissions in excess of the level of the applicable emission limit or requirement that occur due to a malfunction shall constitute a violation of the applicable emission limit.

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Part IV

## Department of Transportation

Federal Railroad Administration

49 CFR Part 228
Hours of Service of Railroad Employees; Substantive Regulations for Train Employees Providing Commuter and Intercity Rail Passenger Transportation; Conforming Amendments to Recordkeeping Requirements; Proposed Rule

**DEPARTMENT OF TRANSPORTATION**

**Federal Railroad Administration**

**49 CFR Part 228**

**[Docket No. FRA–2009–0043, Notice No. 1]**

**RIN 2130–AC15**

# Hours of Service of Railroad Employees; Substantive Regulations for Train Employees Providing Commuter and Intercity Rail Passenger Transportation; Conforming Amendments to Recordkeeping Requirements

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

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

**SUMMARY:** FRA is proposing to amend its hours of service recordkeeping regulations, to establish hours of service regulations, including maximum on-duty periods, minimum off-duty periods, and other limitations, for train employees (*e.g.,* locomotive engineers and conductors) providing commuter and intercity rail passenger transportation. The proposed regulations would require that railroads employing such train employees analyze and mitigate the risks for fatigue in the schedules worked by these train employees, and that the railroads submit to FRA for its approval the relevant schedules and fatigue mitigation plans. This proposed rule would also make corresponding changes to FRA's hours of service recordkeeping regulation, to require railroads to keep hours of service records and report excess service to FRA in a manner consistent with the new requirements. This proposed regulation is authorized by the Rail Safety Improvement Act of 2008.

**DATES:** *Comments:* Written comments must be received by May 23, 2011. Comments received after that date will be considered to the extent possible without incurring additional delay or expense.

*Public hearing:* FRA anticipates being able to resolve this rulemaking without a public hearing. However, if FRA receives a specific request for a public hearing prior to March 29, 2011, one will be scheduled, to be held in the Washington, DC area, on a date prior to the end of the comment period, and FRA will publish a supplemental notice in the **Federal Register** to inform interested parties of the date, time, and specific location of any such hearing.

**ADDRESSES:** Comments, which should be identified by Docket No. FRA–2009–0043, Notice No. 1, may be submitted 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. 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 section of this document.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time or to the 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, FRA, 1200 New Jersey Avenue, SE., RRS–1, Mail Stop 25, Washington, DC 20590 (telephone: 202–493–6350); Dr. Thomas G. Raslear, Staff Director, Human Factors Research Program, Office of Research and Development, FRA, 1200 New Jersey Avenue, SE., RPD–321, Mail Stop 20, Washington, DC 20590 (telephone 202–493–6356); or Colleen A. Brennan, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., RCC–12, Mail Stop 10, Washington, DC 20590 (telephone 202–493–6028 or 202–493–6052).

**SUPPLEMENTARY INFORMATION:**

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## I. Executive Summary

This NPRM proposes hours of service regulations for train employees who provide commuter or intercity rail passenger transportation (passenger train employees). FRA seeks comment on all aspects of this proposal.

Federal laws governing railroad employees' hours of service date back to 1907 with the enactment of the Hours of Service Act (Pub. L. 59–274, 34 Stat. 1415), and FRA, under delegations from the Secretary of Transportation (Secretary), has long administered statutory hours of service requirements for the three groups of employees now covered under the statute, namely employees performing the functions of train employees, signal employees, and dispatching service employees, as those terms are defined at 49 U.S.C. 21101. *See* 49 CFR 1.49; 49 U.S.C. 21101–21109, 21303.

These requirements have been amended several times over the years, most recently in the Rail Safety Improvement Act of 2008 (Pub. L. 110–432, Div. A; RSIA). The RSIA substantially amended the requirements of 49 U.S.C. 21103, applicable to train employees, defined as "* * * individual[s] engaged in or connected with the movement of a train, including

a hostler." 49 U.S.C. 21101(5). However, the RSIA also granted the Secretary authority to prescribe regulations governing the hours of service of passenger train employees. 49 U.S.C. 21109(b)–(c). As will be discussed below, FRA interprets commuter or intercity rail passenger transportation to include rail passenger transportation by tourist, scenic, excursion, and historic railroads. The RSIA provided that this particular subset of train employees would continue to be governed by 49 U.S.C. 21103 as it existed prior to the enactment of the RSIA (old Section 21103), until the earlier of, the effective date of final regulations prescribed by the Secretary, or the date that is three years from the date of enactment of the RSIA. 49 U.S.C. 21102(c). In the absence of a final rule in effect governing this group of train employees, the requirements of the RSIA currently in effect for other train employees (new Section 21103) will go into effect for passenger train employees on October 16, 2011. 49 U.S.C. 21102(c).

As will be discussed further below, FRA reviewed the applicable fatigue science, and sought input from FRA's Railroad Safety Advisory Committee (RSAC). Based on FRA's understanding of current fatigue science, and information received through RSAC, FRA determined that the requirements imposed on train employees by the RSIA were not appropriate for passenger train employees. The chart below compares and contrasts (1) the hours of service requirements in 49 U.S.C. 21103 as amended by the RSIA, (2) the hours of service requirements applicable to all train employees immediately prior to the RSIA, which are currently still applicable to passenger train employees, and (3) the requirements of this proposed regulation that if adopted would apply to passenger train employees.

| | FRA Freight train employee statute | Train employee provisions immediately prior to RSIA and currently applicable only to passenger train employees | FRA passenger train employee NPRM |
|---|---|---|---|
| Citation | 49 U.S.C. 21103 (as amended by the RSIA effective July 16, 2009) (new section 21103) (Applies to train employees on freight railroads. Will apply to train employees on commuter and intercity passenger railroads if no regulations are in effect by October 16, 2011). | 49 U.S.C. 21103 as it existed prior to the October 16, 2008, enactment of the RSIA (old section 21103) (Train employees providing commuter and intercity rail passenger transportation are currently covered by these provisions pursuant to 49 U.S.C. 21102(c).). | Proposed 49 CFR part 228, subpart F. |
| Use of Fatigue Science. | None | None | NRPM requires schedules to be analyzed under a validated biomathematical fatigue model such as the Fatigue Avoidance Scheduling Tool™, with the exception of certain schedules (completely within the hours of 4 a.m. and 8 p.m. and otherwise in compliance with the limitations in the regulation) deemed as categorically presenting an acceptable level of risk for fatigue that does not exceed the defined fatigue threshold. |
| Limitations on Time on Duty in a Single Tour. | 12 consecutive hours of time on duty or 12 nonconsecutive hours on duty if broken by an interim release of at least 4 consecutive hours uninterrupted by communication from the railroad likely to disturb rest, in a 24-hour period that begins at the beginning of the duty tour. | 12 consecutive hours of time on duty or 12 nonconsecutive hours on duty if broken by an interim release of at least 4 consecutive hours, in a 24-hour period that begins at the beginning of the duty tour. | 12 consecutive hours of time on duty or 12 nonconsecutive hours on duty if broken by an interim release of at least 4 consecutive hours, in a 24-hour period that begins at the beginning of the duty tour. |
| Limitations on Consecutive Duty Tours. | May not be on duty as a train employee after initiating an on-duty period on six consecutive days without receiving 48 consecutive hours off duty free from any service for any railroad carrier at the employee's home terminal. Employees are permitted to initiate a seventh consecutive day when the employee ends the sixth consecutive day at the away-from-home terminal, as part of a pilot project, or as part of a grandfathered collectively bargained arrangement. Employees performing service on this additional day must receive 72 consecutive hours free from any service for any railroad carrier at their home terminal before going on duty again as a train employee. | None | No more than six "Type 2" assignments (generally, those including time on duty between 8 p.m. and 4 a.m.) without 24 consecutive hours off duty at the employee's home terminal. No more than 14 "Type 1" assignments (those not Type 2) without 2 consecutive calendar days off duty at the employee's home terminal. Employees may be permitted to perform service on an additional day to facilitate their return to their home terminal. |

| | FRA Freight train employee statute | Train employee provisions immediately prior to RSIA and currently applicable only to passenger train employees | FRA passenger train employee NPRM |
|---|---|---|---|
| Cumulative Limits on Time on Duty. | Limited to 276 hours of time on duty, in deadhead transportation to a point of final release, or any other mandatory activity for the railroad carrier.<br>Limited to 30 hours of time spent on duty and waiting for or in deadhead transportation to a point of final release after reaching 12 hours of time on duty and waiting for or in deadhead transportation to a point of final release. | None | None. |
| Mandatory Off-Duty Periods. | 10 consecutive hours of time off duty free from any communication from the railroad likely to disturb rest, with additional time off duty if on-duty time plus time in or awaiting deadhead transportation to final release exceeds 12 hours.<br>48 consecutive hours off duty, free from any service for any railroad carrier, after initiating an on-duty period for 6 consecutive days. If 7 consecutive days are permitted, mandatory off-duty period extended to 72 consecutive hours. | 8 consecutive hours (10 consecutive hours if time on duty reaches 12 consecutive hours). | 8 consecutive hours (10 consecutive hours if time on duty reaches 12 consecutive hours). |
| Specific Rules for Nighttime Operations. | None | None | Schedules that include any time on duty between 8 p.m. and 4 a.m. must be analyzed using a validated biomathematical model of human performance and fatigue approved by FRA. Schedules with excess risk of fatigue must be mitigated or supported by a determination that mitigation is not possible and the schedule is operationally necessary and approved by FRA. |
| Specific Rules for Unscheduled Assignments. | None | None | The potential for fatigue presented by unscheduled work assignments must be mitigated as part of a railroad's FRA-approved fatigue management plan. |
| Recordkeeping requirements. | Record for each duty tour must contain 15 elements specified in 49 CFR 228.11(b). | Record for each duty tour must contain the first 11 elements specified in 49 CFR 228.11(b), as items 12 through 15 relate to RSIA requirements not applicable to train employees providing commuter or intercity rail passenger transportation. | Record for each duty tour must contain the first 12 elements specified in 49 CFR 228.11(b). Item 12 refers to recording the number of consecutive days, which would be required by the proposed rule. |
| Excess Service Reporting Requirements. | Requires reporting of any of 10 different ways in which hours of service limitations may be exceeded. | Requires reporting of any of 4 different ways in which hours of service limitations may be exceeded. | Requires reporting of any of 10 different ways in which hours of service limitations may be exceeded (reflecting various ways of violating new consecutive-days requirements). |

This proposed rule would leave intact the existing limitations set by old section 21103 on the maximum number of hours in a duty tour and minimum number of hours in a statutory off-duty period. An additional limitation would be added on the number of consecutive days that a passenger train employee may work, depending on the time of day of the assignment. This differentiation takes into account the fact that work during nighttime hours may present a greater risk for fatigue. Conforming changes would also be made to the recordkeeping and reporting requirements to accommodate the consecutive limitations on consecutive days.

The limitations on maximum hours worked, minimum hours of rest, and consecutive days would provide a "floor," a minimum set of limitations, within which the proposed rule would require railroads subject to this proposed rule to analyze their schedules using a validated and calibrated biomathematical model of human performance and fatigue, and to mitigate any fatigue identified that exceeds the fatigue threshold for the model. The fatigue threshold is a level of fatigue at which safety may be compromised. As will be discussed below, there are two models that currently have been validated and calibrated using data from freight railroads, that can be used for the analysis required by this proposed rule. The proposed rule also allows for the development of new models. It

discusses procedures for validating and calibrating a model, and provides that evidence of a new model's validation and calibration may be submitted to FRA for approval.

The proposed rule would define as a "Type 1 assignment" any assignment that requires an employee to report for duty no earlier than 4 a.m. and be released from duty no later than 8 p.m. Based on analysis conducted during the formulation of this proposal, FRA proposes to subject such assignments to a less restrictive consecutive-days limitation, and to deem such schedules as presenting an acceptable level of fatigue when otherwise in compliance with the limitations established in this proposal, such that these schedules would not be required to be submitted to FRA for approval, nor would the application of fatigue mitigation tools to these schedules be required.

A "Type 2 assignment" would be any assignment having any period of time during a calendar day before 4 a.m. or after 8 p.m. Within 180 days of the effective date of a final regulation in this rulemaking, the proposed rule would require railroads to analyze the fatigue risk of assignments they make to their passenger train employees. If the analysis shows that a schedule does not exceed the fatigue threshold, and the schedule is otherwise in compliance with the limitations of the proposed rule and does not require the employee to be on duty for any period of time between midnight and 4 a.m., the proposed rule would allow that schedule to be treated as a Type 1 assignment for the purposes of the consecutive-days limitation, and there would be no requirement to mitigate fatigue in that schedule. However, for those schedules that analysis indicates have a level of risk for fatigue exceeding the fatigue threshold, the railroad would be required to mitigate the fatigue. Railroads would also be required to complete their analysis and submit any schedules with a risk exceeding the fatigue threshold, and the mitigation tools the railroad applied to mitigate the fatigue risk in those schedules to FRA for approval. In addition, any schedule, the fatigue risk of which could not be sufficiently mitigated to within the fatigue threshold, but which the railroad deems operationally necessary, must also be submitted for FRA approval, along with a declaration of operational necessity.

The proposed rule would also require railroads to submit any schedule changes that would result in a schedule that would have been required to be submitted if it were an original schedule, unless the new schedule was the same as another schedule that had previously been analyzed and approved.

Within 120 days of any railroad submission, FRA will notify the railroad of any exceptions taken to its submission. While the proposed rule would require FRA approval of the schedules and fatigue mitigation tools, FRA expects that it would work with a railroad to make necessary modifications to schedules or mitigation tools to minimize fatigue to the greatest extent possible. FRA does not intend to dictate a required schedule for operations. FRA seeks comment on the logistics of schedule review and approval and the collaboration between FRA and the railroad to address any areas of concern.

Railroads would be required to consult with affected employees and applicable labor organizations regarding the analysis of work schedules, fatigue mitigation tools, and submissions to FRA. Should the employees or labor organizations disagree with the railroad, they have the opportunity, under the proposal to file a statement for FRA's consideration in reviewing the submission and determining whether to approve it.

Finally, the proposed rule would require initial fatigue training, addressing a list of subjects, and refresher training every three years. This training may be combined with other training the railroads are providing to their employees.

FRA has analyzed the economic impacts of this proposed rule against two baselines. One is a "status quo" baseline that reflects present conditions (*i.e.,* primarily, the statutory hours of service provisions (specifically, old section 21103) and, secondarily, the hours of service recordkeeping and reporting regulations) that have applied, and will continue to apply, to passenger railroads, with respect to their train employees, until either the passenger railroads become subject, with respect to the same employees, to either the freight hours of service laws on October 16, 2011 or an FRA-issued hours of service rule prior to that). The other baseline is a "no regulatory action" baseline that reflects what would happen in absence of this rulemaking (*i.e.,* the freight hours of service laws are applied to passenger railroads with respect to their train employees).

With respect to the "status-quo" baseline, the FRA proposal would impose costs that are higher than the quantified safety benefits. Costs compared to the "status quo" baseline total $2.1 million (undiscounted), $1.4 million (PV, 7 percent), and $1.7 million (PV, 3 percent). Quantified benefits compared to the "status quo" baseline total $1.4 million (undiscounted), $.7 million (PV, 7 percent), and $1.0 million (PV, 3 percent). However, there are additional benefits that have not been quantified, but should be considered when comparing the overall costs and benefits. For instance, safety and health benefits will accrue from the transfer of knowledge to employees, their families, friends and others with whom they may share the fatigue knowledge they acquire from the required fatigue awareness training programs. This fatigue awareness will result in more optimal decisions regarding rest and sleep leading to less fatigue and improved safety outside of passenger train operations during the course of daily activities that may include the operation of motor vehicles or other heavy machinery. This fatigue awareness will also result in proper identification and treatment, if necessary, of fatigue symptoms. Separately, accident avoidance will result in fewer unplanned delays to passengers and freight commodities impacted by passenger train accident and incidents that result in blocking one or more tracks for prolonged periods. These costs can be very substantial given the need to investigate accidents and often clear wreckage. Finally, there is the non-quantified benefit of ensuring that passenger railroads do not unknowingly require train employees to work schedules with unacceptable high-fatigue risk levels. It is not unreasonable to expect that the unquantified benefits will raise the benefits to a level quite comparable to the costs. FRA also believes that the unquantified benefits coupled with the quantified safety benefits compare very well with the costs associated with meeting the intent of the statutory mandate as proposed.

With respect to the "no regulatory action" baseline, FRA found that its proposal represents a substantially more cost-effective alternative for achieving the goal of identifying and mitigating unacceptable fatigue risk levels and thus ensuring the safety of passenger train operations. Over the 20-year period analyzed, the undiscounted costs associated with the "no regulatory action" alternative total $75.5 million compared to $2.1 million for the FRA proposal. Similarly, when discounted at 7 percent, the costs associated with the "no regulatory action" alternative total $59.0 million compared to $1.4 million for the FRA proposal and when discounted at 3 percent, the costs associated with the "no regulatory action" alternative total $66.8 million

compared to $1.7 million for the FRA proposal.

| Cost description | No-action alternative | | | NPRM | | |
|---|---|---|---|---|---|---|
| | Undiscounted | PV@7% | PV@3% | Undiscounted | PV@7% | PV@3% |
| New Engineer Training, Initial (20% New Hires) | $31,237,549 | $26,299,825 | $28,705,081 | 0 | 0 | 0 |
| New Engineer Training, Refresher (20% New Hires) | 4,599,050 | 2,278,431 | 3,327,802 | 0 | 0 | 0 |
| New Conductor Training, Initial (20% New Hires) | 30,847,974 | 25,942,971 | 28,330,908 | 0 | 0 | 0 |
| New Conductor Training, Refresher (20% New Hires) | 8,636,745 | 4,278,146 | 6,249,071 | 0 | 0 | 0 |
| Work Schedule Analysis (No-Reg Action)/Initial Analysis of Work Schedules + Follow-up Analysis and Fatigue Mitigation Plan Review (NPRM) | 189,723 | 177,312 | 184,198 | ($126,482 + $240,316) = $366,799 | ($118,208 + $122,175) = $240,382 | ($122,798 + $175,894) = $298,692 |
| Biomathematical Model of Fatigue Software | 0 | 0 | 0 | 417,500 | 268,723 | 337,240 |
| Use of Rest Facilities | 0 | 0 | 0 | 30,988 | 28,961 | 30,086 |
| Fatigue Training | 0 | 0 | 0 | 1,329,673 | 841,748 | 1,065,188 |
| TOTAL (rounded) | 75,511,041 | 58,976,685 | 66,797,059 | 2,144,960 | 1,379,815 | 1,731,206 |

FRA estimates that the recordkeeping and reporting costs per employee record under the no-regulatory action alternative and FRA proposal will be practically the same.

The estimated accident reduction benefits of the proposed rule relative to the statutory hours of service requirements currently in place include prevented accident damages, injuries, and fatalities. The table below presents the estimates for the 20-year period of analysis.

INTERCITY PASSENGER, COMMUTER, TOURIST AND EXCURSION RAILROADS

[All track types]

| Accident reduction benefits | VSL = $6 M undiscounted benefits | VSL = $6 M discounted PV@ 7% | VSL = $6 M discounted PV@ 3% |
|---|---|---|---|
| Property Damage | $829,366 | $439,316 | $616,943 |
| Injuries | 120,547 | 63,854 | 89,672 |
| Fatalities | 429,088 | 227,288 | 319,187 |
| TOTAL (rounded) | 1,379,001 | 730,458 | 1,025,803 |

FRA does not expect that the overall number of casualties and property damages prevented under the proposed rule will differ from those that would be prevented under the statutory freight hours of service requirements.

FRA seeks comments on all aspects of the economic impacts of its proposal.

## II. Statutory Background and History

Federal laws governing railroad employees' hours of service date back to 1907 with the enactment of the Hours of Service Act. These laws, codified as amended primarily at 49 U.S.C. 21101–21109, are intended to promote safe railroad operations by limiting the hours of service of certain railroad employees and ensuring that they receive adequate opportunities for rest in the course of performing their duties. Public Law 103–272 (1994). The Secretary is charged with the administration of those laws, collectively referred to in this document as the hours of service laws (HSL). This function has been delegated to the FRA Administrator. 49 U.S.C. 103(c); 49 CFR 1.49(d).

Congress substantially amended the HSL on three occasions. The first significant amendments occurred in 1969. Public Law 91–169, 83 Stat. 463. The 1969 amendments reduced the maximum time on duty for train employees [1] from 16 hours to 14 hours effective immediately, with a further reduction to 12 hours automatically taking effect two years later. Congress also established provisions for determining, in the case of a train employee, whether a period of time is to be counted as time on duty. 49 U.S.C. 21103(b). In so doing, Congress also addressed the issue of deadhead

[1] A "train employee" is defined at 49 U.S.C. 21101(5) and 49 CFR 228.5 as an individual engaged in or connected with the movement of a train, including a hostler. FRA also interpreted this statutory term in published interpretations in 49 CFR part 228, Appendix A, providing: "Train or engine service refers to the actual assembling or operation of trains. Employees who perform this type of service commonly include locomotive engineers, firemen, conductors, trainmen, switchmen, switchtenders (unless their duties come under the provisions of section 3) and hostlers." Other employees, such as food service providers or sleeping car attendants, who may work on passenger trains, but have no responsibility for assembling or operating the train, are not within the definition of a train employee, and are, as such, not generally covered by this proposed rule, or any other hours of service limitations, but they would be covered if they performed functions related to assembling or operating the train, regardless of the employee's job title.

transportation [2] time, providing that "[t]ime spent in deadhead transportation to a duty assignment" is counted as time on duty. (Emphasis added). Although time spent in deadhead transportation from a duty assignment to the point of final release is not included within any of the categories of time on duty, Congress further provided that it shall be counted as neither time on duty nor time off duty. 49 U.S.C. 21103(b)(4). This provision effectively created a third category of time, known commonly as "limbo time."

In 1976, Congress again amended the HSL in several important respects. Most significantly, Congress expanded the coverage of the laws, by including hostlers within the definition of employees now termed "train employees", and adding the section providing hours of service requirements for "signal employees", now codified at 49 U.S.C. 21104. Congress also added a provision that prohibited a railroad from providing sleeping quarters that are not free from interruptions of rest caused by noise under the control of the railroad, and that are not clean, safe, and sanitary, and prohibited the construction or reconstruction of sleeping quarters in an area or in the immediate vicinity of an area in which humping or switching operations are performed. *See* Public Law 94–348, 90 Stat. 818 (1976).

Section 108 of the RSIA also amended the HSL in a number of significant ways, most of which became effective July 16, 2009. *See* Section 108 of Public Law 110–432, Div. A, and FRA Interim Statement of Agency Policy and Interpretation at 74 FR 30665 (June 26, 2009). The RSIA established a limit of 276 hours per calendar month for train employees on service performed for a railroad and on time spent in or waiting for deadhead transportation to a point of final release, increased the quantity of the statutory minimum off-duty period after being on duty for 12 hours in broken service from 8 hours of rest to 10 hours of rest, prohibited communication with train or signal employees during certain minimum statutory rest periods, and established mandatory time off duty for train employees of 48 hours after initiating an on-duty period on six consecutive days, or 72 hours after initiating an on-duty period on seven consecutive days. 49 U.S.C. 21103–21104. The RSIA also revised the definition of "signal employee" to include contractors who perform the work of a signal employee within the scope of the statute. 49 U.S.C. 21101(4).

However, Section 108(d) of the RSIA, which became effective on October 16, 2008, provided that the requirements described above for train employees would not go into effect on July 16, 2009, for train employees when providing commuter or intercity rail passenger transportation. 49 U.S.C. 21102(c). Section 108(d) further provided that these train employees, who provide commuter or intercity passenger rail service, would continue to be governed by the old HSL (as they existed immediately prior to the enactment of the RSIA, at 49 U.S.C. 21103 prior to its 2008 amendment), until the effective date of regulations promulgated by the Secretary. 49 U.S.C. 21102(c). However, if no new regulations are in effect before October 16, 2011, the provisions of Section 108(b), which applied to train employees, would be extended to these employees at that time. *Id.*

Section 108(e) of the RSIA specifically provides the Secretary with the authority to issue hours of service rules and orders applicable to train employees engaged in commuter rail passenger transportation and intercity rail passenger transportation (as defined in 49 U.S.C. 24102), that may be different from the statute applied to other train employees. 49 U.S.C. 21109(b). It further provides that such regulations and orders may address railroad operating and scheduling practices, including unscheduled duty calls, communications during time off duty, and time spent waiting for deadhead transportation or in deadhead transportation from a duty assignment to the place of final release, that could affect employee fatigue and railroad safety. *Id.*

Section 108(e) of the RSIA also provides:

> [i]n issuing regulations under subsection (a) the Secretary shall consider scientific and medical research related to fatigue and fatigue abatement, railroad scheduling and operating practices that improve safety or reduce employee fatigue, a railroad's use of new or novel technology intended to reduce or eliminate human error, the variations in freight and passenger railroad scheduling practices and operating conditions, the variations in duties and operating conditions for employees subject to this chapter, a railroad's required or voluntary use of fatigue management plans covering employees subject to this chapter, and any other relevant factors.

49 U.S.C. 21109(c). Section 21109(a) of title 49 of the U.S. Code refers to other regulatory authority granted to FRA, as the Secretary's delegate related to the HSL, which is not relevant to this proposed rule. However, FRA believes that one of the goals of the present rulemaking is to identify and reduce fatigue for the employees who will be covered by the final rule. Therefore, as will be described below, FRA has based these proposed regulations on scientific research related to fatigue and fatigue abatement, as applied to railroad scheduling practices and operating conditions for train employees providing commuter and intercity rail passenger transportation. Section III below will describe the primary scientific foundation and support for the requirements contained in this proposed rule. In addition, scientific considerations will also be addressed in discussion of various elements of this proposal, including in the discussion of specific provisions in the Section-by-Section Analysis below.

## III. Scientific Background

Most mammals, including human beings, have an approximately 24-hour sleep-wake cycle known as a "circadian rhythm." Rapid changes in the circadian pattern of sleep and wakefulness disrupt many physiological functions such as hormone releases, digestion, and temperature regulation. Human function can be affected, performance may be impaired, and a general feeling of debility may occur until realignment is achieved. Jet lag when flying east is the most commonly experienced syndrome similar to the experience of consistently working on a less-than-24-hour cycle.

Fatigue risk in an industry that operates 24 hours a day and 7 days per week is not just dependent on how many hours per day a person is permitted to work, or the amount of time that a person is required to be off duty between periods of work. Other significant factors in the level of fatigue risk include the time of day that an employee works and the number of consecutive days that an employee works. In addition, the quantity and quality of sleep vary with the time of day. Because of natural circadian rhythms and environmental and social factors, most people are able to achieve the best quality and most restful sleep at night.

As previously mentioned, the statutory hours of service requirements currently in effect for train employees providing commuter and intercity rail passenger transportation establish a maximum on-duty time of 12 hours in a 24-hour period, and a minimum off-duty time of 8 hours in a 24-hour period, or 10 hours after a period of 12 consecutive hours on duty. Statutory requirements applicable to train

[2] Deadheading is defined at 49 CFR 228.5 as the physical relocation of a train employee from one point to another as a result of a railroad-issued verbal or written directive.

employees on freight railroads, as revised by the RSIA, include a limitation on the number of consecutive days on which a train employee may initiate an on-duty period. However, the HSL for the railroad industry have never, up to the present day, differentiated in their requirements based on the time of day in which service is performed, or the time of day that a period is available for rest.

As will be discussed further below, FRA conducted two work/rest diary studies with train employees in freight and passenger operations. Data from these studies indicate that train employees get more sleep than the average U.S. adult. While 46 percent of U.S. adults get less than seven hours of sleep, only 35 percent of freight train employees and 41 percent of passenger train employees get less than seven hours of sleep. This amount of sleep results in a level of fatigue that increases accident risk by 21 to 39 percent.[3] Moreover, certain operational characteristics of commuter and intercity passenger service mitigate the fatigue associated with this amount of sleep loss relative to freight service. For example, many train employees on commuter and intercity passenger railroads work scheduled assignments, in which they begin and end their work day at approximately the same time each day. These employees also usually begin and end their duty tour at the same location, meaning that they can go home at the end of their work day and sleep in their own beds. In addition, very few scheduled assignments on most railroads operate during late night hours, and many of them result in duty tours significantly shorter than the maximum hours that the employee would be allowed to remain or go on duty under the existing law or this proposed regulation. Because these characteristics are more likely to allow for periods of rest that are consistent with normal circadian rhythms, they will provide better opportunities for rest, and less risk for fatigue. In addition, as will be discussed further below, two FRA work/rest diary studies demonstrate that levels of fatigue are not equivalent in freight and passenger operations (Work Schedules and Sleep Patterns of Railroad Train and Engine Service Workers *http://www.fra.dot.gov/downloads/Research/ord0922.pdf* (which included data from a small number of train employees in passenger operations); Work Schedules and Sleep Patterns of Railroad Train and Engine Employees in Passenger Operations [in review—the diary study conducted to support this rulemaking]).

For all of these reasons, FRA has determined that some of the specific limitations that Congress applied to train employees on freight railroads in the RSIA are not appropriate for train employees on commuter and intercity passenger railroads.

However, FRA also recognizes that some train employees covered by this proposed rule will experience a level of fatigue at which safety may be compromised. This is particularly true of those employees who do not work scheduled assignments and may not return home at the end of each duty tour, or who are required to perform service during late night hours, or to work duty tours of the maximum length allowed by existing requirements, with only the minimum required rest between duty tours. FRA has attempted, in this proposed regulation, to specifically address those employees who are most at risk for fatigue, even when in compliance with specific hours of service limitations. As will be discussed below, research that resulted in the validation of fatigue models using data from freight railroads demonstrated that fatigue increases the risk of a human factors accident. In addition, as will be discussed below, diary data show the risk of fatigue in passenger operations. The risk must be measured in order to be managed, and fatigue models allow for that measurement.

An effective proactive fatigue risk management program needs to balance the amount of work performed against when the work is performed, how long a work schedule is in effect in terms of hours in a day, consecutive days, and other variables. This proposed regulation would address fatigue risk by going beyond establishing limitations on the amount of time that an employee may work, and the minimum amount of time that an employee must be off duty between duty tours. It would additionally require the analysis of the fatigue risk in employee work schedules using a biomathematical model of performance and fatigue, identification of those schedules that present an unacceptable level of fatigue risk, and mitigation of the identified fatigue risk. In addition, the proposed regulation would establish different requirements for schedules of employees who operate trains during the late night hours in which the fatigue risk is greatest. Thus, the proposed rule would specifically address those schedules the characteristics of which present a risk for fatigue, even when otherwise in compliance with required maximum on-duty and minimum off-duty periods and other limitations. These risks would not be addressed by a regulation that simply established maximum on-duty and minimum off-duty periods, just as they are not addressed by the existing statutory requirements.

*A. Validated and Calibrated Fatigue Models* [4]

A biomathematical model of performance and fatigue that has been properly validated and calibrated predicts accident risk based on analysis of identified periods of wakefulness and periods available for sleep.

"Validation" of a biomathematical model of human performance and fatigue means determining that the output of a biomathematical model of human performance and fatigue actually measures human performance and fatigue. There are two dimensions to this validation. The first is that the model must be demonstrated to be consistent with currently established science in the area of human performance, sleep, and fatigue. The second part of the validation process involves determining that the model output has a statistically reliable relationship with the risk of a human factors accident caused by fatigue, and that the model output does not have such a relationship with nonhuman factors accident risk.

In general, and for the purpose of compliance with this rule, a model will be validated if statistical analyses demonstrate the existence of a statistically significant relationship between the output of the model and the human factors accident risk ratio, and the absence of such a relationship between the output of the model and the nonhuman factors accident risk ratio. The presence of a statistically significant relationship is evaluated by way of the correlation coefficient (r) with statistical significance requiring a *p*-value of less than 0.05. The first step is the selection of bin [5] edges that correspond to varying levels of fatigue (*e.g.,* the "not fatigued" bin and the "severely fatigued" bin). The "not fatigued" bin is determined by the output of the model when sleep occurs or can occur for 8 or more hours, without abrupt phase changes, between 10 p.m. and 10 a.m. This is similar to the amount of fatigue produced by the standard 9 a.m. to 5 p.m., Monday

[3] *See* Hursh, *et al. infra* at footnote 8.

[4] For a discussion of existing models and their application, *see* Dean II, D.A., Fletcher, A., Hursh, S.R. and Klerman, E.B., *Developing Models of Neurobehavioral Performance for the* "*Real World*"*,* J. Biol Rhythms 2007; 22; 246.

[5] In statistics, a "bin" is a discrete, nonoverlapping interval of a variable. Here, the variable is the level of fatigue.

through Friday work week. The performance bin "severely fatigued" is determined by the output of the model when there is total sleep deprivation for 42.5 hours after waking at 7 a.m. This is similar to the amount of fatigue produced by a permanent night shift schedule with six consecutive 12-hour work periods followed by 1 day off. These two bins are the "anchor" bins for the validation procedure. Four additional bins, equally spaced between the anchor bins, accommodate the intermediate fatigue scores.

Calibration is, in general, the assignment of numerical values to represent aspects of empirical observations. In the case of human fatigue and performance, the calibration of a fatigue scale would start with the assignment of values to "not fatigued," and the most fatigued condition might be described as "severely fatigued." The calibration process starts during the validation process with the assignment of model output values to anchor bins for "not fatigued" and "severely fatigued." The next step consists of determining the fatigue threshold. Given a scale for human fatigue and performance and a relationship between that scale and human factors accident risk, a final calibration point would be to determine the fatigue value at which fatigue becomes unacceptable because the increase in accident risk at that level compromises safety. This is the fatigue threshold.

The procedure for determining the fatigue threshold consists of several computations. First, the cumulative risk for the six fatigue score bins is determined for human factor and nonhuman factor accidents. Next, a 95-percent confidence interval is calculated for the cumulative risk in each bin. Finally, the fatigue score bin in which human factor cumulative risk exceeds both human factors Accident Risk Ratio = 1 and the mean non-human factors risk is determined. This is the fatigue threshold for the model.

The accident risk is defined as an odds ratio, expressed as a percentage of accidents occurring when employees involved in the accident are within a given range of fatigue, divided by the percentage of time spent by the individual working in that given range of predicted fatigue. For example, if 20 percent of accidents occur when an employee is within a particular range of predicted fatigue, and 10 percent of an employee's time in a given duty tour is spent within that range of predicted fatigue, then that specific range of predicted fatigue has doubled the accident risk.[6]

1. Fatigue Avoidance Scheduling Tool™ Model

FRA-sponsored research resulted in the development of a Sleep, Activity, Fatigue, and Task Effectiveness (SAFTE) model and Fatigue Avoidance Scheduling Tool™ (FAST) that have been validated and calibrated using data from freight railroads. FAST is a biomathematical model of performance and fatigue that can be used to assess the risk of fatigue in work schedules and to plan schedules that ameliorate fatigue. The model takes into account the time of day when work occurs (circadian rhythm) and opportunities for sleep based on work schedules.[7]

The model validation used work histories from 400 human factors accidents and 1,000 non-human factors accidents on freight railroads. The model has not specifically been validated using passenger railroad accidents, because there were not enough such accidents in the relevant time period to obtain statistically significant results, and had the period of analysis been extended sufficiently to capture enough passenger railroad accidents, much of the needed work schedule data for the employees involved in those accidents would no longer be available. However, FAST measures fatigue and effectiveness, based on laboratory analysis of cognitive and sensory motor functions during sleep deprivation, which are not job specific. Furthermore, the tasks associated with freight and passenger train operations are actually highly similar. In addition, there was no statistically significant difference between the proportion of accidents in categories associated with fatigue, between freight and passenger railroads. For all of these reasons, FRA has determined that the model is valid for use in evaluating fatigue levels in passenger railroad schedules for the purposes of this proposed rule. Indeed, the FAST model has been used by other entities, including the military and the airline industry.

FAST was used to calculate cognitive effectiveness (the inverse of fatigue) on a scale from 0 (worst) to 100 (best) using the 30-day work histories of locomotive engineers prior to the accidents and at the time of the accidents.[8] Cognitive effectiveness is a metric that tracks speed of performance on a simple reaction time test and is strongly related to overall response speed, vigilance, and the probability of lapses.

The analysis revealed a significant high correlation between reduced predicted crew effectiveness (as a result of increased fatigue) and the risk of a human factor accident for freight railroads. As was discussed above, although FAST was validated using freight railroad accidents, the cognitive and sensory motor functions it measures are not job specific, so the resulting determinations of effectiveness and accident risk are equally applicable to passenger railroads. There was no significant relationship between increased fatigue and non-human factor accidents. In addition, the data showed that there is a reliable relationship between the time of day of human factor accidents and the expected, normal circadian rhythm. The circadian pattern was not reliably present for non-human factor accidents. The risk of a human factor accident is increased by 20 percent by working during the hours from midnight to 3 a.m. *Id.*

The study showed that there is an elevated risk of human factors accidents at any effectiveness score below 90, and accident risk increased as effectiveness decreased. The risk of a human factors accident is increased by 21 percent at effectiveness scores at or below 70, which is a level of risk elevated beyond chance level, and greater than the mean risk of non-human factor accidents. Twenty-three percent of the freight accidents examined occurred when an employee involved was at or below an effectiveness score of 70. The study also found that cause codes associated with accidents that occurred at or below an effectiveness score of 70 showed an over-representation of the type of human factors accident that might be expected of a fatigued crew, such as passing a signal indicating stop, or

[6] For more information on the proper procedures for validation and calibration of a biomathematical model of performance and fatigue, *see* Raslear, T.G., *Criteria and Procedures for Validating Biomathematical Models of Human Performance and Fatigue; Procedures for Analysis of Work Schedules.* (A copy of this document has been placed in the docket for this rulemaking.)

[7] For a description of the FAST model, *see* Hursh, S. R., Redmond, D. P., Johnson, M. L., Thorne, D. R., Belenky, G., Balkin, T. J., Storm, W. F., Miller, J. C., and Eddy, D. R. (2004). *Fatigue models for applied research in warfighting. Aviation, Space, and Environmental Medicine, 75,* A44–53.

[8] Hursh, S. R., Raslear, T. G., Kaye, A. S., and Fanzone, J. F. (2006). *Validation and calibration of a fatigue assessment tool for railroad work schedules, summary report* (Report No. DOT/FRA/ORD–06/21). Washington, DC: U.S. Department of Transportation. *http://www.fra.dot.gov/downloads/Research/ord0621.pdf;* Hursh, S. R., Raslear, T. G., Kaye, A. S., and Fanzone, J. F. (2008). *Validation and calibration of a fatigue assessment tool for railroad work schedules, final report* (Report No. DOT/FRA/ORD–08/04). Washington, DC: U.S. Department of Transportation. *http://www.fra.dot.gov/downloads/Research/ord0804.pdf.*

exceeding the maximum authorized speed, which confirmed that the detected relationship between accident risk and predicted effectiveness is meaningful.

Other research, comparing the effects of alcohol and sleep deprivation on performance on a driving simulator, has also indicated that an effectiveness score of 70 is the rough equivalent of a 0.08 blood alcohol level, or the equivalent of being awake for 21 hours following an 8-hour sleep period the previous night.[9] However, direct comparisons between the performance effects of alcohol and fatigue must be made with caution. Some aspects of a complex task, such as driving an automobile simulator, show a high degree of congruence between the effects of alcohol and fatigue, while the effects of alcohol and fatigue on other aspects of the same task are highly dissimilar. For instance, Arnedt *et al.* (2001) found that tracking, tracking variability, and speed variability were all similarly affected by alcohol and fatigue in a driving simulator. However, Arnedt *et al.* found that, while subjects drove faster after consuming alcohol, fatigue did not affect driving speed. In addition, alcohol produced a more rapid deterioration in performance in off-road events (incidents in which the simulated vehicle was driven off the road) than did fatigue. Thus, while it is clear that alcohol and fatigue can both cause deterioration in task performance, the effect of alcohol is often more severe and extensive.[10]

As a result of this analysis, a fatigue threshold (the fatigue level at which there is an unacceptable accident risk due to fatigue) of 70 was established for FAST.[11] Accordingly, an effectiveness score of less than 70 would exceed that threshold for the purposes of this proposed regulation.[12]

2. Fatigue Audit InterDyne ™ Model [13]

Another biomathematical model of performance and fatigue that has recently been validated and calibrated is the Fatigue Audit InterDyne ™ (FAID). FAID was validated and calibrated using the same accident data from freight railroads as FAST used.[14] For the same reasons described above with regard to FAST, FRA has determined that FAID is valid for use in evaluating fatigue levels in passenger railroad schedules for the purposes of this proposed rule.

Analysis of the FAID scores resulted in a statistically significant correlation for both human factor and non-human factor accidents, which meant that FAID could be validated for freight railroads, and as explained above FRA has determined that it is equally applicable to passenger railroads. The FAID model was validated with scores of 40 and 120, corresponding to "not fatigued" and "extremely fatigued." FAID scores showed a statistically reliable relationship with the risk of a human factors accident but did not show such a relationship with other accident risk.

However, in analyzing the FAID data for the purpose of calibration, none of the confidence intervals demonstrated a statistically significant increase in cumulative risk. This was true for both human factors and non-human factors accidents. An alternative procedure, using FAST, which was already a validated and calibrated model, allowed for calibration of FAID. The alternative procedure required correlating FAST and FAID scores. The calibration of FAST is the equivalent of fundamental measurement in physics, while the calibration of FAID by reference to FAST is the equivalent of derived measurement, both of which are valid measurement methods.[15]

Correlation of individual FAST and FAID scores found a high level of variation in the individual FAST scores within a FAID bin, so linking fatigue scores on an individual level was not feasible. An alternative method is to calculate confidence intervals for the population or mean score. Since biomathematical models are known to be more accurate at predicting population behavior rather than individual behavior, the confidence intervals of the bin means were compared. When analyzed at the population level, the regression line for FAID scores as a function of FAST scores, or FAST scores as a function of FAID scores, has an r of 0.909.

The calibration of FAID indicated that FAID scores above 80 indicate a severe level of fatigue, and that FAID scores between 70 and 80 indicate extreme fatigue. A fatigue threshold (as with FAST, the fatigue level at which there is an unacceptable accident risk due to fatigue) of 60 was established for FAID, and an effectiveness score greater than 60 would exceed that threshold.[16]

FRA believes that the prediction of the effectiveness of an employee's performance may be used to improve work schedules, to alter to the extent possible the timing of safety-critical tasks to coincide with periods of optimal performance, and to apply countermeasures to reduce the fatigue risk, and the corresponding risk of accidents or other errors associated with that fatigue. It is for this reason that FRA has concluded that it is appropriate to require analysis of employee work schedules using a validated and calibrated biomathematical model of performance and fatigue, as an essential component of these proposed hours of service regulations.

As will be discussed in detail below, this proposed rule would require the railroads to mitigate the fatigue resulting from following a certain work schedule, and submit the schedules and fatigue mitigations to FRA for approval. These requirements will be triggered when analysis reveals that an employee working a given schedule will experience 20 percent or more of the employee's working time at an effectiveness score at or exceeding the fatigue threshold under the model used for analysis; that is to say, at an effectiveness score of 70 or less determined by FAST, or at an effectiveness score of 60 or greater as determined by FAID. The applicable effectiveness score could be different if a railroad were using another model that had been properly validated and calibrated. FRA encourages the development, validation, and calibration of alternative models, and their submission to FRA for approval under proposed § 228.407(c), by any

[9] *See* Arnedt, J.T., Wilde, G.J., Munt, P.W., and MacLean, A.W. (2001). How do prolonged wakefulness and alcohol compare in the decrements they produce on a simulated driving task? *Accident Analysis and Prevention, 33,* 3, 337–44; Dawson, D., and Reid, K. (1997). "Fatigue, alcohol and performance impairment." *Nature 388,* 23.

[10] *See also* Williamson, A., Feyer, A.-M., Friswell, R., and Finlay-Brown, S. (2000). *Development of Measures of Fatigue: Using an Alcohol Comparison to Validate the Effects of Fatigue on Performance* (Road Safety Research Report CR 189). Canberra, Australia: Australian Transport Safety Bureau.

[11] *See* Hursh, *et al., supra* note 8.

[12] A 21-day free trial of the FAST Model can be downloaded at *http://fatiguescience.com/products/fast.*

[13] For a description of FAID, *see* Roach, G. D., Fletcher, A., and Dawson, D. (2004). A model to predict work-related fatigue based on hours of work. *Aviation, Space, and Environmental Medicine, 75,* A61–9.

[14] For details *see* Tabak, B., and Raslear, T. G. (2010). *Procedures for Validation and Calibration of Human Fatigue Models: The Fatigue Audit InterDyne (FAID) Tool* (Report No. DOT/FRA/ORD–10/14). Washington, DC: U.S. Department of Transportation. (*http://www.fra.dot.gov/rpd/downloads/TR_Procedures_or_Validation_and_Calibration_final.pdf*)

[15] Kranz, D.H., Luce, R.D., Suppes, P., and Tversky, A. (1971). Foundations of measurement. Volume 1. Additive and polynomial representations. New York: Academic Press.

[16] A free trial of the FAID Model can be downloaded at *http://www.faidsafe.com/products-main.htm#faid330.*

railroad desiring to use an alternative model for the analyses required by this proposed rule.[17]

*B. Diary Study of Train Employees on Commuter and Intercity Passenger Railroads*

To further support this proposed rule, FRA conducted primary research specifically directed to train employees of commuter and intercity passenger railroads (OMB Control Number 2130–0588). The results of the study provided valuable evidence of the actual levels of fatigue experienced by train employees on commuter and intercity passenger railroads, because it allowed analysis of the actual periods of time that an employee reports having worked, slept, or spent in other activities during the period analyzed, which may be different from the assigned schedule and presumed periods available for sleep.

FRA had previously conducted similar surveys for signal employees (OMB Control Number 2130–0558), maintenance of way employees (OMB Control Number 2130–0561), dispatching service employees (OMB Control Number 2130–0570), and train employees generally (OMB Control Number 2130–0577). The purpose of these studies was to characterize, using a consistent statistical survey methodology, the work schedules and sleep patterns of each unique group of railroad workers. Because each of these studies used a random sample of each worker population, they provide defensible and definitive data on work/rest cycle parameters and fatigue for the respective group. The small number of train employees on commuter and intercity passenger railroads represented in the previous study of train employees generally did not allow for meaningful conclusions with regard to this subpopulation of train employees. As a result, the present study, specifically focused on this population, was necessary. The present study of train employees on commuter and intercity passenger railroads used the same methodology as the previous studies.

The primary objectives of this study were to design and conduct a survey to collect work schedule and sleep data from train and engine service (T&E) employees, and to analyze the data to characterize the work/sleep patterns and to identify work schedule-related fatigue issues. The goal was to characterize train employees on commuter and intercity passenger railroads as a group, not to characterize such employees on a specific railroad.

The research described in this report had three phases: preparation; field data collection; and data analysis. Since no existing source would provide answers to the study's research questions, a survey of train employees was the only means to obtain the necessary data. The preparation phase included securing approval from the Office of Management and Budget for the proposed data collection. Representatives from the Brotherhood of Locomotive Engineers and Trainmen (BLET) and the United Transportation Union (UTU) worked closely with the researchers throughout the study.

The study used two survey instruments—a background survey and a daily log. Survey participants used the background survey to provide demographic information, descriptive data for their type of work, type of position, and work schedule, and a self-assessment of overall health. The daily log provided the means for survey participants to record their daily activities in terms of sleep, personal time, time spent commuting to and from work, work time, limbo time, and periods of interim release. Study participants also provided self-assessments of the quality of their sleep and their level of alertness at the start and end of each work period. This study used a 14-day data-collection period to accommodate those train employees who did not work a regular schedule.

Researchers drew a random sample of 1275 train employees on commuter and intercity passenger railroads. The size of the sample from each of the two unions was proportional to that organization's representation in the total number of eligible participants. Retirees, full-time union officials, and anyone currently holding a railroad management position were not eligible for the study. Determination of the sample size assumed a 95-percent confidence interval on the estimates for mean sleep time, an error tolerance of 15 percent, and a 33-percent response rate.

Mailing of the survey materials occurred on December 31, 2009. Ten days later, every potential survey participant received a postcard, signed by his or her union president, to encourage the employee to participate in the survey. Three weeks after distribution of the materials, a second postcard thanked those who had decided to participate and encouraged those who had not yet done so to participate.

The overall response rate for the survey was 21 percent. Of the 269 complete responses, 13 could not be part of the analysis because either there were problems with the respondents' log books, or the respondents were not in crafts covered by the survey. (It was not possible to identify these individuals from the information contained in union membership databases.) The nonresponse-bias study based on age found no difference between survey respondents and nonrespondents.

The results of the study support the approach that FRA has taken in this rule. For instance, the results are consistent with the separate analysis during the development of this proposed rule of schedules provided by commuter and intercity passenger railroads, indicating that a fairly small percentage of employee work time (about 1.8 percent) exceeds the fatigue threshold. The proposed rule would focus additional attention and effort specifically on those schedules presenting this fatigue risk by requiring the mitigation of that risk, while schedules not at risk for fatigue would not be subject to these additional requirements.

In addition, when compared to the results of the previous study that primarily considered train employees on freight railroads, the results support a significantly different approach. Train employees on freight railroads were found to experience some level of fatigue (equivalent to an effectiveness score <90 using the FAST model) during 73 percent of their work time, while train employees on commuter and intercity passenger railroads experienced this level of fatigue during 14 percent of their work time. The substantive limitations imposed on train employees on freight railroads in the RSIA would largely be unnecessary for the commuter and intercity passenger railroad industry, as well as ineffective to target the specific areas where there is a fatigue risk.

## IV. Railroad Safety Advisory Committee (RSAC) Process

*A. Overview of the RSAC*

In March 1996, FRA established RSAC,[18] which provides a forum for developing consensus recommendations to FRA's Administrator on rulemakings and other safety program issues. The Committee includes representation from all of the agency's major stakeholder groups, including railroads, labor organizations, suppliers, and manufacturers, and other interested parties. A list of member groups follows:

[17] *See* Raslear, *supra* note 6 for information on procedures for validating and calibrating a model.

[18] For more information about RSAC activities, *see http://rsac.fra.dot.gov/*. Meetings of the full RSAC are also announced by publication in the **Federal Register.**

- American Association of Private Railroad Car Owners (AARPCO);
- American Association of State Highway and 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;
- 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;
- FRA;
- 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; *
- 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 (NRC);
- 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 the task is 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. A working group may establish one or more task forces to develop facts and options on a particular aspect of a given task. The individual task force then provides that information to the working group for consideration. If a working group comes to unanimous consensus on recommendations for action, the package is presented to the full 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 plays an active role at the working group level in discussing the issues and options and in drafting the language of the consensus proposal, FRA is often favorably inclined toward RSAC recommendations. 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 goal, is soundly supported, and is in accordance with 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 a recommendation for action, FRA moves ahead to resolve the issue through traditional rulemaking proceedings.

*B. RSAC Proceedings in This Rulemaking*

FRA proposed Task No. 08–06 to the RSAC on April 2, 2009. The RSAC accepted the task, and formed the Passenger Hours of Service Working Group (Working Group) for the purpose of developing implementing regulations for the hours of service of train employees of commuter and intercity passenger railroads under the RSIA.

The Working Group is comprised of members from the following organizations:

- AASHTO;
- Amtrak;
- APTA;
- ASLRRA;
- ATDA;
- AAR, including members from BNSF Railway Company (BNSF), Canadian National Railway Company (CN), Canadian Pacific Railway, Limited (CP), CSX Transportation, Inc. (CSXT), Iowa Interstate Railroad, Ltd. (IAIS), Kansas City Southern (KCS) railroads, Metra Electric District, Norfolk Southern Corporation (NS) railroads, and Union Pacific Railroad Company (UP);
- BLET;
- BRS;
- FRA;
- Federal Transit Administration (FTA);
- IBEW;
- Long Island Rail Road (LIRR);
- Metro-North Commuter Railroad Company (Metro-North);
- National Association of Railroad Passengers (NARP);
- National Railroad Construction and Maintenance Association;
- National Transportation Safety Board (NTSB);
- Southeastern Pennsylvania Transportation Authority (SEPTA);
- Tourist Railway Association; and
- UTU.

The Working Group completed its work after six meetings and several conference calls. The first meeting of the Working Group took place on June 24, 2009, in Washington, DC. At that meeting the group heard several presentations on fatigue science, including a report on the diary study that was to be conducted as described above. The group discussed the general approach for the rulemaking, and it was agreed that analysis of the railroads' work schedules would support the rulemaking. Subsequent meetings were held on February 3, 2010; March 4, 2010; April 6, 2010; May 20, 2010; and June 29, 2010. In addition, a Task Force was formed that met on January 14–15, 2010, March 30–31, 2010, and April 28–29, 2010.

At the conclusion of the June 29, 2010 meeting, the Working Group voted to approve a draft of the proposed rule text, with the exception of two sections, to which the group had suggested numerous edits. It was agreed that FRA would address the remaining issues in those sections and circulate a revised draft, on which the group would vote electronically. After the revised draft was produced, the Task Force had several conference calls to discuss the revised provisions, and FRA also participated in several calls with task force members. Ultimately, on September 22, 2010, the Working Group voted unanimously to agree to the rule text presented in this proposed rule. The group's recommendation was presented to the full RSAC on

September 23, 2010. The full RSAC agreed to vote electronically on the rule text recommended by the Working Group, and ultimately accepted its recommendation. Although only a majority was required, the vote was unanimous.[19]

Following the vote of the Working Group and the full RSAC, FRA recognized the need to make two changes to the recordkeeping and reporting requirements in 49 CFR 228.11 and 228.19, to accommodate a new substantive limitation contained in the proposed rule as approved by the RSAC. While the RSAC voted in favor of the substantive requirement in question, and all other elements of the proposed rule, the corresponding amendments to the recordkeeping and reporting provisions were not presented to them.

With the exception of the proposed revisions to 49 CFR 228.11 and 228.19, this proposed regulation is consistent with the recommendation of the Working Group and the full RSAC.

At the February 3, 2010, meeting, FRA presented a strawman draft of the rule text, identifying the basic concepts and direction of the rulemaking. Based on discussions at that meeting, a more complete draft was presented at the March 4, 2010 meeting, and the text was refined and supplemented at subsequent meetings. In addition, during the course of the Working Group and Task Force meetings, a number of significant issues were discussed that resulted in changes in the proposed rule text or common understanding of the intent of specific provisions that should be explained. Some such issues will be explained in this section, while other subjects of discussion by the Working Group and the Task Force will be discussed in the Section-by-Section Analysis at Section V of the preamble.

In addition, as discussed below in the Regulatory Impact and Notices section of the preamble, Section VI, FRA has considered the costs and benefits of this proposed rule. Implementation costs would be associated with analyzing work schedules, training, and rest facilities. However, relative to the "no regulatory action" alternative in which passenger railroad train employees would become subject to the new HSL in effect for freight train employees, the proposed rule would result in a cost savings of $57.6 million (discounted at 7 percent) and $65 million (discounted at 3 percent) over a 20-year period. The quantified accident reduction benefits achieved under both the "no regulatory action" baseline and the proposed rule total $1.4 million (undiscounted), $0.7 million (PV, 7 percent), and $1.0 million (PV, 3 percent). FRA does not expect that the overall number of casualties and property damages prevented will differ under either scenario. Implementation of the proposed rule would yield these benefits at lower cost. While the proposed rule has lower monetized benefits than costs, when compared to the current HSL, FRA believes that there are unquantified benefits that could close the gap.

[19] The rule text voted on by the full RSAC and recommended to FRA is available on the RSAC Web site.

*C. Significant Task Force Contributions*

As was noted above, the Working Group created the Task Force, comprised of representatives from BLET, UTU, APTA, AAR, and FRA. The Task Force met between Working Group meetings to provide additional input and advice to the Working Group on the approach to the proposed rule, specific concerns as to the rule text, and implementation of the proposed regulatory requirements. Although the Task Force was extremely helpful throughout the development of the proposed rule in offering suggestions as to the rule text, its primary contributions were in the areas of schedule analysis and the creation of a fatigue mitigation tool box.

1. Schedule Analysis

The diary study discussed in Section III B of the preamble provided valuable evidence of the actual levels of fatigue experienced by train employees on commuter and intercity passenger railroads. However, since many of these employees work scheduled assignments, it was also valuable to evaluate the schedules themselves, to get a sense of the parameters of those assignments that would result in fatigue exceeding the threshold, which informed some of the provisions of this proposed rule. The Task Force assisted the Working Group by evaluating the schedules and presenting their results to the Working Group.

APTA hired a consultant to analyze the schedules provided by the railroads that were worked by their train employees. The railroads provided all of their schedules for the month of July 2009. The schedules were analyzed using the FAST model, including conservative assumptions about the sleep that would be obtained by an employee working that schedule. For example, the analyses assumed that employees did not sleep during periods of interim release.

The analyses that the Task Force presented to the Working Group demonstrated that most schedules did not result in an employee's exceeding the fatigue threshold. This was true even for schedules in which the employee reported for duty at 4 a.m. and was relieved from duty at 8 p.m., for a 16-hour duty tour that included a total of 12 hours on duty and a 4-hour interim release. Most of the problematic schedules identified through the analysis presented by the Task Force involved duty tours in which some time was spent working during late night hours. These analyses formed the parameters for FRA's definitions of "Type 1 assignment" and "Type 2 assignment" for which different requirements would apply in this proposed rule.

2. Fatigue Mitigation Tool Box

Because a major aspect of this proposed rule would require mitigation of the fatigue risks identified in those schedules that resulted in an employee's exceeding the fatigue threshold, and experiencing a level of fatigue at which safety may be compromised, the Task Force assisted the Working Group by developing a fatigue mitigation tool box, a document that would illustrate the variety of ways in which a railroad might seek to address the fatigue risks in its schedules. (A copy of this document has been placed in the docket for this rulemaking.) The tool box itself is not intended to become a part of the regulatory text. Instead, it is intended to provide the variety of methods from which a railroad may propose, in its plans submitted to FRA for approval, to mitigate identified fatigue risks in its work schedules, to bring them into compliance with the regulation. It is expected that not every tool will be appropriate for each railroad, or for individual locations or schedules on a given railroad, and that the railroads, in consultation with their labor organizations, will choose the mitigation tools most appropriate to each circumstance, subject to FRA review and approval. In addition, the tool box is expected to be a living document, as the available fatigue mitigation tools will change over time as fatigue science continues to develop, or as railroad operations change, either generally or as related to specific properties or schedules. The tool box as a whole will not be approved by FRA, nor will it be maintained by FRA as it evolves. FRA will evaluate the appropriateness of specific fatigue mitigation tools as they are submitted to FRA as part of a railroad's plan to mitigate fatigue risks associated with particular schedules.

This section will describe a representative sample of the variety of the tools included in the tool box developed by the Task Force, which may be applied to mitigate fatigue risk. This is not intended to be an all-inclusive list of the possible fatigue mitigation tools. A railroad is free to use any fatigue mitigation tool that it believes is effective in reducing the fatigue risk found in its schedules, subject to FRA's review and approval.

Perhaps the easiest mitigation tool to understand that was identified by the Task Force is the adoption and implementation of a napping policy, and the provision of facilities for employees to take a nap during interim releases or other periods between assignments that may be available for rest during a duty tour. Addition of a period of sleep to the employee's schedule would have a clear impact on the employee's current level of fatigue, and the level of fatigue that the employee would be expected to experience throughout the remainder of the duty tour after a nap, which might reduce the risk of fatigue sufficiently to bring the schedule and the employee's effectiveness score within the fatigue threshold.

To use this tool to mitigate fatigue, a railroad would be required to identify, in consultation with its labor organizations or employees, the facilities that would be available for the purpose of rest during the duty tour, that are appropriate to the schedule and location at issue. This would not always require a bunk or a quiet room, though this might be available at some locations and in certain situations. However, the period available for rest would have to be at least 90 minutes for this mitigation tool to be applied, as this amount of time would provide sufficient opportunity for an employee to get to his or her napping location and fall asleep, having enough time for a nap of sufficient duration to be beneficial to the employee's level of fatigue, and then also allowing the employee time to be fully awake and ready to resume the duty tour.

Another mitigation tool, applicable to railroads and locations using employees from an extra board, would be the use of multiple extra boards that are temporally separated, so that employees would be scheduled to work morning assignments or evening assignments, rather than being subject to calls for assignments at all times of day. For example, employees assigned to a morning extra board might be subject to being called only for assignments requiring them to report for duty between 4 a.m. and 10 a.m., while employees assigned to an evening extra board might be subject to being called only for assignments requiring them to report for duty between 4 p.m. and 10 p.m. Employees on either extra board would know that they would not be called for an assignment requiring them to report for duty outside the times established for the employee's particular assigned extra board. This would lead to greater predictability of schedule and ability to plan rest, while also avoiding (1) circadian shifts between duty tours resulting from changes in the time of day that the employee is awake and (2) difficulties in adjusting to changing periods available for sleep.

Call windows (*i.e.,* limited periods of time during which an employee is subject to receiving calls from the railroad to report for duty) are another mitigation tool in the tool box, which may be combined with a temporally separated extra board, but could also be used even if the extra board were not so divided. For example, a railroad might decide to establish a call window that would reduce or eliminate calls to the employee during the time from 11 p.m. and 5 a.m. Open assignments that would need to be filled from an extra board of employees who would otherwise be called for the assignment during that time would instead be filled before 11 p.m., which would give the employees greater predictability and ability to plan rest, as well as allowing them more rest during the late night hours.

Another possible tool would be to allow employees a period of uninterrupted rest, similar to the requirement that applies to train employees on freight railroads, which is found at 49 U.S.C. 21103(e). The uninterrupted rest could be applied to an employee's statutory off-duty period before or after the employee is to work a schedule exceeding the fatigue threshold. It could also be applied to periods of interim release within the duty tour.

Education could also be part of the tools that a railroad will use to mitigate fatigue in certain circumstances, and is also a key component of the other mitigation tools. The mitigation tools will not be beneficial if the employees working the schedules to which they are applied do not understand the available tools, and how to properly use them to reduce their fatigue and increase their effectiveness. If employees do not take advantage of the mitigation tools, and use them properly to increase their rest, even those mitigation tools most likely to have the greatest and most tangible impact on reducing fatigue will not have the desired effect. FRA has also recognized the importance of education as a component of fatigue management by specifically requiring in this proposed rule that employees and supervisors receive training on fatigue and strategies for reducing it.

Finally, one additional mitigation tool was discussed by the Task Force that was extremely well-received and supported by the Working Group, including FRA representatives. That suggestion was to develop software that would link the railroad's crew management resources to both the employee's electronic hours of service records (created and maintained in compliance with subpart D of 49 CFR part 228), and a valid biomathematical model of performance and fatigue.

The idea is that the fatigue model would be able to look back at previous duty tours and rest periods to determine which schedules might have sufficiently rested employees available to report for the assignment, not only under the limitations on time on duty and required minimum time off duty that would be established by this proposed rule, but also in terms of the fatigue threshold. The model would have the benefit of the data from the previous duty tours to take into account in determining whether these schedules would exceed the fatigue threshold during the duty tour, as well as at the report-for-duty time. If the analysis revealed that the employees on these schedules would be too fatigued to report for the assignment, or would exceed the fatigue threshold during the duty tour, crew management would be alerted that these employees could be at risk if they work this particular assignment. Employees would have to affirm their fitness for duty if asked to work such assignments and be empowered to reject the assignments, because the model is being used to predict group (average) fatigue from work schedules that could be worked by several individuals. Any individual could be more or less fatigued than the average or group. Employees have a responsibility to indicate if they feel fit to work or not, regardless of the effectiveness score that a model would predict. The employer's responsibility is to arrange schedules that minimize fatigue.

While all of the parties to the Working Group agreed that this idea showed great promise as an effective fatigue mitigation tool for the future, it is not something that the railroads will be able to apply immediately, for technological reasons. Most railroads that would be subject to this proposed rule do not yet create and maintain their hours of service records electronically in

compliance with subpart D, although there is interest among those railroads in developing hours of service electronic recordkeeping programs. In addition, software would need to be developed that would allow the fatigue model to retrieve data from the electronic recordkeeping system, without any possibility of altering or otherwise affecting the integrity of the records maintained in the system. Likewise, software would be needed to connect the fatigue model to the crew management system, so that it could appropriately alert that system and prevent an employee being placed on an assignment for which he or she would be too fatigued. If the necessary systems and software can be developed, compliance with the fatigue threshold would become much easier, and there would be much less excessive fatigue to be mitigated.

*D. Areas of Working Group and Task Force Concern*

During the course of the Task Force and Working Group meetings, a few issues resulted in significant discussion. Some issues were related to specific provisions in the rule text, while other concerns were about the broader implications of the rule, as well as its effects on aspects of railroad operations or existing collective bargaining agreements.

1. Definitions of "Type 1 Assignment" and "Type 2 Assignment"

Some members of the Working Group suggested that there should be a way to determine a template for schedules that would be deemed not to exceed the fatigue threshold. As was discussed above, the Task Force presented schedule analyses showing that a schedule in which an employee began work at 4 a.m. and was relieved at 8 p.m., resulting in a duty tour with a total time on duty of 12 hours, with a 4-hour period of interim release, did not exceed the fatigue threshold.

Based on this analysis, FRA initially defined any assignment beginning no earlier than 4 a.m. and ending no later than 8 p.m., assuming at least a 4-hour period of interim release, as a Type 1 assignment, which would be deemed not to exceed the fatigue threshold. Assignments that included any period of time outside the defined time parameters of a Type 1 assignment would be considered a Type 2 assignment, which would be subject to more stringent requirements, including analysis of the schedule using a scientifically valid biomathematical model, and a more restrictive limit on the number of consecutive days that employees working such assignments could initiate an on-duty period.

However, some Task Force members pointed out that there could be assignments that include time outside the time parameters of a Type 1 assignment that would not exceed the fatigue threshold. In some cases these schedules would only have a small amount of their overall time outside of the Type 1 parameters. For example, an assignment might begin at 4:30 a.m. and end at 8:30 p.m. In addition, some assignments might not exceed the threshold because of the short duration of the duty tour involved, such as, perhaps, an assignment from 5 p.m. until 9:30 p.m.

Based on these considerations, FRA amended the definition of a Type 2 assignment to indicate that if an assignment does not include any time between midnight and 4 a.m., then the particular time of day or night that an assignment is to be performed is not the only determinant of whether an assignment is considered a Type 2 assignment. In particular, a Type 2 assignment that is analyzed using a scientifically valid biomathematical model and is determined not to exceed the fatigue threshold, and that includes no period of time between midnight and 4 a.m., would be considered a Type 1 assignment.

FRA also added language to the definitions of both "Type 1 assignment" and "Type 2 assignment" to require compliance with the substantive limitations contained in proposed § 228.405. FRA expects that railroads would not be operating schedules that violate these limitations; most schedules have long been in effect for the railroads subject to this proposed rule, and this was an implicit assumption of the Working Group. For example, a schedule that requires an employee to report for duty at 4 a.m. and to be released from duty at 8 p.m. would have to include a period of interim release of at least 4 hours that is not time on duty, as defined by proposed § 228.405(b). However, this language is added to the definitions to make clear that the schedule analysis and fatigue mitigation requirements of this proposed rule supplement, but do not replace, the specific limitations, and any schedule that violated other provisions of this proposed rule (for example, exceeded 12 hours total time on duty, or did not allow for at least 8 hours off duty, or 10 hours off duty after 12 consecutive hours) could not be deemed "approved" by FRA and subject to the less stringent requirements applicable to Type 1 assignments.

2. Limitations on Number of Consecutive Days

In the Working Group, both the railroads and labor contended that FAST and/or FAID analysis would suggest that an employee could work beyond the limitations in this proposed rule without adversely affecting safety. One requirement about which this was specifically argued was the proposed limitation on the number of consecutive days that an employee would be permitted to work under this regulation, which would differ depending on the time of day that the employee works. *See* proposed § 228.405(a)(3) and (a)(4). In the Working Group, the railroads and labor unions presented fatigue analyses for theoretical schedules that would have an employee initiating on-duty periods for numbers of days that exceeded those permitted by the proposed rule. The railroads and labor also indicated that the current agreements or practices on their properties allow for such schedules.

Research shows that work on successive days without a full day off exponentially increases the accident risk as the number of days worked increases. For instance, after working four consecutive day shifts, there is a 17-percent increase in risk, and after working four consecutive night shifts, there is a 36-percent increase in risk.[20] FRA research on train crew work schedules and sleep patterns[21] has shown that train crews average a 10.25-hour day (work period, limbo time, and commute time) and get 6.88 hours of primary sleep per day. A follow-up study on passenger train crews found that workers on split shift assignments average a 13.75-hour day (work period, interim release, and commute time) and get 6.18 hours of primary sleep. Laboratory studies of restricted sleep[22] show a 5-percent decrease in performance after 7 days with 7 hours of sleep per day and a 15-percent decrease after 7 days with 5 hours of sleep per day. These studies are consistent with the previously noted increase in accident risk with the number of days worked.

[20] Folkard, S. and Akerstedt, T., *Trends in the Risk of Accidents and Injuries and Their Implications for Models of Fatigue and Performance,* Aviat. Space Environ. Med. (2004).

[21] Gertler, J., and DiFiore, A. (2009). Work schedules and sleep patterns of railroad train and engine service workers (Report No. DOT/FRA/ORD–09/22). Washington, DC: U.S. Department of Transportation

[22] Balkin, T., Thorne, D., Sing, H. (2000). *Effects of sleep schedules on commercial driver performance* (Report No. DOT–MC–00–133). Washington, DC: U.S. Department of Transportation.

Therefore, FRA reasoned that, even if an employee were working a schedule for which the employee's effectiveness score did not exceed the fatigue threshold, even when the schedule was worked for more consecutive days than the regulation would permit, at some point the employee would have to use some of the time between duty tours (time that a model would otherwise view as available for rest) to attend to other personal activities. This time spent in activities other than rest would decrease the time actually available to the employee for rest, and, therefore, the employee's actual effectiveness score. This circumstance would be particularly problematic for schedules featuring long duty tours, such as the maximum 12 hours on duty, including an interim release, for a total time of 16 hours in the duty tour, followed by the minimum of 8 consecutive hours off duty before reporting for the next duty tour. From this perspective, FRA believes that, although the available research does not identify the exact number of consecutive days allowed under this proposed rule as the maximum that can be safely worked, the limitations that FRA has established are reasonable. FRA seeks comment on this.

FRA is aware that the requirements of the proposed rule may have an impact on the collective bargaining agreements affecting the railroads and employees covered by proposed subpart F. For example, there may be some agreements that would allow employees to work a greater number of consecutive days than would be allowed by this proposal. FRA is also mindful that the law provides an option that enables the regulated community to seek waivers to implement pilot projects in accordance with the requirements of 49 U.S.C. 21108(a) and encourages members of the regulated community to consider this option. Pursuant to 49 CFR part 211, subpart C, the Railroad Safety Board will consider whether or not granting such waivers would be in the public interest and consistent with railroad safety. Where warranted, and upon the necessary showing, FRA may grant waivers of the requirements of this proposed rule, including requirements concerning the maximum number of consecutive days an employee may work, to allow for the establishment of pilot projects to demonstrate the possible benefits of implementing alternatives to the strict application of the requirements contained in this proposed rule.

3. Precision of Fatigue Models and Threshold

There was considerable discussion in the Working Group of the precision embodied in the FAST model or the FAID model, and the appropriateness of requiring compliance with a specific fatigue threshold. The railroads argued that models such as the FAST model and the FAID model are not scientifically precise enough to warrant the adoption of a specific threshold, and that different types of operations could safely function at different levels of fatigue. For example, the railroads contended that yard switching activities could safely operate at a different level of fatigue than passenger operations or through-freight activities.

The railroads conceded, however, that the regulatory structure contained in this proposal would not be problematic for passenger operations. The railroads' concern was that, in the future, someone might argue for adoption of the same regulatory structure for freight operations and, were that to occur, schedules might be prohibited from use that should, in fact, be acceptable from a fatigue perspective.

In FRA's view, a specific threshold is desirable because it provides regulatory certainty as to what railroads must do to be considered in compliance with the regulations. FRA has based its regulation on the best available fatigue science, including the FAST model and the FAID model, which are the only currently validated models, and the thresholds established by those models. FRA has left open the possibility that other models may be validated, and other thresholds established in the future, which could be used for the purpose of compliance with this regulation.[23]

Inasmuch as FRA has determined that use of these models and their established thresholds adequately protect safety, that the regulations proposed in this rule would not present significant implementation problems for passenger service, and that a specific threshold would provide the desired regulatory certainty, FRA believes that it is appropriate to include in the regulations a requirement for a specific threshold, based on the understanding that the regulatory requirements will be satisfied based on a "70/20 threshold" using the FAST model (meaning that the fatigue threshold is exceeded if an employee's effectiveness score is *less* than 70 for 20 percent or more of the employee's time on duty), or a "60/20 threshold" using FAID (meaning that the fatigue threshold is exceeded if an employee's effectiveness score is *more* than 60 for 20 percent or more of the employee's time on duty).[24]

In proposing an hours of service regulation with a specific threshold for train employees in passenger service, FRA is not drawing any conclusion about the suitability of such a regulatory scheme for freight operations. There may be substantial differences between freight railroad operating and crew schedules and passenger operating and crew schedules. Passenger railroads have analyzed the results of applying the proposed regulations to their work schedules and concluded that this proposal is feasible. Freight railroads have not undertaken such analysis, nor would they be required to under the proposed regulations, except to the extent that employees of freight railroads may work in passenger service.

4. Freight Railroad Employees Acting as Pilots for Commuter or Intercity Passenger Trains

The Working Group also discussed the application of the requirements of proposed subpart F to train employees of freight railroads who occasionally provide pilot service to a commuter railroad or intercity passenger railroad. FRA's locomotive engineer certification regulations require a pilot to assist an engineer who may not be sufficiently familiar with the territory over which he or she is called to operate. *See* 49 CFR 240.231(b). The railroads indicated that a request for a pilot may come without advance notice, so that it would be difficult to comply with the substantive hours of service limitations and recordkeeping requirements of this regulation, and even more difficult to adhere to the schedule analysis requirements, for an employee who did not otherwise regularly engage in commuter or intercity rail passenger transportation.

The Working Group also cited the safety benefits of having a pilot available on a route when necessary, and the potential risk if commuter or intercity passenger railroads were to become less likely to request a pilot, or freight railroads less likely to be able to make a pilot available when requested, because of concerns about the proposed requirements of this regulation. FRA acknowledges these benefits. Therefore, although a pilot is performing covered service under the HSL on the assignment on which the pilot service is provided, FRA will not consider a train employee employed by a freight railroad

[23] *See* Raslear, *supra* note 6.

[24] *See* Hursh, *et al., supra* note 8, and Tabak and Raslear, *supra* note 13.

who serves as a pilot on a train operated by a commuter railroad or intercity passenger railroad to be a train employee who is engaged in commuter or intercity rail passenger transportation, provided that the employee does not serve as a pilot more than four times in a calendar month, or engage in any other commuter or intercity rail passenger transportation.

**V. Section-by-Section Analysis**

*Subpart A—General*

228.1 Scope

FRA proposes to revise this section by adding paragraph (c), which indicates that the regulation prescribes substantive hours of service requirements for train employees engaged in commuter or intercity rail passenger transportation.

228.5 Definitions

FRA proposes to amend this section to add definitions of "Associate Administrator for Railroad Safety/Chief Safety Officer" and "FRA" as used in this part. Associate Administrator for Railroad Safety/Chief Safety Officer became the title of FRA's Associate Administrator for Safety because Section 101 of the RSIA refers to FRA's "Associate Administrator for Railroad Safety" and emphasizes that the Associate Administrator is the Chief Safety Officer.

FRA also proposes to add definitions of the terms "Type 1 assignment" and "Type 2 assignment." As was previously discussed in Section IV above, these definitions were the subject of significant discussion in the Task Force and the Working Group, particularly because of the implications of a particular schedule's status as a Type 1 assignment or a Type 2 assignment for determining the application of the limitations on consecutive days in proposed § 228.405 and the requirements for analysis of schedules and submission of schedules to FRA for approval in proposed § 228.407. FRA believes the proposed definitions accommodate the concerns expressed in the Working Group regarding schedules outside the time parameters for a Type 1 assignment that may still present very little risk of an effectiveness score that would exceed the fatigue threshold and compromise safety. At the same time, however, the proposed definitions recognize the increased risk of fatigue associated with working late night and very early morning hours, which justifies the application of the more stringent requirements.

FRA has added these terms to this general definitions section for Part 228, rather than the definitions specific to subpart F, because these terms are also used in the recordkeeping provisions of subpart B, as amended by this proposed rule.

*Subpart B—Records and Reporting*

228.11 Hours of Duty Records

FRA proposes to revise paragraph (c) of this section to indicate that paragraphs (13) through (15) of paragraph (b) do not apply to the records of train employees providing commuter or intercity passenger rail transportation. These paragraphs relate to substantive provisions of the HSL for train employees, added by the RSIA. As was described above, these requirements were not extended to train employees on commuter and intercity passenger railroads. The requirements referred to in paragraphs (13) through (15) of paragraph (b) are not required by this proposed rule and therefore would continue not to apply to train employees providing commuter and intercity rail passenger transportation.

Paragraph (c) of this section, as published in FRA's hours of service recordkeeping regulation on May 27, 2009 (74 FR 25330, 25348–49), provided that paragraphs (13) through (16) of paragraph (b) did not apply to the records of train employees providing commuter or intercity passenger rail transportation. However, paragraph (16) requires that a record include the number of consecutive days on which a period of time on duty was initiated. Because this proposed rule would limit the number of consecutive days on which train employees providing commuter or intercity passenger rail transportation may initiate an on-duty period, it is appropriate to require that an employee's hours of service record include the number of consecutive days on which that employee has initiated an on-duty period, so that it is possible for both the railroad and FRA to determine compliance with the limitation established by this proposed rule. Thus, this paragraph is revised to include the requirement in paragraph (16) of paragraph (b), while continuing to exclude the requirements of paragraphs (13) through (15) of paragraph (b), which relate to provisions that do not apply to train employees providing commuter or intercity passenger rail transportation.

FRA recognizes that most railroads and employees subject to this subpart are currently keeping their hours of service records manually, and it may be burdensome for an employee to be required to keep track of his or her consecutive days worked and mark it on the hours of service record each day. However, the railroad will have to have some way to track this information. Therefore, if a railroad wishes to keep this information centrally for all of its employees, this will be considered sufficient to satisfy the requirement that the hours of service record include the number of consecutive days that an employee has worked, provided this information is made available to FRA upon request.

228.19 Monthly Reports of Excess Service

FRA proposes to revise paragraph (c) of this section to require railroads to report to FRA instances of excess service related to new substantive limitations contained in § 228.405(a)(3) and (a)(4) of this proposed rule. Those paragraphs propose to limit the number of consecutive days that train employees engaged in commuter or intercity passenger railroad transportation may initiate an on-duty period, and to require a minimum amount of time off duty after an employee has reached the maximum number of consecutive days, before the employee may return to duty, with different requirements depending on the time of day of the employee's assignment.

*Subpart F—Substantive Hours of Service Requirements for Train Employees Engaged in Commuter or Intercity Rail Passenger Transportation*

228.401 Applicability

This proposed section would establish the specific applicability of proposed new subpart F, which differs from that of existing subparts in this part. The requirements of subpart F apply to railroads and their officers and agents, only with respect to their train employees engaged in commuter or intercity rail passenger transportation. For purposes of subpart F, FRA interprets commuter or intercity passenger transportation to include rail passenger transportation by tourist, scenic, excursion, and historic railroads (referred to collectively for the purposes of this discussion as tourist railroads). FRA believes that Congress intended that these regulations apply to all railroads providing rail passenger transportation, and that Congress did not intend to apply the new statutory provision at 49 U.S.C. 21103 to tourist railroads because tourist railroad operations are more similar to the other passenger service than they are to freight service. The provisions of the HSL that apply to train employees on freight railroads are not as appropriate, therefore, for train employees on tourist

railroads. For fatigue purposes, the most salient difference between passenger and freight operations is that most passenger operations tend to be scheduled, whereas freight operations tend to be unscheduled. Virtually all passenger crew assignments have scheduled on-duty and off-duty times, and the vast majority of passenger crew assignments are to report in the morning and go off duty in the late afternoon or early evening, thereby reducing the likelihood of fatigue. Like classic intercity and commuter rail operations, tourist rail operations tend to be scheduled.

228.403 Nonapplication, Exemption, and Definitions

This proposed section would establish the situations in which this subpart shall not apply, provide circumstances in which a railroad may seek an exemption from the provisions of this subpart, and provide key definitions specifically applicable to this subpart.

Proposed paragraph (a) of this section would establish the situations in which this subpart shall not apply, such as an act of God. This proposed paragraph is substantively identical to the nonapplication provision of the HSL (49 U.S.C. 21102(a)), which was unchanged by the RSIA. The provisions of this proposed rule would therefore not apply to train employees engaged in commuter or intercity passenger service in the same situations as the statutory hours of service requirements would not apply to other train employees, or to signal employees or dispatching service employees.

Proposed paragraph (b) of this section would provide the possibility of an exemption from the requirements of this subpart for a railroad having not more than a total of 15 train employees, signal employees, and dispatching service employees. This proposed paragraph is substantively identical to the exemption provision of the HSL at 49 U.S.C. 21102(b), which was unchanged by the RSIA. It would provide the same opportunity for a railroad to seek an exemption from the requirements of this subpart as a railroad would have to seek an exemption from the statutory requirements applicable to its other employees.

Proposed paragraph (c) of this section defines several key terms specifically applicable to this subpart. It defines ''commuter or intercity rail passenger transportation'' as the terms ''commuter rail passenger transportation'' and ''intercity rail passenger transportation'' have been defined at 49 U.S.C. 24102. This definition is consistent with FRA's authority to issue this proposed rule, as Section 108(e) of the RSIA defined these terms as they are defined at 49 U.S.C. 24102.

This proposed paragraph would also define ''train employee who is engaged in commuter or intercity rail passenger transportation'' to establish that the term includes any train employee performing that function, regardless of whether the train employee is employed by a commuter or intercity passenger railroad, or another type of railroad or other entity. The term also includes all train employees employed by a commuter or intercity passenger railroad. The term excludes a train employee employed by another type of railroad or entity who is engaged in work train service.

228.405 Limitations on Duty Hours of Train Employees Engaged in Commuter or Intercity Rail Passenger Transportation

This proposed section provides the substantive limitations on the duty hours of train employees subject to this subpart.

Paragraphs (a)(1) and (a)(2) of this proposed section establish the maximum time on duty in a duty tour and the required minimum time off duty in a 24-hour period. These limitations are substantively identical to the statutory requirements of 49 U.S.C. 21103(a)(1) and (a)(2) as they existed prior to July 16, 2009, the effective date of the amendments to that section arising from the RSIA, which requirements currently still apply to train employees engaged in commuter or intercity rail passenger transportation. FRA proposes to retain these limitations because there is limited evidence of fatigue-related accidents in operations that would be subject to this proposed rule, and analysis of the schedules provided by the railroads subject to this proposed rule, that are worked by their employees subject to this rule, indicate that many of them are not likely to be at risk for a level of fatigue at which safety may be compromised. Thus, there does not appear at this time to be sufficient justification to change these limitations. Should further research or other evidence or events suggest that different limitations are necessary, FRA will reconsider this issue.

Proposed paragraphs (a)(3) and (a)(4) of § 228.405 would establish limitations on the number of days that an employee may work, with proposed paragraph (a)(3) providing the limitation for an employee who works one or more Type 2 assignments, and proposed paragraph (a)(4) providing the limitation for an employee who works only Type 1 assignments.

Proposed paragraph (a)(3) provides that an employee who initiates an on-duty period on 6 consecutive calendar days including one or more Type 2 assignments must have at least 24 consecutive hours off duty at the employee's home terminal. However, if the on-duty period initiated on the sixth consecutive calendar day does not end at the employee's home terminal, the employee may initiate an on-duty period or deadhead on a seventh consecutive calendar day in order to return to the home terminal, and must then have at least 24 consecutive hours off duty at the home terminal before returning to duty.

Proposed paragraph (a)(4) provides that after an employee has initiated on-duty periods in a period of 14 consecutive calendar days and has not had a total of at least two calendar days within that 14-day period in which the employee has not initiated an on-duty period, the employee must have two consecutive calendar days off duty at the home terminal. However, if the on-duty period initiated on the 14th calendar day does not end at the employee's home terminal, and the employee has not had at least two calendar days within the 14-day period in which the employee has not initiated an on-duty period, the employee may initiate an on-duty period or deadhead on a 15th calendar day in order to return to the home terminal, and must then have at least two consecutive calendar days off duty at the employee's home terminal. However, a new 14-day period begins when the employee accumulates a total of two calendar days in the period of 14 days in which the employee has not initiated an on-duty period.

If an employee works only Type 1 assignments for a period of more than 6 but fewer than 14 calendar days on which the employee has initiated an on-duty period, and then works a Type 2 assignment—for example, a Type 2 assignment on the eighth consecutive day after having worked Type 1 assignments on the previous 7 days—the ''Type 2'' limitation will apply at that time, and the employee must have 24 hours off duty following the Type 2 assignment (or work or deadhead to the home terminal the next day and then have 24 hours off duty at the home terminal) and then begin a new period of consecutive days upon returning to duty.

Although many train employees engaged in commuter or intercity passenger service regularly end their duty tour at their home terminal, FRA

recognizes that this will not be the case for all employees and all railroads subject to this subpart. The language of these paragraphs allows the railroad the flexibility to get the employee back to his or her home terminal, while at the same time ensuring that the employee will observe the required rest period at the home terminal.

As was discussed in Section IV above, members of the Working Group expressed concern about these requirements, because the schedule analysis done by the Task Force had indicated a number of situations in which employees who worked consecutive days beyond the limitations proposed by FRA would not exceed the fatigue threshold. However, as also stated above, FRA still believed the limitations were appropriate, based on accepted fatigue science indicating that work on successive days increases the risk of accidents as the number of successive days of work increases, and because of the likelihood that an employee working an indefinite number of consecutive days will eventually attend to other activities during time that a fatigue model would consider available for rest.

FRA accommodated the concerns of Working Group members in revising the definition of "Type 2 assignments" as discussed above. In addition, the "consecutive day" limitation of paragraph (a)(4) that applies to employees working only Type 1 assignments allows employees to work two consecutive hold downs (allowing the employee to exercise seniority to select and work the full cycle of two 6-day or 7-day schedules for which the incumbent employee is on vacation or otherwise unavailable), before being required to have two consecutive days off. This flexibility eliminates some potential conflict with existing operations and agreements.

At the same time, an employee who does not work the maximum number of consecutive days will be able to restart the count toward 14 consecutive days after having accumulated two calendar days in which the employee does not initiate an on-duty period. This language eliminates a concern that the railroad and the employee would have to look back and find two days off at any point in time to be in compliance.

Paragraph (b) of this proposed section describes how various periods of time are counted for the purpose of determining total time on duty. This paragraph is substantively identical to the provisions for determining time on duty in 49 U.S.C. 21103(b), which were unchanged by the RSIA. Therefore, these provisions are currently in effect for train employees of commuter and intercity passenger railroads, as well as for other train employees. FRA recognizes that any change in these provisions would require significant changes for the industry in operations and recordkeeping. FRA does not believe that there is any reason to change these provisions at the present time.

Paragraph (c) of this proposed section allows a train employee to work additional hours in emergency situations. This paragraph is substantively identical to the "emergency" provision of 49 U.S.C. 21103(c), which was unchanged by the RSIA.

228.407 Analysis of Work Schedules; Submissions; FRA Review and Approval of Submissions; Fatigue Mitigation Plans

This proposed section would require a railroad subject to this subpart to analyze the schedules that the railroad intends its employees subject to this subpart to work, to identify those schedules at risk for fatigue exceeding the fatigue threshold, and to report to FRA in certain circumstances.

Proposed paragraph (a) would require the railroads to analyze one work cycle, of each schedule, using a valid biomathematical model of performance and fatigue, to determine whether the fatigue risk posed by the schedule exceeds the fatigue threshold. A work cycle is the cycle within which the schedule repeats. For example, if a schedule called for an employee to work Monday through Friday from 8 a.m. until 4 p.m., with Saturday and Sunday off, and then report again Monday at 8 a.m., the work cycle is the Monday to Sunday schedule that then repeats. Other schedules on some railroads may operate over a two-week period, with certain days off within the two-week cycle.

For the purpose of this section, FRA considers a Type 1 assignment to present an acceptable level of risk for fatigue that does not exceed the fatigue threshold.

Based on this analysis, the railroad is required to identify those schedules at risk for resulting in a level of fatigue that would exceed the fatigue threshold. To the extent possible, the railroad is required to apply fatigue mitigation tools identified in the railroad's fatigue mitigation plan (including, but not limited to, those tools described in Section IV above) to mitigate the fatigue risk in those schedules to a level that does not exceed the fatigue threshold. If the railroad is unable to mitigate the risk for fatigue presented by a particular schedule to the point that it no longer exceeds the fatigue threshold, and the schedule cannot be modified to reduce the fatigue risk sufficiently, then the railroad must make a determination that the fatigue risk cannot be sufficiently mitigated to bring it within the fatigue threshold, but that the schedule is operationally necessary. Any schedule that has been identified as having a risk for fatigue that exceeds the fatigue threshold must be reported to FRA within 180 days of the effective date of the final rule in this rulemaking.

Paragraph (b) of this proposed section provides further details as to the requirements and procedures for submission of schedules and other information to FRA for review within 180 days of the effective date of the final rule.

A railroad must submit to FRA those schedules for which it has mitigated the fatigue risk so that it no longer exceeds the fatigue threshold, along with the fatigue mitigation tools it applied to each particular schedule to reduce the fatigue risk.

A railroad must also submit to FRA those schedules for which it is unable to mitigate the fatigue risk to a level that does not exceed the fatigue threshold, but which the railroad has determined are operationally necessary. A railroad must also submit the fatigue mitigation tools that the railroad applied to each schedule, if any, to reduce its fatigue risk even if it could not be reduced to the point that it no longer exceeded the fatigue threshold. Finally, a railroad must submit the basis for its determination that each schedule is operationally necessary.

If a railroad performs the required analysis of its schedules and determines that none of its schedules presents a risk for a level of fatigue that exceeds the fatigue threshold and requires transmittal to FRA, the railroad must submit a declaration that it has performed the required analysis and determined that none of its schedules exceed the fatigue threshold, and therefore none are required to be submitted.

FRA will review the submissions, and will notify the railroad if the agency takes any exception to the submitted information within 120 days of FRA's receipt of the submission. FRA expects that it will work with a railroad to address any concerns with the schedules, mitigation tools, or determinations of operational necessity, and does not intend to dictate how a schedule must be modified. FRA seeks comments on the process for resolving concerns about a railroad's submissions.

FRA will also audit each railroad's work schedules and mitigation tools every two years to ensure compliance with the requirements of this proposed section.

Paragraph (c) of this proposed section provides a railroad's options with regard to the use of a biomathematical model of performance and fatigue. Proposed paragraph (c)(1) provides that a railroad may submit to FRA's Associate Administrator for Railroad Safety/Chief Safety Officer for approval evidence of the scientific validation of any biomathematical model of performance and fatigue that it wishes to use for the analysis required by this proposed section. Decisions of the Associate Administrator for Railroad Safety/Chief Safety Officer regarding the validity of a model are subject to review as provided by 49 CFR 211.55. If the Associate Administrator for Railroad Safety/Chief Safety Officer approves a new model as having been validated and calibrated, so that it can be used for schedule analysis in compliance with this regulation, FRA will publish notice of this determination in the **Federal Register**. Proposed paragraph (c)(2) provides that a railroad may use a model that has already been approved, and further provides that FRA has approved the use of both the FAST model and the FAID model, both of which are discussed in Section II above, for the analysis required by this proposed section.

Paragraph (d) of this proposed section requires a railroad that changes its schedules to analyze certain of those schedules and submit them to FRA for approval.

Paragraph (d)(1)(i) requires a railroad to analyze and submit for approval any schedule that has been changed such that it would differ from the parameters of any schedule that had been previously analyzed and approved. In other words, a railroad would not have to submit a revised schedule to FRA if it is the same as any of its schedules that had been previously approved, or is a schedule that would not have had to be analyzed or submitted if it were an original schedule.

Specifically, if a schedule is revised so that it is now the same as another schedule that has previously been submitted to and approved by FRA, that schedule would not have to be analyzed or submitted. A railroad would also not have to analyze or submit any schedule that, as revised, is wholly within the hours of 4 a.m. to 8 p.m. (a Type 1 schedule, which FRA considers per se to present an acceptable level of risk for fatigue that would not exceed the fatigue threshold). A railroad would also not be required to submit a schedule that, as revised, is now the same as another schedule that includes time outside the 4 a.m. to 8 p.m. hours, but that the railroad analyzed and found not to exceed the fatigue threshold, and that does not include any time between midnight and 4 a.m. (because such a schedule would qualify for treatment as a Type 1 assignment).

However, any revised schedule that includes time outside the hours of 4 a.m. to 8 p.m. that is not either the same as a schedule previously approved, or the same as a schedule previously analyzed and found not to exceed the fatigue threshold and not including any time between midnight and 4 a.m., would have to be analyzed by the railroad. Further, a railroad must submit to FRA any revised schedules that, when analyzed, are found to exceed the fatigue threshold, along with the fatigue mitigation tools that the railroad has applied to mitigate the fatigue risk in those schedules to a level that does not exceed the fatigue threshold. In addition, if the railroad analyzes a revised schedule and finds that it cannot be mitigated so that the risk for fatigue does not exceed the fatigue threshold, but is operationally necessary, the railroad must submit the schedule, along with any fatigue mitigation tools that have been applied, and the railroad's determination of the operational necessity of the schedule and the basis for that determination.

Paragraph (d)(1)(ii) of this proposed section requires a railroad to analyze any revised schedule that has been altered to an extent that employees working the schedule may be at risk of experiencing a level of fatigue that exceeds the fatigue threshold. This means that the railroad must analyze a schedule that previously was not at risk of exceeding the fatigue threshold but that may be at risk as revised. If such a revised schedule is in fact found to exceed the fatigue threshold, the fatigue risk must be mitigated or the schedule determined to be operationally necessary, just as in the initial analysis required by paragraph (a) of this proposed section.

In addition, any schedules that were previously found to exceed the fatigue threshold and either mitigated or found to be operationally necessary would also have to be analyzed when those schedules are changed, and submitted to FRA if the revised schedule exceeds the fatigue threshold. Even though the schedule was already known to present a fatigue risk, the level of risk presented by the schedule as revised could increase or decrease, and different mitigations may be warranted, or the determination of operational necessity could be different, depending on the level of fatigue risk, as that determination is based on balancing the necessity with the risk. Therefore, FRA review of these revised schedules, along with the relevant fatigue mitigation tools or determinations of operational necessity, is required.

Paragraph (d)(2) of this proposed section requires that revised schedules and supporting documentation that are required to be submitted to FRA must be submitted as provided by paragraph (b) of this proposed section, as soon as practicable prior to the use of the new schedule. Some railroads expressed the concern that work schedule changes are sometimes not finalized until shortly before the schedules are to begin operation, and the FRA approval process could delay work schedule implementation and published timetable changes. However, the regulatory language does not require FRA approval before a new schedule may begin operation, just that it be submitted as soon as practicable prior to use. In addition, given the limited nature of the schedules that require FRA review, FRA would expect some degree of advance planning for those kinds of schedules, so that the fatigue implications of the revised schedules can be fully understood by the railroad, as well as by FRA.

Some APTA members also expressed concern about compliance with these requirements for special trains that they are sometimes called upon to operate. Many special events require advance notification and planning. For those events of which the railroad does not have advance notice, FRA will address those situations and work with the railroad on a case-by-case basis.

Paragraph (e) of this proposed section requires a railroad to have and comply with a written fatigue mitigation plan, to mitigate the potential for fatigue in its work schedules, identified through the analysis required by paragraphs (a) and (d) of this proposed section. The railroad is required to review the plan every two years and update it as necessary.

Paragraph (f) of this proposed section requires a railroad to consult in good faith with its directly affected employees and any labor organization representing them, on the analysis of work schedules, selection of mitigation tools, and any submissions to FRA required by this proposed section. If the railroad and its affected employees or their labor organization cannot reach consensus on any of those items, the employees or labor organizations may file a statement with FRA's Associate

Administrator for Railroad Safety/Chief Safety Officer, explaining their views on any issue on which consensus was not reached. Any such statements will be considered by FRA during the review and approval of any submissions required by this proposed section.

228.409 Requirements for Railroad-Provided Employee Sleeping Quarters During Interim Releases and Other Periods Available for Rest Within a Duty Tour

This proposed section provides that any rest facilities provided by a railroad for the use of its employees during periods of interim release or other periods during a duty tour must be "clean, safe, and sanitary," and give the employee "an opportunity for rest free from the interruptions caused by noise under the control of the" railroad. This is consistent with statutory language for sleeping quarters at 49 U.S.C. 21106, including sleeping quarters provided for the use of employees during the required minimum off-duty period.

Paragraph (b) of this proposed section provides that if the facilities are proposed as a fatigue mitigation tool, for the purpose of mitigating fatigue identified by the schedule analysis required by § 228.407, then those facilities are subject to the requirement in § 228.407(f), that the railroad consult with affected employees and labor organizations.

228.411 Training

This proposed section would establish training requirements for this proposed rule. FRA believes this provision is especially important because the schedule analysis and fatigue mitigation required by other sections of this proposed rule have little meaning if employees are not aware of the level of fatigue predicted to occur as a result of their work schedule, and the mitigation tools available to the employee to reduce the fatigue risk. For example, suppose that a railroad submits a schedule to FRA for approval that exceeds the fatigue threshold, but as a mitigation tool, the railroad indicates that it will provide facilities and allow employees working that schedule to take a nap during a two-hour break between scheduled trains, and that the insertion of a nap at that point decreases the fatigue level so that the threshold is no longer exceeded. If the employee working that schedule does not realize that his or her work schedule exceeds the fatigue threshold (which is a level of fatigue at which, according to the model, safety may be compromised), or is unaware of facilities and policies allowing the employee to take a nap, or is unaware of the beneficial effect of the nap on the predicted fatigue level, then the employee will not take advantage of the mitigation tool purported to reduce the fatigue risk in that schedule, and the risk will not actually be reduced. Employees who are not currently working assignments that exceed the fatigue threshold will also benefit from the training required by this section, as it may raise awareness of, and provide strategies for addressing, other circumstances in their lives that contribute to their actual level of fatigue that are not accounted for in work schedule analysis. The training requirements in this proposed rule were the subject of extensive discussion within the working group, and members of the working group recommended the content of training, as well as the proposed training interval.

Paragraph (a) of this proposed section would require railroads to provide training to employees subject to this subpart and their immediate supervisors. Paragraph (b) of this proposed section lists the minimum subjects that must be covered in training, based on the most current available scientific and medical research and literature. Although the subjects to be covered are quite broad, the specific information to be covered may change over time based on scientific developments or changes in a railroad's operations that may make additional topics appropriate. The format of the required training is not prescribed, as FRA specifically intends to allow each railroad the flexibility to provide training at a level of formality and complexity that is appropriate to its operations and the needs of its employees. Options include, but are not limited to, classroom training, computer-based training, review of written materials, and oral job briefings. Railroads may also combine this training with other training provided to their employees.

Paragraph (c) of this proposed section requires that training be provided to affected employees as soon as practicable, and to new employees within 90 days after they first work a schedule for the railroad that is subject to analysis under this subpart. Paragraph (d) of this proposed section would require refresher training at least every three years, and when significant changes are made to the railroad's fatigue mitigation plan or to the available fatigue mitigation tools applied to an employee's assignment or to assignments at the location where the employee works. Railroads also have the flexibility to select an appropriate method of providing refresher training, which will likely be less detailed, and could also be less formal, than the initial training provided to an employee, depending on the extent of any new information to be presented.

Paragraph (e) of this proposed section would require a railroad to keep records of each employee provided training and to retain these records for three years.

228.413 Compliance Date

This proposed section provides that 180 days from the effective date of the final rule, railroads subject to this subpart will comply with this subpart with respect to their train employees who are engaged in commuter or intercity rail passenger transportation, and shall be exempt from complying with the hours of service requirements currently in effect for them, which are the requirements of 49 U.S.C. 21103 as it was in effect the day before the enactment of the RSIA.

## VI. Regulatory Impact and Notices

### *A. Executive Orders 12866 and 13563 and DOT Regulatory Policies and Procedures*

This proposed rule has been evaluated in accordance with existing policies and procedures under not only Executive Orders 12866 and 13563 but also DOT policies and procedures. The economic impacts of the proposed rule are well under $100 million annually relative to the no-action alternative. FRA has prepared and placed in the docket a regulatory impact analysis (RIA) addressing the economic impact of this proposed rule over a 20-year period. This section summarizes the impacts of the rule.

This proposed regulation is intended to promote safe railroad operations by limiting the hours of service for passenger railroad train employees, and ensuring that they receive adequate opportunities for rest in the course of performing their duties. The main goal of this rulemaking is to identify and reduce fatigue for passenger train employees.

FRA is proposing to establish substantive hours of service regulations, including maximum on-duty periods, minimum off-duty periods, and other limitations, for train employees of passenger railroads. The proposed regulations would require that passenger railroads analyze and mitigate the risks for fatigue in the schedules worked by their train employees, and that the railroads submit to FRA the relevant schedules and fatigue mitigation plans for approval. The RSIA established a limit of 276 hours each

calendar month for train employees on service performed for a railroad, and on time spent in or waiting for deadhead transportation to a point of final release; increased the quantity of the statutory minimum off-duty period after being on duty for 12 hours in broken service from 8 hours of rest to 10 hours of rest; prohibited communication with train or signal employees during certain minimum statutory rest periods; and established mandatory time off duty for train employees of 48 hours after initiating an on-duty period on 6 consecutive days, or 72 hours after initiating an on-duty period on 7 consecutive days. In absence of a final rule effective before October 16, 2011, passenger railroad train employees would be subject to the more stringent freight hours of service laws described above. Until then, passenger railroads will continue to operate under the hours of service laws in effect prior to the enactment of the RSIA. Thus, issuance of requirements FRA is proposing would relieve railroads covered by this rule from becoming covered by the more strict statutory hours of service laws governing freight railroads and their train crews.

The RSIA mandated that in issuing regulations FRA ''consider scientific and medical research related to fatigue and fatigue abatement, railroad scheduling and operating practices that improve safety and reduce employee fatigue, a railroad's use of new or novel technology intended to reduce or eliminate human error, the variations in freight and passenger railroad scheduling practices and operating conditions, the variations in duties and operating conditions for employees, a railroad's required or voluntary use of fatigue management plans * * *, and any other relevant factors.'' 49 U.S.C. 21109(c). FRA relied on its RSAC to make recommendations with respect to this rulemaking and this proposed rule reflects the recommendations of this committee.

FRA has analyzed the economic impacts of this proposed rule against a ''no regulatory action'' baseline that reflects what would happen in absence of this rulemaking (*i.e.,* the freight hours of service laws are applied to passenger railroads) as well as a ''status quo'' baseline that reflects present conditions (*i.e.,* primarily, the statutory hours of service provisions (specifically, old section 21103 and, secondarily, the applicable hours of service recordkeeping and reporting regulations) that have and will continue to apply to passenger railroads until either they become subject to either the freight hours of service laws on October 16, 2011 or an FRA-issued hours of service rule prior to that). With respect to the ''no regulatory action'' baseline, the FRA proposal represents a substantially more cost-effective alternative for achieving the goal of identifying and mitigating unacceptable fatigue risk levels and thus ensuring the safety of passenger train operations. Over the 20-year period analyzed, the undiscounted costs associated with the ''no regulatory action'' alternative total $75.5 million compared to $2.1 million for the FRA proposal. Similarly, when discounted at 7 percent, the costs associated with the ''no regulatory action'' alternative total $59.0 million compared to $1.4 million for the FRA proposal and when discounted at 3 percent, the costs associated with the ''no regulatory action'' alternative total $66.8 million compared to $1.7 million for the FRA proposal. The quantified accident reduction benefits achieved under both the ''no regulatory action'' baseline and the proposed rule total $1.4 million (undiscounted), $0.7 million (PV, 7 percent), and $1.0 million (PV, 3 percent). FRA does not expect that the overall number of casualties and property damages prevented will differ under either scenario. Implementation of the proposed rule would yield these benefits at lower cost.

With respect to the ''status-quo'' baseline, the FRA proposal would impose costs that are higher than the quantified safety benefits. Costs compared to the ''status quo'' baseline total $2.1 million (undiscounted), $1.4 million (PV, 7 percent), and $1.7 million (PV, 3 percent). Quantified benefits compared to the ''status quo'' baseline total $1.4 million (undiscounted), $.7 million (PV, 7 percent), and $1.0 million (PV, 3 percent). However, there are additional benefits that have not been quantified, but should be considered when comparing the overall costs and benefits. For instance, safety and health benefits will accrue from the transfer of knowledge to employees, their families, friends and others with whom they may share the fatigue knowledge that they acquire from the required fatigue awareness training programs. This fatigue awareness will result in more optimal decisions regarding rest and sleep, leading to less fatigue and improved safety outside of passenger train operations during the course of daily activities that may include the operation of motor vehicles or other heavy machinery. This fatigue awareness will also result in proper identification and treatment, if necessary, of fatigue symptoms. Separately, accident avoidance will result in fewer unplanned delays to passengers and freight commodities impacted by passenger train accident and incidents that result in blocking one or more tracks for prolonged periods. These costs can be very substantial given the need to investigate accidents and often clear wreckage. Finally, there is the non-quantified benefit of ensuring that passenger railroads do not unknowingly require train employees to work schedules with unacceptable high-fatigue risk levels. It is not unreasonable to expect that the unquantified benefits will raise the benefits to a level quite comparable to the costs.

FRA believes that the unquantified benefits coupled with the quantified safety benefits that would result from its proposal compare very well with the costs associated with meeting the intent of the statutory mandate.

The table below presents the costs associated with both the ''no regulatory action'' alternative and the FRA proposal.

| Cost description | No-action alternative | | | NPRM | | |
|---|---|---|---|---|---|---|
| | Undiscounted | PV@7% | PV@3% | Undiscounted | PV@7% | PV@3% |
| New Engineer Training, Initial (20% New Hires) | $31,237,549 | $26,299,825 | $28,705,081 | 0 | 0 | 0 |
| New Engineer Training, Refresher (20% New Hires) | 4,599,050 | 2,278,431 | 3,327,802 | 0 | 0 | 0 |
| New Conductor Training, Initial (20% New Hires) | 30,847,974 | 25,942,971 | 28,330,908 | 0 | 0 | 0 |
| New Conductor Training, Refresher (20% New Hires) | 8,636,745 | 4,278,146 | 6,249,071.15 | 0 | 0 | 0 |

| Cost description | No-action alternative | | | NPRM | | |
|---|---|---|---|---|---|---|
| | Undiscounted | PV@7% | PV@3% | Undiscounted | PV@7% | PV@3% |
| Work Schedule Analysis (No-Reg Action)/Initial Analysis of Work Schedules + Follow-up Analysis and Fatigue Mitigation Plan Review (NPRM) | 189,723 | 177,312 | 184,198 | ($126,482 + $240,316) = $366,799 | ($118,208 + $122,175) = $240,382 | ($122,798 + $175,894) = $298,692 |
| Biomathematical Model of Fatigue Software | 0 | 0 | 0 | $417,500 | $268,723 | $337,240 |
| Use of Rest Facilities | 0 | 0 | 0 | $30,988 | $28,961 | $30,086 |
| Fatigue Training | 0 | 0 | 0 | $1,329,673 | $841,748 | $1,065,188 |
| TOTAL (rounded) | $75,511,041 | $58,976,685 | $66,797,059 | $2,144,960 | $1,379,815 | $1,731,206 |

FRA estimates that the recordkeeping and reporting costs per employee record under the no-action alternative and FRA proposal will be practically the same. Under the "no regulatory action" alternative, costs for recordkeeping and reporting employee hours of service are reflected in the New Engineer and New Conductor training requirements and the Work Schedule Analysis burden. Under the FRA proposal, the costs associated with the recordkeeping and reporting requirements for the substantive hours of service changes are reflected in Fatigue Training as well as the Initial and Follow-up Analysis and Fatigue Mitigation Plan Review.

The estimated benefits of the rule relative to the "status quo" baseline, based on the above calculations of potentially prevented accident damages, injuries, and fatalities, over a 20-year period of analysis are presented below.

INTERCITY PASSENGER, COMMUTER, TOURIST AND EXCURSION RAILROADS (ALL TRACK TYPES)

| Accident reduction benefits | VSL = $6 M Undiscounted benefits | VSL = $6 M Discounted PV@ 7% | VSL = $6 M Discounted PV@ 3% |
|---|---|---|---|
| Property Damage | $829,366 | $439,316 | $616,943 |
| Injuries | 120,547 | 63,854 | 89,672 |
| Fatalities | 429,088 | 227,288 | 319,187 |
| TOTAL (rounded) | 1,379,001 | 730,458 | 1,025,803 |

FRA does not expect that the overall number of casualties prevented will differ under the FRA proposed rule or the "no regulatory action" baseline in which the freight hours of service law would apply to passenger train crews.

FRA requests comments on all aspects of this analysis.

*B. Executive Order 13132*

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 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. Nevertheless, State and local officials were involved in developing this rule. The RSAC, which was used to assist in the development of this rule, has as permanent members, the AASHTO and the ASRSM.

However, this proposed rule could have preemptive effect by operation of law under a provision of the former Federal Railroad Safety Act of 1970 (FRSA) (49 U.S.C. 20106 (Section 20106)) and the HSL. The FRSA 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. Moreover, the HSL have been interpreted by the Supreme Court as totally preempting the field of the hours of labor of railroad employees. *Erie RR. Co.* v. *New York,* 233 U.S. 671 (1914).

*C. Executive Order 13175*

FRA analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this rule does not significantly or uniquely affect tribes and does not impose substantial and direct compliance costs on Indian tribal governments, the funding and consultation requirements of Executive Order 13175 do not apply, and a tribal summary impact statement is not required.

*D. Regulatory Flexibility Act and Executive Order 13272*

To ensure that the potential impact of this rulemaking on small entities is properly considered, FRA developed this proposed rule in accordance with Executive Order 13272 ("Proper Consideration of Small Entities in Agency Rulemaking") and DOT's policies and procedures to promote compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

The Regulatory Flexibility Act requires an agency to review regulations to assess their impact on small entities. An agency must conduct a regulatory flexibility analysis unless it determines and certifies that a rule is not expected to have a significant economic impact on a substantial number of small entities.

As discussed in earlier sections of this preamble, FRA is proposing to establish hours of service regulations, including maximum on-duty periods, minimum off-duty periods, and other limitations, for train employees providing commuter and intercity rail passenger transportation. The proposed regulations would require that commuter and intercity passenger railroads analyze and mitigate the risks for fatigue in the schedules worked by their train employees, and that the railroads submit to FRA for its approval the relevant schedules and fatigue mitigation plans. This rule would also apply to train employees of tourist, scenic, excursion, and historic railroads (tourist and excursion railroads) as well. Issuance of these regulations would relieve railroads covered by this rule from being covered by the more strict hours of service laws governing freight train crews.

This proposed regulation is authorized by Section 108(e) of the RSIA (49 U.S.C. 21109(b)) and is intended to promote safe railroad operations by limiting the hours of service for passenger railroad train employees and ensuring that they receive adequate opportunities for rest in the course of performing their duties. The main goal of this rulemaking is to identify and reduce fatigue for the employees who will be covered by the final rule. As described in Section II of this preamble, FRA has based the proposed regulation on scientific research related to fatigue and fatigue abatement, as applied to railroad scheduling practices and operating conditions for train employees of commuter and intercity passenger railroads. FRA is also proposing conforming changes to existing hours of service recordkeeping requirements.

Federal laws governing railroad employees' hours of service date back to 1907 with the enactment of the Hours of Service Act. Railroads have been subject to the provisions of this Act or successor Federal hours of service laws since it was first enacted. Currently, railroads are subject to the version of 49 U.S.C. 21103 that was in effect the day before the enactment of the RSIA, with respect to their train employees who are engaged in intercity or commuter rail transportation, including tourist and excursion rail operations.

FRA is certifying that this proposed rule will result in "no significant economic impact on a substantial number of small entities." The following section explains the reasons for this certification.

1. Description of Regulated Entities and Impacts

The "universe" of the entities under consideration includes only those small entities that can reasonably be expected to be directly affected by the provisions of this rule. In this case, the "universe" comprises Class III freight railroads that provide train crews for commuter operations and tourist and excursion railroads.

"Small entity" is defined in 5 U.S.C. 601 (Section 601). Section 601(3) defines a "small entity" 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), likewise includes within the definition of "small entities" not-for-profit enterprises that are independently owned and operated, and are not dominant in their fields of operation. Additionally, Section 601(5) defines as "small entities" 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 "Short-Line Operating" railroads.[25]

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 that formally establishes small entities as railroads that meet the line haulage revenue requirements of a Class III railroad.[26] Currently, the revenue requirement is $20 million or less in annual operating revenue, adjusted annually for inflation ($32,113,449 for 2008). This threshold is based on the Surface Transportation Board's (STB) threshold of a Class III railroad carrier, which is adjusted by applying the railroad revenue deflator adjustment.[27] FRA is using the STB's threshold in its definition of "small entities" for this rule.

The proposed regulation would apply to railroads with respect to their train employees engaged in commuter or intercity rail passenger transportation as well as train employees of tourist and excursion railroads. Intercity passenger railroads include Amtrak and the Alaska Railroad, both of which employ their own train crews and neither of which is considered a small entity. Amtrak is a Class I railroad, and the Alaska Railroad is a Class II railroad. Amtrak is owned by the U.S. Government, and the Alaska Railroad is owned by the State of Alaska. Neither the U.S. nor the State of Alaska has a population of less than 50,000.

All commuter railroads in operation in the U.S. serve major metropolitan areas with populations higher than 50,000. Although some commuter railroads contract with Amtrak or other entities to operate some or all of their trains, most employ their own train crews.

Train employees of only two small entities that operate trains under contract for commuter railroads would be covered by this rule, and they are not expected to be impacted significantly. Both of the entities are Class III freight railroads with commuter rail train crew schedules that would be considered

[25] "Table of Size Standards," U.S. Small Business Administration, January 31, 1996, 13 CFR part 121. *See also* NAICS Codes 482111 and 482112.

[26] *See* 68 FR 24891 (May 9, 2003); 49 CFR part 209, app. C.

[27] For further information on the calculation of the specific dollar limit, please *see* 49 CFR part 1201.

Type 1 assignments as defined by this proposed rule and thus be determined not to exceed the fatigue threshold, thus exempting the railroads from analyzing those work schedules. Their current train crew assignments would be allowed to continue without change. Although this proposal would impose some additional recordkeeping burden on these entities for tracking days of consecutive service, the increase would be nominal and proportionate to the extent of their passenger train service, which is quite limited. These train crews would also be subject to initial and refresher training no less frequently than every three years. This training would cover the following topics: (1) Physiological and human factors that affect fatigue, as well as strategies to reduce or mitigate the effects of fatigue; (2) opportunities for identification, diagnosis, and treatment of any medical condition that may affect alertness or fatigue, including sleep disorders; (3) alertness strategies, such as policies on napping, to address acute drowsiness and fatigue while an employee is on duty; (4) opportunities to obtain restful sleep at lodging facilities, including employee sleeping quarters provided by the railroad; and (5) the effects of abrupt changes in rest cycles for employees. There is flexibility with respect to how the training is delivered (*e.g.,* computer-based training, job briefings, pamphlets, as well as in class instruction). Such training could be accomplished in about one hour initially and 15 minutes triennially per train employee. Small freight railroads operating commuter trains could recoup any costs associated with this rulemaking from the commuter authorities with which they contract.

The requirements of this rule that would apply to tourist and excursion railroads are those contained in subpart F, Substantive Hours of Service Requirements for Train Employees Engaged in Commuter or Intercity Rail Passenger Transportation, as well as the conforming changes to the recordkeeping requirements in subpart B. FRA regulates approximately 140 tourist and excursion railroads nationwide. Approximately 130 of these railroads have fewer than 15 covered employees and thus qualify for exemption from the limitations that would be imposed under proposed § 228.403. As noted earlier, this particular exemption is substantively identical to the exemption provision of the HSL at 49 U.S.C. 21102(b), which was unchanged by the RSIA. Proposed § 228.403 would provide the same opportunity for a railroad to seek an exemption from the requirements of this subpart as a railroad would have to seek an exemption from the statutory requirements applicable to its other employees. Thus these 130 tourist and excursion railroads would not be impacted any differently by this rulemaking than by the HSL.

About 10 tourist and excursion railroads have more than 15 covered employees, yet by virtue of their train service schedules would generally have only Type 1 assignments, which have been determined not to exceed the fatigue threshold, thus exempting the railroads from analyzing or mitigating Type 2 work schedules. Scheduled assignments that include "Dinner Train" operations may be the only ones impacted by the requirement for analysis or mitigation. Information available regarding train schedules for these railroads indicates that trains do not operate for more than 12 hours on any day with virtually all train service starting at 10 a.m. or afterward. Dinner trains operate until no later than 10 p.m. and are not in operation every day of the week. They generally operate once a week and in no case more than three days a week. Thus the impact of crew assignment limitations would be minimal. Impacted railroads may conduct the analysis in house or contract it out for a nominal fee. Given the similarity of the assignments, the tourist and excursion railroads impacted may decide to address the assignments that include "Dinner Trains" jointly, either under the auspices of the Tourist Railway Association, Inc. or otherwise. The consecutive-day limitations will likely not impact these railroads since they already accommodate time off for their train crews. Given the very limited train service and the need to accommodate time off now, crew schedules should allow for the proposed time off following consecutive days of service requirement to be met. Since "Dinner Trains" are not included in most assignments, the majority of current scheduled train crew assignments would run no later than 6:30 p.m. and thus be considered Type 1 assignments and be unaffected, assuming the consecutive-day limitations do not affect them. Although the modifications to existing recordkeeping requirements proposed would impose some additional net burden on these entities, the increase would be nominal and proportionate to the size of their passenger service, which is quite limited. The training requirements discussed above would also apply to the approximately 10 tourist and excursion railroads and vary in proportion to the size of each operation. Note, however, that the training cost associated with this proposed rule is lower than that associated with complying with the training requirements for the freight hours of service laws.

The limitations on service proposed afford significantly more flexibility to passenger train employees than those imposed by the RSIA on freight train employees. Given that, in absence of a final rule effective by October 16, 2011, passenger train employees would be subject to the more stringent freight hours of service laws (49 U.S.C. 21103), issuance of this proposed rule could only create a cost savings for small entities impacted. In addition, the more stringent requirements proposed for schedules of employees who operate trains during the late night hours, in which the fatigue risk is greatest, would probably not apply to any tourist and excursion railroads because they do not operate during late night hours.

No shippers, contractors, or small governmental jurisdictions would be directly impacted by this proposal.

If FRA receives a specific request for a public hearing, one 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.

2. Certification

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 605(b), the FRA Administrator certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. FRA requests comments on both this analysis and this certification.

*E. 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 current and proposed information collection requirements, and the estimated time to fulfill each requirement are as follows:

| 49 CFR Section or statutory provision | Respondent universe | Total annual responses | Average time per response | Total annual burden hours |
|---|---|---|---|---|
| 228.11—Hours of Duty Records (Current Requirement). | 768 railroads/signal contractors. | 27,429,750 records ..... | 2 min./5 min./10 min. ... | 2,856,125 |
| 228.17—Dispatchers Record of Train Movements (Current Requirement). | 150 Dispatch Offices ... | 200,750 records ..... | 3 hours ..... | 602,250 |
| 228.19—Monthly Reports of Excess Service (Current Requirement But Now includes Limbo time and consecutive days on duty Proposed New/Revised Requirement). | 300 railroads ..... | 2,670 reports ..... | 2 hours ..... | 5,340 |
| 228.103—Construction of Employee Sleeping Quarters—Petitions to allow construction near work areas (Current Requirement). | 50 railroads ..... | 1 petition ..... | 16 hours ..... | 16 |
| 228.203—Program Components (Current Requirements)—Electronic Recordkeeping—Modifications for Daylight Savings Time. | 9 railroads ..... | 5 modifications ..... | 120 hours ..... | 600 |
| —System Security/Individual User Identification/Program Logic Capabilities/Search Capabilities. | 9 railroads ..... | 1 program w/security/*etc.*. | 720 hours ..... | 720 |
| 228.205—Access to Electronic Records—(Current Requirement)—System Access Procedures for Inspectors. | 768 railroads/signal contractors. | 100 electronic records access procedures. | 30 minutes ..... | 50 |
| 228.207—Training in Use of Electronic System—(Current Requirements)—Initial Training. | 768 railroads/signal contractors. | 47,000 tr. employees ... | 1 hour ..... | 47,000 |
| —Refresher Training ..... | 768 railroads/signal contractors. | 2,200 tr. employees ..... | 1 hour ..... | 2,200 |
| 49 U.S.C. 21102(b)—The Federal hours of service laws—Petitions for Exemption from Laws (Current Requirement). | 10 railroads ..... | 2 petitions ..... | 10 hours ..... | 20 |
| 228.403—Exemption requests from passenger/commuter railroads—(Proposed/New Requirements). | 28 railroads ..... | 5 exemption requests .. | 8 hours ..... | 40 |
| —Initial exemption requests from tourist/excursion railroads. | 140 railroads ..... | 130 exempt requests ... | 2 hours ..... | 260 |
| —Renewal exemption requests from tourist/excursion railroads. | 140 railroads ..... | 130 renewal exemption requests. | 30 minutes ..... | 65 hours |
| 228.407—Analysis of Work Schedules Submissions (Proposed/New Requirements). | 168 railroads ..... | 28 work schedule analyses. | 80 hours ..... | 2,240 |
| —Reports to FRA of Work Schedules that Exceed Fatigue Threshold. | 168 railroads ..... | 20 reports ..... | 2 hours ..... | 40 |
| —Fatigue Mitigation Plans Submitted to FRA. | 168 railroads ..... | 15 plans ..... | 4 hours ..... | 60 |
| —Submission of Work Schedules Using Validation Model At/Exceeding Threshold that can be mitigated by tools. | 168 railroads ..... | 15 work schedules ..... | 4 hours ..... | 60 |
| —Submission of Work Schedules Using Validation Model At/Exceeding Threshold that *cannot* be mitigated by tools. | 168 railroads ..... | 5 work schedules ..... | 4 hours ..... | 20 |
| —RR Determinations of necessary schedules. | 168 railroads ..... | 20 decisions ..... | 2 hours ..... | 40 |
| —RR Declaration that no work schedule needs to be submitted to FRA for exceeding fatigue threshold. | 168 railroads ..... | 10 written declarations | 1 hours ..... | 10 |
| —Submission of follow-up analysis by RR due to work schedule change. | 168 railroads ..... | 28 analyses ..... | 4 hours ..... | 112 |
| —Updated fatigue mitigation plans ..... | 168 railroads ..... | 28 plans ..... | 4 hours ..... | 112 |
| —RR consultations w/employees ..... | 168 railroads ..... | 40 consults ..... | 4 hours ..... | 160 |
| —Filed statements w/FRA by employees and employee organizations unable to reach consensus w/RR on work schedules or mitigation tools/RR submissions to FRA. | RR Employees/Employee Organizations. | 5 statements ..... | 2 hours ..... | 10 |
| 228.411—Training Programs (Proposed/New Requirements). | 168 railroads ..... | 29 programs ..... | 20 hours ..... | 580 |
| —Employee Initial Training ..... | 168 railroads ..... | 10,000 tr. employees ... | 1 hour ..... | 10,000 |
| —Initial Training—New Employees ..... | 168 railroads ..... | 150 trained employees | 1 hour ..... | 150 |
| —Triennial Refresher Training of Employees. | 168 railroads ..... | 10,150 tr. employees ... | 15 minutes ..... | 2,538 |
| —Records of Training ..... | 168 railroads ..... | 10,150 records ..... | 5 minutes ..... | 846 |
| Appendix D: Guidance on Fatigue Management Plans—(Proposed/New Requirement). | 168 railroads ..... | 4 plans ..... | 15 hours ..... | 60 |

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. Kimberly Toone at 202–493–6132.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan or Ms. Kimberly Toone, 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. Toone at the following address: *Robert.Brogan@dot.gov; Kimberly.Toone@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**.

*F. Unfunded Mandates Reform Act*

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 1 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 $100,000,000 or more (as adjusted annually for inflation) in any one year, and thus preparation of such a statement is not required.

*G. Environmental Assessment*

The National Environmental Policy Act, 42 U.S.C. 4321–4375, requires that Federal agencies analyze proposed actions to determine whether the action will have a significant impact on the human environment. This proposed rule will not have a significant impact on the human environment.

*H. 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).

**List of Subjects in 49 CFR Part 228**

Administrative practice and procedures, Buildings and facilities, Hazardous materials transportation, Noise control, Penalties, Railroad employees, Railroad safety, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, FRA proposes to amend part 228 of chapter II, subtitle B, title 49 of the Code of Federal Regulations as follows:

## PART 228—[AMENDED]

1. The authority citation for part 228 is revised to read as follows:

**Authority:** 49 U.S.C. 20103, 20107, 21101–21109; Sec. 108, Div. A, Public Law 110–432, 122 Stat. 4860–4866; 49 U.S.C. 21301, 21303, 21304, 21311; 28 U.S.C. 2461, note; 49 U.S.C. 103; and 49 CFR 1.49.

2. Section 228.1 is amended by removing the word "and" at the end of paragraph (a), removing the period and adding "; and" at the end of paragraph (b), and adding paragraph (c) to read as follows:

**§ 228.1 Scope.**

* * * * *

(c) Prescribes substantive hours of service requirements for train employees engaged in commuter or intercity rail passenger transportation.

3. Section 228.5 is amended by adding the following definitions in alphabetical order to read as follows:

**§ 228.5 Definitions.**

* * * * *

*Associate Administrator for Railroad Safety/Chief Safety Officer* means the Associate Administrator for Railroad Safety/Chief Safety Officer, Office of Railroad Safety, Federal Railroad Administration, 1200 New Jersey Ave., SE., Washington, DC 20590, or any person to whom he or she has delegated authority in the matter concerned.

* * * * *

*FRA* means the Federal Railroad Administration.

* * * * *

*Type 1 assignment* means an assignment to be worked by a train employee who is engaged in commuter or intercity rail passenger transportation that requires the employee to report for duty no earlier than 4 a.m. on a calendar day and be released from duty no later than 8 p.m. on the same calendar day, and that complies with the provisions of § 228.405. For the purposes of this subpart, FRA considers a Type 1 assignment to present an acceptable level of risk for fatigue that does not exceed the defined fatigue threshold under a scientifically valid, biomathematical model of human performance and fatigue specified by FRA at § 228.407(c)(1) or approved by FRA at § 228.407(c)(2) .

*Type 2 assignment* means an assignment to be worked by a train employee who is engaged in commuter or intercity rail passenger transportation that requires the employee to be on duty for any period of time between 8:01 p.m. on a calendar day and 3:59 a.m. on the next calendar day, or that otherwise fails to qualify as a Type 1 assignment.

A Type 2 assignment may be considered a Type 1 assignment if:

(1) It does not exceed the defined fatigue threshold under a scientifically valid biomathematical model of human performance and fatigue specified by FRA at § 228.407(c)(2) or approved by FRA at § 228.407(c)(1);

(2) It complies with the provisions of § 228.405; and

(3) It does not require the employee to be on duty for any period of time between midnight and 4 a.m.

4. Section 228.11 is amended by revising paragraph (c) to read as follows:

**§ 228.11 Hours of duty records.**

* * * * *

(c) *Exceptions to requirements for train employees.* Paragraphs (b)(13) through (15) of this section do not apply to the hours of duty records of train employees providing commuter rail passenger transportation or intercity rail passenger transportation.

* * * * *

5. Section 228.19 is amended by adding paragraphs (c)(5) through (10) to read as follows:

**§ 228.19 Monthly reports of excess service.**

* * * * *

(c) * * *

(5) A train employee initiates an on-duty period on more than 6 consecutive calendar days including one or more Type 2 assignments, when the on-duty period on the sixth consecutive day ended at the employee's home terminal.

(6) A train employee initiates an on-duty period on more than 7 consecutive days including one or more Type 2 assignments.

(7) A train employee returns to duty after initiating an on-duty period on 6 or 7 consecutive days including one or more Type 2 assignments, without having had 24 consecutive hours off duty at the employee's home terminal.

(8) A train employee initiates an on-duty period on 14 or more calendar days including only Type 1 assignments without having had at least two calendar days within the 14-day period in which the employee has not initiated an on-duty period, if the on-duty period on the fourteenth consecutive day ended at the employee's home terminal.

(9) A train employee initiates an on-duty period on more than 15 consecutive days including only Type 1 assignments.

(10) A train employee returns to duty after initiating an on-duty period on 14 or 15 consecutive calendar days including only Type 1 assignments, without 2 consecutive calendar days off duty at the employee's home terminal.

* * * * *

6. Part 228 is amended by adding Subpart F to read as follows:

**Subpart F—Substantive Hours of Service Requirements for Train Employees Engaged in Commuter or Intercity Rail Passenger Transportation**

Sec.

228.401 Applicability.
228.403 Nonapplication, exemption, and definitions.
228.405 Limitations on duty hours of train employees engaged in commuter or intercity rail passenger transportation.
228.407 Analysis of work schedules; submissions; FRA review and approval of submissions; fatigue mitigation plans.
228.409 Requirements for railroad-provided employee sleeping quarters during interim releases and other periods available for rest within a duty tour.
228.411 Training.
228.413 Compliance date.

## Subpart F—Substantive Hours of Service Requirements for Train Employees Engaged in Commuter or Intercity Rail Passenger Transportation

**§ 228.401 Applicability.**

The requirements of this subpart apply to railroads and their officers and agents, with respect to their train employees who are engaged in commuter or intercity rail passenger transportation, including train employees who are engaged in tourist, scenic, historic, or excursion rail passenger transportation.

**§ 228.403 Nonapplication, exemption, and definitions.**

(a) *General.* This subpart does not apply to a situation involving any of the following:

(1) A casualty;

(2) An unavoidable accident;

(3) An act of God; or

(4) A delay resulting from a cause unknown and unforeseeable to a railroad or its officer or agent in charge of the employee when the employee left a terminal.

(b) *Exemption.* The Administrator may exempt a railroad having not more than a total of 15 train employees, signal employees, and dispatching service employees from the limitations imposed by this subpart on the railroad's train employees who are engaged in commuter or intercity rail passenger transportation. The Administrator may allow the exemption from this subpart after a full hearing, for good cause shown, and on deciding that the exemption is in the public interest and will not affect safety adversely. The exemption shall be for a specific period of time and is subject to review at least annually. The exemption may not authorize a railroad to require or allow its train employees to be on duty more than a total of 16 hours in a 24-hour period.

(c) *Definitions.* In this subpart—

*Commuter or intercity rail passenger transportation* has the meaning assigned by section 24102 of title 49, United States Code, to the terms "commuter rail passenger transportation" or "intercity rail passenger transportation."

*Train employee who is engaged in commuter or intercity rail passenger transportation* includes a train employee who is engaged in commuter or intercity rail passenger transportation regardless of the nature of the entity by whom the employee is employed and any other train employee who is employed by a commuter railroad or an intercity passenger railroad. The term excludes a train employee of another type of railroad who is engaged in work train service even though that work train service might be related to providing commuter or intercity rail passenger transportation.

**§ 228.405 Limitations on duty hours of train employees engaged in commuter or intercity rail passenger transportation.**

(a) *General.* Except as provided in paragraph (c) of this section, a railroad and its officers and agents may not require or allow a train employee engaged in commuter or intercity rail passenger transportation to remain or go on duty—

(1) Unless that employee has had at least 8 consecutive hours off duty during the prior 24 hours; or

(2) After that employee has been on duty for 12 consecutive hours, until that employee has had at least 10 consecutive hours off duty; or

(3) After that employee has initiated an on-duty period each day for six consecutive calendar days including one or more Type 2 assignments, unless that employee has had at least 24 consecutive hours off duty at the employee's home terminal during which time the employee is unavailable for any service for any railroad; except that an employee may either deadhead to the point of final release at the employee's home terminal on a seventh consecutive day or initiate an on-duty period on a seventh consecutive calendar day in order to return to the employee's home terminal, and after arrival at the employee's home terminal the employee must have had at least 24 consecutive hours off duty at the employee's home terminal during which time the employee is unavailable for any service

for any railroad before being allowed or required to remain or go on duty; or

(4) After that employee has initiated on-duty periods including only Type 1 assignments in a period of 14 consecutive calendar days, and has not had at least a total of two calendar days in that 14-day period in which the employee has not initiated an on-duty period, until that employee has had at least two consecutive calendar days off duty at the employee's home terminal during which time the employee is unavailable for any service for any railroad; except that an employee may either deadhead to the point of final release at the employee's home terminal on a fifteenth consecutive day or initiate an on-duty period on a fifteenth consecutive calendar day in order to return to the employee's home terminal, and after arrival at the employee's home terminal the employee must have had at least two consecutive calendar days at the employee's home terminal during which the employee does not initiate an on-duty period, and during which time the employee is unavailable for any service for any railroad, before being allowed or required to remain or go on duty. For the purposes of this paragraph (a)(4), a new 14-day period begins each time the employee has accumulated a total of two calendar days in which the employee has not initiated an on-duty period.

(b) *Determining time on duty.* In determining under paragraph (a) of this section the time that a train employee subject to this subpart is on or off duty, the following rules apply:

(1) Time on duty begins when the employee reports for duty and ends when the employee is finally released from duty;

(2) Time the employee is engaged in or connected with the movement of a train is time on duty;

(3) Time spent performing any other service for the railroad during a 24-hour period in which the employee is engaged in or connected with the movement of a train is time on duty;

(4) Time spent in deadhead transportation to a duty assignment is time on duty, but time spent in deadhead transportation from a duty assignment to the place of final release is neither time on duty nor time off duty;

(5) An interim period available for rest at a place other than a designated terminal is time on duty;

(6) An interim period available for less than four hours rest at a designated terminal is time on duty; and

(7) An interim period available for at least four hours rest at a place with suitable facilities for food and lodging is not time on duty when the employee is prevented from getting to the employee's designated terminal by any of the following:

(i) A casualty;

(ii) A track obstruction;

(iii) An act of God; or

(iv) A derailment or major equipment failure resulting from a cause that was unknown and unforeseeable to the railroad or its officer or agent in charge of that employee when that employee left the designated terminal.

(c) *Emergencies.* A train employee subject to this subpart who is on the crew of a wreck or relief train may be allowed to remain or go on duty for not more than four additional hours in any period of 24 consecutive hours when an emergency exists and the work of the crew is related to the emergency. In this paragraph, an emergency ends when the track is cleared and the railroad line is open for traffic.

**§ 228.407 Analysis of work schedules; submissions; FRA review and approval of submissions; fatigue mitigation plans.**

(a) *Analysis of work schedules.* Each railroad subject to this subpart must perform an analysis of one cycle of the work schedules (the period within which the work schedule repeats) of its train employees engaged in commuter or intercity rail passenger transportation and identify those work schedules intended to be assigned to its train employees, that, if worked by such a train employee, put the train employee at risk for a level of fatigue at which safety may be compromised. A level of fatigue at which safety may be compromised, hereafter called "the fatigue threshold," shall be determined by procedures that use a scientifically valid, biomathematical model of human performance and fatigue that has been approved by the Associate Administrator for Railroad Safety/Chief Safety Officer pursuant to paragraph (c)(1) of this section, or previously accepted pursuant to paragraph (c)(2) of this section. Each work schedule that exceeds the fatigue threshold must be—

(1) Reported to the Associate Administrator for Railroad Safety/Chief Safety Officer as provided in paragraph (b) of this section, no later than the date that is 180 days after the effective date of the final rule;

(2) Either—

(i) Mitigated by action in compliance with the railroad's fatigue mitigation plan that has been approved by the Associate Administrator for Railroad Safety/Chief Safety Officer as specified in paragraph (b) of this section, no later than the date that is 180 days after the effective date of the final rule; or

(ii) Supported by a determination that has been approved by the Associate Administrator for Railroad Safety/Chief Safety Officer as specified in paragraph (b) of this section, that the schedule is operationally necessary, and that the fatigue risk cannot be sufficiently mitigated by the use of fatigue mitigation tools to reduce the risk for fatigue to a level within the fatigue threshold, no later than the date that is 180 days after the effective date of the final rule; or

(iii) Both, no later than the date that is 180 days after the effective date of the final rule; and

(3) Approved by FRA for use in accordance with paragraph (b) of this section.

(b) *Submissions of certain work schedules and any fatigue mitigation plans and determinations of operational necessity or declarations; FRA review and approval.* (1) No later than the date that is 180 days after the effective date of the final rule, the railroad shall submit for approval to the Associate Administrator for Railroad Safety/Chief Safety Officer the work schedules described in paragraphs (b)(1)(i) and (ii) of this section. The railroad shall identify and group the work schedules as follows:

(i) Work schedules that the railroad has found, using a validated model (as specified in paragraph (c)(1) of this section or approved by FRA in accordance with paragraph (c)(2) of this section) to present a risk for a level of fatigue that is at or greater than the fatigue threshold, but that the railroad has determined can be mitigated by the use of fatigue mitigation tools so as to present a risk for a level of fatigue that is less than the fatigue threshold. The fatigue mitigation tools that will be used to mitigate the fatigue risk presented by the schedule must also be submitted.

(ii) Work schedules that the railroad has found, using a validated model (as specified in paragraph (c)(1) of this section or approved by FRA in accordance with paragraph (c)(2) of this section), to present a risk for a level of fatigue that is at or greater than the fatigue threshold, but that the railroad has determined cannot be mitigated so as to present a risk for a level of fatigue that is less than the fatigue threshold by the use of fatigue mitigation tools, and that the railroad has determined are operationally necessary. The basis for the determination must also be submitted.

(2) If a railroad performs the analysis of its schedules required by paragraph (a) of this section, and determines that none of them presents a risk for fatigue that requires it to be submitted to the

Associate Administrator for Railroad Safety/Chief Safety Officer pursuant to this paragraph, that railroad shall, no later than the date that is 180 days after the effective date of the final rule, submit to the Associate Administrator for Railroad Safety/Chief Safety Officer a written declaration, signed by an officer of the railroad, that the railroad has performed the required analysis and determined that it has no schedule that is required to be submitted.

(3) FRA will review submitted work schedules, fatigue mitigation tools, and determinations of operational necessity. If FRA identifies any exceptions to the submitted information, the agency will notify the railroad within 120 days of receipt of the railroad's submission.

(4) FRA will audit railroad work schedules and fatigue mitigation tools every two years to ensure compliance with this section.

(c) *Submission of models for FRA approval; validated models already accepted by FRA.* (1) If a railroad subject to this subpart wishes to use a model of human performance and fatigue, not previously approved, for the purpose of making part or all of the analysis required by paragraph (a) or (d) of this section, the railroad shall submit the model and evidence in support of its scientific validation, for the approval of the Associate Administrator for Railroad Safety/Chief Safety Officer. Decisions of the Associate Administrator for Railroad Safety/Chief Safety Officer regarding the validity of a model are subject to review under § 211.55 of this chapter; or

(2) A railroad may use a model that is already accepted by FRA. FRA has approved the Fatigue Avoidance Scheduling Tool™ (FAST) issued on July 15, 2009, by Fatigue Science, Inc., and Fatigue Audit InterDyne™ (FAID) version 2, issued in September 2007 by InterDynamics Pty Ltd. (Australian Company Number (ACN) 057 037 635) as scientifically valid, biomathematical models of human performance and fatigue for the purpose of making the analysis required by paragraph (a) or (d) of this section.

(d) *Analysis of certain later changes in work schedules.* (1) Additional follow-up analysis must be performed each time that the railroad changes one of its work schedules in a manner—

(i) That would differ from the FRA-approved parameters for hours of duty of any work schedule previously analyzed pursuant to paragraph (a) of this section; or

(ii) That would alter the work schedule to the extent that train employees who work the schedule may be at risk of experiencing a level of fatigue that exceeds the FRA-approved fatigue threshold established by paragraph (a) of this section.

(2) Such additional follow-up analysis must be submitted for FRA approval as provided under paragraph (b) of this section, as soon as practicable, prior to the use of the new schedule for an employee subject to this subpart.

(e) *Fatigue mitigation plans.* A written plan must be developed and adopted by the railroad to mitigate the potential for fatigue for any work schedule identified through the analysis required by § 228.407(a) or (d) as at risk, including potential fatigue caused by unscheduled work assignments. Compliance with the fatigue mitigation plan is mandatory. The railroad shall review and, if necessary, update the plan at least once every two years after adopting the plan.

(f) *Consultation.* (1) Each railroad subject to this subpart shall consult with, employ good faith, and use its best efforts to reach agreement with, all of its directly affected employees, including any nonprofit employee labor organization representing a class or craft of directly affected employees of the railroad, on—

(i) The railroad's review of work schedules found to be at risk for a level of fatigue at which safety may be compromised (as described by paragraph (a) of this section);

(ii) The railroad's selection of appropriate fatigue mitigation tools; and

(iii) All submissions by the railroad to the Associate Administrator for Railroad Safety/Chief Safety Officer for approval that are required by this section.

(2) For purposes of this section, the term "directly affected employee" means an employee to whom one of the work schedules applies or would apply if approved.

(3) If the railroad and its directly affected employees, including any nonprofit employee labor organization representing a class or craft of directly affected employees of the railroad, cannot reach consensus on any area described in paragraph (f)(1) of this section, then directly affected employees and any such organization may file a statement with the Associate Administrator for Railroad Safety/Chief Safety Officer explaining their views on any issue on which consensus was not reached. The Associate Administrator for Railroad Safety/Chief Safety Officer shall consider such views during review and approval of items required by this section.

**§ 228.409 Requirements for Railroad-Provided Employee Sleeping Quarters During Interim Releases and Other Periods Available for Rest Within a Duty Tour.**

(a) If a railroad subject to this subpart provides sleeping quarters for the use of a train employee subject to this subpart during interim periods of release as a method of mitigating fatigue identified by the analysis of work schedules required by § 228.407(a) and (d), such sleeping quarters must be "clean, safe, and sanitary," and give the employee "an opportunity for rest free from the interruptions caused by noise under the control of the" railroad within the meaning of section 21106(a)(1) of title 49 of the United States Code.

(b) Any sleeping quarters provided by a railroad that are proposed as a fatigue mitigation tool pursuant to § 228.407(b)(1)(i), are subject to the requirements of § 228.407(f).

**§ 228.411 Training**

(a) *Individuals to be trained.* Each railroad subject to this subpart shall provide training for its employees subject to this subpart, and the immediate supervisors of its employees subject to this subpart.

(b) *Subjects to be covered.* The training shall provide, at a minimum, information on the following subjects that is based on the most current available scientific and medical research literature:

(1) Physiological and human factors that affect fatigue, as well as strategies to reduce or mitigate the effects of fatigue;

(2) Opportunities for identification, diagnosis, and treatment of any medical condition that may affect alertness or fatigue, including sleep disorders;

(3) Alertness strategies, such as policies on napping, to address acute drowsiness and fatigue while an employee is on duty;

(4) Opportunities to obtain restful sleep at lodging facilities, including employee sleeping quarters provided by the railroad; and

(5) The effects of abrupt changes in rest cycles for employees.

(c) *Timing of initial training.* Initial training shall be provided to affected employees as soon as practicable, and to new employees subject to this subpart within 90 days of their first working a schedule subject to analysis under this subpart.

(d) *Timing of refresher training.* (1) At a minimum, refresher training shall be provided every three calendar years.

(2) Additional refresher training shall also be provided when significant changes are made to the railroad's fatigue mitigation plan or to the available fatigue mitigation tools applied to an employee's assignment or assignments at the location where he or she works.

(e) *Records of training.* A railroad shall maintain a record of each

employee provided training in compliance with this section and shall retain these records for three years.

**§ 228.413 Compliance date.**

(a) *General.* On and after the date that is 180 days after the effective date of the final rule, railroads subject to this subpart shall—

(1) Comply with this subpart with respect to their train employees who are engaged in commuter or intercity rail passenger transportation; and

(2) Be exempt from complying with the provisions of old section 21103 and new section 21103 for such employees.

(b) *Definitions.* In this section—

(1) The term "new section 21103" means section 21103 of title 49, United States Code, as amended by the Rail Safety Improvement Act of 2008 effective July 16, 2009.

(2) The term "old section 21103" means section 21103 of title 49, United States Code, as it was in effect on the day before the enactment of that Act.

7. Part 228 is amended by adding Appendix D to read as follows:

## Appendix D: Guidance on Fatigue Management Plans

Railroads subject to subpart F of this part, Substantive Hours of Service Requirements for Train Employees Engaged in Commuter or Intercity Rail Passenger Transportation, may wish to consider adopting a written fatigue management plan that is designed to reduce the fatigue experienced by their train employees subject to that subpart and to reduce the likelihood of accidents, incidents, injuries, and fatalities caused by the fatigue of these employees. If a railroad is required to have a fatigue mitigation plan under § 228.407 (containing the fatigue mitigation tools that the railroad has determined will mitigate the risk posed by a particular work schedule for a level of fatigue at or above the fatigue threshold), then the railroad's fatigue management plan could include the railroad's written fatigue mitigation plan, designated as such to distinguish it from the part of the plan that is optional, or could be a separate document. As provided in § 228.407(a)(2) and (e), compliance with the fatigue mitigation plan itself is mandatory.

A good fatigue management plan contains targeted fatigue countermeasures for the particular railroad. In other words, the plan takes into account varying circumstances of operations by the railroad on different parts of its system, and should prescribe appropriate fatigue countermeasures to address those varying circumstances. In addition, the plan addresses each of the following items, as applicable:

(1) Employee education and training on the physiological and human factors that affect fatigue, as well as strategies to reduce or mitigate the effects of fatigue, based on the most current scientific and medical research and literature;

(2) Opportunities for identification, diagnosis, and treatment of any medical condition that may affect alertness or fatigue, including sleep disorders;

(3) Effects on employee fatigue of an employee's short-term or sustained response to emergency situations, such as derailments and natural disasters, or engagement in other intensive working conditions;

(4) Scheduling practices for employees, including innovative scheduling practices, on-duty call practices, work and rest cycles, increased consecutive days off for employees, changes in shift patterns, appropriate scheduling practices for varying types of work, and other aspects of employee scheduling that would reduce employee fatigue and cumulative sleep loss;

(5) Methods to minimize accidents and incidents that occur as a result of working at times when scientific and medical research has shown that increased fatigue disrupts employees' circadian rhythm;

(6) Alertness strategies, such as policies on napping, to address acute drowsiness and fatigue while an employee is on duty;

(7) Opportunities to obtain restful sleep at lodging facilities, including employee sleeping quarters provided by the railroad;

(8) The increase of the number of consecutive hours of off-duty rest, during which an employee receives no communication from the employing railroad or its managers, supervisors, officers, or agents; and

(9) Avoidance of abrupt changes in rest cycles for employees.

Finally, if a railroad chooses to adopt a fatigue management plan, FRA suggests that the railroad review the plan and update it periodically as the railroad sees fit if changes are warranted.

Issued in Washington, DC, on March 15, 2011.

**Karen J. Rae,**

*Deputy Administrator.*

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