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WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, October 23, 2012
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
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Washington, DC 20002

RESERVATIONS: (202) 741–6008

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Presidential Documents

Title 3—

The President

Proclamation 8885 of October 9, 2012

Leif Erikson Day, 2012

By the President of the United States of America

A Proclamation

Leif Erikson—son of Iceland and grandson of Norway—crossed the North Atlantic more than 1,000 years ago to land on the shores of present-day Canada. His arrival marked the first known European encounter with North America and began a legacy of daring exploration that would help define the character of our Nation. Today, we celebrate not only Leif Erikson and Nordic-American culture, but also those men and women who boldly reach for the next great discovery.

More than 800 years after that first excursion, a ship called *Restauration* set sail in Erikson's wake with the eyes and hearts of its passengers set on American shores. The Norwegians who disembarked in New York City on October 9, 1825, were the first large group of immigrants to arrive in the United States from Norway. On Leif Erikson Day, we commemorate their journey and celebrate the many contributions and accomplishments of their descendants.

Famed adventurers like Leif Erikson still spur our limitless desire to push toward new frontiers and shed light on the unknown. Today, the United States is driving extraordinary innovation in all realms of science and technology, setting out on modern expeditions to research and preserve the Arctic and Antarctic, and even sending robotic explorers to the surface of Mars. As we strive for an ever brighter future, may we continue to be inspired by the rugged determination that motivated our forebears, and may the same spirit of exploration guide our progress in the years to come.

To honor Leif Erikson and celebrate our Nordic-American heritage, the Congress, by joint resolution (Public Law 88–566) approved on September 2, 1964, has authorized the President of the United States to proclaim October 9 of each year as ''Leif Erikson Day.''

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim October 9, 2012, as Leif Erikson Day. I call upon all Americans to observe this day with appropriate ceremonies, activities, and programs to honor our rich Nordic-American heritage.

IN WITNESS WHEREOF, I have hereunto set my hand this ninth day of October, in the year of our Lord two thousand twelve, and of the Independence of the United States of America the two hundred and thirty-seventh.

[FR Doc. 2012–25502
Filed 10–15–12; 8:45 am]
Billing code 3295–F3

Presidential Documents

Proclamation 8886 of October 9, 2012

50th Anniversary of the Office of the United States Trade Representative

By the President of the United States of America

A Proclamation

On October 11, 1962, President John F. Kennedy signed the Trade Expansion Act—a landmark piece of legislation that established a Special Representative for Trade Negotiations who would be tasked with promoting and securing trade agreements with partner countries around the world. Fifty years after that historic event, the Office of the United States Trade Representative (USTR) continues to play a vital role in advancing trade policy that opens new markets for American exports, and that creates and supports jobs right here at home.

Throughout its history, USTR has worked to level the playing field for American workers and create more opportunities for our businesses to compete in global markets. The agency has supported America's commitment to market-based competition and innovation, helping draw good jobs and growing industries to our shores. USTR has striven to promote stability, transparency, high standards, and accountability in international trade.

Today, USTR continues to monitor and enforce our existing trade agreements to ensure trading partners honor their commitments. USTR successfully secured important improvements to our trade agreements with Korea, Colombia, and Panama that I proudly signed into law last year. The agency's efforts to expand trade remain a vital part of my Administration's strategy for an economy built to last.

On this anniversary, we recognize the dedicated professionals who have upheld USTR's mission for half a century, and we applaud their ongoing work to make America the best place in the world to innovate, invest, work, and build a business.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim October 11, 2012, as the 50th Anniversary of the Office of the United States Trade Representative. I call upon all Americans to observe this day with appropriate programs, ceremonies, and activities that recognize the Office of the United States Trade Representative for its many contributions to strengthening American leadership in the global trading system.

IN WITNESS WHEREOF, I have hereunto set my hand this ninth day of October, in the year of our Lord two thousand twelve, and of the Independence of the United States of America the two hundred and thirty-seventh.

[FR Doc. 2012–25504
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Rules and Regulations

Federal Register

Vol. 77, No. 200

Tuesday, October 16, 2012

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

RIN 3206–AM62

Prevailing Rate Systems; Abolishment of Montgomery, Pennsylvania, as a Nonappropriated Fund Federal Wage System Wage Area

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management is issuing a final rule to abolish the Montgomery, Pennsylvania, nonappropriated fund (NAF) Federal Wage System (FWS) wage area and redefine Chester, Montgomery, and Philadelphia Counties, PA, to the Burlington, NJ, NAF wage area and Luzerne County, PA, to the Morris, NJ, NAF wage area. Bucks County, PA, will no longer be defined to an NAF wage area. These changes are necessary because the closure of the Naval Air Station Joint Reserve Base (NAS JRB) Willow Grove left the Montgomery wage area without an activity having the capability to conduct a local wage survey.

DATES: *Effective date:* This regulation is effective on October 16, 2012. *Applicability date:* FWS employees remaining in the Montgomery NAF wage area were transferred to the Burlington and Morris NAF wage area schedules on the first day of the first applicable pay period beginning on or after May 15, 2012.

FOR FURTHER INFORMATION CONTACT: Madeline Gonzalez, (202) 606–2838; email *pay-leave-policy@opm.gov;* or Fax: (202) 606–4264.

SUPPLEMENTARY INFORMATION: On May 15, 2012, the U.S. Office of Personnel Management (OPM) issued an interim rule (77 FR 28471) to abolish the Montgomery, Pennsylvania, nonappropriated fund (NAF) Federal Wage System (FWS) wage area and redefine Chester, Montgomery, and Philadelphia Counties, PA, to the Burlington, NJ, NAF wage area and Luzerne County, PA, to the Morris, NJ, NAF wage area. Bucks County, PA, will no longer be defined to an NAF wage area. The Federal Prevailing Rate Advisory Committee, the national labor-management committee responsible for advising OPM on matters concerning the pay of FWS employees, reviewed and recommended these changes by consensus. The interim rule had a 30-day comment period, during which OPM received no comments.

Regulatory Flexibility Act

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

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

U.S. Office of Personnel Management.

John Berry,

Director.

Accordingly, under the authority of 5 U.S.C. 5343, the interim rule published on May 15, 2012, amending 5 CFR part 532 (77 FR 28471) is adopted as final with no changes.

[FR Doc. 2012–25422 Filed 10–15–12; 8:45 am]

BILLING CODE 6325–39–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 380

RIN 3064–AD94

Enforcement of Subsidiary and Affiliate Contracts by the FDIC as Receiver of a Covered Financial Company

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final rule.

SUMMARY: The Federal Deposit Insurance Corporation (the ''FDIC'' or the ''Corporation'') is issuing a final rule (''Final Rule'') that implements part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act'' or the ''Act''), which permits the Corporation, as receiver for a financial company whose failure would pose a significant risk to the financial stability of the United States (a ''covered financial company''), to enforce contracts of subsidiaries or affiliates of the covered financial company despite contract clauses that purport to terminate, accelerate or provide for other remedies based on the insolvency, financial condition or receivership of the covered financial company. As a condition to maintaining these subsidiary or affiliate contracts in full force and effect, the Corporation as receiver must either: Transfer any supporting obligations of the covered financial company that back the obligations of the subsidiary or affiliate under the contract (along with all assets and liabilities that relate to those supporting obligations) to a bridge financial company or qualified third-party transferee by the statutory one-business-day deadline; or provide adequate protection to such contract counterparties. The final rule sets forth the scope and effect of the authority granted under the Dodd-Frank Act, clarifies the conditions and requirements applicable to the receiver, addresses requirements for notice to certain affected counterparties and defines key terms.

DATES: Effective November 15, 2012.

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SUPPLEMENTARY INFORMATION: Title II of the Dodd-Frank Act provides for the appointment of the FDIC as receiver of a covered financial company that poses a systemic risk to the nation's economic stability and outlines the process for the orderly resolution of a covered financial company following the FDIC's appointment as receiver. Section 209, codified at 12 U.S.C. 5389, authorizes the FDIC, in consultation with the Financial Stability Oversight Council (''FSOC''), to prescribe rules and

regulations as the FDIC considers necessary or appropriate with respect to the rights, interests and priorities of creditors, counterparties, security entitlement holders or other persons with respect to any covered financial company and other matters necessary or appropriate to the implementation of the orderly liquidation authority established under Title II of the Act. Pursuant to the authority granted by section 209, the FDIC is issuing the Final Rule.

I. Background

Fundamental to the orderly liquidation of a covered financial company is the ability to continue key operations, transactions and services that will maximize the value of the firm's assets and operations and avoid a disorderly collapse in the marketplace. To facilitate this continuity of operations, the Dodd-Frank Act provides several tools to preserve the value of the covered financial company's assets and business lines, including the powers granted in section 210(c)(16), codified at 12 U.S.C. 5390(c)(16) (''section 210(c)(16)'' or the ''Statute''). Specifically, section 210(c)(16) provides that the Corporation, as receiver for a covered financial company, has the power ''to enforce contracts of subsidiaries or affiliates of the covered financial company, the obligations under which are guaranteed or otherwise supported by or linked to the covered financial company, notwithstanding any contractual right to cause the termination, liquidation, or acceleration of such contracts based solely on the insolvency, financial condition, or receivership of the covered financial company, if (i) such guaranty or other support and all related assets and liabilities are transferred to and assumed by a bridge financial company or a third party * * * or (ii) the Corporation, as receiver, otherwise provides adequate protection with respect to such obligations.''

The conditions contained in (i) and (ii) of the quoted statute assure counterparties that any contractual right to guaranties or other support, including claims on collateral or other related assets, would be protected. Thus, section 210(c)(16) requires, as a condition to the authority to enforce subsidiary or affiliate contracts that are ''linked to'' the financial condition of the covered financial company through a default provision, that the Corporation as receiver transfer any guaranty or other support provided by the specified covered financial company for the contractual obligations together with all related collateral to a bridge financial company or other qualified transferee within one business day after its appointment as receiver. In the alternative, if the receiver does not transfer the support and the related assets and liabilities, the receiver must provide ''adequate protection'' with respect to any support or collateral not transferred in order to preserve its right to enforce the contract of the subsidiary or affiliate.

In providing the orderly liquidation authority of Title II, the Dodd-Frank Act provides certain particular authorities with respect to subsidiaries and affiliates of the covered financial company. For instance, section 210(a)(1)(E) of the Dodd-Frank Act provides an expedited procedure to allow the Corporation to appoint itself as the receiver of certain subsidiaries of a covered financial company if the Corporation and the Secretary of the Treasury jointly determine that such subsidiary is in default or in danger of default and that such action would mitigate serious adverse effects on the financial stability of the United States and would facilitate the orderly liquidation of the covered financial company. That section further provides that upon such an appointment, the subsidiary would be treated as a covered financial company and the Corporation would be able to exercise the full range of special powers available to the receiver.

In certain cases, however, the receiver for the covered financial company may find that the best course of action to maximize the value of the covered financial company and to mitigate systemic risk would be to avoid actions that place subsidiaries in danger of default or that necessitate complex interlocking receiverships. The affiliated legal entities that collectively comprise a complex financial institution typically share and provide intra-group funding, guaranties, administrative support, human resources and other operational and business functions. Some of these operations and activities may be critical to the day-to-day functions and overall operations of the group. In addition, certain significant subsidiaries of a covered financial company may be essential to core business lines or may conduct critical operations that, if discontinued, may threaten the stability of the financial markets. In these circumstances, orderly liquidation of a covered financial company may best be accomplished by establishing a single receivership of the parent holding company and transferring valuable operations and assets to a solvent bridge financial company, including the stock or other equity interests of some or all of the company's various subsidiaries. Accordingly, the Dodd-Frank Act provides the FDIC with the tools and flexibility to act effectively as receiver for the covered financial company at the holding company or parent level without placing solvent subsidiaries into receivership. This approach may be the best means of preserving value, minimizing the shock to the financial system, providing additional flexibility to mitigate cross-border resolution issues for global systemically-important financial companies and allowing for a more expeditious resolution of a covered financial company.

Where such an approach is adopted, the powers granted to the receiver under section 210(c)(16) are essential to preservation of going-concern value of the subsidiaries for the benefit of the parent in receivership. Absent this statutory provision, counterparties to contracts of subsidiaries and affiliates could exercise contractual rights to terminate their agreements based upon the insolvency of the specified covered financial company. As a result, otherwise viable affiliates of the covered financial company could become insolvent, thereby inciting the collapse of interrelated companies and potentially amplifying ripple effects throughout the economy.

As described in more detail below, the Final Rule clarifies the scope of the authority granted in section 210(c)(16) as well as conditions and requirements applicable to the receiver. The Final Rule makes clear that the effect of this enforcement authority is that no party may exercise any remedy under a contract simply as a result of the appointment of the receiver and the exercise of its orderly liquidation authorities as long as the receiver complies with the statutory requirements. The Final Rule addresses requirements for notice to affected counterparties and defines key terms. It also clarifies the term ''adequate protection'' in a manner consistent with its interpretation under the Bankruptcy Code.

On March 27, 2012, the FDIC published a notice of proposed rulemaking (''NPR'') relating to the enforcement of subsidiary and affiliate contracts by the Corporation as receiver of a covered financial company under section 210(c)(16) (77 FR 18127, March 27, 2012). The NPR, which included proposed rules (the ''Proposed Rule''), requested comments on all aspects of the Proposed Rule and included specific questions as to several aspects of the Proposed Rule. The comment period ended on May 29, 2012. The FDIC

considered all of the comments received in response to the NPR.

In accordance with section 209 of the Act, the FDIC reviewed otherwise applicable insolvency law, including the Bankruptcy Code, and has harmonized the Final Rule with such laws where possible. Such harmonization includes the formulation of the definition of adequate protection, which is generally consistent with Bankruptcy Code precedent. Also consistent with Section 209 of the Act, the FDIC consulted with the FSOC in preparing the Final Rule.

II. Summary of Comments on the Proposed Rule

The FDIC received six comments in response to the Proposed Rule. Two letters were from individuals and fully supported the Proposed Rule. The other four letters, of which two were submitted by insurance industry trade groups, one by an insurance underwriter and one jointly on behalf of three financial industry associations, proposed that various changes should be made to the Proposed Rule. The FDIC also held a follow-up teleconference at the request of one of the authors of the financial industry association letter.

One of the areas of concern to commenters related to how the rule would be applied. The letter from the financial industry associations expressed concern that by defining ''specified financial condition clause'' to include provisions permitting a counterparty to exercise remedies based directly or indirectly upon a change in the financial condition or the insolvency of the covered financial company, the Proposed Rule could be construed to prohibit the exercise of remedies by reason of an actual default by a subsidiary or affiliate of the covered financial company. One example cited in the letter was a payment default by a subsidiary which relied on its parent for funds with which to make contractual payments to its counterparties. The letter stated that if the subsidiary were to default on a payment obligation because the parent covered financial company was no longer capable of providing it with necessary funds, it could be argued that the default arose as a result of a change in the financial condition or the insolvency of the covered financial company.

This outcome is not intended by the Proposed Rule, and language has been added to the preamble to further clarify this point. Although the Final Rule prohibits the exercise of remedies based upon specified types of actions or circumstances relating to a covered financial company or one of its direct or indirect transferees, the Final Rule does not prohibit a termination or exercise of other remedies based upon a default under a contractual provision that relates solely to a breach or default by the subsidiary or affiliate. Thus, the rule would not affect a counterparty's rights if the subsidiary or affiliate fails to make a payment due a counterparty. Of course, if the subsidiary or affiliate were to be in default under its contract because the subsidiary or affiliate did not comply with a proscribed remedy for an asserted violation of an unenforceable specified financial condition clause, the Final Rule does not permit the counterparty to take action on the basis of that default. Thus, for example, if a contract of a subsidiary required that the subsidiary deliver additional collateral on account of the changed financial condition of the covered financial company, the counterparty's right to exercise that remedy would be prohibited by the Final Rule and, accordingly, the counterparty would not be permitted to terminate or accelerate the contract based on the non-delivery by the subsidiary of the additional collateral.

The letter from the financial industry associations also requested that the Proposed Rule be revised to clarify that the contractual rights of a counterparty to demand performance from a subsidiary or affiliate of the covered financial company at any time and for any reason cannot be interfered with under section 210(c)(16), without inquiry ''whether demand is made as a result of the CFC's default.'' The FDIC agrees that the rule is only intended to restrict the ability of a counterparty to take action based on the insolvency, financial condition or receivership of the covered financial company. Thus, if contractual terms provide a counterparty with a right to require margin or repayment in full or other performance on demand, without any linkage to the covered financial company, the enforceability of the provision is not limited by the Final Rule. On the other hand, if a right to demand margin is premised on the existence of a condition that is financial in nature, such as the counterparty deeming itself insecure, and if the counterparty's demand is based upon the financial condition of the covered financial company, such demand would not be permitted by the Final Rule.

The financial industry association letter objected to the provisions of the Proposed Rule that would prevent a margin call against a subsidiary or affiliate of a covered financial company based on a change in the rating of the covered financial company following the appointment of the receiver. The letter argued that prohibiting such margin calls ''goes beyond the statutory scope of section 210(c)(16), which only permits the FDIC to override contractual provisions to 'terminate, liquidate or accelerate.' '' This argument seems to be a very narrow reading of the scope of section 210(c)(16). As discussed in more detail under III. *The Final Rule—Section-by-section analysis* below, a broader reading of the section is necessary to implement the intended effect of the Statute to limit the impact of changes in the financial condition of the covered financial company on contractual relationships of counterparties. Allowing unlimited margin calls would impede the orderly resolution of the covered financial company and may well have the same practical effect as the termination of the applicable subsidiary or affiliate contract.

This letter also objected that under the Proposed Rule it appeared that margin levels would be frozen based on the rating of the covered financial company immediately before the receiver was appointed. The letter suggested that rights to margin under contracts supported by the covered financial company be based on the rating of the bridge financial company or other qualified transferee to which the support is transferred and that rights to margin on a contract of a subsidiary that is linked but not supported be based on the rating of the entity to which the direct or indirect ownership interests in such subsidiary have been transferred. This would not be consistent with section 210(c)(16), which refers to actions based on the financial condition of the covered financial company. This statutory framework is conducive to the creation of a period of stability following the appointment of a receiver to allow for the orderly resolution of a covered financial company. Moreover, it is not unlikely that ratings are uncertain in times of economic uncertainty; it is also likely that a bridge financial company would be unrated. The protection provided by section 210(c)(16) is particularly important with respect to remedies, such as margin calls, that if permitted to be asserted against a subsidiary or affiliate could impede the ability of the receiver to accomplish an orderly liquidation in a manner that minimizes the impact on the U.S. economy.

Although the counterparty's ability to call for additional margin would be suspended until the end of the orderly liquidation process to the extent that

margin levels were based on the financial condition of the covered financial company, it should be noted that the Final Rule would not interfere with the operation of other contractual provisions that would result in changes in the level of collateral during the orderly liquidation process.

The financial industry association letter also asserted that section 210(c)(16) requires that adequate protection be provided for counterparties to contracts that are linked to, but not supported or guaranteed by, the covered financial company. The FDIC does not find this position supported in the express language of the statute. The portion of section 210(c)(16) in question states that the FDIC as receiver shall have the power to enforce subsidiary or affiliate contracts, the obligations under which are guaranteed or otherwise supported or linked to the covered financial company, if ''(i) such guaranty or other support and all related assets and liabilities are transferred to and assumed by a bridge financial company or a third party * * * or (ii) the Corporation, as receiver, otherwise provides adequate protection with respect to such obligations.'' Since the initial clause refers only to guaranty and support, the most straightforward reading is that each of the two clauses refers only to guaranties and other support and not to mere linkages that are not supported. The clause clearly intends to provide two alternatives for the circumstances that are intended to be covered—(i) the transfer of the guaranty or other support or (ii) the granting of adequate protection. Clause (i) is clearly directed only at guaranties and other support. If clause (ii) were construed to apply to other linked contracts, clause (ii) would be the only option for such contracts and would not work consistently with clause (i).

Moreover, the interpretation suggested by the commenter might serve to create a windfall for counterparties of subsidiaries or affiliates by requiring the creation of support when none originally existed. If, prior to the failure of the covered financial company, a linked contract were not supported by a guaranty or collateral provided by the covered financial company, the concept of adequate protection would not suggest a requirement for the creation of such support after the failure.

One of the letters from the insurance industry commenters also addressed linked-but-not supported contracts and objected to the Proposed Rule treating such contracts as covered by the Proposed Rule. The text of section 210(c)(16) specifically refers to a category of agreements that are ''linked'' to the covered financial company, in addition to agreements which are guaranteed or otherwise supported by the covered financial company. Accordingly, it is quite clear that contracts that are linked but not guaranteed or supported are included as protected contracts under section 210(c)(16).

This commenter also objected that the Proposed Rule exceeded the intended effect of section 210(c)(16) by providing the power to enforce subsidiary and affiliate contracts not only to the FDIC as receiver but also to transferees of the covered financial company, such as bridge financial companies and third party acquirers. While the FDIC does not view the provision in the Proposed Rule that would have granted such authority to a transferee as providing any significant powers that were not suggested by the text of section 210(c)(16), the extension of such authority to transferees is not necessary to achieve the purposes of section 210(c)(16) and has not been included in the Final Rule. As noted in *III. The Final Rule—Section-by-section analysis* below, such contracts remain enforceable by the applicable subsidiary or affiliate as well as by the FDIC as receiver.

The financial industry association letter also expressed concern that setoff or netting rights in respect of qualified financial contracts could be impaired unless the Proposed Rule was revised to limit the scope of section 210(c)(16) by providing that qualified financial contracts of subsidiaries or affiliates of a covered financial company would be enforceable only to the extent that such enforcement does not impair setoff or netting rights with respect to other qualified financial contracts. The limitation sought by the commenter generally was not consistent with the Statute. Moreover, in the examples provided in the letter, the asserted practical limitation on setoff or netting rights would result from the counterparty deciding to close out contracts, a situation wholly within the control of the counterparty.

The financial industry association letter also requested clarification of the terms ''adequate protection'' and ''indubitable equivalent.'' As discussed below, it is intended that these terms be interpreted consistently with their treatment under the Bankruptcy Code. The letter correctly observes that under the Bankruptcy Code these terms are applied in the context of secured obligations and that they are subject to varying treatment among different jurisdictions and cases. Nonetheless, there is sufficient guidance in this precedent to provide at least a comparable degree of certainty in application as is provided by the Bankruptcy Code. The fact that under the Final Rule these terms are also to be applied to unsecured obligations should not detract from the guidance provided by such precedent.

The financial industry associations also requested that the option to provide cash payments as a form of adequate protection be clarified and that the difference between this option and option of providing a guaranty of the receiver be clarified. The option to provide cash payments was included for cases where a full guaranty by the receiver would provide a disproportionate benefit to a counterparty or where there might be other reasons why the FDIC might prefer the use of cash to a guaranty. Such a situation might arise, for example, where there was a limited guaranty in favor of the counterparty that was not transferred to a bridge financial company. Another situation would be where a portion of collateral supporting a counterparty obligation was not transferred. In each of these cases, there might be an increased risk of loss to the counterparty arising from such failure to transfer, but the loss might be limited in nature.

The letter also stated that ''[w]hile we believe that the FDIC means for 'adequate protection' to protect counterparties from any incremental loss sustained due to actions taken by the FDIC as receiver for a covered financial company, clarifying this view could help provide much-needed certainty with respect to the application of this term.'' As suggested above, this is not a correct reading of the Final Rule. With respect to contracts of subsidiaries and affiliates that the receiver desires to remain enforceable notwithstanding an applicable specified financial condition clause, adequate protection would be provided only to compensate for the increased risk of loss due to the non-transfer of all or any portion of the covered financial company's support for such contract or related assets and liabilities.

This letter also requested that the FDIC provide a procedure for counterparties to challenge the FDIC's adequate protection determinations. Such special procedures would be inconsistent with the urgency of the FDIC's responsibility to act expeditiously and efficiently in resolving a covered financial company. The Act makes clear that the FDIC as receiver should not be subject to delays of the type that are inherent in the

bankruptcy process. For example, section 210(e) of the Act provides that no court may take any action to restrain or affect the exercise of powers or functions of the receiver.

The letters from the insurance industry included certain comments that relate only to the insurance industry. One letter proposed that the Final Rule state that section 210(c)(16) will not be applied to enforce a contract of an affiliate or subsidiary of a covered financial company if the affiliate or subsidiary is an insurance company. The commenter argued that because the Act provides that an insurance company should be liquidated in accordance with state law, Congress intended that insurance company subsidiaries and affiliates of a covered financial company should not be subject to the orderly liquidation provisions of Title II. In fact, to the contrary, insurance companies are expressly included among financial companies that may, in the circumstances set forth in the Act, become covered financial companies.

Two insurance industry letters urged that the Final Rule include a provision that excludes director's or officer's liability insurance contracts and depository and financial institution bonds from the scope of the Final Rule. Both letters cited section 210(c)(13) of the Act, which specifically exempts liability insurance contracts and financial institution bonds entered into by a covered financial company from that section's general invalidation of *ipso facto* provisions, but both letters also noted that the Proposed Rule was not intended to override section 210(c)(13). One of these letters cited the ''common practice of a parent financial institution including its affiliates or subsidiaries as insureds under its financial institution bond.'' The other letter argued that the Proposed Rule would override a ''key historical element'' of a director's or officer's liability insurance contract that allows an ''automatic run-off'' upon a change in control of the insured company. The FDIC agrees that if the bond or insurance contract is entered into with the covered financial company and not with the subsidiary or affiliate in question, pursuant to section 210(c)(13) the contract with the covered financial company would be terminable by the insurance company. Unlike the *ipso facto* provisions of the Act, however, section 210(c)(16) does not exempt director and officer liability policies. Rather, it applies to all contracts. Thus, if the obligations to the subsidiary or affiliate under the bond or insurance contract constitute a contract between the insurance company and the subsidiary or affiliate, such obligations would not be covered by the exception to the *ipso facto* provisions of section 210(c)(13) and the contract with the subsidiary or affiliate would not be terminable by the insurance company upon the appointment of the receiver for the covered financial company. This is particularly important because the subsidiaries and affiliates are expected to include companies which will continue to operate and will need to have the protection afforded by this insurance.

One of the insurance industry letters also proposed that the definition of ''support'' be expanded to include support that is not financial in nature, such as an agreement by a covered financial company to provide specific performance of the obligations of a subsidiary or affiliate. The phrase ''guaranteed or otherwise supported'' in section 210(c)(16) strongly suggests that the reference to support is support that is financial in nature.

Finally, this letter also objected to the provision in the Proposed Rule that permits notice of the transfer of support and related assets and liabilities or the provision of adequate protection to be made on a Web site. As noted in the NPR, section 210(c)(16) does not require that any notice be given. However, the FDIC recognizes that counterparties will need to know the status of their contracts and the Web site posting option is included in the Final Rule in acknowledgement of the public's growing reliance on internet communication as well as the prevalence of online commerce. The Final Rule permits such posting in order to provide a means for the giving of notice that is practical from the perspective of the receiver, which might otherwise be burdened with having to send many thousands of notices, as well as from the perspective of the parties to the applicable contracts with the subsidiaries and affiliates, which would ordinarily be expected to monitor public information relating to covered financial companies and their subsidiaries and affiliates. The FDIC believes that the notice provisions of the Final Rule are reasonably calculated to provide actual notice.

III. The Final Rule

Overview

The Final Rule clarifies that the power of the Corporation as receiver to enforce contracts of subsidiaries and affiliates under Dodd-Frank Act section 210(c)(16) effectively preserves contractual relationships of subsidiaries and affiliates of the covered financial company during the orderly liquidation process. The Final Rule identifies certain contracts that are ''linked to'' the covered financial company within the meaning of the Statute, as well as contracts that also are ''supported by'' the covered financial company. Under the Statute, a contract is ''linked to'' a covered financial company if it contains a provision that provides a contractual right to ''cause the termination, liquidation or acceleration of such contract based solely on the insolvency, financial condition, or receivership of the covered financial company.'' That type of provision, called a ''specified financial condition clause'' in the Final Rule, is more fully defined in the Final Rule. Although the Statute speaks in terms of the power to enforce a contract to which the receiver is not a party, the Final Rule recognizes the practical effect of this authority, which is that the counterparty to such a contract may not exercise remedies in connection with a specified financial condition clause if the statutory conditions are met. No action is required of the receiver to enforce a linked contract; the Final Rule makes clear that the contract will remain in full force and effect unless the receiver fails to meet the requirements with respect to any supporting obligations of the covered financial company.

The Final Rule establishes that if the subsidiary's obligations under the linked contract are supported by the covered financial company through, for example, guaranties or the granting of collateral that supports the obligations, the Corporation as receiver must either (a) transfer such support (along with all related assets and liabilities) to a qualified transferee not later than 5:00 p.m. (eastern time) on the business day following the appointment of the receiver, or (b) provide ''adequate protection'' to contract counterparties following notice given to the counterparties in accordance with the guidelines set forth in the Final Rule by the one-business-day deadline.

The Final Rule also clarifies the meaning of the statutory provision regarding a contractual obligation that is ''guaranteed or otherwise supported by'' the covered financial company. Support includes guaranties that may or may not be collateralized and other examples of financial support of the obligations of the subsidiary or affiliate under the contract. In circumstances where a contract of a subsidiary or affiliate is linked to the financial condition of the parent company via a ''specified financial condition clause,'' but where the obligations of the subsidiary or affiliate are not ''supported by'' the

covered financial company through guaranties or similar supporting obligations, the requirement to transfer support and related assets or provide adequate protection does not apply. The mere existence of a ''specified financial condition clause'' does not constitute a ''support'' obligation by the covered financial company, and the Final Rule makes it clear that the subsidiary or affiliate contract remains enforceable without any requirement to effectively create new support where none originally existed. This is consistent with the effect of section 210(c)(13), providing that *ipso facto* clauses in contracts of the covered financial company are unenforceable, and section 210(c)(8) of the Dodd-Frank Act, providing that ''walkaway clauses'' in qualified financial contracts of the covered financial company are unenforceable. In the case of those types of contractual provisions, there is no specified entity required to provide support, hence the concept of alternate support or adequate protection is inapplicable. In the same way, under the Final Rule, the concept of adequate protection does not arise in the absence of supporting obligations by the specified entity.

The Final Rule applies broadly to all contracts, and not solely to qualified financial contracts. For example, a real estate lease or a credit agreement, neither of which would typically be classified as a qualified financial contract, is subject to enforcement under section 210(c)(16) and the Final Rule notwithstanding a specified financial condition clause that might, for instance, give a lessor the right to terminate a lease based upon a change in financial condition of the parent of the lessee. A swap agreement of a subsidiary or affiliate is subject to section 210(c)(16) and the Final Rule in the same manner if the agreement contains specified financial condition clause.

The Final Rule does not affect other provisions of the Dodd-Frank Act governing qualified financial contracts, such as sections 210(c)(8) (''Certain Qualified Financial Contracts'') and 210(c)(9) (''Transfer of Qualified Financial Contracts''). For example, where a covered financial company's support of a subsidiary or affiliate obligation would itself be considered a qualified financial contract, such as a securities contract, the provisions of section 210(c)(9) that prohibit the selective transfer of qualified financial contracts with a common counterparty (or a group of affiliated counterparties) continue to apply. Likewise, the provisions in section 210(c)(10) of the Dodd-Frank Act applicable to counterparties of qualified financial contracts also continue to apply. On the other hand, if the covered financial company's support of a subsidiary or affiliate consists of multiple contracts that are not qualified financial contracts, the Corporation as receiver may transfer all or a portion of such group of contracts as long as it provides adequate protection for the supporting obligations that were not transferred. Similarly, the Corporation may transfer all or a portion of ''related assets and liabilities'' that are not qualified financial contracts if it provides adequate protection for the portion of the assets and liabilities that was retained by the Corporation as receiver.

Section-by-Section Analysis

Paragraph (a) of the Final Rule states the general rule with respect to the authority granted under section 210(c)(16) of the Dodd-Frank Act, i.e., that the contracts of a subsidiary or affiliate of a covered financial company are enforceable notwithstanding the existence of a ''specified financial condition clause'' that provides a counterparty with the right to terminate or exercise remedies based upon the financial condition of the parent or affiliate covered financial company, provided that the FDIC as receiver for the covered financial company transfers all support and related assets and liabilities that back the obligations of such subsidiary or affiliate. To the extent that the receiver fails to transfer all support and related assets and liabilities, it must provide adequate protection to such counterparty to preserve its right to enforce the contracts of the subsidiary. The effect of this ability to enforce the contract is intended to be broad enough to preclude the counterparties from terminating or exercising other remedies such as requiring additional collateral but is intended to be limited in scope solely to remedies arising out of a specified financial condition clause, not other contractual defaults by the subsidiary or affiliate. The ability either to transfer support or to provide adequate protection can be exercised in the alternative, or in combination. For example, if some, but not all collateral is transferred, appropriate adequate protection may be provided in lieu of the collateral not transferred.

The deadline for the transfer of support is the same as the time limit applicable to the transfer of qualified financial contracts under section 210(c)(10) of the Dodd-Frank Act, i.e., by 5:00 p.m. (eastern time) on the next business day. Although the decision to provide adequate protection in lieu of transferring support must also be made and steps must be taken that are reasonably calculated to provide notice within a business day, the language of the Final Rule does not require that the adequate protection be fully in place by that next-day deadline. Although the failure to complete within a business day the necessary documentation or transactions should not be deemed to be a waiver of the right to enforce the contract, once the receiver has provided notice of its intent to transfer support or provide adequate protection, the counterparty would be entitled to the benefit of the support or adequate protection even if the need for access to such support or protection arises before the applicable documentation or transfer of collateral is fully completed.

The Final Rule provides, as set forth in the Statute, that the Corporation as receiver has the authority to enforce linked contracts under section 210(c)(16) of the Dodd-Frank Act. Also, the subsidiary or affiliate continues to have the ability to enforce the terms of such contracts as well. In essence, the effect of such authority to enforce is substantively the same as a prohibition of the counterparty to assert a specified financial condition clause against the subsidiary or affiliate. Effectively, the Final Rule makes clear that the practical effect of the operation of section 210(c)(16) is similar to that of section 210(c)(13) (prohibiting counterparties from the exercise of certain rights arising out of *ipso facto* clauses) and section 210(c)(8)(F) (prohibiting counterparties to qualified financial contracts from the exercise of certain rights arising out of walkaway clauses); i.e., that the counterparties are prohibited from exercising remedies under a specified financial condition clause if the statutory conditions are met.

Section 210(c)(16) expressly states that the power to enforce contracts of a subsidiary in the circumstances described in the Statute is vested in ''[t]he Corporation, as receiver for a covered financial company or as receiver for a subsidiary of a covered financial company (including an insured depository institution).'' This is captured in section 380.12(a)(3) of the Final Rule. This recognizes that the preservation of value through the enforcement of subsidiary and affiliate contracts is important to all of the interconnected entities that are related to the entity in receivership. The effect of the Statute is to prohibit the counterparty from terminating or exercising remedies based solely on the financial condition of the covered

financial company. Once the essential link to the covered financial company is established via the specified financial condition clause, the contract is enforceable by the receiver and by the subsidiary or affiliate that is the direct party-in-interest to the contract.

Definitions

Section 380.1 is revised in the Final Rule because four terms have been added to it. These terms—''subsidiary,'' ''affiliate,'' ''control'' and ''business day''—are used in the Final Rule but have been included as defined terms under section 380.1 because they are, or may be, used on more than one occasion in part 380. One of these terms—''business day''—was not included in the Proposed Rule but is defined in Title II of the Act. The other terms were included in the *Definitions* section of the Proposed Rule.

The Final Rule includes six definitions in its *Definitions* section: ''linked,'' ''specified financial condition clause,'' ''support,'' ''related assets and liabilities,'' ''qualified transferee'' and ''successor'' that relate specifically to the matters discussed in the Final Rule and therefore are not included in section 380.1 among definitions of general applicability to Part 380.

A contract is ''linked'' to a covered financial company if it contains a specified financial condition clause naming the covered financial company as the specified company.

The term ''specified financial condition clause'' is intended to broadly capture any provision that gives any counterparty a right to terminate, accelerate or exercise default rights or remedies as a result of any action or circumstance that results in or arises out of the exercise of the orderly liquidation authority. Each aspect of the definition of the term ''specified financial condition clause'' should be read expansively so that counterparties are effectively stayed from exercising rights under such a clause to terminate contracts or exercise other remedies during a Title II resolution process if the requirements of the Statute are met. Thus, a specified financial condition clause includes any clause that might be interpreted as giving rise to a termination right or other remedy due to the insolvency of the specified covered financial company that might have precipitated the appointment of the receiver, such as an act of insolvency or a downgrade in a rating from a rating agency. Likewise, as indicated in the NPR, the definition is broad enough to include a change in control provision that creates termination rights or other remedies upon the appointment of the FDIC as receiver or other change in control, such as the transfer of stock in the subsidiary to the bridge financial company or the sale, conversion or merger of the bridge financial company or its assets or the issuance of interests in the bridge financial company or its successor to creditors of the covered financial company in satisfaction of their claims. As stated in the NPR, the intent is to allow the subsidiary or affiliate contract to remain in effect despite the exercise of any or all of the authorities granted to the FDIC as receiver for a covered financial company throughout the orderly liquidation process.

Although the language of the Statute refers to the counterparty's rights as ''termination, liquidation or acceleration,'' that list of remedies cannot be read to be exclusive, as the purpose of the provision is provide the FDIC with the power it needs to preserve going-concern value of the covered financial company as long as the rights of counterparties to receive bargained-for support is respected. Accordingly, the Final Rule uses the broader phrase ''terminate, liquidate, accelerate or declare a default under'' the contract. In effect, the specified financial condition clause is unenforceable if the statutory requirements are met. In addition, by clarifying that the link created by the specified financial condition clause may operate ''directly or indirectly,'' the Final Rule clarifies that the scope of the defined term includes contracts where the specified company under the clause may be another company or an affiliate in the corporate structure so long as the ultimate triggering event relates to the financial condition of the covered financial company or the Title II actions taken with respect to that covered financial company. The term ''specified company'' used in the definition is consistent with terminology commonly used in such provisions in derivatives contracts to refer to the company whose financial condition is the basis for the termination right or other remedy.

Language in this definition is borrowed from sections of the Dodd-Frank Act addressing related matters, such as the enforceability of contracts of the covered financial company notwithstanding *ipso facto* clauses (section 210(c)(13)) and walkaway clauses with respect to qualified financial contracts (section 210(c)(8)(F)). The fact that this language is adapted and expanded upon should not be deemed to reflect any interpretation of the meaning or possible limitations of those sections. The broad language of this definition reflects the authority granted in section 210(c)(16), which ensures that the receiver has the power to avoid precipitous terminations by counterparties of the subsidiary resulting in disorderly collapse and a loss of value to the covered financial company.

In the event a counterparty (including its affiliates) has more than one contract with the subsidiary or affiliate of the covered financial company, any contract with a cross-default provision with respect to another contract containing a specified financial condition clause also would be ''linked.'' The same would be true of a single contract of a counterparty with a subsidiary or affiliate that cross-defaulted to the contract of another subsidiary or affiliate that contained a specified financial condition clause.

In order to make unmistakably clear that, as set forth in the Proposed Rule, section 210(c)(16) and the Final Rule protect covered contracts of subsidiaries and affiliates from the exercise of remedies until completion of the resolution process, a new subclause (G) has been added to specifically refer to a step that may be taken in the resolution process by the successor to a bridge financial company. The listed steps are intended to be illustrative but not exclusive. As stated in the NPR, section 210(c)(16) and the Final Rule give the receiver the necessary tools to keep subsidiary and affiliate contracts with specified financial condition clauses in place throughout the resolution process. This is further discussed below in the description of the definition of ''successor.''

The term ''support'' means to guarantee, indemnify, undertake to make any loan, advance or capital contribution, maintain the net worth of the subsidiary or affiliate, or provide other financial assistance. This would include a pledge of collateral that directly secures an obligation of a subsidiary or affiliate. The definition does not include other assistance that is not financial in nature, such as an undertaking to conduct specific performance. Generally, if the obligation of the counterparty to perform is linked to the financial condition of the parent, the support also would likely be financial, and other types of arrangements are beyond the scope of the Statute. One comment was received in response to a question included in the NPR as to the sufficiency of this definition. As noted under *II. Summary of Comments on the Proposed Rule* above, this commenter argued that the definition should be expanded to include support that is not financial in nature. However, including such type of

support in the definition would be inconsistent with section 210(c)(16).

The term ''related assets and liabilities'' includes assets of the covered financial company serving as collateral securing the covered financial company's support obligation, and setoff rights or netting arrangements to which the covered financial company is subject if they are related to the covered financial company's support. It should be noted, however, that if the ''support'' were in the nature of a guaranty, the related assets and liabilities would not consist of all of the assets of the covered financial company unless the guaranty was secured by all assets of the covered financial company. The transfer of an unsecured guaranty or obligation to a qualified transferee would meet the requirements of the Final Rule in this regard, without the transfer of any particular assets. The definition also broadly includes any liabilities of the covered financial company that directly arise out of or relate to its support of the obligations or liabilities of the subsidiary or affiliate. In some instances, this definition may be redundant with the definition of support, as a guaranty could be both a related liability and a supporting obligation. The broader definition is intended to make clear that the full range of supporting obligations and related assets and liabilities must be transferred to ensure that the counterparties are in substantially the same position as they were prior to the transfer to the qualified transferee.

It is important to note that in some situations ''support'' and ''related assets and liabilities'' are themselves qualified financial contracts. Section 210(c)(8)(D)(ii)(XII) of the Act includes ''securities contracts'' as qualified financial contracts, and defines securities contracts to include ''any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause, including any guaranty or reimbursement obligation in connection with any agreement or transaction referred to in this clause.'' Other types of qualified financial contracts, such as for example, swaps (in section 210(c)(8)(D)(vi)(VI) of the Act), are similarly defined to include related security agreements arrangements and other credit enhancements. To the extent such support and related assets and liabilities themselves constitute financial contracts, they are subject to the rules applicable to the treatment of qualified financial contracts, including the so-called all-or-none rule under section 210(c)(9).

The term ''qualified transferee'' specifically includes a bridge financial company as well as any unrelated third party (other than a third party for which a conservator, receiver, trustee in bankruptcy, or other legal custodian has been appointed, or which is otherwise the subject of a bankruptcy or insolvency proceeding). A qualified transferee can include both the bridge financial company and a subsequent transferee; for instance, if assets and liabilities, including the support and related assets and liabilities are transferred first to a bridge financial company and then to another acquirer either prior to or upon the termination of the bridge financial company pursuant to the orderly liquidation authorities granted under Title II of the Dodd-Frank Act.

The definition of the terms ''subsidiary'' and ''affiliate'' are consistent with the definitions given to such terms in the Dodd-Frank Act. Section 2(18) of the Act, codified at 12 U.S.C. 5301(18), provides that these terms will have the same meanings as in section 3 of the FDI Act (12 U.S.C. 1813). Under the Federal Deposit Insurance Act (''FDI Act''), the term ''subsidiary'' is broadly defined as ''any company which is owned or controlled directly or indirectly by another company * * *.'' ''Affiliate'' is defined by reference to the Bank Holding Company Act, 12 U.S.C. 1841(k) as ''any company that controls, is controlled by, or is under common control with another company.''

The term ''control'' is used in the definitions of the terms ''subsidiary'' and ''affiliate.'' The Statute refers to the definition of ''control'' provided in the FDI Act, which in turn, refers to the definition provided in the Bank Holding Company Act, 12 U.S.C. 1841(a). In defining the use of this term for purposes of the definitions of ''subsidiary'' and ''affiliate,'' the Final Rule streamlines these cross-references, clarifies that certain provisions of the Bank Holding Company Act definition are inapplicable in this context, and adopts the flexible approach of conforming to the relevant provisions of the Bank Holding Company Act and regulations promulgated thereunder at the time of appointment of the receiver.

In effect, the definition of ''control'' includes, as a company in ''control'' of another company, a company that directly or indirectly or acting through one or more persons owns, controls, or has the power to vote 25 percent or more of any class of voting securities of the other company. Under the Final Rule, a company may also exercise ''control'' if that company controls in any manner the election of a majority of the directors or trustees of the company. This definition is consistent with the Bank Holding Company Act definition as it has been reflected in regulations promulgated under that section, including Regulation W (12 CFR 223.3(g)) and Regulation Y (12 CFR 225.2(e)).

Section 2 of the Dodd-Frank Act expressly adopts the FDI Act definitions that incorporate the Bank Holding Company Act definitions ''except to the extent the context otherwise requires.'' Parts of the Bank Holding Company Act definition of ''control'' are inapposite to the context of section 210(c)(16). Provisions that provide for a determination of ''control'' made by the Federal Reserve Board of Governors pursuant to a notice and hearing are inconsistent with the expedited decision-making expressly required by section 210(c)(16).

An entity is deemed to be a ''successor'' of a bridge financial company if it is the company into which the bridge financial company is converted by way of incorporation under the laws of a state or if it is the surviving company of a merger or consolidation of the bridge financial company with another company (whether before or after any such conversion). Although this definition was not included in the Proposed Rule, no substantive change is effected by its insertion in the Final Rule. Under the Act, it is possible that a bridge financial company's status as such could terminate before the resolution process is completed and a successor merely constitutes a continuation of a qualified transferee. By including this definition for ''successor,'' the Final Rule more specifically reflects a possible step and strategy in the resolution process that, while clearly within the general scope of the Proposed Rule and NPR, was not given specific mention.

The term ''business day'' is defined in the same way such term is defined in section 210(c)(10)(D) of the Act, relating to notification of transfer of qualified financial contracts. This is consistent with the notice requirement in the Final Rule, which provides for steps to be taken to provide notice during the same time period that is applicable for the taking of steps to provide notice of the transfer of qualified financial contracts. This was also contemplated by a question included in the NPR (in respect of which no responses were received) as to whether ''business day'' should be defined consistently with the definition in section 210(c)(10)(D).

Adequate Protection

Paragraph (c) of the Final Rule describes the different ways that the Corporation may provide adequate protection in the event that it does not transfer a covered financial company's support to a qualified transferee. The definition of adequate protection is consistent with the definition in section 361 of the Bankruptcy Code,[1] which also formed the basis of the definition of adequate protection in the context of treatment of certain secured creditors under 12 CFR 380.52. Adequate protection may include any of the following: (1) Making a cash payment or periodic cash payments to the counterparties of the contract to the extent that the failure to cause the assignment and assumption of the covered financial company's support and related assets and liabilities causes a loss to the counterparties; (2) providing to the counterparties a guarantee, issued by the Corporation as receiver for the covered financial company, of the obligations of the subsidiary or affiliate of the covered financial company under the contract; or (3) providing relief that will result in the realization by the claimant of the indubitable equivalent of the covered financial company's support. The phrase ''indubitable equivalent,'' which appears in section 361 of the Bankruptcy Code, is intended to have a meaning consistent with its meaning in bankruptcy, in conformance with section 209 of the Dodd-Frank Act that requires rules promulgated under Title II of the Act to be ''harmonized'' with the Bankruptcy Code where possible. One comment was received requesting further clarification of the definitions of adequate protection and indubitable equivalent. As discussed under *II. Summary of Comments on the Proposed Rule* above, no further clarification of these terms was deemed necessary.

It is important to note that although a guaranty of the Corporation as receiver is expressly included among the enumerated examples of ''adequate protection'' in paragraph (c) of the Final Rule, the omission of such specific reference in 12 CFR 380.52 is not intended to suggest that such a guaranty would not constitute adequate protection to secured creditors under to 12 CFR 380.52. The guaranty of the receiver is, in any event, the indubitable equivalent of any guaranty or support that it may replace, and the express mention of the guaranty is added only for the avoidance of any doubt. Any such guaranty issued in accordance with the Act would be backed by the assets of the covered financial company, and also would be supported by the orderly liquidation fund and the authority of the Corporation as manager of the orderly liquidation fund to assess the financial industry pursuant to section 210(o) of the Act. Such a guaranty would in all events qualify as the indubitable equivalent of any guaranty or support that it may replace. The express mention of the guaranty is added merely for the avoidance of any doubt.

Notice of Transfer or Provision of Adequate Protection

Paragraph (d) of the Final Rule provides that if the Corporation as receiver transfers any support and related assets and liabilities of the covered financial company or decides to provide adequate protection in accordance with subparagraphs (a)(1) and (2), it will promptly take steps to notify contract counterparties of such transfer or provision of adequate protection. Although the Statute does not contain a notice requirement, the Final Rule requires that these reasonable steps be taken to provide notice in recognition of the practical reality that contract counterparties will need to know whether they may exercise remedies under a specified financial condition clause. In acknowledgement of the public's growing reliance on internet communication as well as the prevalence of online commerce, the Final Rule provides that the Corporation may post such notice on its public Web site, the Web site of the covered financial company or the subsidiary or affiliate, or provide notice via other electronic media. One comment was received in response to the question posed by the NPR as to whether these steps were reasonably calculated to provide notice. This commenter objected that navigation of Web sites is often difficult and that counterparties may not be aware that the parent financial company was placed into receivership and that, accordingly, this form of notice was inadequate. As discussed under *II. Summary of Comments on the Proposed Rule* above, no change has been made in the Final Rule. The use of electronic notification is effective and efficient in connection with the failure of a systemically important financial company. In such a case, individually directed notice would be unduly cumbersome and burdensome.

While the Corporation will endeavor to provide notice in a manner reasonably calculated to provide notification to the parties in a timely manner, the provision of actual notice is not a condition precedent to enforcing such contracts. Any action by a counterparty in contravention of section 210(c)(16) will be ineffective, whether or not such counterparty had actual notice of the transfer of support or provision of adequate protection. Further, where the contract of the subsidiary or affiliate is linked to the covered financial company but not otherwise supported by the covered financial company, actual notice of by the Corporation of its appointment as receiver or its intent to exercise the authority under section 210(c)(16) is not required.

IV. Regulatory Analysis and Procedure

A. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*) (''PRA''), the FDIC 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 Final Rule would not involve any new collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*). Consequently, no information will be submitted to the Office of Management and Budget for review.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act 5 U.S.C. 601, *et seq.* (RFA) requires each federal agency to prepare a final regulatory flexibility analysis in connection with the promulgation of a final rule, or certify that the final rule will not have a significant economic impact on a substantial number of small entities.[2] Pursuant to section 605(b) of the Regulatory Flexibility Act, the FDIC certifies that the Final Rule will not have a significant economic impact on a substantial number of small entities.

C. Small Business Regulatory Enforcement Act

The Office of Management and Budget has determined that the Final Rule is not a ''major rule'' within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), (5 U.S.C. 801 *et seq.*). As required by the SBREFA, the FDIC will file the appropriate reports with Congress and the General Accounting Office so that the Final Rule may be reviewed.

[1] 11 U.S.C. 361.

[2] *See* 5 U.S.C. 603, 604 and 605.

D. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the Final Rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681).

E. Plain Language

Section 722 of the Gramm-Leach-Bliley Act (Pub. L. 106–102, 113 Stat.1338, 1471), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC has sought to present the Final Rule in a simple and straightforward manner.

List of Subjects in 12 CFR Part 380

Banks, banking, Financial companies, Holding companies, Insurance companies, Mutual insurance holding companies.

For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation amends part 380 of title 12 of the Code of Federal Regulations as follows:

PART 380—ORDERLY LIQUIDATION AUTHORITY

■ 1. The authority citation for part 380 is revised to read as follows:

Authority: 12 U.S.C. 5383(e); 12 U.S.C. 5389; 12 U.S.C. 5390(c)(16); 12 U.S.C. 5390(s)(3); 12 U.S.C. 5390(b)(1)(C); 12 U.S.C. 5390(a)(7)(D).

■ 2. Amend § 380.1 by adding definitions of ''affiliate,'' ''business day,'' ''control,'' and ''subsidiary'' in alphabetical order to read as follows:

§ 380.1 Definitions.

* * * * *

Affiliate. The term ''*affiliate''* means any company that controls, is controlled by, or is under common control with another company at the time of, or immediately prior to, the appointment of receiver of the covered financial company.

* * * * *

Business day. The term ''*business day''* means any day other than any Saturday, Sunday or any day on which either the New York Stock Exchange or the Federal Reserve Bank of New York is closed.

* * * * *

Control. The term ''*control'',* when used in the definitions of ''affiliate'' and ''subsidiary'', has the meaning given to such term under 12 U.S.C. 1841(a)(2)(A) and (B) as such law, or any successor, may be in effect at the date of the appointment of the receiver, together with any regulations promulgated thereunder then in effect.

* * * * *

Subsidiary. The term ''*subsidiary''* means any company which is controlled by another company at the time of, or immediately prior to, the appointment of receiver of the covered financial company.

■ 3. Add § 380.12 to read as follows:

§ 380.12 Enforcement of subsidiary and affiliate contracts by the FDIC as receiver of a covered financial company.

(a) *General.* (1) Contracts of subsidiaries or affiliates of a covered financial company that are linked to or supported by the covered financial company shall remain in full force and effect notwithstanding any specified financial condition clause contained in such contract and no counterparty shall be entitled to terminate, accelerate, liquidate or exercise any other remedy arising solely by reason of such specified financial condition clause. The Corporation as receiver for the covered financial company shall have the power to enforce such contracts according to their terms.

(2) Notwithstanding paragraph (a)(1) of this section, if the obligations under such contract are supported by the covered financial company then such contract shall be enforceable only if—

(i) Any such support together with all related assets and liabilities are transferred to and assumed by a qualified transferee not later than 5 p.m. (eastern time) on the business day following the date of appointment of the Corporation as receiver for the covered financial company; or

(ii) If and to the extent paragraph (a)(2)(i) of this section is not satisfied, the Corporation as receiver otherwise provides adequate protection to the counterparties to such contracts with respect to the covered financial company's support of the obligations or liabilities of the subsidiary or affiliate and provides notice consistent with the requirements of paragraph (d) of this section not later than 5 p.m. (eastern time) on the business day following the date of appointment of the Corporation as receiver.

(3) The Corporation as receiver of a subsidiary of a covered financial company (including a failed insured depository institution that is a subsidiary of a covered financial company) may enforce any contract that is enforceable by the Corporation as receiver for a covered financial company under paragraphs (a)(1) and (2) of this section.

(b) *Definitions.* For purposes of this part, the following terms shall have the meanings set forth below:

(1) A contract is ''*linked''* to a covered financial company if it contains a specified financial condition clause that specifies the covered financial company.

(2)(i) A ''*specified financial condition clause''* means any provision of any contract (whether expressly stated in the contract or incorporated by reference to any other contract, agreement or document) that permits a contract counterparty to terminate, accelerate, liquidate or exercise any other remedy under any contract to which the subsidiary or affiliate is a party or to obtain possession or exercise control over any property of the subsidiary or affiliate or affect any contractual rights of the subsidiary or affiliate directly or indirectly based upon or by reason of

(A) A change in the financial condition or the insolvency of a specified company that is a covered financial company;

(B) The appointment of the FDIC as receiver for the specified company or any actions incidental thereto including, without limitation, the filing of a petition seeking judicial action with respect to the appointment of the Corporation as receiver for the specified company or the issuance of recommendations or determinations of systemic risk;

(C) The exercise of rights or powers by the Corporation as receiver for the specified company, including, without limitation, the appointment of the Securities Investor Protection Corporation (SIPC) as trustee in the case of a specified company that is a covered broker-dealer and the exercise by SIPC of all of its rights and powers as trustee;

(D) The transfer of assets or liabilities to a bridge financial company or other qualified transferee;

(E) Any actions taken by the FDIC as receiver for the specified company to effectuate the liquidation of the specified company;

(F) Any actions taken by or on behalf of the bridge financial company to operate and terminate the bridge financial company including the dissolution, conversion, merger or termination of a bridge financial company or actions incidental or related thereto; or

(G) The transfer of assets or interests in a transferee bridge financial company or its successor in full or partial

satisfaction of creditors' claims against the covered financial company.

(ii) Without limiting the general language of paragraphs (b)(1) and (2) of this section, a specified financial condition clause includes a ''walkaway clause'' as defined in 12 U.S.C. 5390(c)(8)(F)(iii) or any regulations promulgated thereunder.

(3) The term ''*support*'' means undertaking any of the following for the purpose of supporting the contractual obligations of a subsidiary or affiliate of a covered financial company for the benefit of a counterparty to a linked contract—

(i) To guarantee, indemnify, undertake to make any loan or advance to or on behalf of the subsidiary or affiliate;

(ii) To undertake to make capital contributions to the subsidiary or affiliate; or

(iii) To be contractually obligated to provide any other financial assistance to the subsidiary or affiliate.

(4) The term ''*related assets and liabilities*'' means—

(i) Any assets of the covered financial company that directly serve as collateral for the covered financial company's support (including a perfected security interest therein or equivalent under applicable law);

(ii) Any rights of offset or setoff or netting arrangements that directly arise out of or directly relate to the covered financial company's support of the obligations or liabilities of its subsidiary or affiliate; and

(iii) Any liabilities of the covered financial company that directly arise out of or directly relate to its support of the obligations or liabilities of the subsidiary or affiliate.

(5) A ''*qualified transferee*'' means any bridge financial company or any third party (other than a third party for which a conservator, receiver, trustee in bankruptcy, or other legal custodian has been appointed, or which is otherwise the subject of a bankruptcy or insolvency proceeding).

(6) A ''*successor*'' of a bridge financial company means

(i) A company into which the bridge financial company is converted by way of incorporation under the laws of a State of the United States; or

(ii) The surviving company of a merger or consolidation of the bridge financial company with another company (whether before or after the conversion (if any) of the bridge financial company).

(c) *Adequate protection.* The Corporation as receiver for a covered financial company may provide adequate protection with respect to a covered financial company's support of the obligations and liabilities of a subsidiary or an affiliate pursuant to paragraph (a)(2)(ii) of this section by any of the following means:

(1) Making a cash payment or periodic cash payments to the counterparties of the contract to the extent that the failure to cause the assignment and assumption of the covered financial company's support and related assets and liabilities causes a loss to the counterparties;

(2) Providing to the counterparties a guaranty, issued by the Corporation as receiver for the covered financial company, of the obligations of the subsidiary or affiliate of the covered financial company under the contract; or

(3) Providing relief that will result in the realization by the counterparty of the indubitable equivalent of the covered financial company's support of such obligations or liabilities.

(d) *Notice of transfer of support or provision of adequate protection.* If the Corporation as receiver for a covered financial company transfers any support and related assets and liabilities of the covered financial company in accordance with paragraph (a)(2)(i) of this section or provides adequate protection in accordance with paragraph (a)(2)(ii) of this section, it shall promptly take steps to notify contract counterparties of such transfer or provision of adequate protection. Notice shall be given in a manner reasonably calculated to provide notification in a timely manner, including, but not limited to, notice posted on the Web site of the Corporation, the covered financial company or the subsidiary or affiliate, notice via electronic media, or notice by publication. Neither the failure to provide actual notice to any party nor the lack of actual knowledge on the part of any party shall affect the authority of the Corporation to enforce any contract or exercise any rights or powers under this section.

Dated at Washington, DC, this 9th day of October, 2012.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2012–25315 Filed 10–15–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0724; Directorate Identifier 2012–NM–043–AD; Amendment 39–17215; AD 2012–20–09]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

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

ACTION: Final rule.

SUMMARY: We are superseding an existing airworthiness directive (AD) for certain Bombardier, Inc. Model DHC–8–400 series airplanes. That AD currently requires a modification to trim the edge of the bumper plate, including performing an inspection for damage or cracks of the bumper plate and base fitting, and replacing any damaged or cracked part. That AD also currently requires, for certain airplanes, reidentifying the bumper plate. This new AD requires, for airplanes on which the reidentification is done, an operational check of the alternate extension system of the main landing gear (MLG), and repair if necessary. This AD was prompted by the determination that an operational check must be done after reidentifying the bumper plate to ensure the identified unsafe condition is addressed. We are issuing this AD to detect and correct failure of the MLG to extend and lock, which could adversely affect the safe landing of the airplane.

DATES: This AD becomes effective November 20, 2012.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of September 19, 2011 (76 FR 50403, August 15, 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: Cesar Gomez, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7318; 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 July 25, 2012 (77 FR 43545), and proposed to supersede AD 2011–17–04, Amendment 39–16768 (76 FR 50403, August 15, 2011). That NPRM proposed to correct an unsafe condition for the specified products. The Mandatory Continuing Airworthiness Information (MCAI) states:

> One in-service incident has been reported on [a] DHC–8 Series 400 aeroplane in which the right hand main landing gear (MLG) failed to extend using the alternate gear extension system. Investigation determined that the tread on the outboard tire was catching on the bumper plate located on the outboard MLG door that prevented the MLG door to open following an extension attempt via the alternate extension system. Failure of [the] MLG to extend and lock could adversely affect the safe landing of the aeroplane.
>
> To prevent the potential jam condition between the bumper plate and the MLG tires, Bombardier Aerospace has developed a modification to trim the edge of the bumper plate to eliminate the possibility of interference [Bombardier Modsum 4–113645].

The Modsum includes performing a detailed visual inspection for damage or cracks of the bumper plate and base fitting, and replacing any damaged or cracked part with a new part, if necessary. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM (77 FR 43545, July 25, 2012) 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.

Costs of Compliance

Based on the service information, we estimate that this AD affects about 65 products of U.S. registry.

The actions that are required by AD 2011–17–04, Amendment 39–16768 (76 FR 50403, August 15, 2011), and retained in this AD take about 8 work-hours per product, at an average labor rate of $85 per work hour. Required parts would cost about $479 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, the cost of the currently required actions is $1,159 per product.

We estimate that it takes about 1 work-hour per product to comply with the new basic requirements of this AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the AD on U.S. operators to be $5,525, or $85 per product.

We have received no definitive data that would enable us to provide a cost estimate for the on-condition actions specified in this AD.

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 that 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);

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.

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 (77 FR 43545, July 25, 2012), 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 airworthiness directive (AD) 2011–17–04, Amendment 39–16768 (76 FR 50403, August 15, 2011), and adding the following new AD:

2012–20–09 Bombardier: Amendment 39–17215. Docket No. FAA–2012–0724; Directorate Identifier 2012–NM–043–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective November 20, 2012.

(b) Affected ADs

This AD supersedes AD 2011–17–04, Amendment 39–16768 (76 FR 50403, August 15, 2011).

(c) Applicability

This AD applies to Bombardier, Inc. Model DHC–8–400, –401, and –402 airplanes, certificated in any category, having serial numbers 4001 through 4247 inclusive.

(d) Subject

(d) Air Transport Association (ATA) of America Code 32: Landing Gear.

(e) Reason

This AD was prompted by the determination that an operational check must be done after reidentifying the bumper plate to ensure the identified unsafe condition is

addressed. We are issuing this AD to detect and correct failure of the main landing gear (MLG) to extend and lock, which could adversely affect the safe landing of the airplane.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Retained Actions for All Airplanes

Within 2,000 flight hours after September 19, 2011 (the effective date of AD 2011–17–04, Amendment 39–16768 (76 FR 50403, August 15, 2011)): Incorporate Bombardier Modsum 4–113645, including performing a detailed visual inspection for damage or cracks of the bumper plate and base fitting and replacing any damaged or cracked part, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 84–32–74, Revision A, dated May 17, 2010. Do all applicable replacements before further flight.

Note 1 to paragraphs (g) and (h) of this AD: Bombardier Service Bulletin 84–32–74, Revision A, dated May 17, 2010, includes an operational check of the alternate extension system of the MLG. If the operational check fails, guidance on doing corrective actions can be found in the Bombardier Q400 Dash 8 Aircraft Maintenance Manual.

(h) Retained Actions for Airplanes Having Certain Bumper Plates

For airplanes on which a bumper plate having part number 85424082–101 or 85424082–103 is installed on which the rework specified in Bombardier Repair Drawing 8/4–54–553 has been done: Within 1,000 flight hours after September 19, 2011 (the effective date of AD 2011–17–04, Amendment 39–16768 (76 FR 50403, August 15, 2011)), reidentify the bumper plate, in accordance with paragraph 3.B., step (8) of the Accomplishment Instructions of Bombardier Service Bulletin 84–32–74, Revision A, dated May 17, 2010.

(i) Retained Credit for Previous Actions

This paragraph provides credit for the modification required by paragraph (h) of this AD by incorporation of Bombardier Modsum 4–113645 if the modification was performed before September 19, 2011 (the effective date of AD 2011–17–04, Amendment 39–16768 (76 FR 50403, August 15, 2011)), using Bombardier Service Bulletin 84–32–74, dated December 23, 2009 (which is not incorporated by reference in this AD); and provided the modification is done within the compliance time specified in paragraph (h) of this AD.

(j) New Requirements of This AD: Operational Check for Airplanes on Which the Action Required by Paragraph (h) of This AD Is Done

Concurrently with doing the actions required by paragraph (h) of this AD, or within 30 days after the effective date of this AD, whichever occurs later: Perform an operational check of the alternate extension system of the MLG, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 84–32–74, Revision A, dated May 17, 2010. If the operational check fails, before further flight, repair in accordance with a method approved by either the Manager, New York Aircraft Certification Office (ACO), FAA; or the Transport Canada Civil Aviation (TCCA) (or its delegated agent).

Note 2 to paragraph (j) of this AD: If the operational check fails, guidance on doing the repair can be found in the Bombardier Q400 Dash 8 Aircraft Maintenance Manual.

(k) New Credit for Previous Actions

This paragraph provides credit for actions required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD, provided the operational check specified in paragraph (j) of this AD is done within the compliance time specified in paragraph (g) of this AD, or within 30 days after the effective date of this AD, whichever occurs later, using Bombardier Service Bulletin 84–32–74, dated December 23, 2009 (which is not incorporated by reference in this AD).

(l) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, New York ACO, ANE–170, 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 New York ACO, send it 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.

(m) Related Information

(1) Refer to MCAI Canadian Airworthiness Directive CF–2010–23, dated July 21, 2010; and Bombardier Service Bulletin 84–32–74, Revision A, dated May 17, 2010; for related information.

(2) For service information identified in this AD, contact Bombardier, Inc., Q-Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone 416–375–4000; fax 416–375–4539; email *thd.qseries@aero.bombardier.com;* Internet *http://www.bombardier.com.*

(n) Material Incorporated by Reference

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

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(3) The following service information was approved for IBR on September 19, 2011 (76 FR 50403, August 15, 2011).

(i) Bombardier Service Bulletin 84–32–74, Revision A, dated May 17, 2010.

(ii) Reserved.

(4) For service information identified in this AD, contact Bombardier, Inc., Q-Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone 416–375–4000; fax 416–375–4539; email *thd.qseries@aero.bombardier.com;* Internet *http://www.bombardier.com.*

(5) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(6) You may view this 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/cfr/ibr-locations.html.*

Issued in Renton, Washington, on October 4, 2012.

Dionne Palermo,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–25109 Filed 10–15–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 121

[Docket No. FAA–2012–0928; Amdt. No. 121–361]

RIN 2120–AK18

Use of Additional Portable Oxygen Concentrators on Board Aircraft

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the FAA's rules for permitting limited use of portable oxygen concentrator systems on board aircraft, to allow for the use of additional portable oxygen concentrator (POC) devices on board aircraft, provided certain conditions in the SFAR are met. This action is necessary to allow all POC devices deemed acceptable by the FAA for use in air commerce to be available to the

traveling public in need of oxygen therapy. Passengers will be able to carry these devices on board the aircraft and use them with the approval of the aircraft operator.

DATES: Effective October 31, 2012.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this action, contact DK Deaderick, Air Transportation Division, AFS–200, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone 202–167–8166; email *DK.Deaderick@faa.gov*.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA is authorized to issue this final rule pursuant to 49 U.S.C. 44701. Under that section, the FAA is authorized to establish regulations and minimum standards for other practices, methods, and procedures the Administrator finds necessary for air commerce and national security.

Background

On July 12, 2005, the FAA published Special Federal Aviation Regulation 106 (SFAR 106) entitled, ''Use of Certain Portable Oxygen Concentrator Devices Onboard Aircraft'' (70 FR 40156). SFAR 106 is the result of a notice the FAA published in July 2004 (69 FR 42324) to address the needs of passengers who must travel with medical oxygen. Before publication of SFAR 106, passengers in need of medical oxygen during air transportation faced many obstacles when requesting service. Many aircraft operators did not provide medical oxygen service aboard flights, and those that did often provided service at a price that travelers could not afford. Coordinating service between operators and suppliers at airports was also difficult, and passengers frequently chose not to fly because of these difficulties.

Medical oxygen technologies approved by the Food and Drug Administration (FDA) reduce the risks typically associated with compressed oxygen and provide a safe alternative for passengers who need oxygen therapy. Numerous manufacturers have developed small portable oxygen concentrators (POC) that work by separating oxygen from nitrogen and other gases contained in ambient air and dispensing it in concentrated form to the user with an oxygen concentration of about 90%. The POCs operate using either rechargeable batteries or, if the aircraft operator obtains approval from the FAA, aircraft electrical power.

In addition, the Pipeline and Hazardous Materials Safety Administration (PHMSA) has determined that the POCs covered by this amendment are not hazardous material. Thus, they do not require the same level of special handling as compressed oxygen, and are safe for use on board aircraft, provided certain conditions for their use are met.

SFAR 106 permits passengers to carry on and use certain POCs on board aircraft if the aircraft operator ensures that the conditions specified in the SFAR for their use are met. The devices initially determined acceptable for use in SFAR 106, published July 12, 2005, were AirSep Corporation's LifeStyle and Inogen, Inc.'s Inogen One POCs. SFAR 106 has been amended several times to allow passengers to use additional devices. This final rule adds additional POC devices, including AirSep Corporation's Focus, AirSep FreeStyle 5, Inogen One G3, Inova Labs, Inc.'s LifeChoice Activox, Phillips Respironics Simply Go, Precision Medical Inc.'s EasyPulse and SeQual Technologies, Inc.'s SAROS that may be carried on and used by a passenger on board an aircraft.

In addition, on January 27, 2012 (77 FR 4219), the FAA published a Technical Amendment to update the names of two approved POC manufacturers due to business changes. The LifeChoice POC is currently being manufactured by Inova Labs, Inc. and the RS–00400 POC is currently being manufactured by Oxus, Inc. In the technical amendment, the FAA inadvertently removed the previous manufacturer's names from the list of approved POCs in SFAR 106. People still have POCs marked with those manufacturer's names. In this final rule, the FAA will add those previous manufacturer's names (International Biophysics Corporation's LifeChoice and Delphi Medical Systems' RS–00400) back to the list of approved POCs in SFAR 106.

Aircraft operators can meet certain conditions and allow passengers to carry on and use one of the POC devices covered in SFAR 106. SFAR 106 is an enabling rule, which means that no aircraft operator is required to allow passengers to operate these POC devices on board its aircraft, but it may allow them to be operated on board. If one of these devices is allowed by the aircraft operator to be operated on board, the conditions in the SFAR must be met.

When SFAR 106 was published, the FAA committed to establishing a single performance standard for all POCs so the regulations wouldn't apply to specific manufacturers and models of device. Whenever possible, the FAA tries to regulate by creating performance-based standards rather than approving by manufacturer. In the case of SFAR 106, the most efficient way to serve both the passenger and the aircraft operator was to allow the use of the devices determined to be acceptable by the FAA in SFAR 106 in a special, temporary regulation. As the FAA stated in the preamble discussion of the final rule that established SFAR 106, ''while we are committed to developing a performance-based standard for all future POC devices, we do not want to prematurely develop standards that have the effect of stifling new technology of which we are unaware.'' The FAA developed and published SFAR 106 so passengers who otherwise could not fly could do so with an affordable alternative to what existed before SFAR 106 was published.

The FAA continues to pursue the performance-based standard for all POCs. This process is time-consuming, and the FAA intends to publish a notice in the **Federal Register** and offer the public a chance to comment on the proposal when it is complete. In the meantime, manufacturers continue to create new and better POCs, and manufacturers have requested that their product also be included as an acceptable POC in SFAR 106. Precision Medical, Inc., Inogen, Inc. and AirSep Corporation have formally submitted petitions for exemption to the FAA that would allow their POCs to be used on aircraft. In addition, SeQual Technologies, Inc., Inova Labs, Inc., and Phillips Respironics have submitted requests for approval and addition to SFAR 106, with all required documentation for their POCs, to the Department of Transportation's Docket Management System.

Additionally, as stated in Section 2 of SFAR 106, no covered device may contain hazardous materials as determined by PHMSA (written documentation necessary), and each device must also be regulated by the FDA. All manufacturers have included technical specifications for their devices in each request for approval, as well as the required documentation from PHMSA and the FDA.

The Rule

This amendment to SFAR 106 will include the AirSep Focus, AirSep FreeStyle 5, Inogen One G3, Inova Labs LifeChoice Activox, Respironics Simply Go, Precision Medical EasyPulse and SeQual SAROS devices in the list of POC devices authorized for use in air commerce. The FAA has reviewed these devices and accepted the

documentation provided by the manufacturers. That documentation includes letters provided to the manufacturer by PHMSA and the FDA affirming the status of the device as it applies to the requirements stated in SFAR 106. After reviewing the applicable FDA safety standards and the PHMSA findings, the device was determined by the FAA to be acceptable for use in air commerce.

Additionally, in the January 27, 2012 technical amendment to SFAR 106, while updating manufacturer's names due to business changes, the FAA inadvertently removed the previous manufacturer's names from the list of approved POCs. Even though these POCs are manufactured under new manufacturer's names, people still have POCs marked with the previous manufacturer's names. In this final rule, the FAA will add those previous manufacturer's names (International Biophysics Corporation's LifeChoice and Delphi Medical Systems' RS–00400) back to the list of approved POCs in SFAR 106.

Waiver of Notice of Proposed Rulemaking and Delay in Effective Date

Section 553 of the Administrative Procedure Act, 5 U.S.C 553(b)(3)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. We have determined that there is good cause for making the rule final without prior proposal and opportunity for comment because the issues related to the use of POC devices on board aircraft have already been discussed as part of an earlier rulemaking. More specifically, on July 14, 2004, the FAA issued a notice of proposed rulemaking on the use of portable oxygen concentrator devices on board aircraft (69 FR 42324). Then, on July 12, 2005, after reviewing public comments received, the FAA published Special Federal Aviation Regulation 106 (SFAR 106) entitled, ''Use of Certain Portable Oxygen Concentrator Devices on Board Aircraft.'' (70 FR 40156) Therefore, it is unnecessary and contrary to the public interest to publish a notice requesting comments on this amendment.

Moreover, pursuant to 5 U.S.C.553(d)(3), we find that good cause exists for making this rule effective in less than 30 days. This rule is being made effective 15 calendar days after its publication in the **Federal Register** to prevent unnecessary delay in acceptance of these devices as authorized for use on board aircraft by airlines while still providing airlines adequate notice and time to ensure the devices can be used safely on board aircraft. We believe, based on information the Department has received from airlines, that fifteen calendar days is sufficient amount of time for an airline to ensure/confirm that an FAA-approved POC does not cause interference with avionics system on that carrier's aircraft and convey this information to the appropriate airline personnel in order to accept these devices on board aircraft for use by passengers who need oxygen therapy for air travel. As such, the FAA believes that good cause exists for making this rule effective 15 calendar days after its publication in the **Federal Register**.

Regulatory Notices and Analyses

Regulatory Evaluation

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 and Executive Order 13563 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this final rule.

Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits that a statement to that effect and the basis for it be included in the preamble if a full regulatory evaluation of the cost and benefits is not prepared. Such a determination has been made for this final rule. The reasoning for this determination follows:

This action amends SFAR 106 to allow for the use of additional POC devices on board aircraft, provided certain conditions in the SFAR are met. This action is necessary to allow additional POC devices deemed acceptable by the FAA to be available to the traveling public in need of oxygen therapy, for use in air commerce. When this rule becomes effective, there will many different POC devices the FAA finds acceptable for use on board aircraft, and passengers will be able to carry these devices on board the aircraft and use them with the approval of the aircraft operator. As the rule increases the number of acceptable POC devices on board aircraft, the rule does not increase costs and provides additional benefits. The FAA has, therefore, determined that this final rule is not a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, and is not ''significant'' as defined in DOT's Regulatory Policies and Procedures.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to ''solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.'' The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the

factual basis for this determination, and the reasoning should be clear.

This final rule adds additional POC devices to the list of authorized POC devices in SFAR 106. This economic impact is minimal. Therefore, as the Acting FAA Administrator, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $143.1 million in lieu of $100 million. This final rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

Paperwork Reduction

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number.

Information collection requirements associated with this final rule have been approved previously by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) and have been assigned OMB Control Number 2120–0702. This final rule requires that if a passenger carries a POC device on board the aircraft with the intent to use it during the flight, he or she must inform the pilot in command of that flight. Additionally, the passenger who plans to use the device must provide a written statement signed by a licensed physician that verifies the passenger's ability to operate the device, respond to any alarms, the extent to which the passenger must use the POC (all or a portion of the flight), and prescribes the maximum oxygen flow rate. The Paperwork Reduction Act paragraph in the final rule that established SFAR 106 still applies to this amendment. The availability of a new POC device will likely increase the availability and options for a passenger in need of oxygen therapy, but the paperwork burden discussed in the original final rule is unchanged. Therefore, the OMB Control Number associated with this collection remains 2120–0702.

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.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to these regulations.

International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this final] rule and determined that it will have only a domestic impact and therefore will not create unnecessary obstacles to the foreign commerce of the United States.

Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 312f and involves no extraordinary circumstances.

Executive Order Determinations

Executive Order 13132, Federalism

The FAA has analyzed this immediately adopted final rule under the principles and criteria of Executive Order 13132, Federalism. The agency determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have Federalism implications.

Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this immediately adopted final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The agency has determined that it is not a ''significant energy action'' under the executive order and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

How To Obtain Additional Information

Rulemaking Documents

An electronic copy of a rulemaking document my be obtained by using the Internet—

1. Search the Federal eRulemaking Portal (*http://www.regulations.gov*);
2. Visit the FAA's Regulations and Policies Web page at *http://www.faa.gov/regulations_policies/or*
3. Access the Government Printing Office's Web page at *http://www.gpo.gov/fdsys/*.

Copies may also be obtained by sending a request (identified by notice, amendment, or docket number of this rulemaking) to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document, may contact its local FAA official, or the person listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. To find out more about SBREFA on the Internet, visit *http://*

www.faa.gov/regulations_policies/rulemaking/sbre_act/.

List of Subjects in 14 CFR Part 121

Air carriers, Aircraft, Airmen, Reporting and recordkeeping requirements.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends SFAR No. 106 to Chapter I of title 14, Code of Federal Regulations as follows:

PART 121—OPERATING REQUIREMENTS: DOMESTIC, FLAG, AND SUPPLEMENTAL OPERATIONS

■ 1. The authority citation for part 121 continues to read as follows:

Authority: 49 U.S.C. 106(g), 1153, 40101, 40102, 40103, 40113, 41721, 44105, 44106, 44111, 44701–44717, 44722, 44901, 44903, 44904, 44906, 44912, 44914, 44936, 44938, 46103, 46105.

■ 2. Amend SFAR 106 by revising sections 2 and 3(a) introductory text to read as follows:

Special Federal Aviation Regulation 106—Rules for Use of Portable Oxygen Concentrator Systems on Board Aircraft

* * * * *

Section 2. *Definitions*—For the purposes of this SFAR the following definitions apply: Portable Oxygen Concentrator: means the AirSep FreeStyle, AirSep LifeStyle, AirSep Focus, AirSep FreeStyle 5, Delphi RS–00400, DeVilbiss Healthcare iGo, Inogen One, Inogen One G2, Inogen One G3, Inova Labs LifeChoice, Inova Labs LifeChoice Activox, International Biophysics LifeChoice, Invacare XPO2, Invacare Solo2, Oxlife Independence Oxygen Concentrator, Oxus RS–00400, Precision Medical EasyPulse, Respironics EverGo, Respironics SimplyGo, SeQual Eclipse and SeQual SAROS Portable Oxygen Concentrator medical device units as long as those medical device units: (1) Do not contain hazardous materials as determined by the Pipeline and Hazardous Materials Safety Administration; (2) are also regulated by the Food and Drug Administration; and (3) assist a user of medical oxygen under a doctor's care. These units perform by separating oxygen from nitrogen and other gases contained in ambient air and dispensing it in concentrated form to the user.

Section 3. Operating Requirements—

(a) No person may use and no aircraft operator may allow the use of any portable oxygen concentrator device, except the AirSep FreeStyle, AirSep LifeStyle, AirSep Focus, AirSep FreeStyle 5, Delphi RS–00400, DeVilbiss Healthcare iGo, Inogen One, Inogen One G2, Inogen One G3, Inova Labs LifeChoice, Inova Labs LifeChoice Activox, International Biophysics LifeChoice, Invacare XPO2, Invacare Solo2, Oxlife Independence Oxygen Concentrator, Oxus RS–00400, Precision Medical EasyPulse, Respironics EverGo, Respironics SimplyGo, SeQual Eclipse and SeQual SAROS Portable Oxygen Concentrator units. These units may be carried on and used by a passenger on board an aircraft provided the aircraft operator ensures that the following conditions are satisfied:

* * * * *

Issued in Washington, DC, on October 2, 2012.

Michael P. Huerta,

Acting Administrator.

[FR Doc. 2012–25412 Filed 10–15–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 440

Waiver of Requirement To Enter Into a Reciprocal Waiver of Claims Agreement With All Customers

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of waiver.

SUMMARY: This notice concerns a petition for waiver submitted to the FAA by Space Exploration Technologies Corp. (SpaceX) to waive in part the requirement that a launch operator enter into a reciprocal waiver of claims with each customer. The FAA grants the petition.

DATES: October 16, 2012.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this waiver, contact Charles P. Brinkman, Licensing Program Lead, Commercial Space Transportation—Licensing and Evaluation Division, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–7715; email: *Phil.Brinkman@faa.gov.* For legal questions concerning this waiver, contact Laura Montgomery, Senior Attorney for Commercial Space Transportation, AGC–200, Office of the Chief Counsel, International, Legislation and Regulations Division, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–3150; email: *Laura.Montgomery@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

On September 20, 2012, SpaceX submitted a petition to the Federal Aviation Administration's (FAA's) Office of Commercial Space Transportation (AST) requesting a waiver under its launch license, for flight of a Falcon 9 launch vehicle carrying a Dragon reentry vehicle, and the related reentry license, for reentry of the Dragon. SpaceX requested a partial waiver of 14 CFR 440.17, which requires a licensee to enter into a reciprocal waiver of claims (a ''cross-waiver'') with each of its customers.

The FAA licenses the launch of a launch vehicle and reentry of a reentry vehicle under authority granted to the Secretary of Transportation by the Commercial Space Launch Act of 1984, as amended and re-codified by 51 U.S.C. Subtitle V, chapter 509 (Chapter 509), and delegated to the FAA Administrator and the Associate Administrator for Commercial Space Transportation, who exercises licensing authority under Chapter 509.

The petition for waiver applies to SpaceX's October launch of a Falcon 9 launch vehicle and Dragon reentry vehicle to the International Space Station (ISS) and return of the Dragon from the ISS to Earth. The Dragon spacecraft will carry cargo for NASA to resupply the ISS and return with cargo from the ISS. The Falcon 9 will also carry a commercial satellite for ORBCOMM, Inc. as a secondary payload, and has signed cross-waivers covering that payload. The cross-waiver among SpaceX, ORBCOMM and the FAA is amended to provide that ORBCOMM waives claims against any other customer as defined by 14 CFR 440.3. The petition for partial waiver of the requirement that the licensee implement a cross-waiver with each customer applies to all launches and reentries under SpaceX's current licenses with respect only to the customers that are the subject of this waiver.

In addition to the ISS supplies and ORBCOMM satellite, SpaceX will carry other payloads whose transport NASA has arranged. These consist of a NanoRacks, LLC, (NanoRacks) locker insert and student experiments created under NASA's Student Spaceflight Experiments Program (SSEP). NASA describes SSEP as a national science, technology, engineering and

mathematics education initiative.[1] According to its Space Act Agreement with NASA,[2] NanoRacks arranges to carry the student experiments on a locker insert to put into an experimental locker on board the ISS. The Space Act Agreement provides that NASA will provide on-orbit resources and limited launch opportunities to NanoRacks for the launch of its insert and the experiments the insert carries. SpaceX advises by amendment dated October 3, 2012, to its petition for waiver that, to the best of its knowledge, no NanoRacks employees will be present at the launch site during flight.

NanoRacks and each student who places a payload on board the NanoRacks insert qualify as customers under the FAA's definitions. Section 440.3 defines a customer, in relevant part, as any person with rights in the payload or any part of the payload, or any person who has placed property on board the payload for launch, reentry, or payload services. A person is an individual or an entity organized or existing under the laws of a State or country. 51 U.S.C. 50901(12), 14 CFR 401.5. The subjects of this waiver are persons because the students are individuals and NanoRacks is an entity, a limited liability corporation. Accordingly, because NanoRacks and the students are persons who have rights in their respective payloads, the locker insert and the experiments, due to their ownership of those objects, and because they have placed property on board, they are customers. Section 440.17 requires their signatures as customers.

In this instance, however, NanoRacks and the students are also subject to a NASA reciprocal waivers of claims, a cross-waiver, which is governed by NASA's regulations at 14 CFR part 1266. Article 8 of the Space Act Agreement between NASA and NanoRacks governs liability and risk of loss and establishes a cross-waiver of liability.

Waiver Criteria

Chapter 509 allows the FAA to waive a license requirement if the waiver (1) will not jeopardize public health and safety, safety of property; (2) will not jeopardize national security and foreign policy interests of the United States; and (3) will be in the public interest. 51 U.S.C. 50905(b)(3) (2011); 14 CFR 404.5(b)(2012).

Waiver of FAA Requirement for Each Customer To Sign a Reciprocal Waivers of Claims

The FAA waives the 14 CFR 440.17, which requires a licensee to enter into a reciprocal waiver of claims with each of its customers, with respect to NanoRacks and the SSEP participants.

In 1988, as part of a comprehensive financial responsibility and risk sharing regime that protects launch participants and the U.S. Government from the risks of catastrophic loss and litigation, Congress required that all launch participants agree to waive claims against each other for their own property damage or loss, and to cover losses experienced by their own employees. 51 U.S.C. 50915(b). This part of the regime was intended to relieve launch participants of the burden of obtaining property insurance by having each party be responsible for the loss of its own property and to limit the universe of claims that might arise as a result of a launch. *Commercial Space Launch Act Amendments of 1988,* H.R. 4399, H. Rep. 639, 11–12, 100th Cong., 2d Sess. (May 19, 1988); *Commercial Space Launch Act Amendments of 1988,* H.R. 4399, S. Rep. 593, 14, 100th Cong., 2d Sess. (Oct. 6, 1988); *Financial Responsibility Requirements for Licensed Launch Activities, Notice of Proposed Rulemaking,* 61 FR 38992, 39011 (Jul. 25, 1996). The FAA's implementing regulations may be found at 14 CFR part 440.

In its request for a waiver, SpaceX maintains that the NASA requirements imposed on NanoRacks and the SSEP participants are equivalent to the requirements imposed on each customer under the FAA's requirements of 14 CFR part 440. A comparison of the two regimes shows that in this particular situation the two sets of cross-waivers are sufficiently similar that the statutory goals of 51 U.S.C. 50914(b) will be met by the FAA agreeing to accept the NASA cross-waivers in this instance.

The FAA cross-waivers require the launch participants, including the U.S. Government and each customer, and their respective contractors and subcontractors, to waive and release claims against all the other parties to the waiver and agree to assume financial responsibility for property damage sustained by that party and for bodily injury or property damage sustained by the party's own employees, and to hold harmless and indemnify each other from bodily injury or property damage sustained by their respective employees resulting from the licensed activity, regardless of fault. 14 CFR 440.17(b) and (c). Each party[3] to the cross-waiver must indemnify the other parties from claims by the indemnifying party's contractors and subcontractors if the indemnifying party fails to properly extend the requirements of the cross-waivers to its contractors and subcontractors. 14 CFR 440.17(d). A comparison of each element shows that, although there are some differences, because the NASA cross-waiver signed by NanoRacks is consistent with Congressional intent and the FAA's regulations, and because relevant employees will not be present at the launch site, NanoRacks and the SSEP participants need not sign a cross-waiver under 14 CFR part 440.

Both the FAA's cross-waivers and NASA's agreement with NanoRacks apply to damages resulting from an FAA licensed activity, regardless of fault. 14 CFR 440.17(b); NanoRacks Agreement, Art. 8, par. 3(a) and 2(e). An FAA license applies, in relevant part, to launch and reentry. 51 USC 50904(a)(1); 14 CFR 440.3. The FAA's definition of launch also includes pre- and post-flight ground operations at a launch site in the United States. 51 U.S.C. 50902; 14 CFR 401.5. The NanoRacks Agreement applies under Article 8, paragraph 3(a) to damages arising out of ''protected space operations,'' which paragraph 2(e) defines to include all launch or transfer vehicle[4] activities on Earth, in outer space or in transit between Earth and outer space. Because protected space operations encompass development, test, manufacture, assembly, integration, operation and use of launch and transfer vehicles the meaning of protected space operations is broad enough to encompass launch, reentry, and pre- and post-flight ground operations.

Under the FAA cross-waivers and the NanoRacks Agreement, covered claims include those for property damage or bodily injury sustained by any party. The NanoRacks Agreement defines damage to mean both damage to, loss, or loss of the use of any property; and bodily injury to, including the impairment of health of, or death of, any person. NanoRacks Agreement Art. 8, par. 2a. The FAA defines ''property damage'' to mean partial or total destruction, impairment, or loss of tangible property, real or personal. 14

[1] *Space Station—Here we Come!* NASA Press Release: *http://www.nasa.gov/audience/foreducators/station-here-we-come.html* (last visited September 25, 2012).

[2] Nonreimbursable Space Act Agreement Between NANORACKS, LLC and NASA for Operation of the NANORACKS System Aboard the International Space Station National Laboratory, (Sept. 4 and 9 2009) (NanoRacks Agreement), 387938main_SAA_SOMD_6355_Nanoracks_ISS_National_Lab.pdf.

[3] Indemnification by the U.S. Government is conditioned upon the passage of legislation. 51 U.S.C. 50915; 14 CFR 440.17(d).

[4] The definition of a transfer vehicle encompasses SpaceX's Dragon reentry vehicle. NanoRacks Agreement, Art. 8, par. 2(g) (a vehicle that operates in space and transfers payloads or persons between a space object and the surface of a celestial body).

CFR 440.3. The FAA defines ''bodily injury'' to mean physical injury, sickness, disease, disability, shock, mental anguish, or mental injury sustained by any person, including death. 14 CFR 440.3. To the extent that the NanoRacks Agreement does not, at first look, appear to address mental injuries, the FAA notes that, generally, the courts have tied mental anguish to physical injuries. An injury to the mind, acquired as a form of bodily injury should be barred by the cross-waivers.

The persons to whom both cross-waivers apply are the same for the FAA's purposes.[5] The FAA requires its licensee, each customer of the licensee, and each of their respective contractors and subcontractors to waive claims, and to agree to be responsible for their own property damage and for the bodily injury or property damage sustained by their own employees. 14 CFR 440.17(a).[6] The parties agree to waive claims against, among others, the other party, each ''related entity'' of the other party, and the respective employees of each of them. NanoRacks Agreement Art. 8, par. 3(a)(i)–(iv). Under paragraph 2(f) of the NanoRacks Agreement, a ''related entity'' means a contractor or subcontractor of another party to the waiver at any tier or a user or customer of a party at any tier. The terms ''contractor'' and ''subcontractor'' include suppliers of any kind. Because a related entity includes a customer or user at any tier, NanoRacks, as a customer of NASA and each SSEP participant with an experiment on NanoRack's manifest is a related entity.

Both the FAA cross-waivers and the NanoRacks Agreement require the parties to extend the requirements of the cross-waivers to certain related entities, which extension is frequently referred to as a ''flow-down'' of the cross-waiver requirements. Under the FAA's requirements, each customer must extend the cross-waiver requirements to its contractors and subcontractors by requiring them to waive and release all claims they may have against the licensee, each other customer, and the United States, and against the respective contractors and subcontractors of each. Waiver of Claims and Assumption of Responsibility for Licensed Launch, including Suborbital Launch, With More than One Customer, 14 CFR part 440, appendix B, part 1, subpart B (FAA Cross-Waiver), par. 4(b). Likewise, NanoRacks must extend the requirements of the cross-waiver it has signed with NASA to its related entities, including its users or customers, the SSEP students. This means that, just as with the FAA cross-waivers, NanoRacks and the owners of the experiments on its locker insert, have waived the requisite claims.

Although the two schemes appear to diverge with regards to indemnification for any failure by a party to extend the cross-waiver requirements to its contractors and subcontractors, the legal effect of the different cross-waivers remains the same. The FAA cross-waiver expressly requires indemnification[7] for the consequences of a party's failure to ''flow-down'' the requirements. FAA Cross-Waiver at par. 5(b) (customer indemnification for claims brought by its contractors and subcontractors). SpaceX notes that, because of the obligations each party accepts under the different cross-waivers, a failure to extend the requirements to related entities still results in a duty to indemnify the other parties for the failure, even where the duty is not express. State courts have long recognized that where a special relationship between parties exists, even where there is no express promise to indemnify, a duty to indemnify may arise. This has been true for indemnification of claims brought by employees. *See, e.g., Howard Univ.* v. *Good Food Svcs., Inc.,* 608 A.2d 116, 1124 (DC 1992) (special relationship may be found where there is an on-going contractual relationship); *Rucker Co.* v. *M&P Drilling Co.,* 653 P2.2d 1239, 1242 (Okl. 1982) (where intention of parties to a contract is clear that one party shall not be liable for damages, labeling the relationship as exculpatory or indemnitory is irrelevant and the results are the same). *See also* 100 ALR 3d 350.

Analogous cases may apply to indemnification for claims brought by a contractor or subcontractor of someone who failed to extend the cross-waiver requirements. *See, e.g., Jinwoong, Inc.* v. *Jinwoong, Inc.,* 310 F.3d 962, 965 (7th Cir. 2002) (even where parties fail to include an indemnity provision by contract, one may be implied unless disclaimed). *Jinwoong's* discussion of the issue is illuminating. The Seventh Circuit noted that contract completion is a standard function of common law courts, and gives the parties what, if they were omniscient, they would have provided regarding all contingencies that might arise under a contract. 310 F.3d at 965. Thus, when the NanoRacks Agreement requires all parties to extend the waivers of claims to each of their related entities, the FAA may reasonably rely on the implicit presence of an agreement to indemnify. The FAA's reliance is further bolstered by Article 8, paragraph (3)(d)(v), of the NanoRack Agreement, which states that the cross-waiver does not apply to claims for damage arising out of a party's failure to extend the cross-waiver to its related entities. The cross-waiver itself contemplates recourse. Additionally, for those situations where courts find necessary the existence of a special relationship before finding a duty to indemnify, a special relation exists here by virtue of the agreement between NanoRacks and NASA.

The FAA notes that its cross-waivers, in addition to requiring waivers of claims and indemnification, also require the parties to assume responsibility for their own losses. The intent of the NASA cross-waivers suggests this is unnecessary. NASA itself has noted its own long and consistent responsibility of requiring the parties to its cross-waiver to waive claims for loss or damage and, thus, in NASA's own words, ''assume responsibility for the risks inherent in space exploration.'' *Cross-Waiver of Liability, Notice of Proposed Rulemaking,* 71 FR 62061 (Oct. 23, 2006). In the context of a customer assuming responsibility for its own property loss, the NASA explanation may suffice. However, in its implementing regulations, the FAA made it clear that it considers a party's assumption of responsibility a separate element of the cross-waiver. *Financial Responsibility Requirements for Licensed Launch Activities, Final Rule,* 63 FR 45592, 45601–06 (Aug. 26, 1998).

For this waiver, the FAA analyzed the significance of the assumption of responsibility in two parts. The FAA determined that it may rely on the

[5] The NanoRacks Agreement applies to more persons than the FAA requires. That difference poses no issues.

[6] Although the NanoRacks Agreement does not address assumption of responsibility for harm to employees like the FAA cross-waiver does, that issue is discussed below.

[7] To be precise, section 5 of the FAA cross-waiver requires parties to hold harmless and indemnify each other. The phrase is a unitary phrase that means nothing more than ''indemnify'' alone. Indemnify generally means ''[t]o reimburse (another) for a loss suffered because of a third party's or one's own act or default.'' *Black's Law Dictionary* (9th ed. 2009). ''The terms 'hold-harmless clause' and 'indemnity clause' often refer to the same thing-an agreement under which 'one party agrees to answer for any * * * *liability* or *harm* that the other party might incur.' *Black's Law Dictionary* 784 (8th ed. 2004) (defining ''indemnity clause,'' noting that the clause is ''[a]lso termed *hold-harmless clause; save-harmless clause* '' (emphasis in original)).'' *Long Beach Area Peace Network* v. *City of Long Beach,* 574 F.3d 1011, 1039 (Cal. 2009). Hold harmless is defined as ''[t]o absolve (another party) from any responsibility for damage or other liability arising from the transaction; indemnify.'' *Black's Law Dictionary* (9th ed. 2009); *see also Kevin Gros Marine, Inc.* v. *Quality Diesel Service, Inc.,* No. 11–2340, slip op. at 5 (E.D.La. May 30, 2012).

indemnification implicit in the NanoRacks cross-waiver, as discussed above, for claims for property damage, because the parties expressly waive claims for property damage. It is a different matter with respect to employees. The parties may not waive claims on behalf of their employees. Additionally, here, the NanoRacks cross-waiver does not address employee claims in the first instance. This does not interfere with the FAA's ability to grant SpaceX's request for a waiver with respect to the student customers because they presumably do not have employees. However, NanoRacks itself does have employees. If any of them were to be at risk at the launch site, the FAA might not have been able to grant SpaceX's request for a waiver with respect to NanoRacks itself. SpaceX recently advised the FAA, however, that it was its understanding that no NanoRacks employees would be present at the launch site during the flight.

The final issue the FAA must consider is that NASA's regulations provide that the NASA cross-waiver is not applicable when 51 U.S.C. Subtitle V, Chapter 509 is applicable.[8] 14 CFR 1266.102(c)(6). At first glance, this might create the impression that the NanoRacks cross-waiver does not apply when a launch or reentry is conducted under FAA license. However, by waiving the requirement that all customers sign, the FAA is not applying the specific requirements of Chapter 509 to NanoRacks and each SSEP participant. Accordingly, the NanoRacks agreement should retain legal effect.

This waiver implicates no safety, national security or foreign policy issues. The waiver is consistent with the public interest goals of Chapter 509. Under 51 U.S.C. 50914, Congress determined that it was necessary to reduce the costs associated with insurance and litigation by requiring launch participants, including customers, to waive claims against each other. Because the NanoRacks Agreement under 14 CFR part 1266 accomplishes these goals by the same or similar means, the FAA finds this request in the public interest, and grants the waiver with respect to NanoRacks and the SSEP participants in reliance on the representations SpaceX made in its petition and subsequent communications.

Issued in Washington, DC, on October 5, 2012.

Kenneth Wong,

Manager, Licensing and Evaluation Division, Office of Commercial Space Transportation, Federal Aviation Administration.

[FR Doc. 2012–25419 Filed 10–15–12; 8:45 am]

BILLING CODE 4910–13–P

[8] The provision was not incorporated into the NanoRacks Agreement.

DEPARTMENT OF DEFENSE

Department of the Navy

32 CFR Part 706

Certifications and Exemptions Under the International Regulations for Preventing Collisions at Sea, 1972

AGENCY: Department of the Navy, DoD.

ACTION: Final rule.

SUMMARY: The Department of the Navy (DoN) is amending its certifications and exemptions under the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), to reflect that the Deputy Assistant Judge Advocate General (DAJAG) (Admiralty and Maritime Law) has determined that USS PELELIU (LHA 5) is a vessel of the Navy which, due to its special construction and purpose, cannot fully comply with certain provisions of the 72 COLREGS without interfering with its special function as a naval ship. The intended effect of this rule is to warn mariners in waters where 72 COLREGS apply.

DATES: This rule is effective October 16, 2012 and is applicable beginning October 3, 2012.

FOR FURTHER INFORMATION CONTACT: Lieutenant Jocelyn Loftus-Williams, JAGC, U.S. Navy, Admiralty Attorney, (Admiralty and Maritime Law), Office of the Judge Advocate General, Department of the Navy, 1322 Patterson Ave. SE., Suite 3000, Washington Navy Yard, DC 20374–5066, telephone 202–685–5040.

SUPPLEMENTARY INFORMATION: Pursuant to the authority granted in 33 U.S.C. 1605, the DoN amends 32 CFR Part 706.

This amendment provides notice that the DAJAG (Admiralty and Maritime Law), under authority delegated by the Secretary of the Navy, has certified that USS PELELIU (LHA 5) is a vessel of the Navy which, due to its special construction and purpose, cannot fully comply with the following specific provisions of 72 COLREGS without interfering with its special function as a naval ship: Annex I, paragraph 3(a) pertaining to the horizontal distance between the forward and aft masthead lights; Rule 21(a) pertaining to placement of masthead lights over the fore and aft centerline of the vessel; Annex I, paragraph 2(g) pertaining to the placement of sidelights above the hull of the vessel; Annex I, paragraph 2(i)(iii) pertaining to the vertical position and spacing of task lights. The DAJAG (Admiralty and Maritime Law) has also certified that the lights involved are located in closest possible compliance with the applicable 72 COLREGS requirements.

Moreover, it has been determined, in accordance with 32 CFR Parts 296 and 701, that publication of this amendment for public comment prior to adoption is impracticable, unnecessary, and contrary to public interest since it is based on technical findings that the placement of lights on this vessel in a manner differently from that prescribed herein will adversely affect the vessel's ability to perform its military functions.

List of Subjects in 32 CFR Part 706

Marine safety, Navigation (water), and Vessels.

For the reasons set forth in the preamble, amend part 706 of title 32 of the CFR as follows:

PART 706—CERTIFICATIONS AND EXEMPTIONS UNDER THE INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA, 1972

■ 1. The authority citation for part 706 continues to read as follows:

Authority: 33 U.S.C. 1605.

■ 2. Section 706.2 is amended as follows:

■ A. In Table Two by revising the entry for USS PELELIU (LHA 5);

■ B. In Table Three by adding, in alpha numerical order, by vessel number, an entry for USS PELELIU (LHA 5); and

■ C. In Table Four, paragraph 22, by adding, in alpha numerical order, by vessel number, an entry for USS PELELIU (LHA 5).

§ 706.2 Certifications of the Secretary of the Navy under Executive Order 11964 and 33 U.S.C. 1605.

* * * * *

TABLE TWO

Vessel	Number	Masthead lights, distance to stbd of keel in meters; Rule 21(a)	Forward anchor light, distance below flight dk in meters; § 2(K), Annex I	Forward anchor light, number of; Rule 30(a)(i)	AFT anchor light, distance below flight dk in meters; Rule 21(e), Rule 30(a)(ii)	AFT anchor light, number of; Rule 30(a)(ii)	Side lights, distance below flight dk in meters; § 2(g), Annex I	Side lights, distance forward of forward masthead light in meters; § 3(b), Annex I	Side lights, distance inboard of ship's sides in meters; § 3(b), Annex I
*		*	*		*	*	*		*
USS PELELIU	LHA 5	10.13		4			2.64	70.05	
*		*	*		*	*	*		*

* * * * *

TABLE THREE

Vessel	Number	Masthead Lights arc of visibility rule 21(a)	Side light arc of visibility; rule 21(b)	Stern light arc of visibility; rule 21(c)	Side lights distance in board of ship's sides in meters 3(b) annex 1	Stern light, distance forward of stern in meters; rule 21(c)	Forward anchor light height above hull in meters; 2(K) annex 1	anchor lights relationship of aft light to forward light in meters (2K) annex 1
*	*		*	*	*	*		*
USS PELELIU ...	LHA 5	214.5						
*	*		*	*	*	*		*

* * * * * 22. * * *

TABLE FOUR

Vessel	Number	Vertical separation of the task light array is not equally spaced, the separation between the middle and lower task light exceed the separation between the upper and middle light by
*	*	* * * * *
USS PELELIU ..	LHA 5	0.18 meter.

* * * * *

Approved: October 3, 2012.

A.B. Fischer,

Captain, JAGC, U.S. Navy, Deputy Assistant Judge Advocate, General (Admiralty and Maritime Law).

Dated: October 9, 2012

C.K. Chiappetta,

Lieutenant Commander, Office of the Judge Advocate General, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2012–25416 Filed 10–15–12; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AO09

Extension of Statutory Period for Compensation for Certain Disabilities Due to Undiagnosed Illnesses and Medically Unexplained Chronic Multi-Symptom Illnesses

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is issuing this final rule to affirm an amendment to its adjudication regulation regarding compensation for disabilities experienced by veterans who served in the Southwest Asia Theater of Operations during the Persian Gulf War. This amendment is necessary to extend the period during which disabilities associated with undiagnosed illnesses and medically unexplained chronic multi-symptom illnesses must become manifest in order for a veteran to be eligible for compensation. Additionally, in this final rule, VA will correct the adjudication section title that was amended and published in the **Federal Register** on September 29, 2010, but inadvertently changed to the original title.

DATES: *Effective Date:* This rule is effective October 16, 2012.

Applicability Date: The provisions of this final rule shall apply to all applications for benefits that are or have been received by VA on or after December 29, 2011, or that were pending before VA, the United States Court of Appeals for Veterans Claims, or the United States Court of Appeals for the Federal Circuit on December 29, 2011.

FOR FURTHER INFORMATION CONTACT: Nancy Copeland, Consultant, Regulations Staff (211D), Compensation Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–9685. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On December 29, 2011, VA published in the **Federal Register** (76 FR 81834) an interim final rule amending its adjudication regulation regarding compensation for disabilities suffered by veterans who served in the Southwest Asia Theater of Operations during the Persian Gulf War. In order to ensure that benefits established by Congress are fairly administered, VA extended the evaluation period in which disabilities associated with undiagnosed illnesses and chronic multi-symptom illnesses must become manifest in order for a veteran to be eligible for compensation. Accordingly, VA removed the date, ''December 31, 2011'' from 38 CFR 3.317(a)(1)(i) and added, in its place, December 31, 2016.

Interested persons were invited to submit written comments on or before February 27, 2012; VA received 169 comments in response to the interim final rule. VA received comments from veterans service organizations and advocacy groups. VA also received comments and material from blogs and surveys established for Gulf War veterans who were deployed in the Southwest Asia Theater of Operations and also for those non-deployed during the Gulf War era. Lastly, VA received comments from military service members and their families.

General Comments

VA received general comments that were not associated with extension of the time frame for VA to continue to evaluate undiagnosed illnesses and medically unexplained chronic multi-symptom illnesses in Persian Gulf War veterans. Some commenters asserted that undiagnosed illness is not fully understood even though 20 years have lapsed since the beginning of the Persian Gulf War. Others asserted that VA should revise the definition of Southwest Asia Theater of Operations or revise the type of service required and add medically unexplained chronic multi-symptom illnesses associated with different time periods. One commenter stated that VA examinations should be provided only by VA examiners and not contracted out. One commenter supported a minimum 30-percent rating for all Persian Gulf War veterans suffering from an undiagnosed illness. These comments are beyond the scope of this rulemaking. Therefore, VA makes no changes based on these comments.

Claims Specific Comments

VA received numerous comments from veterans regarding their individual claims for veterans benefits and comments from family members and friends in support of Gulf War veterans. These comments are beyond the scope of this rulemaking. Therefore, VA makes no changes based on these comments.

Post-9/11 [September 11, 2001] Veterans

Several commenters asserted the need for VA to consider those suffering from undiagnosed and medically unexplained chronic multi-symptom illnesses associated with the wars in Iraq, Afghanistan, and other Post-9/11 locations. As required by 38 U.S.C. 101(33), VA acknowledges that the Persian Gulf War period continues until an end date is established by Congress or Presidential proclamation. Section 1117(f) of the same title provides that the term '''Persian Gulf veteran' means a veteran who served on active duty in the Armed Forces in the Southwest Asia theater of operations during the Persian Gulf War,'' and, as reflected in 38 CFR 3.317(e)(2), ''[t]he Southwest Asia theater of operations refers to Iraq, Kuwait, Saudi Arabia, the neutral zone between Iraq and Saudi Arabia, Bahrain, Qatar, the United Arab Emirates, Oman, the Gulf of Aden, the Gulf of Oman, the Persian Gulf, the Arabian Sea, the Red Sea, and the airspace above these locations.'' As such, VA's regulatory provisions already pertain to Post-9/11 veterans who previously served or continue to serve in these theaters of operation. Further, any suggestions to expand the types of service to which the statute and regulation apply are beyond the scope of this rulemaking. Therefore, we make no changes based on these comments.

Immediate Extension of the Effective Date

VA received comments expressing gratitude for the extension to December 31, 2016, and asserting that VA should extend the date immediately. One such commenter expressed the belief that ''this amendment is reasonable and effective.'' With regard to the immediate extension of the expiration date, the interim final rule was effective immediately upon its date of publication, December 29, 2011, and extended the manifestation period of the regulation through December 31, 2016. This final rule merely keeps that regulation in effect. Accordingly, this final rule is effective upon publication.

Elimination of the Expiration Date

The majority of commenters, some of whom thanked VA for the extension to December 31, 2016, asserted that VA should completely eliminate the expiration date. Some provided statements such as ''undiagnosed illnesses remain difficult to identify or treat''; ''veterans may not realize they need help until after the five-year extension''; the presumption for Amyotrophic Lateral Sclerosis has no end date; diseases affecting Vietnam veterans are still emerging 50 years later with no end date for filing, and some Gulf War veterans are more ill than Vietnam veterans; ''undiagnosed and chronic multi-symptom illnesses cause life-long disabilities'' warranting no time restrictions on a veteran to seek presumptive service connection; ''medical conditions may take decades to manifest,'' and the Persian Gulf War period continues under 38 U.S.C. 101(33); and the regulations should cover veterans of the interim war period between the Gulf War and the Iraq War and those ''on the ground as late as December 2011.''

We will make no change based on these comments. Section 102(7) of the Persian Gulf War Veterans' Benefits Act states Congress' finding that further research must be undertaken to determine the causes of Gulf War veterans illnesses and that ''pending the outcome of such research, veterans who are seriously ill as the result of such illnesses should be given the benefit of the doubt and be provided compensation to offset the impairment in earning capacities they may be experiencing.'' Congress contemplated an ongoing process for investigating the nature and causes of Gulf War veterans' illnesses. The statutory scheme reflects the hope that further research may eventually diminish the need for the presumptions in section 1117. Accordingly, we believe that extending the presumptive period for a significant, but not indefinite, period to permit further investigation is consistent with the goals of this statutory scheme.

In section 1117(b), Congress provided the Secretary with discretion to prescribe a presumptive period based upon, among other things, a review of credible medical or scientific evidence. As stated in the interim final rule, the Secretary is extending the presumptive period to December 31, 2016, in order to provide more time for scientific and medical research regarding diseases and illnesses that may be related to service in the Southwest Asia Theater of

Operations. Based on the current lack of scientific certainty surrounding the cause of illnesses suffered by Gulf War veterans, the Secretary's decision to extend the presumption period until December 31, 2016, is within the discretion given to him by section 1117.

Extension of the Expiration Date to 2018 or 2050

Two commenters thanked VA for extending the time frame to December 31, 2016, but asserted that since VA publicly announced the intention to draft a rule extending the presumptive date by an additional 7 years, VA should follow through by extending the date to December 31, 2018, versus December 31, 2016, in the final rule. One of these comments stated that a VA Web page describing that VA intended to extend the date through 2018 remained publicized and called this ''overt duplicity'' on the part of VA. The Web page information referred to by the commenter is not publicized at this time and was removed as soon as the error was noted. It appears the date publicized was mistaken and should have stated December 31, 2016. One commenter supported extending the time frame to 2050. The two previously established time frame extensions implemented by VA for medically unexplained chronic multi-symptom illnesses and undiagnosed illnesses that appeared in Gulf War veterans were 5-year periods. VA determined that it was appropriate to extend the time frame again by 5 years consistent with the extensions that have occurred in the past. Therefore, we make no change based on these comments.

Need for Further Research

Some commenters conveyed disagreement with the apparent premise of scientific studies that only those serving in certain areas during the Gulf War era are afflicted with Gulf War Syndrome and prone to adverse effects and toxins of war because this premise is based on ''a flawed definition set by Congress in 1994.'' Commenters in this group assert that ill Gulf War era veterans, including those both deployed and non-deployed, should be considered equally in regards to researching causative agents and treatments. Commenters asserted that non-deployed veterans are excluded from participation in the Gulf War Illness Registry and consideration of all Gulf War veterans, those deployed and non-deployed, would narrow the field of possible main causes down to causative agents and treatments, vaccines, immunizations, and infectious communicable diseases/biological weapons. Some commenters asserted the need for more time for investigation, medical and scientific research, and testing regarding undiagnosed and medically unexplained chronic multi-symptom illnesses. Others asserted the need for enhanced medical care for Gulf War veterans, testing for possible effects on offspring, and the need for VA to examine Gulf War veterans before VA makes a decision on an extension deadline.

VA recognizes the need for further investigation and scientific and medical research until more consistent evidence is available to the Secretary. This rulemaking finalizes an extension of the time frame in which manifestations of undiagnosed illnesses and medically unexplained chronic multi-symptom illnesses must appear in Gulf War veterans to be presumed as service-connected diseases to allow time for further research. To the extent the comments call for specific types of research, they are outside the scope of this rulemaking. We, therefore, make no change based on these comments.

Technical Amendment

On September 29, 2010, VA published AN24, ''Presumptions of Service Connection for Persian Gulf Service,'' in the **Federal Register** at 75 FR 59968 and replaced the title ''§ 3.317 Compensation for certain disabilities due to undiagnosed illnesses'' with ''§ 3.317 Compensation for certain disabilities occurring in Persian Gulf veterans.'' Subsequently, on October 7, 2010, VA published an amendment to the final rule which removed a provision reserving to the Secretary the authority for certain determinations and, inadvertently, also switched the title back to its original form. Therefore, in this final rule, VA makes a technical correction to replace the current title with ''§ 3.317 Compensation for certain disabilities occurring in Persian Gulf veterans.''

Based on the rationale set forth in the interim final rule and this document, we are adopting the provisions of the interim final rule as a final rule with no changes other than correction of the title of § 3.317.

Paperwork Reduction Act

This document contains no provisions constituting a new collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This rule will not affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a ''significant regulatory action,'' which requires review by the Office of Management and Budget (OMB), as ''any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.''

The economic, interagency, budgetary, legal, and policy implications of this final rule have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any year. This rule will have no such effect

on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program number and title for this rule is 64.109, Veterans Compensation for Service-Connected Disability.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, approved this document on October 4, 2012, for publication.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Dated: October 10, 2012.

Robert C. McFetridge,

Director of Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

Accordingly, the interim final rule amending 38 CFR part 3 that was published at 76 FR 81834 on December 29, 2011, is adopted as a final rule with the following change:

PART 3—ADJUDICATION

■ 1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

■ 2. In § 3.317, revise the section heading to read as follows:

§ 3.317 Compensation for certain disabilities occurring in Persian Gulf veterans.

* * * * *

[FR Doc. 2012–25353 Filed 10–15–12; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2011–0317 and EPA–R01–OAR–2011–0321 (CT); EPA–R01–OAR–2011–0318 and EPA–R01–OAR–2011–0322 (ME); EPA–R01–OAR–2009–0459 and EPA–R01–OAR–2011–0323 (MA); EPA–R01–OAR–2009–0460 and EPA–R01–OAR–2011–0324 (NH); A–1–FRL–9740–1]

Approval and Promulgation of Air Quality Implementation Plans; Connecticut, Maine, Massachusetts, New Hampshire; Infrastructure SIPs for the 1997 and 2006 Fine Particulate Matter Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving most elements of submittals from the States of Connecticut, Maine, Massachusetts, and New Hampshire. We are also conditionally approving certain elements of these submittals, as well as disapproving a few elements of Massachusetts' submittals. The submittals outline how each state's State Implementation Plan (SIP) meets the requirements of section 110(a) of the Clean Air Act (CAA) for both the 1997 and 2006 fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS). These actions are being taken under the Clean Air Act.

DATES: This rule is effective on November 15, 2012.

ADDRESSES: EPA has established dockets for these actions under Docket Identification No. EPA–R01–OAR–2011–0317 and EPA–R01–OAR–2011–0321 for Connecticut,[1] EPA–R01–OAR–2011–0318 and EPA–R01–OAR–2011–0322 for Maine, EPA–R01–OAR–2009–0459 and EPA–R01–OAR–2011–0323 for Massachusetts, and EPA–R01–OAR–2009–0460 and EPA–R01–OAR–2011–0324 for New Hampshire. All documents in the dockets are listed on the *www.regulations.gov* Web site. 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 through *www.regulations.gov* or in hard copy at the Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Quality Planning Unit, 5 Post Office Square—Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact 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 legal holidays.

Copies of the documents relevant to this action are also available for public inspection during normal business hours, by appointment at the respective State Air Agency: The Bureau of Air Management, Department of Energy and Environmental Protection, State Office Building, 79 Elm Street, Hartford, CT 06106–1630; the Bureau of Air Quality Control, Department of Environmental Protection, First Floor of the Tyson Building, Augusta Mental Health Institute Complex, Augusta, ME 04333–0017; Division of Air Quality Control, Department of Environmental Protection, One Winter Street, 8th Floor, Boston, MA 02108; and Air Resources Division, Department of Environmental Services, 6 Hazen Drive, P.O. Box 95, Concord, NH 03302–0095.

FOR FURTHER INFORMATION CONTACT: Alison C. Simcox, Air Quality Planning Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Quality Planning Unit, 5 Post Office Square—Suite 100, (Mail code OEP05–2), Boston, MA 02109—3912, telephone number (617) 918–1684, fax number (617) 918–0684, email *simcox.alison@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

The following outline is provided to aid in locating information in this preamble.

I. Background and Purpose
II. Response to Comments
III. Final Action
IV. Statutory and Executive Order Reviews

I. Background and Purpose

Under CAA section 110(a)(1), states are required to submit plans called state implementation plans (SIPs) that provide for the implementation, maintenance and enforcement of each NAAQS. 42 U.S.C. 7410(a)(1). Section 110(a)(2)(D)(i)(I) of the CAA, in turn, specifically requires SIPs to contain provisions adequate to prohibit emissions activity within the state that

[1] For each State, the first docket number refers to the docket for the 1997 $PM_{2.5}$ infrastructure submittal and the second docket number refers to the docket for the 2006 $PM_{2.5}$ infrastructure submittal.

contributes significantly to nonattainment or interferes with maintenance in another state. 42 U.S.C. 7410(a)(2)(D)(i)(I).

On July 23, 2012, EPA published a Notice of Proposed Rulemaking (NPR) for the States of Connecticut, Maine, Massachusetts, and New Hampshire. See 77 FR 43023. The NPR proposed action on submittals from these four states that outlined how each state's SIP meets the requirements of section 110(a) of the Clean Air Act (CAA) for the 1997 and 2006 $PM_{2.5}$ standards.

The States of Connecticut, Maine, Massachusetts and New Hampshire submitted SIPs to meet infrastructure requirements under section 110(a)(2) for the 1997 and 2006 $PM_{2.5}$ NAAQS. The SIPs addressed the following section 110(a)(2) components:

(A) Emission limits and other control measures.

(B) Ambient air quality monitoring/data system.

(C) Program for enforcement of control measures.

(D) Interstate transport.

(E) Adequate resources.

(F) Stationary source monitoring system.

(G) Emergency power.

(H) Future SIP revisions.

(J) Consultation with government officials, Public notification, Prevention of significant deterioration (PSD) and Visibility protection.

(K) Air quality modeling/Data

(L) Permitting fees.

(M) Consultation/participation by affected local entities.

EPA proposed to approve the submittals from all four states as fully meeting the infrastructure requirements for the 1997 and 2006 $PM_{2.5}$ standards for the following section 110(a)(2) elements and sub-elements: (B), (C) (enforcement program only), (E)(i), (E)(iii), (F), (G), (H), (J) (consultation), (J) (public notification), (K), (L), and (M). EPA also proposed to approve the submittals from Maine and New Hampshire as fully meeting the infrastructure requirements for the 1997 and 2006 $PM_{2.5}$ standards for the two prongs of section 110(a)(2)(D)(i)(I). These two prongs are (1) contribute significantly to nonattainment in any other state with respect to any such national primary or secondary NAAQS, and (2) interfere with maintenance by any other state with respect to the same NAAQS. EPA proposed to determine that their existing SIPs satisfy these prongs because emissions from these states do not contribute significantly to nonattainment or interfere with maintenance of the 1997 annual or the 2006 24-hour $PM_{2.5}$ NAAQS in any other state. *See* 77 FR 43207. In addition, EPA proposed to approve the submittals from Maine for the prong of section 110(a)(2)(D)(i)(II) related to interference with visibility protection, and the submittals from New Hampshire for section 110(a)(2)(D)(ii) related to interstate and international pollution abatement.

EPA proposed to conditionally approve the submittals from all four states for the following section 110(a)(2) elements and sub-elements: (A) and (E)(ii) (state boards and conflict of interest provisions). We proposed to conditionally approve the submittals from three states (Connecticut, Maine, and New Hampshire) for section 110(a)(2) sub-elements (C), (D)(i)(II), and (J) as they relate to the states' PSD programs. We also proposed to conditionally approve the submittals from Connecticut and Maine for section 110(a)(2)(D)(ii).

For Massachusetts, EPA proposed to disapprove the state's submittals for section 110(a)(2) sub-elements (C), (D)(i)(II), and (J) as they relate to the state's PSD program, as well as (D)(ii), which relates to interstate and international pollution abatement. Notwithstanding our conclusion that Massachusetts' section 110(a) submissions do not meet these PSD requirements, the state is already subject to a Federal Implementation Plan (FIP) for PSD, and so EPA has no additional FIP obligations under section 110(c). Furthermore, the state will not be subject to mandatory sanctions as a result of this disapproval.

A detailed explanation of the requirements for $PM_{2.5}$ infrastructure SIPs, as well as EPA's analysis of the submittals from Connecticut, Maine, Massachusetts, and New Hampshire, was provided in the NPR and is not restated here.

II. Response to Comments

EPA received comments on our proposed action from an anonymous commenter and from the Sierra Club. The anonymous commenter noted that EPA's action on the four states' infrastructure SIPs for the 1997 and 2006 $PM_{2.5}$ NAAQS is a good move to alleviate air pollution, thus reducing poor air quality days. EPA agrees with this commenter. The Sierra Club's comments focused on the states' air-quality standards and PSD programs, and a recent judicial decision vacating the Cross State Air Pollution Rule (CSAPR). The comments are provided in the dockets for today's final actions. A summary of the comments and EPA's responses are provided below.

Comment 1: The Sierra Club noted that section 110(a)(2)(A) requires SIPs to include enforceable emission limits. The Sierra Club argued that any infrastructure SIP submissions ultimately approved by EPA must include emissions limitations on direct $PM_{2.5}$ emissions, PM precursors, and condensable PM. It also asserted that the state infrastructure SIP submissions needed to impose specific $PM_{2.5}$ emissions limitations on major sources such as the Schiller and Merrimack coal-fired power plants in New Hampshire, the Mount Tom and Brayton Point plants in Massachusetts, and the Bridgeport plant in Connecticut.

Response 1: In this action, EPA is conditionally approving the states' $PM_{2.5}$ infrastructure SIPs with respect to section 110(a)(2)(A) pending each state's timely submission (i.e., within one year of conditional approval) of specific enforceable measures to fulfill specific requirements of section 110(a)(2)(A) as explained in the proposal. We will review each state's submission as it is received, and will propose to approve or disapprove that submission based on our evaluation of whether the submission meets the applicable requirements of section 110(a)(2)(A) relevant to infrastructure SIP requirements. At that time, it will be appropriate for commenters to raise any questions regarding whether the submission has met applicable requirements.

Comment 2: The Sierra Club noted that sections 110(a)(2)(C), (D), and (J) require infrastructure submittals to include, among other things, a SIP-approved PSD program that meets all federal requirements. The Sierra Club argued that any infrastructure SIP submission approved by EPA must include $PM_{2.5}$ increments under the PSD Program.

Response 2: In this action, EPA is conditionally approving the infrastructure SIPs submitted by Connecticut, Maine, and New Hampshire with respect to sections 110(a)(2)(C), (D), and (J) pending each state's timely submission (i.e., within one year of conditional approval) of specific enforceable measures to fulfill requirements of sections 110(a)(2)(C), (D), and (J) as explained in the proposal. EPA proposed conditional approval consistent with EPA's authority under section 110(k)(4), and based upon a commitment by each State to address these deficiencies within one year. We will review each state's submission as it is received, and will propose to approve or disapprove that submission based on our evaluation of whether the submission meets the applicable

requirements of section 110(a)(2)(C), D(i)(II), and (J), relevant to infrastructure SIP requirements. At that time, it will be appropriate for commenters to raise any questions regarding whether the submission has met applicable requirements. As described in section 110(k)(4), should the States fail to meet their commitments to address these deficiencies, a final conditional approval for these elements would become a disapproval. The Commenter does not argue that this proposed action is inconsistent with the requirements of the CAA.

However, EPA disagrees with Commenter's suggestion that EPA must generally approve the $PM_{2.5}$ increments prior to fully approving sections 110(a)(2)(C), (D), and (J). Pursuant to the 2010 PSD for $PM_{2.5}$ Rule (75 FR 64864, October 20, 2010) and CAA section 166(b), States were not required to submit a revised SIP addressing the $PM_{2.5}$ increments until July 20, 2012. The Agency proposed action on Connecticut, Maine, and New Hampshire's infrastructure SIPs in a notice signed on July 16, 2012.[2] Therefore, on the date that the proposed rule was signed by the Agency, the $PM_{2.5}$ increments were not required to be included in the States' SIPs in order for the States to meet the PSD requirements of sections 110(a)(2)(C), (D), and (J) of the Act. However, Connecticut, Maine, and New Hampshire each submitted to EPA a request for a conditional approval of these infrastructure elements based, in part, on its commitment to adopt the $PM_{2.5}$ increments into the State rules and submit revisions including the $PM_{2.5}$ increments to EPA within one year of EPA's conditional approval. Accordingly, although EPA would not generally have been required to address the $PM_{2.5}$ increments prior to the deadline for submission of such revisions on July 20, 2012, because the States requested conditional approval contingent on their commitments to address the increments, EPA's proposed conditional approval was also made contingent on those commitments. EPA will review the sufficiency of any future submissions made by the States in order to satisfy the conditional approvals consistent with its commitments and in accordance with the CAA.

Furthermore, we are disapproving the Massachusetts submittals with respect to sections 110(a)(2)(C), (D), and (J). Massachusetts does not have an approved PSD SIP, and has long been subject to a FIP. Because the state is subject to a PSD FIP, $PM_{2.5}$ increments are applied consistent with the federal program. Although Massachusetts' infrastructure submissions are not approvable with respect to sections 110(a)(2)(C), (D), and (J), the state is not subject to mandatory sanctions because the SIP deficiencies are not associated with a submittal required under part D or in response to a SIP call. In addition, because state requirements are satisfied by the FIP, this disapproval action will not trigger additional FIP obligations.

Comment 3: The Sierra Club noted that on August 21, 2012, the D.C. Circuit Court issued an opinion vacating the Cross State Air Pollution Rule (CSAPR), which is also known as the Transport Rule and was promulgated by EPA in 2011 to address interstate pollution issues. *See EME Homer City Generation, L.P.* v. *EPA,* No. 11–1302 (D.C. Cir. August 21, 2012). The Sierra Club asserted that EPA can no longer approve any submission in which compliance with interstate transport (section 110(a)(2)(D)(i)(I)) or visibility (section 110(a)(2)(D)(i)(II)) requirements are based on the CSAPR.

Response 3: We discuss sections 110(a)(2)(D)(i)(I) and 110(a)(2)(D)(i)(II) separately.

Section 110(a)(2)(D)(i)(I): In this action, EPA is approving infrastructure SIP submissions for Maine and New Hampshire with respect to both prongs of section 110(a)(2)(D)(i)(I): (1) contribute significantly to nonattainment in any other state with respect to any such national primary or secondary NAAQS; and (2) interfere with maintenance by any other state with respect to that NAAQS. The CSAPR also addressed and quantified certain states' requirements under section 110(a)(2)(D)(i)(I). *See* 76 FR 48208. Neither Maine nor New Hampshire were subject to any requirements under the CSAPR, *see* 76 FR 48208, 48236–45 (Aug. 8, 2011), and neither state's compliance with the requirements of section 110(a)(2)(D)(i)(I) is based on CSAPR. As such, this action does not rely on any requirements of the CSAPR or emission reductions associated with that rule to support its conclusion that these two states have met their 110(a)(2)(D)(i)(I) obligations with respect to the 1997 and 2006 $PM_{2.5}$ NAAQS.

EPA's decision to approve the infrastructure SIPs for Maine and New Hampshire for this element is based on our conclusion that the existing SIPs for both states have adequate provisions to satisfy the obligation under section 110(a)(2)(D)(i)(I) of the CAA to address these requirements with respect to the 1997 annual and the 2006 24-hour $PM_{2.5}$ NAAQS. As explained in section III of this notice, this conclusion is based on air quality modeling originally conducted to quantify each individual state's contributions to downwind nonattainment and maintenance areas during the rulemaking process for the CSAPR.

The recent D.C. Circuit opinion in the CSAPR litigation, *EME Homer City Generation* v. *EPA,* No. 11–1302 (D.C. Cir., August 21, 2012), does not alter our conclusion that the existing SIPs for Maine and New Hampshire adequately address this requirement. Nothing in the *Homer City* opinion disturbs or calls into question that conclusion or the validity of the air quality modeling on which the conclusion is based. In addition, nothing in that opinion undermines our conclusion that Maine and New Hampshire do not contribute significantly to nonattainment or interfere with maintenance in another state because emissions from neither state contributes more than one percent of the 1997 or 2006 $PM_{2.5}$ NAAQS to any downwind area with nonattainment or maintenance problems.[3]

Section 110(a)(2)(D)(i)(II): For New Hampshire, we will take separate action on $PM_{2.5}$ infrastructure SIP visibility requirements. Notably, we recently approved the New Hampshire Regional Haze SIP. See 77 FR 50602, August 22, 2012. However, we are not taking action on section 110(a)(2)(D)(i)(II) visibility requirements for New Hampshire today.

For Maine, in this action, we are approving Maine's $PM_{2.5}$ infrastructure SIP as meeting the visibility requirements of section 110(a)(2)(D)(i)(II). This approval is based on the fact that EPA has approved Maine's Regional Haze SIP for the first planning period from 2008 through 2018 (77 FR 24385).

III. Final Action

EPA is approving $PM_{2.5}$ infrastructure SIP submittals from Connecticut, Maine, Massachusetts, and New Hampshire as fully meeting the infrastructure requirements for the 1997 and 2006 $PM_{2.5}$ standards for the following 110(a)(2) elements and sub-elements: (B), (C) (enforcement program), (E)(i), (E)(iii), (F), (G), (H), (J) (consultation), (J) (public notification), (K), (L), and (M). EPA is also approving the submittals from Maine and New Hampshire as

[2] Although the notice was published by the **Federal Register** on July 23, 2012, the notice was signed by the Regional Administrator on July 16, 2012, before the statutory deadline for submission of the SIP revision addressing the $PM_{2.5}$ increments.

[3] To the contrary, the Court looked favorably upon EPA's determination to exclude certain states from the CSAPR based on the amount of the upwind State's contribution to nonattainment and maintenance areas in downwind states. *See EME Homer City,* slip op. at 34.

fully meeting the infrastructure requirements for the 1997 and 2006 $PM_{2.5}$ standards for the two prongs of section 110(a)(2)(D)(i)(I). These two prongs are (1) contribute significantly to nonattainment in any other state with respect to any such national primary or secondary NAAQS, and (2) interfere with maintenance by any other state with respect to the same NAAQS. EPA's decision to approve the infrastructure SIPs for Maine and New Hampshire for this element is based on our conclusion that the existing SIPs for both states have adequate provisions to satisfy the obligation under section 110(a)(2)(D)(i)(I) of the CAA to address these requirements with respect to the 1997 and 2006 $PM_{2.5}$ NAAQS. This conclusion is based on air quality modeling originally conducted to quantify each individual state's contributions to downwind nonattainment and maintenance areas during the rulemaking process for the CSAPR. A technical support document describing that modeling is available in the dockets for the Maine and New Hampshire portions of this rulemaking. This air quality modeling demonstrates that emissions from the states of Maine and New Hampshire do not contribute more than one percent of the NAAQS to any downwind areas with nonattainment and maintenance problems with respect to the 1997 and the 2006 $PM_{2.5}$ NAAQS. For this reason, EPA concludes that these states do not contribute significantly to nonattainment or interfere with maintenance of the 1997 or 2006 $PM_{2.5}$ NAAQS in another state.

In addition, EPA is approving the submittals from Maine for the prong of section 110(a)(2)(D)(i)(II) related to interference with visibility protection. EPA is also approving the submittals from New Hampshire for 110(a)(2)(D)(ii) related to interstate and international pollution abatement.

EPA is conditionally approving the submittals from all four states for the following 110(a)(2) elements and sub-elements: (A) and (E)(ii) (state boards and conflict of interest provisions). We are conditionally approving the submittals from three states (Connecticut, Maine, and New Hampshire) for section 110(a)(2) sub-elements (C), (D)(i)(II), and (J) as they relate to the states' PSD programs. We are also conditionally approving the submittals from Connecticut and Maine for 110(a)(2)(D)(ii).

For Massachusetts, EPA is disapproving the state's submittals for section 110(a)(2) sub-elements (C), (D)(i)(II), and (J) as they relate to the state's PSD program, as well as (D)(ii), which relates to interstate and international pollution abatement. Notwithstanding our conclusion that the Massachusetts' 110(a) submissions do not meet these PSD requirements, the state is already subject to a Federal Implementation Plan (FIP) for PSD, and so EPA has no additional FIP obligations under section 110(c). Furthermore, the state will not be subject to mandatory sanctions as a result of this disapproval.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the 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 either is not approved to apply in Indian country located in the state or does not alter the requirements of any state law that may already apply in Indian country. EPA notes that this approval will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

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 December 17, 2012. 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: September 27, 2012.

H. Curtis Spalding,

Regional Administrator, Region 1.

Part 52 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart H—Connecticut

■ 2. Section 52.379 is amended by adding paragraphs (c), (d), (e), and (f) to read as follows:

§ 52.379 Control strategy: $PM_{2.5}$.

* * * * *

(c) Approval—Submittal from the Connecticut Department of Environmental Protection, dated September 4, 2008, to address the Clean Air Act (CAA) infrastructure requirements for the 1997 $PM_{2.5}$ National Ambient Air Quality Standard (NAAQS). This submittal is approved as meeting the requirements of sections 110(a)(2)(B), (C) (enforcement program only), (E)(i), (E)(iii), (F), (G), (H), (J) (consultation and public notification only), (K), (L), and (M).

(d) Conditional Approval—Submittal from the Connecticut Department of Environmental Protection, dated September 4, 2008, to address the Clean Air Act (CAA) infrastructure requirements for the 1997 $PM_{2.5}$ National Ambient Air Quality Standard (NAAQS). EPA is conditionally approving Connecticut's submittal with respect to CAA sections 110(a)(2)(A), (C) only as it related to the PSD program, (D)(ii), (E)(ii), and (J) only as it relates to the PSD program. This conditional approval is contingent upon Connecticut taking actions to meet requirements of these elements within one year of conditional approval, as committed to in letters from the state to EPA Region 1 dated June 15, 2012, and July 11, 2012.

(e) Approval—Submittal from the Connecticut Department of Environmental Protection, dated September 18, 2009, with supplements submitted on January 7, 2011, and August 19, 2011, to address the Clean Air Act (CAA) infrastructure requirements for the 2006 $PM_{2.5}$ National Ambient Air Quality Standard (NAAQS). This submittal is approved as meeting the requirements of sections 110(a)(2)(B), (C) (enforcement program only), (E)(i), (E)(iii), (F), (G), (H), (J) (consultation and public notification only), (K), (L), and (M).

(f) Conditional Approval—Submittal from the Connecticut Department of Environmental Protection, dated September 18, 2009, with supplements submitted on January 7, 2011, and August 19, 2011, to address the Clean Air Act (CAA) infrastructure requirements for the 2006 $PM_{2.5}$ National Ambient Air Quality Standard (NAAQS). EPA is conditionally approving Connecticut's submittal with respect to CAA sections 110(a)(2)(A), (C) only as it related to the PSD program, (D)(ii), (E)(ii), and (J) only as it relates to the PSD program. This conditional approval is contingent upon Connecticut taking actions to meet requirements of these elements within one year of conditional approval, as committed to in letters from the state to EPA Region 1 dated June 15, 2012, and July 11, 2012.

Subpart U—Maine

■ 3. Section 52.1019 is added to read as follows:

§ 52.1019 Identification of plan—conditional approval.

(a) 1997 $PM_{2.5}$ NAAQS: The SIP submitted September 10, 2008, with a supplement submitted on June 1, 2011, is conditionally approved for Clean Air Act (CAA) elements 110(a)(2)(A), (C) only as it relates to the PSD program, (D)(i)(II) only as it relates to the PSD program, (D)(ii), (E)(ii), and (J) only as it relates to the PSD program. This conditional approval is contingent upon Maine taking actions to meet requirements of these elements within one year of conditional approval, as committed to in letters from the state to EPA Region 1 dated June 13, 2012, and June 30, 2012.

(b) 2006 $PM_{2.5}$ NAAQS: The SIP submitted July 27, 2009, with a supplement submitted on June 1, 2011, is conditionally approved for CAA elements 110(a)(2)(A), (C) only as it relates to the PSD program, (D)(i)(II) only as it relates to the PSD program, (D)(ii), (E)(ii), and (J) only as it relates to the PSD program. This conditional approval is contingent upon Maine taking actions to meet requirements of these elements within one year of conditional approval, as committed to in letters from the state to EPA Region 1 dated June 13, 2012, and June 30, 2012.

■ 4. In § 52.1020, the table in paragraph (e) is amended by adding two entries to the end to read as follows:

§ 52.1020 Identification of plan.

* * * * *

(e) * * *

MAINE NON REGULATORY

Name of non regulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/effective date	EPA approved date [3]	Explanations
*	*	*	*	*
Submittal to meet Section 110(a)(2) Infrastructure Requirements for the 1997 $PM_{2.5}$ NAAQS.	Statewide	9/10/2008; supplement submitted 6/1/2011.	10/16/2012 [Insert **Federal Register** page number where the document begins].	This submittal is approved with respect to the following CAA elements or portions thereof: 110(a)(2) (B), (C) (enforcement program only), (D)(i)(I), (D)(i)(II) (visibility only), (E)(i), (E)(iii), (F), (G), (H), (J) (consultation and public notification only), (K), (L), and (M).
Submittal to meet Section 110(a)(2) Infrastructure Requirements for the 2006 $PM_{2.5}$ NAAQS.	Statewide	7/27/2009; supplement submitted 6/1/2011.	10/16/2012 [Insert **Federal Register** page number where the document begins].	This submittal is approved with respect to the following CAA elements or portions thereof: 110(a)(2) (B), (C) (enforcement program only), (D)(i)(I), (D)(i)(II) (visibility only), (E)(i), (E)(iii), (F), (G), (H), (J) (consultation and public notification only), (K), (L), and (M).

[3] In order to determine the EPA effective date for a specific provision listed in this table, consult the **Federal Register** notice cited in this column for the particular provision.

Subpart W—Massachusetts

■ 5. Section 52.1131 is amended by adding paragraphs (b), (c), (d), (e), (f) and (g) to read as follows:

§ 52.1131 Control strategy: Particulate matter.

* * * * *

(b) Approval—Submittal from the Massachusetts Department of Environmental Protection, dated April 4, 2008 to address the Clean Air Act (CAA) infrastructure requirements for the 1997 $PM_{2.5}$ NAAQS. This submittal satisfies requirements of CAA sections 110(a)(2)(B), (C) (enforcement program only), (E)(i), (E)(iii), (F), (G), (H), (J) (consultation and public notification only), (K), (L), and (M).

(c) Conditional Approval—Submittal from the Massachusetts Department of Environmental Protection, dated April 4, 2008, to address the Clean Air Act (CAA) infrastructure requirements for the 1997 $PM_{2.5}$ NAAQS is conditionally approved for CAA elements 110(a)(2)(A) and (E)(ii). This conditional approval is contingent upon Massachusetts taking actions to meet requirements of these elements within one year of conditional approval, as committed to in a letter from the state to EPA Region 1 dated July 12, 2012.

(d) Disapproval—Submittal from the Massachusetts Department of Environmental Protection, dated April 4, 2008, to address the Clean Air Act (CAA) infrastructure requirements for the 1997 $PM_{2.5}$ NAAQS. This submittal does not satisfy requirements of CAA sections 110(a)(2)(C) (PSD program only), (D)(i)(II) (PSD program only), (D)(ii), and (J) (PSD program only).

(e) Approval—Submittal from the Massachusetts Department of Environmental Protection, dated September 21, 2009, with supplements submitted on January 13, 2011, and August 19, 2011, to address the Clean Air Act (CAA) infrastructure requirements for the 2006 $PM_{2.5}$ NAAQS. This submittal satisfies requirements of CAA sections 110(a)(2)(B), (C) (enforcement program only), (E)(i), (E)(iii), (F), (G), (H), (J) (consultation and public notification only), (K), (L), and (M).

(f) Conditional Approval—Submittal from the Massachusetts Department of Environmental Protection, dated September 21, 2009, with supplements submitted on January 13, 2011, and August 19, 2011, to address the Clean Air Act (CAA) infrastructure requirements for the 2006 $PM_{2.5}$ NAAQS is conditionally approved for CAA elements 110(a)(2)(A) and (E)(ii). This conditional approval is contingent upon Massachusetts taking actions to meet requirements of these elements within one year of conditional approval, as committed to in a letter from the state to EPA Region 1 dated July 12, 2012.

(g) Disapproval—Submittal from the Massachusetts Department of Environmental Protection, dated September 21, 2009, with supplements submitted on January 13, 2011, and August 19, 2011, to address the Clean Air Act (CAA) infrastructure requirements for the 2006 $PM_{2.5}$ NAAQS. This submittal does not satisfy requirements of CAA sections 110(a)(2)(C) (PSD program only), (D)(i)(II) (PSD program only), (D)(ii), and (J) (PSD program only).

Subpart EE—New Hampshire

■ 6. Section 52.1519 is amended by adding paragraphs (a)(3) and (4) to read as follows:

§ 52.1519 Identification of plan—conditional approval.

(a) * * *

(3) 1997 $PM_{2.5}$ NAAQS: The 110(a)(2) infrastructure SIP submitted on April 3, 2008, with a supplement submitted on July 3, 2012, is conditionally approved for Clean Air Act (CAA) elements 110(a)(2)(A), (C) only as it relates to the PSD program, (D)(i)(II) only as it relates to the PSD program, (E)(ii), and (J) only as it relates to the PSD program. This conditional approval is contingent upon New Hampshire taking actions to meet requirements of these elements within one year of conditional approval, as committed to in a letter from the state to EPA Region 1 dated June 29, 2012.

(4) 2006 $PM_{2.5}$ NAAQS: The 110(a)(2) infrastructure SIP submitted on September 18, 2009, with a supplement submitted on July 3, 2012, is conditionally approved for CAA elements 110(a)(2)(A), (C) only as it relates to the PSD program, (D)(i)(II) only as it relates to the PSD program, (E)(ii), and (J) only as it relates to the PSD program. This conditional approval is contingent upon New Hampshire taking actions to meet requirements of these elements within one year of conditional approval, as committed to in a letter from the state to EPA Region 1 dated June 29, 2012.

* * * * *

■ 7. Section 52.1520 is amended to read as follows:

In § 52.1520, the table in paragraph (e) is amended by adding two entries to the end to read as follows:

§ 52.1520 Identification of plan.

* * * * *

(e) * * *

NEW HAMPSHIRE NON REGULATORY

Name of non regulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/effective date	EPA approved date [3]	Explanations
*	*	*	*	*
Submittal to meet Section 110(a)(2) Infrastructure Requirements for the 1997 $PM_{2.5}$ NAAQS.	Statewide	4/3/2008; supplement submitted 7/3/2012.	10/16/2012 [Insert **Federal Register** page number where the document begins].	This submittal is approved with respect to the following CAA elements or portions thereof: 110(a)(2)(B), (C) (enforcement program only), (D)(i)(I), (D)(ii), (E)(i), (E)(iii), (F), (G), (H), (J) (consultation and public notification only), (K), (L), and (M).
Submittal to meet Section 110(a)(2) Infrastructure Requirements for the 2006 $PM_{2.5}$ NAAQS.	Statewide	9/18/2009; supplement submitted 7/3/2012.	10/16/2012 [Insert **Federal Register** page number where the document begins].	This submittal is approved with respect to the following CAA elements or portions thereof: 110(a)(2)(B), (C) (enforcement program only), (D)(i)(I), (D)(ii), (E)(i), (E)(iii), (F), (G), (H), (J) (consultation and public notification only), (K), (L), and (M).

[3] In order to determine the EPA effective date for a specific provision listed in this table, consult the **Federal Register** notice cited in this column for the particular provision.

[FR Doc. 2012–25300 Filed 10–15–12; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2010–1015; FRL–9739–2]

Approval and Promulgation of Implementation Plans; North Carolina 110(a)(1) and (2) Infrastructure Requirements for the 1997 and 2006 Fine Particulate Matter National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to approve in part and conditionally approve in part portions of the State Implementation Plan (SIP) submissions, submitted by the State of North Carolina, through the Department of Environment and Natural Resources (NC DENR), Division of Air Quality (DAQ), as demonstrating that the State meets the SIP requirements of sections 110(a)(1) and (2) of the Clean Air Act (CAA or the Act) for the 1997 annual and 2006 24-hour fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS). Section 110(a) of the CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by EPA, which is commonly referred to as an ''infrastructure'' SIP. North Carolina certified in two separate submissions that its SIP contains provisions that ensure the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS are implemented, enforced, and maintained in North Carolina (hereafter referred to as ''infrastructure submissions''). With the exception of elements 110(a)(2)(C), 110(a)(2)(D)(i), 110(a)(2)(E)(ii) and 110(a)(2)(J), North Carolina's infrastructure submissions, provided to EPA on April 1, 2008, and September 21, 2009, address all the required infrastructure elements for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. With respect to sections 110(a)(2)(C), 110(a)(2)(E)(ii) and 110(a)(2)(J), EPA is conditionally approving these requirements.

DATES: This rule will be effective on November 15, 2012.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2010–1015. All documents in the docket are listed on the *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 *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: Sean Lakeman, 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. The telephone number is (404) 562–9043. Mr. Lakeman can be reached via electronic mail at *lakeman.sean@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. Background

Upon promulgation of a new or revised NAAQS, sections 110(a)(1) and (2) of the CAA require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance for that new NAAQS. On July 18, 1997 (62 FR 38652), EPA promulgated a new annual $PM_{2.5}$ NAAQS and on October 17, 2006 (71 FR 61144), EPA promulgated a new 24-hour $PM_{2.5}$ NAAQS. On July 24, 2012, EPA proposed to approve North Carolina's April 1, 2008, and September 21, 2009, infrastructure submissions for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. *See* 77 FR 43196. A summary of the background for today's final action is provided below. See EPA's July 24, 2012, proposed rulemaking at 77 FR 43196 for more detail.

Section 110(a) of the CAA requires states to submit SIPs to provide for the implementation, maintenance, and enforcement of a new or revised NAAQS within three years following the promulgation of such NAAQS, or within such shorter period as EPA may prescribe. Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, but the contents of that submission may vary depending upon the facts and circumstances. The data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affect the content of the submission. The contents of such SIP submissions may also vary depending upon what provisions the state's existing SIP already contains. In the case of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous PM NAAQS.

More specifically, section 110(a)(1) provides the procedural and timing requirements for SIPs. Section 110(a)(2) lists specific elements that states must meet for ''infrastructure'' SIP requirements related to a newly established or revised NAAQS. As already mentioned, these requirements include SIP infrastructure elements such as modeling, monitoring, and emissions inventories that are designed to assure attainment and maintenance of the NAAQS. The requirements that are the subject of this final rulemaking are listed below[1] and in EPA's October 2, 2007, memorandum entitled ''Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards.'' and September 25, 2009, memorandum entitled ''Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards.''

[1] Two elements identified in section 110(a)(2) are not governed by the three year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within three years after promulgation of a new or revised NAAQS, but rather are due at the time the nonattainment area plan requirements are due pursuant to section 172. These requirements are: (1) Submissions required by section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D Title I of the CAA, and (2) submissions required by section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, Title I of the CAA. Today's final rulemaking does not address infrastructure elements related to section 110(a)(2)(I) or the nonattainment plan requirements of section 110(a)(2)(C).

- 110(a)(2)(A): Emission limits and other control measures.
- 110(a)(2)(B): Ambient air quality monitoring/data system.
- 110(a)(2)(C): Program for enforcement of control measures.[2]
- 110(a)(2)(D): Interstate transport.[3]
- 110(a)(2)(E): Adequate resources.
- 110(a)(2)(F): Stationary source monitoring system.
- 110(a)(2)(G): Emergency power.
- 110(a)(2)(H): Future SIP revisions.
- 110(a)(2)(I): Areas designated nonattainment and meet the applicable requirements of part D.[4]
- 110(a)(2)(J): Consultation with government officials; public notification; and prevention of significant deterioration (PSD) and visibility protection.
- 110(a)(2)(K): Air quality modeling/data.
- 110(a)(2)(L): Permitting fees.
- 110(a)(2)(M): Consultation/participation by affected local entities.

II. This Action

Section 110(a) of the CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by the EPA, which is commonly referred to as an ''infrastructure'' SIP. North Carolina certified that the North Carolina SIP contains provisions that ensure the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS are implemented, enforced, and maintained in North Carolina.

With the exceptions of elements 110(a)(2)(C), 110(a)(2)(D)(i), 110(a)(2)(E)(ii) and 110(a)(2)(J) related to PSD requirements, EPA is taking final action to approve North Carolina's infrastructure submissions as demonstrating that the State's implementation plan meets portions of the section 110(a)(2) infrastructure requirements for both the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. North Carolina submitted a letter to EPA on July 10, 2012, to address certain outstanding requirements related to the $PM_{2.5}$ standard for its PSD program and committing to providing the necessary SIP revision to address the requirements of 110(a)(2)(C) and 110(a)(2)(J) PSD requirements for which the SIP is currently deficient. This letter of commitment meets the requirements of section 110(k)(4) of the CAA, 42 U.S.C. 7410(k)(4), and as such, EPA is today finalizing its proposed action to conditional approve these elements. See EPA's July 24, 2012, proposed rulemaking at 77 FR 43196 for more detail. If North Carolina fails to submit these revisions by October 16, 2013, today's conditional approval will automatically become a disapproval on that date and EPA will issue a finding of disapproval. EPA is not required to propose the finding of disapproval. If the conditional approval is converted to a disapproval, the final disapproval triggers the Federal Implementation Plan requirement under section 110(c). However, if the State meets its commitment within the applicable timeframe, the conditionally approved submission will remain a part of the SIP until EPA takes final action approving or disapproving the new submittal. If EPA disapproves the new submittal, today's conditionally approved submittal will also be disapproved at that time. If EPA approves the new submittal, North Carolina's infrastructure SIP will be fully approved, with the exceptions noted above, and those approved elements will replace the relevant conditionally-approved elements in the SIP.

In addition, EPA is today relying upon an earlier commitment by North Carolina to address the CAA section 128(a)(1) and (2) requirements in order to conditionally approve its 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS infrastructure SIPs with respect to section 110(a)(2)(E)(ii). North Carolina's earlier commitment, which was made in connection with the State's 2008 8-hour Ozone infrastructure SIP submission, committed the State to addressing CAA section 128(a)(1) and (2) requirements by submitting a SIP revision to EPA to address these requirements by February 2, 2013. As the underlying requirements of section 128 are the same for purposes of the 2008 8-hour Ozone NAAQS and the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS, EPA is today relying upon this earlier commitment to conditionally approve the State's 110(a)(2)(E)(ii) infrastructure SIPs for purposes of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. As with the conditional approvals for the other elements discussed above, if the State fails to submit this revision by February 6, 2013, a final conditional approval would then automatically become a disapproval on that date and EPA will issue a finding of disapproval.

With the exception of 110(a)(2)(D)(i), related to interstate transport, EPA is today taking final action to determine that North Carolina's infrastructure submissions, provided to EPA on April 1, 2008, and September 21, 2009, and the January 11, 2012, and July 3, 2012, letters of commitment address all the required infrastructure elements for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS.[5]

III. EPA's Response to Comments

EPA received adverse comments from the Sierra Club on the July 24, 2012, proposed rulemaking to approve North Carolina's April 1, 2008, and September 21, 2009, infrastructure submissions as meeting the requirements of certain sections of 110(a)(1) and (2) of the CAA for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. A summary of the comments and EPA's response are provided below.

Comment 1: The Commenter contends that North Carolina's SIP does not contain the requisite enforceable limits for $PM_{2.5}$, and therefore, EPA cannot approve the State's infrastructure SIP submission with respect to section 110(a)(2)(A).

The Commenter asserts that North Carolina's SIP does not distinguish between filterable and condensable PM to demonstrate that condensable $PM_{2.5}$ emissions are limited and monitored. In addition, the Commenter states that North Carolina regulations do not currently provide adequate enforceable limitations for $PM_{2.5}$ emissions from individual sources. In support of this position, the Commenter notes that the North Carolina SIP addresses emissions of particulate matter generally, and does not distinguish between PM_{10} and $PM_{2.5}$. The Commenter also references the particulate matter maximum emission rates for two coal-fired power plants by way of example and argues that because test methods, such as Reference Test Method 5, do not test for condensable PM, as a practical matter, the SIP does not currently contain $PM_{2.5}$ emissions limits for sources that have not recently undergone new source review. The Commenter asserts that, as a result, the SIP does not ensure specific sources in North Carolina maintain the $PM_{2.5}$ NAAQS in attainment and unclassifiable areas. The Commenter concludes that this constitutes a SIP deficiency germane to EPA's determination respecting the sufficiency of the State's infrastructure SIP for purposes of section 110(a)(2)(A).

Response 1: EPA disagrees with the Commenter's contention that the State's

[2] This rulemaking only addresses requirements for this element as they relate to attainment areas.

[3] Today's final rule does not address element 110(a)(2)(D)(i) (Interstate Transport) for the 1997 and 2006 $PM_{2.5}$ NAAQS.

[4] This requirement was inadvertently omitted from EPA's October 2, 2007, memorandum entitled ''Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards,'' but as mentioned above is not relevant to today's final rulemaking.

[5] EPA intends to act on North Carolina's outstanding section 110(a)(2)(D)(i) requirements for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS in a separate action.

infrastructure SIP submission is not approvable with respect to section 110(a)(2)(A) because it does not contain adequate enforceable emissions limitations on $PM_{2.5}$.

With respect to the Commenter's specific concerns about the adequacy of emissions limitations at stationary sources, the Commenter is incorrect with respect both to the scope of what is germane to an action on an infrastructure SIP and with respect to when certain regulatory requirements for stationary sources became operative. This comment pertains to EPA's action on an infrastructure SIP, which must meet the general structural requirements described in section 110(a)(2)(A). Section 110(a)(2)(A) of the CAA reads as follows:

> Each implementation plan submitted by a State under this Act shall be adopted by the State after reasonable notice and public hearing. Each such plan shall include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this Act.

The Commenter seems to believe that in the context of an infrastructure SIP submission, section 110(a)(2)(A) explicitly requires that a state adopt all possible new enforceable emission limits, control measures and other means developed specifically for attaining and maintaining the new NAAQS within the state.

EPA does not believe that this is a reasonable interpretation of the provision with respect to infrastructure SIP submissions. Rather, EPA believes that different requirements for SIPs become due at different times depending on the precise applicable requirements in the CAA. For example, some state regulations are required pursuant to CAA section 172(b), as part of an attainment demonstration for areas designated as nonattainment for the standard. The timing of such an attainment demonstration would be after promulgation of a NAAQS, after completion of designations, and after the development of the applicable nonattainment plans. The Commenter seems to believe that EPA should disapprove a states infrastructure SIP if the state has not already developed all the substantive emissions limitations that may ultimately be required for all purposes, such as attainment and maintenance of the NAAQS as part of an attainment plan for a designated nonattainment area.

The Commenter focuses upon the adequacy of specific stationary source maximum emission rates in the North Carolina SIP—specifically the existing emissions rates for the Allen and Asheville coal-fired power plants provided at 15A N.C. Admin. Code 02D.0536—to support its argument that the SIP does not require adequate enforceable emissions limitations for $PM_{2.5}$ for existing sources. As described above, for purposes of approving North Carolina's infrastructure submittal as it relates to section 110(a)(2)(A), EPA's evaluation is limited to whether the State has adopted, as necessary and appropriate, enforceable emission limitations and other control measures to meet applicable structural requirements of the CAA. Today's action does not involve source specific evaluations of particular emissions limits or whether the state has correctly imposed emissions limitations on each stationary source. Moreover, EPA disagrees that the Allen and Asheville coal-fired power plant examples cited by the Commenter demonstrate a SIP deficiency germane to an EPA approval action respecting infrastructure 110(a)(2)(A) requirements. The Commenter has not identified how these maximum emissions limits, which were approved into the SIP on February 14, 1996, demonstrate that North Carolina has not sufficiently addressed the treatment of condensables in the State consistent with EPA guidance and the requirements of the CAA. In the implementation regulations for the $PM_{2.5}$ NAAQS, EPA separately authorized states to elect not to address condensable emissions in their air pollution programs until on or after January 1, 2011.[6] Thus, the State was not required to address condensables at the time these maximum emission rates were incorporated into the SIP. The State's compliance with what EPA authorized with respect to condensables is not grounds for disapproval of the state's infrastructure SIP submission.

Likewise, the fact that existing sources which have not gone through new source review in recent years are not subject to $PM_{2.5}$ emissions limits is not grounds for disapproving section 110(a)(2)(A). As referenced above, consistent with EPA authorization, states may elect not to address condensable emissions in their air pollution programs until on or after January 1, 2011. The fact that existing sources would not be subject to such requirements prior to this applicability date is not a grounds upon which to disapprove the infrastructure SIP submission with respect to section 110(a)(2)(A). EPA believes that the better approach to ensure that sources are evaluated in due course for condensable emissions as required by federal regulations after January 1, 2011, is through revisions to the PSD program consistent with the requirements of sections 110(a)(2)(C), (D)(i)(II) and (J). As discussed in the proposal for today's action, EPA is today conditionally approving North Carolina's infrastructure SIP submission as it relates to the section 110(a)(2)(C) and (J) PSD requirements. This conditional approval is based upon a commitment by the State to make a submission to meet current PSD program requirements, including proper evaluation of condensable emissions on an ongoing basis, in future regulatory actions, such as PSD permits. In addition, EPA notes that as a matter of State law, North Carolina has already elected to incorporate by reference EPA's own regulations relevant to the May 16, 2008, $PM_{2.5}$ NSR Implementation Rule.[7] Thus, as a practical matter, EPA believes that sources will in fact be evaluated for condensable emissions in the interim prior to the SIP submission from the State to meet the conditional approval requirement for section 110(a)(2)(C) and (J).

For purposes of section 110(a)(2)(A), and for purposes of an infrastructure SIP submission, EPA believes that the proper inquiry is whether the state has met the basic structural SIP requirements appropriate at the point in time EPA is acting upon it. As stated in EPA's proposed approval for this rule, to meet section 110(a)(2)(A), North Carolina submitted a list of existing emission reduction measures in the SIP that control PM emissions. These include all the required measures previously adopted for the control of PM. The Commenter identifies a number of ways in which it believes that the State's implementation plan fails to meet such current requirements, but EPA concludes that the Commenter has not identified any deficiency that justifies disapproval of the infrastructure SIP submission in this action.

Comment 2: The Commenter states that North Carolina's SIP does not meet

[6] *See* Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$), 73 FR 28321 (May 16, 2008); 40 CFR 51.166(b)(49)(vi); 40 CFR 52.21(b)(50)(vi).

[7] *See* North Carolina's PSD regulations at 15A NC Admin. Code 2D.0530, incorporates by reference 40 CFR 51.166(b)(49)(vi), which requires that condensable emissions be accounted for in applicability in determinations and in establishing emissions limitations for $PM_{2.5}$.

the requirements of CAA section110(a)(2)(D)(ii) because the North Carolina regulations cited in the proposed rule do not make any mention of notification requirements and fail to make any other reference to interstate or international transport.

Response 2: This comment pertains to infrastructure requirements described in section 110(a)(2)(D)(ii) of the CAA. Section 110(a)(2)(D)(ii) of the CAA requires that ''each implementation plan submitted by a State under this Act shall * * * contain adequate provisions * * * insuring compliance with applicable requirements of sections [126] and [115] * * * relating to interstate and international pollution.'' EPA disagrees with the Commenter's assertion that none of the state regulations referenced in the proposed rule make any mention of this notification requirement, nor make any other reference to interstate or international transport issues.'' Specifically, NCAC 2D.0530, *Prevention of Significant Deterioration,* states that ''[a] permit application subject to this Regulation shall be processed in accordance with the procedures and requirements of 40 CFR 51.166(q).'' 40 CFR 51.166(q) requires that ''a copy of the notice of public comment to the applicant, the Administrator and to officials and agencies having cognizance over the location where the proposed construction would occur as follows: Any other State or local air pollution control agencies, the chief executives of the city and county where the source would be located; any comprehensive regional land use planning agency, and any State, Federal Land Manager, or Indian Governing body whose lands may be affected by emissions from the source or modification.'' The Commenter has not provided how the above-described notification requirements fail to address the requirements under section 110(a)(2)(D)(ii). In addition, the Commenter does not identify any submittal required by section 110(a)(2)(A) that is overdue or deficient.

The Commenter also alleges deficiencies with respect to section 110(a)(2)(D)(ii) and section 115 international transport requirements, without articulating any specific reason. EPA does not believe that a state has any SIP requirements with respect to section 115 unless EPA has previously made a finding that emissions from the state cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country. EPA has made no such finding with respect to North Carolina, and thus the infrastructure SIP of that state need not contain or reference any provisions to address that requirement substantively.

Comment 3: The Commenter states that, although EPA is proposing to conditionally approve North Carolina's infrastructure submissions with respect to sections 110(a)(2)(C), (D) and (J), North Carolina's SIP must include $PM_{2.5}$ increments and significant emission rates under the PSD Program before EPA can fully approve the State's PM infrastructure submissions. The Commenter also states that any future submission by North Carolina that includes the significant impact levels for $PM_{2.5}$ cannot be approved by EPA for the reasons the Commenter articulated in *Sierra Club* v. *EPA,* 10–1413 (DC Circuit).

Response 3: EPA first notes that the Commenter mischaracterizes the scope of EPA's proposed conditional approval of North Carolina's infrastructure submissions. As described in the proposed rule for today's action, EPA only proposed to conditionally approve sections 110(a)(2)(C) and (J) as they relate to PSD requirements, and section 110(a)(2)(E)(ii). *See* 77 FR 43196. EPA did not propose any action respecting section 110(a)(2)(D)(i) in the August 24, 2012 proposed rule, and proposed approval of section 110(a)(2)(D)(ii) requirements. *See* 77 FR 43198, note 3; 43202.

With respect to the Commenter's statements as they relate to EPA's proposed conditional approval of sections 110(a)(2)(C) and (J) related to PSD requirements, EPA agrees that presently the North Carolina SIP does not contain the requisite significant emissions rate provisions necessary for EPA to approve these sections of the State's infrastructure SIP submissions. As such, EPA proposed conditional approval for sections 110(a)(2)(C) and (J) consistent with EPA's authority under section 110(k)(4), and based upon a commitment by the State to address these deficiencies within one year. As described in section 110(k)(4), should North Carolina fail to meet its commitment to address these deficiencies, a final conditional approval for these elements would become a disapproval. The Commenter has failed to state a reason why this proposed action is inconsistent with the requirements of the CAA.

In addition, EPA disagrees with Commenter's suggestion that EPA must approve North Carolina's $PM_{2.5}$ increments prior to fully approving sections 110(a)(2)(C) and (J). Pursuant to the 2010 $PM_{2.5}$ NSR Rule and CAA section 166(b), States were not required to submit a revised SIP addressing the $PM_{2.5}$ increments until July 20, 2012. The Agency proposed action on North Carolina's infrastructure SIP in a notice signed on July 13, 2012.[8] Therefore, on the date that the proposed rule was signed by the Agency, the $PM_{2.5}$ increments were not required to be included in the North Carolina SIP in order for North Carolina to meet the PSD requirements of sections 110(a)(2)(C) and (J) of the Act.

The Commenter's concerns relate to the timing of agency action on collateral, yet related, SIP submissions. These concerns highlight an important overarching question that the EPA has to confront when assessing the various infrastructure SIP submittals addressed in the proposed rule: how to proceed when the timing and sequencing of multiple related SIP submissions impact the ability of the State and the Agency to address certain substantive issues in the infrastructure SIP submission in a reasonable fashion.

It is appropriate for EPA to take into consideration the timing and sequence of related SIP submissions as part of determining what it is reasonable to expect a state to have addressed in an infrastructure SIP submission for a NAAQS at the time when EPA acts on such submission. EPA has historically interpreted section 110(a)(2)(C) and section 110(a)(2)(J) to require EPA to assess a State's infrastructure SIP submission with respect to the then-applicable and federally enforceable PSD regulations required to be included in a State's implementation plan at the time EPA takes action on the SIP. However, EPA does not consider it reasonable to interpret section 110(a)(2)(C) and section 110(a)(2)(J) to require EPA to propose to disapprove a State's infrastructure SIP submissions because the State had not yet, at the time of proposal, made a submission that was not yet due for the 2010 $PM_{2.5}$ NSR Rule. To adopt a different approach by which EPA could not act on an infrastructure SIP, or at least could not approve an infrastructure SIP, whenever there was any impending revision to the SIP required by another collateral rulemaking action would result in regulatory gridlock and make it impracticable or impossible for EPA to act on infrastructure SIPs if EPA is in the process of revising collateral PSD regulations. EPA believes that such an outcome would be an unreasonable reading of the statutory process for the

[8] Although the notice was published by the **Federal Register** on July 24, 2012, the notice was signed by the Regional Administrator on July 13, 2012, before the statutory deadline for submission of the SIP revision addressing the $PM_{2.5}$ increments.

infrastructure SIPs contemplated in section 110(a)(1) and (2).

EPA acknowledges that it is important that these additional PSD program revisions be evaluated and approved into the State's SIP in accordance with the CAA, and EPA intends to address the $PM_{2.5}$ increments in a subsequent rulemaking.

Finally, EPA notes that the Commenter's statements regarding future EPA action on potential North Carolina $PM_{2.5}$ significant impact level submittals are not relevant to today's action, which as described in the proposed rule, is not approving any specific rule, but rather proposing that North Carolina's already-approved SIP meets—or in the case of the elements proposed for conditional approval, will meet—certain CAA requirements.

Comment 4: The Commenter states that EPA cannot approve future North Carolina submissions to meet CAA section 110(2)(D)(i) interstate transport and visibility obligations if it relies on the now vacated Cross State Air Pollution Rule to satisfy such obligations.

Response 4: As described in the proposed rule for today's action, EPA is not taking any action with respect to North Carolina's infrastructure SIP submissions related to section 110(a)(2)(D)(i). Comments related to EPA action on SIP submissions from North Carolina to address the requirements of 110(a)(2)(D)(i), including the interference with visibility prong in section 110(a)(2)(D)(i)(II), are not relevant to today's action.

IV. Final Action

As already described, North Carolina has addressed the elements of the CAA 110(a)(1) and (2) SIP requirements pursuant to EPA's October 2, 2007, guidance to ensure that 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS are implemented, enforced, and maintained in North Carolina. EPA is taking final action to approve in part, and conditionally approve in part, North Carolina's April 1, 2008, and September 21, 2009, submissions, with noted exceptions, for 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS because these submissions are consistent with section 110 of the CAA. Today's action is not approving any specific rule, but rather making a determination that North Carolina's already approved SIP meets certain CAA requirements.

V. 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 that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the 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, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

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 December 17, 2012. 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, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: September 27, 2012.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

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 II—North Carolina

■ 2. Section 52.1770(e) is revised to read as follows:

§ 52.1770 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED NORTH CAROLINA NON-REGULATORY PROVISIONS

Provision	State effective date	EPA approval date	Federal Register citation	Explanation
Capital Area, North Carolina Interagency Transportation Conformity Memorandum of Agreement.	1/1/2002	12/27/2002	67 FR 78986.	
Durham-Chapel Hill Interagency Transportation Conformity Memorandum of Agreement.	1/1/2002	12/27/2002	67 FR 78986.	
Winston-Salem Interagency Transportation Conformity Memorandum of Agreement.	1/01/2002	12/27/2002	67 FR 78986.	
High Point Interagency Transportation Conformity Memorandum of Agreement.	1/01/2002	12/27/2002	67 FR 78986.	
Greensboro Interagency Transportation Conformity Memorandum of Agreement.	1/01/2002	12/27/2002	67 FR 78986.	
Gaston, North Carolina Interagency Transportation Conformity Memorandum of Agreement.	1/1/2002	12/27/02	67 FR 78986.	
Mecklenburg-Union Interagency Transportation Conformity Memorandum of Agreement.	8/7/2003	9/15/2003	68 FR 53887.	
10 Year Maintenance Plan Update for the Raleigh/Durham Area.	6/4/2004	9/20/2004	69 FR 56163.	
10 Year Maintenance Plan Update for the Greensboro/Winston-Salem/High Point Area.	6/4/2004	9/20/2004	69 FR 56163.	
Attainment Demonstration of the Mountain, Unifour, Triad and Fayetteville Early Action Compact Areas.	12/21/2004	9/21/2005	70 FR 48874.	
Charlotte, Raleigh-Durham, and Winston-Salem Carbon Monoxide Second 10-Year Maintenance Plan.	3/18/05	3/24/06	71 FR 14817.	
8-Hour Ozone Maintenance plan for the Rocky Mount, North Carolina area (Edgecombe and Nash Counties).	6/19/2006	11/6/2006	71 FR 64891.	
8-Hour Ozone Maintenance plan for the Raleigh-Durham-Chapel Hill, North Carolina area (Durham, Franklin, Granville, Johnston, Orange, Person and Wake Counties in their entireties, and Baldwin, Center, New Hope and Williams Townships in Chatham County).	6/7/2007	12/26/2007	72 FR 72948.	
1-Hour Ozone Maintenance plan revision for the Greensboro/Winston-Salem/High Point area (Davidson, Forsyth, and Guilford counties and a portion of Davie County).	2/4/2008	4/8/2008	73 FR 18963.	
8-Hour Ozone Maintenance Plan for the Great Smoky Mountains National Park Area.	7/24/2009	12/07/2009	74 FR 63995.	
1997 Annual $PM_{2.5}$ Maintenance Plan for the Hickory, North Carolina Area (Catawba County).	12/18/2009	11/18/2011	76 FR 71452.	
1997 Annual $PM_{2.5}$ Maintenance Plan for the Hickory, North Carolina Area—MOVES Update.	12/22/2010	11/18/2011	76 FR 71452.	
1997 Annual $PM_{2.5}$ Maintenance Plan for the Greensboro, North Carolina Area (Davidson and Guilford Counties).	12/18/2009	11/18/2011	76 FR 71455.	
1997 Annual $PM_{2.5}$ Maintenance Plan for the Greensboro, North Carolina Area—MOVES Update.	12/22/2010	11/18/2011	76 FR 71455.	

EPA-APPROVED NORTH CAROLINA NON-REGULATORY PROVISIONS—Continued

Provision	State effective date	EPA approval date	**Federal Register** citation	Explanation
North Carolina 110(a)(1) and (2) Infrastructure Requirements for the 1997 8-Hour Ozone National Ambient Air Quality Standards.	12/12/2007	2/6/2012	77 FR 5703.	
1997 8-Hour Ozone 110(a)(1) Maintenance Plan for the Triad Area.	4/13/2011	3/26/2012	76 FR 3611.	
Supplement to 110(a)(1) Maintenance Plan for the Triad Area.	5/18/2011	3/26/2012	76 FR 3611.	
North Carolina portion of bi-state Charlotte; 1997 8-Hour Ozone 2002 Base Year Emissions Inventory.	11/12/2009	5/4/2012	77 FR 26441.	
Regional Haze Plan	11/17/2007	6/27/2012	77 FR 38185.	
110(a)(1) and (2) Infrastructure Requirements for 1997 Fine Particulate Matter National Ambient Air Quality Standards.	4/1/2008	10/16/2012	[Insert citation of publication].	With the exception of section 110(a)(2)(D)(i). With respect to sections 110(a)(2)(C) related to PSD requirements, 110(a)(2)(E)(ii) and 110(a)(2)(J) related to PSD requirements, EPA conditionally approved these requirements.
110(a)(1) and (2) Infrastructure Requirements for 2006 Fine Particulate Matter National Ambient Air Quality Standards.	9/21/2009	10/16/2012	[Insert citation of publication].	With the exception of section 110(a)(2)(D)(i). With respect to sections 110(a)(2)(C) related to PSD requirements, 110(a)(2)(E)(ii) and 110(a)(2)(J) related to PSD requirements, EPA conditionally approved these requirements.

■ 3. Section 52.1773 is amended by redesignating the existing text in § 52.1773 as paragraph (a) and adding paragraph (b) to read as follows:

§ 52.1773 Conditional approval.

* * * * *

(b) North Carolina submitted a letter to EPA on July 10, 2012, with a commitment to address the State Implementation Plan deficiencies regarding requirements of Clean Air Act sections 110(a)(2)(C) and 110(a)(2)(J) as they both relate to Prevention of Significant Deterioration (PSD) infrastructure requirements for the 1997 annual and 2006 24-hour fine particulate matter ($PM_{2.5}$) national ambient air quality standards. EPA is conditionally approving North Carolina's commitment to address outstanding requirements promulgated in the New Source Review (NSR) $PM_{2.5}$ Rule related to the $PM_{2.5}$ standard for their PSD program and committing to providing the necessary SIP revision to address these NSR $PM_{2.5}$ Rule requirements. If North Carolina fails to submit these revisions by October 16, 2013, the conditional approval will automatically become a disapproval on that date and EPA will issue a finding of disapproval.

[FR Doc. 2012–25301 Filed 10–15–12; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket No. 02–278; FCC 12–21]

Telephone Consumer Protection Act of 1991

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: In this document, the Commission announces that the Office of Management and Budget (OMB) has approved, for a period of three years, the information collection associated with the Commission's document Telephone Consumer Protection Act of 1991 (Report and Order). This notice is consistent with the *Report and Order,* which stated that the Commission would publish a document in the **Federal Register** announcing the effective date of those amendments.

DATES: The amendments to 47 CFR 64.1200(a)(2) and (3) published at 77 FR 34233, June 11, 2012, are effective October 16, 2013, 47 CFR 64.1200(a)(7) published at 77 FR 34233, June 11, 2012, is effective November 15, 2012, and 47 CFR 64.1200(b)(3), published at 77 FR 34233, June 11, 2012, is effective January 14, 2013.

FOR FURTHER INFORMATION CONTACT: Karen Johnson, Consumer and Governmental Affairs Bureau, at (202) 418–7706, or email *Karen.Johnson@fcc.gov.*

SUPPLEMENTARY INFORMATION: This document announces that, on September 17, 2012, OMB approved, for a period of three years, the information collection requirements contained in the Commission's *Report and Order,* FCC 12–21, published at 77 FR 34233, June 11, 2012. The OMB Control Number is 3060–0519. The Commission publishes this notice as an announcement of the effective date of those amendments. If you have any comments on the burden estimates listed below, or how the Commission can improve the collections and reduce any burdens caused thereby, please contact Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street SW., Washington, DC 20554. Please include the OMB Control Number, 3060–0519, in your correspondence. The Commission will also accept your comments via the Internet if you send them to *PRA@fcc.gov.*

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the FCC is notifying the public that it received OMB approval on September 17, 2012, for the information collection requirements contained in the

Commission's revised rules at 47 CFR 64.1200(a)(2), 64.1200(a)(3), 64.1200(a)(7), and 47 CFR 64.1200(b)(3).

Under 5 CFR 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, 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 that does not display a current, valid OMB Control Number. The OMB Control Number is 3060–0519.

The foregoing notice is required by the Paperwork Reduction Act of 1995, Public Law 104–13, October 1, 1995, and 44 U.S.C. 3507.

The total annual reporting burdens and costs for the respondents are as follows:

OMB Control Number: 3060–0519.

OMB Approval Date: September 17, 2012.

OMB Expiration Date: September 30, 2015.

Title: Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, CG Docket No. 02–278.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; Individuals or households; Not-for-profit institutions.

Number of Respondents and Responses: 50,151 respondents; 147,453,559 responses.

Estimated Time per Response: .004 hours (15 seconds) to 1 hour.

Frequency of Response: Recordkeeping requirement; Annual, on-occasion and one-time reporting requirement; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for the information collection requirements is found in the Telephone Consumer Protection Act of 1991 (TCPA), Public Law 102–243, December 20, 1991, 105 Stat. 2394, which added Section 227 of the Communications Act of 1934, [47 U.S.C. 227] Restrictions on the Use of Telephone Equipment.

Total Annual Burden: 712,140 hours.

Total Annual Cost: $3,989,700.

Nature and Extent of Confidentiality: Confidentiality is an issue to the extent that individuals and households provide personally identifiable information, which is covered under the FCC's system of records notice (SORN), FCC/CGB–1, ''Informal Complaints and Inquiries.'' As required by the Privacy Act, 5 U.S.C. 552a, the Commission also published a SORN, FCC/CGB–1 ''Informal Complaints and Inquiries'', in the **Federal Register** on December 15, 2009 (74 FR 66356) which became effective on January 25, 2010. A system of records for the do-not-call registry was created by the Federal Trade Commission (FTC) under the Privacy Act. The FTC originally published a notice in the **Federal Register** describing the system. *See* 68 FR 37494, June 24, 2003. The FTC updated its system of records for the do-not-call registry in 2009. *See* 74 FR 17863, April 17, 2009.

Privacy Impact Assessment: Yes. The Privacy Impact Assessment (PIA) was completed on June 28, 2007. It may be reviewed at: *http://www.fcc.gov/omd/privacyact/Privacy_Impact_Assessment.html.*

Note: The Commission will prepare a revision to the SORN and PIA to cover the PII collected related to this information collection, as required by OMB's Memorandum M–03–22 (September 26, 2003) and by the Privacy Act, 5 U.S.C. 552a.

Needs and Uses: The reporting requirements included under this OMB Control Number 3060–0519 enable the Commission to gather information regarding violations of Section 227 of the Communications Act, the Do-Not-Call Implementation Act, and the Commission's implementing rules. If the information collection were not conducted, the Commission would be unable to track and enforce violations of Section 227 of the Communications Act, the Do-Not-Call Implementation Act, or the Commission's implementing rules. The Commission's implementing rules provide consumers with several options for avoiding most unwanted telephone solicitations.

The national do-not-call registry supplements the company-specific do-not-call rules for those consumers who wish to continue requesting that particular companies not call them. Any company that is asked by a consumer, including an existing customer, not to call again originally had to honor that request for five years. In a subsequent order, the Commission required sellers and/or telemarketers to honor registrations with the National Do-Not-Call Registry indefinitely.

A provision of the Commission's rules, however, allows consumers to give specific companies permission to call them through an express written agreement. Nonprofit organizations, companies with whom consumers have an established business relationship, and calls to persons with whom the telemarketer has a personal relationship are exempt from the ''do-not-call'' registry requirements.

On September 21, 2004, the Commission released the *Safe Harbor Order* establishing a limited safe harbor in which persons will not be liable for placing autodialed and prerecorded message calls to numbers ported from a wireline service within the previous 15 days. The Commission also amended its existing National Do-Not-Call Registry safe harbor to require telemarketers to scrub their lists against the Registry every 31 days.

On December 4, 2007, the Commission released a notice of proposed rulemaking seeking comment on its tentative conclusion under the Do-Not-Call Improvement Act of 2007 that registrations with the Registry should be honored indefinitely, unless a number is disconnected or reassigned, or the consumer cancels his registration.

On June 17, 2008, in accordance with the Do-Not-Call Improvement Act of 2007, the Commission revised its rules to minimize the inconvenience to consumers of having to re-register their preferences not to receive telemarketing calls and to further the underlying goal of the National Do-Not-Call Registry to protect consumers' privacy rights. The Commission released a *Report and Order* in CG Docket No. 02–278, FCC 08–147, amending the Commission's rules under the Telephone Consumer Protection Act (TCPA) to require sellers and/or telemarketers to honor registrations with the National Do-Not-Call Registry so that registrations will not automatically expire based on the then-existing five-year registration period. Specifically, the Commission modified § 64.1200(c)(2) of its rules to require sellers and/or telemarketers to honor numbers registered on the Registry indefinitely or until the number is removed by the database administrator or the registration is cancelled by the consumer.

Most recently, on February 15, 2012, the Commission released a *Report and Order* in CG Docket No. 02–278, FCC 12–21, revising its rules to: (1) Require prior express written consent for all autodialed or pre-recorded telemarketing calls to wireless numbers and for all pre-recorded telemarketing calls to residential lines; (2) eliminate the established business relationship exception to the consent requirement for pre-recorded telemarketing calls to residential lines; (3) require telemarketers to include an automated, interactive opt-out mechanism in all pre-recorded telemarketing calls, to allow consumers more easily to opt-out of future robocalls during a robocall itself; and (4) require telemarketers to comply with the 3% limit on abandoned calls during each calling campaign, in order to discourage intrusive calling campaigns.

Finally, the Commission exempted from the Telephone Consumer Protection Act requirements pre-recorded calls to residential lines made by health-care-related entities governed by the Health Insurance Portability and Accountability Act of 1996.

Federal Communications Commission.

Gloria J. Miles,

Federal Register Liaison, Office of the Secretary, Office of Managing Director.

[FR Doc. 2012–25316 Filed 10–15–12; 8:45 am]

BILLING CODE 6712–01–P

NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR Part 821

[Docket No. NTSB–GC–2011–0001]

Rules of Practice in Air Safety Proceedings

AGENCY: National Transportation Safety Board.

ACTION: Interim final rule; request for comments.

SUMMARY: The National Transportation Safety Board (NTSB or Board) amends portions of its regulations, which set forth rules of procedure for the NTSB's review of certificate actions taken by the Federal Aviation Administration (FAA), as a result of the recent enactment of the Pilot's Bill of Rights.

DATES: This rule is effective October 16, 2012. Comments must be received by December 17, 2012. Comments received after the deadline will be considered to the extent possible.

ADDRESSES: A copy of this interim final rule, published in the **Federal Register** (FR), is available for inspection and copying in the NTSB's public reading room, located at 490 L'Enfant Plaza SW., Washington, DC 20594–2003. Alternatively, a copy is available on the government-wide Web site on regulations at *http://www.regulations.gov* (Docket ID Number NTSB–GC–2011–0001).

You may send comments identified by Docket ID Number NTSB–GC–2011–0001 using any of the following methods:

Federal eRulemaking Portal: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.

Mail: Send comments to NTSB Office of General Counsel, 490 L'Enfant Plaza East SW., Washington, DC 20594–2003.

Facsimile: Fax comments to 202–314–6090.

Hand Delivery: Bring comments to 490 L'Enfant Plaza East SW., 6th Floor, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For more information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: David Tochen, General Counsel, (202) 314–6080.

SUPPLEMENTARY INFORMATION:

I. Background

The NTSB previously issued an advance notice of proposed rulemaking (ANPRM), 75 FR 80452 (Dec. 22, 2010), and a notice of proposed rulemaking (NPRM), 77 FR 6760 (Feb. 9, 2012), concerning 49 CFR parts 821 and 826. (Part 826 sets forth rules of procedure concerning applications for fees and expenses under the Equal Access to Justice Act of 1980.) Prior to the NTSB's issuance of a final rule concerning parts 821 and 826, Congress enacted the Pilot's Bill of Rights, Public Law 112–53, 126 Stat. 1159 (August 3, 2012), which implemented statutory changes for, among other things: (1) The FAA to disclose its enforcement investigative report (EIR) to each respondent in an aviation certificate enforcement case; (2) the NTSB to apply the Federal Rules of Civil Procedure and Federal Rules of Evidence to each case; and (3) litigants now to have the option of appealing the Board's orders to either a Federal district court or a Federal court of appeals. The Board therefore issues this interim final rule in response to these legislative changes. Elsewhere in today's **Federal Register**, the NTSB published a final rule concerning those portions of its February 2012 NPRM not affected by enactment of the Pilot's Bill of Rights.

II. Rulemaking Procedure

As a result of enactment of the Pilot's Bill of Rights and to ensure compliance with it, the NTSB is immediately changing its Rules of Practice applicable to air safety proceedings. The statute is effective immediately, thus requiring the NTSB to promulgate regulatory changes without delay. As a result, the NTSB believes the statute constitutes good cause for issuance of an interim final rule. The NTSB will consider comments received during the comment period, and will alter the interim final rule issued herein if the comments warrant alteration.

III. Statutory Changes

Pursuant to subsection 2(a) of the Pilot's Bill of Rights, the Federal Rules of Evidence and Federal Rules of Civil Procedure, to the extent practicable, are applicable to all NTSB proceedings conducted under 49 CFR part 821, subparts C (rules applicable to proceedings under 49 U.S.C. 44703, which governs airman certificates), D (rules applicable to proceedings under 49 U.S.C. 44709, which governs amendments, modifications, suspensions, and revocations of certificates), and F (rules applicable to hearings conducted under 49 CFR part 821).

Subsection 2(b) of the statute requires the FAA provide ''timely, written notification'' to individuals who are the subject of an FAA enforcement action regarding the ''nature of the investigation.'' The FAA must inform the individual he or she need not respond to an FAA letter of investigation and will not be adversely affected if he or she elects not to respond. The statute requires the Administrator of the FAA to make available the releasable portions of the EIR to each individual, and provide certain air traffic data. The statute further provides that the Administrator may delay this notification if the FAA determines the notification would threaten the integrity of the investigation.

In addition, subsection 2(c) of the statute strikes from 49 U.S.C. 44703(d)(2), 44709(d)(3), and 44710(d)(1) the phrase, ''but is bound by all validly adopted interpretations of laws and regulations the Administrator carries out unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law.'' The statute also strikes from 49 U.S.C. 44709(d)(3) and 44710(d)(1) the language stating the Board is bound by FAA policy guidance concerning sanctions for violations.

Subsection 2(d) of the statute provides individuals with the option of appealing a Board order to a Federal district court or a Federal court of appeals. Previously, only the Federal courts of appeals had jurisdiction to review appeals of Board orders on certificate actions. Additionally, the statute states, absent a stay from the Board, an emergency order the Administrator issues under 49 U.S.C. 44709(e)(2) will remain in effect pending the exhaustion of the appeal to Federal district court. Regarding review of orders, the statute requires Federal district courts to give ''full independent review'' of the Administrator's decision; and in the case of emergency orders, the statute requires Federal district courts to give ''substantive independent and expedited review'' of the

Administrator's decision to make the order immediately effective.

Other provisions of the Pilot's Bill of Rights involve notices to airmen (section 3) and the FAA medical certification process (section 4). These provisions do not directly affect the Board's Rules of Practice and therefore do not require changes to the Board's rules.

IV. Regulatory Changes

As a result of these statutory provisions, the Board herein implements the following changes to 49 CFR part 821. As indicated above, the NTSB will consider all comments concerning this rulemaking received by the deadline, but will only alter any provisions implemented in this rule if the comments establish such alteration is necessary.

A. Section 821.5: Procedural Rules

The NTSB herein adds a new section, 821.5, entitled ''Procedural rules'' within Subpart B of part 821. This new section will state, ''In proceedings under subparts C, D, and F, for situations not covered by a specific Board rule, the Federal Rules of Civil Procedure will be followed to the extent they are consistent with sound administrative practice.'' The NTSB considers the phrase, ''to the extent they are consistent with sound administrative practice,'' to preclude the application of Federal Rules of Civil Procedure that are obviously inapplicable. For example, Federal administrative agencies do not conduct jury trials. *See, e.g., Atlas Roofing Co., Inc.* v. *OSHRC,* 430 U.S. 442, 455 (1977). Likewise, rules concerning class actions are inapplicable. Overall, the NTSB has reviewed the Federal Rules of Civil Procedure and notes the inapplicability of the following rules: 5.1 (''Constitutional Challenge to a Statute—Notice, Certification, and Intervention''), 5.2 (''Privacy Protection for Filings Made with the Court''), 13 (''Counterclaim and Crossclaim''), 14 (''Third-Party Practice''), 35 (''Physical and Mental Examinations''), 38 (''Right to a Jury Trial; Demand''), 39 (''Trial by Jury or by the Court''), 47 (''Selecting Jurors''), 48 (''Number of Jurors; Verdict; Polling''), 49 (''Special Verdict; General Verdict and Questions''), 50 (''Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling''), 51 (''Instructions to the Jury; Objections; Preserving a Claim of Error''), 53 (''Masters''), and the Rules contained in Titles IV (''Parties''), VIII (''Provisional and Final Remedies''), IX (''Special Proceedings''), X (''District Courts and Clerks; Conducting Business; Issuing Orders''), and ''Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions'' of the Federal Rules of Civil Procedure.

Furthermore, the NTSB considers the rules contained in subpart B of 49 CFR part 821 (''General Rules Applicable to Petitions for Review, Appeals to the Board, and Appeals from Law Judges' Initial Decisions and Appealable Orders'') analogous to local rules, as referenced in various parts of the Federal Rules of Civil Procedure. In this regard, the NTSB will consider its rules in subpart B of part 821 to supplement the overarching applicable Federal Rules of Civil Procedure. To the extent the timelines for filing or responding, as well as procedural processes such as for discovery or subpoenas, differ slightly from the Federal Rules of Civil Procedure, the NTSB will consider the rules in subpart B as the local rules followed in practice before the Board.

The NTSB believes this new section adequately provides notice to parties of the application of the Federal Rules of Civil Procedure, yet still complies with the statutory directive in section 2(a) of the Pilot's Bill of Rights—that the Board's Rules of Practice adopt the Federal Rules of Civil Procedure ''to the extent practicable.'' Notably, most sections within subpart B of the Board's Rules of Practice have a Federal Rule counterpart. Sections 821.7 (''Filing of documents with the Board'') and 821.8 (''Service of documents'') of the Board's Rules of Practice are supplemental to Federal Rules of Civil Procedure (FRCP) 5 (''Serving and Filing Pleadings and Other Papers'') and 7 (''Pleadings Allowed; Form of Motions and Other Papers''), respectively. Concerning sections 821.10 (''Computation of time'') and 821.11 (''Extensions of time''), FRCP 6 (''Computing and Extending Time; Time for Motion Papers'') is also applicable. Similarly, section 821.12(a) will function as a supplement to FRCP 15 (''Amended and Supplemental Pleadings''), and section 821.12(b) will function as a supplement to FRCP 41(a) (''Dismissal of Actions''). The NTSB will read Title III (''Pleadings and Motions'') of the FRCPs in conjunction with section 821.14, concerning motion practice before the Board. Sections 821.24 and 821.30, both entitled ''[i]nitiation of proceeding,'' will function as supplements to FRCP 3, which simply states, ''[a] civil action is commenced by filing a complaint with the court.'' Likewise, section 821.40, concerning the record of the proceeding before the NTSB law judge, will function as a supplement to FRCP 44 (''Proving an Official Record'').

B. Section 821.19: Depositions and Other Discovery

As a general matter, the Board encourages parties to resolve discovery disputes on their own. In cases where parties seek a ruling from an NTSB law judge on a discovery dispute, the NTSB encourages parties to articulate clearly their position by relying on the Federal Rules of Civil Procedure as read in conjunction with the Board's Rules of Practice.

1. Subsection (a)

Subsection 821.19(a), entitled ''Depositions,'' will now include a reference to the Federal Rules of Civil Procedure within the second sentence, to read as follows: ''Reasonable notice shall be given in writing to the other parties, stating the name of the witness and the time and place of the taking of the deposition, in accordance with the Federal Rules of Civil Procedure.'' Federal Rules 30 (''Depositions by Oral Exam'') and 31 (''Depositions by Written Questions'') address deposition testimony, and require such written notice. The Board believes subsection 821.19(a) is fully consistent with FRCPs 30 and 31; therefore, the Board intends to retain the text of subsection (a) and simply add a reference to the Federal Rules.

2. Subsection (b)

Subsection (b), entitled ''[e]xchange of information by the parties,'' is amended to state: ''The parties must exchange information in accordance with the Federal Rules of Civil Procedure. Copies of discovery requests and responses shall be served on the law judge to whom the proceeding has been assigned or, if no law judge has been assigned, on the Case Manager. In the event of a dispute, either the assigned law judge or another law judge delegated this responsibility (if a law judge has not yet been assigned or if the assigned law judge is unavailable) may issue an appropriate order, including an order directing compliance with any ruling previously made with respect to discovery.'' The NTSB herein strikes the previous language at the beginning of subsection (b), which allowed parties to set their own discovery schedules, as this language is not consistent with FRCPs 26 (''Duty to Disclose; General Provisions Governing Discovery'') and 34 (''Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspections and Other Purposes'').

3. Subsection (c)

Subsection 821.19(c) is entitled ''[u]se of the Federal Rules of Civil Procedure,''

and describes the NTSB's use of the Federal Rules as instructive, rather than mandatory. The NTSB herein strikes that subsection, and recodifies the previous subsection (d), entitled, ''Failure to provide or preserve evidence,'' as new subsection (c). The text of that subsection will remain unchanged. The NTSB will read this subsection in conjunction with FRCP 11 (''Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions''), which provides sanction for noncompliance with discovery obligations.

4. Subsection (d)

Subsection 2(b)(2)(E) of the Pilot's Bill of Rights requires the FAA to make available the releasable portions of its EIR concerning each individual against whose certificate it takes action. The disclosure must occur in a timely manner, unless doing so would threaten the integrity of the investigation. The FAA's guidance to its inspectors concerning implementation of Pilot's Bill of Rights' provisions indicates the FAA intends to release the EIRs contemporaneously with the FAA's letters of investigation. FAA Notice N 8900.195 (Aug. 8, 2012), available at *http://fsims.faa.gov/wdocs/notices/n8900_195.htm* (to be incorporated in FAA Order 8900.1).

In order to implement this provision of the statute, the NTSB herein adds new subsection 821.19(d), entitled ''Motion to dismiss for failure to include copy of releasable portion of Enforcement Investigative Report (EIR).'' This new subsection states as follows: ''(1) Where the FAA fails to provide the releasable portion of its EIR with its required notification to the respondent, the respondent may move to dismiss the complaint and, unless the Administrator establishes good cause for that failure, the law judge shall dismiss the complaint. The law judge may accept arguments from the parties on the issue of whether a dismissal resulting from failure to provide the releasable portions of the EIR should be deemed to occur with or without prejudice. (2) The releasable portion of the EIR shall include all information in the EIR, except for the following: (i) Information that is privileged; (ii) Information that is an internal memorandum, note or writing prepared by a person employed by the FAA or another government agency; (iii) Information that would disclose the identity of a confidential source; (iv) Information of which applicable law prohibits disclosure; (v) Information about which the law judge grants leave to withhold as not relevant to the subject matter of the proceeding or otherwise, for good cause shown; or (vi) Sensitive security information, as defined at 49 U.S.C. 40119 and 49 CFR 15.5. (3) Nothing in this section shall be interpreted as preventing the Administrator from releasing to the respondent information in addition to that which is contained in the releasable portion of the EIR.''

The NTSB will only enforce the statutory mandate for the FAA to make available the releasable portions of the EIR in cases coming within the purview of the Board's jurisdiction. Therefore, the NTSB implements this requirement by way of a motion to dismiss, rather than as a predicate to a respondent's filing of an appeal.

C. Section 821.38: Evidence

The NTSB herein changes the text of section 821.38, concerning evidence, to read as follows: ''In any proceeding under the rules in this part, all evidence which is relevant, material, reliable and probative, and not unduly repetitious or cumulative, shall be admissible. All other evidence shall be excluded. Unless inconsistent with the requirements of the Administrative Procedure Act, the Federal Rules of Evidence will be applied in these proceedings.'' This change is consistent with section 2(a) of the Pilot's Bill of Rights, which mandates the Federal Rules of Evidence be applied to NTSB proceedings under part 821, subparts C, D, and F ''to the extent practicable.''

The previous version of section 821.38 permitted hearsay evidence. Under the provision in the Pilot's Bill of Rights requiring application of the Federal Rules of Evidence ''to the extent practicable,'' the NTSB believes NTSB law judges must exclude hearsay evidence unless an exception to the hearsay rule applies. Therefore, the language from the previous rule permitting hearsay (to include hearsay within hearsay) is stricken from the rule.

D. Section 821.64: Judicial Review

Subsection 3(d), paragraph (1) of the Pilot's Bill of Rights provides for judicial review in either a Federal district court or a Federal court of appeals. Subsection 821.64(a) of the Board's Rules of Practice previously informed parties they may seek judicial review ''by the filing of a petition for review with the appropriate United States Court of Appeals within 60 days of the date of entry (i.e., service date) of the Board's order.'' The Board herein adds ''or United States District Court'' to the first sentence, in accordance with the Pilot's Bill of Rights.

V. Regulatory Analysis

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of the potential costs and benefits under section 6(a)(3) of that Order. As such, the Office of Management and Budget has not reviewed this rule under Executive Order 12866. Likewise, this rule does not require an analysis under the Unfunded Mandates Reform Act, 2 U.S.C. 1501–1571, or the National Environmental Policy Act, 42 U.S.C. 4321–4347.

In addition, the NTSB has considered whether this rule would have a significant economic impact on a substantial number of small entities, under the Regulatory Flexibility Act (5 U.S.C. 601–612). The NTSB certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities. Moreover, in accordance with 5 U.S.C. 605(b), the NTSB will submit this certification to the Chief Counsel for Advocacy at the Small Business Administration.

Moreover, the NTSB does not anticipate this rule will have a substantial, direct effect on state or local governments or will preempt state law; as such, this rule does not have implications for federalism under Executive Order 13132, Federalism. This rule also complies with all applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. In addition, the NTSB has evaluated this rule under: Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights; Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks; Executive Order 13175, Consultation and Coordination with Indian Tribal Governments; Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use; and the National Technology Transfer and Advancement Act, 15 U.S.C. 272 note. The NTSB has concluded that this rule does not contravene any of the requirements set forth in these Executive Orders or statutes, nor does this rule prompt further consideration with regard to such requirements.

The NTSB invites comments relating to any of the foregoing determinations and notes the most helpful comments reference a specific portion of the proposal, explain the reason for any

recommended change, and include supporting data.

List of Subjects in 49 CFR Part 821

Administrative practice and procedure, Airmen, Aviation safety.

For the reasons discussed in the preamble, the NTSB amends 49 CFR part 821 as follows:

PART 821—RULES OF PRACTICE IN AIR SAFETY PROCEEDINGS

■ 1. The authority citation for 49 CFR part 821 is revised to read as follows:

Authority: 49 U.S.C. 1101–1155, 44701–44723, 46301, Pub. L. 112–153, unless otherwise noted.

■ 2. Add § 821.5 to Subpart B to read as follows:

§ 821.5 Procedural rules.

In proceedings under subparts C, D, and F of this part, for situations not covered by a specific Board rule, the Federal Rules of Civil Procedure will be followed to the extent they are consistent with sound administrative practice.

■ 3. Revise § 821.19 to read as follows:

§ 821.19 Depositions and other discovery.

(a) *Depositions.* After a petition for review or a complaint is filed, any party may take the testimony of any person, including a party, by deposition, upon oral examination or written questions, without seeking prior Board approval. Reasonable notice shall be given in writing to the other parties, stating the name of the witness and the time and place of the taking of the deposition, in accordance with the Federal Rules of Civil Procedure. A copy of any notice of deposition shall be served on the law judge to whom the proceeding has been assigned or, if no law judge has been assigned, on the Case Manager. In other respects, the taking of any deposition shall be compliance with the provisions of 49 U.S.C. 46104(c).

(b) *Exchange of information by the parties.* The parties must exchange information in accordance with the Federal Rules of Civil Procedure. Copies of discovery requests and responses shall be served on the law judge to whom the proceeding has been assigned or, if no law judge has been assigned, on the Case Manager. In the event of a dispute, either the assigned law judge or another law judge delegated this responsibility (if a law judge has not yet been assigned or if the assigned law judge is unavailable) may issue an appropriate order, including an order directing compliance with any ruling previously made with respect to discovery.

(c) *Failure to provide or preserve evidence.* The failure of any party to comply with a law judge's order compelling discovery, or to cooperate with a timely request for the preservation of evidence, may result in a negative inference against that party with respect to the matter sought and not provided or preserved, a preclusion order, dismissal or other relief deemed appropriate by the law judge.

(d) *Motion to dismiss for failure to include copy of releasable portion of Enforcement Investigative Report (EIR).* (1) Where the FAA fails to provide the releasable portion of its EIR with its required notification to the respondent, the respondent may move to dismiss the complaint and, unless the Administrator establishes good cause for that failure, the law judge shall dismiss the complaint. The law judge may accept arguments from the parties on the issue of whether a dismissal resulting from failure to provide the releasable portions of the EIR should be deemed to occur with or without prejudice.

(2) The releasable portion of the EIR shall include all information in the EIR, except for the following:

(i) Information that is privileged;

(ii) Information that is an internal memorandum, note or writing prepared by a person employed by the FAA or another government agency;

(iii) Information that would disclose the identity of a confidential source;

(iv) Information of which applicable law prohibits disclosure;

(v) Information about which the law judge grants leave to withhold as not relevant to the subject matter of the proceeding or otherwise, for good cause shown; or

(vi) Sensitive security information, as defined at 49 U.S.C. 40119 and 49 CFR 15.5.

(3) Nothing in this section shall be interpreted as preventing the Administrator from releasing to the respondent information in addition to that which is contained in the releasable portion of the EIR.

■ 4. Revise § 821.38 to read as follows:

§ 821.38 Evidence.

In any proceeding under the rules in this part, all evidence which is relevant, material, reliable and probative, and not unduly repetitious or cumulative, shall be admissible. All other evidence shall be excluded. Unless inconsistent with the requirements of the Administrative Procedure Act, the Federal Rules of Evidence will be applied in these proceedings.

■ 5. In § 821.64, revise paragraph (a) to read as follows:

§ 821.64 Judicial review.

(a) *General.* Judicial review of a final order of the Board may be sought as provided in 49 U.S.C. 1153 and 46110 by the filing of a petition for review with the appropriate United States Court of Appeals or United States District Court within 60 days of the date of entry (*i.e.,* service date) of the Board's order. Under the applicable statutes, any party may appeal the Board's decision. The Board is not a party in interest in such appellate proceedings and, accordingly, does not typically participate in the judicial review of its decisions. In matters appealed by the Administrator, the other parties should anticipate the need to make their own defense.

* * * * *

Deborah A.P. Hersman,

Chairman.

[FR Doc. 2012–25421 Filed 10–15–12; 8:45 am]

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NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR Parts 821 and 826

[Docket No. NTSB–GC–2011–0001]

Rules of Practice in Air Safety Proceedings; Rules Implementing the Equal Access to Justice Act of 1980

AGENCY: National Transportation Safety Board (NTSB or Board).

ACTION: Final rule.

SUMMARY: The NTSB amends its regulations which set forth rules of procedure for the NTSB's review of certificate actions taken by the Federal Aviation Administration (FAA); and its regulations which set forth rules of procedure concerning applications for fees and expenses under the Equal Access to Justice Act of 1980 (EAJA). The NTSB previously issued an advance notice of proposed rulemaking (ANPRM) and a notice of proposed rulemaking (NPRM) and has carefully considered comments submitted in response to both documents. In a separate interim final rule published elsewhere in this issue of the **Federal Register**, the NTSB is implementing regulatory changes as a result of the recently enacted Pilot's Bill of Rights.

DATES: This final rule is effective November 15, 2012.

ADDRESSES: A copy of the NPRM, published in the **Federal Register** (FR), is available for inspection and copying in the NTSB's public reading room, located at 490 L'Enfant Plaza SW., Washington, DC 20594–2003.

Alternatively, a copy of the NPRM is available on the government-wide Web site on regulations at *http://www.regulations.gov* (Docket ID Number NTSB–GC–2011–0001).

FOR FURTHER INFORMATION CONTACT: David Tochen, General Counsel, (202) 314–6080.

SUPPLEMENTARY INFORMATION:

I. Notice of Proposed Rulemaking

On February 9, 2012, the NTSB published an NPRM inviting public comments concerning the NTSB procedural rules codified at 49 CFR parts 821 and 826. 77 FR 6760. The NPRM also addressed each of the 20 relevant comments received in response to the ANPRM, which the NTSB published on December 22, 2010. 75 FR 80452. In addition to various technical changes, the NTSB proposed in the NPRM changes to various regulations to allow for the electronic filing of certain documents; a requirement that the FAA provide a copy of the releasable portions of its enforcement investigation report (EIR) by the date on which an emergency order is issued; a statement that the law judge may consider the facts of each case and determine whether to dismiss the case with prejudice when the FAA withdraws its complaint; and a statement that the law judge will accept evidence in determining whether a case warrants emergency status. The NTSB also proposed amendments to 49 CFR part 826, governing claims brought under the EAJA, to bring the regulations up-to-date and ensure petitioners are aware of the steps necessary to obtain fees from the FAA following an order requiring the payment of fees.

Both the ANPRM and NPRM included a discussion of the Board's procedure for handling certain aspects of emergency cases. The FAA issues emergency orders when it determines the interests of aviation safety require that the order take effect immediately, and, in those cases, the certificate holder may not exercise certificate privileges during the pendency of an appeal with the NTSB. Section 716 of the Aviation Investment and Reform Act for the 21st Century (''AIR–21'') amended 49 U.S.C. 44709 by granting the NTSB authority to review such emergency determinations. Public Law 106–181, section 716 (April 5, 2000) (codified at 49 U.S.C. 44709(e)(3)). The NTSB's rules governing review of the emergency status of a case have been the subject of debate in the aviation legal community in the recent past. Specifically, § 821.54(e) directs NTSB's law judges to dispose of petitions for review of the FAA's emergency determinations by:

> Consider[ing] whether, based on the acts and omissions alleged in the [Federal Aviation] Administrator's order, and assuming the truth of such factual allegations, the Administrator's emergency determination was appropriate under the circumstances, in that it supports a finding that aviation safety would likely be compromised by a stay of the effectiveness of the order during the pendency of the respondent's appeal.

The aspect of the standard relating to the law judges' assumption of the truth of the FAA's allegations of fact prompted much feedback.

II. Comments Received on the NPRM and Responses Thereto

The NTSB received nine comments in response to the NPRM, which are available at *http://www.regulations.gov* (Docket No. NTSB–GC–2011–0001). The NTSB carefully considered all comments received in response to the NPRM, as well as the preceding ANPRM.[1] This section contains summaries of the NRPM comments. The NTSB's responses to the comments are included in the section below entitled ''Changes.''

The comments primarily address the NTSB's regulations governing review of emergency determinations, but also provide feedback concerning other NTSB regulations. Most of the comments assert the current standard for review of FAA emergency determinations is fundamentally unfair because it requires the NTSB's law judges to assume the truth of the factual allegations the FAA makes in its emergency order. While the NTSB did not propose changing the standard of review in the NPRM, it did propose a requirement that the FAA provide a copy of the EIR to each respondent in emergency cases at the time the FAA issues its emergency order. Following publication of the NPRM and the comment period, Congress passed the Pilot's Bill of Rights. Pub. L. No. 112–153 (August 3, 2012). The statute requires the FAA to release the EIR in each case. *Id.* section 2(b)(2)(E). As a result, the EIR proposal in the NPRM is moot as it now is required by statute. Therefore, this final rule will not address the release of the EIR, rather the NTSB addresses that requirement in an interim final rule in response to the Pilot's Bill of Rights. This interim final rule is published elsewhere in this issue of the **Federal Register**.

[1] Comments submitted in response to the ANPRM are also available in Docket No. NTSB–GC–2011–0001.

In addition, the NTSB proposed a rule that the law judge may consider evidence concerning whether the case warrants emergency status when the respondent submits such evidence with his or her petition for review of the emergency order. This proposal also prompted much discussion from the commenters, as described below.

A. Section 821.54 (Disposition of Petitions for Review of Emergency Determinations of the Federal Aviation Administration)

1. Comments Received

Regarding respondents' challenges to the emergency status of a case under section 821.54, the FAA contends the NTSB should not have used a drug testing refusal case as an example of a case where the law judge granted a respondent's petition regarding the emergency status of the case. The FAA's comment asserts the NTSB gave the impression that a respondent's opportunity to submit evidence was equivalent to a trial on the merits. The comment suggests adding the following sentence at the end of § 821.54(b): ''The respondent may include attachments to the petition for review (e.g., affidavits, other records) limited to evidence the respondent believes supports the reasons enumerated in the petition for why the Administrator's emergency determination is not warranted in the interest of aviation safety.''

The Air Line Pilots Association, International (ALPA), also submitted a comment concerning the emergency actions. ALPA strongly disagrees with the decision to leave the ''assuming the truth'' standard of review undisturbed, and proposed adding a requirement that law judges *must* consider evidence a respondent submits in his or her challenge to the emergency status of a case. ALPA's comment also states the NTSB should consider the amount of time the FAA knew of the alleged wrongdoing before issuing an emergency order, as this time period is relevant to whether the case is a legitimate emergency.

Similarly, the Aircraft Owners and Pilots Association (AOPA) disagrees with the intent to leave the emergency determination standard of review unchanged. AOPA's comment contends Congress, in authorizing us to review emergency appeals of aviation certificate actions, intended to provide each respondent with a ''substantive review'' of the emergency action. AOPA notes it ''remains perplexed as to why the NTSB maintains that this type of review does not lend itself to evidentiary proof.'' AOPA states it is

mindful of the time constraints applicable to emergency cases, but contends the time limits should not be a reason to ''undermine meaningful review'' of the emergency status. AOPA suggests an allowance for telephonic presentations and arguments concerning whether the emergency status of a case is warranted, and argues the law judges should have discretion concerning whether to assume the truth of the factual allegations contained in the FAA's emergency orders. AOPA agrees with the proposal that law judges may consider evidence a respondent submits in challenging an emergency order.

The National Air Transportation Association (NATA) also commented on the NPRM. As with the ANPRM, NATA is in favor of eliminating the ''assuming the truth'' standard of review concerning the emergency status of cases. NATA asserts no statute requires this standard of review, nor does any legislative history indicate this standard is necessary. NATA contends emergency actions, and deferential review of them, are fundamentally unfair, and asserts emergency actions must be subject to ''meaningful review'' by an ''impartial and independent body.'' NATA suggests the NTSB impose a rebuttable presumption standard concerning emergency challenges. In particular, the comment states:

> [w]hile NATA strongly believes that the NTSB should create no presumption with regard to the FAA's factual allegations, NATA believes that a rebuttable presumption standard is the absolute minimum review standard necessary to provide to the NTSB at least some argument that it is providing due process, appropriate checks and balances and the type of meaningful, impartial and independent review of FAA's emergency determination that Congress intended.

NATA asserts the requirement to defer to the FAA's interpretation of the Federal Aviation Regulations (as required by 49 U.S.C. 44709(d)(3)),[2] combined with the ''assuming the truth'' standard, results in too much deference to the FAA. NATA also believes the law judges would not grant a challenge to the FAA's emergency action even when the respondent presents evidence indicating the factual allegations are not true, as a result of the deferential standard of review.

The National Business Aviation Association (NBAA) submitted a comment identical to that of NATA.

The Aeronautical Repair Station Association (ARSA) also submitted a comment expressing disagreement with the intent not to remove the ''assuming the truth'' standard of review applicable to emergency cases. ARSA contends the FAA's authority to issue an emergency order remains unchecked, and the ''assuming the truth'' standard ''effectively swallows the rule'' because it renders review of petitions challenging emergency status meaningless. ARSA asserts an emergency order should be used sparingly, because the effect of such an order is severe.

Carstens and Cahoon, LLP, submitted a brief comment concurring with the proposal to retain the ''assuming the truth'' standard, as it is ''in full accord with 49 U.S.C. 44709(e).'' The commenter also agrees with the proposed rule to permit respondents to present evidence challenging the emergency nature of the case, as this proposal ''provides both sides with fairness and justice for the purpose of the limited review by the law judge of the FAA's emergency determination.''

The Transport Workers Union of America (TWU) commented concerning the standard of review of the emergency status of cases. TWU acknowledges the need for some deference to the FAA's factual allegations, given the fact that a challenge concerning the emergency status is limited in scope and cannot consist of litigating the merits of the case. As with its response to the ANPRM, TWU again suggests adoption of a less deferential standard of review than the current ''assuming the truth'' standard. TWU analogizes its proposed review of FAA emergency cases to Federal courts' review of temporary restraining orders or preliminary injunctionsto require the FAA to show a substantial likelihood of success on the merits.[3] TWU notes other Federal agencies apply this ''substantial likelihood of success'' standard when determining whether to grant a stay of a case.[4]

The Aviation Law Firm submitted a comment discussing the proposed changes regarding emergency cases. The commenter recommends the NTSB change the permissive language of ''should permit evidence, if appropriate'' within § 821.54(e) to say ''shall permit evidence.'' The Aviation Law Firm contends such a change would provide sufficient clarity that law judges will consider evidence a petitioner submits.

The FAA Whistleblowers Alliance submitted a brief comment stating the FAA misuses its authority to issue emergency orders. The comment indicates the organization agrees with this rulemaking activity concerning review of emergency orders.

2. Changes

The NTSB carefully reviewed all comments regarding procedures applicable to emergency cases. As indicated above, the FAA is authorized, under 49 U.S.C. 44709(e)(2), to issue orders amending, modifying, suspending, or revoking certificates issued on an ''emergency'' basis. In 2000, AIR–21 amended 49 U.S.C. 44709 to grant the NTSB authority to review such emergency determinations. In particular, section 44709(e)(3) and (4) states:

> (3) Review of emergency order.—A person affected by the immediate effectiveness of the Administrator's order under paragraph (2) may petition for a review by the Board, under procedures promulgated by the Board, of the Administrator's determination that an emergency exists. Any such review shall be requested not later than 48 hours after the order is received by the person. If the Board finds that an emergency does not exist that requires the immediate application of the order in the interest of safety in air commerce or air transportation, the order shall be stayed, notwithstanding paragraph (2). The Board shall dispose of a review request under this paragraph not later than 5 days after the date on which the request is filed.
>
> (4) Final disposition.—The Board shall make a final disposition of an appeal under subsection (d) not later than 60 days after the date on which the appeal is filed.

In order to implement these statutory provisions, on July 11, 2000, the NTSB published an interim rule with a request for comments. 65 FR 42637. This interim rule amended 49 CFR part 821 by providing NTSB's law judges with the authority to issue orders affirming or denying the FAA's emergency determination under 49 U.S.C. 44709(e). The interim rule directed NTSB law judges to determine whether the

[2] The Pilot's Bill of Rights removes the requirement that the Board defer to the FAA's interpretation of the Federal Aviation Regulations.

[3] As TWU notes in its comment, review of a ''traditional stay'' consists of a four-part test: (1) Likelihood that the party seeking action would prevail on the merits to any challenge sought; (2) the aggrieved party would suffer irreparable harm in the absence of a stay; (3) other interested parties would not be substantially harmed by a stay; and (4) the public interest supports the granting of a stay. *Washington Metro Area Transit Comm'n* v. *Holiday Tours, Inc.,* 559 F.2d 841, 843 (D.C. Cir. 1977). TWU's comment also cited a Surface Transportation Board decision for this standard: *Eighteen Thirty Group LLC—Acquisition Exemption—in Allegheny County, MD,* STB FD 35438, 2010 WL 4639505.

[4] TWU cited a Surface Transportation Board (STB) case, *Eighteen Thirty Group LLC—Acquisition Exemption in Allegheny County, MD,* STB FD 35438, 2010 WL 4639505, in which the STB determined whether to grant a motion to stay their decision. TWU's comment also included citations to two cases from the District of Columbia Court of Appeals that addressed organizations' petitions to agencies for injunctions.

Administrator abused his or her discretion in finding an emergency existed under the facts alleged in the Administrator's order. The NTSB assumed the facts to be true for the limited purpose of reviewing the emergency determination. The NTSB incorporated the abuse of discretion standard of review that had been set forth in *Nevada Airlines* v. *Bond,* 622 F.2d 1017 (9th Cir. 1980).[5] Courts have since upheld the ''arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law'' standard in other cases. See *Ickes* v. *FAA,* 299 F.3d 260 (3d Cir. 2002) (citing *Blackman* v. *Busey,* 938 F.2d 659, 663 (6th Cir. 1991)); *Armstrong* v. *FAA,* 515 F.3d 1294 (D.C. Cir. 2008).

On April 29, 2003, the NTSB published the final rule altering the standard of review for emergency determinations. 58 FR 22623. Since 2003, § 821.54(e) has provided:

> [w]ithin 5 days after the Board's receipt of [a petition for review of the FAA's emergency determination], the * * * law judge * * * shall dispose of the petition by written order, and, in so doing, shall consider whether, based on the acts and omissions alleged in the Administrator's order, and assuming the truth of such factual allegations, the Administrator's emergency determination was appropriate under the circumstances, in that it supports a finding that aviation safety would likely be compromised by a stay of the effectiveness of the order during the pendency of the respondent's appeal.

This standard, therefore, was a departure from the more stringent standard the courts affirmed.

In the 2010 ANPRM, the NTSB revisited this standard of review, requesting comments. 75 FR 80452–01 (Dec. 22, 2010). In the ANPRM, the NTSB reminded parties § 821.54(e) does not explicitly state the allegations of the FAA's complaint are ''deemed true,'' but instead uses the word ''assum[ed].'' The NTSB modeled this language after subsection (b) of the Board's Stale Complaint Rule, codified at 49 CFR 821.33.

In the 2012 NPRM, the NTSB did not propose changing this ''assuming the truth'' standard of review. The NTSB concluded that a challenge to an emergency determination should not be an opportunity to contest the factual allegations underlying the certificate action. This determination simply is the result of the statutory time constraints applicable to emergency cases.

If the NTSB held a hearing for every petition challenging the emergency status of a case, it could not fulfill its obligation to rule on the merits of the case within the statutorily required 60-day time frame. A commenter's suggestion to utilize telephonic hearings for emergency cases demonstrates an understanding of this predicament. The NTSB carefully considered alternatives to the ''assuming the truth'' standard, especially in light of the comments received in response to both the ANPRM and the NPRM, and determined it simply cannot issue a ruling on a petition challenging the emergency status of a case within 5 days if the NTSB holds a hearing.

The NTSB currently does not have the resources to hold hearings on petitions contesting emergency determinations, given the expedited time frame. Scheduling a time in which the parties are available to participate in a hearing, securing a space for the hearing, and ensuring a law judge is available for the hearing, would all be difficult to accomplish within 5 days. These considerations are only applicable to the scheduling of the hearing. Issuing a well-reasoned decision following the receipt of evidence and testimony from a hearing would require additional time.

Moreover, the NTSB only has four administrative law judges, all of whom are responsible for holding hearings across all 50 states, the District of Columbia, and Puerto Rico. Consistent with § 821.37(a), the NTSB holds hearings at the most convenient locations for the parties. The NTSB generally refrains from conducting telephonic hearings at which the NTSB's law judges must make factual determinations, because the law judges' ability to assess the credibility of witnesses at such hearings is greatly diminished.

Additionally, the four-prong standard applicable to preliminary injunctions or temporary restraining orders is similar to the manner in which NTSB law judges currently handle emergency challenges. By policy, the FAA attaches to each emergency order a document outlining the reason the FAA believes emergency treatment of the case is necessary. Under the Pilot's Bill of Rights, the FAA is now required to also provide a copy of releasable portions of the EIR to each respondent. In the document providing the FAA's justification for pursuing the case as an emergency, the FAA articulates the public interest at stake, which is akin to a showing of how irreparable harm would ensue if it could not proceed with the case as an emergency. The FAA's statement also contains a factual summary as to why the FAA would prevail on the merits, and why the FAA believes the public interest supports proceeding under our emergency rules. Federal courts, in applying the four-part preliminary injunction or temporary stay standard, must weigh the facts in a similar manner. For example, in such cases, they do not have time for a trial on the merits of the case wherein they apply a preponderance of the evidence standard. Instead, the courts must weigh the facts in favor of the party seeking action in analyzing the four prongs to determine whether short-term, immediate legal action is appropriate. The NTSB law judges' review of emergency challenges is similar to this analysis.

For the reasons set forth above, the NTSB retains the ''assuming the truth'' standard of review in § 821.54(e). However, the NTSB will also consider this analysis anew in light of any petition for rulemaking, that includes novel suggestions or points not previously articulated.

Finally, the NTSB adopts the suggestion from the Aviation Law Firm, recommending a change in the language of § 821.54(e) to state the law judge ''shall'' consider evidence a respondent submits in challenging the FAA's decision to proceed with a case as an emergency. The NTSB also adds the phrase ''if appropriate'' to the sentence, to ensure parties are aware the law judge ultimately makes the determination as to whether the evidence the respondent submits is relevant to the emergency determination. Therefore, this portion of § 821.54(e) will now read, ''* * * the law judge is not so limited to the order's factual allegations themselves, but also shall permit evidence, if appropriate, pertaining to the propriety of the emergency determination * * *.''

B. Electronic Filing of Documents

1. Comments Received

Several parties commented on the proposed changes to allow for electronic submission of documents. All commenters generally concur with permitting electronic submission. AOPA agrees with the move toward an electronic filing system by accepting documents via electronic mail, and stated it also agrees with the proposal to continue receiving documents by facsimile or postal mail, as not all respondents may have access to electronic mail. NBAA and NATA, however, both suggest creation of an electronic docketing system, such as the

[5] In *Nevada Airlines,* the Ninth Circuit stated as follows concerning review of the emergency status of cases: ''[w]ithout an administrative record or agency hearing at this stage of the proceedings and in light of the Administrator's broad discretion, we limit our review to determining whether the Administrator's finding of an emergency was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.'' *Id.* at 1020.

Federal courts' Public Access to Court Electronic Records (PACER) system. They indicate electronic docketing would provide for the timeliest and most efficient means of allowing parties to receive documents, and therefore provide a ''level playing field'' for both parties. ALPA's comment states it agrees with the proposed changes to allow for electronic submission of documents.

The Aviation Law Firm suggests an allowance for electronic submission of documents in emergency cases. Therefore, it proposes an amendment to § 821.54(b), to provide a respondent challenging the emergency status of an emergency order to file his or her petition via electronic mail.

The FAA also agrees with the proposal to allow for electronic submission of documents, and offered several suggestions. With regard to § 821.7, the FAA suggests adding the following sentence to subsections (a)(1) and (a)(2) of the regulation, to simplify it: ''Paragraph (3) provides the acceptable methods for filing documents under this provision.'' As for subsection (a)(3), the FAA suggests the NTSB not adopt the proposed rule stating, ''Documents filed by electronic mail must be signed and transmitted in a commonly accepted format, such as Adobe Portable Document Format (PDF),'' and instead adopt the following language: ''Documents filed by electronic mail must be signed and transmitted in accordance with the procedures established by the Board for accepting electronically filed documents, which can be found at [reference Web site where procedures can be found].'' The FAA suggests this amendment to provide the NTSB with flexibility in the future to alter the procedures as technology changes. The FAA's comment states that if the NTSB adopts this approach, the language in § 821.52 could be changed to clarify whether parties may submit documents in emergency cases via electronic mail.

The FAA also suggests clarification as to whether parties must file the ''originally signed document'' in addition to the copy received via facsimile or electronic mail. The FAA states, ''[a]s currently drafted, it appears that no hard copy needs to follow if a document is filed by facsimile or email.'' The FAA suggests requiring a hard copy submission in addition to facsimile or electronic mail submission, to ''ensure the NTSB is aware of the filing and that technical glitches do not undermine an otherwise timely and intended filing.'' The FAA also recommends establishing an automatic receipt to be transmitted in response to electronic mail filings.

With regard to the proposed change to § 821.8(b), which would require a party serve any other party by any method prescribed in § 821.7(a)(3), and allow a party the option of receiving service via electronic mail only, the FAA recommends clarifying this section by stating whether parties must also serve a hard copy of the document. The FAA states the reference to § 821.7(a)(3) creates this ambiguity. In response, the FAA recommends explicitly requiring, ''as a general matter,'' that any party serving a document by electronic mail or facsimile also serve a hard copy, to ensure the other party receives the document.

Finally, the FAA, like the Aviation Law Firm, questions why service via electronic mail is not permitted for emergency cases. The FAA recommends allowing electronic service of documents in the initial proceedings before the law judges. Several other commenters also recommend allowing electronic submission of documents in emergency cases.

2. Changes

As stated above, all commenters approve of the concept of permitting electronic filing in emergency cases. Given the time constraints applicable to emergency cases, the NTSB has determined adopting such a requirement would be advantageous to all parties. For this reason, the NTSB herein adopts the requirement for emergency cases as well as cases that proceed on the normal case disposition timeline. This change involves deleting references to expedited filing in § s 821.54(b) and (c), and 821.57(b). Additionally, the change requires adding a new subsection within § 821.52 to clarify electronic submission of documents is permissible in emergency cases.

The NTSB has determined the FAA's suggestion to provide a reference to the NTSB public Web site for a listing of procedures for electronic filing is advantageous. Such an approach will provide the NTSB with the flexibility to accommodate technological changes. In addition, listing procedures on the NTSB public Web site will be helpful as the NTSB seeks to design, build and utilize a robust electronic docketing system for enforcement cases. As a result, the NTSB adopts this change, and notes these procedures will be available on the NTSB Web site after publication of this final rule, but before its effective date.

Finally, the NTSB intends to provide in its online electronic filing procedures additional clarifications concerning § 821.8(d)(3), in which the following language was proposed: ''[We will presume lawful service] when a document is transmitted by facsimile or electronic mail and there is evidence to confirm its successful transmission to the intended recipient.'' By this change, the NTSB encourages parties filing via electronic mail to keep a copy of the transmission from their ''sent mail'' file. With an electronic docketing system, the NTSB may have the ability in the future to provide a fill-able electronic Web page that automatically generates an electronic ''receipt'' for documents.

Some commenters urge the NTSB to implement a robust electronic docketing system, such as the Federal courts' PACER system. The NTSB is currently in the process of gathering requirements and working with a contractor to design a system for the NTSB's docketing and electronic filing needs. The NTSB intends to develop and implement such a docketing system; however, this process may take some time, due to resource and fiscal constraints.

C. Rules Concerning the EAJA (49 CFR part 826)

1. Comments Received

Several commenters address the proposed change to § 821.12(b), which addressed the FAA's voluntary withdrawal of a complaint. The proposed language stated: ''The law judge may accept arguments from the parties on the issue of whether a dismissal resulting from the withdrawal of a complaint should be deemed to occur with or without prejudice.'' As explained in the preamble of the NPRM, the issue of dismissal with or without prejudice is directly relevant to whether a party has achieved ''prevailing party'' status under the EAJA.

Some commenters, such as NATA and NBAA, indicate they have ''no objection'' to the proposed change in § 821.12(b). The Aviation Law Firm suggests changing the word ''may'' to ''shall,'' to require law judges to accept arguments on the issue of dismissal with or without prejudice. The comment from the Aviation Law Firm includes a summary of recent cases concerning the EAJA. In particular, in the case of *Green Aviation Management Co., LLC* v. *Federal Aviation Administration,* 676 F.3d 200 (DC Cir. 2012), the DC Circuit indicated the with-or-without-prejudice prong of the three-prong test articulated in *District of Columbia* v. *Straus,* 590 F.3d 898 (DC Cir. 2010), is indeed an important consideration. In *Green,* the District of Columbia Circuit Court of Appeals held the applicant was the prevailing party because the law judge dismissed the

complaint with prejudice. *Green,* 676 F.3d at 204–205. Because this prong is such an important consideration, the Aviation Law Firm suggests the NTSB rules state law judges ''shall'' consider arguments concerning whether they should dismiss a case with prejudice when the FAA withdraws the complaint.

The FAA's comment states the proposed addition to § 821.12(b) lacks clarity, because the rule also states the law judge's approval is not necessary ''in the case of a petition for review, an appeal to the Board, a complaint, or an appeal from the law judge's initial decision or appealable order.'' Therefore, the FAA indicates the proposed change implies approval from a law judge is necessary to allow the FAA to withdraw a complaint. The FAA's comment suggests if this implication is correct, then the NTSB should specify ''such withdrawal must be by motion of the party.'' The FAA suggests the following concerning such a motion: (1) The motion state why the moving party is requesting withdrawal; (2) the motion state whether the moving party is requesting dismissal with prejudice; and (3) the motion state whether the non-moving party consents to the motion. The FAA also suggests stating that the law judges will summarily grant uncontested motions to withdraw without prejudice.

The FAA also suggests a change to part 826. The comment recommends changing the formula in § 826.6(b)(1) to the following: X/$125 per hour = CPI_NEW/CPI_1996. The FAA states the formula in the current rule is outdated and results in a higher cap on fees.

AOPA agrees with the proposed change to § 821.12(b). AOPA's comment, however, addresses a different aspect of the EAJA: the time for which an EAJA applicant may recover fees. With an extensive amount of research cited in its comment, AOPA contends the NTSB should allow an applicant to petition for fees and expenses incurred prior to the commencement of the applicant's appeal. AOPA states applicants and their representatives often expend time and resources in preparation for a defense prior to filing an appeal.

2. Changes

The majority of the comments regarding the EAJA focused on § 821.12(b), involving dismissal of the complaint with or without prejudice. As stated in the NPRM, this issue is a critical consideration in determining whether a party is the ''prevailing party'' for purposes of the EAJA. The NTSB understands the comment from the Aviation Law Firm, wherein it suggests inclusion of the word ''shall,'' to require the law judges to consider parties' arguments concerning whether to dismiss a case with prejudice. The NTSB initially chose to include the word ''may'' in the proposed language to acknowledge parties were not required to make such arguments. If parties are silent on the issue, then the law judges would not consider such arguments. The NTSB does not want to penalize parties who do not present any arguments on the issue of whether the law judge should dismiss with prejudice. As a result, the NTSB amends the proposed language to include the word ''shall,'' in conjunction with the phrase, ''if offered.''

The FAA's comment on the issue of dismissal with prejudice was helpful. The NTSB believes the clearest way to address the issue of dismissal with prejudice is to require a motion to dismiss in light of the FAA's withdrawal of a complaint. As a result, the NTSB changes the language in § 821.12(b) to require dismissals based on withdrawals of complaints to occur only on oral or written motion.

The FAA's comment also recommends updating the formula for the calculation of the cap on the maximum hourly rate for attorney's fees under the EAJA, found at 49 CFR 826.6(b)(1). The NTSB did not propose such a change or solicit comments concerning this calculation in either the ANPRM or the NPRM. As a result, the NTSB declines to consider this change in the current rulemaking.

Likewise, AOPA submitted a comment urging the NTSB to change the EAJA rules to allow a respondent to recover fees from the time he or she begins preparing the defense (*i.e.,* once the respondent becomes aware of the investigation). As with the FAA's suggestion regarding the calculation for the cap of fees under the EAJA, the NTSB did not propose a change or solicit comments regarding when to permit recovery of fees to commence. As a result, the NTSB declines to consider this change in the current rulemaking.

If the FAA, AOPA, or any other commenter wishes the NTSB to consider making changes to these rules under the EAJA, they may petition for a new rulemaking.

D. Miscellaneous Technical Changes

1. Comments Received

The majority of the comments concur with the miscellaneous technical changes. The FAA provided several suggested changes to the proposed language in this category. Concerning § 821.8(d) (entitled ''service of documents''), the NTSB proposed to add a new subsection (3), to presume lawful service ''[w]hen a document is transmitted by facsimile or electronic mail and there is evidence to confirm its successful transmission to the intended recipient.''

With regard to § 821.64(b) (entitled ''judicial review''), the NTSB proposed adding the following language: ''[n]o request for a stay pending judicial review will be entertained unless it is served on the Board within 20 days after the date of service of the Board's order. The Administrator may, within 2 days after the date of service of such a motion, file a reply thereto.'' The FAA's comment notes the NTSB based this change on the incorrect presumption that only a respondent would seek a stay. The FAA contends there may be times when the FAA needs to file a motion for a stay, and therefore recommends adopting party-neutral language in the rule (such as ''moving party'' and ''non-moving party''). The FAA also believes it is unreasonable to allow the non-moving party only 2 days to file a reply to the motion for stay, when the moving party has 20 days. In this regard, the FAA suggests permitting the moving party 10 days from the date of service of the Board's order to file a motion for stay, and allow the non-moving party 10 days to submit a reply to the motion.

2. Changes

In response to the FAA's suggestions regarding motions for stays, the NTSB herein amends the language in 821.64(b) to ensure it is party-neutral. The FAA also suggests altering the timeframe to allow the moving party 10 days to file a motion for stay, and the non-moving party an additional 10 days to reply to the motion. The NTSB considered this suggestion, and believes the most reasonable and fair filing timeframe is as follows: a party may file a motion for stay within 15 days of the date of service of the Board's order, and the non-moving party may reply to the motion within 5 days of the date of service of the motion for stay. The NTSB adopts this change, as it will ensure the NTSB does not encounter a situation in which a party files a motion for stay on the 29th day following service of the Board's order, but still provides sufficient time for a party to submit the motion. Likewise, the NTSB believes a 5-day timeframe to reply following service of the motion is reasonable.

Finally, ARSA suggests an alteration to the language in the stale complaint rule (codified at 49 CFR 821.33), to shift

the burden to the FAA in response to a respondent's motion to dismiss based on the stale complaint rule. Specifically, ARSA suggests changing the rule to require the FAA to reply within 15 days of a motion to dismiss based on the stale complaint rule, and to require the reply show good cause existed for the FAA's delay, or that public interest warrants imposition of the sanction, notwithstanding the delay. The NTSB did not propose a change or request comments concerning the stale complaint rule. Therefore, as indicated above, the NTSB will not attempt to issue such a change herein.

For the foregoing reasons, the NTSB finalizes the language of 49 CFR parts 821 and 826 as set forth below.

III. Regulatory Analyses

In the NPRM, the NTSB included a regulatory analyses section concerning various Executive Orders and statutory provisions. The NTSB did not receive any comments concerning the results of these analyses. The NTSB again notes the following concerning such Executive Orders and statutory provisions.

This final rule is not a significant regulatory action under Executive Order 12866. Therefore, Executive Order 12866 does not require a Regulatory Assessment. As such, the Office of Management and Budget (OMB) has not reviewed this proposed rule under Executive Order 12866. In addition, on July 11, 2011, the President issued Executive Order 13579, ''Regulation and Independent Regulatory Agencies,'' 76 FR 41587, July 14, 2011). Section 2(a) of the Executive Order states:

> Independent regulatory agencies ''should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.''

76 FR at 41587.

Consistent with Executive Order 13579, the NTSB's amendments to 49 CFR parts 821 and 826 reflect its judgment that these rules should be updated and streamlined.

This rule does not require an analysis under the Unfunded Mandates Reform Act, 2 United States Code (U.S.C.) 1501–1571, or the National Environmental Policy Act, 42 U.S.C. 4321–4347.

As stated in the NPRM, the NTSB has also analyzed these amendments in accordance with the principles and criteria contained in Executive Order 13132. Any rulemaking proposal resulting from this notice would not propose any regulations that would: (1) Have a substantial direct effect on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government; (2) impose substantial direct compliance costs on state and local governments; or (3) preempt state law. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

The NTSB is also aware that the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires each agency to review its rulemaking to assess the potential impact on small entities, unless the agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities. The NTSB certifies this final rule will not have a significant economic impact on a substantial number of small entities.

Regarding other Executive Orders and statutory provisions, this final rule also complies with all applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. In addition, the NTSB has evaluated this rule under: Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights; Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks; Executive Order 13175, Consultation and Coordination with Indian Tribal Governments; Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use; and the National Technology Transfer and Advancement Act, 15 U.S.C. 272 note. The NTSB has concluded that this rule does not contravene any of the requirements set forth in these Executive Orders or statutes, nor does this rule prompt further consideration with regard to such requirements.

List of Subjects

49 CFR Part 821

Administrative practice and procedure, Airmen, Aviation safety.

49 CFR Part 826

Claims, Equal access to justice, Lawyers.

For the reasons discussed in the preamble, the NTSB amends 49 CFR parts 821 and 826 as follows:

PART 821—RULES OF PRACTICE IN AIR SAFETY PROCEEDINGS

■ 1. The authority citation for 49 CFR part 821 is revised to read as follows:

Authority: 49 U.S.C. 1101–1155, 44701–44723, 46301, Pub. L. 112–153, unless otherwise noted.

■ 2. In § 821.6, revise paragraphs (b) and (d) to read as follows:

§ 821.6 Appearances and rights of witnesses.

* * * * *

(b) Any person appearing in any proceeding governed by this part may be accompanied, represented and advised, and may be examined by, his or her own counsel or representative.

* * * * *

(d) Any party to a proceeding who is represented by an attorney or representative shall, in a separate written document, notify the Board of the name, address and telephone number of that attorney or representative. In the event of a change in representation or a withdrawal of representation, the party shall immediately, in a separate written document, notify the Board (in the manner provided in § 821.7) and the other parties to the proceeding (pursuant to § 821.8), before the new attorney or representative may participate in the proceeding in any way. Parties, and their attorneys and representatives, must notify the Board immediately of any changes in their contact information.

■ 3. In § 821.7, revise paragraphs (a), (e), and (f) to read as follows:

§ 821.7 Filing of documents with the Board.

(a) *Filing address, method and date of filing.* (1) Except as provided in paragraph (a)(2) of this section, documents are to be filed with the Office of Administrative Law Judges, National Transportation Safety Board, 490 L'Enfant Plaza East SW., Washington, DC 20594, and addressed to the assigned law judge, if any. If the proceeding has not yet been assigned to a law judge, documents shall be addressed to the Case Manager. Paragraph (a)(3) of this section provides the acceptable methods for filing documents under this provision.

(2) Subsequent to the filing of a notice of appeal with the Office of Administrative Law Judges from a law judge's initial decision or appealable order, the issuance of a decision permitting an interlocutory appeal, or the expiration of the period within which an appeal from the law judge's initial decision or appealable order may be filed, all documents are to be filed with the Office of General Counsel, National Transportation Safety Board, 490 L'Enfant Plaza East SW., Washington, DC 20594. Paragraph (a)(3)

of this section provides the acceptable methods for filing documents under this provision.

(3) Documents shall be filed: By personal delivery, by U.S. Postal Service first-class mail, by overnight delivery service, by facsimile or by electronic mail as specified on the ''Administrative Law Judges'' Web page on the NTSB's public Web site. Documents filed by electronic mail must be signed and transmitted as specified on the ''Administrative Law Judges'' Web page on the NTSB's public Web site.

(4) Documents shall be deemed filed on the date of personal delivery; on the send date shown on the facsimile or the item of electronic mail; and, for mail delivery service, on the mailing date shown on the certificate of service, on the date shown on the postmark if there is no certificate of service, or on the mailing date shown by other evidence if there is no certificate of service and no postmark. Where the document bears a postmark that cannot reasonably be reconciled with the mailing date shown on the certificate of service, the document will be deemed filed on the date of the postmark.

* * * * *

(e) *Subscription.* The original of every document filed shall be signed by the filing party, or by that party's attorney or representative.

(f) *Designation of person to receive service.* The initial document filed by a party in a proceeding governed by this part, and any subsequent document advising the Board of any representation or change in representation of a party that is filed pursuant to § 821.6(d), shall show on the first page the name, address and telephone number of the person or persons who may be served with documents on that party's behalf.

* * * * *

■ 4. In § 821.8, revise paragraphs (a), (b)(1), (c), (d), and (e) to read as follows:

§ 821.8 Service of documents.

(a) *Who must be served.* (1) Copies of all documents filed with the Board must be simultaneously served on (*i.e.,* sent to) all other parties to the proceeding, on the date of filing, by the person filing them. A certificate of service shall be a part of each document and any copy or copies thereof tendered for filing, and shall certify concurrent service on the Board and the parties. A certificate of service shall be in substantially the following form:

I hereby certify that I have this day served the foregoing [specify document] on the following party's counsel or designated representatives [or party, if without counsel or representative], at the address indicated, by [specify the method of service (*e.g.,* first-class mail, electronic mail, personal service, etc.)] [List names and addresses of all persons served] Dated at _____this____ day of_____ 20__ (Signature)_____ For (on behalf of)_____

(2) Service shall be made on the person designated in accordance with § 821.7(f) to receive service. If no such person has been designated, service shall be made directly on the party. (b) *Method of Service.* (1) Service of documents by any party on any other party shall be accomplished by any method prescribed in § 821.7(a)(3) for the filing of documents with the Board. A party may waive the applicability of this paragraph, and elect to be served with documents by the other parties to the proceeding solely by electronic mail, by filing a written document with the Board (with copies to the other parties) expressly stating such a preference.

* * * * *

(c) *Where service shall be made.* Except for electronic mail, personal service, parties shall be served at the address appearing in the official record, which the Board must receive under §§ 821.6(d) and 821.7(f). In the case of an agent designated by an air carrier under 49 U.S.C. 46103, service may be accomplished only at the agent's office or usual place of residence.

(d) *Presumption of service.* There shall be a presumption of lawful service:

(1) When receipt has been acknowledged by a person who customarily or in the ordinary course of business receives mail at the residence or principal place of business of the party or of the person designated under § 821.7(f);

(2) When a properly addressed envelope, sent to the most current address in the official record, by regular, registered or certified mail, has been returned as unclaimed or refused; or

(3) When a document is transmitted by facsimile or electronic mail and there is evidence to confirm its successful transmission to the intended recipient.

(e) *Date of service.* The date of service shall be determined in the same manner as the filing date is determined under § 821.7(a)(4).

■ 5. In § 821.12, revise paragraph (b) to read as follows:

§ 821.12 Amendment and withdrawal of pleadings.

* * * * *

(b) *Withdrawal.* Except in the case of a petition for review, an appeal to the Board, a complaint, or an appeal from a law judge's initial decision or appealable order, pleadings may be withdrawn only upon approval of the law judge or the Board. The law judge may dismiss the case after receiving a motion to dismiss based on withdrawal of the complaint. The law judge shall accept arguments or motions, oral or written, from the parties, if offered, on the issue of whether a dismissal resulting from the withdrawal of a complaint should be deemed to occur with or without prejudice.

■ 6. In § 821.35, revise paragraph (b)(10) to read as follows:

§ 821.35 Assignment, duties and powers.

* * * * *

(b) * * *

(10) To issue initial decisions and dispositional orders.

* * * * *

■ 7. In § 821.50, revise paragraph (c) to read as follows:

§ 821.50 Petition for rehearing, reargument, reconsideration or modification of an order of the Board.

* * * * *

(c) *Content.* The petition shall state briefly and specifically the matters of record alleged to have been erroneously decided, and the ground or grounds relied upon. If the petition is based, in whole or in part, upon new matter, it shall set forth such new matter and shall contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable, and shall explain why such new matter could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed. To the extent the petition is not based upon new matter, the Board will not consider arguments that could have been made in the appeal or reply briefs received prior to the Board's decision.

* * * * *

■ 8. In § 821.52, add paragraph (e) to read as follows:

§ 821.52 General.

* * * * *

(e) Acceptable methods of filing and service. All documents submitted by a party in a proceeding governed by this subpart must be filed with the Board by overnight delivery, facsimile or electronic mail, and simultaneously served on all other parties by the same means. If filing by electronic mail, parties must adhere to the requirements in § 821.7(a)(3).

■ 9. In § 821.54, paragraphs (b), (c), and (e) to read as follows:

§ 821.54 Petition for review of Administrator's determination of emergency.

* * * * *

(b) *Form, content and service of petition.* The petition may be in letter form. A copy of the Administrator's order, from which review of the emergency determination is sought, must be attached to the petition. If a copy of the order is not attached, the petition will be dismissed. While the petition need only request that the Board review the Administrator's determination as to the existence of an emergency requiring the order be effective immediately, it may also enumerate the respondent's reasons for believing that the Administrator's emergency determination is not warranted in the interest of aviation safety. The respondent may include attachments to the petition for review (e.g., affidavits, other documents or records) limited to evidence the respondent believes supports the reasons enumerated in the petition for why the Administrator's emergency determination is not warranted in the interest of aviation safety.

(c) *Reply to petition.* If the petition enumerates the respondent's reasons for believing that the Administrator's emergency determination is unwarranted, the Administrator may, within 2 days after the date of service of the petition, file a reply, which shall be strictly limited to matters of rebuttal. No submissions other than the respondent's petition and the Administrator's reply in rebuttal will be accepted, except in accordance with paragraph (d) of this section.

* * * * *

(e) *Disposition.* Within 5 days after the Board's receipt of the petition, the chief law judge (or, if the case has been assigned to a law judge other than the chief law judge, the law judge to whom the case is assigned) shall dispose of the petition by written order, and, in so doing, shall consider whether, based on the acts and omissions alleged in the Administrator's order, and assuming the truth of such factual allegations, the Administrator's emergency determination was appropriate under the circumstances, in that it supports a finding that aviation safety would likely be compromised by a stay of the effectiveness of the order during the pendency of the respondent's appeal. In making this determination, however, the law judge is not so limited to the order's factual allegations themselves, but also shall permit evidence, if appropriate, pertaining to the propriety of the emergency determination, presented by the respondent with the petition and the Administrator with the reply to the petition. This evidence can include affidavits or other such records.

* * * * *

■ 10. In § 821.55, revise paragraph (a) to read as follows:

§ 821.55 Complaint, answer to complaint, motions and discovery.

(a) *Complaint.* In proceedings governed by this subpart, the Administrator's complaint shall be filed and simultaneously served on the respondent within 3 days after the date on which the Administrator received the respondent's appeal, or within 3 days after the date of service of an order disposing of a petition for review of an emergency determination, whichever is later.

* * * * *

■ 11. In § 821.57, revise paragraphs (b) and (c) to read as follows:

§ 821.57 Procedure on appeal.

* * * * *

(b) *Briefs and oral argument.* Each appeal in proceedings governed by this subpart must be perfected, within 5 days after the date on which the notice of appeal was filed, by the filing, and simultaneous service on the other parties, of a brief in support of the appeal. Any other party to the proceeding may file a brief in reply to the appeal brief within 7 days after the date on which the appeal brief was served on that party. A copy of the reply brief shall simultaneously be served on the appealing party and any other parties to the proceeding. Aside from the time limits specifically mandated by this paragraph, the provisions of §§ 821.7(a)(3) and 821.48 shall apply.

(c) *Issues on appeal.* The provisions of § 821.49(a) and (b) shall apply in proceedings governed by this subpart.

* * * * *

■ 12. In § 821.64, revise paragraph (b) to read as follows:

§ 821.64 Judicial Review.

* * * * *

(b) *Stay pending judicial review.* No request for a stay pending judicial review will be entertained unless it is served on the Board within 15 days after the date of service of the Board's order. The non-moving party may, within 5 days after the date of service of such a motion, file a reply thereto.

PART 826—RULES IMPLEMENTING THE EQUAL ACCESS TO JUSTICE ACT OF 1980

■ 13. The authority citation for 49 CFR part 826 continues read as follows:

Authority: Section 203(a)(1) Pub. L. 99–80, 99 Stat. 186 (5 U.S.C. 504).

■ 14. Revise § 826.1 to read as follows:

§ 826.1 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504 (the Act), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (adversary adjudications) before the National Transportation Safety Board. An eligible party may receive an award when it prevails over the Federal Aviation Administration (FAA), unless the FAA's position in the proceeding was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards this Board will use to make them. As used hereinafter, the term ''Administrator'' refers to the Administrator of the FAA.

■ 15. Revise § 826.40 to read as follows:

§ 826.40 Payment of award.

Within 5 days of the Board's service of a final decision granting an award of fees and expenses to an applicant, the Administrator shall transmit to the applicant instructions explaining how the applicant may obtain the award. These instructions may require, but are not limited to, the submission of the following information to the Administrator: a statement that the applicant will not seek review of the decision in the United States courts, bank routing numbers to which the Administrator may transmit payment, and the applicant's tax identification or Social Security number. The Administrator will pay the applicant the amount awarded within 60 days of receiving the necessary information from the applicant, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

Deborah A.P. Hersman,

Chairman.

[FR Doc. 2012–25400 Filed 10–15–12; 8:45 am]

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Proposed Rules

Federal Register

Vol. 77, No. 200

Tuesday, October 16, 2012

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.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

[Docket No. PRM–72–6; NRC–2008–0649]

Petition for Rulemaking Submitted by C–10 Research and Education Foundation, Inc.

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; partial consideration in the rulemaking process.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) received a petition for rulemaking (PRM) dated November 24, 2008, filed by Ms. Sandra Gavutis, Executive Director for C–10 Research and Education Foundation Inc. (the petitioner). The petition was docketed by the NRC and assigned Docket No. PRM–72–6. The petitioner requests that the NRC amend its regulations concerning dry cask safety, security, transferability, and longevity. The petitioner made 12 requests. The NRC is denying nine of the petitioner's requests, but will consider one request in the rulemaking process. Action on two requests is being reserved for future rulemaking determinations, as these requests are currently under consideration by the NRC. The NRC will publish another **Federal Register** notice to inform the public of the Commission's decision for these two requests. The docket for this PRM will remain open until action is taken on the two remaining requests.

ADDRESSES: Further NRC action on the issues raised by this petition can be found on the Federal rulemaking Web site at *http://www.regulations.gov* by searching on Docket ID NRC–2009–0558, which is the identification for the future rulemaking.

You can access publicly available documents related to the petition, which the NRC possesses and is publicly available, using the following methods:

• *Federal Rulemaking Web site:* Public comments and supporting materials related to this petition can be found at *http://www.regulations.gov* by searching on the petition Docket ID NRC–2008–0649 or the future rulemaking Docket ID NRC–2009–0558. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced.

NRC's PDR: You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Jeffery Lynch, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–5041, email: *Jeffery.Lynch@nrc.gov.*

SUPPLEMENTARY INFORMATION:

Background

On November 24, 2008, C–10 Research and Education Foundation, Inc. filed a petition for rulemaking. The petition was docketed by the NRC and assigned Docket No. PRM–72–6. On March 3, 2009 (74 FR 9178), the NRC published a notice of receipt and request for comment for PRM–72–6.

The petitioner requested that the NRC amend part 72 of Title 10 of the *Code of Federal Regulations* (10 CFR), ''Licensing Requirements for the Independent Storage of Spent Nuclear Fuel, High-Level Radioactive Waste, and Reactor-Related Greater than Class C Waste,'' to revise the NRC requirements for interim dry cask storage of spent fuel. Specifically, the petitioner requested that the NRC's regulations be amended to:

(1) Require that the NRC prohibit non-conforming pre-built full-scale casks, specifically built for NRC certification testing, from being put into production under industry pressure to ''accept-as-is.''

(2) Require that the NRC base its certification of casks on upgraded code requirements, which include design criteria and technical specifications for a 100-year-minimum age-related degradation timeframe, upgraded from the current ''inadequate'' 20-year design specification. The NRC must also require an NRC regulatory and public review of an in-depth technical evaluation of the casks done at the 20-year certificate of compliance (CoC) reapproval interval to effectively catch and address cask deterioration.

(3) Require that the NRC approve, as part of the original independent spent fuel storage installation (ISFSI) certification process and construction license, a method for dry cask transfer capacity that will allow for immediate and safe maintenance on a faulty or failing cask.

(4) Require that dry casks are qualified for transport at the time of onsite storage approval certification.

(5) Require the most current American Society of Mechanical Engineers (ASME) Codes and Standards be adopted for all spent fuel storage containers without exception.

(6) Require ASME Code stamping for fabrication.

(7) Require that all materials for fabrication be supplied by ASME-approved material suppliers who are certificate holders.

(8) Require that current ASME Codes and Standards for conservative heat treatment and leak tightness are adopted and enforced.

(9) Require a safe and secure hot cell transfer station coupled with an auxiliary pool to be built as part of an upgraded ISFSI design certification and licensing process.

(10) Require real-time heat and radiation monitoring at ISFSIs at all nuclear power plant sites and away-from-reactor storage sites maintained by the utilities and that the monitoring data be transmitted in real-time to affected State health, safety, and environmental regulators.

(11) Require ''Hardened On-Site Storage'' (HOSS) at all nuclear power plants as well as away-from-reactor dry cask storage sites, and that all nuclear industry interim on-site or off-site dry cask storage installations or ISFSIs be fortified against terrorist attack. In addition, all sites should be safeguarded against accident and age-related leakage.

(12) Establish funding to conduct on-going studies to provide the data required to accurately define and monitor for age-related material degradation, assess the structural integrity of the casks and fuel cladding in ''interim'' waste storage.

While the NRC was considering the C–10 petition for rulemaking, it issued a draft technical basis for a future security rulemaking for ISFSIs and a final rule on terms and conditions for both ISFSI licenses and certificates of compliance. As described in the following paragraphs, some aspects of both these actions are pertinent to the petitioner's requests

On December 16, 2009 (74 FR 66589), the NRC published a notice of availability and solicitation of public comments for Draft Technical Basis for Rulemaking Revising Security Requirements for Facilities Storing Spent Nuclear Fuel and High-Level Waste. In this draft technical basis, the NRC describes the objectives, conceptual approaches, and potential solutions. The NRC staff expects that the rulemaking, if approved by the Commission, will result in risk-informed, performance-based regulations, with both site-specific and generally licensed ISFSIs having consistent regulations. The NRC staff received comments on the draft regulatory basis from several stakeholders who were opposed, for different reasons, to the draft technical basis. For this reason, the NRC staff, in SECY–10–0114 (ADAMS Accession No. ML101880013) recommended that the schedule for the rulemaking effort be extended to allow the staff to further evaluate these comments and their implications. The Commission approved the NRC staff's recommendation in its staff requirements memorandum, SRM–SECY–10–0114 (ADAMS Accession No. ML103210025), and reaffirmed the previous Commission direction for the ISFSI security rulemaking provided in SRM–SECY–07–0148 (ADAMS Accession No. ML073530119).

On February 16, 2011 (76 FR 8872), the NRC issued the Final Rulemaking ''License and CoC Terms.'' This rulemaking extended the duration of ISFSI licenses and storage cask CoCs to 40 years, clarified the difference between ''renewal'' versus ''reapproval'' terminology in 10 CFR part 72, and codified the requirements for an aging management plan for both general and specific licensees.

In addition, since the petition was filed, in response to direction provided by the Commission in SRM–COMDEK–09–0001, the staff has initiated a thorough review of whether regulatory changes will be needed to support the safe and secure storage of spent nuclear fuel (SNF) for multiple renewal periods.

Public Comments on the Petition

The notice of receipt for PRM–72–6 invited interested persons to submit comments. The comment period closed on May 18, 2009. The NRC received over nine thousand comments. Comments were received from industry, various non-governmental organizations, and members of the public. The majority of the comments were identical (form) emails. The Nuclear Energy Institute (NEI) and the Strategic Teaming and Resource Sharing (STARS) organization opposed the petition. All other commenters, including the ASME and Berkeley Fellowship of Unitarian Universalists Social Justice Committee, supported the petition.

NEI Comments

In its letter dated May 18, 2009 (ADAMS Accession No. ML091400073), the NEI stated that the current NRC regulations contained in 10 CFR part 72 are sufficient to provide for the safe storage of spent nuclear fuel and that the NRC should deny the petition. The NEI made the following assertions:

(1) Industry has safely maintained spent fuel storage pools for over 40 years and has successfully loaded and emplaced at ISFSIs over 1,000 dry cask storage systems at 47 locations over the past 25 years.

(2) The additional requirements requested by the petitioner ''go far beyond'' the necessary regulation of existing dry-cask design technology and extend to dictating design changes that go beyond the NRC's purview. The petitioner's request that the NRC require a hot cell transfer station coupled with an auxiliary pool requirement is unnecessary for safety and costly for both the NRC and its regulated entities.

(3) The petitioner's request that the NRC specify design criteria and technical specifications for a 100-year minimum age-related degradation timeframe for dry cask storage certification is not appropriate, given that any renewals by the NRC would be based upon conditions that would require licensees to undertake an aging management program subject to NRC inspection.

(4) There is no need for rulemaking regarding ASME Code requirements, because the NRC acknowledges in its ''*Standard Review Plan for Dry Cask Storage Systems,*'' NUREG–1536 (ADAMS Accession No. ML010040237), that ASME Boiler and Pressure Vessel (B&PV) Code, Section III is an acceptable standard for the design and fabrication of spent fuel dry-storage casks. The NRC recognized in Spent Fuel Storage and Transportation Interim Staff Guidance 10, ''Alternatives to the ASME Code,'' Revision 1 (ADAMS Accession No. ML003770459), that dry storage casks are not pressure vessels, and as such, ASME Code Section III cannot be implemented without allowing some exceptions to its requirements. The NRC, in NUREG–1567 (ADAMS Accession No. ML003686776), ''Standard Review Plan for Spent Fuel Dry Storage Facilities,'' Section 16.4.1, has provisions for ISFSI licensees and applicants for a CoC to request exceptions from the ASME Code.

(5) The petitioner's request that the NRC require real-time heat and radiation monitoring should be denied, because the current NRC regulations (i.e., 10 CFR 72.44) already contain requirements for the technical specifications to include monitoring instruments, surveillance requirements, and administrative controls.

(6) There is no need for rulemaking with regard to security issues. The NRC relies on security assessments to ensure that the industry meets the relevant regulations (e.g., 10 CFR 72.212 and 10 CFR 73.55). Compliance with these existing regulations ensures that dry cask storage modules will be appropriately designed to resist terrorist attack.

(7) There is no need for rulemaking to include funding to conduct effectiveness studies of age-related material degradation because the ISFSI license renewal contains license conditions addressing an aging management review program.

NRC Response

As described in the response to Petitioner Request 9, the NRC is still considering the request to require a hot cell transfer station for decommissioned reactor facilities as part of its review of potential regulatory changes to accommodate the storage of SNF for multiple renewal periods. Therefore, at this time, the NRC does not agree with NEI that this request should be denied. Also as discussed below in the response to Petitioner Requests 5 through 8, the

NRC agrees with NEI that there is no need for rulemaking regarding either ASME Code requirements or to include funding to conduct effectiveness studies of age-related material degradation.

The NRC also agrees that including design criteria and technical specifications for a 100-year minimum age-related degradation timeframe is not warranted. The updated ASME Code requirements do not include design criteria and technical specifications for a 100-year minimum age-related degradation timeframe. In addition, when renewing licenses to store SNF, the NRC requires that licensees implement an aging management program to ensure that storage casks will perform as designed under extended license terms. Furthermore, as discussed in response to Petitioner Request 2, the NRC is evaluating material degradation and other issues for extended storage and transportation that might last beyond 100 years. The NRC is evaluating this in the context of SECY–11–0029, ''Plan for the Long Term Update to the Waste Confidence Rule and Integration with the Extended Storage and Transportation Initiative'' (ADAMS Accession No. ML110330445).

The NRC disagrees with NEI that the security assessments, by themselves, are sufficient to preclude the need for any rulemaking to enhance security at ISFSIs. As such, the NRC is considering Request 11, as part of the ongoing ISFSI security rulemaking effort.

STARS Comments

In its letter dated May 18, 2009 (ADAMS Accession No. ML091410360), the STARS organization opposed the petition. It made the following assertions:

(1) The proposed changes would impose significant additional costs on the NRC and the industry with no safety benefit.

(2) The NRC should continue to allow exceptions to the ASME Code requirements for dry storage casks. This is consistent with other similar existing regulations that recognize the need for exceptions and alternatives to the ASME Code. Because dry storage casks are not pressure vessels, it is virtually impossible to implement the ASME Code without allowing exceptions to some of the requirements.

(3) There is no need for rulemaking to include funding to conduct effectiveness studies of age-related material degradation. As part of an NRC research program, a dry storage cask from the ISFSI at the Surry Power Station was opened at the Idaho National Engineering Laboratory after the fuel had been stored approximately 15 years. The findings confirmed the condition of the fuel to be acceptable during the 15-year storage period (SECY–09–0069, Proposed Rule: 10 CFR part 72 License and Certificate of Compliance Terms [RIN 3150–AI09], ADAMS Package Accession No. ML090610154).

NRC Response

Regarding the STARS comments, the NRC agrees that ASME Code exceptions should continue to be allowed as discussed below in NRC response to Petitioner Requests 5 through 8. As stated in the response to Petitioner Request 12, rulemaking is not the appropriate mechanism for establishing funding for conducting research. With regard to materials aging studies, the NRC has initiated independent research on the impacts of long term storage for multiple renewal periods, has cooperated with other interested agencies, and is participating in the Electric Power Research Institute Extended Storage Collaboration Program.

ASME Comments

In its letter dated May 5, 2009 (ADAMS Accession No. ML091260362), the ASME supported the NRC's full endorsement of the ASME B&PV Code, Section III, Division 3, ''Containments for Transportation and Storage of Spent Nuclear Fuel and High-Level Radioactive Waste.'' The ASME stated that all five of the petitioners' requests that make specific reference to the ASME Codes and Standards would be resolved by the NRC's full endorsement of the ASME Code because it includes the latest edition and addenda of the Code, code stamping, materials and fabrication and testing.

NRC Response

The NRC staff is reviewing the ASME B&PV Code, Section III, Division 3 for endorsement. If endorsed, the staff intends to develop guidance for licensees and vendors to use in future design and fabrication of dry storage casks.

Other Comments

In a comment dated May 4, 2009 (ADAMS Accession No. ML091250353), the Berkeley Fellowship of Unitarian Universalists Social Justice Committee supported rulemaking to strengthen the NRC quality assurance rules on the design and manufacture of dry casks. All other comments were submitted in a standard form letter. These comments requested: (1) HOSS requirements at all nuclear power plants, as well as away-from-reactor dry cask storage sites; and (2) that nuclear power facilities be required to promptly transfer spent fuel from the pools to dry casks. Approximately 100 comments included additional information that fell outside the scope of rulemaking and were not considered in this PRM.

NRC Response

Regarding comments about HOSS requirements at nuclear power plant ISFSIs and away-from-reactor dry storage sites, in the response to Petitioner Request 11, the NRC notes that it has conducted considerable analyses regarding the safety of dry storage casks in use in the United States. The agency has, consistently, found that the robust nature of dry storage systems approved by the NRC under 10 CFR part 72 assures the protection of public health, safety, and security and therefore has not mandated HOSS. Nevertheless, the NRC is in the process of reviewing a potential rulemaking regarding enhancements to the security of spent fuel dry storage facilities. As the substance of Request 11 is relevant to this rulemaking, the NRC will examine this item in the context of this rulemaking process.

With regard to comments regarding a requirement that nuclear power facilities promptly transfer spent fuel from pools to dry casks, the NRC remains confident that both wet and dry storage systems are fully protective of public safety and security. However, as an element of the NRC's post-Fukushima review, the agency is conducting a detailed assessment of the safety benefits and challenges that could result from the expedited transfer of spent fuel from pools to dry casks.

Petition Resolution

For the reasons discussed in this section, the NRC is considering this petition in part, denying it in part, and reserving it in part for a future rulemaking determination. The NRC is denying Petitioner Requests 1, 2, 3, 5 through 8, 10, and 12, as listed in the **Background** section of this document, because the petitioner has not provided new and significant information that would warrant the NRC revising its regulations. Petitioner Request 11 will be considered, as part of the ongoing ISFSI security rulemaking effort (Docket ID NRC–2009–0558). In this section, the description of each request being denied, reserved for future rulemaking determination, and considered in future rulemaking is summarized immediately before the NRC response.

Action on Petitioner Requests 4 and 9 are reserved for future rulemaking determinations. Petitioner Request 4,

which requested that the NRC require that dry casks are qualified for transport at the time of onsite storage approval certification, is being evaluated as part of COMSECY–10–0007, ''Project Plan for the Regulatory Program Review to Support Extended Storage and Transportation of Spent Nuclear Fuel'' (ADAMS Accession No. ML101390413). The staff identified storage and transportation compatibility as a potential policy issue in COMSECY–10–0007, Enclosure 1, Appendix A, ''Project Plan for the Extended Storage and Transportation Regulatory Program Review,'' (ADAMS Accession No. ML101390426).

Petitioner Request 9, which requested that the NRC require a safe and secure hot cell transfer station coupled with an auxiliary pool as part of an upgraded ISFSI design certification and licensing process, is still being evaluated by staff as part of its review of the regulatory changes that might be necessary to safely store fuel for multiple renewal periods. Additionally, as discussed in Section 3.1 of Enclosure 1 of COMSECY–10–0007, research is needed to develop the safety basis for the behavior of high burnup fuel during extended storage periods. Whether the fuel retains sufficient structural integrity for extended storage and eventual transportation may affect whether the NRC would require dry transfer capability at decommissioned reactors storing high burnup fuel.

The docket for PRM–72–6 will remain open and consist of Petitioner Requests 4 and 9. Once the Commission takes action on the two remaining requests, the NRC will publish another document in the **Federal Register** to give notice of the Commission's decision.

Petitioner Request 1: Prohibit non-conforming pre-built full-scale casks, specifically built for NRC certification testing, from being put into production under industry pressure to ''accept-as-is.''

NRC Response: The NRC is denying Petitioner Request 1. The NRC's regulations provide that only those casks that have been approved under the procedures of Subpart L, 10 CFR part 72 and subsequently listed in § 72.214, ''List of Approved Spent Fuel Storage Casks,'' may be used under a 10 CFR part 72 general license.[1] The NRC is not aware of, nor did the petition state where any non-conforming, pre-built, full-scale casks were placed into service.

The NRC requires in 10 CFR 72.170, ''Nonconforming materials, parts, or components,'' that storage cask vendors/fabricators establish measures to control materials, parts, or components that do not conform to their requirements in order to prevent their inadvertent use or installation, that includes procedures for identification, documentation, segregation, disposition, and notification to affected organizations. Non-conforming items must be reviewed and accepted, rejected or reworked in accordance with documented procedures. Prior to nonconforming parts being used in a storage cask that is placed into service, the certificate holder/fabricator must perform a review under 10 CFR 72.48 to ensure that its use will not affect the ability of the storage cask to safely store spent fuel. The NRC will perform a safety review of any non-conformances in response to requests for a certificate or license amendment. In addition, 10 CFR 72.122 requires both general and specific licensees to design, fabricate, test and erect structures, systems and components that are important to safety to quality standards that are commensurate with its importance to safety.

Also, the NRC inspection program confirms that non-conforming casks and materials are not placed into service. This inspection program is designed to confirm that fabrication activities are performed in accordance with the requirements in 10 CFR part 72, the applicable CoC, the Safety Analysis Report, and the CoC holder's NRC-approved Quality Assurance program. Both CoC holders and general licensees are periodically inspected in accordance with the NRC's inspection program. The petitioner did not provide any new or significant information indicating that any storage casks have been loaded and placed on a storage pad that does not conform to the design approved by the NRC. Accordingly, for the reasons previously discussed, the NRC is denying this request.

Petitioner Request 2—Require that NRC certification of casks be based on upgraded code requirements, which include design criteria and technical specifications for a 100-year-minimum age-related degradation timeframe, upgraded from the current inadequate 20-year design specification. Also, require an NRC regulatory and public review of an in-depth technical evaluation of the casks done at the 20-year CoC reapproval interval to effectively catch and address cask deterioration.

The petitioner asserted that the federal government has not created a permanent high-level radioactive waste repository and therefore, States will inherit the responsibility of high-level, on-site nuclear waste storage for an indefinite period of time. In addition, the petitioner asserted that in proposing to revise the Waste Confidence Decision (73 FR 59551; November 9, 2008), the NRC has effectively stated that there is no deadline for the Federal Government to take title to the spent fuel and remove it from its point of origin at the nuclear power facilities. The petitioner stated that casks are designed to meet criteria and technical specifications for certification for a 20-year interval while onsite storage is for an indeterminable timeframe.

The petitioner noted that the NRC has not upgraded design specifications to the current ASME Code. The petitioner requested that NRC require all storage casks be designed and built to the latest version of the ASME B&PV Code which, according to the petitioner, includes a requirement that storage cask designs be designed for a minimum of 100-years, as opposed to the 20-year interval for licenses and CoCs. Note that since the petitioner submitted its request, the NRC extended the 20-year duration for licenses and CoCs to 40 years in the Final Rulemaking entitled ''License and Certificate of Compliance Terms'' (76 FR 8872; February 16, 2011) and issued a Waste Confidence Decision Update (75 FR 81037; December 23, 2010).

Additionally, the petitioner stated that the regulations for storage of spent fuel are unclear on the specific NRC requirements to ''renew'' or ''reapprove'' storage CoCs. The petitioner stated that an application for ''reapproval,'' as used in 10 CFR 72.240, ''Conditions for Spent Fuel Storage Cask Reapproval,'' implies that the NRC would reevaluate the original cask design basis using current review standards and regulatory requirements prior to extending the 20-year CoC expiration date. The petitioner also asserted that under Section 72.42, ''Duration of License; Renewal,'' use of the word ''renewal'' implies that the design requirements remain the same as the original cask design basis, and the expiration date is extended. Additionally, the petitioner contends that the NRC has not addressed the regulatory requirements needed to extend a license for multiple cask designs with different expiration dates at the same ISFSI.

The petitioner asserted that the NRC must require an in-depth technical review of the cask design basis at the 20-year reapproval period to catch and address cask deterioration. The petitioner stated that there is a lack of regulatory requirements to address the extension of CoCs from 20 years to 60 years and that CoCs are being extended

[1] The CoC holder or its contractor fabricates dry storage casks in accordance with the CoC and sells them to 10 CFR part 72 general licensees, who are nuclear power plant operators.

without the technical data, regulatory evaluation, or scrutiny to protect the public health and safety. Specifically, there is limited data to determine the extent of degradation of storage casks and the spent fuel it contains. The petitioner cited ''The Dry Cask Storage Characterization Project,'' a study jointly funded by the NRC, the Electric Power Research Institute, and the U.S. Department of Energy that is detailed in NUREG/CR–6831 (ADAMS Accession No. ML032731021), ''Examination of Spent PWR Fuel Rods after 15 Years in Dry Storage'' and NUREG/CR–6745, ''Dry Cask Storage Characterization Project—Phase 1: Castor V/21 Cask Examination and Opening'' (ADAMS Accession No. ML013020363). The petitioner also refers to the opening of, subsequent to this study, several storage casks at the Surry ISFSI due to inner seal failures. These casks were opened after a shorter storage duration than the cask opened in the study. The petitioner stated that although the spent fuel in these cases was found acceptable, there were signs of degradation, and therefore, there is no conclusive data for integrity of casks or the condition of the nuclear fuel.

NRC Response: The NRC is denying Petitioner Request 2. With respect to the request that the NRC incorporate the latest version of the ASME B&PV Code in its regulations, the NRC has determined that amending its regulations to incorporate the latest versions of the AMSE B&PV Code is not necessary to ensure that adequate codes and standards are applied for the material selection, fabrication, design, examination, and testing of dry cask storage systems. As stated in the NRC's standard review plans for spent fuel storage, NUREG–1536 and NUREG–1567, the NRC staff reviews ISFSI and storage cask designs to verify that they incorporate appropriate national codes and standards, in order to comply with NRC regulations. Storage casks approved by the NRC are designed and fabricated to the ASME B&PV Code, Section III, Division 1 for steel confinements and Division 2 for concrete containments. While Section III, Division 3 of the ASME B&PV Code has been specifically written by ASME for containment systems for spent fuel transportation packages and storage casks, it has not been endorsed by the NRC. The NRC staff is reviewing ASME Code Section III, Division 3 and if endorsed, the NRC staff intends to develop guidance for its use in future fabrication of dry storage casks. In addition, with regard to the ASME Code, the petitioner stated that the code includes a requirement that storage cask designs be designed for a minimum of 100-years. A 100-year minimum age-related degradation requirement, however, is not in the ASME B&PV Code.

With respect to the petitioner's request that the NRC perform a complete review of the design basis for a storage cask prior to extending the expiration date of a storage cask's certificate of compliance, the NRC addressed some of the petitioner's concerns regarding aging management in the February 2011 Final Rulemaking, ''License and Certificate of Compliance Terms'' (76 FR 8872).

With respect to the petitioner's assertions regarding ''reapproval'' and ''renewal,'' the NRC determined in the February 2011 Final Rulemaking (76 FR 8872) that the 40-year duration, with renewals that include aging management plans, is the appropriate duration for licenses and CoCs for spent fuel storage casks. In addition, the NRC clarified the difference between ''renewal'' versus ''reapproval'' terminology and codified the requirements for an aging management plan for both general and specific licensees. Additionally, the NRC stated in the July 18, 1999, Final Rulemaking, ''Storage of Spent Fuel in NRC-Approved Storage Casks at Power Reactor Sites'' (55 FR 29184), that it did not intend to use the term reapproval to mean that all the initial design bases were reviewed and reapproved prior to extending a CoC expiration date. Additionally, this rulemaking included requirements for an aging management plan for both general and specific licensees. Along with the rulemaking, the NRC issued NUREG–1927, (ADAMS Accession No. ML100350309) ''Standard Review Plan for Renewal of Spent Fuel Dry Cask Storage System Licenses and Certificates of Compliance,'' to provide staff guidance on reviewing renewal requests for ISFSI licenses and spent fuel storage cask certificates of compliance.

With respect to the petitioner's assertions regarding degradation of the storage cask and fuel, the NRC addressed aging and potential degradation mechanisms of spent fuel in storage casks in the February 2011 rulemaking (76 FR 8872). In that rulemaking, the NRC stated that, based on the research performed at Idaho National Laboratory and described in NUREG/CR–6381, the NRC expects very little, to no, degradation of the spent fuel or cask internals at the end of an extended storage period up to 60 years. Finally, in SECY–11–0029, ''Plan for the Long Term Update to the Waste Confidence Rule and Integration with the Extended Storage and Transportation Initiative'' (ADAMS Package Accession No. ML110330445), the NRC staff described the work that will be done to identify and resolve any regulatory and/or technical gaps that may exist for application of current regulations to longer periods of extended storage. The NRC staff will provide the public with an opportunity to comment on the draft gap assessment report, and will treat the current petition request as a public comment on this activity. As described in SECY–11–0029, the NRC staff will evaluate the need for rulemaking to address any gaps that are identified for extended storage and transportation.

Petitioner Request 3: Require that the NRC approve, as part of the original ISFSI certification process and construction license, a method for dry cask transfer capacity that will allow for immediate and safe maintenance on a faulty or failing cask. The temperature of the fuel inside a dry storage cask may reach 400 degrees Fahrenheit, while irradiated waste storage pool water is kept at 100 degrees Fahrenheit. Reinsertion of the canister into the pool and resultant steam flash is a risk to workers, and would thermally shock the fuel rods, potentially damaging the fuel assemblies.

NRC Response: The NRC is denying Petitioner Request 3. Dry cask storage systems are designed to be robust, and operating experience indicates that they have been safely used to store fuel for over 20 years. Additionally, pursuant to 10 CFR 72.236(h), ''Specific Requirements for Spent Fuel Storage Cask Approval and Fabrication,'' the applicant must ensure that the spent fuel storage cask is compatible with wet or dry spent fuel loading and unloading facilities. As described in NUREG–1536, a reflood analysis can be used to show that the thermally induced stresses on fuel rods are not sufficient to damage the rods. The typical operating procedure introduces water into the canister at a very low flow rate. This flow rate allows the steam that forms at the bottom of the canister, well below the active fuel length, to cool the fuel as a vapor to reduce the thermal-induced stresses on the fuel. When the bottom portion of the canister is sufficiently cool for the water level to rise to the active fuel, the rate at which the water level rises is sufficient to cool the fuel rods without causing thermal stresses that would damage the fuel. These operating procedures allow maintenance to be performed safely without undue risk to workers or the public. The petitioner did not provide

any new or significant information to indicate that spent fuel assemblies would be damaged if placed back into the spent fuel pool or that existing requirements do not adequately address worker safety.

Petitioner Requests 5 through 8: Require the most current ASME Codes and Standards be adopted for all spent fuel storage containers without exception; require ASME Code stamping for fabrication; require that all fabrication materials be supplied by ASME-approved material suppliers who are certificate holders; and require that the current ASME Codes and Standards for conservative heat treatment and leak tightness be adopted and enforced.

The petitioner asserted that design criteria in material dedication cannot meet the quality assurance requirements in 10 CFR part 50, Appendix B, ''Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants,'' without full adherence to ASME B&PV Code and NCA 3800 of the ASME Code, which includes ASME Code stamping.

Additionally the petitioner stated that 10 CFR 72.122(a) and 10 CFR 72.234(b) require that structures, systems and components important to safety be designed, fabricated, and tested to quality standards commensurate with the importance of the function performed. However, the petitioner asserted that the NRC has not updated its use of the ASME B&PV Code and grants the utilities and their vendors numerous exemptions. The petitioner stated that while the NRC allows exemptions to vendors by justifying vendor compliance to ''merely the maximum extent possible,'' the NRC simultaneously cites vendors and manufacturers with numerous violations and then approves repeated corrective actions, which has resulted in dry cask design, fabrication and performance issues remaining unresolved. The petitioner stated that the NRC should not issue ''justifications and compensatory measures'' for ASME codes or allow conformance with safety regulations ''to the extent practical.'' The petitioner asserted that the ASME codes should be enforced unconditionally, without exception or exemption.

The petitioner cited an example request from a dry cask storage vendor seeking exemptions to certain portions of the ASME Code and a set of technical specifications that the NRC issued for a storage cask that states ''The 32PTH DSC is designed, fabricated and inspected to the maximum practical extent in accordance with ASME B&PV, Code Section III, Division 1, 1998 Edition with Addenda through 2000, Subsections NB, NF, and NG for Class 1 components and supports. Code alternatives are discussed in 4.4.4.'' Although the petitioner referenced Section 4.3 of the technical specifications, the NRC believes the petitioner meant Section 4.4, which provides the codes and standards that apply to this particular storage cask.

NRC Response: The NRC is denying Petitioner Requests 5 through 8, because the NRC has determined that revising the regulations is not the most effective or efficient method to adopt the ASME Code for the design and fabrication of spent fuel dry storage casks. As stated in NUREG–1567, the industry has adopted, and the NRC has accepted, ASME Code Section III, Division 1 and Division 2 as acceptable standards for the design and fabrication of dry storage casks. It is expressly understood, by the NRC and industry, however, that dry storage casks are not pressure vessels and, as such, ASME Code Section III could not be implemented without allowing some exceptions to its requirements. Therefore, the NRC allows specific exceptions to the code for those requirements that are not applicable or practical to implement for spent fuel dry cask storage systems. Further, the petitioner asserted that adherence to ASME B&PV Code and NCA 3800 of the ASME Code is required to meet the quality assurance requirements in 10 CFR part 50, Appendix B. Storage casks are not, however, required by the NRC's regulations to meet the requirements of 10 CFR part 50, ''Domestic Licensing of Production and Utilization Facilities.''

The NRC staff is reviewing ASME Section III, Division 3, ''Containments for Transportation and Storage of Spent Nuclear Fuel and High-Level Radioactive Waste'' for endorsement. If endorsed, the staff intends to develop guidance for use in future fabrication of dry storage casks.

Petitioner Request 10: Require real-time heat and radiation monitoring at ISFSIs at all nuclear power plant sites and away-from-reactor storage sites maintained by the utilities and that the monitoring data be transmitted in real-time to affected State health, safety, and environmental regulators.

The petitioner referenced a paper from PATRAM '98: 12th International Conference on the Packaging and Transportation of Radioactive Materials, written by a non-NRC employee asserting that the NRC has declared that a storage cask shares the same class of importance to safety (Class 1 in ASME Code Section III terminology) as a reactor vessel, yet an NRC proposed rule regarding miscellaneous changes to 10 CFR part 72 (63 FR 31364; June 9, 1998) states that the NRC distinguishes between wet and dry storage requirements. The petitioner notes that in that Part 72 rulemaking, the NRC chose not to require control systems for dry cask storage systems at ISFSIs.

The petitioner also stated that another example showing the differentiation between wet and dry storage is that the NRC does not require a method for licensees to provide positive means to verify that solid neutron absorbing materials have continued efficacy after being placed in an inert environment in dry storage. The petitioner stated that the NRC regulations in 10 CFR 72.124(b) provide that for dry storage, in lieu of a positive means to test for continued efficacy, a demonstration that solid neutron absorbing materials do not undergo significant degradation during storage is sufficient. The petitioner further asserted that the Point Beach incident in May 1996, the evidence provided from the Surry reactor's inner seal failures, and the NRC reports of salt-water air corrosiveness at seacoast reactors are proof that the assumption that the corrosive environment that is present in wet storage is not present during dry storage is invalid.

The petitioner also stated that the NRC has determined that it is not practical to penetrate the integrity of storage casks to measure the efficacy of neutron absorbing materials. Finally, the petitioner states that NRC regulations do not require adequate technical radiation and heat monitoring data to protect nuclear workers, assure public safety and provide for future cask fabrication, material specifications and performance analysis.

NRC Response: The NRC is denying Petitioner Request 10, because regular monitoring for radiation at and near ISFSIs is currently required by § 72.44(d)(2) for specific licensees, with reporting required at 12-month intervals as specified in § 72.44(d)(3), and similarly for general licensees in 10 CFR 50.36(a)(2). There have not been any instances of measurable radiation doses from ISFSIs at the site boundaries. The storage cask technical specifications require that concrete storage casks with vents for natural convection provide cooling to the canister and have temperature-monitoring devices or periodic visual monitoring to ensure that the inlet and outlet vents are free of blockage that would inhibit convective airflow.

The applicant demonstrates performance of the thermal design and thermal limits through analyses during the certification and licensing process.

The cask systems are also periodically examined by the licensee to verify there are no adverse conditions that would impede thermal performance. Given the surveillance, monitoring, and inspection programs, the risk of immediate failure or emergency is remote. The NRC staff has determined that the current regulatory requirements provide adequate protection of public health and safety and the environment.

While the petitioner referenced a proposed rule, the final rule (64 FR 33178; June 22, 1999), revised the regulations for continuous monitoring of the dry storage confinement system to allow periodic monitoring consistent with the storage cask design requirements and to require that instrumentation systems for dry storage casks be provided in accordance with cask design requirements. In the rulemaking, the NRC determined that continuous, uninterrupted control systems and monitoring are required for wet storage systems that have active heat removal and other active systems, whose safety depends on the continued operation of these systems. Dry storage casks, whose safety solely relies on passive heat removal, do not require continuous, uninterrupted control systems and monitoring as wet storage does. The NRC revised the rules in § 72.122(h)(4) and (i) to require monitoring and instrumentation systems that are consistent with the storage cask design basis.

Finally, the examples that the petitioner cited, the Point Beach hydrogen gas ignition event, Surry seal failure, and potential degradation due to salt water environment, all occurred where air was present and not in an inert environment like the inside of a canister. The NRC is unaware of any degradation mechanism that would occur inside of an inert, sealed canister after being placed on the storage pad that would require licensees to open a storage canister and positively verify the neutron poison's efficacy.

Petitioner Request 11: Require HOSS at all nuclear power plants as well as away-from-reactor dry cask storage sites; and that all nuclear industry interim on-site or off-site dry cask storage installations or ISFSIs be fortified against terrorist attack. In addition, all sites should be safeguarded against accident and age-related leakage.

NRC Response: Regarding comments about HOSS requirements at nuclear power plant ISFSIs and away-from-reactor dry storage sites, in the response to Petitioner Request 11, the NRC notes that it has conducted considerable analyses regarding the safety of dry storage casks in use in the United States. The agency has, consistently, found that the robust nature of dry storage systems approved by the NRC under 10 CFR part 72 assures the protection of public health, safety, and security and therefore has not mandated HOSS. Nevertheless, the NRC is in the process of reviewing a potential rulemaking regarding enhancements to the security of spent fuel dry storage facilities (SRM–SECY–10–0114 and SRM–SECY–07–0148—ADAMS Accession Nos. ML103210025 and ML073530119, respectively). Because Petitioner Request 11 raises issues that are relevant to this rulemaking, the NRC will address this item in the context of this proposed rule. Further information regarding NRC action on Petitioner Request 11 will be available at *http://www.regulations.gov* by searching Docket ID NRC–2009–0558.

Petitioner Request 12: Establish funding to conduct on-going studies to provide the data required to accurately define and monitor for age-related material degradation, assess the structural integrity of the casks and fuel cladding in ''interim'' waste storage.

NRC Response: The NRC is denying Petitioner Request 12 because rulemaking is not the appropriate mechanism for establishing funding for conducting research. The NRC has initiated independent research on the impacts of long term storage of SNF for multiple renewal periods, cooperated with other interested agencies to support materials aging studies, and is participating in an Electric Power Research Institute program that evaluates materials aging issues.

Conclusion

For the reasons previously discussed, the NRC is denying nine of the petitioner's requests (Requests 1, 2, 3, 5 through 8, 10, and 12), will consider one request in the rulemaking process (Request 11), and is deferring action on two requests (Requests 4 and 9). The docket for PRM–72–6 will remain open until the Commission acts, at which time the NRC will publish another document in the **Federal Register** to notice the Commission's decision.

Dated at Rockville, Maryland, this 10th day of October 2012.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2012–25366 Filed 10–15–12; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1088; Directorate Identifier 2012–SW–005–AD]

RIN 2120–AA64

Airworthiness Directives; Robinson Helicopter Company Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for Robinson Helicopter Company (Robinson) Model R44 and R44 II helicopters equipped with emergency floats, which would require replacing the inflation valve assembly. The proposed AD is prompted by failure of the emergency floats to deploy during a factory test because a needle was binding within the inflation valve assembly. The proposed actions are intended to prevent the failure of the floats to inflate during an emergency landing.

DATES: We must receive comments on this proposed AD by December 17, 2012.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Docket:* Go to *http://www.regulations.gov.* Follow the online instructions for sending your comments electronically.
- *Fax:* 202–493–2251.
- *Mail:* Send comments 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 20590–0001.
- *Hand Delivery:* Deliver to the ''Mail'' address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the Docket Operations Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the economic 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 service information identified in this proposed AD, contact Robinson

Helicopter Company, 2901 Airport Drive, Torrance, CA 90505; telephone (310) 539–0508; fax (310) 539–5198; or at *http://www.robinsonheli.com.* You may review a copy of the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

FOR FURTHER INFORMATION CONTACT:

Venessa Stiger, Aerospace Engineer, Cabin Safety/Mechanical & Environmental Systems, Los Angeles Aircraft Certification Office, Transport Airplane Directorate, FAA, 3960 Paramount Blvd., Lakewood, CA 90712–4137; telephone (562) 627–5337; email *venessa.stiger@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time.

We will file in the docket all comments that we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. We may change this proposal in light of the comments we receive.

Discussion

We propose to adopt a new AD for Robinson Model R44 and Model R44 II helicopters equipped with emergency floats. The AD proposes replacing the inflation valve assembly. The needle that releases helium from a cylinder was binding within the float inflation valve assembly. These helicopters often transport people and goods over water. Consequently, this unsafe condition presents risks to a crew and its passengers should the helicopter need to land in water during an emergency.

FAA's Determination

We are proposing this AD because we evaluated all known relevant information and determined that an unsafe condition exists and is likely to exist or develop on other products of these same type designs.

Related Service Information

We have reviewed Robinson R44 Service Bulletin SB–80, dated September 7, 2011 (SB), which describes procedures for upgrading certain valve assemblies within the next 250 flight hours or by June 30, 2012, whichever occurs first. The SB reports that during a factory test of pop-out emergency floats the floats failed to inflate because of a stuck cylinder valve.

Proposed AD Requirements

This AD would require, within 1 year or 500 hours time-in-service (TIS), whichever occurs first, replacing the inflation valve assembly.

Differences Between This Proposed AD and the Service Information

This proposed AD would require replacing the inflation valve assembly within 1 year or 500 hours TIS, whichever occurs first. The SB specifies replacing the assembly within 250 flight hours or by June 30, 2012, whichever occurs first. We used the Monitor Safety/Analyze Data (MSAD) process and were able to predict when the next occurrence would likely occur if no repairs were completed.

Costs of Compliance

We estimate that this proposed AD would affect 165 helicopters of U.S. Registry and that the labor cost would average $85 per work-hour. Based on these assumptions, we estimate that replacing the inflation valve assembly would take 2.5 work-hours for a labor cost of about $213. Parts would cost $850 to $955 for a total cost per helicopter of $1,063 to $1,168.

According to Robinson's service information, some or all 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. Accordingly, 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, 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 to the extent that it justifies making a regulatory distinction; 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.

We prepared an economic 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 airworthiness directive (AD):

Robinson Helicopter Company: Docket No. FAA–2012–1088; Directorate Identifier 2012–SW–005–AD.

(a) Applicability

This AD applies to Robinson Helicopter Company (Robinson) Model R44 and R44 II helicopters with emergency floats equipped with an inflation valve assembly, part number (P/N) D757–1, not engraved with ''D758–4'' or modified with modification B900–8, and containing a housing assembly, P/N D758–1, Revision C or prior, certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as binding of the needle within the float inflation valve assembly, which has resulted in the emergency floats failing to inflate.

(c) Comments Due Date

Comments are due December 17, 2012.

(d) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(e) Required Action

Within 1 year or 500 hours time-in-service (TIS), whichever occurs first, replace the inflation valve assembly with an airworthy inflation valve assembly, P/N D757–1R.

(f) Alternative Methods of Compliance (AMOC)

(1) The Manager, Los Angeles Aircraft Certification Office, FAA, may approve AMOCs for this AD. Send your proposal to: Venessa Stiger, Aerospace Engineer, Cabin Safety/Mechanical & Environmental Systems, Los Angeles Aircraft Certification Office, Transport Airplane Directorate, FAA, 3960 Paramount Blvd., Lakewood, CA 90712–4137; telephone (562) 627–5337; email *venessa.stiger@faa.gov.*

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office before operating any aircraft complying with this AD through an AMOC.

(g) Additional Information

Robinson R44 Service Bulletin SB–80, dated September 7, 2011, which is not incorporated by reference, contains additional information about the subject of this AD. For service information identified in this AD, contact Robinson Helicopter Company, 2901 Airport Drive, Torrance, CA 90505; telephone (310) 539–0508; fax (310) 539–5198; or at *http://www.robinsonheli.com/servelib.htm.* You may review a copy of information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

(h) Subject

Joint Aircraft Service Component (JASC) Code: 3212, Emergency Flotation Section.

Issued in Fort Worth, Texas, on October 2, 2012.

Kim Smith,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2012–25428 Filed 10–15–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1087; Directorate Identifier 2009–SW–32–AD]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for Eurocopter France (ECF) Model AS332C, L, and L1 helicopters to require an initial and repetitive inspections of the outer skin, butt strap, and fuselage frame for a crack and modification of the helicopter. This proposed AD is prompted by an AD issued by the European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, which states that a crack was discovered in a fuselage frame during a daily check. The proposed actions are intended to detect a crack, to prevent loss of airframe structural integrity and subsequent loss of control of the helicopter.

DATES: We must receive comments on this proposed AD by December 17, 2012.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Docket:* Go to *http://www.regulations.gov.* Follow the online instructions for sending your comments electronically.
- *Fax:* 202–493–2251.
- *Mail:* Send comments 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 20590–0001.
- *Hand Delivery:* Deliver to the ''Mail'' address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the Docket Operations Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the economic 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 service information identified in this proposed AD, contact American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, Texas 75053–4005; telephone (800) 232–0323; fax (972) 641–3710; or at *http://www.eurocopter.com.* You may review the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

FOR FURTHER INFORMATION CONTACT: Gary Roach, Aviation Safety Engineer, Regulations and Policy Group, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5110; email *gary.b.roach@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time.

We will file in the docket all comments that we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. We may change this proposal in light of the comments we receive.

Discussion

EASA has issued EASA AD No. 2008–0035–E, dated February 21, 2008, to

correct an unsafe condition for ECF Model AS 332 C, C1, L, and L1 helicopters.

The EASA AD states that a crack was discovered on an ECF Model AS332L helicopter in fuselage frame 5295, which has plates and angles assembled by riveting that corresponds to the first generation frame (before modification (MOD) 0722907). The crack in the frame was found because of a crack in the outer skin and in the butt strap where the rail of the main gear box (MGB) sliding cowling is attached to the frame. You may obtain further information by examining the EASA AD and any related service information in the AD docket.

FAA's Determination

These helicopters have been approved by the aviation authority of France and are approved for operation in the United States. Pursuant to our bilateral agreement with France, EASA, its technical representative, has notified us of the unsafe condition described in its AD. We are proposing this AD because we evaluated all known relevant information and determined that an unsafe condition is likely to exist or develop on other products of the same type design.

Related Service Information

Eurocopter has issued Alert Service Bulletin No. 05.00.76, Revision 0, dated February 20, 2008 (ASB), which specifies checking for a crack on the outside of the helicopter, on the skin and the butt strap near the sliding cowling rail attachment. If a crack is found in the outer skin or butt strap, the ASB specifies visually checking for a crack in Frame 5295. The ASB specifies doing MOD 0726478R2, which consists of cutting out a section of the sliding cowling rails. This cut-out exposes the splice near the rail attachment holes, making it easier to detect a crack in the frame during the 10-hour repetitive inspection and thus reducing the risks of a crack going undetected in Frame 5295. Also, the ASB specifies contacting the manufacturer for the ''appropriate repair sheet according to how the crack is situated'' if there is a crack in Area 1 of Frame 5295. EASA classified this ASB as mandatory and issued AD No. 2008–0035–E, dated February 21, 2008, to ensure the continued airworthiness of these helicopters.

Proposed AD Requirements

This proposed AD would require compliance with specified portions of the manufacturer's service bulletin including:

- Within 10 hours time-in-service (TIS) for helicopters that have 8,800 or more hours TIS or before or upon reaching 8,810 hours TIS for helicopters that have less than 8,800 hours TIS, and thereafter at intervals not to exceed 10 hours TIS, visually inspect for a crack in the outer skin and the butt strap in the sliding cowling right-hand and left-hand rail attachment areas on Frame 5295.
  - ○ If there is a crack in the outer skin or in the butt strap, before further flight, inspect for a crack in Frame 5295.
  - ○ If there is a crack in the outer skin, butt strap, or Frame 5295, repair the part before further flight.
- Within 300 hours TIS, modify each helicopter that has 8,800 or more hours TIS by doing MOD 0726478R2 on the sliding cowling rails and shims in the attachment areas on Frame 5295.

Differences Between This Proposed AD and the EASA AD

This proposed AD requires you to repair Frame 5295 before further flight rather than contacting the manufacturer. This proposal refers to a check as an inspection to be performed by a mechanic versus a check that a pilot can do if specifically allowed by the AD. This proposal also does not list the Model AS332C1 in the applicability because this model is not type certificated in the U.S. This proposed AD also does not allow further flight with the outer skin or butt strap cracked unless it is a ferry flight to a repair facility.

Costs of Compliance

We estimate that this proposed AD would affect 5 helicopters of U.S. Registry. We estimate that it would take about 4.25 work-hours per helicopter to initially inspect for a crack and to modify the MGB sliding cowling rails. Each 10-hour repetitive inspection would take about 0.25 work-hour. The average labor rate is $85 per work-hour and required parts would cost about $1,793 per helicopter. Based on these figures, we estimate the cost of the proposed AD on U.S. operators would be $17,145 or $3,429 per helicopter, assuming 60 repetitive inspections would be performed each year and assuming the entire fleet is modified and no cracks are found.

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, 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 to the extent that it justifies making a regulatory distinction; 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.

We prepared an economic 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 airworthiness directive (AD):

Eurocopter France: Docket No. FAA–2012–1087; Directorate Identifier 2009–SW–32–AD.

(a) Applicability

This AD applies to all Model AS332C, L, and L1 helicopters without modification (MOD) 0722907, except helicopters with serial numbers 2078 and 2102, certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as a crack in the outer skin, butt strap, or fuselage frame, which could result in loss of airframe structural integrity, and subsequent loss of control of the helicopter.

(c) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(d) Required Actions

(1) Within 10 hours time-in-service (TIS) for helicopters that have 8,800 or more hours TIS or before or upon reaching 8,810 hours TIS for helicopters that have less than 8,800 hours TIS, and thereafter at intervals not to exceed 10 hours TIS, visually inspect for a crack on the outer skin and the butt strap in the sliding cowling right-hand and left-hand rail attachment areas on Frame 5295 as shown in Figure 2 of Eurocopter Alert Service Bulletin No. 05.00.76, Revision 0, dated February 20, 2008 (ASB).

(i) If there is a crack in the outer skin or in the butt strap per paragraph (d)(1) of this AD, before further flight, inspect for a crack in Frame 5295 in the areas shown in Figure 3, Area 1, and Figure 4, of the ASB.

(ii) If there is a crack in the outer skin, the butt strap, or in Frame 5295 in the areas inspected as required by this AD, before further flight, repair the part in accordance with a method approved by the FAA.

(2) Within 300 hours TIS, for each helicopter that has 8,800 or more hours TIS, modify the sliding cowling rails and shims in the attachment areas on Frame 5295 (corresponds to MOD 0726478R2), as depicted in Figure 5 and by following the Accomplishment Instructions, paragraph 2.B.3., of the ASB.

(e) Special Flight Permit

A special flight permit is permitted for a helicopter with a crack in the outer skin or butt strap to operate the helicopter to a location where the requirements of this AD can be accomplished. A special flight permit is not permitted for a helicopter with a crack in Frame 5295.

(f) Alternative Methods of Compliance (AMOC)

(1) The Manager, Safety Management Group, FAA, may approve AMOCs for this AD. Send your proposal to: Gary Roach, Aviation Safety Engineer, Regulations and Policy Group, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5110; email *gary.b.roach@faa.gov*.

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office before operating any aircraft complying with this AD through an AMOC.

(g) Additional Information

The subject of this AD is addressed in European Aviation Safety Agency (France) AD No. 2008–0035–E, dated February 21, 2008.

(h) Subject

Joint Aircraft Service Component (JASC) Code: 5311, Fuselage, Main Frame.

Issued in Fort Worth, Texas, on October 2, 2012.

Kim Smith,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2012–25429 Filed 10–15–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1074; Directorate Identifier 2012–NM–027–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Airbus Model A330–200 Freighter series airplanes; Model A330–200 and –300 series airplanes; and Model A340–200 and –300 series airplanes. This proposed AD was prompted by a report of a manufacturing defect in certain rods installed in the belly fairing, which could lead to cracks at the crimped end of the rod. This proposed AD would require an inspection of the rods to determine the manufacturer; and for affected parts, an inspection for any cracking of the rods, and related investigative and corrective actions if necessary. We are proposing this AD to detect and correct cracking of the rods, which could result in rupture of rods that attach the belly fairing to the airframe, leading to separation of the belly fairing from the airframe, and consequent damage to airplane structure and airplane systems.

DATES: We must receive comments on this proposed AD by November 30, 2012.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, 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; email *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, WA. 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, WA 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–2012–1074; Directorate Identifier 2012–NM–027–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 2012–0005, dated January 10, 2012 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> A rod manufacturing process defect has been identified at the supplier, Technical Airborne Components Industries (TAC), which could lead to cracks at the crimped end of the rod.
>
> A design review of all affected rods has demonstrated that rupture of rods which attach the belly fairing can lead to separation of the belly fairing from the airframe, which would constitute an unsafe condition.
>
> For the reasons described above, this AD requires detailed visual inspections of the 21 affected rods installed in the belly fairing for manufacturer identification, and if TAC is identified as manufacturer, or if the manufacturer cannot be identified, to further inspect the rods to find any crack, using a high frequency eddy current (HFEC) method and, depending on findings, accomplishment of the applicable [related investigative and] corrective actions, to ensure structural integrity of the belly fairing rods. This AD also prohibits installation of an affected TAC rod as replacement part in the belly fairing to all aeroplanes.

A design review of all affected rods has demonstrated that rupture of rods which attach the belly fairing can lead to separation of the belly fairing from the airframe, which can cause damage to airplane structure and airplane systems. The related investigative actions include an inspection to determine the manufacturer and an HFEC inspection of any affected replacement rod for any cracking. The corrective actions include replacing the cracked rod with a new rod. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Airbus has issued Mandatory Service Bulletins A330–53–3186 and A340–53–4185, both including Appendix 01, both Revision 01, both dated April 7, 2011. 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.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 54 products of U.S. registry. We also estimate that it would take about 13 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $59,670, or $1,105 per product.

In addition, we estimate that any necessary follow-on actions would take 28 work-hours and require parts costing $0, for a cost of $2,380 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. We have no way of determining the number of products that may need these actions.

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.

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–2012–1074; Directorate Identifier 2012–NM–027–AD.

(a) Comments Due Date

We must receive comments by November 30, 2012.

(b) Affected ADs

None.

(c) Applicability

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

(1) Airbus A330–201, –202, –203, –223, –223F, –243, –243F, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes.

(2) Airbus A340–211, –212, –213, –311, –312, and –313 airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 53; Fuselage.

(e) Reason

This AD was prompted by a report of a manufacturing defect in certain rods installed in the belly fairing, which could lead to cracks at the crimped end of the rod. We are issuing this AD to detect and correct cracking of the rods, which could result in rupture of rods that attach the belly fairing to the airframe, leading to separation of the belly fairing from the airframe, and consequent damage to airplane structure and airplane systems.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Actions

For Model A330–201, –202, –203, –223, –223F, –243, –243F, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes, having manufacturer serial number (MSN) 0002 to 1113 inclusive, except MSN 0996, 1039, 1054, 1059, 1105, 1107, 1108 and 1112; and Model A340–211, –212, –213, –311, –312, and –313 airplanes: Within 72 months after the effective date of this AD, accomplish the actions in paragraphs (g)(1) and (g)(2) of this AD, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330–53–3186, excluding Appendix 01, Revision 01, dated April 7, 2011 (for Model A330 airplanes); or A340–53–4185, excluding Appendix 01, Revision 01, dated April 7, 2011 (for Model A340 airplanes).

(1) Do a detailed inspection of the 21 rods of the belly fairing identified in Airbus Mandatory Service Bulletin A330–53–3186, excluding Appendix 01, Revision 01, dated April 7, 2011 (for Model A330 airplanes); or A340–53–4185, excluding Appendix 01, Revision 01, dated April 7, 2011 (for Model A340 airplanes); for rod manufacturer identification. A review of airplane maintenance records is acceptable in lieu of this inspection if the manufacturer of the rods can be conclusively determined from that review.

(2) If the rod manufacturer is found to be Technical Airborne Components Industries (TAC), or if the manufacturer cannot be identified, do a high frequency eddy current (HFEC) inspection for cracking of the crimped end of the rod body and, if any crack is found, before further flight, do all applicable related investigative and corrective actions.

(h) Parts Installation Limitations

As of the effective date of this AD, no person may install any affected TAC rod, as identified in Airbus Mandatory Service Bulletin A330–53–3186, Revision 01, dated April 7, 2011; or A340–53–4185, Revision 01, dated April 7, 2011; as applicable; on any airplane unless the rod has passed (found to have no cracking) the inspection as required by paragraph (g)(2) of this AD.

(i) Credit for Previous Actions

This paragraph provides credit for the inspections and corrective actions required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD using Airbus Mandatory Service Bulletin A330–53–3186, dated January 17, 2011; or A340–53–4185, dated January 17, 2011; which are not incorporated by reference.

(j) Other FAA AD Provisions

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 International Branch, send it to ATTN: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: (425) 227–1138; fax: (425) 227–1149. Information may be emailed 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.

(k) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) European Aviation Safety Agency (EASA) Airworthiness Directive 2012–0005, dated January 10, 2012, and the Airbus service information identified in paragraphs (k)(1)(i) and (k)(1)(ii) of this AD, for related information.

(i) Airbus Mandatory Service Bulletin A330–53–3186, excluding Appendix 01, Revision 01, dated April 7, 2011.

(ii) Airbus Mandatory Service Bulletin A340–53–4185, excluding Appendix 01, Revision 01, dated April 7, 2011.

(2) For service information identified in this 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; email *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, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on October 4, 2012.

Dionne Palermo,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–25427 Filed 10–15–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1073; Directorate Identifier 2012–NM–078–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 767–300 series airplanes. This proposed AD was prompted by a report that, for certain airplanes, reinforcement straps were not bonded to the center overhead stowage bins in the passenger compartment. For certain airplanes, this proposed AD would require performing an inspection of reinforcement straps to ensure they are correctly bonded to the center overhead stowage bins, and bonding the reinforcement straps to the center overhead stowage bins if necessary. For certain airplanes, this proposed AD would require installing reinforcement straps on the center overhead stowage bins. We are proposing this AD to prevent missing or incorrectly bonded reinforcement straps, which could result in the center overhead stowage bins breaking loose and causing injury to passengers and damage to equipment during in-flight turbulence.

DATES: We must receive comments on this proposed AD by November 30, 2012.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, 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, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; 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: Sarah Piccola, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6483; fax: 425–917–6590; email: *sarah.piccola@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–2012–1073; Directorate Identifier 2012–NM–078–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 received a report that, for certain airplanes, reinforcement straps installed at specified stations for the center overhead stowage bins in the passenger compartment were not correctly bonded to the stowage bins. In addition, for some airplanes, reinforcement straps may have been missing on the center overhead stowage bins at other specified stations. This condition, if not corrected, could result in the center overhead stowage bins breaking loose and causing injury to passengers and damage to equipment during in-flight turbulence.

Relevant Service Information

We reviewed Boeing Special Attention Service Bulletin 767–25–0520, dated February 8, 2012. For certain airplanes, this service bulletin describes procedures for general visual and detailed inspections of the existing reinforcement straps installed on the center overhead storage bins in the passenger compartment to ensure they are bonded to the center overhead storage bins. For airplanes on which the straps are incorrectly bonded, this service bulletin describes procedures for bonding the reinforcement straps to the center overhead stowage bins. For certain airplanes, this service bulletin describes procedures for installing reinforcement straps.

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.

Costs of Compliance

We estimate that this proposed AD affects 4 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
Group 1 and Group 2 Airplanes: General Visual Inspection for Correct Bonding.	2 work-hours × $85 per hour = $170.	$0	$170	$340 (2 airplanes).
Group 1 and Group 3 Airplanes: Install Reinforcement Straps.	7 work-hours × $85 per hour = $595.	$1,277 or $1,746	$1,872 or $2,341	Up to $4,682 (2 airplanes).

We estimate the following costs to do any necessary repairs 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 repair:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Group 1 and Group 2 Airplanes: Bonding Existing Reinforcement Straps to the Center Overhead Stowage Bins.	Between 7 and 12 work-hours × $85 per hour = $595 to $1,020.	$0	Between $595 and $1,020.

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–2012–1073; Directorate Identifier 2012–NM–078–AD.

(a) Comments Due Date

We must receive comments by November 30, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 767–300 series airplanes, certificated in any category, as identified in Boeing Special Attention Service Bulletin 767–25–0520, dated February 8, 2012.

(d) Subject

Joint Aircraft System Component (JASC) Code 2520, Passenger Compartment Equipment.

(e) Unsafe Condition

This proposed AD was prompted by a report that, for certain airplanes, reinforcement straps were not bonded to the center overhead stowage bins in the passenger compartment. We are issuing this AD to prevent missing or incorrectly bonded reinforcement straps, which could result in the center overhead stowage bins breaking loose and causing injury to passengers and damage to equipment during in-flight turbulence.

(f) Compliance

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

(g) Inspection, Bonding, and Installation of Reinforcement Straps

Within 36 months after the effective date of this AD, do a general visual or detailed inspection to determine the condition of the reinforcement straps for the center overhead stowage bins, and bond the reinforcement straps to the stowage bins as applicable; and install reinforcement straps as applicable; in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 767–25–0520, dated February 8, 2012.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), ANM–150S, 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 emailed 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.

(i) Related Information

(1) For more information about this AD, contact Sarah Piccola, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: (425) 917–6483; fax: (425) 917–6590; email: *sarah.piccola@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone (206) 544–5000, extension 1; fax (206) 766–5680; 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.

Issued in Renton, Washington, on October 4, 2012.

Dionne Palermo,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–25450 Filed 10–15–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1071; Directorate Identifier 2012–NM–070–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Airbus Model A310–203 airplanes. This proposed AD was prompted by a report of an analysis that demonstrated a reduced fatigue life for the side link bolts, center sway link bolts, and thrust link bolts on the forward engine mounts. This proposed AD would require repetitive replacement of those

bolts. We are proposing this AD to prevent deterioration of the structural integrity of the bolts, which could result in possible damage to an engine or wing.

DATES: We must receive comments on this proposed AD by November 30, 2012.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, 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; email *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, WA. 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, WA 98057–3356; telephone (425) 227–2125; fax (425) 227–1147.

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–2012–1071; Directorate Identifier 2012–NM–070–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 2012–0056, dated April 3, 2012 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> Post type-certification analyses performed in the frame of the Extended Service Goal (ESG) exercise, demonstrated a reduced fatigue life for the side link bolts, centre sway link bolts and thrust link bolts of the General Electric (GE) CF6–80A3 forward engine mounts. This condition, if left uncorrected, could result in a deterioration of the structural integrity of the front engine mount bolts [and possible damage to an engine or wing]. For the reasons described above, this [EASA] AD requires [repetitive] replacement of all side link bolts, centre sway link bolts and all thrust link bolts of GE CF6–80A3 powered aeroplanes.

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

Relevant Service Information

Airbus has issued Mandatory Service Bulletin A310–71–2037, including Appendices 01 and 02, dated September 30, 2011. 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.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 30 products of U.S. registry. We also estimate that it would take about 139 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 $4,810 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 the proposed AD on U.S. operators to be $498,750, or $16,625 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);

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.

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–2012–1071; Directorate Identifier 2012–NM–070–AD.

(a) Comments Due Date

We must receive comments by November 30, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Airbus Model A310–203 airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 71; Powerplant.

(e) Reason

This AD was prompted by a report of an analysis that demonstrated a reduced fatigue life for the side link bolts, center sway link bolts, and thrust link bolts on the forward engine mounts. We are issuing this AD to prevent deterioration of the structural integrity of the bolts, which could result in possible damage to an engine or wing.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Actions

Within 18 months after the effective date of this AD, replace all side link bolts on left hand (LH) and right hand (RH) side of the engines, and all center sway link bolts and thrust link bolts of both engines, having any part number (P/N) identified in paragraphs (g)(1) through (g)(6) of this AD, with new bolts having the same part number, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A310–71–2037, including Appendices 01 and 02, dated September 30, 2011. Repeat the bolt replacements thereafter at intervals not exceeding 134 months.

(1) P/N 9021M88P01
(2) P/N 9021M88P02
(3) P/N 9205M81P01
(4) P/N 9021M88P03
(5) P/N 9021M88P04
(6) P/N 9205M82P01

(h) Other FAA AD Provisions

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 International Branch, send it to ATTN: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–2125; fax (425) 227–1147. Information may be emailed 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.

(i) Related Information

(1) Refer to MCAI European Aviation Safety Agency (EASA) Airworthiness Directive 2012–0056, dated April 3, 2012; and Airbus Mandatory Service Bulletin A310–71–2037, including Appendices 01 and 02, dated September 30, 2011; for related information.

(2) For 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; email *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, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on October 4, 2012.

Dionne Palermo,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–25458 Filed 10–15–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1076; Directorate Identifier 2011–NM–274–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Airbus Model A320–214, –232 and –233; and Model A321–211, –213, and –231 airplanes. This proposed AD was prompted by a report of a missing fastener between certain stringers of the fuselage frame which connects the frame to a tee. This proposed AD would require a rototest inspection and modification or repair of the fuselage frame at the affected area. We are proposing this AD to detect and correct cracking in the fuselage that could result in reduced structural integrity of the airplane.

DATES: We must receive comments on this proposed AD by November 30, 2012.

ADDRESSES: You may send comments by any of the following methods:

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

For service information identified in this proposed AD, contact Airbus, Airworthiness Office—EAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36

96; fax +33 5 61 93 44 51; email *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, WA. 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: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–1405; 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–2012–1076; Directorate Identifier 2011–NM–274–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 aviation authority for the Member States of the European Community, has issued EASA Airworthiness Directive 2011–0229, dated December 6, 2011 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

During a quality check in production of an A320 family aeroplane, it was discovered that a fastener was missing at [frame] FR 24 between stringer (STRG) 25 and STRG 26 on the right-hand (RH) side. The purpose of the missing fastener, a 4 [millimeter] mm diameter aluminum rivet, Part Number (P/N) ASNA2050DXJ040, is to connect the FR 24 to the FR 24 Tee. The hole where the fastener was missing was not drilled.

Further investigations revealed that the drilling was missing on the milling grid used for frame assembly of a limited group of aeroplanes.

This condition, if not corrected, could impair the structural integrity of the affected aeroplanes.

For the reasons described above, this [EASA] AD requires a special detailed inspection (SDI) [rototest inspection for cracking] of the affected area, and the accomplishment of the associated corrective actions [modification and/or repair].

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

Relevant Service Information

Airbus has issued Service Bulletin A320–53–1247, including Appendix 01, dated July 15, 2011. 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.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 111 products of U.S. registry. We also estimate that it would take about 6 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $56,610, or $510 per product.

We have received no definitive data that would enable us to provide cost estimates for the on-condition actions specified in this proposed AD. We have no way of determining the number of products that may need these actions.

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.

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–2012–1076; Directorate Identifier 2011–NM–274–AD.

(a) Comments Due Date

We must receive comments by November 30, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Model A320–214, –232, and –233; and Model A321–211, –213, and –231 airplanes; certificated in any category; manufacturer serial numbers 4338, 4371, 4374, 4375, 4377, 4381 through 4384 inclusive, 4386, 4387, 4388, 4390 through 4402 inclusive, 4404 through 4409 inclusive, 4411 through 4417 inclusive, 4419, 4420, 4421, 4423, 4424, 4426, 4429 through 4436 inclusive, 4438 through 4443 inclusive, 4445 through 4450 inclusive, 4453, 4454, 4456 through 4469 inclusive, 4471, 4472, 4474 through 4481 inclusive, 4483 through 4498 inclusive, 4500, 4504, 4505, 4506, and 4509.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Reason

This AD was prompted by a report of a missing fastener between certain stringers of the fuselage frame which connects the frame to a tee. We are issuing this AD to detect and correct cracking in the fuselage that could result in reduced structural integrity of the airplane.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Inspection

Before the accumulation of 24,000 total flight cycles since first flight of the airplane, or within 30 days after the effective date of this AD, whichever occurs later: Do a rototest inspection for cracking of the two adjacent fastener holes at fuselage frame (FR) 24 between stringer 25 and stringer 26 right-hand side, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–53–1247, excluding Appendix 01, dated July 15, 2011.

(1) If, during the rototest inspection required by paragraph (g) of this AD, any crack is found, before further flight, repair using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA) (or its delegated agent).

(2) If, during the rototest inspection required by paragraph (g) of this AD, no crack is found, before the accumulation of 24,000 total flight cycles since first flight of the airplane, or within 30 days after the effective date of this AD, whichever occurs later, modify fuselage frame FR 24 between stringer 25 and stringer 26 right-hand side, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–53–1247, excluding Appendix 01, dated July 15, 2011.

(h) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, 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: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–1405; fax (425) 227–1149. Information may be emailed 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.

(i) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2011–0229, dated December 6, 2011; and Airbus Service Bulletin A320–53–1247, excluding Appendix 01, dated July 15, 2011.

(2) For service information identified in this AD, contact Airbus, Airworthiness Office—EAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *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, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on October 5, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–25461 Filed 10–15–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1077; Directorate Identifier 2012–NM–146–AD]

RIN 2120–AA64

Airworthiness Directives; Embraer S.A. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Embraer S.A. Model ERJ 170 and ERJ 190 airplanes. This proposed AD was prompted by a report that high rate discharge (HRD) bottle explosive cartridges of a cargo compartment fire extinguisher system were swapped between the forward and aft cargo compartments. Additional investigation also revealed the possibility of swapping between the electrical connectors of the HRD and low rate discharge (LRD) bottles, and a rotated installation of the HRD bottle. Improper assembly of the fire extinguishing bottle might cause the extinguishing agent to be discharged toward the unselected cargo compartment rather than toward the cargo compartment with fire. This proposed AD would require an inspection of the HRD bottle for correct installation and to determine if the pressure switch is in the correct position, and re-installation if necessary; an inspection of the HRD and LRD bottle discharge heads to determine the part number and replacement if necessary; and, for certain airplanes, an inspection to determine the part numbers of the HRD and LRD electrical connectors, and relocation if necessary. We are proposing this AD to prevent the inability of the fire extinguishing system to suppress fire.

DATES: We must receive comments on this proposed AD by November 30, 2012.

ADDRESSES: You may send comments by any of the following methods:

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

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

For service information identified in this proposed AD, contact Embraer S.A., Technical Publications Section (PC 060), Av. Brigadeiro Faria Lima, 2170—Putim–12227–901 São Jose dos Campos–SP—BRASIL; telephone +55 12 3927–5852 or +55 12 3309–0732; fax +55 12 3927–7546; email *distrib@embraer.com.br;* Internet *http://www.flyembraer.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. 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: Cindy Ashforth, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–2768; 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–2012–1077; Directorate Identifier 2012–NM–146–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 Agência Nacional de Aviação Civil (ANAC), which is the aviation authority for Brazil, has issued Brazilian Airworthiness Directives 2012–07–01 and 2012–07–02, both effective July 30, 2012 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> It was found during an inspection of the cargo compartment fire extinguisher system that High Rate Discharge (HRD) bottle explosive cartridges were swapped between forward and aft cargo compartments. Additional investigation has also revealed the possibility of swapping between the electrical connectors of the HRD and Low Rate Discharge (LRD) bottles and a rotated installation of the HRD bottle. Such improper assembly of the fire extinguishing bottle may cause the extinguishing agent to be discharged toward the unselected cargo compartment rather than toward the cargo compartment with fire, resulting in an insufficient concentration of fire extinguishing agent in the cargo compartment with fire, and consequent inability of the fire extinguishing system to suppress fire.
>
> * * * * *

Required actions include an inspection of the HRD bottle for correct installation and to determine if the pressure switch is in the correct position, and re-installation if necessary; an inspection of the HRD and LRD bottle discharge heads to determine the part number and replacement if necessary; and, for certain airplanes, an inspection to determine the part numbers of the HRD and LRD electrical connectors, and relocation if necessary. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Embraer has issued the following service bulletins to correct the unsafe condition identified in the MCAI.

- EMBRAER Service Bulletin 170–26–0011, Revision 01, dated June 19, 2012 (for Model ERJ 170–100 LR, –100 STD, –100 SE, and –100 SU airplanes; and Model ERJ 170–200 LR, –200 SU, and –200 STD airplanes).
- EMBRAER Service Bulletin 190–26–0011, Revision 01, dated June 19, 2012 (for Model ERJ 190–100 STD, –100 LR, –100 ECJ, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes).
- EMBRAER Service Bulletin 190LIN–26–0006, Revision 01, dated June 19, 2012 (for Model ERJ 190–100 STD, –100 LR, –100 ECJ, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW 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.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 163 products of U.S. registry. We also estimate that it would take about 7 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $96,985, or $595 per product.

In addition, we estimate that any necessary follow-on actions would take about 1 work-hour and require parts costing $68,588, for a cost of $68,673 per product. We have no way of determining the number of products that may need these actions.

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.

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:

Embraer S.A.: Docket No. FAA–2012–1077; Directorate Identifier 2012–NM–146–AD.

(a) Comments Due Date

We must receive comments by November 30, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the airplanes identified in paragraphs (c)(1) and (c)(2) of this AD.

(1) Embraer S.A. Model ERJ 170–100 LR, –100 STD, –100 SE, and –100 SU airplanes; and Model ERJ 170–200 LR, –200 SU, and –200 STD airplanes; certificated in any category; as identified in EMBRAER Service Bulletin 170–26–0011, Revision 01, dated June 19, 2012.

(2) Embraer S.A. Model ERJ 190–100 STD, –100 LR, –100 ECJ, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes; certificated in any category; as identified in EMBRAER Service Bulletins 190–26–0011, Revision 01, dated June 19, 2012, and 190LIN–26–0006, Revision 01, dated June 19, 2012.

(d) Subject

Air Transport Association (ATA) of America Code 26, Fire Protection.

(e) Reason

This AD was prompted by a report that high rate discharge (HRD) bottle explosive cartridges of a cargo compartment fire extinguisher system were swapped between the forward and aft cargo compartments. Additional investigation also revealed the possibility of swapping between the electrical connectors of the HRD and low rate discharge (LRD) bottles, and a rotated installation of the HRD bottle. We are issuing this AD to prevent the inability of the fire extinguishing system to suppress fire.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Inspections and Corrective Actions for Group 1 Airplanes

For airplanes on which EMBRAER Service Bulletin 170–26–0011, dated December 1, 2011 (for Model ERJ 170–100 LR, –100 STD, –100 SE, and –100 SU airplanes; and Model ERJ 170–200 LR, –200 SU, and –200 STD airplanes); EMBRAER Service Bulletin 190–26–0011, dated December 1, 2011 (for Model ERJ 190–100 STD, –100 LR, –100 ECJ, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes); or EMBRAER Service Bulletin 190LIN–26–0006, dated December 1, 2011 (for Model ERJ 190–100 STD, –100 LR, –100 ECJ, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes); has not been accomplished as of the effective date of this AD: Within 3,000 flight hours after the effective date of this AD, do the actions specified in paragraphs (g)(1), (g)(2), and (g)(3) of this AD. All actions must be done in accordance with Part I and Part II, as applicable, of the Accomplishment Instructions of EMBRAER Service Bulletin 170–26–0011, Revision 01, dated June 19, 2012 (for Model ERJ 170–100 LR, –100 STD, –100 SE, and –100 SU airplanes; and Model ERJ 170–200 LR, –200 SU, and –200 STD airplanes); EMBRAER Service Bulletin 190–26–0011, Revision 01, dated June 19, 2012 (for Model ERJ 190–100 STD, –100 LR, –100 ECJ, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes); or EMBRAER Service Bulletin 190LIN–26–0006, Revision 01, dated June 19, 2012 (for Model ERJ 190–100 STD, –100 LR, –100 ECJ, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes).

(1) Do a general visual inspection of the HRD bottle to determine if it is correctly installed and if the pressure switch is in the correct position. If the bottle is not correctly installed or the pressure switch is in the incorrect position, before further flight, remove and re-install the HRD bottle.

(2) Inspect the HRD and LRD bottle discharge heads to determine the part number. If the part number of the discharge heads is not the part number specified in Figure 3 of EMBRAER Service Bulletin 170–26–0011, Revision 01, dated June 19, 2012 (for Model ERJ 170–100 LR, –100 STD, –100 SE, and –100 SU airplanes; and Model ERJ 170–200 LR, –200 SU, and –200 STD airplanes); EMBRAER Service Bulletin 190–26–0011, Revision 01, dated June 19, 2012 (for Model ERJ 190–100 STD, –100 LR, –100 ECJ, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes); or EMBRAER Service Bulletin 190LIN–26–0006, Revision 01, dated June 19, 2012 (for Model ERJ 190–100 STD, –100 LR, –100 ECJ, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes); before further flight, replace the discharge bottle with a discharge bottle having the same part number.

(3) Inspect to determine the part numbers of the HRD and LRD bottle electrical connectors. If the part numbers of the HRD or LRD bottle electrical connectors are not the part numbers specified in Figure 1 of EMBRAER Service Bulletin 170–26–0011, Revision 01, dated June 19, 2012 (for Model ERJ 170–100 LR, –100 STD, –100 SE, and –100 SU airplanes; and Model ERJ 170–200 LR, –200 SU, and –200 STD airplanes); EMBRAER Service Bulletin 190–26–0011, Revision 01, dated June 19, 2012 (for Model ERJ 190–100 STD, –100 LR, –100 ECJ, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes); or EMBRAER Service Bulletin 190LIN–26–0006, Revision 01, dated June 19, 2012 (for Model ERJ 190–100 STD, –100 LR, –100 ECJ, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes); before further flight, relocate the HRD or LRD bottle electrical connectors by re–routing the electrical harness.

(h) Inspections and Corrective Actions for Group 2 Airplanes

For airplanes on which EMBRAER Service Bulletin 170–26–0011, dated December 1, 2011 (for Model ERJ 170–100 LR, –100 STD, –100 SE, and –100 SU airplanes; and Model ERJ 170–200 LR, –200 SU, and –200 STD airplanes); EMBRAER Service Bulletin 190–26–0011, dated December 1, 2011 (for Model ERJ 190–100 STD, –100 LR, –100 ECJ, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes); or EMBRAER Service Bulletin 190LIN–26–0006, dated December 1, 2011 (for Model ERJ 190–100 STD, –100 LR, –100 ECJ, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes); has been accomplished as of the effective date of this AD: Within 3,000 flight hours after the effective date of this AD, do the actions specified in paragraphs (h)(1) and (h)(2) of this AD. All actions must be done in accordance with Part III of the Accomplishment Instructions of EMBRAER Service Bulletins 170–26–0011, Revision 01, dated June 19, 2012 (for Model ERJ 170–100 LR, –100 STD, –100 SE, and –100 SU airplanes; and Model ERJ 170–200 LR, –200 SU, and –200 STD airplanes); EMBRAER Service Bulletin 190–26–0011, Revision 01, dated June 19, 2012 (for Model ERJ 190–100 STD, –100 LR, –100 ECJ, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes); or EMBRAER Service Bulletin 190LIN–26–0006, Revision

01, dated June 19, 2012 (for Model ERJ 190–100 STD, –100 LR, –100 ECJ, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes).

(1) Do a general visual inspection of the HRD bottle to determine if it is correctly installed and if the pressure switch is in the correct position. If the bottle is not correctly installed or the pressure switch is in the incorrect position, before further flight, remove and re–install the HRD bottle.

(2) Inspect the HRD and LRD bottle discharge heads to determine the part number. If the part number of the discharge heads is not the part number specified in Figure 3 of EMBRAER Service Bulletin 170–26–0011, Revision 01, dated June 19, 2012 (for Model ERJ 170–100 LR, –100 STD, –100 SE, and –100 SU airplanes; and Model ERJ 170–200 LR, –200 SU, and –200 STD airplanes); EMBRAER Service Bulletin 190–26–0011, Revision 01, dated June 19, 2012 (for Model ERJ 190–100 STD, –100 LR, –100 ECJ, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes); or EMBRAER Service Bulletin 190LIN–26–0006, Revision 01, dated June 19, 2012 (for Model ERJ 190–100 STD, –100 LR, –100 ECJ, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes), before further flight, replace the discharge bottle with a discharge bottle having the same part number.

(i) Other FAA AD Provisions

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: Cindy Ashforth, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–2768; fax (425) 227–1149. Information may be emailed 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.

(j) Related Information

(1) Refer to MCAI Brazilian Airworthiness Directives 2012–07–01 and 2012–07–02, both effective July 30, 2012, and the service bulletins identified in paragraphs (j)(1)(i), (j)(1)(ii), and (j)(1)(iii) of this AD, for related information.

(i) EMBRAER Service Bulletin 170–26–0011, Revision 01, dated June 19, 2012.

(ii) EMBRAER Service Bulletin 190–26–0011, Revision 01, dated June 19, 2012.

(iii) EMBRAER Service Bulletin 190LIN–26–0006, Revision 01, dated June 19, 2012.

(2) For service information identified in this AD, contact Embraer S.A., Technical Publications Section (PC 060), Av. Brigadeiro Faria Lima, 2170–Putim–12227–901 São Jose dos Campos–SP–BRASIL; telephone +55 12 3927–5852 or +55 12 3309–0732; fax +55 12 3927–7546; email *distrib@embraer.com.br;* Internet *http://www.flyembraer.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on October 5, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–25459 Filed 10–15–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1078; Directorate Identifier 2011–NM–012–AD]

RIN 2120–AA64

Airworthiness Directives; Lockheed Martin Corporation/Lockheed Martin Aeronautics Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede an existing airworthiness directive (AD) that applies to all Lockheed Martin Corporation/Lockheed Martin Aeronautics Company Model L–1011 series airplanes. The existing AD currently requires repetitive inspections to detect corrosion or fatigue cracking of certain structural elements of the airplane; corrective actions if necessary; and incorporation of certain structural modifications. Since we issued that AD, we have received reports of small cracks in additional areas outside those addressed in the existing AD, prior to the inspection threshold required by the existing AD. This proposed AD would reduce certain compliance times for the initial inspection, and the repetitive inspection interval for certain airplanes. We are proposing this AD to prevent corrosion or fatigue cracking of certain structural elements, which could result in reduced structural integrity of the airplane.

DATES: We must receive comments on this proposed AD by November 30, 2012.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, 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 AD, contact Lockheed Martin Corporation/Lockheed Martin Aeronautics Company, Airworthiness Office, Dept. 6A0M, Zone 0252, Column P–58, 86 S. Cobb Drive, Marietta, Georgia 30063; telephone 770–494–5444; fax 770–494–5445; email *ams.portal@lmco.com;* Internet *http://www.lockheedmartin.com/ams/tools/TechPubs.html.* 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: Carl Gray, Aerospace Engineer, Airframe Branch, ACE–117A, FAA, Atlanta Aircraft Certification Office (ACO), 1701 Columbia Avenue, College Park, Georgia 30337; phone: 404–474–5554; fax: 404–474–5605; email: *carl.w.gray@faa.gov.*

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–2012–1078; Directorate Identifier 2011–NM–012–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

On July 8, 2005, we issued AD 2005–15–01, Amendment 39–14191 (70 FR 42262, July 22, 2005), for all Lockheed Martin Corporation/Lockheed Martin Aeronautics Company Model L–1011 series airplanes. That AD requires repetitive inspections to detect corrosion or fatigue cracking of certain structural elements of the airplane; corrective actions if necessary; and incorporation of certain structural modifications. That AD resulted from new recommendations related to incidents of fatigue cracking and corrosion in transport category airplanes that are approaching or have exceeded their economic design goal. We issued that AD to prevent corrosion or fatigue cracking of certain structural elements, which could result in reduced structural integrity of the airplane.

Actions Since Existing AD Was Issued

Since we issued AD 2005–15–01, Amendment 39–14191 (70 FR 42262, July 22, 2005), we have received reports of small cracks found outside the areas addressed by the existing AD. Specifically, these cracks were found from inner wing station (IWS) 477.70 to IWS 372.64 (inboard) and from outer wing station (OWS) 52.2 to OWS 296.5 (outboard).

Relevant Service Information

AD 2005–15–01, Amendment 39–14191 (70 FR 42262, July 22, 2005), refers to Lockheed Tristar L–1011 Service Bulletin 093–51–041, Revision 1, dated March 3, 2000 (a ''collector service bulletin''), as the appropriate source of service information for the required actions. This service bulletin has since been revised. We have reviewed Lockheed Service Bulletin 093–51–041, Revision 2, dated March 30, 2010, which, in turn, refers to Lockheed Service Bulletin 093–57–195, now at Revision 4, dated March 17, 2010.

Lockheed Service Bulletin 093–57–195, Revision 4, dated March 17, 2010, includes the following changes:

- Supersedes Lockheed Service Bulletin 093–57–069, Revision 4, dated October 5, 1998.
- Reduces the initial inspection threshold to 15,000 flight cycles; or 15,000 flight cycles after incorporation of Lockheed Service Bulletin 093–57–069, Revision 4, dated October 5, 1998.
- Reduces the repetitive inspection interval to 1,750 flight cycles for Model L–1011–385–3 airplanes.
- Changes the fastener hole cold working procedure from ''FTI–LCC–8701'' to ''FTI–LASC–51–20–01.''

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 these same type designs.

Proposed AD Requirements

This proposed AD would retain all requirements of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005). This proposed AD would reduce the initial inspection threshold for certain airplanes for accomplishment of the actions specified in Lockheed Service Bulletin 093–57–195, Revision 4, dated March 17, 2010, and would reduce the repetitive inspection interval for Model L–1011–385–3 airplanes. This proposed AD would also require accomplishing the actions specified in the service information described previously.

Changes to Existing AD

This proposed AD would retain all requirements of AD 2005–15–01, Amendment 39–14191 (70 FR 42262, July 22, 2005). Since AD 2005–15–01 was issued, the AD format has been revised, and certain paragraphs have been rearranged. As a result, the corresponding paragraph identifiers have changed in this proposed AD, as listed in the following table:

REVISED PARAGRAPH IDENTIFIERS

Requirement in AD 2005–15–01, Amendment 39-14190 (70 FR 42262, July 22, 2005)	Corresponding requirement in this proposed AD
paragraph (a)	paragraph (g).
paragraph (b)	paragraph (h).
paragraph (c)	paragraph (i).

In addition, we have removed paragraph (b)(2) from AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005), and added a new sentence to paragraph (h)(3) of this proposed AD to specify that information on additional methods of compliance can be obtained from the Manager, Atlanta Aircraft Certification Office (ACO). We might decide to approve certain sections of the Lockheed L–1011 structural repair manual as an alternative method of compliance with this proposed AD, as provided by paragraph (l) of this proposed AD.

We have also revised the applicability of the existing AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005), to identify model designations as published in the most recent type certificate data sheet for the affected models.

Costs of Compliance

We estimate that this proposed AD affects 26 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
Inspections [retained actions from existing AD 2005–15–01, Amendment 39–14191 (70 FR 42262, July 22, 2005)].	129 work-hours × $85 per hour = $10,965 per inspection cycle.	$0	$10,965 per inspection cycle.	$285,090 per inspection cycle.
Modification [retained action from existing AD 2005–15–01, Amendment 39–14191 (70 FR 42262, July 22, 2005)].	614 work-hours × $85 per hour = $52,190.	$142,275	$194,465	$5,056,194.

We have received no definitive data that would enable us to provide cost estimates for the retained on-condition actions specified in this proposed AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that the proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(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 removing airworthiness directive (AD) 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005), and adding the following new AD:

Lockheed Martin Corporation/Lockheed Martin Aeronautics Company: Docket No. FAA–2012–1078; Directorate Identifier 2011–NM–012–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by November 30, 2012.

(b) Affected ADs

This AD supersedes AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005).

(c) Applicability

This AD applies to all Lockheed Martin Corporation/Lockheed Martin Aeronautics Company Model L–1011–385–1, L–1011–385–1–14, L–1011–385–1–15, and L–1011–385–3 airplanes; certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 51, Standard practices/structures; 52, Doors; 53, Fuselage; 57, Wings.

(e) Unsafe Condition

This AD was prompted by reports of small cracks in additional areas outside those addressed in the existing AD (AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005)), prior to the inspection threshold required by the existing AD. We are issuing this AD to prevent corrosion or fatigue cracking of certain structural elements, which could result in reduced structural integrity of the airplane.

(f) Compliance

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

(g) Retained Inspections With Revised Service Information and Reduced Compliance Times

This paragraph restates the inspection required by paragraph (a) of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005), with revised service information and reduced compliance times for paragraph (g)(16) of this AD. At the time specified in the ''Initial Compliance Time'' column of table 1 to paragraph (g) of this AD, perform structural inspections to detect corrosion or fatigue cracking of certain structural elements of the airplane, in accordance with the applicable service bulletins listed under ''Service Bulletin Number, Revision, and Date'' in tables I and II of Lockheed Tristar L–1011 Service Bulletin 093–51–041, Revision 1, dated March 3, 2000, or Revision 2, dated March 30, 2010. As of the effective date of this AD, only Lockheed Tristar L–1011 Service Bulletin 093–51–041, Revision 2, dated March 30, 2010, may be used for the actions required by this paragraph. Thereafter, repeat the inspections at intervals specified in the ''Repetitive Intervals'' column of table 1 to paragraph (g) of this AD.

TABLE 1 TO PARAGRAPH (g) OF THIS AD

Lockheed TriStar L–1011 Service Bulletin	Initial compliance time (whichever occurs later between the times in ''Inspection Threshold'' and ''Grace Period'')		Repetitive intervals	Terminating action
	Inspection threshold	Grace period		
(1) 093–53–269, Revision 1, dated October 28, 1997; or.	Before the accumulation of 8,000 total flight cycles or 15,000 total flight hours, whichever occurs first.	Within 6,450 flight cycles or 5 years after August 26, 2005 (the effective date of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005)), whichever occurs first.	At intervals not to exceed 6,450 flight cycles or 5 years, whichever occurs first.	(None).

TABLE 1 TO PARAGRAPH (g) OF THIS AD—Continued

Lockheed TriStar L–1011 Service Bulletin	Initial compliance time (whichever occurs later between the times in "Inspection Threshold" and "Grace Period")		Repetitive intervals	Terminating action
	Inspection threshold	Grace period		
(2) 093–53–274, dated May 28, 1997.	Within 14 months after August 26, 2005 (the effective date of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005)).	(None)	At intervals not to exceed 14 months.	(None).
(3) 093–53–275, dated December 10, 1996.	Within 6,450 flight cycles or 5 years after August 26, 2005 (the effective date of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005)), whichever occurs first.	(None)	(None)	(None).
(4) 093–53–276, dated June 17, 1996.	At the next Corrosion Prevention and Control Program (CPCP) inspection after August 26, 2005 (the effective date of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005)).	(None)	At intervals not to exceed the next CPCP inspection.	(None).
(5) 093–57–085, Revision 1, dated December 1, 1997.	Before the accumulation of 26,000 total flight cycles or 48,000 total flight hours, whichever occurs first.	Within 1,800 flight cycles or 3,300 flight hours after August 26, 2005 (the effective date of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005)), whichever occurs first.	At intervals not to exceed 1,800 flight cycles or 3,300 flight hours, whichever occurs first.	Modification in accordance with Lockheed TriStar L–1011 Service Bulletin 093–57–085, Basic Issue, dated May 7, 1993; or Revision 1, dated December 1, 1997.
(6) 093–57–208, Revision 1, dated October 28, 1997.	Before the accumulation of 18,000 total flight cycles.	Within 6,450 flight cycles or 5 years after August 26, 2005 (the effective date of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005)), whichever occurs first.	At intervals not to exceed 6,450 flight cycles or 5 years, whichever occurs first.	(None).
(7) 093–52–210, dated July 19, 1991.	Within 5,000 flight hours or 18 months after August 26, 2005 (the effective date of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005)), whichever occurs first.	(None)	(None)	(None).
(8) 093–53–054, Revision 1, dated August 12, 1975.	Within 6,450 flight cycles or 5 years after August 26, 2005 (the effective date of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005)), whichever occurs first.	(None)	(None)	(None).
(9) 093–53–070, Revision 3, dated September 19, 1989.	Before the accumulation of 6,000 total flight hours.	Within 1,500 flight hours after August 26, 2005 (the effective date of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005)).	At intervals not to exceed 3,000 flight hours.	Modification in accordance with Lockheed TriStar L–1011 Service Bulletin 093–53–070, Basic Issue, dated September 26, 1974; Revision 1, dated January 23, 1975; Revision 2, dated July 7, 1975; or Revision 3, dated September 19, 1989.

TABLE 1 TO PARAGRAPH (g) OF THIS AD—Continued

Lockheed TriStar L–1011 Service Bulletin	Initial compliance time (whichever occurs later between the times in "Inspection Threshold" and "Grace Period")		Repetitive intervals	Terminating action
	Inspection threshold	Grace period		
(10) 093–53–085, Revision 3, dated December 15, 1989.	Part I: Before the accumulation of 20,000 flight cycles or 37,000 total flight hours, whichever occurs first.	Part I: Within 1,600 flight cycles or 3,000 flight hours after August 26, 2005 (the effective date of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005)), whichever occurs first.	Part I: At intervals not to exceed 1,600 flight cycles or 3,000 flight hours, whichever occurs first.	Modification in accordance with Lockheed TriStar L–1011 Service Bulletin 093–53–085, Basic Issue, dated September 29, 1975; Revision 1, dated September 3, 1976; or Revision 2, dated February 8, 1988.
	Part II: Before the accumulation of 30,000 flight cycles or 55,000 total flight hours, whichever occurs first.	Part II: Within 5,000 flight cycles or 9,200 flight hours after August 26, 2005 (the effective date of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005)), whichever occurs first.	Part II: At intervals not to exceed 5,000 flight cycles or 9,200 flight hours, whichever occurs first.	Modification in accordance with Lockheed TriStar L–1011 Service Bulletin 093–53–085, Basic Issue, dated September 29, 1975; Revision 1, dated September 3, 1976; or Revision 2, dated February 8, 1988.
(11) 093–53–086, Revision 5, dated April 12, 1990.	Before the accumulation of 9,000 flight cycles or 10,000 flight hours, whichever occurs first.	Within 1,600 flight cycles or 3,000 flight hours after August 26, 2005 (the effective date of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005)), whichever occurs first.	At intervals not to exceed 1,600 flight cycles or 3,000 flight hours, whichever occurs first.	Modification in accordance with Lockheed TriStar L–1011 Service Bulletin 093–53–086, Basic Issue, dated September 26, 1975; Revision 1, dated November 12, 1975; Revision 2, dated December 12, 1976; Revision 3, dated July 19, 1977; Revision 4, dated July 8, 1985; or Revision 5, dated April 12, 1990.
(12) 093–53–110, Revision 1, dated May 7, 1993.	Before the accumulation of 22,000 total flight cycles or 40,000 total flight hours, whichever occurs first.	Within 2,200 flight cycles or 4,000 flight hours after August 26, 2005 (the effective date of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005)), whichever occurs first.	At intervals not to exceed 2,200 flight cycles or 4,000 flight hours, whichever occurs first.	Modification in accordance with Lockheed TriStar L–1011 Service Bulletin 093–53–110, Basic Issue, dated August 19, 1991; or Revision 1, dated May 7, 1993.
(13) Change Notification 093–53–260, CN4, dated May 8, 1998.	Before the accumulation of 8,000 total flight cycles or 20,000 total flight hours, whichever occurs first.	Within 800 flight cycles or 1,500 flight hours after August 26, 2005 (the effective date of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005)), whichever occurs first.	At intervals not to exceed 800 flight cycles or 1,500 flight hours, whichever occurs first.	Inspection and modification in accordance with Part 2.A. of Lockheed TriStar L–1011 Service Bulletin 093–53–260, Basic Issue, dated May 15, 1991.
(14) Change Notification 093–53–266, CN1, dated July 10, 1992.	Within 12 months after August 26, 2005 (the effective date of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005)).	(None)	At intervals not to exceed 90 days.	Modification in accordance with Lockheed TriStar L–1011 Service Bulletin 093–53–266, Basic Issue, dated March 2, 1992.
(15) Change Notification 093–57–058, R5–CN1, dated May 3, 1993.	Before the accumulation of 20,000 total flight cycles or 37,000 total flight hours, whichever occurs first.	Within 1,600 flight cycles or 3,000 flight hours after August 26, 2005 (the effective date of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005)), whichever occurs first.	At intervals not to exceed 1,600 flight cycles or 3,000 flight hours, whichever occurs first.	Modification in accordance with Lockheed TriStar L–1011 Service Bulletin 093–57–058, Basic Issue, dated September 16, 1975; Revision 1, dated December 1, 1976; Revision 2, dated June 30, 1978; Revision 3, dated October 19, 1978; or Revision 4, dated July 6, 1981, Revision 5, dated June 9, 1983.

TABLE 1 TO PARAGRAPH (g) OF THIS AD—Continued

Lockheed TriStar L–1011 Service Bulletin	Initial compliance time (whichever occurs later between the times in "Inspection Threshold" and "Grace Period")		Repetitive intervals	Terminating action
	Inspection threshold	Grace period		
(16) Change Notification 093–57–195, R3–CN1, dated August 22, 1995, or Lockheed TriStar L–1011 Service Bulletin 093–57–195, Revision 4, dated March 17, 2010.	At the applicable time specified in paragraph (j) of this AD.	At the applicable time specified in paragraph (j) of this AD.	At the applicable time specified in paragraph (k) of this AD.	Modification in accordance with Lockheed TriStar L–1011 Service Bulletin 093–57–195, Revision 2, dated July 27, 1990; Revision 3, dated June 30, 1992; or Revision 4, dated March 17, 2010
(17) Change Notification 093–57–213, CN1, dated February 20, 1996.	For Model L–1011–385–1, L–1011–385–1–14, L–1011–385–1–15: Before the accumulation of 15,000 total flight cycles. For Model L–1011–385–3: Before the accumulation of 10,000 total flight cycles.	Within 6,450 flight cycles or 5 years after August 26, 2005 (the effective date of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005)), whichever occurs first.	At intervals not to exceed 6,450 flight cycles or 5 years, whichever occurs first.	Repair or modification in accordance with Lockheed TriStar L–1011 Service Bulletin 093–57–213, Basic Issue, dated December 9, 1994.

(h) Retained Corrective Action With a Certain Compliance Method Removed

This paragraph restates the corrective action required by paragraph (b) of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005), with certain exceptions. If any cracking or corrosion is detected during any inspection required by paragraph (g) of this AD, prior to further flight, accomplish the actions specified in paragraph (h)(1), (h)(2), or (h)(3) of this AD.

(1) Repair in accordance with the applicable service bulletin referenced in table I or II of Lockheed Tristar L–1011 Service Bulletin 093–51–041, Revision 1, dated March 3, 2000, or Revision 2, dated March 30, 2010.

(2) Accomplish the terminating modification in accordance with the applicable service bulletin referenced in table I or II of Lockheed Tristar L–1011 Service Bulletin 093–51–041, Revision 1, dated March 3, 2000, or Revision 2, dated March 30, 2010.

(3) Repair in accordance with a method approved by the Manager, Atlanta Aircraft Certification Office (ACO), FAA. Information on additional methods of compliance can be obtained from the Manager, Atlanta ACO.

(i) Retained Terminating Action

This paragraph restates the terminating action required by paragraph (c) of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005). Within 5 years or 5,000 flight cycles after August 26, 2005 (the effective date of AD 2005–15–01), whichever occurs first, install the terminating modification referenced in the applicable service bulletin listed in table 1 to paragraph (g) of this AD, in accordance with the applicable service bulletin. Such installation constitutes terminating action for the applicable structural inspection required by paragraph (g) of this AD.

(j) Newly Revised Initial Inspection Compliance Time for Certain Airplanes

For airplanes identified in Lockheed TriStar L–1011 Service Bulletin 093–57–195, Revision 4, dated March 17, 2010: Do the initial inspection required by paragraph (g)(16) of this AD at the applicable time specified in paragraph (j)(1) or (j)(2) of this AD.

(1) For airplanes having serial numbers (S/Ns) 1002 through 1109 inclusive: At the earlier of the times specified in paragraphs (j)(1)(i) and (j)(1)(ii) of this AD.

(i) Before the accumulation of 20,000 total flight cycles, or within 2,200 flight cycles after August 26, 2005 (the effective date of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005)), whichever occurs later.

(ii) Before the accumulation of 15,000 total flight cycles, or within 2,200 flight cycles after the effective date of this AD, whichever occurs later.

(2) For airplanes having S/Ns 1110 through 1250 inclusive: At the earlier of the times specified in paragraphs (j)(2)(i) and (j)(2)(ii) of this AD.

(i) Before the accumulation of 30,000 total flight cycles, or within 2,200 flight cycles after August 26, 2005 (the effective date of AD 2005–15–01, Amendment 39–14190 (70 FR 42262, July 22, 2005)), whichever occurs later.

(ii) Before the accumulation of 15,000 total flight cycles, or within 2,200 flight cycles after the effective date of this AD, whichever occurs later.

(k) Newly Revised Repetitive Intervals for Certain Airplanes

For airplanes identified in paragraph (j) of this AD, repeat the inspection required by paragraph (j) of this AD thereafter at the applicable times specified in paragraph (k)(1) or (k)(2) of this AD.

(1) For airplanes having S/Ns 1002 through 1156 inclusive: Repeat the inspection at intervals not to exceed 2,200 flight cycles.

(2) For airplanes having S/Ns 1157 through 1250 inclusive: Repeat the inspection one time within 2,200 flight cycles after the most recent inspection; and thereafter at intervals not to exceed 1,750 flight cycles.

(l) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Atlanta 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.

(m) Related Information

(1) For more information about this AD, contact Carl Gray, Aerospace Engineer, Airframe Branch, ACE–117A, FAA, Atlanta Aircraft Certification Office (ACO), 1701 Columbia Avenue, College Park, Georgia 30337; phone: 404–474–5554; fax: 404–474–5605; email: *carl.w.gray@faa.gov.*

(2) For service information identified in this AD, contact Lockheed Martin Corporation/Lockheed Martin Aeronautics Company, Airworthiness Office, Dept. 6A0M, Zone 0252, Column P–58, 86 S. Cobb Drive, Marietta, Georgia 30063; telephone 770–494–5444; fax 770–494–5445; email *ams.portal@lmco.com;* Internet *http://www.lockheedmartin.com/ams/tools/TechPubs.html.* 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.

Issued in Renton, Washington, on October 5, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–25463 Filed 10–15–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1072; Directorate Identifier 2012–NM–141–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. This proposed AD was prompted by reports of two in-service incidents where the left main landing gear (MLG) failed to extend. This proposed AD would require installing stopper plates on the aft uplock frames in the MLG bay adjacent to the right and left MLG uplock assemblies. We are proposing this AD to prevent incorrect installation of the upper bolt in the MLG uplock assembly, which could prevent the MLG from extending and adversely affect the safe landing of the airplane.

DATES: We must receive comments on this proposed AD by November 30, 2012.

ADDRESSES: You may send comments by any of the following methods:

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

For service information identified in this proposed AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514-855–7401; email *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Cesar Gomez, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; phone: 516–228–7328; fax: 516–794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–1072; Directorate Identifier 2012–NM–141–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2012–22, dated July 24, 2012 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

There have been two reported in-service incidents where the left main landing gear (MLG) failed to extend. The investigation revealed that in both cases, the uplock assembly had been replaced prior to the in-service incidents and the upper bolt of the uplock assembly was incorrectly installed. The incorrect installation of the upper bolt resulted in the uplock assembly pivoting on the lower attachment bolt and preventing the MLG from extending under normal or alternate extension

The potential for an incorrect installation of the upper bolt could occur at both the left hand side (LHS) and/or the right hand side (RHS) MLG uplock assembly. Failure of the MLG to extend could adversely affect the safe landing of the aeroplane.

This [Canadian] AD mandates the installation of stopper plates on the aft uplock frames in the MLG bay, adjacent to both the RHS and LHS MLG uplock assemblies, to prevent an incorrect installation of the MLG uplock assembly.

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

Relevant Service Information

Bombardier, Inc. has issued Service Bulletin 601R–32–109, dated May 29, 2012. 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.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 574 products of U.S. registry. We also estimate that it would take about 5 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $243,950, or $425 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);
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.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Bombardier, Inc.: Docket No. FAA–2012–1072; Directorate Identifier 2012–NM–141–AD.

(a) Comments Due Date

We must receive comments by November 30, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, certificated in any category, serial numbers 7003 through 7990 inclusive, and 8000 through 8999 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 32, Landing gear.

(e) Reason

This AD was prompted by reports of two in-service incidents where the left main landing gear (MLG) failed to extend. We are issuing this AD to prevent incorrect installation of the upper bolt in the MLG uplock assembly, which could prevent the MLG from extending and adversely affect the safe landing of the airplane.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Installation of Stopper Plates

Within 5,500 flight hours or 48 months after the effective date of this AD, whichever occurs first: Install stopper plates on the aft uplock frame of both the right and left MLG uplock assemblies, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 601R–32–109, dated May 29, 2012.

(h) Other FAA AD Provisions

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. 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 ACO, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, NY 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.

(i) Related Information

(1) Refer to MCAI Canadian Airworthiness Directive CF–2012–22, dated July 24, 2012; and Bombardier Service 601R–32–109, dated May 29, 2012; for related information.

(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; email thd.*crj@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on October 4, 2012.

Dionne Palermo,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–25453 Filed 10–15–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1075; Directorate Identifier 2012–NM–111–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. This proposed AD was prompted by a revision to the airplane airworthiness limitations to introduce more stringent inspection requirements on certain affected components. This proposed AD would require revising the maintenance program to incorporate revised tasks specified in certain temporary revisions. We are proposing this AD to detect and correct fatigue cracking in the affected components and consequent loss of structural integrity.

DATES: We must receive comments on this proposed AD by November 30, 2012.

ADDRESSES: You may send comments by any of the following methods:

• *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.

• *Fax:* (202) 493–2251.

• *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

• *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. 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: Jeffrey Zimmer, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7306; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–1075; Directorate Identifier 2012–NM–111–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2012–13, dated April 10, 2012 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> A revision has been made to Part 2 of the Canadair Regional Jet Maintenance Requirements Manual (MRM), Airworthiness Limitations (AWL), to introduce more stringent inspection requirements for continued airworthiness based on re-analysis, in-service data and/or fatigue testing. Failure to comply with these revised AWL items could lead to an unsafe condition.
>
> This [TCCA] AD is issued to ensure that fatigue cracking of these affected components [and consequent loss of airplane structural integrity] is detected and corrected.

Required actions include revising the maintenance program by incorporating the revised inspection requirements specified in certain temporary revisions to Appendix B—Airworthiness Limitations, of Part 2 of the Bombardier CL–600–2B19 Maintenance Requirements Manual (MRM). You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Bombardier Inc. has issued the following temporary revisions to Appendix B—Airworthiness Limitations, of Part 2 of the Bombardier CL–600–2B19 MRM.

• Canadair Regional Jet Temporary Revision 2B–2098, dated November 24, 2005.

• Canadair Regional Jet Temporary Revision 2B–2110, dated November 24, 2005.

• Canadair Regional Jet Temporary Revision 2B–2119, dated February 14, 2006.

• Canadair Regional Jet Temporary Revision 2B–2123, dated August 28, 2006.

• Canadair Regional Jet Temporary Revision 2B–2127, dated October 9, 2007.

• Canadair Regional Jet Temporary Revision 2B–2128, dated October 9, 2007.

• Canadair Regional Jet Temporary Revision 2B–2129, dated February 14, 2008.

• Canadair Regional Jet Temporary Revision 2B–2133, dated February 14, 2008.

• Canadair Regional Jet Temporary Revision 2B–2148, dated January 12, 2009.

• Canadair Regional Jet Temporary Revision 2B–2160, dated January 14, 2011.

• Canadair Regional Jet Temporary Revision 2B–2161, dated January 14, 2011.

• Canadair Regional Jet Temporary Revision 2B–2168, dated January 14, 2011.

• Canadair Regional Jet Temporary Revision 2B–2174, dated January 14, 2011.

• Canadair Regional Jet Temporary Revision 2B–2198, dated December 8, 2011.

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.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 575 products of U.S. registry. We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $48,875, 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);
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.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Bombardier, Inc.: Docket No. FAA–2012–1075; Directorate Identifier 2012–NM–111–AD.

(a) Comments Due Date

We must receive comments by November 30, 2012.

(b) Affected ADs

None.

(c) Applicability

(1) This AD applies to Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, certificated in any category, serial numbers 7003 and subsequent.

(2) This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by section 91.403(c) of the Federal Aviation Regulations (14 CFR 91.403(c)). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, an operator might 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 of an alternative method of compliance (AMOC) in accordance with the provisions of paragraph (j) of this AD. The request should include a description of changes to the required inspections that will ensure the continued damage tolerance of the affected structure.

(d) Subject

Air Transport Association (ATA) of America Code 05, Periodic inspections.

(e) Reason

This AD was prompted by a revision to the airplane airworthiness limitations to introduce more stringent inspection requirements on certain affected components. We are issuing this AD to detect and correct fatigue cracking in the affected components and consequent loss of structural integrity.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Maintenance Program Revision

Within 60 days after the effective date of this AD: Revise the maintenance program by incorporating the revised inspection requirements specified in the temporary revisions to Appendix B—Airworthiness Limitations, of Part 2 of the Bombardier CL–600–2B19 Maintenance Requirements Manual (MRM) specified in paragraphs (g)(1) through (g)(14) of this AD.

(1) Canadair Regional Jet Temporary Revision 2B–2098, dated November 24, 2005.

(2) Canadair Regional Jet Temporary Revision 2B–2110, dated November 24, 2005.

(3) Canadair Regional Jet Temporary Revision 2B–2119, dated February 14, 2006.

(4) Canadair Regional Jet Temporary Revision 2B–2123, dated August 28, 2006.

(5) Canadair Regional Jet Temporary Revision 2B–2127, dated October 9, 2007.

(6) Canadair Regional Jet Temporary Revision 2B–2128, dated October 9, 2007.

(7) Canadair Regional Jet Temporary Revision 2B–2129, dated February 14, 2008.

(8) Canadair Regional Jet Temporary Revision 2B–2133, dated February 14, 2008.

(9) Canadair Regional Jet Temporary Revision 2B–2148, dated January 12, 2009.

(10) Canadair Regional Jet Temporary Revision 2B–2160, dated January 14, 2011.

(11) Canadair Regional Jet Temporary Revision 2B–2161, dated January 14, 2011.

(12) Canadair Regional Jet Temporary Revision 2B–2168, dated January 14, 2011.

(13) Canadair Regional Jet Temporary Revision 2B–2174, dated January 14, 2011.

(14) Canadair Regional Jet Temporary Revision 2B–2198, dated December 8, 2011.

(h) Initial Task Compliance Time

The initial compliance times for the tasks specified in the temporary revisions specified in paragraphs (g)(1) though (g)(14) of this AD are at the applicable time specified in the applicable temporary revision, or within 60 days after the effective date of this AD, whichever occurs later.

(i) No Alternative Actions or Intervals

After accomplishing the revisions required by paragraph (g) of this AD, no alternative actions (e.g., inspections) or intervals may be used other than those specified in the temporary revisions specified in paragraphs (g)(1) through (g)(14) of this AD, unless the actions and intervals are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (j)(1) of this AD.

(j) Other FAA AD Provisions

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. 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 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.

(k) Related Information

(1) Refer to MCAI Canadian Airworthiness Directive CF–2012–13, dated April 10, 2012, and the temporary revisions to Appendix B—Airworthiness Limitations, of Part 2 of the Bombardier CL–600–2B19 MRM specified in paragraphs (k)(1) through (k)(14) of this AD, for related information.

(i) Canadair Regional Jet Temporary Revision 2B–2098, dated November 24, 2005.

(ii) Canadair Regional Jet Temporary Revision 2B–2110, dated November 24, 2005.

(iii) Canadair Regional Jet Temporary Revision 2B–2119, dated February 14, 2006.

(iv) Canadair Regional Jet Temporary Revision 2B–2123, dated August 28, 2006.

(v) Canadair Regional Jet Temporary Revision 2B–2127, dated October 9, 2007.

(vi) Canadair Regional Jet Temporary Revision 2B–2128, dated October 9, 2007.

(vii) Canadair Regional Jet Temporary Revision 2B–2129, dated February 14, 2008.

(viii) Canadair Regional Jet Temporary Revision 2B–2133, dated February 14, 2008.

(ix) Temporary Revision 2B–2148, dated January 12, 2009.

(x) Temporary Revision 2B–2160, dated January 14, 2011.

(xi) Temporary Revision 2B–2161, dated January 14, 2011.

(xii) Temporary Revision 2B–2168, dated January 14, 2011.

(xiii) Temporary Revision 2B–2174, dated January 14, 2011.

(xiv) Temporary Revision 2B–2198, dated December 8, 2011.

(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; email *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, WA, on October 4, 2012.

Dionne Palermo,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–25430 Filed 10–15–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1093; Directorate Identifier 2011–SW–020–AD]

RIN 2120–AA64

Airworthiness Directives; Brantly International, Inc. Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the Brantly International, Inc. (Brantly) Model B–2, Model B–2A, and Model B–2B helicopters with a certain main rotor blade. This proposed AD was prompted by multiple reports of main rotor (M/R) blade cracks and an accident in which a crack that originated near the M/R blade trailing edge resulted in the loss of a large section of the M/R blade. The proposed actions are intended to prevent loss of the M/R blade and subsequent loss of control of the helicopter.

DATES: We must receive comments on this proposed AD by December 17, 2012.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Docket:* Go to *http://www.regulations.gov.* Follow the online instructions for sending your comments electronically.
- *Fax:* 202–493–2251.
- *Mail:* Send comments 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 20590–0001.
- *Hand Delivery:* Deliver to the ''Mail'' address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the Docket Operations Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the economic 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 service information identified in this proposed AD, contact Brantly International, Inc., 621 South Royal Lane, Suite 100, Coppell, Texas 75019, telephone (972) 829–4638, email *tarcher@superiorairparts.com.* You may review a copy of the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

FOR FURTHER INFORMATION CONTACT: Marc Belhumeur, Senior Project Engineer, Rotorcraft Certification Office, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5177; email *marc.belhumeur@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time.

We will file in the docket all comments that we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. We may change this proposal in light of the comments we receive.

Discussion

We propose to adopt a new AD for all Brantly B–2, B–2A, and B–2B helicopters with an M/R blade, part number (P/N) 248–101, 248–202, or 248–404. This proposed AD is prompted by a 2007 accident in New Zealand in which a large inboard section of the M/R blade of a Brantly B–2B helicopter separated from the helicopter during flight. Laboratory analysis concluded that the M/R blade failure was caused by hydrocarbon contaminants inside the blade's skin-to-foam bond and that the fracture originated near the blade's trailing edge. There were three other reports of portions of M/R blades separating during flight and another five reports of M/R blades having cracks or other defects that were found during inspections.

FAA's Determination

We are proposing this AD because we evaluated all known relevant information and determined that an unsafe condition exists and is likely to exist or develop on other products of these same type designs.

Related Service Information

We reviewed Brantly International Inc. Service Bulletin No. 111, dated February 10, 2011 (SB 111). The bulletin describes procedures for inspecting the M/R blades every 300 hours time-in-service (TIS) using Eddy Current Procedure ET002, performing a visual inspection using a 10X power magnifying glass and conducting a tap

test every 25 hours TIS and a visual inspection of the M/R blades before the first flight of the day.

Proposed AD Requirements

This proposed AD would require, before the first flight of each day, for any helicopter with M/R blade, P/N 248–101, 248–202, or 248–404, visually inspecting the M/R blade for a crack, nick, wrinkle, or bend. Within 8 hours TIS, this proposed AD would require for any helicopter with an M/R blade P/N 248–404 with 10 or more years in service or 1,000 or more hours TIS, whichever occurs first, or for any helicopter with M/R blade, P/N 248–101 or P/N 248–202:

- Having an inspector qualified to the American Society for Nondestructive Testing (ASNT) Level II or equivalent, perform an eddy current inspection for a crack or a nick and repeating this inspection at intervals not to exceed 300 hours TIS or five calendar years, whichever occurs first.
- Tap inspecting for delamination focusing more attention on the inboard first 12 inches of the top and bottom of the M/R blade and repeating this action at intervals not to exceed 25 hours TIS.
- Visually inspecting with a 10X or higher power magnifying glass for a crack, nick, crease, wrinkle, bend, added hole (such as a drilled hole to stop the spread of a crack), extra rivet, or inadequate rivet spacing and repeating this inspection at intervals not to exceed 25 hours TIS.
- Before further flight, removing from service any M/R blade that has a crack, nick, crease, wrinkle, bend, extra hole, extra rivet or inadequate rivet spacing or any delamination.

Differences Between This Proposed AD and the Service Information

SB 111 requires accomplishment of sections 1 and 2 before further flight. The proposed AD requires it to be completed within 8 hours TIS. SB 111 allows up to 10 square inches of delamination outside of the inboard 12 inches of the M/R blade. The proposed AD does not.

Costs of Compliance

We estimate that this proposed AD would affect 76 helicopters of U.S. registry. We estimate the following costs to comply with this proposed AD, using an average of $85 per work-hour:

- For the visual inspection before the first flight of each day, we estimate that it would require about one work-hour for a labor cost of $85 per inspection cycle. No parts would be needed, so the total cost for the U.S. fleet would be $6,460.
- For the eddy current inspection, we estimate that it would require about four work-hours for a labor cost of $340 per inspection cycle. No parts would be needed, so the total cost for the 76-helicopter U.S. fleet would be $25,840 per inspection cycle.
- For the visual inspection with the magnifying glass and the tap inspection, we estimate that it would require about three work-hours for a labor cost of $255 per inspection cycle. No parts would be needed, so the total cost for the U.S. fleet would be $19,380 per inspection cycle.
- Replacing an M/R blade, if needed, would require about two work-hours for a labor cost of $170. An M/R blade would cost $7,500 for a total cost of $7,670 per helicopter, assuming one M/R blade is replaced.

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, 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 to the extent that it justifies making a regulatory distinction; 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.

We prepared an economic 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 airworthiness directive (AD):

Brantly International, Inc.: Docket No. FAA–2012–1093; Directorate Identifier 2011–SW–020–AD.

(a) Applicability

This AD applies to the Model B–2, Model B–2A, and Model B–2B helicopters, with a main rotor (M/R) blade, part number (P/N) 248–101, 248–202, or 248–404, installed, certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as a crack, nick, crease, wrinkle, bend, extra hole, extra rivet, inadequate rivet spacing, or any delamination in an M/R blade. Any of these conditions could result in loss of an M/R blade and subsequent loss of control of the helicopter.

(c) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(d) Required Actions

(1) Before the first flight of each day, visually inspect each M/R blade for a crack, nick, wrinkle, or bend. Pay particular attention to the M/R blade root area, the area around the lead/lag damper mounting fork, and the trailing edge.

(2) Within 8 hours time-in-service (TIS), for a helicopter with an M/R blade, P/N 248–101 or P/N 248–202, and for a helicopter with an M/R blade P/N 248–404 with 10 or more years or 1,000 or more hours TIS, whichever occurs first, remove each M/R blade and:

(i) Using an inspector qualified to the American Society for Nondestructive Testing

(ASNT) Level II or equivalent, eddy current inspect each M/R blade for a crack or a nick in accordance with paragraph number 4 and paragraph number 7 through 17 of Technique Number ET002, dated November 2007, attached to Brantly International, Inc., Service Bulletin No. 111, dated February 10, 2011 (SB 111).

(ii) Thereafter, at intervals not to exceed 300 hours TIS or five calendar years, whichever occurs first, repeat the eddy current inspection in accordance with the requirements of paragraph (d)(2)(i) of this AD.

(iii) Using a metallic coin or tap hammer, tap inspect each M/R blade for delamination in the bonded areas as shown on SB 111, Section 4. Pay particular attention to the root area in the first 12 inches of the top and bottom of each M/R blade.

(iv) Using a 10X or higher power magnifying glass, visually inspect for a crack, nick, crease, wrinkle, bend, extra hole (such as a stop drill hole), extra rivet, and any inadequate rivet spacing caused by additional holes or rivets.

(v) Thereafter, at intervals not to exceed 25 hours TIS, repeat the tap inspection in accordance with the requirements of paragraph (d)(2)(iii) of this AD and the visual inspection using a 10X or higher power magnifying glass in accordance with the requirements of paragraph (d)(2)(iv) of this AD.

(3) Before further flight, remove from service any M/R blade with a crack, nick, crease, wrinkle, bend, extra hole, extra rivet, delamination, or inadequate rivet spacing caused by additional holes or rivets.

(e) Alternative Methods of Compliance (AMOC)

(1) The Manager, Safety Management Group, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send your proposal to: Marc Belhumeur, Senior Project Engineer, Rotorcraft Certification Office, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5177; email *marc.belhumeur@faa.gov.*

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office before operating any aircraft complying with this AD through an AMOC.

(f) Additional Information

For service information identified in this AD, contact Brantly International, Inc, 621 South Royal Lane, Suite 100, Coppell Texas 75019, telephone (972) 829–4638, email *tarcher@superiorairparts.com.* You may review a copy of this information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

(g) Subject

Joint Aircraft Service Component (JASC) Code: 6210, Main Rotor Blade.

Issued in Fort Worth, Texas, on October 5, 2012.

Kim Smith,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2012–25444 Filed 10–15–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–130266–11]

RIN 1545–BK57

Additional Requirements for Charitable Hospitals; Hearing

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Change of date of public hearing on proposed rulemaking.

SUMMARY: This document changes the date of a public hearing on proposed regulations that provide guidance regarding the requirements for charitable hospital organizations relating to financial assistance and emergency medical care policies, charges for certain care provided to individuals eligible for financial assistance, and billing and collections.

DATES: The public hearing originally scheduled for Monday, October 29, 2012, at 10 a.m. is rescheduled for Wednesday, December 5, 2012, at 10 a.m. Outlines of topics to be discussed at the public hearing must be received by November 7, 2012.

ADDRESSES: The public hearing is being held in the IRS Auditorium, Internal Revenue Service Building, 1111 Constitution Avenue NW., Washington, DC 20224. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building.

Send Submissions to CC:PA:LPD:PR (REG–130266–11), Room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday to CC:PA:LPD:PR (REG–130266–11), Couriers Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (REG–130266–11).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Amber L. Mackenzie or Preston J. Quesenberry at (202) 622–6070; concerning submissions of comments, the hearing and/or to be placed on the building access list to attend the hearing Oluwafunmilayo Taylor at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION: A notice of public hearing on proposed rulemaking appearing in the **Federal Register** on Monday, October 1, 2012 (77 FR 59878), announced that a public hearing on proposed regulations regarding the requirements for charitable hospital organizations, would be held on Monday, October 29, 2012, beginning at 10 a.m. in the auditorium of the Internal Revenue Service Building at 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.

The date of the public hearing has been changed. The hearing is now scheduled for Wednesday, December 5, 2012, beginning at 10 a.m. in the auditorium of the Internal Revenue Service at 1111 Constitution Avenue NW., Washington, DC. Outlines of topics to be discussed at the public hearing must be received by November 7, 2012.

LaNita Van Dyke,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 2012–25298 Filed 10–15–12; 8:45 am]

BILLING CODE 4830–01–P

Notices

Federal Register

Vol. 77, No. 200

Tuesday, October 16, 2012

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

Submission for OMB Review; Comment Request

October 10, 2012.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Economic Research Service

Title: Food Security Supplement to the Current Population Survey.

OMB Control Number: 0536–0043.

Summary of Collection: The Food Security Supplement is sponsored by USDA as research and evaluation activity authorized under 7 U.S.C. 2026(a)(1) of the Food and Nutrition Act of 2008. This latter section authorizes the Secretary of Agriculture to enter into contract with private and public institutions to collect data to undertake research that would improve the administration and effectiveness of Supplemental Nutrition Assistance Program (SNAP) in delivering nutrition-related benefits. SNAP is currently the primary source of nutrition assistance for low-income Americans enabling households to improve their diet by increasing their food purchasing power. As the nation's primary public program for ensuring food security and alleviating hunger, the SNAP needs to regularly monitor food security conditions among its target population. This monitoring need requires that USDA continue basic data collection, analysis, and evaluation.

Need and Use of the Information: The data collected by the food security supplement will be used to monitor the prevalence of food security, food insecurity, and very low food security within the U.S. population as a whole and in selected population subgroups; conducting research on causes of food insecurity and the role of Federal food and nutrition programs in ameliorating food insecurity; and continuing development and improvement of methods for measuring these conditions. Information will be collected on food spending, use of Federal and community food and nutrition assistance programs, difficulties in obtaining adequate food during the previous 12 months and 30 days due to constrained resources, and conditions that result from inadequate access to food.

Description of Respondents: Individuals or Households.

Number of Respondents: 53,935.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 6,927.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–25399 Filed 10–15–12; 8:45 am]

BILLING CODE 3410–18–P

DEPARTMENT OF COMMERCE

U.S. Census Bureau

Proposed Information Collection; Comment Request; Manufacturers' Unfilled Orders 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 December 17, 2012.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *jjessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Chris Savage, U. S. Census Bureau, Manufacturing and Construction Division, 4600 Silver Hill Road, Room 7K071, Washington, DC 20233–6913, (301) 763–4834, or (via the internet at *John.C.Savage@census.gov.*)

SUPPLEMENTARY INFORMATION:

I. Abstract

The Manufacturers' Shipments, Inventories, and Orders (M3) survey collects monthly data on shipments, inventories, and new and unfilled orders from manufacturing companies. The orders, as well as the shipments and inventory data, are valuable tools for analysts of business cycle

conditions, including members of the Council of Economic Advisers, the Treasury Department, and the business community.

The monthly M3 Survey estimates are based on a relatively small sample and reflect primarily the month-to-month changes of large companies. There is a clear need for periodic benchmarking of the M3 estimates to reflect the manufacturing universe. The Annual Survey of Manufactures (ASM) provides annual benchmarks for the shipments and inventory data in this monthly survey. There is no benchmark for unfilled orders. The U.S. Census Bureau plans a reinstatement to an expired collection ''Manufacturers' Shipments, Inventories and Orders (M3) Supplement: 2006–2007 Unfilled Orders Benchmark Survey,'' to be renamed the ''Manufacturers' Unfilled Orders Survey.'' Over the life of the M3 Survey, there have been four surveys specifically designed to collect unfilled orders. These surveys were conducted in 1976, 1986, 2000, and 2008. After analyzing the results of the 2008 survey, the Census Bureau ascertained the need for an ongoing data collection of unfilled orders data annually.

The Manufacturers' Unfilled Orders Survey will be used as a benchmark for the M3 Survey each year. The Census Bureau will use these data to develop universe estimates of unfilled orders as of the end of the calendar year and adjust the monthly M3 data on unfilled orders to these levels on the NAICS basis. The benchmarked unfilled orders levels will be used to derive estimates of new orders received by manufacturers. The survey data will also be used to determine whether it is necessary to collect unfilled orders data for specific industries on a monthly basis; some industries are not requested to provide unfilled orders data on the M3 Survey.

II. Method of Collection

The Census Bureau will use mail out/mail back survey forms to collect the data. Companies will be asked to respond to the survey within 30 days of receipt. Letters encouraging participation will be mailed to companies that have not responded by the designated time. Telephone follow-up will be conducted to obtain response from delinquent companies.

III. Data

OMB Control Number: 0607–0561.
Form Number: MA–3000.
Type of Review: Regular submission.
Affected Public: Businesses, large and small, or other for-profit organizations.
Estimated Number of Respondents: 6,000.
Estimated Time per Response: .50 hours.
Estimated Total Annual Burden Hours: 3,000.
Estimated Total Annual Cost: $94,950.
Respondent's Obligation: Mandatory.
Legal Authority: Title 13 U.S.C. Section 182.

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: October 10, 2012.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–25326 Filed 10–15–12; 8:45 am]

BILLING CODE 3510–09–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–51–2012]

Foreign-Trade Zone 32—Miami, Florida; Application for Reorganization Under Alternative Site Framework; Amendment of Application

A request has been submitted to the Foreign-Trade Zones Board (the Board) by the Greater Miami Foreign-Trade Zone, Inc., grantee of FTZ 32, to amend its application to reorganize FTZ 32 zone under the alternative site framework (77 FR 43048–43049, 7/23/2012). The applicant is amending the application to remove existing Site 2 (Beacon Centre Development complex) from the zone. The application otherwise remains unchanged. For further information, contact Camille Evans at *Camille.Evans@trade.gov* or (202) 482–2350.

Dated: October 10, 2012.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2012–25474 Filed 10–15–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–107–2012]

Foreign-Trade Zone 61—San Juan, PR, Application for Subzone, Coamo Property & Investments, LLC, Coamo, PR

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Puerto Rico Trade & Export Company, grantee of FTZ 61, requesting special-purpose subzone status for the facility of Coamo Property & Investments, LLC, located in Coamo, Puerto Rico. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally docketed on October 9, 2012.

The proposed subzone (6.09 acres) is located at Carrera 14 Km 25.3, Barrio Los Llanos, Coamo, Puerto Rico. No authorization for production activity has been requested at this time. The proposed subzone would be subject to the existing activation limit of FTZ 61.

In accordance with the Board's regulations, Camille Evans of the FTZ Staff is the designated examiner to review the application and make recommendations to the Executive Secretary.

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is November 26, 2012. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to December 10, 2012.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *www.trade.gov/ftz.* For further information, contact Camille Evans at *Camille.Evans@trade.gov* or (202) 482–2350.

Dated: October 9, 2012.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2012–25286 Filed 10–15–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–47–2012]

Foreign-Trade Zone 74—Baltimore, MD, Authorization of Production Activity, J.D. Neuhaus LP, (Overhead Lifting Equipment Production), Sparks, MD

On June 13, 2012, the Baltimore Development Corporation, grantee of FTZ 74, submitted a notification of proposed production activity on behalf of J.D. Neuhaus LP, located in Sparks, Maryland.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (77 FR 39209, 7/2/2012). The FTZ Board has determined that no further review of the activity is warranted at this time. The production activity described in the notification is authorized, subject to the FTZ Act and the Board's regulations, including Section 400.14.

Dated: October 11, 2012.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2012–25476 Filed 10–15–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–44–2012]

Foreign-Trade Zone 61—San Juan, Puerto Rico; Authorization of Production Activity, Pfizer Pharmaceuticals, LLC (Subzone 61A), (Ibuprofen Pharmaceutical Products), Guayama, Puerto Rico

On June 13, 2012, the Puerto Rico Trade and Export Company, grantee of FTZ 61, submitted a notification of proposed production activity on behalf of Pfizer Pharmaceuticals, LLC (Subzone 61A) for its manufacturing facility located in Guayama, Puerto Rico. The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (77 FR 36997, 6/20/2012). The FTZ Board has determined that no further review of the activity is warranted at this time. The production activity described in the notification is authorized, subject to the FTZ Act and the Board's regulations, including Section 400.14.

Dated: October 11, 2012.

Elizabeth Whiteman

Acting Executive Secretary.

[FR Doc. 2012–25475 Filed 10–15–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–73–2012]

Foreign-Trade Zone 181—Akron/Canton, OH, Notification of Proposed Production Activity, Cimbar Performance Minerals, (Barium Sulfate Grinding), Wellsville, OH

The Northeast Ohio Trade & Economic Consortium, grantee of FTZ 181, submitted a notification of proposed production activity on behalf of Cimbar Performance Minerals (Cimbar), located in Wellsville, Ohio. The notification conforming to the requirements of the regulations of the Board (15 CFR 400.22) was received on October 10, 2012.

The Cimbar facility is located within Site 12 of FTZ 181. The facility is used for the grinding of raw barium sulfate into ground barium sulfate. Production under FTZ procedures could exempt Cimbar from customs duty payments on the foreign status components used in export production. On its domestic sales, Cimbar would be able to choose the duty rates during customs entry procedures that apply to ground barite (duty free) for the foreign status inputs noted below. Customs duties also could possibly be deferred or reduced on foreign status production equipment. Components and materials sourced from abroad include raw barium sulfate (duty rate of $1.25 per metric ton).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is November 26, 2012.

A copy of the notification will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *www.trade.gov/ftz.*

For Further Information Contact: Christopher J. Kemp at *Christopher.Kemp@trade.gov* or (202) 482–0862.

Dated: October 10, 2012.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2012–25460 Filed 10–15–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–72–2012]

Foreign-Trade Zone 121—Albany, NY; Notification of Proposed Production Activity; Albany Molecular Research, Inc., Subzone 121A, (Pharmaceutical Chemicals Production), Rensselaer, NY

Albany Molecular Research, Inc. (AMRI), operator of Subzone 121A, submitted a notification of proposed production activity for its facility in Rensselaer, New York. The notification conforming to the requirements of the regulations of the Board (15 CFR 400.22) was received on September 26, 2012.

Subzone 121A was originally approved by the Board in 1994 for the production of bulk pharmaceutical chemicals and intermediates under FTZ procedures at the former Sanofi Winthrop L.P. plant located at 33 Riverside Avenue in Rensselaer, New York, (Board Order 698, 7/20/1994, 59 FR 18318, 7/28/1994).

AMRI is now requesting to produce an active pharmaceutical ingredient, dexpramipexole dihydrochloride monohydrate, under zone procedures at the Rensselaer facility. AMRI plans to transfer the active ingredient to another FTZ facility where it will be processed into a finished dosage pharmaceutical product (duty-free).

Production under FTZ procedures could exempt AMRI from customs duty payments on the foreign status components used in export production for the additional finished product listed above. Production for the domestic market would not involve inverted tariff savings since the active ingredient is subject to the same duty rate (6.5%) as the chemical inputs. Customs duties also could possibly be deferred or reduced on foreign status production equipment. The chemicals sourced from abroad are (R)-4,5,6,7-tetrahydrobenzo[d]thiazole-2,6-diamine and propyl 4-methylbenzenesulfonate.

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive

Secretary at the address below. The closing period for their receipt is *November 26, 2012.*

A copy of the notification will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *www.trade.gov/ftz.*

For further information, contact Diane Finver at *Diane.Finver@trade.gov* (202) 482–1367.

Dated: October 11, 2012.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2012–25478 Filed 10–15–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–351–840]

Certain Orange Juice From Brazil: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* October 16, 2012.

SUMMARY: On April 11, 2012, the Department of Commerce (the Department) published its preliminary results of the administrative review of the antidumping duty order on certain orange juice (OJ) from Brazil. This review covers four producers/exporters of the subject merchandise to the United States. The period of review (POR) is March 1, 2010, through February 28, 2011.

After analyzing the comments received, we have made certain changes in the margin calculations. Therefore, these final results differ from the preliminary results. The final weighted-average dumping margins for the reviewed firms are listed below in the section entitled ''Final Results of Review.''

FOR FURTHER INFORMATION CONTACT: Blaine Wiltse or Elizabeth Eastwood, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–6345 or (202) 482–3874, respectively.

SUPPLEMENTARY INFORMATION:

Background

On April 11, 2012, the Department published in the **Federal Register** the preliminary results of the 2010–2011 administrative review of antidumping duty order on certain OJ from Brazil.[1] Also in April 2012, the Department issued supplemental questionnaires to each of the three respondents in this administrative review (*i.e.,* Fischer S.A. Comercio, Industria, and Agricultura (Fischer), Louis Dreyfus Commodities Agroindustrial S.A. (Louis Dreyfus), and Sucocitrico Cutrale, S.A. (Cutrale)). We received responses to these supplemental questionnaires in the same month.

We invited parties to comment on our preliminary results of review. In May 2012, we received case briefs from the petitioners (*i.e.,* Florida Citrus Mutual and Citrus World Inc.), Cutrale, Fischer, and Louis Dreyfus. We received rebuttal briefs from the petitioners. On July 20, 2012, the Department extended the final results in the current review to no later than October 9, 2012. *See* the Memorandum to Christian Marsh, Deputy Assistant Secretary, AD/CVD Operations, from Blaine Wiltse, Senior Trade Analyst, Office 2, AD/CVD Operations, entitled, ''Certain Orange Juice from Brazil: Extension of Deadline for Final Results of Antidumping Duty Administrative Review,'' dated July 20, 2012.

The Department has conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order

The scope of this order includes certain orange juice for transport and/or further manufacturing, produced in two different forms: (1) Frozen orange juice in a highly concentrated form, sometimes referred to as frozen concentrated orange juice for manufacture (FCOJM); and (2) pasteurized single-strength orange juice which has not been concentrated, referred to as not-from-concentrate (NFC). At the time of the filing of the petition, there was an existing antidumping duty order on frozen concentrated orange juice (FCOJ) from Brazil. *See Antidumping Duty Order; Frozen Concentrated Orange Juice from Brazil,* 52 FR 16426 (May 5, 1987). Therefore, the scope of this order with regard to FCOJM covers only FCOJM produced and/or exported by those companies which were excluded or revoked from the pre-existing antidumping order on FCOJ from Brazil as of December 27, 2004. Those companies are Cargill Citrus Limitada, Coinbra Frutesp S.A. (Coinbra Frutesp),[2] Cutrale, Fischer, and Montecitrus Trading S.A. (Montecitrus).

Excluded from the scope of the order are reconstituted orange juice and frozen concentrated orange juice for retail (FCOJR). Reconstituted orange juice is produced through further manufacture of FCOJM, by adding water, oils and essences to the orange juice concentrate. FCOJR is concentrated orange juice, typically at 42 Brix, in a frozen state, packed in retail-sized containers ready for sale to consumers. FCOJR, a finished consumer product, is produced through further manufacture of FCOJM, a bulk manufacturer's product.

The subject merchandise is currently classifiable under subheadings 2009.11.00, 2009.12.25, 2009.12.45, and 2009.19.00 of the Harmonized Tariff Schedule of the United States (HTSUS). These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive. Rather, the written description of the scope of the order is dispositive.

Period of Review

The POR is March 1, 2010, through February 28, 2011.

Successor-in-Interest

As noted in the *Preliminary Results,* in its request for a review, Louis Dreyfus claimed that it is the successor-in-interest to Coinbra Frutesp and its wholly-owned subsidiary Coinbra Frutesp Agroinstrial Ltda. (Coinbra Frutesp Ag.), a producer of subject merchandise in Brazil. Based on Louis Dreyfus' submissions addressing the four factors with respect to this change in corporate structure (*i.e.,* management, production facilities for the subject merchandise, supplier relationships, and customer base),[3] in the preliminary results we preliminarily found that Coinbra Frutesp Ag.'s organizational structure, management, production facilities, supplier relationships, and

[1] *See Certain Orange Juice from Brazil: Preliminary Results of Antidumping Duty Administrative Review and Preliminary No Shipment Determination,* 77 FR 21724 (Apr. 11, 2012) (*Preliminary Results*).

[2] As discussed below, we find that Louis Dreyfus is the successor-in-interest to Coinbra Frutesp. See the ''Successor-in Interest'' section of this notice.

[3] *See Notice of Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products from Canada,* 70 FR 50299, 50300–01 (Aug. 26, 2005) (setting forth the four factors to be considered for successorship determinations), unchanged in *Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products from Canada,* 70 FR 59721 (Oct. 13, 2005).

customers have remained essentially unchanged. Further, we found that Louis Dreyfus operates as the same business entity as Coinbra Frutesp Ag. with respect to the production and sale of OJ. Therefore, we preliminarily determined that Louis Dreyfus is the successor-in-interest to Coinbra Frutesp. *See Preliminary Results,* 77 FR at 21726.

Since the preliminary results, no party to this proceeding has commented on this issue, and we have received no new information with respect to this issue. As a result, we continue to find that Louis Dreyfus is the successor-in-interest to Coinbra Frutesp.

Determination of No Shipments

As noted in the *Preliminary Results,* we received a no-shipment claim from Montecitrus, named in the notice of initiation of this review, and we confirmed its claim with U.S. Customs and Border Protection (CBP). Because we find that the record indicates that Montecitrus did not export subject merchandise to the United States during the POR, we determine that it had no reviewable transactions during the POR.

As we stated in the *Preliminary Results,* our former practice concerning respondents submitting timely no-shipment certifications was to rescind the administrative review with respect to those companies if we were able to confirm the no-shipment certifications through a no-shipment inquiry with CBP. *See Antidumping Duties; Countervailing Duties; Final rule,* 62 FR 27296, 27393 (May 19, 1997); *see also Stainless Steel Sheet and Strip in Coils from Taiwan: Final Results of Antidumping Duty Administrative Review,* 75 FR 76700, 76701 (Dec. 9, 2010). As a result, in such circumstances, we normally instructed CBP to liquidate any entries from the no-shipment company at the deposit rate in effect on the date of entry.

In our May 6, 2003, clarification of the ''automatic assessment'' regulation, we explained that, where respondents in an administrative review demonstrate that they had no knowledge of sales through resellers to the United States, we would instruct CBP to liquidate such entries at the all-others rate applicable to the proceeding. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003) (*Assessment Policy Notice*).

As noted in the *Preliminary Results,* because ''as entered'' liquidation instructions do not alleviate the concerns which the May 2003 clarification was intended to address, we find it appropriate in this case to instruct CBP to liquidate any existing entries of merchandise produced by Montecitrus and exported by other parties at the all-others rate. In addition, we continue to find that it is more consistent with the May 2003 clarification not to rescind the review in part in these circumstances but, rather, to complete the review with respect to this company and issue appropriate instructions to CBP based on the final results of this administrative review. *See* the ''Assessment Rates'' section of this notice below.

Cost of Production

As discussed in the preliminary results, we conducted an investigation to determine whether Cutrale, Fischer, and Louis Dreyfus made home market sales of the foreign like product during the POR at prices below their costs of production (COP) within the meaning of section 773(b) of the Act. *See Preliminary Results,* 77 FR at 21731. For these final results, we performed the cost test following the same methodology as in the *Preliminary Results,* except that we used the COP database accompanying Fischer's April 2012 response in our calculations for Fischer. For further discussion, see the Issues and Decision Memorandum (Decision Memo), accompanying this notice, at Comment 9.

We found 20 percent or more of each respondent's sales of a given product during the reporting period were at prices less than the weighted-average COP for this period. Thus, we determined that these below-cost sales were made in ''substantial quantities'' within an extended period of time and at prices which did not permit the recovery of all costs within a reasonable period of time in the normal course of trade. *See* sections 773(b)(1) and (2) of the Act.

For purposes of these final results, we continue to find that Cutrale, Fischer, and Louis Dreyfus made below-cost sales not in the ordinary course of trade. Consequently, we disregarded these sales for each respondent and used the remaining sales (if any) as the basis for determining normal value (NV), pursuant to section 773(b)(1) of the Act. Where there were no home market sales made in the ordinary course of trade, we based NV on constructed value.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties in this administrative review are addressed in the Decision Memo, dated concurrently with, and hereby adopted by, this notice. A list of the issues addressed in the Decision Memo is appended to this notice. The Decision Memo is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Services System (IA ACCESS). Access to IA ACCESS is available to registered users at *http://iaaccess.trade.gov* and in the Central Records Unit of the main Commerce Building, room 7046. In addition, a complete version of the Decision Memo is also accessible on the Web at *http://ia.ita.doc.gov/frn.* The paper copy and the electronic version of the Decision Memo are identical in content.

Changes Since the Preliminary Results

Based on our analysis of the comments received, we have made certain changes to the margin calculations. These changes are discussed in the relevant sections of the Decision Memo.

Final Results of Review

We determine that the following weighted-average margin percentages exist for the period March 1, 2010, through February 28, 2011:

Manufacturer/Exporter	Percent margin
Sucocitrico Cutrale, S.A.	2.63
Fischer S.A. Comercio, Industria, and Agricultura	4.72
Louis Dreyfus Commodities Agroindustrial S.A.	20.34
Montecitrus Trading S.A.	*

* No shipments or sales subject to this review.

Assessment

The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries.

We have calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of the sales. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any importer-specific assessment rate is above *de minimis* (*i.e.,* less than 0.50 percent). The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of review.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. *See Assessment Policy Notice,* 68 FR 23954. This clarification will apply to entries of subject merchandise during the POR produced by companies included in these final results of review for which the reviewed companies did not know their merchandise was destined for the

United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate established in the less-than-fair-value investigation if there is no rate for the intermediate company(ies) involved in the transaction.

Cash Deposit Requirements

In April 2012, the International Trade Commission (ITC) determined, pursuant to section 751(c) of the Act, that revocation of this order would not be likely to lead to the continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See Certain Orange Juice From Brazil,* 77 FR 22343 (Apr. 13, 2012). *See also* USITC Publication 4311 (April 2012), titled *Certain Orange Juice from Brazil (Inv. No. 731–TA–1089).* As a result of the ITC's negative determination, the Department revoked the order on OJ from Brazil on April 20, 2012, effective as of March 9, 2012 (*i.e.,* the fifth anniversary of the date of publication in the **Federal Register** of the antidumping duty order). *See Revocation of Antidumping Duty Order: Certain Orange Juice From Brazil,* 77 FR 23659 (Apr. 20, 2012). Consequently, the collection of cash deposits of antidumping duties on entries of the subject merchandise is no longer required.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility, under 19 CFR 351.402(f)(2), to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these results of review in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: October 9, 2012.

Paul Piquado,

Assistant Secretary for Import Administration

Appendix—Issues in Decision Memorandum

General Issues

1. Offsetting of Negative Margins
2. Treatment of By-Product Revenue in the Calculation of General and Administrative and Financial Expenses

Cutrale Issues

3. Constructed Export Price Offset for Cutrale
4. Use of Actual Brix To Calculate the Prices and Quantities for Cutrale's Home Market Sales
5. Inventory Carrying Costs for Cutrale's U.S. Sales
6. Capping of Certain Revenues Received by Cutrale by the Amount of Reported Expenses
7. Cutrale's Biological Assets

Fischer Issues

8. Calculation of Fischer's International Freight Expenses To Include Bunker Fuel
9. Ministerial Errors in Fischer's Cost Calculations
10. Loss on Hedge Operations Included in the Calculation of Fischer's Financial Expense Ratio
11. Exclusion of Long-Term Interest Income From the Calculation of Fischer's Financial Expense Ratio

Louis Dreyfus Issues

12. Date of Sale for Louis Dreyfus
13. Classification of Louis Dreyfus' U.S. Sales as CEP Sales
14 Calculation of Louis Dreyfus' Brokerage and Handling Expenses
15. Calculation and Application of Louis Dreyfus' U.S. Indirect Selling Expense Ratio
16. Use of Partial Adverse Facts Available for Louis Dreyfus' U.S. Indirect Selling Expenses and Inventory Carrying Costs

[FR Doc. 2012–25454 Filed 10–15–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Coastal Ocean Program Grants Proposal Application Package

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before December 17, 2012.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Laurie Golden, 301–713–3338 ext 151 or *laurie.golden@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for a revision of a currently approved information collection. The National Oceanic and Atmospheric Administration's Coastal Ocean Program (COP) provides direct financial assistance through grants and cooperative agreements for research supporting the management of coastal ecosystems. The statutory authority for COP is Public Law 102–567 Section 201 (Coastal Ocean Program). In addition to standard government application requirements, applicants for financial assistance are required to submit a project summary form, current and pending form and a key contacts form. Recipients are required to file annual progress reports and a project final report using COP formats. All of these requirements are needed for better evaluation of proposals and monitoring of awards.

This request is for a revision due to the addition of the Key Contacts and the Current and Pending Federal Support forms. These additional forms are necessary for consistency. The main purpose of this information collection is to enable COP to provide a summary of the key applicant contacts and their current and pending Federal funding. The information gathered will enable COP to properly and quickly evaluate proposals in a collaborative environment with its partner agencies.

II. Method of Collection

Respondents have a choice of either electronic or paper forms.

III. Data

OMB Control Number: 0648–0384.
Form Number: None.

Type of Review: Regular submission (revision of a currently approved collection).

Affected Public: Non-profit institutions; State, local, or tribal government; business or other for-profit organizations.

Estimated Number of Respondents: 700.

Estimated Time per Response: 30 minutes each for a project summary, key contacts and current and pending federal support; 5 hours for an annual report; and 10 hours for a final report.

Estimated Total Annual Burden Hours: 1,050.

Estimated Total Annual Cost to Public: $0 in recordkeeping/reporting costs.

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: October 11, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–25354 Filed 10–15–12; 8:45 am]

BILLING CODE 3510–JS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC291

Endangered and Threatened Species; Take of Anadromous Fish

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; availability of joint state/tribal hatchery plan and request for comment.

SUMMARY: Notice is hereby given that the Lower Elwha Klallam Tribe and the Washington Department of Fish and Wildlife have submitted five Hatchery and Genetic Management Plans, to be considered jointly, to NMFS pursuant to the limitation on take prohibitions for actions conducted under Limit 6 of the 4(d) Rule for salmon and steelhead promulgated under the Endangered Species Act (ESA). The plans specify the propagation of five species of salmon and steelhead in the Elwha River of Washington state. This document serves to notify the public of the availability for comment of the proposed evaluation of the Secretary of Commerce (Secretary) as to whether implementation of the joint plan will appreciably reduce the likelihood of survival and recovery of Puget Sound Chinook salmon and Puget Sound steelhead.

This notice further advises the public of the availability for review of an Environmental Assessment of the effects of the NMFS determination on the subject plans and associated harvest.

DATES: Comments must be received at the appropriate address or fax number (see **ADDRESSES**) no later than 5 p.m. Pacific time on November 15, 2012.

ADDRESSES: Written comments on the application should be addressed to the NMFS Salmon Management Division, 1201 NE. Lloyd Boulevard, Suite 1100, Portland, OR 97232, or faxed to 503–872–2737. Comments may be submitted by email. The mailbox address for providing email comments is: *ElwhaHatcheries.nwr@noaa.gov.* Include in the subject line of the email comment the following identifier: Comments on Elwha River hatchery programs.

FOR FURTHER INFORMATION CONTACT: Allyson Purcell, at phone number: (503) 736–4736, or email: *Allyson.Purcell@noaa.gov.*

SUPPLEMENTARY INFORMATION:

ESA-Listed Species Covered in This Notice

Chinook salmon (*Oncorhynchus tshawytscha*): threatened, naturally produced and artificially propagated Puget Sound. Steelhead (*O. mykiss*): threatened, naturally produced and artificially propagated Puget Sound. Bull trout (*Salvelinus confluentus*): threatened Puget Sound/Washington Coast. Pacific eulachon (*Thaleichthys pacificus*): threatened southern DPS.

The Lower Elwha Klallam Tribe and the WDFW have submitted to NMFS five jointly operated hatchery programs in the Elwha River basin. The plans were submitted pursuant to limit 6 of the 4(d) Rule for the listed Puget Sound Chinook salmon evolutionarily significant unit (ESU) and listed Puget Sound steelhead distinct population segment (DPS). Two of the hatchery programs release ESA-listed Chinook salmon and steelhead, and three hatchery programs release non-ESA listed coho, fall chum, and pink salmon into the Elwha River watershed. All of the programs are currently operating, and all five hatchery programs raise fish native to the Elwha River basin.

As required by the ESA 4(d) rule (65 FR 42422, July 10, 2000, as updated in 70 FR 37160, June 28, 2005), the Secretary is seeking public comment on his pending determination as to whether the joint plans for hatchery programs in the Elwha River would appreciably reduce the likelihood of survival and recovery of the ESA-listed Puget Sound salmon and steelhead.

Under section 4(d) of the ESA, the Secretary is required to adopt such regulations as he deems necessary and advisable for the conservation of species listed as threatened. NMFS has issued a final ESA 4(d) Rule for salmon and steelhead, adopting in Limit 6 regulations necessary and advisable to harmonize statutory conservation requirements with tribal rights and the Federal trust responsibility to tribes (50 CFR 223.209).

This 4(d) Rule applies the prohibitions enumerated in section 9(a)(1) of the ESA. NMFS did not find it necessary and advisable to apply the take prohibitions described in section 9(a)(1)(B) and 9(a)(1)(C) to artificial propagation activities if those activities are managed in accordance with a joint plan whose implementation has been determined by the Secretary to not appreciably reduce the likelihood of survival and recovery of the listed salmonids. As specified in limit 6 of the 4(d) Rule, before the Secretary makes a decision on the joint plan, the public must have an opportunity to review and comment on the pending determination.

Authority

Under section 4 of the ESA, the Secretary of Commerce is required to adopt such regulations as he deems necessary and advisable for the conservation of species listed as threatened. The ESA salmon and steelhead 4(d) rule (65 FR 42422, July 10, 2000, as updated in 70 FR 37160, June 28, 2005) specifies categories of activities that contribute to the conservation of listed salmonids and sets out the criteria for such activities. Limit 6 of the updated 4(d) rule (50 CFR 223.203(b)(6)) further provides that the prohibitions of paragraph (a) of the

updated 4(d) rule (50 CFR 223.203(a)) do not apply to activities associated with a joint state/tribal artificial propagation plan provided that the joint plan has been determined by NMFS to be in accordance with the salmon and steelhead 4(d) rule (65 FR 42422, July 10, 2000, as updated in 70 FR 37160, June 28, 2005).

NEPA requires Federal agencies to conduct an environmental analysis of their proposed actions to determine if the actions may affect the human environment. NMFS expects to take action on a joint state/tribal plan under the 4(d) rule for salmon and steelhead. Therefore, NMFS is seeking public input on the scope of the required NEPA analysis, including the range of reasonable alternatives and associated impacts of any alternatives.

Dated: October 11, 2012.

Larissa Plants,

Acting Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–25452 Filed 10–15–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC274

Endangered and Threatened Species; Take of Anadromous Fish

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Receipt of application for scientific research and enhancement.

SUMMARY: Notice is hereby given that NMFS has received one scientific research and enhancement permit application request relating to anadromous species listed under the Endangered Species Act (ESA). The proposed research activities are intended to increase knowledge of the species and to help guide management and conservation efforts. The application and related documents may be viewed online at: *https://apps.nmfs.noaa.gov/preview/preview_open_for_comment.cfm.* These documents are also available upon written request or by appointment by contacting NMFS by phone (916) 930–3607 or fax (916) 930–3629.

DATES: Written comments on the permit applications must be received at the appropriate address or fax number (see **ADDRESSES**) no later than 5 p.m. Pacific standard time on November 15, 2012.

ADDRESSES: Written comments on the permit application should be submitted to the Protected Resources Division, NMFS, 650 Capitol Mall, Room 5–100, Sacramento, CA 95814. Comments may also be submitted via fax to (916) 930–3629 or by email to *FRNpermits.SR@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Amanda Cranford, Sacramento, CA (ph.: 916–930–3706, email.: *Amanda.Cranford@noaa.gov*).

SUPPLEMENTARY INFORMATION:

Species Covered in This Notice

This notice is relevant to federally threatened California Central Valley (CCV) steelhead (*Oncorhynchus mykiss*), threatened Central Valley (CV) spring-run Chinook salmon (*O. tshawytscha*), and endangered Sacramento River (SR) winter-run Chinook salmon (*O. tshawytscha*).

Authority

Issuance of permits and permit modifications, as required by the Endangered Species Act of 1973 (16 U.S.C. 1531–1543) (ESA), is based on a finding that such permits/modifications: (1) Are applied for in good faith; (2) 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. Authority to take listed species is subject to conditions set forth in the permits. Permits and modifications are issued in accordance with and are subject to the ESA and NMFS regulations governing listed fish and wildlife permits (50 CFR parts 222–226).

Those individuals requesting a hearing on an application listed in this notice should set out the specific reasons why a hearing on that application would be appropriate (see **ADDRESSES**). The holding of such a hearing is at the discretion of the Assistant Administrator for Fisheries, NOAA. All statements and opinions contained in the permit action summaries are those of the applicant and do not necessarily reflect the views of NMFS.

Application Received

Permit 17428

The U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office is requesting a 5-year scientific research and enhancement permit to take adult spawned carcasses, smolt, and fry CCV steelhead, juvenile SR winter-run Chinook salmon, and juvenile CV spring-run Chinook salmon associated with research activities in the American River, downstream of the Watt Avenue Bridge, in Sacramento County, California. In the studies described below, researchers do not expect to kill any listed fish but a small number, up to 8.5 percent may die as an unintended result of the research activities.

Two to four rotary screw traps (RSTs) will be deployed on the American River downstream of the Watt Avenue Bridge from 2013 through 2017. Each year, RSTs will be operated 5 to 7 days each week between January 1 and June 30. As traps are operated, data will be collected on fish abundance, trap operational status, and environmental characteristics at the trap site. Trap operations will focus on the collection of the juvenile life stage of CCV steelhead listed pursuant to the Federal Endangered Species Act (ESA) and non-listed fall-run Chinook salmon. Other fish species will be collected on an incidental basis. If salmon that may be federally listed spring- or winter-run Chinook salmon are captured, fin clips will be taken so those samples can be used in genetic studies to determine which runs are actually present. The lengths of a representative sample of up to 100 individuals of each fish species will be measured each day. Weights from 25 salmon will be quantified each day. Captured fish will be released alive immediately downstream of the RSTs.

The proposed monitoring project does not include activities designed to intentionally result in the death of listed taxa. Ten measures designed to reduce adverse effects relating to the monitoring project will be undertaken, e.g., servicing traps each day so none of the captured fish experience a hold time in excess of 24 hours. If juvenile salmonids are found dead or accidentally killed during trapping activities, they will be salvaged for future studies. Data summaries and analyses will be presented in annual reports prepared each year trapping occurs. After five years of data collection, the principal investigators will develop a report evaluating fish responses to habitat restoration activities in the watershed, and whether future management activities should be modified to enhance the abundance, production, condition, and survival of juvenile salmon and steelhead.

Dated: October 11, 2012.

Larissa Plants,

Acting Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–25481 Filed 10–15–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC159

Fisheries of the Northeast Region

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notification of determination of overfishing and approaching an overfished condition as well as inadequate progress in rebuilding.

SUMMARY: This action serves as a notice that NMFS, on behalf of the Secretary of Commerce (Secretary), has determined that the Gulf of Maine (GOM) stock of haddock is subject to overfishing and is approaching an overfished condition. In addition, the rebuilding plans for American plaice and the Southern New England/Mid-Atlantic (SNE/MA) stock of winter flounder were found to have not resulted in adequate progress toward rebuilding the affected fish stocks.

NMFS notifies the appropriate fishery management council (Council) whenever it determines that overfishing is occurring, a stock is in an overfished condition, a stock is approaching an overfished condition, or when a rebuilding plan has not resulted in adequate progress toward ending overfishing and rebuilding affected fish stocks.

FOR FURTHER INFORMATION CONTACT: Mark Nelson, (301) 427–8565.

SUPPLEMENTARY INFORMATION: Pursuant to sections 304(e)(2) and (e)(7) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1854(e)(2) and (e)(7), and implementing regulations at 50 CFR 600.310(e)(2), NMFS, on behalf of the Secretary, must notify Councils whenever it determines that a stock or stock complex is: overfished; approaching an overfished condition; or an existing rebuilding plan has not ended overfishing or resulted in adequate rebuilding progress. NMFS also notifies Councils when it determines a stock or stock complex is subject to overfishing. Section 304(e)(2) further requires NMFS to publish these notices in the **Federal Register**.

On May 30, 2012, NMFS informed the New England Fishery Management Council of the latest status of the New England groundfish stocks. In that letter they indicate changes in the status of several stocks:

- GOM haddock is now subject to overfishing and is approaching an overfished condition;
- The rebuilding plan for American plaice has not resulted in adequate progress toward rebuilding. The stock is neither overfished nor subject to overfishing;
- The SNE/MA stock of winter flounder is no longer subject to overfishing but remains overfished and the stock's rebuilding plan has not resulted in adequate progress toward rebuilding the stock.

For the above stocks approaching an overfished condition, the Council must prevent overfishing and if the stock becomes overfished, steps must be taken under MSA § 304(e)(3) and (4) to end overfishing and to rebuild the stock. For the above stocks which are subject to rebuilding plans that have been determined to have not resulted in adequate progress towards rebuilding, within 2 years, the Council must revise the rebuilding plan for each stock and implement the revised plan, as required by MSA § 304(e)(3).

Dated: October 11, 2012.

Emily Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2012–25455 Filed 10–15–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC100

Marine Mammals; File No. 17115

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of permit.

SUMMARY: Notice is hereby given that a permit has been issued to James Lloyd-Smith, Department of Ecology and Evolutionary Biology, University of California, Los Angeles, 610 Charles E. Young Dr. South, Box 723905, Los Angeles, California 90095–7239 to conduct research on California sea lions (*Zalophus californianus*).

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following offices:

Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)427–8401; fax (301)713–0376; and Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562)980–4001; fax (562)980–4018.

FOR FURTHER INFORMATION CONTACT: Amy Sloan or Joselyd Garcia-Reyes, (301)427–8401.

SUPPLEMENTARY INFORMATION: On July 12, 2012, notice was published in the **Federal Register** (77 FR 41171) that a request for a permit to conduct research on the species identified above had been submitted by the above-named applicant. The requested permit has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The permit holder is authorized to study the prevalence of leptospirosis in wild California sea lions. Up to 5,100 California sea lions may be taken annually from Año Nuevo Island including 20 by capture and release, 80 by capture/sample/release and 5,000 by incidental disturbance. Procedures include: capture (stalking, hoop net); restraint (board, cage, hand, net); anesthesia (gas); mark (flipper tag); measure; and sample (blood, urine, vibrissae). Up to 3,000 northern elephant seals (*Mirounga angustirostris*) and up to 60 Pacific harbor seals (*Phoca vitulina*) may be taken annually due to incidental disturbance. Up to four California sea lions may die incidental to the permitted activities. The permit expires September 30, 2017.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Dated: October 10, 2012.

P. Michael Payne,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–25480 Filed 10–15–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2012–OS–0098]

Proposed Collection; Comment Request

AGENCY: Defense Finance and Accounting Service, DoD.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Defense Finance and Accounting Service announces the proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by December 17, 2012.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Defense Finance and Accounting Service—Cleveland, 1240 East Ninth St., ATTN: JBJDA—Mr. Charles Moss, Room 1569, Cleveland, OH 44199, or call, Mr. Charles Moss, (216) 204–4426.

Title, Associated Form, and OMB Number: Claim for Unpaid Compensation of Deceased Member of the Uniformed Services; DD Form X602; OMB Control Number 0730–TBD.

Needs and Uses: Entitlement to retired pay terminates on the date of the retiree's death. Claims for any arrears in pay can be made using DD Form X602. This information collection is needed to provide DFAS the basic data needed to process the request.

Type of Collection: New.

Affected Public: Individuals and households.

Annual Burden Hours: 11,549 hours.

Number of Respondents: 46,194.

Responses per Respondent: 1.

Average Burden per Response: 15 minutes.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

The respondents of this information collection are family members or designated beneficiaries of military members. The applicant submits a DD Form X602 to the Defense Finance and Accounting Service (DFAS). The information from the DD Form X602 is used by DFAS in processing the applicant's request. Information on the form is also used to determine the applicant's current status and contains statutorily required certifications the applicant must make when applying for payments.

Dated: October 10, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–25319 Filed 10–15–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2012–HA–0126]

Proposed Collection; Comment Request

AGENCY: Office of the Assistant Secretary of Defense for Health Affairs, DoD.

ACTION: Notice.

In compliance with Section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995,* the Office of the Assistant Secretary of Defense for Health Affairs announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received December 17, 2012.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to: CAPT Nita Sood, TRICARE Management Activity, Pharmaceutical Operations Directorate, 7700 Arlington Boulevard, Falls Church, VA 22042–5101.

Title; Associated Form; and OMB Number: Federal Agency Retail Pharmacy Program; OMB Number 0720–0032.

Needs and Uses: Specifically, under the collection of information, respondents (drug manufacturers) will base refund calculation reporting requirements on both the Federal Ceiling Price and the Federal Supply Schedule Price, whichever is lower. Previously, drug manufacturers' reporting requirements addressed only the Federal Ceiling Price. DoD will use the reporting and audit capabilities of the Pharmacy Data Transaction Service (PDTS) to validate refunds owed to the Government. The government received approximately $1.5 billion from pharmaceutical companies as a result of this program/refund calculation reporting requirement.

Affected Public: Business or other for profit.

Annual Burden Hours: 16,000.

Number of Respondents: 250.

Responses per Respondent: 8.

Average Burden Per Response: 8 hours.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

Title 10, United States Code (U.S.C.) 1074g(f) makes drugs provided to eligible covered beneficiaries through the TRICARE Retail Pharmacy Program subject to the pricing standards of the Veterans Health Care Act. Under the authority of 10 U.S.C. 1074g(h), Title 32, Code of Federal Regulation (CFR) 199.21(q)(3) requires information collection to implement 10 U.S.C. 1074g(f). Specifically, under the collection of information, respondents (drug manufacturers) will base refund calculation reporting requirements on both the Federal Ceiling Price and the Federal Supply Schedule Price, whichever is lower. Previously, drug manufacturers' reporting requirements addressed only the Federal Ceiling Price. The DoD will use the reporting and audit capabilities of the Pharmacy Data Transaction Service (PDTS) to validate refunds owed to the Government.

Dated: October 11, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–25373 Filed 10–15–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2012–OS–0099]

Proposed Collection; Comment Request

AGENCY: Defense Finance and Accounting Service, DoD.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Defense Finance and Accounting Service announces the proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by December 17, 2012

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Defense Finance and Accounting Service—Cleveland, 1240 East Ninth St., ATTN: JBJDA—Mr. Charles Moss, Room 1569, Cleveland, OH 44199, or call, Mr. Charles Moss, (216) 204–4426.

Title, Associated Form, and OMB Number: Representative Payee-Application; DD Form x632; OMB Control Number 0730–TBD.

Needs and Uses: To establish a representative payee to receive survivor annuity payments on behalf of a minor, mentally incompetent, or otherwise legally disabled person for whom a guardian or other fiduciary has not been appointed. This information collection is needed to provide DFAS the basic data needed to process the request.

Affected Public: Individuals and households.

Annual Burden Hours: 300 hours.

Number of Respondents: 1,200.

Responses per Respondent: 1.

Average Burden per Response: 15 minutes.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

The respondents of this information collection are family members or agencies designated to assist annuitants of former military members. The applicant submits a DD Form x632 to the Defense Finance and Accounting Service (DFAS). The information from the DD Form x632 is used by DFAS in processing the applicant's request. Information on the form is also used to determine the applicant's current status and contains statutorily required certifications the applicant must make when applying for payments.

Dated: October 10, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–25318 Filed 10–15–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

Accelerated Payments to Small Business Subcontractors

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Notice.

SUMMARY: In accordance with the one-year temporary policy established in the OMB Memorandum, *Providing Prompt Payment to Small Business Subcontractors* (July 11, 2012), DoD has taken steps to accelerate Federal payments to prime contractors, so that prime contractors can expedite payments to their small business subcontractors.

DATES: Effective through July 10, 2013, unless otherwise rescinded or extended.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Gomersall, telephone 571–372–6099.

SUPPLEMENTARY INFORMATION: OMB Memorandum M–12–16, *Providing Prompt Payment to Small Business Subcontractors* (July 11, 2012) establishes the Administration's initiative to accelerate Federal payments to prime contractors, so that prime contractors can, in turn, expedite payments to their small business subcontractors. Faster payments to small business subcontractors can improve their cash flow and provide the capital resources needed to expand their business opportunities. This can lead to a stronger supplier base that supports Federal prime contractors in meeting the needs of their Federal customers in a timely and cost-effective manner. The Memorandum is available at *http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-16.pdf.*

In accordance with the one-year temporary policy established in the OMB Memorandum, DoD has taken steps to make payments under the contract as soon as practicable, with the goal of paying its contractors within 15 days. DoD strongly encourages all prime contractors to accelerate payments to small business subcontractors under existing contracts to the maximum extent practicable.

The Federal Acquisition Regulatory Council (FAR Council) has recommended that Federal agencies issue deviations to the FAR, which permit immediate incorporation of the policy outlined in OMB Memorandum M–12–16 in solicitations and resultant contracts. In accordance with this recommendation, DoD has begun using a new contract clause, pursuant to Class Deviation 2012–O0014, ''Providing Accelerated Payment to Small Business Subcontractors.'' This class deviation requires prime contractors, upon receipt of accelerated payments from the Government, to make accelerated payments to small business subcontractors to the maximum extent practicable after receipt of a proper invoice and all proper documentation from the small business subcontractor, while also maintaining necessary DoD internal controls. The FAR Council has opened FAR case 2012–031 to undertake rulemaking and obtain public comments to further implement OMB's policy.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

[FR Doc. 2012–25367 Filed 10–15–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army; Army Corps of Engineers

Notice of Intent To Prepare a Joint Environmental Impact Statement/ Environmental Impact Report for the Folsom Dam Water Control Manual Update

AGENCY: Department of the Army, U.S. Army Corps of Engineers; DOD.

ACTION: Notice of Intent.

SUMMARY: The U.S. Army Corps of Engineers, Sacramento District (USACE) intends to prepare a joint Environmental Impact Statement/Environmental Impact Report (EIS/EIR) for the Folsom Dam Water Control Manual Update (Folsom WCM Update). USACE will serve as lead agency and the Bureau of Reclamation will be a cooperating agency for compliance with the National Environmental Policy Act (NEPA), and the Central Valley Flood Protection Board (CVFPB) will serve as lead agency for compliance with the California Environmental Quality Act (CEQA). The Folsom WCM Update is intended to improve the ability of Folsom Dam to utilize the new physical features to manage large flood events and meet dam safety requirements.

DATES: Written comments regarding the scope of the environmental analysis should be received by November 11, 2012.

ADDRESSES: Written comments and suggestions concerning this project and requests to be included on the project mailing list may be submitted to Tyler Stalker, U.S. Army Corps of Engineers, Sacramento District, Attn: Public Affairs Office (CESPK–PAO), 1325 J Street, Sacramento, CA 95814.

FOR FURTHER INFORMATION CONTACT: Tyler Stalker via telephone at (916) 557–5107, email at *Tyler.M.Stalker@usace.army.mil*, or mail at (see **ADDRESSES**). Study information will also be posted periodically on the Internet at *http://www.spk.usace.army.mil/Missions/CivilWorks/JointFederalProject.aspx*

SUPPLEMENTARY INFORMATION:

1. *Proposed Action.* The Folsom WCM Update will identify, evaluate, and recommend changes to the flood management operation rules of Folsom Dam and Reservoir to reduce flood risk to the Sacramento area by utilizing the auxiliary spillway currently under construction and by incorporating an improved understanding of the American River watershed upstream of Folsom Dam. The findings of the evaluation will be used to help define the Dam's new flood operations plan, with the intention of meeting flood risk management objectives and dam safety requirements in a manner that conserves as much water as possible and maximizes all authorized Folsom Dam project uses to the extent practicable.

2. *Alternatives.* The EIS/EIR will develop new operational rules to meet dam safety and flood risk management objectives that comply with Congressional direction to reduce Folsom Reservoir variable space allocation from the current operating range of 400,000–670,000 acre-feet (ac-ft) to 400,000–600,000 ac-ft. In addition, the incorporation of improved forecasting capabilities and basin wetness parameters as part of flood management operations will be evaluated. A number of flood management operation alternatives are expected to be developed and the effect of those alternatives on Folsom Dam and Reservoir's other authorized purposes will be analyzed in the EIS/EIR.

3. *Scoping Process.*

a. Two public scoping meetings will be held to present an overview of the Folsom WCM Update and the EIS/EIR process, and to afford all interested parties with an opportunity to provide comments regarding the scope of analysis and potential alternatives. The public scoping meetings will be held at the following locations, dates, and times: Sacramento Library Galleria, 828 I Street, Sacramento, CA. October 15th, 2012, 4 p.m. to 7 p.m. and Folsom Community Center, 52 Natoma Street, Folsom, CA. October 22nd, 2012, 4 p.m. to 7 p.m.

b. Potentially significant issues to be analyzed in depth in the EIS/EIR include project-specific, system-wide, and cumulative effects on authorized purposes of the Folsom Dam project and the environmental resources associated with those purposes. Effects analyzed will include: Water supply for irrigation, municipal, and industrial uses; fish and wildlife resources; power generation; water quality; recreation; special status species; soils and levee safety; and cultural resources.

c. USACE will consult with the U.S. Fish and Wildlife Service and National Marine Fisheries Service to comply with the Endangered Species Act, the Fish and Wildlife Coordination Act, and the requirements of the current Biological Opinions that affect the operations of Folsom Dam. USACE will consult with the State Historic Preservation Officer to comply with the National Historic Preservation Act. USACE will coordinate with the U.S. Bureau of Indian Affairs to establish consultation requirements with tribes having trust assets and tribal interests that could be affected by the WCM Update's outcome.

d. A 45-day public review period will be provided for individuals, interested parties, and agencies to review and comment on the draft EIS/EIR. All interested parties are encouraged to respond to this notice and provide a current address if they wish to be notified of the draft EIS/EIR circulation.

4. *Availability.* The draft EIS/EIR is scheduled to be available for public review and comment in 2015.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2012–25307 Filed 10–15–12; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Portsmouth

AGENCY: Department of Energy (DOE).

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Portsmouth. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, November 1, 2012, 6:00 p.m.

ADDRESSES: Ohio State University, Endeavor Center, 1862 Shyville Road, Piketon, Ohio 45661.

FOR FURTHER INFORMATION CONTACT: Greg Simonton, Alternate Deputy Designated Federal Officer, Department of Energy Portsmouth/Paducah Project Office, Post Office Box 700, Piketon, Ohio 45661, (740) 897–3737, *Greg.Simonton@lex.doe.gov*.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management and related activities.

Tentative Agenda

- Call to Order, Introductions, Review of Agenda
- Approval of September Minutes
- Deputy Designated Federal Officer's Comments
- Federal Coordinator's Comments
- Liaisons' Comments
- Presentation
- Administrative Issues
- Subcommittee Updates
- Public Comments
- Final Comments from the Board
- Adjourn

Public Participation: The meeting is open to the public. The EM SSAB, Portsmouth, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Greg Simonton at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Greg Simonton at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Greg Simonton at the address and phone number listed above. Minutes will also be available at the following Web site: *http://www.ports-ssab.energy.gov/*.

Issued at Washington, DC on October 9, 2012.

LaTanya R. Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2012–25369 Filed 10–15–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Ultra-Deepwater Advisory Committee

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Ultra-Deepwater Advisory Committee. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, November 1, 2012, 1:00 p.m.–3:00 p.m. (EDT).

ADDRESSES: U.S. Department of Energy, 1000 Independence Avenue SW., Room 3G–043, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Elena Melchert, U.S. Department of Energy, Office of Oil and Natural Gas, 1000 Independence Avenue SW., Washington, DC 20585. Phone: (202) 586–5600.

SUPPLEMENTARY INFORMATION:

Purpose of the Committee: The purpose of the Ultra-Deepwater Advisory Committee is to provide advice on development and implementation of programs related to ultra-deepwater architecture and technology to the Secretary of Energy and provide comments and recommendations and priorities for the Department of Energy Annual Plan per requirements of the Energy Policy Act of 2005, Title IX, Subtitle J, Section 999D.

Tentative Agenda

12:30 p.m.: Registration

1:00 p.m.: Welcome and Roll Call; Opening Remarks by the Committee Chair; Report by the Editing Subcommittee; Facilitated Discussion by the Members regarding Final Report; Approval of Committee Final Report

2:45 p.m.: Public Comments, if any

3:00 p.m.: Adjourn

Public Participation: The meeting is open to the public. The Designated Federal Officer and the Chairman of the Committee will lead the meeting for the orderly conduct of business. Individuals who would like to attend must RSVP by email at: *UltraDeepwater@hq.doe.gov* no later than 5:00 p.m. on Monday, October 29, 2012. Please provide your name, organization, citizenship and contact information. Space is limited. Anyone attending the meeting will be required to present government issued identification. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Elena Melchert at the telephone number listed above. You must make your request for an oral statement at least three business days prior to the meeting, and reasonable provisions will be made to include all who wish to speak. Public comment will follow the three minute rule.

Minutes: The minutes of this meeting will be available for public review and copying within 60 days at the following Web site: *http://www.fossil.energy.gov/programs/oilgas/advisorycommittees/UltraDeepwater.html.*

Issued at Washington, DC, on October 10, 2012.

LaTanya R. Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2012–25376 Filed 10–15–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Unconventional Resources Technology Advisory Committee

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Unconventional Resources Technology Advisory Committee. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register.**

DATES: Thursday, November 1, 2012, 10:00 a.m.–12:00 p.m. (EDT).

ADDRESSES: U.S. Department of Energy, 1000 Independence Avenue SW., Room 3G–043, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Elena Melchert, U.S. Department of Energy, Office of Oil and Natural Gas, 1000 Independence Avenue SW., Washington, DC 20585. Phone: (202) 586–5600.

SUPPLEMENTARY INFORMATION:

Purpose of the Committee: The purpose of the Unconventional Resources Technology Advisory Committee is to provide advice on development and implementation of programs related to onshore unconventional natural gas and other petroleum resources to the Secretary of Energy and provide comments and recommendations and priorities for the Department of Energy Annual Plan per requirements of the Energy Policy Act of 2005, Title IX, Subtitle J, Section 999.

Tentative Agenda

9:30 a.m.: Registration
10:00 a.m.: Welcome and Roll Call; Opening Remarks by the Committee Chair; Report by the Editing Subcommittee; Facilitated Discussion by the Members regarding Final Report; Approval of Committee Final Report
11:45 p.m.: Public Comments, if any
12:00 p.m.: Adjourn

Public Participation: The meeting is open to the public. The Designated Federal Officer and the Chairman of the Committee will lead the meeting for the orderly conduct of business. Individuals who would like to attend must RSVP by email to: *UnconventionalResources@hq.doe.gov* no later than 5:00 p.m. on Monday, October 29, 2012. Please provide your name, organization, citizenship, and contact information. Space is limited. Anyone attending the meeting will be required to present government issued identification. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Elena Melchert at the telephone number listed above. You must make your request for an oral statement at least three business days prior to the meeting, and reasonable provisions will be made to include all who wish to speak. Public comment will follow the three minute rule.

Minutes: The minutes of this meeting will be available for public review and copying within 60 days at the following Web site: *http://www.fossil.energy.gov/programs/oilgas/advisorycommittees/UnconventionalResources.html.*

Issued at Washington, DC, on October 10, 2012.

LaTanya R. Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2012–25371 Filed 10–15–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13563–001]

Juneau Hydropower, Inc.; Notice of Draft License Application and Preliminary Draft Environmental Assessment (PDEA) and Request for Preliminary Terms and Conditions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Major Unconstructed Project.

b. *Project No.:* 13563–001.

c. *Date Filed:* August 31, 2012.

d. *Applicant:* Juneau Hydropower, Inc.

e. *Name of Project:* Sweetheart Lake Hydroelectric Project.

f. *Location:* At the confluence of Sweetheart Creek and Gilbert Bay, about 30 air miles and 33 nautical miles southeast of the City of Juneau, Alaska. The project would occupy 1,882 acres of federal lands within the Tongass National Forest, administered by the U.S. Forest Service.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Duff Mitchell, Business Manager, Juneau Hydropower, Inc., P.O. Box 22775, Juneau, AK 99802; 907–789–2775, email: *duff.mitchell@juneauhydro.com.*

i. *FERC Contact:* Jennifer Harper, (202) 502–6136, *jennifer.harper@ferc.gov.*

j. *Status of Project:* With this notice the Commission is soliciting (1) preliminary terms, conditions, and recommendations on the Preliminary Draft Environmental Assessment (PDEA), and (2) comments on the Draft License Application (DLA).

k. *Deadline for filing:* November 29, 2012.

All comments on the PDEA and DLA should be sent to the addresses noted above in Item (h), and filed with FERC. Comments 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 at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. 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.

All comments must include the project name and number and bear the heading Preliminary Comments, Preliminary Recommendations, Preliminary Terms and Conditions, or Preliminary Prescriptions.

l. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Juneau Hydropower, Inc. has mailed a copy of the PDEA and DLA to interested entities and parties. Copies of these documents are available for review at the Juneau Public Library, 292 Marine Way, Juneau, Alaska 99801; or at the Juneau Hydropower, Inc. Web site, *www.juneauhydro.com.*

m. With this notice, we are initiating consultation with the Alaska State Historic Preservation Officer as required by Section 106, National Historic Preservation Act, and the regulations of the Advisory Council on Historic Preservation, 36 CFR § 800.4.

Dated: October 10, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–25394 Filed 10–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14448–000]

Jay A. Moyle; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, Protests, Recommendations, and Terms and Conditions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Conduit Exemption.

b. *Project No.:* 14448–000.

c. *Date filed:* August 20, 2012.

d. *Applicant:* Jay A. Moyle.

e. *Name of Project:* P Coulee Power Plant Project.

f. *Location:* The proposed P Coulee Power Plant Project would be located on a pressurized irrigation sprinkler pipeline in Twin Falls County, Idaho. The land on which all the project structures are located is owned by the applicant.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. Jack J. Straubhar, P.O. Box 5071, Twin Falls, ID 83303–5071 phone (208) 736–8255.

i. *FERC Contact:* Robert Bell, (202) 502–6062, *robert.bell@ferc.gov*.

j. *Status of Environmental Analysis:* This application is ready for environmental analysis at this time, and the Commission is requesting comments, reply comments, recommendations, terms and conditions, and prescriptions.

k. *Deadline for filing responsive documents:* Due to the small size of the proposed project, as well as the resource agency consultation letters filed with the application, the 60-day timeframe specified in 18 CFR 4.34(b) for filing all comments, motions to intervene, protests, recommendations, terms and conditions, and prescriptions is shortened to 30 days from the issuance date of this notice. All reply comments filed in response to comments submitted by any resource agency, Indian tribe, or person, must be filed with the Commission within 45 days from the issuance date of this notice.

Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* The Commission strongly encourages electronic filings.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

l. *Description of the project:* The proposed P Coulee Power Plant Project would consist of: (1) A proposed powerhouse containing one proposed generating unit with an installed capacity of 60 kilowatts; and (2) appurtenant facilities. The applicant estimates the project would have an average annual generation of 0.500 gigawatt-hours.

m. This filing is available for review and reproduction at the Commission in the Public Reference Room, Room 2A, 888 First Street NE., Washington, DC 20426. The filing may also be viewed on the Web at *http://www.ferc.gov/docs-filing/elibrary.asp* using the ''eLibrary'' link. Enter the docket number, P–14448, in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659. A copy is also available for review and reproduction at the address in item h above.

n. *Development Application*—Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified deadline date for the particular application, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified deadline date for the particular application. Applications for preliminary permits will not be accepted in response to this notice.

p. *Protests or Motions to Intervene*—Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

q. All filings must (1) bear in all capital letters the title ''PROTEST'', ''MOTION TO INTERVENE'', ''COMMENTS'', ''REPLY COMMENTS,'' ''RECOMMENDATIONS,'' ''TERMS AND CONDITIONS,'' or ''PRESCRIPTIONS;'' (2) set forth in the heading, the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Any of these documents must be filed by providing the original and seven copies to: The Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Office of Energy Projects, Federal Energy Regulatory Commission, at the above address. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: October 10, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–25396 Filed 10–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14428–000]

San Gabriel Valley Water Company dba, Fontana Water Company; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, Protests, Recommendations, and Terms and Conditions

October 10, 2012.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Conduit Exemption.

b. *Project No.:* 14428–000.

c. *Date filed:* June 27, 2012, and supplemented on September 4, 2012.

d. *Applicant:* San Gabriel Valley Water Company dba, Fontana Water Company.

e. *Name of Project:* Sandhill Water Treatment Plant In-Conduit Hydroelectric Project.

f. *Location:* The proposed Sandhill Water Treatment Plant In-Conduit Hydroelectric Project would be located on a water supply pipeline in San Bernardino County, California. The land on which all the project structures are located is owned by the applicant.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. Lon House, NLine Energy, Inc., 533 Airport Road, Suite 400, Burlingame, CA 94010, phone (650) 7356–2025.

i. *FERC Contact:* Robert Bell, (202) 502–6062, *robert.bell@ferc.gov*.

j. *Status of Environmental Analysis:* This application is ready for environmental analysis at this time, and the Commission is requesting comments, reply comments, recommendations, terms and conditions, and prescriptions.

k. *Deadline for filing responsive documents:* Due to the small size of the proposed project, as well as the resource agency consultation letters filed with the application, the 60-day timeframe specified in 18 CFR 4.34(b) for filing all comments, motions to intervene, protests, recommendations, terms and conditions, and prescriptions is shortened to 30 days from the issuance date of this notice. All reply comments filed in response to comments submitted by any resource agency, Indian tribe, or person, must be filed with the Commission within 45 days from the issuance date of this notice.

Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* The Commission strongly encourages electronic filings.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

l. *Description of the project:* The proposed Sandhill Water Treatment Plant In-Conduit Hydroelectric Project would consist of: (1) A 24-inch-diameter, 24-foot-long intake pipeline, (2) two inlet pipelines, one 12-inch-diameter, 18-foot-long intake pipeline and one 12-inch-diameter, 14-foot-long intake pipeline, (3) a proposed powerhouse containing two proposed generating units with a total installed capacity of 310 kilowatts; (4) two outlet pipelines, one 12-inch-diameter, 6-foot-long intake pipeline and one 12-inch-diameter, 14-foot-long intake pipeline; (5) a 24-inch-diameter, 22-foot-long discharge pipeline and (6) appurtenant facilities. The applicant estimates the project would have an average annual generation of 1.155 gigawatt-hours.

m. This filing is available for review and reproduction at the Commission in the Public Reference Room, Room 2A, 888 First Street NE., Washington, DC 20426. The filing may also be viewed on the Web at *http://www.ferc.gov/docs-filing/elibrary.asp* using the ''eLibrary'' link. Enter the docket number, P–14428, in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov*. For TTY, call (202) 502–8659. A copy is also available for review and reproduction at the address in item h above.

n. *Development Application*—Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified deadline date for the particular application, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified deadline date for the particular application. Applications for preliminary permits will not be accepted in response to this notice.

p. *Protests or Motions to Intervene*—Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

q. All filings must (1) bear in all capital letters the title ''PROTEST'', ''MOTION TO INTERVENE'', ''COMMENTS'', ''REPLY COMMENTS,'' ''RECOMMENDATIONS,'' ''TERMS AND CONDITIONS,'' or ''PRESCRIPTIONS;'' (2) set forth in the heading, the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Any of these documents must be filed by providing the original and seven copies to: The Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Office of Energy Projects, Federal Energy Regulatory Commission, at the above address. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: October 10, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–25395 Filed 10–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2335–035]

FPL Energy Maine Hydro LLC; Notice of Intent To File License Application, Filing of Pre-Application Document (PAD), Commencement of Pre-Filing Process, and Scoping; Request for Comments on the PAD and Scoping Document, and Identification of Issues and Associated Study Requests

a. *Type of Filing:* Notice of Intent to File License Application for a New License and Commencing Pre-filing Process.

b. *Project No.:* 2335–035.

c. *Dated Filed:* August 17, 2012.

d. *Submitted By:* FPL Energy Maine Hydro LLC.

e. *Name of Project:* Williams Hydroelectric Project.

f. *Location:* On the Kennebec River near Solon in Somerset County, Maine. The project does not occupy federal lands.

g. *Filed Pursuant to:* 18 CFR part 5 of the Commission's Regulations.

h. *Potential Applicant Contact:* Frank Dunlap, FPL Energy Maine Hydro LLC, 26 Katherine Drive, Hallowell, ME 04347.

i. *FERC Contact:* Amy Chang at (202) 502–8250 or email at *amy.chang@ferc.gov*.

j. *Cooperating agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item o below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See* 94 FERC ¶ 61,076 (2001).

k. With this notice, we are initiating informal consultation with: (a) the U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR, Part 402 and (b) the State Historic Preservation Officer, as required by section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating FPL Energy Maine Hydro LLC as the Commission's non-federal representative for carrying out informal consultation, pursuant to section 7 of the Endangered Species Act and section 106 of the National Historic Preservation Act.

m. FPL Energy Maine Hydro LLC filed with the Commission a Pre-Application Document (PAD; including a proposed process plan and schedule), pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site (*http://www.ferc.gov*), using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in paragraph h.

Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

o. With this notice, we are soliciting comments on the PAD and Commission's staff Scoping Document 1 (SD1), as well as study requests. All comments on the PAD and SD1, and study requests should be sent to the address above in paragraph h. In addition, all comments on the PAD and SD1, study requests, requests for cooperating agency status, and all communications to and from Commission staff related to the merits of the potential application must be filed with the Commission. Documents 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.

All filings with the Commission must include on the first page, the project name (Williams Hydroelectric Project) and number (P–2335–035), and bear the appropriate heading: ''Comments on Pre-Application Document,'' ''Study Requests,'' ''Comments on Scoping Document 1,'' ''Request for Cooperating Agency Status,'' or ''Communications to and from Commission Staff.'' Any individual or entity interested in submitting study requests, commenting on the PAD or SD1, and any agency requesting cooperating status must do so by December 8, 2012.

p. Although our current intent is to prepare an Environmental Assessment (EA), there is the possibility that an Environmental Impact Statement (EIS) will be required. Nevertheless, this meeting will satisfy the NEPA scoping requirements, irrespective of whether an EA or EIS is issued by the Commission.

Scoping Meetings

Commission staff will hold two scoping meetings in the vicinity of the project at the time and place noted below. The daytime meeting will focus on resource agency, Indian tribes, and non-governmental organization concerns, while the evening meeting is primarily for receiving input from the public. We invite all interested individuals, organizations, and agencies to attend one or both of the meetings, and to assist staff in identifying particular study needs, as well as the scope of environmental issues to be addressed in the environmental document. The times and locations of these meetings are as follows:

Daytime Scoping Meeting

Date and Time: November 8, 2012 at 9:00 a.m.

Location: FPL Energy Maine Hydro LLC Office, 26 Katherine Drive, Hallowell, ME 04347.

Phone Number: (207) 629–1817.

Evening Scoping Meeting

Date and Time: November 7, 2012 at 6:00 p.m.

Location: Solon Town Office, 121 South Main Street, Solon, Maine 04949.

Phone Number: (207) 643–2541.

Scoping Document 1 (SD1), which outlines the subject areas to be addressed in the environmental document, was mailed to the individuals and entities on the Commission's mailing list. Copies of SD1 will be available at the scoping meetings, or may be viewed on the Web at *http://www.ferc.gov*, using the ''eLibrary'' link. Follow the directions for accessing information in paragraph n. Based on all oral and written comments, a Scoping Document 2 (SD2) may be issued. SD2 may include a revised process plan and schedule, as well as a list of issues, identified through the scoping process.

Environmental Site Review

The potential applicant and Commission staff will conduct an environmental site review of the project on Thursday, November 8, 2012, starting at 12:30 p.m. All participants should meet at the Williams Hydroelectric Project on Kilowatt Drive, Embden, ME 04979. Anyone who would like to participate in the site visit should contact Frank Dunlap at (207–629–1817) or *Frank.Dunlap@nee.com* or Andy Qua at (207–487–3328) or *Andy.Qua@Kleinschmidtusa.com* by November 1, 2012.

Meeting Objectives

At the scoping meetings, staff will: (1) Initiate scoping of the issues; (2) review and discuss existing conditions and resource management objectives; (3) review and discuss existing information

and identify preliminary information and study needs; (4) review and discuss the process plan and schedule for pre-filing activity that incorporates the time frames provided for in Part 5 of the Commission's regulations and, to the extent possible, maximizes coordination of federal, state, and tribal permitting and certification processes; and (5) discuss the appropriateness of any federal or state agency or Indian tribe acting as a cooperating agency for development of an environmental document.

Meeting participants should come prepared to discuss their issues and/or concerns. Please review the PAD in preparation for the scoping meetings. Directions on how to obtain a copy of the PAD and SD1 are included in item n. of this document.

Meeting Procedures

The meetings will be recorded by a stenographer and will be placed in the public records of the project.

Dated: October 9, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–25391 Filed 10–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2290–001.
Applicants: Avista Corporation.
Description: Notice of Non-Material Change in Status of Avista Corporation.
Filed Date: 10/9/12.
Accession Number: 20121009–5275.
Comments Due: 5 p.m. ET 10/30/12.

Docket Numbers: ER10–2405–002; ER10–2407–002; ER10–2425–002; ER10–2424–002.
Applicants: High Prairie Wind Farm II, LLC, Pioneer Prairie Wind Farm I, LLC, Rail Splitter Wind Farm, LLC, Lost Lakes Wind Farm LLC.
Description: Supplement to Updated Market Power Analysis for the Central Region of High Prairie Wind Farm II LLC, *et al.*
Filed Date: 10/9/12.
Accession Number: 20121009–5179.
Comments Due: 5 p.m. ET 10/30/12.

Docket Numbers: ER10–2602–001.
Applicants: NewPage Energy Services, LLC.
Description: NewPage Energy Services, LLC Market-Based Rate Tariff to be effective 10/6/2012.
Filed Date: 10/5/12.
Accession Number: 20121005–5188.
Comments Due: 5 p.m. ET 10/26/12.

Docket Numbers: ER10–2994–006; ER12–2075–001; ER12–2076–001; ER12–2077–001; ER12–2078–001; ER12–2081–001; ER12–2083–001; ER12–2084–001; ER12–2086–001; ER12–2108–001; ER12–2097–001; ER12–2101–001; ER12–2102–001; ER12–2109–001; ER12–2106–001; ER12–2107–001.
Applicants: MinnDakota Wind LLC, Northern Iowa Windpower II LLC, Flying Cloud Power Partners, LLC, Moraine Wind LLC, Trimont Wind I LLC, Barton Windpower LLC, Elm Creek Wind, LLC, Farmers City Wind, LLC, Buffalo Ridge I LLC, Moraine Wind II LLC, Buffalo Ridge II LLC, Elm Creek Wind II LLC, Atlantic Renewable Projects II LLC, New Harvest Wind Project LLC, Rugby Wind LLC, Iberdrola Renewables, LLC.
Description: IRL MBR Sellers Supplement to Central Triennial.
Filed Date: 10/5/12.
Accession Number: 20121005–5055.
Comments Due: 5 p.m. ET 10/26/12.

Docket Numbers: ER11–3736–001.
Applicants: Pocahontas Prairie Wind, LLC.
Description: Supplement to Updated Market Power Analysis for the Central Region of Pocahontas Prairie Wind, LLC.
Filed Date: 10/5/12.
Accession Number: 20121005–5114.
Comments Due: 5 p.m. ET 10/26/12.

Docket Numbers: ER12–2461–002.
Applicants: NorthWestern Corporation.
Description: SA 277—Ravalli Coop—Woodside Interconnect Amended to be effective 6/6/2012.
Filed Date: 10/5/12.
Accession Number: 20121005–5208.
Comments Due: 5 p.m. ET 10/26/12.

Docket Numbers: ER12–2642–001.
Applicants: North Eastern States, Inc.
Description: Baseline Amendment Filing to be effective 10/8/2012.
Filed Date: 10/9/12.
Accession Number: 20121009–5056.
Comments Due: 5 p.m. ET 10/30/12.

Docket Numbers: ER13–37–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: 10–5–12 Schedule 43 to be effective 6/15/2012.
Filed Date: 10/5/12.
Accession Number: 20121005–5197.
Comments Due: 5 p.m. ET 10/26/12.

Docket Numbers: ER13–38–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: SA 6500 Esanaba-MISO SSR to be effective 6/15/2012.
Filed Date: 10/5/12.
Accession Number: 20121005–5198.
Comments Due: 5 p.m. ET 10/26/12.

Docket Numbers: ER13–39–000.
Applicants: Wolverine Power Supply Cooperative, Inc.
Description: Normal filing section 15 to be effective 10/5/2012.
Filed Date: 10/5/12.
Accession Number: 20121005–5210.
Comments Due: 5 p.m. ET 10/26/12.

Docket Numbers: ER13–40–000.
Applicants: California Independent System Operator Corporation.
Description: 2012–10–05 Data and Information Release Phase 3 Amendment Filing to be effective 12/11/2012.
Filed Date: 10/5/12.
Accession Number: 20121005–5228.
Comments Due: 5 p.m. ET 10/26/12.

Docket Numbers: ER13–41–000.
Applicants: Dynasty Power Inc.
Description: Change in Status and Tariff Amendment of Dynasty Power Inc. to be effective 12/7/2012.
Filed Date: 10/9/12.
Accession Number: 20121009–5040.
Comments Due: 5 p.m. ET 10/30/12.

Docket Numbers: ER13–42–000.
Applicants: Carolina Power & Light Company.
Description: Revised Attachment H of Carolina Power and Light Company OATT to be effective 6/1/2011.
Filed Date: 10/9/12.
Accession Number: 20121009–5045.
Comments Due: 5 p.m. ET 10/30/12.

Docket Numbers: ER13–43–000.
Applicants: Florida Power Corporation.
Description: Revised Schedule 10 of Florida Power Corporation OATT to be effective 6/1/2011.
Filed Date: 10/9/12.
Accession Number: 20121009–5046.
Comments Due: 5 p.m. ET 10/30/12.

Docket Numbers: ER13–44–000.
Applicants: Carolina Power & Light Company, Florida Power Corporation, Duke Energy Carolinas, LLC.
Description: Joint OATT Rate Settlements to be effective 7/2/2012.
Filed Date: 10/9/12.
Accession Number: 20121009–5047.
Comments Due: 5 p.m. ET 10/30/12.

Docket Numbers: ER13–45–000.
Applicants: Dynamo Power LLC.
Description: Market-Based Rates Tariff to be effective 10/10/2012.
Filed Date: 10/9/12.
Accession Number: 20121009–5072.
Comments Due: 5 p.m. ET 10/30/12.

Docket Numbers: ER13–46–000.
Applicants: Pacific Gas and Electric Company.
Description: Balancing Account Update 2013 (TRBAA, RSBAA, and ECRBAA) to be effective 1/1/2013.

Filed Date: 10/9/12.
Accession Number: 20121009–5234.
Comments Due: 5 p.m. ET 10/30/12.

Docket Numbers: ER13–46–001.
Applicants: Pacific Gas and Electric Company.
Description: Amendment to Balancing Account Update 2013 (TRBAA, RSBAA, and ECRBAA) to be effective 5/1/2013.
Filed Date: 10/9/12.
Accession Number: 20121009–5237.
Comments Due: 5 p.m. ET 10/30/12.

Docket Numbers: ER13–47–000.
Applicants: Exelon New England Power Marketing, Limited.
Description: Exelon New England Power Marketing, LP, Notice of Cancellation to be effective 10/10/2012.
Filed Date: 10/9/12.
Accession Number: 20121009–5244.
Comments Due: 5 p.m. ET 10/30/12.

Docket Numbers: ER13–48–000.
Applicants: BITH Energy, Inc.
Description: Baseline new to be effective 12/1/2012.
Filed Date: 10/9/12.
Accession Number: 20121009–5254.
Comments Due: 5 p.m. ET 10/30/12.

Docket Numbers: ER13–49–000.
Applicants: Valley Electric Association, Inc.
Description: Valley Electric Association, Inc. TRR and TO Tariff to be effective 1/3/2013.
Filed Date: 10/9/12.
Accession Number: 20121009–5264.
Comments Due: 5 p.m. ET 10/30/12.

Docket Numbers: ER13–50–000.
Applicants: PacifiCorp.
Description: PGE Dalreed Substation to be effective 12/9/2012.
Filed Date: 10/9/12.
Accession Number: 20121009–5270.
Comments Due: 5 p.m. ET 10/30/12.

Docket Numbers: ER13–51–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii): Original Service Agreement No. 3404; PJM Queue No. U4–033 to be effective 9/6/2012.
Filed Date: 10/9/12.
Accession Number: 20121009–5276.
Comments Due: 5 p.m. ET 10/30/12.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 9, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–25338 Filed 10–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC13–5–000.
Applicants: Tenaska Washington Partners, L.P., Puget Sound Energy, Inc.
Description: Tenaska Washington Partners, L.P., *et. al.* submits Application for Authorization for Disposition & Consolidation of Jurisdictional Facilities, Acquisition of an Existing Generation Facility, *et. al.*
Filed Date: 10/4/12.
Accession Number: 20121004–5196.
Comments Due: 5 p.m. ET 10/25/12.

Docket Numbers: EC13–6–000.
Applicants: Broken Bow Wind, LLC, Crofton Bluffs Wind, LLC.
Description: Application for Authorization for Disposition of Jurisdictional Facilities and Request for Expedited Action of Broken Bow Wind, LLC, *et. al.*
Filed Date: 10/4/12.
Accession Number: 20121004–5205.
Comments Due: 5 p.m. ET 10/25/12.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER09–771–000.
Applicants: Entergy Services, Inc.
Description: KCP&L Greater Missouri Operations Company submits Informational Filing with Voluntary Refund to Westar Energy, Inc. & Cargill Power Marketers, L.L.C. in 2012.
Filed Date: 10/4/12.
Accession Number: 20121004–5195.
Comments Due: 5 p.m. ET 10/25/12.

Docket Numbers: ER12–2206–000; ER12–2208–000.
Applicants: Southern California Edison Company.
Description: Southern California Edison Company's submits Interconnection Handbook to the Response to August 10, 2012 letter requesting additional information.
Filed Date: 9/10/12.
Accession Number: 20120910–5201.
Comments Due: 5 p.m. ET 10/12/12.

Docket Numbers: ER12–2207–000; ER12–2209–000.
Applicants: California Independent System Operator Corporation.
Description: California Independent System Operator Corporation submits Response to August 10, 2012 Commission Staff's Deficiency Letter.
Filed Date: 9/17/12.
Accession Number: 20120917–5148.
Comments Due: 5 p.m. ET 10/12/12.

Docket Numbers: ER12–2630–001.
Applicants: Noble Americas Energy Solutions LLC.
Description: Amendment to Errata Tariff Filing to be effective 10/5/2012.
Filed Date: 10/4/12.
Accession Number: 20121004–5134.
Comments Due: 5 p.m. ET 10/25/12.

Docket Numbers: ER13–26–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: SA 2484 G830 GIA to be effective 10/5/2012.
Filed Date: 10/4/12.
Accession Number: 20121004–5136.
Comments Due: 5 p.m. ET 10/25/12.

Docket Numbers: ER13–27–000.
Applicants: PJM Interconnection, L.L.C.
Description: Notice of Cancellation of Svc Agrmt Nos. 2812 & 2813 in Docket No. ER11–3956–000 to be effective 9/6/2012.
Filed Date: 10/4/12.
Accession Number: 20121004–5171.
Comments Due: 5 p.m. ET 10/25/12.

Docket Numbers: ER13–28–000.
Applicants: Chesapeake Renewable Energy LLC.
Description: Baseline New to be effective 12/1/2012.
Filed Date: 10/5/12.
Accession Number: 20121005–5001.
Comments Due: 5 p.m. ET 10/26/12.

Docket Numbers: ER13–29–000.
Applicants: BITH Solar 1, LLC.
Description: Baseline New to be effective 12/1/2012.
Filed Date: 10/5/12.
Accession Number: 20121005–5002.
Comments Due: 5 p.m. ET 10/26/12.

Docket Numbers: ER13–30–000.
Applicants: The Midwest Independent Transmission System Operator, Inc.
Description: Notice of Termination of Generator Interconnection Agreement of The Midwest Independent Transmission System Operator, Inc.
Filed Date: 10/4/12.

Accession Number: 20121004–5193.
Comments Due: 5 p.m. ET 10/25/12.

Docket Numbers: ER13–31–000.
Applicants: New England Power Pool Participants Committee, ISO New England Inc.
Description: Tariff Revisions to Attachment G of ISO NE OATT to be effective 12/4/2012.
Filed Date: 10/5/12.
Accession Number: 20121005–5020.
Comments Due: 5 p.m. ET 10/26/12.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 5, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–25339 Filed 10–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC13–7–000.
Applicants: Bangor Hydro Electric Company.
Description: Application Under FPA Section 203 of Bangor Hydro Electric Company.
Filed Date: 10/05/2012.
Accession Number: 20121005–5154.
Comment Date: 5:00 p.m. Eastern Time on Friday, October 26, 2012.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER13–32–000.
Applicants: Topaz Solar Farms LLC.
Description: Topaz Solar Farms LLC submits tariff filing per 35.13(a)(2)(iii): Designation Change Filing to be effective 12/4/2012.
Filed Date: 10/05/2012.
Accession Number: 20121005–5118.
Comment Date: 5:00 p.m. Eastern Time on Friday, October 26, 2012.

Docket Numbers: ER13–33–000.
Applicants: Collegiate Clean Energy, LLC.
Description: Collegiate Clean Energy, LLC submits tariff filing per 35.12: Market-Based Rate Tariff to be effective 11/5/2012.
Filed Date: 10/05/2012.
Accession Number: 20121005–5137.
Comment Date: 5:00 p.m. Eastern Time on Friday, October 26, 2012.

Docket Numbers: ER13–34–000.
Applicants: Ingenco Holdings, LLC.
Description: Ingenco Holdings, LLC submits tariff filing per 35.12: Market-Based Rate Tariff to be effective 11/5/2012.
Filed Date: 10/05/2012.
Accession Number: 20121005–5142.
Comment Date: 5:00 p.m. Eastern Time on Friday, October 26, 2012.

Docket Numbers: ER13–35–000.
Applicants: San Diego Gas & Electric Company.
Description: San Diego Gas & Electric Company submits tariff filing per 35.13(a)(2)(iii): Revision to SDGE FERC Electric Tariff Volume 10 to be effective 10/8/2012.
Filed Date: 10/05/2012.
Accession Number: 20121005–5155.
Comment Date: 5:00 p.m. Eastern Time on Friday, October 26, 2012.

Docket Numbers: ER13–36–000.
Applicants: Flat Ridge Wind Energy, LLC.
Description: Flat Ridge Wind Energy, LLC submits tariff filing per 35.13(a)(2)(iii): Updated Market-Based Rate Tariff Update to be effective 12/4/2012.
Filed Date: 10/05/2012.
Accession Number: 20121005–5168.
Comment Date: 5:00 p.m. Eastern Time on Friday, October 26, 2012.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 05, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–25340 Filed 10–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Commission Staff Attendance

The Federal Energy Regulatory Commission hereby gives notice that members of the Commission's staff may attend the following meetings related to the transmission planning activities of the Southwest Power Pool, Inc. (SPP):

Seams FERC Order 1000 Task Force meetings:

October 12, 2012
10:00 a.m.–12:00 p.m. CDT.

October 18, 2012,
10:00 a.m.–12:00 p.m. CDT.

The above-referenced meetings will be held via teleconference.

The above-referenced meetings are open to stakeholders.

Further information may be found at *www.spp.org.*

The discussions at the meetings described above may address matters at issue in the following proceedings:

Docket No. ER06–451, Southwest Power Pool, Inc.
Docket No. ER08–1419, Southwest Power Pool, Inc.
Docket No. ER09–659, Southwest Power Pool, Inc.
Docket No. ER11–4105, Southwest Power Pool, Inc.
Docket No. ER12–140, Southwest Power Pool, Inc.
Docket No. ER12–550, Southwest Power Pool, Inc.
Docket No. ER12–891, Southwest Power Pool, Inc.
Docket No. ER12–909, Southwest Power Pool, Inc.
Docket No. ER12–959, Southwester Power Pool, Inc.
Docket No. ER12–1017, Southwest Power Pool, Inc.
Docket No. ER12–1018, Southwest Power Pool, Inc.
Docket No. ER12–1179, Southwest Power Pool, Inc.
Docket No. ER12–1401, Southwest Power Pool, Inc.
Docket No. ER12–1402, Southwest Power Pool, Inc.

Docket No. ER12–1586, Southwest Power Pool, Inc.
Docket No. ER12–1772, Southwest Power Pool, Inc.
Docket No. ER12–1779, Southwest Power Pool, Inc.
Docket No. ER12–1849, Southwest Power Pool, Inc.
Docket No. ER12–1854, Southwest Power Pool, Inc.
Docket No. ER12–1974, Southwest Power Pool, Inc.
Docket No. ER12–2054, Southwest Power Pool, Inc.
Docket No. ER12–2064, Southwest Power Pool, Inc.
Docket No. ER12–2090, Southwest Power Pool, Inc.
Docket No. ER12–2091, Southwest Power Pool, Inc.
Docket No. ER12–2292, Southwest Power Pool, Inc.
Docket No. ER12–2366, Southwest Power Pool, Inc.
Docket No. ER12–2387, Southwest Power Pool, Inc.
Docket No. ER12–2505, Southwest Power Pool, Inc.
Docket No. ER12–2507, Southwest Power Pool, Inc.
Docket No. ER12–2525, Southwest Power Pool, Inc.
Docket No. ER12–2562, Southwest Power Pool, Inc.
Docket No. ER12–2648, Southwest Power Pool, Inc.
Docket No. EL12–2, Southwest Power Pool, Inc.
Docket No. EL12–47, Southwest Power Pool, Inc.
Docket No. EL12–51, Southwest Power Pool, Inc.
Docket No. EL12–60, Southwest Power Pool, Inc., et al.
Docket No. ER12–1813, The Empire District Electric Co.
Docket No. ER12–1071, Entergy Arkansas, Inc.
Docket No. EL12–59, Golden Spread Electric Cooperative, Inc.
Docket No. ER09–548, ITC Great Plains, LLC
Docket No. ER12–1826, Kansas City Power & Light Co.
Docket No. ER12–1828, KCP&L Greater Missouri Operations Co.
Docket No. ER11–3728, Midwest Independent Transmission System Operator, Inc.
Docket No. ER12–480, Midwest Independent Transmission System Operator, Inc.
Docket No. ER12–1577, Midwest Independent Transmission System Operator, Inc.
Docket No. EL11–34, Midwest Independent Transmission System Operator, Inc.
Docket No. ER09–36, Prairie Wind Transmission, LLC
Docket No. ER12–1537, Public Service Co. of Oklahoma
Docket No. ER12–1538, Southwestern Electric Power Co.
Docket No. ER12–1970, Southwestern Electric Power Co.
Docket No. ER09–35, Tallgrass Transmission, LLC
Docket No. EL12–28, Xcel Energy Services Inc., *et al.*

For more information, contact Luciano Lima, Office of Energy Markets Regulation, Federal Energy Regulatory Commission at (202) 502–6210 or *luciano.lima@ferc.gov.*

Dated: October 9, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–25390 Filed 10–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Commission Staff Attendance

The Federal Energy Regulatory Commission (Commission) hereby gives notice that members of the Commission's staff may attend the following meeting related to the transmission planning activities of the Southern Company Services, Inc.

Southeastern Regional Transmission Planning Process (SERTP) Interim Stakeholders' Meeting on Order No. 1000

October 17, 2012, 9:00 a.m.–3:00 p.m., Local Time.

The above-referenced meeting will be held at: Atlanta Airport Marriott, Atlanta Georgia.

The above-referenced meeting is open to stakeholders.

Further information may be found at: *www.southeasternrtp.com*.

The discussions at the meeting described above may address matters at issue in the following proceedings:

Docket No. ER12–337, Mississippi Power Company.

Docket No. ER12–2521, Louisville Gas and Electric Company and Kentucky Utilities Company.

For more information, contact Valerie Martin, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (202) 502–6139 or *Valerie.Martin@ferc.gov*.

Dated: October 10, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–25397 Filed 10–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL12–106–000]

J. William Foley Incorporated v. United Illuminating Company; Notice of Complaint

Take notice that on October 5, 2012, pursuant to sections 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206 and sections 206 and 306 of the Federal Power Act, 16 U.S.C. 824(e) and 825(e), J. William Foley Incorporated (Complainant) filed a formal complaint against United Illuminating Company (Respondent) alleging that the Respondent's inclusion of certain costs incurred in the Respondent's rate base were not reasonably and/or prudently incurred and/or were not incurred in good faith.

The Complainant certifies that copies of the complaint were served on the contacts for the Respondent as listed on the Commission's list of Corporate Officials, as well as on ISO New England Inc and the Public Utilities Regulatory Authority of the State of Connecticut.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 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 email notification when a

document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on November 5, 2012.

Dated: October 9, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–25389 Filed 10–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PA10–13–000]

ITC Holdings Corp.; Notice of Filing

Take notice that on September 28, 2012, ITC Holdings Corp. and ITC Midwest LLC (collectively ITC) filed its Refund Report in the above-docketed proceeding in compliance with the May 11, 2012 Order on Paper Hearing (Order), 139 FERC ¶ 61,112, issued by the Commission.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 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 email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on October 25, 2012.

Dated: October 9, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–25392 Filed 10–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PF12–9–000]

Constitution Pipeline Company, LLC; Notice of Public Scoping Meeting and Extension of Scoping Period for the Planned Constitution Pipeline Project

On October 24, 2012, the Federal Energy Regulatory Commission (FERC or Commission) will hold an additional public scoping meeting for Constitution Pipeline Company's (Constitution) Constitution Pipeline Project. This notice also extends the scoping period for the project, which will now close on November 9, 2012. The project would consist of a 120.6-mile-long natural gas pipeline in Susquehanna County, Pennsylvania; and Broome, Chenango, Delaware, and Schoharie Counties, New York. FERC staff will conduct this public scoping meeting as part of our preparation of an environmental impact statement (EIS) for the project. The scoping meeting is designed to provide the public with an opportunity to offer verbal comments on the project and on the issues they believe should be addressed in the EIS.

More information about this project and the Commission's EIS process is available in the *Notice of Intent to Prepare an Environmental Impact Statement for the Planned Constitution Pipeline Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings* (NOI), issued on September 7, 2012. The NOI also provides details on how to submit written comments in lieu of or in addition to verbal comments on the project.[1] We ask that you submit your comments so that we receive them by November 9, 2012.

Constitution representatives will be present one hour before the meeting with maps of the potential routes. The additional public scoping meeting is scheduled as follows:

Wednesday, October 24, 2012, Beginning at 7:00–10:00 p.m. EDT, Foothills Performing Arts & Civic Center Atrium, 24 Market Street, Oneonta, New York 13820

This and all public meetings will be posted on the Commission's calendar located at *www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

This notice is being sent to the Commission's current environmental mailing list for this project. Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site at *www.ferc.gov* using the ''eLibrary'' link. Click on the eLibrary link, click on ''General Search'' and enter the docket number, excluding the last three digits in the Docket Number field (i.e., PF12–9). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Dated: October 9, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–25388 Filed 10–15–12; 8:45 am]

BILLING CODE 6717–01–P

[1] The NOI can be viewed on the Commission's e-Library link under Accession Number 20120907–3012.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Sunshine Act Meetings

The following notice of meeting is published pursuant to section 3(a) of the government in the Sunshine Act (Pub. L. 94–409), 5 U.S.C. 552b:

AGENCY HOLDING MEETING: Federal Energy Regulatory Commission, DOE.

DATE AND TIME: October 18, 2012. 9:00 a.m.

***NOTE:** There has been a time change for this meeting only.

PLACE: Room 2C, 888 First Street NE., Washington, DC 20426.

STATUS: Open.

MATTERS TO BE CONSIDERED: Agenda.

***NOTE:** Items listed on the agenda may be deleted without further notice.

CONTACT PERSON FOR MORE INFORMATION: Kimberly D. Bose, Secretary, Telephone (202) 502–8400.

For a recorded message listing items struck from or added to the meeting, call (202) 502–8627.

This is a list of matters to be considered by the Commission. It does not include a listing of all documents relevant to the items on the agenda. All public documents, however, may be viewed on line at the Commission's Web site at *http://www.ferc.gov* using the eLibrary link, or may be examined in the Commission's Public Reference Room.

985TH—MEETING; REGULAR MEETING

[October 18, 2012, 9:00 a.m.]

Item No.	Docket No.	Company
		ADMINISTRATIVE
A–1	AD02–1–000	Agency Business Matters.
A–2	AD02–7–000	Customer Matters, Reliability, Security and Market Operations.
		ELECTRIC
E–1	RM10–23–002	Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities.
E–2	RM12–22–000	Reliability Standards for Geomagnetic Disturbances.
E–3	RM12–4–000	Revisions to Reliability Standard for Transmission Vegetation Management.
E–4	ER12–1179–000	Southwest Power Pool, Inc.
	ER12–1179–001.	
E–5	ER12–550–000	Southwest Power Pool, Inc.
E–6	OMITTED.	
E–7	ER12–2506–000	Southern California Edison Company.
E–8	EL12–100–000	Benjamin Riggs v. Rhode Island Public Utilities Commission.
E–9	OMITTED.	
E–10	OMITTED.	
E–11	EL12–75–000	Pepco Holdings, Inc.
E–12	OMITTED.	
E–13	EC11–60–004	Duke Energy Corporation Progress Energy, Inc.
	ER12–1339–001.	Carolina Power & Light Company.
	ER12–1340–001.	
	ER12–1341–001.	
	ER12–1342–001	Duke Energy Carolinas, LLC.
E–14	ER11–3839–000	Nevada Power Company.
	ER11–3839–001.	
		MISCELLANEOUS
M–1	RM12–2–000	Filing of Privileged Materials and Answers to Motions.
		GAS
G–1	OMITTED.	
G–2	RM12–14–000	Annual Charge Filing Procedures for Natural Gas Pipelines.
G–3	RM12–15–000	Filing, Indexing and Service Requirements for Oil Pipelines.
G–4	RM12–17–000	Revisions to Procedural Regulations Governing Transportation by Intrastate Pipelines.
		HYDRO
H–1	P–13944–002	Valley Affordable Housing Corporation.
H–2	P–82–026	Alabama Power Company.
H–3	DI11–13–001	Cottonwood Hydro, LLC.
		CERTIFICATES
C–1	CP11–56–001	Texas Eastern Transmission, LP and Algonquin Gas Transmission, LLC.

985TH—MEETING; REGULAR MEETING—Continued

[October 18, 2012, 9:00 a.m.]

Item No.	Docket No.	Company
C–2	CP12–11–000 CP12–11–001.	Elba Express Company, L.L.C.

Dated: October 11, 2012.

Kimberly D. Bose,

Secretary.

A free webcast of this event is available through *www.ferc.gov.* Anyone with Internet access who desires to view this event can do so by navigating to *www.ferc.gov*'s Calendar of Events and locating this event in the Calendar. The event will contain a link to its webcast. The Capitol Connection provides technical support for the free webcasts. It also offers access to this event via television in the DC area and via phone bridge for a fee. If you have any questions, visit *www.CapitolConnection.org* or contact Danelle Springer or David Reininger at 703–993–3100.

Immediately following the conclusion of the Commission Meeting, a press briefing will be held in the Commission Meeting Room. Members of the public may view this briefing in the designated overflow room. This statement is intended to notify the public that the press briefings that follow Commission meetings may now be viewed remotely at Commission headquarters, but will not be telecast through the Capitol Connection service.

[FR Doc. 2012–25490 Filed 10–12–12; 11:15 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR13–1–000]

Acacia Natural Gas Corporation; Notice of Petition for Rate Approval

Take notice that on October 9, 2012, Acacia Natural Gas Corporation (Acacia) filed a Petition for Rate Approval pursuant to 284.123(b)(2) of the Commissions regulations for approval of a new rate applicable to interruptible transportation service and to revise its Statement of Operating Conditions, as more fully detailed in the petition.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on Monday, October 22, 2012.

Dated: October 10, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–25393 Filed 10–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13432–002]

Lake Clementine Hydro, LLC; Notice of Successive Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On October 2, 2012, Lake Clementine Hydro, LLC (Lake Clementine Hydro) filed an application for a successive preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA). Lake Clementine Hydro proposes to study the feasibility of the Lake Clementine Small Hydroelectric Project to be located at the U.S. Corps of Engineer's North Fork Dam on the North Fork of the American River, near the City of Auburn, Placer County, California. 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.

By harnessing the water that now flows over the spillway of the North Fork Dam, Lake Clementine Hydro plans to install two 7.5 megawatt (MW) generation units, for a total installed capacity of 15 MW and an estimated annual generation of 42.0 gigawatt-hours. The applicant plans to study three alternative designs for the project.

Applicant Contact: Mr. Magnus Johannesson, America Renewables, LLC, 46–E Peninsula Center, Palos Verdes Estates, California, 90274; phone: (310) 699–6400.

FERC Contact: Jim Fargo at *james.fargo@ferc.gov;* phone: (202) 502–6095.

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 at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. 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–13432) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: October 10, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–25398 Filed 10–15–12; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9741–9]

Notice of Intent: Designation of an Ocean Dredged Material Disposal Site (ODMDS) in Eastern Long Island Sound; Connecticut, New York, and Rhode Island

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Intent to prepare a Supplemental Environmental Impact Statement (SEIS) to evaluate the potential designation of one or more Ocean Dredged Material Disposal Sites (ODMDS) to serve the eastern Long Island Sound region (Connecticut, New York, and Rhode Island).

SUMMARY: EPA is authorized to designate ODMDS under section 102(c) of the Marine Protection, Research and Sanctuaries Act (MPRSA). EPA is preparing the SEIS in accordance with the Agency's Statement of Policy for Voluntary Preparation of National Environmental Policy Act documents for all ocean disposal site designations. The SEIS will update and build on the analyses that were conducted for the 2005 Long Island Sound Environmental Impact Statement that supported the designation of the Central and Western Long Island Sound disposal sites. The following federal and state agencies have expressed interest in serving as cooperating agencies: U.S. Army Corps of Engineers (USACE), New England and New York Districts; National Oceanic and Atmospheric Administration, National Marine Fisheries Service; Connecticut Department of Energy and Environmental Protection; Connecticut Department of Transportation; New York Department of State; Rhode Island Department of Environmental Management; and Rhode Island Coastal Resources Management Council.

SUPPLEMENTARY INFORMATION: The primary statutes governing the open-water disposal of dredged material in the United States are the MPRSA and the Clean Water Act (CWA). The waters of Long Island Sound are *landward* of the baseline from which the territorial sea of the United States is measured. As with other waters lying landward of the baseline, all dredged material disposal activities in Long Island Sound, whether from federal or non-federal projects of any size, are subject to the requirements of section 404 of the CWA. The MPRSA generally only applies to dredged material disposal in waters *seaward* of the baseline and would not apply to Long Island Sound but for the 1980 amendment that added section 106(f) to the statute. This provision requires that the disposal of dredged material in Long Island Sound from federal projects (projects carried out under the USACE civil works program or by other federal agencies) and non-federal projects generating more than 25,000 cubic yards of material must comply with the requirements of both CWA section 404 and the MPRSA. This applies to both the designation of specific disposal sites and the assessment of the suitability of specific dredged material for disposal. Disposal from non-federal projects involving 25,000 cubic yards or less of dredged material, however, is subject only to CWA section 404.

Need for Action: Dredging is essential for maintaining safe navigation in ports and harbors in the eastern Long Island Sound region. Over the past approximately 30 years, dredged material from eastern Long Island Sound has been disposed of primarily at the New London and Cornfield Shoals disposal sites. These two sites, both of which were selected by the USACE for short-term use, expire on December 16, 2016.

Therefore, EPA has decided to prepare an SEIS to evaluate the two current sites used in eastern Long Island Sound as well as other sites for, and means of, disposal and management, including the no action alternative. The SEIS will support the EPA's final decision on whether one or more dredged material disposal sites will be designated under the MPRSA. The SEIS will include analysis applying the five general and eleven specific site selection criteria for designating ocean disposal sites presented in 40 CFR 228.5 and 228.6, respectively. Designation of a site does not by itself authorize or result in disposal of any particular material; it only serves to make the designated site a disposal option available for consideration in the alternatives analysis for each individual dredging project in the area.

Alternatives: In evaluating the alternatives, the SEIS will identify and evaluate locations within the eastern Long Island Sound study area using the aforementioned criteria to determine the sites that are best suited to receive dredged material for open-water disposal. At a minimum, the SEIS will consider alternatives including:

- No-action (i.e., no designation of any sites);
- Designation of one or both of the currently active USACE-selected sites;
- Designation of alternative open-water sites identified within the study area that may offer environmental advantages to the existing sites; and
- Identification of other disposal and/or management options, including beneficial uses.

Scoping: EPA is requesting written comments from federal, state, and local governments, industry, non-governmental organizations, and the general public on the need for action, the range of alternatives considered, and the potential impacts of the alternatives. Scoping comments will be accepted for 45 days from the date of this notice. Public scoping meetings are scheduled at two locations on the following dates: November 14, 2012, 4–7 p.m. at the University of Connecticut, Avery Point auditorium in Groton, CT (*http://www.averypoint.uconn.edu/about/directions.html*) and November 15, 2012, 3–6 p.m. at the Port Jefferson Village Center in Port Jefferson, NY (*http://www.portjeff.com/village-map/*). Registration for both meetings will begin a half-hour before the meeting (3:30

p.m. on November 14 and 2:30 p.m. on November 15).

FOR FURTHER INFORMATION CONTACT: For further information and to be placed on the project information distribution list, please contact: Ms. Jean Brochi, U.S. EPA, Region 1, 5 Post Office Square, Suite 100, OEP06–1, Boston, MA 02109–3912, (617) 918–1536, *ELIS@epa.gov*. Please contact Ms. Brochi should you have special needs (sign language interpreters, access needs) at the above address or our TDY#, (617) 918–1189.

Estimated Date of the Draft SEIS Release: September 30, 2014.

Dated: October 4, 2012.

H. Curtis Spalding,

Regional Administrator, EPA New England.

[FR Doc. 2012–25420 Filed 10–15–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9741–4]

Notice of Meeting of the EPA's Children's Health Protection Advisory Committee (CHPAC)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the next meeting of the Children's Health Protection Advisory Committee (CHPAC) will be held November 7 and 8, 2012 at EPA's Potomac Yards Building (2777 South Crystal Drive, Arlington, VA 22202), Room 4120 North. The CHPAC was created to advise the Environmental Protection Agency on science, regulations, and other issues relating to children's environmental health.

DATES: The CHPAC will meet November 7 and 8, 2012.

ADDRESSES: 2777 South Crystal Drive, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: Martha Berger, Office of Children's Health Protection, USEPA, MC 1107A, 1200 Pennsylvania Avenue NW., Washington, DC 20460, (202) 564–2191 or *berger.martha@epa.gov*.

SUPPLEMENTARY INFORMATION: The meetings of the CHPAC are open to the public. The CHPAC will meet on Wednesday, November 7th from 9 a.m. to 5 p.m., and Thursday, November 8th from 9 a.m. to 12 p.m. Agenda items include discussions on lead and children, prenatal environmental exposures and health disparities.

Access and Accommodations: For information on access or services for individuals with disabilities, please contact Martha Berger at 202–564–2191 or *berger.martha@epa.gov.,* preferably at least 10 days prior to the meeting.

Dated: October 4, 2012.

Martha Berger,

Designated Federal Official.

[FR Doc. 2012–25424 Filed 10–15–12; 8:45 am]

BILLING CODE 6560–50–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SES Performance Review Board; Appointment of Members

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given of the appointment of members to the Performance Review Board of the Equal Employment Opportunity Commission.

FOR FURTHER INFORMATION CONTACT: Lisa M. Williams, Chief Human Capital Officer, U.S. Equal Employment Opportunity Commission, 131 M Street NE., Washington, DC 20507, (202) 663–4306.

SUPPLEMENTARY INFORMATION: Publication of the Performance Review Board (PRB) membership is required by 5 U.S.C. 4314(c)(4). The PRB reviews and evaluates the initial appraisal of a senior executive's performance by the supervisor, and makes recommendations to the Chair, EEOC, with respect to performance ratings, pay level adjustments and performance awards.

The following are the names and titles of executives appointed to serve as members of the SES PRB. Members will serve a 12-month term, which begins on October 22, 2012.

PRB Chair

Mr. Reuben Daniels, Director, Charlotte District Office, Equal Employment Opportunity Commission.

Members

Mr. Kevin J. Berry, Director, New York District Office, Equal Employment Opportunity Commission;

Ms. Katherine E. Bissell, Deputy Solicitor for Regional Enforcement, Department of Labor;

Ms. Kathryn A. Ellis, Assistant General Counsel, Division of Educational Equity and Research, and Agency Dispute Resolution Specialist, Department of Education;

Mr. James L. Lee, Deputy General Counsel, Equal Employment Opportunity Commission;

Mr. Webster N. Smith, Director, Indianapolis District Office, Equal Employment Opportunity Commission.

Alternate

Mr. Dexter R. Brooks, Director, Federal Sector Programs, Equal Employment Opportunity Commission.

Dated: October 11, 2012.

By the direction of the Commission.

Jacqueline A. Berrien,

Chair.

[FR Doc. 2012–25443 Filed 10–15–12; 8:45 am]

BILLING CODE 6570–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection(s) Being Submitted for Review and Approval to the Office of Management and Budget (OMB)

AGENCY: Federal Communications Commission.

ACTION: Notice; request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3502–3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: 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; the accuracy of the Commission's burden estimates; ways to enhance the quality, utility, and clarity of the information collected; 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 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 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 valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before November 15, 2012. 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: Submit your PRA comments to Nicholas A. Fraser, Office of Management and Budget (OMB), via fax at 202–395–5167 or via Internet at *Nicholas_A._Fraser@omb.eop.gov* and to Judith B. Herman, Federal Communications Commission, via the Internet at *Judith-b.herman@fcc.gov.* To submit your PRA comments by email send them to: *PRA@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, FCC, at 202–418–0214.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0876.

Title: Section 54.703, USAC Board of Directors Nomination Process and Sections 54.719 through 54.725, Review of the Administrator's Decision.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit and not-for-profit institutions.

Number of Respondents: 432 respondents; 432 responses.

Estimated Time per Response: 20 hours to 32 hours.

Frequency of Response: On occasion reporting requirement and third party disclosure requirements.

Obligation to Respond: Voluntary. Statutory authority for this information collection is contained in 47 U.S.C. sections 151 through 154, 201 through 205, 218 through 220, 254, 303(r), 403 and 405 of the Communications Act of 1934, as amended.

Total Annual Burden: 13,680 hours.

Total Annual Cost: N/A.

Privacy Impact Assessment: N/A.

Nature and Extent of Confidentiality: The Commission is not requesting that respondents submit confidential information to the Commission. If the Commission requests information that the respondents believe is confidential, respondents may request confidential treatment of such information under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission will submit this collection to the OMB for approval of an extension or renewal of this currently approved information collection. There is no change in the reporting and/or third party disclosure requirements. The Commission is reporting a 28,160 hour reduction adjustment to their 2009 burden estimates. This reduction adjustment is due to a reduction in the number of respondents based on updated information.

The information in this collection is used by the Commission to select Universal Service Administrative Company (USAC) Board of Directors and to ensure that requests for review are filed properly with the Commission.

Section 54.703 states that industry and non-industry groups may submit to the Commission for approval nominations for individuals to be appointed to the USAC Board of Directors.

Sections 54.719 through 54.725 describes the procedures for Commission review of USAC decisions including the general filing requirements pursuant to which parties may file requests for review.

Federal Communications Commission.

Gloria J. Miles,

Federal Register Liaison, Office of the Secretary, Office of Managing Director.

[FR Doc. 2012–25317 Filed 10–15–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meetings

AGENCY: Federal Election Commission.

DATE AND TIME: Thursday, October 18, 2012 At 10:00 a.m.

PLACE: 999 E Street NW., Washington, DC (Ninth Floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED:

Correction and Approval of the Minutes for the Meeting of October 4, 2012

Audit Division Recommendation Memorandum on the Minnesota Democratic-Farmer-Labor Party (A09–08)

Audit Division Recommendation Memorandum on Rightmarch.com PAC, Inc. (A09–25)

Audit Division Recommendation Memorandum on Friends of Sharron Angle (FOSA) (A11–09)

Proposed Final Audit Report on the Los Angeles County Democratic Central Committee (A09–07)

Notice of Availability—Petition for Rulemaking on Electioneering Communications Reporting filed by the Center for Individual Freedom

Management and Administrative Matters

Individuals who plan to attend and require special assistance, such as sign language interpretation or other reasonable accommodations, should contact Shawn Woodhead Werth, Secretary and Clerk, at (202) 694–1040, at least 72 hours prior to the meeting date.

PERSON TO CONTACT FOR INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Shawn Woodhead Werth,

Secretary and Clerk of the Commission.

[FR Doc. 2012–25492 Filed 10–12–12; 11:15 am]

BILLING CODE 6715–01–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 October 30, 2012.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. The Sindt Family which consists of Darold, Paulette, and Derrick Sindt, all of Keystone, Iowa, and John and Krissa Sindt, Fairfax, Iowa; together as a group acting in concert, to acquire voting shares of Keystone Community Bancorporation, and thereby indirectly acquire voting shares of Keystone Savings Bank, both in Keystone, Iowa.

B. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. Robert B. Flood, Jr., Marquette, Michigan; Susan Flood-Dziubinski; together with Susan J. Flood Revocable Living Trust, Susan J. Flood-Dziubinski trustee; Mary Ann Flood Revocable Living Trust, all of Crystal Falls, Michigan; Robert B. Flood, Jr., and Susan J. Flood-Dziubinski, co-trustees; James Flood, Medford, Wisconsin; Lisa Flood, Marquette, Michigan; Mark A. Flood; and Mark A. Flood Revocable

Trust, both of Iron Mountain, Michigan; Mark A. Flood, trustee as a group acting in concert, to acquire voting shares of C.F.C. Bancorp, Inc., and thereby indirectly acquire voting shares of First National Bank of Crystal Falls, both in Crystal Falls, Michigan.

C. Federal Reserve Bank of Dallas (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. James Leon Bradley, Sr., individually and as Trustee of the Bradley 2012 Irrevocable Trust; The Bradley 2012 Irrevocable Trust; Diana McBay Bradley, James Leon Bradley, Jr.; and Christopher Richard Bradley, all of Groesbeck, Texas; and Bryan Lee Bradley, Wortham, Texas; to retain voting shares of Groesbeck Bancshares, Inc., and thereby indirectly retain voting shares of Farmers State Bank, both in Groesbeck, Texas.

Board of Governors of the Federal Reserve System, October 10, 2012.

Robert deV. Frierson,

Secretary of the Board.

[FR Doc. 2012–25325 Filed 10–15–12; 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 applications will also 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 November 9, 2012.

A. Federal Reserve Bank of Cleveland (Nadine Wallman, Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101–2566:

1. *InFirst Bancorp, MHC and InFirst Bancorp, Inc.,* both of Indiana, Pennsylvania; to become bank holding companies by acquiring 100 percent of the voting shares of Indiana Savings Bank, Indiana, Pennsylvania.

B. Federal Reserve Bank of Dallas (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *Strategic Growth Bank Incorporated,* and Strategic Growth Bancorp Incorporated, both in El Paso, Texas; to acquire 100 percent of the voting shares of Mile High Banks, Longmont, Colorado.

Board of Governors of the Federal Reserve System.

October 10, 2012.

Robert deV. Frierson,

Secretary of the Board.

[FR Doc. 2012–25324 Filed 10–15–12; 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 applications will also 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 November 9, 2012.

A. Federal Reserve Bank of San Francisco (Kenneth Binning, Vice President, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. *Grandpoint Capital, Inc.,* Los Angeles, California; to acquire 100 percent of the voting shares of Bank Capital Corporation and thereby indirectly acquire voting shares of The Biltmore Bank of Arizona, both in Phoenix, Arizona.

In connection with this application, Applicant also has applied to acquire voting shares of 5055 Holdings, LLC, 5055–1 LLC, and 5055–2 LLC, all in Phoenix, Arizona, and thereby engage in extending credit and servicing loans, pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, October 11, 2012.

Robert deV. Frierson,

Secretary of the Board.

[FR Doc. 2012–25374 Filed 10–15–12; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Sunshine Act Meetings

TIME AND DATE: 9:00 a.m. (Eastern Time) October 22, 2012.

PLACE: 10th Floor Training Room, 77 K Street NE., Washington, DC 20002.

STATUS: All parts will be open to the public.

MATTERS TO BE CONSIDERED:

1. Approval of the Minutes of the September 24, 2012 Board Member Meeting
2. Thrift Savings Plan Activity Report by the Executive Director
   a. Monthly Participant Activity Report
   b. Quarterly Investment Performance Report
   c. Legislative Report
3. Quarterly Vendor Financials
4. Mid-year Financial Audit
5. Resource Management Review
6. Office of the General Counsel Overview

CONTACT PERSON FOR MORE INFORMATION: Kimberly Weaver, Director, Office of External Affairs, (202) 942–1640.

Dated: October 12, 2012.

James B. Petrick,

Secretary, Federal Retirement Thrift Investment Board.

[FR Doc. 2012–25560 Filed 10–12–12; 4:15 pm]

BILLING CODE 6760–01–P

GENERAL SERVICES ADMINISTRATION

[Notice–2012–03; Docket No: 2012–0002; Sequence 22]

Privacy Act of 1974; Notice of New System of Records

AGENCY: General Services Administration.

ACTION: Notice.

SUMMARY: GSA proposes to establish a new system of records subject to the Privacy Act of 1974, as amended, 5 U.S.C. 552a.

DATES: Effective November 15, 2012.

FOR FURTHER INFORMATION CONTACT: Call or email the GSA Privacy Act Officer: telephone 202–208–1317; email *gsa.privacyact@gsa.gov.*

ADDRESSES: GSA Privacy Act Officer (CIB), General Services Administration, 1275 First Street NE., Washington, DC 20417.

SUPPLEMENTARY INFORMATION: GSA proposes to establish a new system of records subject to the Privacy Act of 1974, 5 U.S.C. 552a. The new system will allow GSA Users to utilize the SalesForce application environment and the Google Apps for Government platform used by the GSA.

Dated: October 4, 2012.

Cheryl M. Paige,

Director, Office of Information Management.

GSA/CIO–3

SYSTEM NAME:

GSA's Enterprise Organization of Google Applications for Government and SalesForce.com for Government.

SYSTEM LOCATION:

Enterprise Application Services (EAS) is a singular component system managed by the Applied Solutions Division, a division of Office of the Chief Information Officer. The EAS system is housed in secure datacenters hosted by GSA in Kansas City (Region 6) and Fort Worth (Region 7) as well as Cloud components as part of GSA's implementation of Google Apps for Government and Salesforce.com for Government. In addition, some employees and contractors may download and store information from this system. Those copies are located within the employees' or contractors' offices or on encrypted workstations issued by GSA for individuals who are teleworking.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Only one category of individual is covered by this system, collectively referred to as ''GSA Users'', which are individuals who require routine access to agency information technology systems, including federal employees, contractors, child care workers and other temporary workers with similar access requirements. The system does not apply to or contain information on occasional visitors or short-term guests not cleared for use under HSPD–12.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system contains information needed for the functionality of specific minor applications that are developed for either GSA's implementation of Google Apps for Government or Salesforce.com for Government. This system contains the following information:

Employee/contractor/other worker's full name
Organization/office of assignment
Company/agency name
Work address
GSA assigned work telephone number
Social Security Number
Personal physical home address
Personal home or mobile phone
Personal email addresses
Individual work related records

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, 40 U.S.C. 11315, 44 U.S.C. 3506, E.O. 9397, as amended, and Homeland Security Presidential Directive 12 (HSPD–12).

PURPOSES:

For the functionality and use of specific minor applications within GSA's implementation of Google Apps for Government and Salesforce.com for Government. Information may be collected to meet the business requirements of the application, site, group or instance. The new system will allow GSA Users to utilize the SalesForce application environment and the Google Apps for Government platform used by the GSA.

A listing of applications covered by this SORN can be found at: *http://goo.gl/Qrj2c.*

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

a. To a Member of Congress or to a Congressional staff member in response to an inquiry of the Congressional office, made at the written request of the constituent about whom the record is maintained.

b. To the National Archives and Records Administration (NARA) for records management purposes.

c. To Agency contractors, grantees, consultants, or experts who have been engaged to assist the agency in the performance of a Federal duty to which the information is relevant.

d. To a Federal, State, local, foreign, or tribal or other public authority, on request, in connection with the hiring or retention of an employee, the issuance or retention of a security clearance, the letting of a contract, or the issuance or retention of a license, grant, or other benefit, to the extent that the information is relevant and necessary to the requesting agency's decision.

e. To the Office of Management and Budget (OMB) when necessary to the review of private relief legislation pursuant to OMB circular No. A–19.

f. To designated Agency personnel for the purpose of performing an authorized audit or oversight evaluation.

g. To the Office of Personnel Management (OPM), the Office of Management and Budget (OMB), the Government Accountability Office (GAO), or other Federal agencies when the information is required for program evaluation purposes.

h. To appropriate agencies, entities, and persons when (1) the Agency suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) the Agency has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by GSA or another agency or entity) that rely upon the compromised information; (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with GSA's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

i. In any criminal, civil or administrative legal proceeding, where pertinent, to which GSA, a GSA employee, or the United States or other entity of the United States Government is a party before a court or administrative body.

j. To an appeal, grievance, hearing, or complaints examiner; an equal employment opportunity investigator, arbitrator, or mediator; and/or an exclusive representative or other person

authorized to investigate or settle a grievance, complaint, or appeal filed by an individual who is the subject of the record.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Computer records are stored on a secure server and accessed over the Web via encryption software. Paper records, when created, are kept in file folders and cabinets in secure rooms. When individuals download information, it is kept on encrypted, password secured computers and it is their responsibility to protect the data, including compliance with HCO 2180.1, GSA Rules of Behavior for Handling Personally Identifiable Information (PII).

RETRIEVABILITY:

Records are retrievable by a combination of first name and last name. Group records are retrieved by organizational code or other listed identifiers as configured in the application by the program office for their program requirements.

SAFEGUARDS:

Cloud systems are authorized to operate separately by the GSA CIO at the moderate level. All GSA Users utilize two-factor authentication to access Google Apps for Government. Access is limited to authorized individuals with passwords or keys. Computer records are protected by a password system that is compliant with National Institute of Standards and Technology standards. Paper records are stored in locked metal containers or in secured rooms when not in use. Information is released to authorized officials based on their need to know.

RETENTION AND DISPOSAL:

Records are retained and disposed of according to GSA records maintenance and disposition schedules, GSA Records Maintenance and Disposition System (CIO P 1820.1), GSA 1820.2A, and requirements of the National Archives and Records Administration.

SYSTEM MANAGER AND ADDRESS:

Director, Applied Solutions, General Services Administration, 1275 First Street NE., Washington, DC 20417.

NOTIFICATION PROCEDURE:

An individual can determine if this system contains a record pertaining to him/her by sending a request in writing, signed, to the System Manager at the above address. When requesting notification of or access to records covered by this notice, an individual should provide his/her full name, date of birth, region/office, and work location. An individual requesting notification of records in person must provide identity documents sufficient to satisfy the custodian of the records that the requester is entitled to access.

RECORD ACCESS PROCEDURES:

Individuals wishing to access their own records should contact the system manager at the address above.

CONTESTING RECORD PROCEDURES:

Rules for contesting the content of a record and appealing a decision are contained in 41 CFR 105–64.

RECORD SOURCE CATEGORIES:

The sources for information in the system are the individuals about whom the records are maintained, the supervisors of those individuals, existing GSA systems, a sponsoring agency, a former sponsoring agency, other Federal agencies, contract employers, or former employers.

[FR Doc. 2012–25380 Filed 10–15–12; 8:45 am]

BILLING CODE 6820–34–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Extension of a Currently Approved Information Collection; Comment Request Proposed Projects

Title: Cross-Site Evaluation of Children's Bureau's Child Welfare Technical Assistance Implementation Centers and National Child Welfare Resource Centers.

OMB No.: 0970–0377.

Background and Brief Description: The Cross-Site Evaluation of the Child Welfare Implementation Centers (ICs) and National Resource Centers (NRCs) is sponsored by the Children's Bureau, Administration for Children and Families, of the U.S. Department of Health and Human Services and involves the conduct of a multi-year cross-site evaluation that examines the service provision of the ICs' and NRCs' and the relation of their training and technical assistance activities to organizational and systems change in State and Tribal child welfare systems. Additionally, the evaluation examines the degree to which networking, collaboration, information sharing, adherence to common principles, and common messaging occurs across members of the Children's Bureau Training and Technical Assistance (T/TA) Network, which is designed to improve child welfare systems and to support States and Tribes in achieving sustainable, systemic change that results in greater safety, permanency, and well-being for children, youth, and families. The Children's Bureau desires to assess the quality and effectiveness of the technical assistance it supports, and several of these programs and projects are required to be evaluated, including those funded under Section 105 of The Child Abuse Prevention and Treatment Act, as amended [42 U.S.C. 5106]. The Children's Bureau T/TA Network is currently comprised of providers funded entirely or partially by the Children's Bureau through grants, contracts, and interagency agreements.

The cross-site evaluation uses a mixed-method, longitudinal approach to examine the ICs (funded in FY 2009) and the NRCs (funded in FY 2010). Data collection methods that already have been employed are a longitudinal telephone survey of State and Tribal child welfare directors (or their designees), a web-based survey of State and Tribal T/TA recipients, and aggregation of outputs from a web-based technical assistance tracking system (OneNet) that will continue to be used by the ICs and NRCs. A web-based survey also has been administered to members of the T/TA Network to assess their communication, coordination, and how they function as part of the Network. Data collected through these instruments are being used by the Children's Bureau to evaluate the technical assistance delivered to State, local, Tribal, and other publicly administered or publicly supported child welfare agencies and family and juvenile courts. Extension of the follow-up data collection instruments beyond the June 30, 2013 expiration date is necessary so that the Children's Bureau can assess the extent to which the ICs and NRCs fulfill their key objectives and determine the outcomes of the T/TA provided by the ICs and NRCs from the perspective of States and Tribes, incorporating service utilization data from OneNet into these analyses.

Respondents: Respondents to two of the survey instruments will be State and Tribal governments. Respondents to the third survey will be private institutions, including universities, not-for-profit organizations, and private companies. Private institutions, including universities and not-for-profit organizations will be respondents to the forms in the OneNet tracking system.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total annual burden hours
Agency Results Survey	74	1	1.0	74.00
T/TA Activity Survey	160	3	0.25	120.00
Web-Based Network Survey	15	1	0.25	3.75
OneNet Form: General T/TA Event	17	11.8	0.25	50.00
OneNet Form: T/TA Request	13	12.31	0.40	64.00
OneNet Form: T/TA Assessment and Work Plan	13	6.2	0.28	22.568
OneNet Form: T/TA Activity	12	160	0.30	576.00
OneNet Form: Implementation Project Application	5	1.7	0.40	3.4
OneNet Form: Implementation Project Assessment and Work Plan	5	4.6	0.28	6.44
OneNet Form: Implementation Project T/TA Activity	5	600	0.30	900
OneNet Form: Implementation Project Monthly Report	5	36	0.17	30.60
Estimated Total Annual Burden Hours:				1850.76

Overall, the estimated burden hours have decreased by 284 hours from the original submission (the estimated total annual burden hours were 2135.12). This difference is explained in part due to plans for fewer Network member organizations to complete subsequent surveys. Additional data fields have been added to four of the OneNet forms at the request of respondents, and a few questions on survey instruments have been removed or revised. These minor changes did not increase the total annual burden hours.

In compliance with the requirements of Section 3506(c) (2) (A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. Email address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2012–25359 Filed 10–15–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: National Youth in Transition Database and Youth Outcome Survey.

OMB No.: 0970–0340.

Description: The Foster Care Independence Act of 1999 (42 U.S.C. 1305 *et seq.*) as amended by Public Law 106–169 requires State child welfare agencies to collect and report to the Administration on Children and Families (ACF) data on the characteristics of youth receiving independent living services and information regarding their outcomes. The regulation implementing the National Youth in Transition Database, listed in 45 CFR 1356.80, contains standard data collection and reporting requirements for States to meet the law's requirements. ACF will use the information collected under the regulation to track independent living services, assess the collective outcomes of youth, and potentially to evaluate State performance with regard to those outcomes consistent with the law's mandate.

Respondents: State agencies that administer the John H. Chafee Foster Care Independence Program.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Youth Outcome Survey	15,334	1	0.50	7,667
Data File	52	2	1,201	124,904

Estimated Total Annual Burden Hours: 132,571.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information

collection. Email address: *infocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: 202–395–7285, Email: *OIRA_SUBMISSION@OMB.EOP.GOV.* Attn: Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2012–25401 Filed 10–15–12; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects:

Title: Child Care and Development Fund Tribal Plan Preprint—ACF–118–A.

OMB No.: 0970–0198.

Description: The Child Care and Development Fund (CCDF) Plan (the Plan) for Tribes (Indian Tribes, Tribal consortia and Tribal organizations) is required from each CCDF Lead agency in accordance with Section 658E of the Child Care and Development Block Grant Act of 1990, as amended (Pub. L. 101–508, Pub. L. 104–193, and 42 U.S.C. 9858). The implementing regulations for the statutorily required Plan are set forth at 45 CFR 98.10 through 98.18. The Plan, submitted on the ACF 118–A, is required biennially, and remains in effect for two years. The Plan provides ACF and the public with a description of, and assurance about, the Tribal child care program. The ACF 118–A is currently approved through May 31, 2014, making it available to Tribes needing to submit Plan Amendments through the end of the FY 2013 Plan Period. However, on July 1, 2013, Tribes will be required to submit their FY 2014–2015 Plans for approval by September 30, 2013. Consistent with the statute and regulations, ACF requests revision of the ACF 118–A with minor corrections and modifications.

OCC has revised the document to reflect some of the changes made to minimize the burden of the collection of information on respondents. The revised document contains revisions to improve the accuracy and clarity of questions in order to improve the quality of information that is collected.

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *infocollection@acf.hhs.gov.*

Respondents: Tribal CCDF programs (257 total).

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
CCDF Tribal Plan	257	0.50	120	15,420

Estimated Total Annual Burden Hours: 15,420.

In compliance with the requirements of Section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. Email address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2012–25405 Filed 10–15–12; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Agency Information Collection Activities; Submission for OMB Review; Comment Request: Semi-Annual and Final Reporting Requirements for the Older Americans Act Title IV Discretionary Grants Program

AGENCY: Administration for Community Living, HHS.

ACTION: Notice.

SUMMARY: The Administration for Community Living (ACL) is announcing that the proposed collection of information listed below has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments on the collection of information by November 15, 2012.

ADDRESSES: Submit written comments on the collection of information to *OIRA_submission@omb.eop.gov* or by fax to 202.395.5806. Attn: OMB Desk Officer for ACL, Office of Information and Regulatory Affairs, OMB.

FOR FURTHER INFORMATION CONTACT: Lori Stalbaum at (202) 357–3452, or *lori.stalbaum@acl.hhs.gov*.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, ACL has submitted the following proposed collection of information to OMB for review and clearance.

ACL is requesting to continue an existing approved collection of information for semi-annual and final reports pursuant to the requirements of its discretionary grant programs. ACL estimates the burden of this collection of information as follows: *Frequency:* Semi-annually with the Final report taking the place of the semi-annual report at the end of the final year of the grant. *Respondents:* States, public agencies, private nonprofit agencies, institutions of higher education, and organizations including tribal organizations. *Estimated Number of Responses:* 600. *Total Estimated Burden Hours:* 12,000.

Dated: October 11, 2012.

Kathy Greenlee,

Administrator and Assistant Secretary for Aging.

[FR Doc. 2012–25425 Filed 10–15–12; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Petroleum Refineries in Foreign Trade Sub-zones

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day Notice and request for comments; Extension of an existing collection of information.

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: Petroleum Refineries in Foreign Trade Sub-zones. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no 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** (77 FR 47429) on August 8, 2012, 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 November 15, 2012.

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.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to 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.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (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 estimates 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 including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Petroleum Refineries in Foreign Trade Sub-zones.

OMB Number: 1651–0063.

Form Number: None.

Abstract: The Foreign Trade Zones Act, 19 U.S.C. 81c(d) contains specific provisions for petroleum refinery sub-zones. It permits refiners and U.S. Customs and Border Protection (CBP) to assess the relative value of such multiple products at the end of the manufacturing period during which these products were produced when the actual quantities of these products resulting from the refining process can be measured with certainty. The Act also permits the products refined in a sub-zone during a manufacturing period to be attributed to a given crude introduced into production during the period, to the extent that such products were producible or could have been produced the from quantities removed from the sub-zone if Industry Standards of Potential Production on a Practical Operating Basis (known as producibility) is utilized.

19 CFR 146.4(d) provides that the operator of the refinery sub-zone is required to retain all records relating to the above mentioned activities for five years after the merchandise is removed from the sub-zone. Further, the records shall be readily available for CBP review at the sub-zone.

Instructions on compliance with these record keeping provisions are available in the Foreign Trade Zone Manual which is accessible at: *http://www.cbp.gov/linkhandler/cgov/trade/cargo_security/cargo_control/ftz/ftzmanual.ctt/FTZManual2.doc.*

Action: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Respondents: 81.

Estimated Number of Total Annual Responses: 81.

Estimated Time per Response: 1000 hours.

Estimated Total Annual Burden Hours: 81,000.

Dated: October 11, 2012.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2012–25361 Filed 10–15–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Protest

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.

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: Protest (Form 19). This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours. This document is published to obtain comments from the public and affected agencies. This information collection was previously published in the **Federal Register** (77 FR 47420) on August 8, 2012, 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 November 15, 2012.

ADDRESSES: Interested persons are invited to submit written comments on this 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 U.S. 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.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to 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.

SUPPLEMENTARY INFORMATION: CBP invites 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: Protest.

OMB Number: 1651–0017.

Form Number: Form 19.

Abstract: CBP Form 19, *Protest,* is used by an importer, filer, or any party at interest to petition CBP, or protest any action or charge made by the port director with respect to imported merchandise. The information collected on CBP Form 19 is authorized by Sections 514 and 514(a) of the Tariff Act of 1930 and provided for by 19 CFR Part 174. This form is accessible at: *http://forms.cbp.gov/pdf/CBP_Form_19.pdf.*

Action: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to CBP Form 19.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Respondents: 3,750.

Estimated Number of Total Annual Responses: 45,000.

Estimated Time per Response: 1 hour.

Dated: October 11, 2012.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2012–25364 Filed 10–15–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5603–N–72]

Notice of Submission of Proposed Information Collection to OMB Collection of Information From HUD Lead Hazard Control Grantees To Support a Review of the Federal Dust-lead Standards

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been 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.

Leaded paint in housing remains as the last major source of lead exposure to young children. Efforts to reduce childhood lead poisoning have focused on controlling lead paint hazards, specifically lead dust and deteriorated lead-based paint. Lead hazard control programs are looking for ways to make this housing safer without placing an undue financial burden on the property owners or tenants. On August 10, 2009, a petition was submitted to EPA *www.regulations.gov;* search for EPA–HQ–OPPT–2009–0655) to lower the definition of lead-based paint in pre-1978 ''target'' housing to some value below the current value of 1 mg/cm 2 or 0.5% by weight (42 U.S.C. 4822(c)), and to lower the lead hazard control standards and clearance standards for lead in dust on floors and window sills in such housing and in pre-1978 child-occupied facilities below the current values of 40 and 250 mg/ft 2 (micrograms per square foot), respectively (40 CFR 745.65(b) and 745.227(e)(8)(viii), and 24 CFR 35.1320(b)(2)(i)), and below the current clearance standard for window troughs of 400 mg/ft2 (40 CFR 45.227(e)(8)(viii), and 24 CFR 35.1320(b)(2)(i)). The HUD Secretary may reduce the level that defines lead-based paint in target housing (42 U.S.C. 4822(c)), and the EPA Administrator identifies the leadbased paint hazard standards (15 U.S.C. 2683), and the lead-based paint standard (15 U.S.C.2683), and the lead-based paint standard in child-occupied facilities.

In a response dated October 22, 2009, EPA, writing on behalf of itself and HUD, agreed to study the issues and decide whether the lead hazard standards and/or the lead-based paint standard should be changed, and to

collaborate with HUD on this effort. *www.epa.gov/oppt/chemtest/pubs/eparesponse. pdf*). The Agency and the Department intend to have identical standards for the sake of maximizing their effectiveness in this matter.

One of the issues to be considered is the ability to actually determine ''clearance'' (a work area is sufficiently clean of lead dust) before allowing reoccupancy. The clearance levels for floors and window sills are the same as the lead hazard standards. This survey will question HUD grantees as to their ability to achieve clearance at the current level for floors and windowsills, and whether it would be technically feasible to achieve clearance at potentially lower levels.

DATES: *Comments Due Date:* November 15, 2012.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2529-Pending) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov*; fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; email Colette Pollard at *Colette. Pollard@hud.gov.* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting 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 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; (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 Proposed: Collection of Information from HUD Lead Hazard Control Grantees to Support a review of the Federal Dust-lead Standards.

OMB Approval Number: 2529-Pending.

Form Numbers: None.

Description of the need for the information and proposed use: Leaded paint in housing remains as the last major source of lead exposure to young children. Efforts to reduce childhood lead poisoning have focused on controlling lead paint hazards, specifically lead dust and deteriorated lead-based paint. Lead hazard control programs are looking for ways to make this housing safer without placing an undue financial burden on the property owners or tenants. On August 10, 2009, a petition was submitted to EPA *www.regulations.gov;* search for EPA–HQ–OPPT–2009–0655) to lower the definition of lead-based paint in pre-1978 ''target'' housing to some value below the current value of 1 mg/cm 2 or 0.5% by weight (42 U.S.C. 4822(c)), and to lower the lead hazard control standards and clearance standards for lead in dust on floors and window sills in such housing and in pre-1978 child-occupied facilities below the current values of 40 and 250 mg/ft 2 (micrograms per square foot), respectively (40 CFR 745.65(b) and 745.227(e)(8)(viii), and 24 CFR 35.1320(b)(2)(i)), and below the current clearance standard for window troughs of 400 mg/ft2 (40 CFR 45.227(e)(8)(viii), and 24 CFR 35.1320(b)(2)(i)). The HUD Secretary may reduce the level that defines lead-based paint in target housing (42 U.S.C. 4822(c)), and the EPA Administrator identifies the leadbased paint hazard standards (15 U.S.C. 2683), and the lead-based paint standard (15 U.S.C. 2683), and the lead-based paint standard in child-occupied facilities. In a response dated October 22, 2009, EPA, writing on behalf of itself and HUD, agreed to study the issues and decide whether the lead hazard standards and/or the lead-based paint standard should be changed, and to collaborate with HUD on this effort. *www.epa.gov/oppt/chemtest/pubs/eparesponse.pdf*). The Agency and the Department intend to have identical standards for the sake of maximizing their effectiveness in this matter.

One of the issues to be considered is the ability to actually determine ''clearance'' (a work area is sufficiently clean of lead dust) before allowing reoccupancy. The clearance levels for floors and window sills are the same as the lead hazard standards. This survey will question HUD grantees as to their ability to achieve clearance at the current level for floors and windowsills, and whether it would be technically feasible to achieve clearance at potentially lower levels.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	100	1		16		1,600

Total estimated burden hours: 1,600.

Status: New collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: *October 10, 2012.*

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2012–25406 Filed 10–15–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5603–N–71]

Notice of Submission of Proposed Information Collection to OMB Fee or Roster Personnel (Appraisers and Inspectors) Designation and Appraisal Report Forms

AGENCY: Office of the Chief Information Officer, HUD

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been 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.

HUD requires that appraisals and inspections be performed on certain FHA insured properties and the FHA

Appraiser and Inspector rosters assure that HUD has the ability to track the performance of appraisers and inspectors and sanction those who are not performing adequately, this is necessary to protect the FHA insurance fund.

DATES: *Comments Due Date:* November 15, 2012.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0538) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov* fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard., Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov.* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting 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 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; (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 Proposed: Fee or Roster Personnel (Appraisers and Inspectors) Designation and Appraisal Report Forms.

OMB Approval Number: 2502–0538.

Form Numbers: 1004mc, HUD 92563–A, 1004, 1004C, 1025, 1075, 2055, HUD 92563I, 1073.

Description of the need for the information and proposed use: HUD requires that appraisals and inspections be performed on certain FHA insured properties and the FHA Appraiser and Inspector rosters assure that HUD has the ability to track the performance of appraisers and inspectors and sanction those who are not performing adequately, this is necessary to protect the FHA insurance fund.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	17,650	26.524		0.0529		24,783

Total estimated burden hours: 24,783.

Status: Extension without change of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: October 10, 2012,

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2012–25410 Filed 10–15–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5607–N–31]

Notice of Proposed Information Collection for Public Comment; FHA Lender Approval, Annual Renewal, Periodic Updates and Noncompliance Reporting by FHA Approved Lenders

AGENCY: Office of the Assistant Secretary for Housing, 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:* December 17, 2012.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments must be received within sixty (60) days from the date of this Notice. Comments should refer to the proposal by name/or OMB Control Number and should be sent to: Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, Room 9120 or the number for the Federal Information Relay Service (1–800–877–8339).

FOR FURTHER INFORMATION CONTACT: Joy Hadley, Director, Office of Lender Activities and Program Compliance, Department of Housing and Urban Development, 451 7th Street SW., Room B133–P3214, Washington, DC 20410, telephone (202) 708–1515 (this is not a toll free number). Copies of the proposed forms and other available documents submitted to OMB may be obtained from Ms. Hadley.

SUPPLEMENTARY INFORMATION: The Department is submitting 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 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; (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 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: FHA Lender Approval, Annual Renewal, Periodic Updates and Noncompliance Reports by FHA Approved Lenders

OMB Control Number, if applicable: 2502–0005.

Description of the need for the information and proposed use: The information is used by FHA to verify that lenders meet all approval, renewal, update and compliance requirements at all times. It is also used to assist FHA in managing its financial risks and

protect consumers from lender noncompliance with FHA rules and regulations.

Agency Form Numbers, if Applicable

HUD–92001–A FHA Lender Approval Application Form
HUD–92001–B FHA Branch Registration Form
HUD 92001–C Noncompliances on Title I Lenders
HUD–92001–G Corporate Guarantee

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 14,001. The number of respondents is 3,740, the number of responses is 17,711, the frequency of response is on occasion, and the burden hour per response is .79.

Status of the proposed information collection: Revision of currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: October 9, 2012.

Laura M. Marin,

Acting General Deputy Assistant Secretary for Housing—Acting General Deputy Federal Housing Commissioner.

[FR Doc. 2012–25411 Filed 10–15–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5664–N–01]

Notice of Certain Operating Cost Adjustment Factors for 2013

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: This notice establishes operating cost adjustment factors (OCAFs) for project based assistance contracts for eligible multifamily housing projects having an anniversary date on or after February 11, 2013. OCAFs are annual factors used to adjust Section 8 rents renewed under section 524 of the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA).

DATES: *Effective Date:* February 11, 2013.

FOR FURTHER INFORMATION CONTACT: Stan Houle, Housing Program Manager, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; telephone number 202–402–2572 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number through TTY by calling the toll-free Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. OCAFs

Section 514(e)(2) of MAHRA (42 U.S.C. 1437f note) requires HUD to establish guidelines for rent adjustments based on an OCAF. The statute requiring HUD to establish OCAFs for Low-Income Housing Preservation and Resident Homeownership Act (LIHPRHA) (12 U.S.C. 4101, *et seq.*) projects and projects with contract renewals or adjustments under section 524(b)(1)(A) of MAHRA is similar in wording and intent. HUD has therefore developed a single factor to be applied uniformly to all projects utilizing OCAFs as the method by which renewal rents are established or adjusted.

LIHPRHA projects are low-income housing projects insured by the Federal Housing Administration (FHA). LIHPRHA projects are primarily low-income housing projects insured under section 221(d)(3) below-market interest rate (BMIR) and section 236 of the National Housing Act, respectively. Both categories of projects have low-income use restrictions that have been extended beyond the 20-year period specified in the original documents, and both categories of projects also receive assistance under section 8 of the U.S. Housing Act of 1937 to support the continued low-income use.

MAHRA gives HUD broad discretion in setting OCAFs, referring, for example, in sections 524(a)(4)(C)(i), 524(b)(1)(A), 524(b)(3)(A) and 524(c)(1) simply to ''an operating cost adjustment factor established by the Secretary.'' The sole limitation to this grant of authority is a specific requirement in each of the foregoing provisions that application of an OCAF ''shall not result in a negative adjustment.'' Contract rents are adjusted by applying the OCAF to that portion of the rent attributable to operating expenses exclusive of debt service.

The OCAFs provided in this notice and applicable to eligible projects having a project based assistance contracts anniversary date of on or after February 11, 2013, are calculated using the same method as those published in HUD's 2012 OCAF notice published on October 26, 2011 (76 FR 66319). Specifically, OCAFs are calculated as the sum of weighted average cost changes for wages, employee benefits, property taxes, insurance, supplies and equipment, fuel oil, electricity, natural gas, and water/sewer/trash using publicly available indices. The weights used in the OCAF calculations for each of the nine cost component groupings are set using current percentages attributable to each of the nine expense categories. These weights are calculated in the same manner as in HUD's October 26, 2011, notice. Average expense proportions were calculated using three years of audited Annual Financial Statements from projects covered by OCAFs. The expenditure percentages for these nine categories have been found to be very stable over time, but using three years of data increases their stability. The nine cost component weights were calculated at the state level, which is the lowest level of geographical aggregation with enough projects to permit statistical analysis. These data were not available for the Western Pacific Islands, so data for Hawaii were used as the best available indicator of OCAFs for these areas.

The best current price data sources for the nine cost categories were used in calculating annual change factors. State-level data for fuel oil, electricity, and natural gas from Department of Energy surveys are relatively current and continue to be used. Data on changes in employee benefits, insurance, property taxes, and water/sewer/trash costs are only available at the national level. The data sources for the nine cost indicators selected used were as follows:

- *Labor Costs:* First quarter, 2012 Bureau of Labor Statistics (BLS) ECI, Private Industry Wages and Salaries, All Workers (Series ID CIU2020000000000I) at the national level and Private Industry Benefits, All Workers (Series ID CIU2030000000000I) at the national level.
- *Property Taxes:* Census Quarterly Summary of State and Local Government Tax Revenue—Table 1 *http://www2.census.gov/govs/qtax/2012/q1t1.xls.* 12-month property taxes are computed as the total of four quarters of tax receipts for the period from April through March. Total 12-month taxes are then divided by the number of households to arrive at average 12-month tax per household. The number of households (occupied housing units) is taken from the estimates program at the Bureau of the Census. *http://www.census.gov/hhes/www/housing/hvs/historic/files/his_tab8a_v2010_web.xls.*
- *Goods, Supplies, Equipment:* May 2011 to May 2012 Bureau of Labor Statistics (BLS) Consumer Price Index, All Items Less Food, Energy and shelter (Series ID CUUR0000SA0L12E) at the national level.
- *Insurance:* May 2011 to May 2012 Bureau of Labor Statistic (BLS)

Consumer Price Index, Tenants and Household Insurance Index (Series ID CUUR0000SEHD) at the national level.

• *Fuel Oil:* The Energy Information Agency Retail Price of No. 2 Fuel Oil to Residential Consumers report has been suspended as of May, 2011; see *http://www.eia.gov/oil_gas/petroleum/survey_forms/petforms_notice.html* for more information. In its place, the U.S. Weekly Heating Oil and Propane Prices report has been substituted. Weekly residential heating oil prices in cents per gallon excluding taxes for the period from October 3, 2011 through March 19, 2012 are compared to the period from October 4, 2010 through March 14, 2012. For the States with insufficient fuel oil consumption to have separate estimates, the relevant regional Petroleum Administration for Defense Districts (PADD) change between these two periods is used; if there is no regional PADD estimate, the U.S. change between these two periods is used. *http://www.eia.gov/dnav/pet/pet_pri_wfr_a_EPD2F_prs_dpgal_w.htm.*

• *Electricity:* Energy Information Agency, February 2012 ''Electric Power Monthly'' report, Table 5.6.B. *http://www.eia.gov/electricity/monthly/current__year/february2012.pdf.*

• *Natural Gas:* Energy Information Agency, Natural Gas, Residential Energy Price, 2010–2011 annual prices in dollars per 1,000 cubic feet at the state level. Due to EIA data quality standards several states were missing data for one or two months in 2011; in these cases, data for these missing months were estimated using data from the surrounding months in 2011 and the relationship between that same month and the surrounding months in 2010. *http://www.eia.gov/dnav/ng/ngpri_sum_aEPG0_PRS_DMcf_a.htm.*

• *Water and Sewer:* May 2011 to May 2012 Consumer Price Index, All Urban Consumers, Water and Sewer and Trash Collection Services (Series ID CUUR0000SEHG) at the national level.

The sum of the nine cost component percentage weights equals 100 percent of operating costs for purposes of OCAF calculations. To calculate the OCAFs, state-level cost component weights developed from AFS data are multiplied by the selected inflation factors. For instance, if wages in Virginia comprised 50 percent of total operating cost expenses and increased by 4 percent from 2010 to 2011, the wage increase component of the Virginia OCAF for 2013 would be 2.0 percent (50% * 4%). This 2.0 percent would then be added to the increases for the other eight expense categories to calculate the 2013 OCAF for Virginia. The OCAFs for 2013 are included as an Appendix to this Notice.

II. MAHRA and LIHPRHA OCAF Procedures

MAHRA, as amended, created the Mark-to-Market Program to reduce the cost of federal housing assistance, enhance HUD's administration of such assistance, and ensure the continued affordability of units in certain multifamily housing projects. Section 524 of MAHRA authorizes renewal of Section 8 project-based assistance contracts for projects without restructuring plans under the Mark-to-Market Program, including projects that are not eligible for a restructuring plan and those for which the owner does not request such a plan. Renewals must be at rents not exceeding comparable market rents except for certain projects. As an example, for Section 8 Moderate Rehabilitation projects, other than single room occupancy projects (SROs) under the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11301 *et seq.*), that are eligible for renewal under section 524(b)(3) of MAHRA, the renewal rents are required to be set at the lesser of: (1) the existing rents under the expiring contract, as adjusted by the OCAF; (2) fair market rents (less any amounts allowed for tenant-purchased utilities); or (3) comparable market rents for the market area.

LIHPRHA (see, in particular, section 222(a)(2)(G)(i), 12 U.S.C. 4112 (a)(2)(G) and HUD's regulations at 24 CFR 248.145(a)(9)) requires that future rent adjustments for LIHPRHA projects be made by applying an annual factor, to be determined by HUD to the portion of project rent attributable to operating expenses for the project and, where the owner is a priority purchaser, to the portion of project rent attributable to project oversight costs.

III. Findings and Certifications

Environmental Impact

This issuance sets forth rate determinations and related external administrative requirements and procedures that do not constitute a development decision affecting the physical condition of specific project areas or building sites. Accordingly, under 24 CFR 50.19(c)(6), this notice is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Catalog of Federal Domestic Assistance Number

The Catalog of Federal Domestic Assistance Number for this program is 14.187.

Dated: September 21, 2012.

Carol J. Galante,

Acting Assistant Secretary for Housing Federal Commissioner.

Appendix

Operating Cost Adjustment Factors for 2013

Alabama	2.4
Alaska	3.1
Arizona	1.9
Arkansas	2.2
California	2.3
Colorado	2.1
Connecticut	1.5
Delaware	2.2
District of Columbia	1.7
Florida	2.3
Georgia	2.9
Hawaii	5.5
Idaho	1.8
Illinois	1.3
Indiana	2.4
Iowa	1.7
Kansas	2.2
Kentucky	2.6
Louisiana	2.1
Maine	2.2
Maryland	1.5
Massachusetts	1.8
Michigan	1.7
Minnesota	2.0
Mississippi	2.1
Missouri	2.6
Montana	2.6
Nebraska	2.0
Nevada	1.5
New Hampshire	2.0
New Jersey	1.6
New Mexico	2.1
New York	2.1
North Carolina	2.2
North Dakota	2.3
Ohio	1.9
Oklahoma	2.0
Oregon	2.4
Pacific Islands	5.4
Pennsylvania	2.3
Puerto Rico	2.3
Rhode Island	1.2
South Carolina	2.3
South Dakota	2.5
Tennessee	2.4
Texas	1.7
Utah	2.2
Vermont	3.3
Virgin Islands	2.7
Virginia	2.3
Washington	2.4
West Virginia	2.5
Wisconsin	1.7
Wyoming	2.5
U.S. Average	2.1

[FR Doc. 2012–25289 Filed 10–15–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Wildland Fire Executive Council Meeting Schedule

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of meeting.

SUMMARY: In accordance with the requirements of the Federal Advisory Committee Act, 5 U.S.C. App., 2, the U.S. Department of the Interior, Office of the Secretary, Wildland Fire Executive Council (WFEC) will meet as indicated below.

DATES: The next meeting will be held on November 2, 2012.

ADDRESSES: The meetings will be held from 10 a.m. to 2 p.m. Eastern Time in the McArdle Room (First Floor Conference Room) in the Yates Federal Building, USDA Forest Service Headquarters, 1400 Independence Ave. SW., Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Shari Eckhoff, Designated Federal Officer, 300 E. Mallard Drive, Suite 170, Boise, Idaho 83706; telephone (208) 334–1552; fax (208) 334–1549; or email *Shari_Eckhoff@ios.doi.gov*.

SUPPLEMENTARY INFORMATION: The WFEC is established as a discretionary advisory committee under the authorities of the Secretary of the Interior and Secretary of Agriculture, in furtherance of 43 U.S.C. 1457 and provisions of the Fish and Wildlife Act of 1956 (16 U.S.C. 742a–742j), the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 *et seq.*), the National Wildlife Refuge System improvement Act of 1997 (16 U.S.C. 668dd–668ee), and the National Forest Management Act of 1976 (16 U.S.C. 1600 *et seq.*) and in accordance with the provisions of the Federal Advisory Committee Act, as amended, 5 U.S.C. App. 2. The Secretary of the Interior and Secretary of Agriculture certify that the formation of the WFEC is necessary and is in the public interest.

The purpose of the WFEC is to provide advice on coordinated national-level wildland fire policy and to provide leadership, direction, and program oversight in support of the Wildland Fire Leadership Council. Questions related to the WFEC should be directed to Shari Eckhoff (Designated Federal Officer) at *Shari_Eckhoff@ios.doi.gov* or (208) 334–1552 or 300 E. Mallard Drive, Suite 170, Boise Idaho, 83706–6648.

Meeting Agenda: The meeting agenda will include: (1) Welcome and introduction of Council members; (2) Overview of prior meeting and action tracking; (3) Members' round robin to share information and identify key issues to be addressed; (4) Wildland Fire Management Cohesive Strategy; (5) Wildland Fire Issues; (6) Council Members' review and discussion of sub-committee activities; (7) Future Council activities; (8) Public comments which will be scheduled for 11:30 on each agenda; (9) and closing remarks. Participation is open to the public.

Public Input: All WFEC meetings are open to the public. Members of the public who wish to participate must notify Shari Eckhoff at *Shari_Eckhoff@ios.doi.gov* no later than the Friday preceding the meeting. Those who are not committee members and wish to present oral statements or obtain information should contact Shari Eckhoff via email no later than the Friday preceding the meeting. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited.

Questions about the agenda or written comments may be emailed or submitted by U.S. Mail to: Department of the Interior, Office of the Secretary, Office of Wildland Fire, Attention: Shari Eckhoff, 300 E. Mallard Drive, Suite 170, Boise, Idaho 83706–6648. WFEC requests that written comments be received by the Friday preceding the scheduled meeting. Attendance is open to the public, but limited space is available. Persons with a disability requiring special services, such as an interpreter for the hearing impaired, should contact Ms. Eckhoff at (202) 527–0133 at least seven calendar days prior to the meeting.

Dated: October 5, 2012.

Shari Eckhoff,

Designated Federal Officer.

[FR Doc. 2012–25402 Filed 10–15–12; 8:45 am]

BILLING CODE 4310–J4–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R6–R–2008–N0186; FF06R06000 134 FXRS1265066CCP0]

Huron Wetland Management District, Madison Wetland Management District, and Sand Lake Wetland Management District, SD; Final Comprehensive Conservation Plan and Finding of No Significant Impact for Environmental Assessment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of Availability.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of our final comprehensive conservation plan (CCP) and finding of no significant impact (FONSI) for the environmental assessment (EA) involving Huron, Madison, and Sand Lake Wetland Management Districts (Districts). In this final CCP, we describe how we will manage these three Districts for the next 15 years.

ADDRESSES: You may view or obtain copies of the final CCP and FONSI/EA by any of the following methods. You may request a hard copy or CD–ROM.

Agency Web Site: Download a copy of the document at *http://mountain-prairie.fws.gov/planning.*

Email: bernardo_garza@fws.gov. Include ''Huron Wetland Management District, Madison Wetland Management District, Sand Lake Wetland Management District final CCP'' in the subject line of the message.

Mail: U.S. Fish and Wildlife Service, Division of Refuge Planning, P.O. Box 25486, Denver Federal Center, Denver, Colorado 80225.

In person Viewing or Pickup: call 303–236–4377 to make an appointment during regular business hours at 134 Union Boulevard, Suite 300, Lakewood, Colorado 80228.

FOR FURTHER INFORMATION CONTACT: Bernardo Garza, 303–236–4377, (phone); *bernardo_garza@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we finalize the CCP process for Huron Wetland Management District, Madison Wetland Management District, Sand Lake Wetland Management District. We started this process through a notice in the **Federal Register** (73 FR 53439, September 16, 2008). We released the draft CCP and the EA to the public, announcing and requesting comments in a notice of availability in the **Federal Register** (76 FR 65525, October 21, 2011).

Huron Wetland Management District was established in 1992 encompassing lands that were previously under the management of both the Lake Andes and Sand Lake Wetland Management Districts. Madison Wetland Management District was established in 1969. Sand Lake Wetland Management District was established in 1961. These Districts lie in eastern South Dakota, within the highly productive Prairie Pothole region. These Districts are three of six existing Districts in South Dakota, and together manage more than 1.5 million acres of land within the 27-county planning area. A mosaic of primarily tallgrass and mixed-grass prairies dotted with many small lakes

and semipermanent or permanent wetlands, interspersed among agricultural lands, comprise most of the Districts.

These diverse prairie habitats provide for a myriad of waterfowl, waterbird, and neotropical migratory bird species, resident white-tailed deer, as well as federally listed species such as whooping and sandhill cranes, least terns, and piping plovers in the eastern portion of the districts to pronghorn, mule deer, and prairie chicken, among others, in the westernmost portion of the planning area. Native fish such as walleye and lake trout, as well as a large variety of other smaller native fish species, share this environment with sport fishes such as smallmouth and largemouth bass, bluegill and northern pike.

Wetland drainage and tiling, as well as prairie conversion to crop production, pose some of the greatest challenges to the wildlife and native plant species of this region of the Central Flyway.

The Districts were created to administer the Small Wetlands Acquisition Program to protect wetlands from various threats—particularly drainage. Grassland easements were included in this program in 1991. The purpose of the Districts is ''to assure the long-term viability of the breeding waterfowl population and production through the acquisition and management of waterfowl production areas, while considering the needs of other migratory birds, threatened and endangered species, and other wildlife.'' This purpose statement was developed for all Region 6 wetland management districts.

Despite the decentralized nature of the lands managed by the three districts, it is estimated that annual visitation to all three districts' lands totaled more than 240,000 visitor-days, with nearly 75 percent of this visitation involving local residents and the remaining 25 percent from visitors from outside of the planning area. Hunting accounted for nearly 80 percent of the total visitation, followed by fishing with nearly 12 percent, and non-consumptive uses, such as bird watching and wildlife photography, accounting for less than eight percent. Trapping is also a popular activity among visitors to the Districts.

The Districts have been historically managed for migratory birds, with an emphasis on waterfowl species. Management techniques include prescribed burning, cattle grazing, invasive species control, and water level management in wetlands with water control structures. Past management has included installing some water control structures and constructing channels used to divert water. The planning area is a popular area for research by the Service and local universities, as well as state and other partners, given its diversity of wildlife and plants.

We announce our decision and the availability of the FONSI for the final CCP for the Huron Wetland Management District, Madison Wetland Management District, and Sand Lake Wetland Management District in accordance with National Environmental Policy Act (NEPA) (40 CFR 1506.6(b)) requirements. We completed a thorough analysis of impacts on the human environment, which we included in the EA that accompanied the draft CCP.

The CCP will guide us in managing and administering Huron Wetland Management District, Madison Wetland Management District, and Sand Lake Wetland Management District for the next 15 years. Alternative B, as we described in the final CCP, is the foundation for the CCP.

Background

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee) (Refuge Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each unit of the National Wildlife Refuge System (System). The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving their unit's purposes and contributing toward the mission of the System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Refuge Administration Act.

CCP Alternatives, Including Selected Alternative

Our draft CCP and our EA addressed and evaluated three management alternatives. Alternative A, Current Management, would have maintained the current management activities of each of the three Districts. Alternative B, Increased Efficiency, would seek the development and implementation of an improved, science-based priority system to restore native prairie habitats. Alternative C, Increased Efficiency with Expanded Resources, would follow the same prioritization system for restoration and management as under Alternative B, but it would be based on projected staffing and funding increases.

Comments

We solicited comments on the draft CCP and the EA for Huron, Madison, and Sand Lake Wetland Management Districts from October 21, 2011 to November 21, 2011 (76 FR 65525, October 21, 2011). The Service received 9 comments during the public review period. All of those comments were thoroughly evaluated by the planning team. However none of the comments caused substantial changes to the CCP.

Selected Alternative

After considering the comments we received, we have selected Alternative B for implementation. This alternative, also known as Increased Efficiency, would emphasize developing and implementing an improved, science-based priority system to restore native prairie habitats for the benefit of waterfowl and other migratory birds. Districts staffs will focus on high priority tracts and, when possible, on medium-priority tracts. The focus of this will be to restore ecological processes and native grassland species to the greatest extent possible within the parameters of available resources and existing budgetary and staffing constraints. The Districts' staffs will seek to maintain the existing levels and types of public use programs, ensuring that programs offered to the public are of consistently high quality.

Dated: September 12, 2012.

Steve Guertin,

Regional Director, Mountain-Prairie Region, U. S. Fish and Wildlife Service.

[FR Doc. 2012–25337 Filed 10–15–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLAZ956000.L14200000.BJ0000.241A]

Notice of Filing of Plats of Survey; Arizona

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Filing of Plats of Survey; Arizona.

SUMMARY: The plats of survey of the described lands were officially filed in the Arizona State Office, Bureau of Land

Management, Phoenix, Arizona, on dates indicated.

SUPPLEMENTARY INFORMATION:

The Gila and Salt River Meridian, Arizona

The supplemental plat representing the amended lotting in section 3, Township 4 South, Range 5 East, accepted October 1, 2012, and officially filed October 3, 2012, Arizona.

This plat was prepared at the request of the Bureau of Land Management.

The supplemental plat representing the amended lotting in section 15, Township 4 South, Range 6 East, accepted October 1, 2012, and officially filed October 3, 2012, Arizona.

This plat was prepared at the request of the Bureau of Land Management.

A person or party who wishes to protest against any of these surveys must file a written protest with the Arizona State Director, Bureau of Land Management, 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.

FOR FURTHER INFORMATION CONTACT: These plats will be available for inspection in the Arizona State Office, Bureau of Land Management, One North Central Avenue, Suite 800, Phoenix, Arizona, 85004–4427. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

Stephen K. Hansen,

Chief Cadastral Surveyor of Arizona.

[FR Doc. 2012–25385 Filed 10–15–12; 8:45 am]

BILLING CODE 4310–32–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWYL03000–L51010000–FX0000–LVRWK09K1030; WYW–167155]

Notice of Availability of the Record of Decision for the Chokecherry and Sierra Madre Wind Energy Project and Approved Visual Resource Management Plan Amendment for Public Lands Administered by the Bureau of Land Management, Rawlins Field Office, Carbon County, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: The Bureau of Land Management (BLM) announces the availability of the Record of Decision (ROD) for the Chokecherry and Sierra Madre Wind Energy Project and Approved Plan Amendment to the Rawlins Resource Management Plan (RMP) for Visual Resource Management (VRM), the applicable plan for the project site and the surrounding areas located in the Rawlins Field Office. The Secretary of the Interior signed the ROD on October 9, 2012, which constitutes the final decision of the Department.

ADDRESSES: Copies of the ROD including the Approved Plan amendment to the Rawlins RMP are available upon request from the BLM Rawlins Field Office, 1300 North Third Street, Rawlins, Wyoming; or via the Internet at the following Web site: *http://www.blm.gov/wy/st/en/info/NEPA/documents/rfo/Chokecherry.html.*

FOR FURTHER INFORMATION CONTACT: Pamela Murdock, BLM Project Manager, at 307–775–6259; through mail at BLM Wyoming State Office, 5353 Yellowstone Road, Cheyenne, WY 82007; or email at *pmurdock@blm.gov*. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The BLM evaluated the potential wind energy development on a broad level to determine appropriate areas and restrictions for the Power Company of Wyoming, LLC (PCW) to develop a wind energy facility on public lands in the Application Area administered by the BLM in compliance with the Federal Land Policy and Management Act of 1976, BLM right-of-way (ROW) regulations, and other applicable Federal laws. This decision does not authorize development of the wind energy project; rather, it sets the parameters for which future ROW applications may be submitted by PCW. The ROW applications will be screened against the analysis conducted in this environmental impact statement (EIS), and then the appropriate level of subsequent, tiered National Environmental Policy Act analysis will be conducted prior to the BLM issuing a decision on ROW applications. The BLM selected this manner of analyzing the project based on its size and complexity of resources. Accordingly, through this decision the BLM is (1) determining whether the area identified in PCW's proposal is appropriate for wind energy development; (2) Identifying the requirements for future wind development in the area; and (3) Amending the VRM class decision portions of the 2008 Rawlins RMP for the designated Decision Area. Two resulting decisions are as follows: (1) The BLM has determined that portions of the Application Area are suitable for wind energy development and associated facilities on public lands subject to the requirements for all future wind development in the area as described under the Preferred Alternative in the CCSM project Final EIS, herein referred to as the Selected Alternative. The Selected Alternative analyzed a wind energy development proposal by PCW in the 219,707-acre alternative boundary to accommodate development of a 2,000- to 3,000-megawatt (MW) project consisting of up to 1,000 turbines and ancillary facilities in the two sites—the 109,086-acre Chokecherry site and the 110,161-acre Sierra Madre site—and off-site access on 460 acres. Power generated by the project would be routed to one or more of up to five potential transmission lines analyzed in detail in separate EISs or an existing transmission line on the northern edge of the Project Site, all of which were considered in the cumulative impact analysis for this project. (2) The BLM is requiring that certain project design features and mitigation measures be incorporated into any future CCSM wind energy development authorizations. These design features and mitigation measures include the identified BLM environmental constraints, applicant-committed measures and best management practices, and mitigation measures identified through the EIS process. The CCSM project also would

be subject to additional constraints identified in the Programmatic Agreement for cultural and Native American resources, Biological Opinion, development of Eagle Conservation Plans (ECPs) and Avian Protection Plans (APPs) in coordination with the U.S. Fish and Wildlife Service (USFWS), and other monitoring and implementation plans amended to the ROW grant. The BLM will not issue ROWs for the Chokecherry and Sierra Madre portions of the project to PCW until USFWS issues letters of concurrence for the APPs and ECPs.

The Proposed Plan Amendment/Final EIS and CCSM Project Final EIS were released for a 30-day public review and protest period commencing on June 29, 2012. At the close of the 30-day protest period on July 30, 2012, thirteen timely and complete written protests were received and resolved. Their resolution is summarized in the Director's Protest Summary Report attached to the ROD. The proposed amendment to the Rawlins RMP was not modified as a result of the protest resolution. Simultaneously with the protest period, the Governor of Wyoming conducted a 60-day consistency review of the proposed Rawlins RMP Amendment to identify any inconsistencies with State or local plans, policies or programs; no inconsistencies were identified.

Because this decision is approved by the Secretary of the Interior, it is not subject to administrative appeal (43 CFR 4.410(a)(3)).

Authority: 40 CFR 1506.6.

Timothy Spisak,

Deputy Assistant Director, Minerals and Realty Management, Bureau of Land Management.

[FR Doc. 2012–25384 Filed 10–15–12; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NCR–NACA–11375; 3086–SYM]

Notice of Meeting, National Capital Memorial Advisory Commission

AGENCY: National Park Service, Interior.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given that the National Capital Memorial Advisory Commission (the Commission) will meet at the National Building Museum, Room 312, 401 F Street NW., Washington, DC 20001, on Wednesday, November 7, 2012, at 1:00 p.m., to consider matters pertaining to commemorative works in the District of Columbia and its environs.

DATES: Wednesday, November 7, 2012.

ADDRESSES: The National Building Museum, Room 312, 401 F Street NW., Washington, DC 20001.

FOR FURTHER INFORMATION CONTACT: Ms. Nancy Young, Secretary to the Commission, by telephone at (202) 619–7097, by email at *nancy_young@nps.gov,* by telefax at (202) 619–7420, or by mail at the National Capital Memorial Advisory Commission, 1100 Ohio Drive SW., Room 220, Washington, DC 20242. Information is also available at the Commission's Web site, *http://parkplanning.nps.gov/ncmac.*

SUPPLEMENTARY INFORMATION: The Commission was established by Public Law 99–652, the Commemorative Works Act (40 U.S.C. Chapter 89 et seq.), to advise the Secretary of the Interior (the Secretary) and the Administrator, General Services Administration, (the Administrator) on policy and procedures for establishment of, and proposals to establish, commemorative works in the District of Columbia and its environs, as well as such other matters as it may deem appropriate concerning commemorative works.

The Commission examines each memorial proposal for conformance to the Commemorative Works Act, and makes recommendations to the Secretary and the Administrator and to Members and Committees of Congress. The Commission also serves as a source of information for persons seeking to establish memorials in Washington, DC, and its environs.

The members of the Commission are as follows:

Director, National Park Service
Administrator, General Services Administration
Chairman, National Capital Planning Commission
Chairman, Commission of Fine Arts
Mayor of the District of Columbia
Architect of the Capitol
Chairman, American Battle Monuments Commission
Secretary of Defense

The Commission will consider:

(1) Legislation under Consideration in the 112th Congress:
(a) S. 3548, Native American Veterans' Memorial amendments
(b) H.R. 5914, National Desert Storm & Desert Shield Memorial
(c) H.R. 6077, Rachel Carson Nature Trail Designation
(d) H.R. 6291, Vietnam Veterans Memorial Center Donor Contribution Recognition

(2) Approval of National Capital Memorial Advisory Commission Operational Bylaws.

(3) Other Business.

The meeting will begin at 1:00 p.m. and is open to the public. Persons who wish to file a written statement or testify at the meeting or who want further information concerning the meeting may contact Ms. Nancy Young, Secretary to the Commission. Before including your address, phone number, email 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: October 1, 2012.

Lisa Mendelson-Ielmini,

Acting Regional Director, National Capital Region.

[FR Doc. 2012–25415 Filed 10–15–12; 8:45 am]

BILLING CODE 4310–DL–P

DEPARTMENT OF THE INTERIOR

Office of Natural Resources Revenue

[Docket No. ONRR–2011–0020]

Agency Information Collection Activities: Submitted for Office of Management and Budget Review; Comment Request

AGENCY: Office of the Secretary, Office of Natural Resources Revenue (ONRR).

ACTION: Notice of an extension of a currently approved information collection.

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), the Office of Natural Resources Revenue (ONRR) is notifying the public that we have submitted to the Office of Management and Budget (OMB) an information collection request (ICR) to renew approval of the paperwork requirements in the regulations under title 30, *Code of Federal Regulations* (CFR), parts 1210 and 1212. There are three forms associated with this information collection. This notice also provides the public with a second opportunity to comment on the paperwork burden of these regulatory requirements.

DATES: OMB has up to 60 days to approve or disapprove the information collection request, but may respond after 30 days; therefore, public

comments should be submitted to OMB by November 15, 2012, in order to be assured of consideration.

ADDRESSES: Submit comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Department of Interior (1012–0004), by telefax at (202) 395–5806 or via e-mail to *OIRA_Docket@omb.eop.gov*. Also, please send a copy of your comments to Stephen Chubb, Regulatory Specialist, Office of Natural Resources Revenue, P.O. Box 25165, MS 64000A, Denver, Colorado 80225. Please reference ICR 1012–0004 in your comments.

FOR FURTHER INFORMATION CONTACT: Stephen Chubb, Regulatory Specialist, email *Stephen.Chubb@onrr.gov*. You may also contact Mr. Chubb to obtain copies, at no cost, of (1) the ICR, (2) any associated forms, and (3) the regulations that require us to collect the information. To see a copy of the entire ICR submitted to OMB, go to: *http://www.reginfo.gov* and select Information Collection Review, Currently Under Review.

SUPPLEMENTARY INFORMATION:

Title: 30 CFR Parts 1210 and 1212, Royalty and Production Reporting.

OMB Control Number: 1012–0004.

Bureau Form Number: Forms MMS–2014, MMS–4054, and MMS–4058.

Note: ONRR will publish a rule updating our form numbers to Forms ONRR–2014, ONRR–4054, and ONRR–4058.

Abstract: The Secretary of the United States Department of the Interior is responsible for mineral resource development on Federal and Indian lands and the Outer Continental Shelf (OCS). The Secretary's responsibility, according to various laws, is to manage mineral resource production from Federal and Indian lands and the OCS, collect the royalties and other mineral revenues due, and distribute the funds collected in accordance with applicable laws. The Secretary also has a trust responsibility to manage Indian lands and seek advice and information from Indian beneficiaries. ONRR performs the minerals revenue management functions for the Secretary and assists the Secretary in carrying out the Department's trust responsibility for Indian lands. Public laws pertaining to mineral leases on Federal Indian lands are available on our Web site at *www.onrr.gov/Laws_R_D/PublicLawsAMR.htm*.

When a company or an individual enters into a lease to explore, develop, produce, and dispose of minerals from Federal or Indian lands, that company or individual agrees to pay the lessor a share in an amount or value of production from the leased lands. The lessee, or the designee, must report various kinds of information to the lessor relative to the disposition of the leased minerals. Such information is generally available within the records of the lessee or others involved in developing, transporting, processing, purchasing, or selling of such minerals. The information that ONRR collects includes data necessary to ensure that the lessee accurately values and appropriately pays all royalties and other mineral revenues due.

Reporters submit information into the ONRR financial accounting system that includes royalty, rental, bonus, and other payment information; sales volumes and values; and other royalty values. ONRR uses the accounting system to compare production volumes with royalty volumes to verify that companies reported and paid proper royalties for the minerals produced. Additionally, we share the data electronically with the Bureau of Safety and Environmental Enforcement, Bureau of Land Management, Bureau of Indian Affairs, and Tribal and State governments so they can perform their lease management responsibilities.

We use the information collected in this ICR to ensure that companies properly pay royalties based on accurate production accounting on oil, gas, and geothermal resources that they produce from Federal and Indian leases. The requirement to report accurately and timely is mandatory. Please refer to the chart for all reporting requirements and associated burden hours.

Royalty Reporting

Payors (Reporters) must report, according to various regulations, and remit royalties on oil, gas, and geothermal resources that they produced from leases on Federal and Indian lands. ONRR uses the following form for royalty reporting:

Form MMS–2014, Report of Sales and Royalty Remittance. Reporters submit this form monthly to report royalties on oil, gas, and geothermal leases, certain rents, and other lease-related transactions such as transportation and processing allowances, lease adjustments, and quality and location differentials.

Production Reporting

Operators (Reporters) must submit, according to various regulations, production reports if they operate a Federal or Indian onshore or offshore oil and gas lease or federally approved unit or communitization agreement. We use the ONRR financial accounting system to track minerals produced from Federal and Indian lands, from the point of production to the point of disposition or royalty determination and/or point of sale. The reporters use the following forms for production accounting and reporting:

Form MMS–4054, Oil and Gas Operations Report (OGOR). Reporters submit this form monthly for all production reporting for Outer Continental Shelf, Federal, and Indian leases. ONRR compares the production information with sales and royalty data that reporters submit on Form MMS–2014 to ensure that the latter reported and paid the proper royalties on the oil and gas production to ONRR. ONRR uses the information from OGOR parts A, B, and C to track all oil and gas from the point of production to the point of first sale, or other disposition.

Form MMS–4058, Production Allocation Schedule Report (PASR). Reporters submit this form monthly. The facility operators manage the facilities and measurement points where they commingle the production from an offshore Federal lease or metering point with production from other sources before they measure it for royalty determination. ONRR uses the data to determine if the payors reported reasonable sales.

We will request OMB approval to continue to collect this information. If ONRR does not collect this information, it would limit the Secretary's ability to discharge fiduciary duties and may also result in the loss of royalty payments. We protect the proprietary information that it receives and do not collect items of a sensitive nature. It is mandatory that the reporters submit Forms MMS–2014, MMS–4054, and MMS–4058.

Frequency: Monthly.

Estimated Number and Description of Respondents: 3,870 oil, gas, and geothermal reporters.

Estimated Annual Reporting and Recordkeeping ''Hour'' Burden: 337,933 hours.

We have not included in our estimates certain requirements that companies perform in the normal course of business, and that ONRR considers usual and customary. We display the estimated annual burden hours by CFR section and paragraph in the following chart.

BILLING CODE 4310–T2–P

Respondents' Estimated Annual Burden Hours

30 CFR Part 1210	Reporting and Recordkeeping Requirement	Hour Burden	Average Number of Annual Responses (lines of data)	Annual Burden Hours
30 CFR 1210—FORMS AND REPORTS				
Subpart B—Royalty Reports—Oil, Gas, and Geothermal Resources				
1210.52 (a) and (b)	**1210.52 What royalty reports must I submit?** You must submit a completed Form MMS–2014, Report of Sales and Royalty Remittance, to ONRR with: (a) All royalty payments; and (b) Rents on nonproducing leases, where specified in the lease.	**Form MMS-2014**		
		Electronic* (approximately 99 percent)		
		3 min. per line	4,688,216	234,411
		Manual* (approximately 1 percent)		
1210.53 (a), (b), and (c)	**1210.53 When are my royalty reports and payments due?** (a) Completed Forms MMS–2014 for royalty payments and the associated payments are due by the end of the month following the production month (see also §1218.50). (b) Completed Forms MMS–2014 for rental payments, where applicable, and the associated payments are due as specified by the lease terms (see also §1218.50). (c) You may submit reports and payments early.	7 min. per line	47,356	5,526
1210.54 (a), (b), and (c)	**1210.54 Must I submit this royalty report electronically?** (a) You must submit Form MMS–2014 electronically unless you qualify for an exception under §1210.55(a). (b) You must use one of the following electronic media types, unless ONRR instructs you differently * * * (c) Refer to our electronic reporting guidelines in the ONRR *Minerals Revenue Reporter Handbook*, for the most current reporting options, instructions, and security measures. The handbook may be found on our Internet Web site or you may call your ONRR customer service representative * * *			
	* * * * *			
	SUBTOTAL FOR ROYALTY REPORTING		**4,735,572**	**239,937**
Subpart C—Production Reports—Oil and Gas				

30 CFR Part 1210	Reporting and Recordkeeping Requirement	Hour Burden	Average Number of Annual Responses (lines of data)	Annual Burden Hours
1210.102 (a)(1)(i) and (ii)	**1210.102 What production reports must I submit?** (a) Form MMS–4054, Oil and Gas Operations Report. If you operate a Federal or Indian onshore or OCS oil and gas lease or federally approved unit or communitization agreement that contains one or more wells that are not permanently plugged or abandoned, you must submit Form MMS–4054 to ONRR: (1) You must submit Form MMS–4054 for each well for each calendar month, beginning with the month in which you complete drilling, unless: (i) You have only test production from a drilling well; or (ii) The ONRR tells you in writing to report differently.	Burden hours covered under 1210.104(a) and (b).		
1210.102 (a)(2)(i) and (ii)	(2) You must continue reporting until: (i) The Bureau of Land Management (BLM) and [Bureau of Safety and Environmental Enforcement] approves all wells as permanently plugged or abandoned or the lease or unit or communitization agreement is terminated; and (ii) You dispose of all inventory.			

30 CFR Part 1210	Reporting and Recordkeeping Requirement	Hour Burden	Average Number of Annual Responses (lines of data)	Annual Burden Hours
1210.102 (b)(1)	(b) Form MMS–4058, Production Allocation Schedule Report. If you operate an offshore facility measurement point (FMP) handling production from a Federal oil and gas lease or federally approved unit agreement that is commingled (with approval) with production from any other source prior to measurement for royalty determination, you must file Form MMS–4058. (1) You must submit Form MMS–4058 for each calendar month beginning with the month in which you first handle production covered by this section.	Burden hours covered under 1210.104(a) and (b).		
1210.102 (b)(2)(i)-(vi)	(2) Form MMS–4058 is not required whenever all of the following conditions are met: (i) All leases involved are Federal leases; (ii) All leases have the same fixed royalty rate; (iii) All leases are operated by the same operator; (iv) The facility measurement device is operated by the same person as the leases/agreements; (v) Production has not been previously measured for royalty determination; and (vi) The production is not subsequently commingled and measured for royalty determination at an FMP for which Form MMS–4058 is required under this part.			
1210.103 (a) and (b)	**1210.103 When are my production reports due?** (a) The ONRR must receive your completed Forms MMS–4054 and MMS–4058 by the 15th day of the second month following the month for which you are reporting. (b) A report is considered received when it is delivered to ONRR by 4 p.m. mountain time at the addresses specified in §1210.105. Reports received after 4 p.m. mountain time are considered received the following business day.	Burden hours covered under 1210.104(a) and (b).		

30 CFR Part 1210	Reporting and Recordkeeping Requirement	Hour Burden	Average Number of Annual Responses (lines of data)	Annual Burden Hours
1210.104 (a), (b), and (c)	**1210.104 Must I submit these production reports electronically?** (a) You must submit Forms MMS–4054 and MMS–4058 electronically unless you qualify for an exception under §1210.105. (b) You must use one of the following electronic media types, unless ONRR instructs you differently * * * (c) Refer to our electronic reporting guidelines in the ONRR *Minerals Production Reporter Handbook*, for the most current reporting options, instructions, and security measures. The handbook may be found on our Internet Web site or you may call your ONRR customer service representative * * * * * * * *	**Form MMS-4054 (OGOR)**		
		Electronic* (approximately 99 percent)		
		1 min. per line	5,688,962	94,816
		Manual* (approximately 1 percent)		
		3 min. per line	57,464	2,873
		TOTAL OGOR	**5,746,426**	**97,689**
		Form MMS-4058 (PASR)		
		Electronic* (approximately 99 percent)		
		1 min. per line	17,820	298
		Manual* (approximately 1 percent)		
		3 min. per line	180	9
		TOTAL PASR	**18,000**	**307**
Subpart D—Special-Purpose Forms and Reports—Oil, Gas, and Geothermal Resources				
1210.155	**1210.155 What reports must I submit for Federal onshore stripper oil properties?** (a) *General.* Operators who have been granted a reduced royalty rate by the Bureau of Land Management (BLM) under 43 CFR 3103.4–2 must submit Form MMS–4377, Stripper Royalty Rate Reduction Notification, under 43 CFR 3103.4–2(b)(3). * * * * *	Burden covered under OMB Control Number 1012-0005.		
SUBTOTAL FOR PRODUCTION REPORTING			**5,764,426**	**97,996**
PART 1212—RECORDS AND FILES MAINTENANCE				
Subpart B—Oil, Gas and OCS Sulphur—General				

30 CFR Part 1210	Reporting and Recordkeeping Requirement	Hour Burden	Average Number of Annual Responses (lines of data)	Annual Burden Hours
1212.50	**1212.50 Required recordkeeping and reports.** All records pertaining to offshore and onshore Federal and Indian oil and gas leases shall be maintained by a lessee, operator, revenue payor, or other person for 6 years after the records are generated unless the recordholder is notified, in writing, that records must be maintained for a longer period * * *. **[In accordance with 30 U.S.C. 1724(f), Federal oil and gas records must be maintained for 7 years from the date the obligation became due.]**	Burden hours covered under 1210.54(a), (b), and (c); and 1210.104(a) and (b).		
1212.51 (a) and (b)	(a) *Records.* Each lessee, operator, revenue payor, or other person shall make and retain accurate and complete records necessary to demonstrate that payments of rentals, royalties, net profit shares, and other payments related to offshore and onshore Federal and Indian oil and gas leases are in compliance with lease terms, regulations, and orders * * *. (b) Period for keeping records. Lessees, operators, revenue payors, or other persons required to keep records under this section shall maintain and preserve them for 6 years from the day on which the relevant transaction recorded occurred unless the Secretary notifies the record holder of an audit or investigation involving the records and that they must be maintained for a longer period * * *. **[In accordance with 30 U.S.C. 1724(f), Federal oil and gas records must be maintained for 7 years from the date the obligation became due.]**	Burden hours covered under 1210.54(a), (b), and (c); and 1210.104(a) and (b).		
TOTAL FOR ROYALTY AND PRODUCTION REPORTING			**10,499,998**	**337,933**

* ***Note:*** *ONRR considers each line of data as one response/report.*

Estimated Annual Reporting and Recordkeeping "Non-hour" Cost Burden: We have identified no "non-hour" cost burden associated with the collection of information.

Public Disclosure Statement: The PRA (44 U.S.C. 3501 *et seq.*) provides that an agency may not conduct or sponsor, and a person does not have to respond to, a collection of information unless it displays a currently valid OMB control number.

Comments: Section 3506(c)(2)(A) of the PRA requires each agency to "* * * provide 60-day notice in the **Federal Register** * * * and otherwise consult with members of the public and affected agencies concerning each proposed collection of information * * *." Agencies must specifically solicit comments to (a) evaluate whether the proposed collection of information is necessary for the agency to perform its

duties, including whether the information is useful; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) enhance the quality, usefulness, and clarity of the information that ONRR collects; and (d) minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

To comply with the public consultation process, we published a notice in the **Federal Register** on April 2, 2012 (77 FR 19704), announcing that we would submit this ICR to OMB for approval. The notice provided the required 60-day comment period. We received no unsolicited comments in response to the notice.

If you wish to comment in response to this notice, you may send your comments to the offices listed under the **ADDRESSES** section of this notice. OMB has up to 60 days to approve or disapprove the information collection, but they may respond after 30 days. Therefore, in order to ensure maximum consideration, OMB should receive public comments by November 15, 2012.

Public Comment Policy: We will post all comments, including names and addresses of respondents, at *www.regulations.gov.* 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 view, we cannot guarantee that we will be able to do so.

Information Collection Clearance Officer: Dave Alspach (202) 219–8526.

Dated: October 2, 2012.

Gregory J. Gould,

Director, Office of Natural Resources Revenue.

[FR Doc. 2012–25290 Filed 10–15–12; 8:45 am]

BILLING CODE 4310–T2–C

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–857]

Certain Reduced Folate Nutraceutical Products and L-Methylfolate Raw Ingredients Used Therein; Institution of Investigation Pursuant to United States Code

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on September 10, 2012, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of South Alabama Medical Science Foundation of Mobile, Alabama; Merck & Cie of Switzerland; and Pamlab LLC of Covington, Louisiana. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain reduced folate nutraceutical products and l-methylfolate raw ingredients used therein by reason of infringement of certain claims of U.S. Patent No. 5,997,915 (''the '915 patent''); U.S. Patent No. 6,673,381 (''the '381 patent''); U.S. Patent No. 7,172,778 (''the '778 patent''); and U.S. Patent No. 6,011,040 (''the '040 patent''). The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainants request that the Commission institute an investigation and, after the investigation, issue an exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Room 112, Washington, DC 20436, telephone (202) 205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: The Office of the Secretary, Docket Services Division, U.S. International Trade Commission, telephone (202) 205–1802.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2012).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on October 10, 2012, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain reduced folate nutraceutical products and l-methylfolate raw ingredients used therein that infringe one or more of claims 37, 39, 40, 47, 66, 67, 73, 76, 78–81, 83, 84, 86–89, 91, 92, 94–97, 99, 100, 110, 111, 113, 117, and 121 of the '915 patent; claims 22, 26, and 32–38 of the '381 patent; claims 1, 4–6, and 15 of the '778 patent; and claims 1–3, 5, 6, 8, 9, 11–15, and 19–22 of the '040 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

South Alabama Medical Science Foundation, 307 University Boulevard, PO Box U–1060, Mobile, AL 36688;

Merck & Cie, Weisshausmatte, 6460 Altdorf, Switzerland;

Pamlab LLC, 4099 Highway 190, Covington, LA 70433.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Gnosis SpA, Via Lavoratori Autobianchi 1, 20832 Desio (MB), Italy;

Gnosis Bioresearch SA, Via Lischedi, 4, 6592 Sant'Antonino, Switzerland;

Gnosis USA Inc., 160 North Main Street, Doylestown, PA 18901;

Macoven Pharmaceuticals LLC, 33219 Forest West Street, Magnolia, TX 77354.

(3) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission,

shall designate the presiding Administrative Law Judge.

The Office of Unfair Import Investigations will not participate as a party in this investigation.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d)–(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: October 10, 2012.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2012–25378 Filed 10–15–12; 8:45 am]

BILLING CODE 7020–02–P

JOINT BOARD FOR THE ENROLLMENT OF ACTUARIES

Renewal of Charter of Advisory Committee on Actuarial Examinations

AGENCY: Joint Board for the Enrollment of Actuaries.

ACTION: Notice of Renewal of Advisory Committee.

SUMMARY: The Joint Board for the Enrollment of Actuaries announces the renewal of the charter of the Advisory Committee on Actuarial Examinations.

FOR FURTHER INFORMATION CONTACT: Patrick McDonough, 202–622–8225.

SUPPLEMENTARY INFORMATION: The purpose of the Advisory Committee on Examinations (Advisory Committee) is to advise the Joint Board for the Enrollment of Actuaries (Joint Board) on examinations in actuarial mathematics and methodology. The Joint Board administers such examinations in discharging its statutory mandate to enroll individuals who wish to perform actuarial services with respect to pension plans subject to the Employee Retirement Income Security Act of 1974. The Advisory Committee's functions include but, are necessarily limited to (1) considering and recommending examination topics; (2) developing examination questions; (3) recommending proposed examinations and pass marks; and (4) as requested by the Joint Board, making recommendations relative to the examination program.

Dated: October 9, 2012.

David Ziegler,

Chairman, Joint Board for the Enrollment of Actuaries.

[FR Doc. 2012–25312 Filed 10–15–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0021]

Agency Information Collection Activities: Extension of a Currently Approved Collection; Comments Requested; Semi-Annual Progress Report for the Grants To Enhance Culturally and Linguistically Specific Services for Victims of Domestic Violence, Dating Violence, Sexual Assault, and Stalking

ACTION: 30-Day Notice.

The Department of Justice, Office on Violence Against Women (OVW) 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 of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register**, Volume 77, Number 157, page 48539 on August 14, 2012, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until November 15, 2012. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–7285.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Semi-Annual Progress Report for Grantees from Grants to Enhance Culturally and Linguistically Specific Services for Victims of Domestic Violence, Dating Violence, Sexual Assault, and Stalking Program (Culturally and Linguistically Specific Services Program).

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: 1122–0021. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes the approximately 50 grantees of the Culturally and Linguistically Specific Services Program. The program funds projects that promote the maintenance and replication of existing successful domestic violence, dating violence, sexual assault, and stalking community-based programs providing culturally and linguistically specific services and other resources. The program also supports the development of innovative culturally and linguistically specific

strategies and projects to enhance access to services and resources for victims of violence against women.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the approximately 50 respondents (Culturally and Linguistically Specific Services Program grantees) approximately one hour to complete a semi-annual progress report. The semi-annual progress report is divided into sections that pertain to the different types of activities in which grantees may engage. A Culturally and Linguistically Specific Services Program grantee will only be required to complete the sections of the form that pertain to its own specific activities.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the data collection forms is 100 hours, that is 50 grantees completing a form twice a year with an estimated completion time for the form being one hour.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Room 2E–508, Washington, DC 20530.

Jerri Murray,

Department Clearance Officer for PRA, United States Department of Justice.

[FR Doc. 2012–25349 Filed 10–15–12; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0001]

Agency Information Collection Activities; Extension of a Currently Approved Collection; Comments Requested: Certification of Compliance With the Statutory Eligibility Requirements of the Violence Against

Women Act as Amended for Applicants to the STOP (Services* Training* Officers* Prosecutors) Violence Against Women Formula Grant Program

ACTION: 30-day Notice.

The Department of Justice, Office on Violence Against Women (OVW) 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 of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 77, Number 157, page 48539 on August 14, 2012, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until November 15, 2012. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–3176.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Certification of Compliance with the Statutory Eligibility Requirements of the Violence Against Women Act as Amended for Applicants to the STOP Formula Grant Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: 1122–0001. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: The affected public includes STOP formula grantees (50 states, the District of Columbia and five territories (Guam, Puerto Rico, American Samoa, Virgin Islands, Northern Mariana Islands). The STOP Violence Against Women Formula Grant Program was authorized through the Violence Against Women Act of 1994 and reauthorized and amended by the Violence Against Women Act of 2000 and the Violence Against Women Act of 2005. The purpose of the STOP Formula Grant Program is to promote a coordinated, multi-disciplinary approach to improving the criminal justice system's response to violence against women. It envisions a partnership among law enforcement, prosecution, courts, and victim advocacy organizations to enhance victim safety and hold offenders accountable for their crimes of violence against women. The Department of Justice's Office on Violence Against Women (OVW) administers the STOP Formula Grant Program funds which must be distributed by STOP state administrators according to statutory formula (as amended by VAWA 2000 and VAWA 2005).

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the approximately 56 respondents (state administrators from the STOP Formula Grant Program) less than one hour to complete a Certification of Compliance with the Statutory Eligibility Requirements of the Violence Against Women Act, as Amended.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the Certification is less than 56 hours.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Room 2E–508, Washington, DC 20530.

Dated: October 10, 2012.

Jerri Murray,

Department Clearance Officer for PRA, United States Department of Justice.

[FR Doc. 2012–25348 Filed 10–15–12; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0022]

Agency Information Collection Activities; Extension of a Currently Approved Collection; Comments Requested: Semi-Annual Progress Report for the Sexual Assault Services Formula Grant Program

ACTION: 30-Day Notice.

The Department of Justice, Office on Violence Against Women (OVW) 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 of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 77, Number 157, page 48540 on August 14, 2012, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until November 15, 2012. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–7285.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Semi-Annual Progress Report for Grantees from the Semi-Annual Progress Report for the Sexual Assault Services Formula Grant Program (SASP).

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* 1122–0022. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes the approximately 606 administrators and subgrantees of the SASP. SASP grants support intervention, advocacy, accompaniment, support services, and related assistance for adult, youth, and child victims of sexual assault, family and household members of victims, and those collaterally affected by the sexual assault. The SASP supports the establishment, maintenance, and expansion of rape crisis centers and other programs and projects to assist those victimized by sexual assault. The grant funds are distributed by SASP state administrators to subgrantees as outlined under the provisions of the Violence Against Women Act of 2005.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the approximately 606 respondents (SASP administrators and subgrantees) approximately one hour to complete a semi-annual progress report. The semi-annual progress report is divided into sections that pertain to the different types of activities in which grantees may engage. A SASP subgrantee will only be required to complete the sections of the form that pertain to its own specific activities.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the data collection forms is 1,212 hours, that is 606 subgrantees completing a form twice a year with an estimated completion time for the form being one hour.

If Additional Information is Required Contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Room 2E–508, Washington, DC 20530.

Dated: October 11, 2012.

Jerri Murray,

Department Clearance Officer for PRA, United States Department of Justice.

[FR Doc. 2012–25375 Filed 10–15–12; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

Amended Notice of Lodging Proposed Consent Decree

This Notice amends and replaces the original notice published on October 10, 2012, 77 FR 61640. In accordance with Departmental Policy, 28 CFR 50.7, notice is hereby given that a proposed Consent Decree in *United States* v. *Snowden,* Civil Action No. 3:12-cv-04107-SRU, was lodged with the United States District Court for the District of Connecticut on October 2, 2012.

This proposed Consent Decree concerns a complaint filed by the United States against Guy B. Snowden, Diane P. Snowden, FCF Realty, LLC, and Falls Creek Farm, LLC, pursuant to sections 309(b), 309(d) and 404 of the Clean Water Act, 33 U.S.C. 1319(b), 1319(d) and 1344, to obtain injunctive relief and impose civil penalties against the Defendants for violating the Clean Water Act by discharging pollutants without a permit into waters of the United States. The proposed Consent Decree resolves these allegations by requiring the Defendants to restore the impacted areas and/or perform mitigation, and to pay a civil penalty. The proposed Consent Decree also calls for the Defendants to establish a conservation easement to preserve wetlands and associated upland habitat.

The Department of Justice will accept written comments relating to this proposed Consent Decree for thirty (30) days from the date of publication of this Notice. Please address comments to Joshua M. Levin, Senior Attorney, United States Department of Justice, Environment and Natural Resources Division, Environmental Defense Section, P.O. Box 7611, Washington, DC 20044, and refer to *United States* v. *Snowden,* DJ # 90–5–1–1–18622/1.

The proposed Consent Decree may be examined electronically at the Clerk's Office, United States District Court for the District of Connecticut. The Clerk's Office has three locations: Brien McMahon Federal Building, 915 Lafayette Boulevard, Bridgeport, CT 06604; Abraham Ribicoff Federal Building, 450 Main Street, Hartford, CT 06103; and Richard C. Lee Federal

Building, 141 Church Street, New Haven, CT 06510. In addition, the proposed Consent Decree may be examined electronically at *http://www.justice.gov/enrd/Consent_Decrees.html.*

Cherie L. Rogers,

Assistant Section Chief, Environmental Defense Section, Environment and Natural Resources Division.

[FR Doc. 2012–25323 Filed 10–15–12; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–NEW]

Agency Information Collection Activities; Proposed Collection; Comments Requested: FEL Out-of-Business Records

ACTION: 60-Day Notice.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), 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 of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until December 17, 2012. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Robin Little, Industry Records Branch at *NTC-IndustryRecordsBranch@atf.gov,* 244 Needy Road, Martinsburg, WV 25405.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Summary of Information Collection

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* FEL Out-of-Business Records.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: None. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for profit. Other: None.

Need for Collection

Federal explosives licensees (FELs) and permittees are required by 27 CFR 555.128 where an explosive materials business or operation is discontinued and succeeded by a new licensee or new permittee to reflect that fact in the records and deliver records to the successor or where discontinuance of the business or operation is absolute, deliver records to any ATF office located in the region in which the business or operation was located or to ATF Out of Business Records Center, 244 Needy Road, Martinsburg, WV 25405 within 30 days following the business or operation discontinuance. FELs and permittees are also required by 27 CFR 555.61 to furnish notification of the discontinuance or succession and submit their license or permit and any copies furnished with the license or permit to the Chief, Firearms and Explosives Licensing Center within 30 days following the discontinuance.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 200 respondents will take 30 minutes to package and deliver the records to ATF.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 100 annual total burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, Room 2E–508, 145 N Street NE., Washington, DC 20530.

Dated: October 10, 2012.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2012–25351 Filed 10–15–12; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

[OMB Number 1110–0026]

Agency Information Collection Activities; Existing Collection, Comments Requested: Federal Firearms Licensee (FFL) Enrollment/National Instant Criminal Background Check System (NICS) E-Check Enrollment Form, Federal Firearms Licensee (FFL) Officer/Employee Acknowledgment of Responsibilities Under the NICS Form

ACTION: 60 Day Notice.

The Department of Justice (DOJ), Federal Bureau of Investigation (FBI), Criminal Justice Information Services (CJIS) Division's National Instant Criminal Background Check System (NICS) Section 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 of 1995. The proposed information collection is published to obtain comments from the public and affected agencies.

Comments are encouraged and will be accepted for 60 days until December 17, 2012. This process is conducted in accordance with Title 5, Code of Federal Regulations (CFR), Section 1320.10.

If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Sherry L. Kuneff, Management and Program Analyst, Federal Bureau of Investigation, Criminal Justice Information Services (CJIS) Division, NICS Section, Module A–3, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306, or facsimile at (304) 625–7540.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's/component's estimate of the burden of the proposed collection of the 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 the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This information

(1) *Type of Information Collection:* Approval of an Existing Collection

Title of the Form:

Federal Firearms Licensee (FFL) Enrollment/National Instant Criminal Background Check System (NICS) E-Check Enrollment Form

Federal Firearms Licensee (FFL) Officer/Employee Acknowledgment of Responsibilities under the National Instant Criminal Background Check System (NICS) Form

(2) *Agency Form Number, if any, and the applicable component of the department sponsoring the collection:*

Form Number: 1110–0026.

Sponsor: Criminal Justice Information Services (CJIS) Division of the Federal Bureau of Investigation (FBI), Department of Justice (DOJ).

(3) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Any Federal Firearms Licensee (FFL) or State Point of Contact (POC) requesting access to conduct National Instant Criminal Background Check System (NICS) checks telephonically or by the Internet through the NICS E-Check.

Brief Abstract: The Brady Handgun Violence Prevention Act of 1993 required the United States Attorney General to establish a national instant criminal background check system that any FFL may contact, by telephone or by other electronic means, for information to be supplied immediately, on whether receipt of a firearm to a prospective purchaser would violate state or federal law. Information pertaining to licensees who may contact the NICS is being collected to manage and control access to the NICS and to the NICS E-Check, to ensure appropriate resources are available to support the NICS, and also to ensure the privacy and security of NICS information. *http://www.fbi.gov/programs/nics/index.htm.*

(4) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

It is estimated that 250 FFLs enroll with the NICS per month for a total of 3,000 enrollments per year. The average response time for reading the directions for the National Instant Criminal Background Check System (NICS) Federal Firearms Licensee (FFL) Enrollment/NICS E-Check Enrollment Form is estimated to be two minutes; time to complete the form is estimated to be three minutes; and the time it takes to assemble, mail, or fax the form to the FBI is estimated to be three minutes, for a total of eight minutes. The average hour burden for this specific form is 3,000 × 8 minutes/60 = 400 hours.

The Federal Firearms Licensee (FFL) Officer/Employee Acknowledgment of Responsibilities Form under the National Instant Criminal Background Check System (NICS) takes approximately three minutes to read the responsibilities and two minutes to complete the form, for a total of five minutes. The average hour burden for this specific form is 6,000 × 5 minutes/60 = 250 hours.

The letter mailed to each new FFL takes an additional two minutes to read which would be 3,000 × 2 minutes/60 = 100 hours.

The entire process of reading the letter and completing both forms would take 15 minutes per respondent. The average hour burden for completing both forms and reading the accompanying letter would be 3,000 × 15/60 = 750 hours.

(5) *An estimate of the total public burden (in hours) associated with the collection:*

The entire process of reading the letter and completing both forms would take 15 minutes per respondent. The average hour burden for completing both forms and reading the accompanying letter would be 3,000 × 15/60 = 750 hours.

If additional information is required, contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Room 2E–508, Washington, DC 20530.

Dated: October 10, 2012.

Jerri Murray,

Department Clearance Officer for PRA, United States Department of Justice.

[FR Doc. 2012–25347 Filed 10–15–12; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OMB Number 1121–0321]

Agency Information Collection Activities; Proposed Collection; Comments Requested: National Institute of Justice Compliance Testing Program

ACTION: 30-Day Notice.

The Department of Justice, Office of Justice Programs, National Institute of Justice (NIJ) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with review procedures of the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. If granted, the approval is valid for three years. This proposed information collection was previously published in the **Federal Register** Volume 77, Number 136, page 41799, on July 16 2012, allowing for a 60-day comment period. This process is conducted in accordance with 5 CFR 1320.10.

Comments are encouraged and should be directed to the National Institute of Justice, Office of Justice Programs, Department of Justice, Attention: Jamie Phillips, 810 7th St. NW., Washington, DC 20530. Comments will be accepted for 30 days until November 15, 2012.

All comments and suggestions, or questions regarding additional information, to include obtaining a copy of the proposed information collection instrument with instructions, should be directed to NIJ at the above address.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—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 agencies estimate of the burden of the proposed collection of information,

including the validity of the methodology and assumptions used;
—Enhance the quality, utility, and clarity of the information to be collected; and
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information

(1) Type of information collection: revision of a currently approved collection.

(2) The title of the form/collection: National Institute of Justice Compliance Testing Program (NIJ CTP). This collection consists of seven forms: NIJ CTP Applicant Agreement; NIJ CTP Authorized Representatives Notification; NIJ CTP Body Armor Build Sheet; NIJ CTP Body Armor Agreement; NIJ CTP Manufacturing Location Notification; NIJ CTP Multiple Listee Notification; NIJ Approved Laboratory Application and Agreement.

(3) Agency Form Number: None. Component Sponsoring Collection: National Institute of Justice, Office of Justice Programs, Department of Justice.

(4) Affected public who will be asked or required to respond, as well as a brief abstract. Primary: Applicants to the NIJ Compliance Testing Program and Testing Laboratories. Other: None. The purpose of the voluntary NIJ Compliance Testing Program (CTP) is to provide confidence that equipment used for law enforcement and corrections applications meets minimum published performance requirements. One type of equipment is ballistic body armor. Ballistic body armor designs that are determined to meet minimum requirements by NIJ and listed on the NIJ Compliant Products List are eligible for purchase with grant funding through the Ballistic Vest Partnership.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply: Total of 90 respondents estimated. *NIJ CTP Applicant Agreement:* Estimated 90 respondents at 1 hour each; *NIJ CTP Authorized Representatives Notification:* Estimated 90 respondents at 20 minutes each; *NIJ CTP Body Armor Build Sheet:* Estimated 60 respondents (estimated 300 responses) at 1 hour each; *NIJ CTP Body Armor Agreement:* Estimated 60 respondents (estimated 300 responses) at 20 minutes each; *NIJ CTP Manufacturing Location Notification:* Estimated 90 respondents (estimated 350 responses) at 20 minutes each; *NIJ CTP Listee Notification:* Estimated 90 respondents (estimated 350 responses) at 20 minutes each; *NIJ Approved Laboratory Application and Agreement:* Estimated 10 respondents at 1 hour each.

(6) An estimate of the total public burden (in hours) associated with the collection: The estimated total public burden associated with this information is 322 hours in the first year and 222 hours each subsequent year.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., 2E–508, Washington, DC 20530.

October 10, 2012.

Jerri Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2012–25352 Filed 10–15–12; 8:45 am]

BILLING CODE 4410–18–P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2012–10]

Extension of Comment Period: Resale Royalty Right

AGENCY: Copyright Office, Library of Congress.

ACTION: Extension of comment period.

SUMMARY: The Copyright Office is extending the period of public comment in response to its September 19, 2012 Notice of Inquiry requesting comments regarding issues relating to consideration of a federal resale royalty right.

DATES: Comments are due December 5, 2012.

ADDRESSES: All comments and reply comments shall be submitted electronically. A comment page containing a comment form is posted on the Office Web site at *http://www.copyright.gov/docs/resaleroyalty.* The Web site interface requires commenting parties to complete a form specifying name and organization, as applicable, and to upload comments as an attachment via a browser button. To meet accessibility standards, commenting parties must upload comments in a single file not to exceed six megabytes (MB) in one of the following formats: the Adobe Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The form and face of the comments must include both the name of the submitter and organization. The Office will post the comments publicly on the Office's Web site exactly as they are received, along with names and organizations. If electronic submission of comments is not feasible, please contact the Office at 202–707–8350 for special instructions.

FOR FURTHER INFORMATION CONTACT: Jason Okai, Counsel, Office of Policy and International Affairs, by email at *jokai@loc.gov* or by telephone at 202–707–9444.

SUPPLEMENTARY INFORMATION: On September 19, 2012, the Copyright Office published a Notice of Inquiry inviting public comments on consideration of a federal resale royalty right. Due to the number and complexity of the issues raised in that Notice, it appears that some stakeholders may need additional time to respond. In order to facilitate full and adequate public comment, the Office hereby extends the time for filing additional comments to December 5, 2012.

Dated: October 10, 2012.

Maria A. Pallante,

Register of Copyrights.

[FR Doc. 2012–25370 Filed 10–15–12; 8:45 am]

BILLING CODE 1410–30–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos.: 50–280 and 50–281; 50–338 and 50–339; NRC–2012–0241]

Virginia Electric and Power Company, Surry Power Station Units 1 and 2 and North Anna Power Station Units 1 and 2, Notice of Withdrawal of Application for Amendment to Facility Operating License

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment application; withdrawal.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) has granted the request of Virginia Electric and Power Company (the licensee) to withdraw its September 29, 2012, application for proposed amendment to Facility Operating License Nos. DPR–32 and DPR–37, NPF–4 and NPF–7 for Surry Power Station, Units 1 and 2, Surry County,

Virginia and North Anna Power Station, Units 1 and 2, Mineral, Virginia.

ADDRESSES: Please refer to Docket ID NRC–2012–0241 when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and are publicly available, using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0241. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents''* and then select ''*Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Dr. V. Sreenivas, Project Manager, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2597; email: *V.Sreenivas@nrc.gov.*

SUPPLEMENTARY INFORMATION: The proposed amendment would have revised the facility technical specifications pertaining to change the Emergency Action Levels (EALs) for North Anna Power Station (NAPS) and Surry Power Station (SPS). Several changes are proposed to incorporate lessons learned from the safety related breaker fire that occurred at NAPS on April 22, 2009 (Reference NRC Event Notification Report 45013). The proposed changes are briefly summarized as follows: (1) revise the definition of ''Affecting Safe Shutdown'' in the EAL Technical Basis Documents to specifically describe how this applies to NAPS and SPS; (2) revise applicable Hazards EALs to incorporate the intent of the revised definition for ''Affecting Safe Shutdown''; in addition, the main dam is added to the Initiating Condition (IC) for HA1 for NAPS and the low level intake structure is added to the IC for HA1 for SPS; (3) changing the IC for HA2 and HA3 to replace ''a safe shutdown area'' with ''any Table H–1 Area''; and (4) revise applicable System Malfunctions EAL to include a 15-minute threshold for RCS leaks.

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on February 21, 2012 (77 FR 10001). However, by letter dated September 27, 2012, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendment dated October 6, 2011, and the licensee's letter dated September 27, 2012, which withdrew the application for license amendment. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are available online in the NRC Library at *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's PDR reference staff by telephone at 1–800–397–4209, or 301–415–4737 or by email to *pdr.resource@nrc.gov.*

Dated at Rockville, Maryland, this 10th day of October, 2012.

For the Nuclear Regulatory Commission.

V. Sreenivas,

Project Manager, Plant Licensing Branch II–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2012–25379 Filed 10–15–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0236]

Biweekly Notice: Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations

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 or combined license, as applicable, 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 September 20, 2012 to October 3, 2012. The last biweekly notice was published on October 2, 2012 (77 FR 60146–60160).

Addresses: You may access information and comment submissions related to this document, which the NRC possesses and are publicly available, by searching on *http://www.regulations.gov* under Docket ID NRC–2012–0236. You may submit comments by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0236. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.
- *Fax comments to:* RADB at 301–492–3446.

For additional direction on accessing information and submitting comments, see ''Accessing Information and Submitting Comments'' in the *Supplementary Information* section of this document.

Supplementary Information:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2012–0236 when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and are publicly available, by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0236.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search,

select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* Documents may be viewed in ADAMS by performing a search on the document date and docket number.

- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2012–0236 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *http://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Combined 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 section 50.92 of Title 10 of the *Code of Federal Regulations* (10 CFR), 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.

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 or combined 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 NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. The NRC regulations are accessible electronically from the NRC Library on the NRC's Web site at *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, then any hearing held would take place before the issuance of any amendment.

All documents filed in the 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 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov*, or by telephone at 301–415–1677, to request (1) a digital identification (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 the 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 the 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 the Electronic Information Exchange System, users will be required to install a Web browser plug-in from the NRC's 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 the NRC guidance available on the NRC's 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 email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's 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 email at *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866 672–7640. 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 the 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. Requests for hearing, petitions for leave

to intervene, and motions for leave to file new or amended contentions that are filed after the 60-day deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the following three factors in 10 CFR 2.309(c)(1): (i) The information upon which the filing is based was not previously available; (ii) the information upon which the filing is based is materially different from information previously available; and (iii) the filing has been submitted in a timely fashion based on the availability of the subsequent information.

For further details with respect to this license amendment application, see the application for amendment which is available for public inspection at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC Library at *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's PDR Reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov*.

Carolina Power and Light Company, Docket Nos. 50–325 and 50–324, Brunswick Steam Electric Plant, Units 1 and 2, Brunswick County, North Carolina.

Date of amendment request: June 19, 2012.

Description of amendment request: The proposed license amendments would revise the Technical Specifications (TS) for the Brunswick Steam Electric Plant (BSEP), Units 1 and 2. The TS change proposes to extend the Completion Time (CT) of TS 3.8.1 Required Action D.4 for an inoperable diesel generator (DG). A commensurate change is also proposed to extend the maximum CT of TS 3.8.1 Required Actions C.3 and D.4. The licensee stated that it will add a supplemental alternating current power source (i.e., a supplemental diesel generator) with the capability to power any E-bus within one hour from the Station Blackout (SBO) event, and with the capacity to bring the affected unit to cold shutdown, to support this request.

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 DGs are safety related components which provide backup electrical power supply to the onsite emergency power distribution system. The proposed changes do not affect the design of the DGs, the operational characteristics or function of the DGs, the interfaces between the DGs and other plant systems, or the reliability of the DGs. The DGs are not accident initiators; the DGs are designed to mitigate the consequences of previously evaluated accidents including a loss of offsite power. Extending the CT for a single DG would not affect the previously evaluated accidents since the remaining DGs supporting the redundant ESF [engineered safety feature] systems would continue to be available to perform the accident mitigation functions. Thus, allowing a DG to be inoperable for an additional 7 days for performance of maintenance or testing does not increase the probability of a previously evaluated accident.

Deterministic and probabilistic risk assessments evaluated the effect of the proposed TS changes on the availability of an electrical power supply to the plant emergency safeguards features systems. These assessments concluded that the proposed TS changes do not involve a significant increase in the risk of power supply unavailability.

There is small incremental risk associated with continued operation for an additional 7 days with one DG inoperable; however, the calculated impact on risk provides risk metrics consistent with the acceptance guidelines contained in RG [Regulatory Guide] 1.177 and 1.174 (References 7.2.1 and 7.2.2). This risk is judged to be reasonably consistent with the risk associated with operations for 7 days with one DG inoperable as allowed by the current TS.

Specifically, the remaining operable DGs and paths are adequate to supply electrical power to the onsite emergency power distribution system. A DG is required to operate only if both offsite power sources fail and there is an event which requires operation of the plant engineered safety features such as a design basis accident. The probability of a design basis accident occurring during this period is low.

The consequences of previously evaluated accidents will remain the same during the proposed 14-day CT as during the current 7-day CT. The ability of the remaining TS required DG to mitigate the consequences of an accident will not be affected since no additional failures are postulated while equipment is inoperable within the TS CT. The standby AC [alternating current] power supply for each of the four safety-related load groups consists of one DG complete with its auxiliaries, which include the cooling water, starting air, lubrication, intake and exhaust, and fuel oil systems. The sizing of the DGs and the loads assigned among them is such that any combination of three out of four of these DGs is capable of shutting down the plant safely, maintaining the plant in a safe shutdown condition, and mitigating the consequences of accident conditions.

Thus this change does not involve a significant increase in the probability or consequences of a previously analyzed accident.

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 do not involve a change in the plant design, plant configuration, system operation, or procedures involved with the DGs. The proposed changes allow a DG to be inoperable for additional time. Equipment will be operated in the same configuration and manner that is currently allowed and designed for. The functional demands on credited equipment is unchanged. There are no new failure modes or mechanisms created due to plant operation for an extended period to perform DG maintenance or testing. Extended operation with an inoperable DG does not involve any modification in the operational limits or physical design of plant systems. There are no new accident precursors generated due to the extended CT.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

Currently, if an inoperable DG is not restored to operable status within 7 days, TS 3.8.1, Condition H, requires the unit to be in MODE 3 (i.e., HOT SHUTDOWN) within a CT of 12 hours, and to be in MODE 4 (i.e., COLD SHUTDOWN) within a CT of 36 hours. This TS Condition is entered on both units resulting in a dual-unit shutdown. The proposed Technical Specification changes will allow steady state plant operation at 100 percent power for an additional 7 days for performance of DG planned reliability improvements and preventive and corrective maintenance.

Deterministic and probabilistic risk assessments evaluated the effect of the proposed TS changes on the availability of an electrical power supply to the plant ESF systems. These assessments concluded that the proposed TS changes do not involve a significant increase in the risk of power supply unavailability.

The DGs continue to meet their design requirements; there is no reduction in capability or change in design configuration. The DG response to LOOP [loss of offsite power], LOCA [loss-of-coolant accident], SBO [station blackout], or fire is not changed by this proposed amendment; there is no change to the DG operating parameters. In the extended CT, as in the existing CT, the remaining operable DGs and paths are adequate to supply electrical power to the onsite emergency power distribution system. The proposed change does not alter a design basis or safety limit; therefore, it does not significantly reduce the margin of safety. The DGs will continue to operate per the existing design and regulatory requirements.

The proposed TS changes do not alter the plant design nor does it change the assumptions contained in the safety analyses. The standby AC power system is designed with sufficient redundancy such that a DG may be removed from service for maintenance or testing. The remaining DGs are capable of carrying sufficient electrical loads to satisfy the UFSAR [updated final safety analysis report] requirements for accident mitigation or unit safe shutdown. The proposed changes do not impact the redundancy or availability requirements of offsite power circuits or change the ability of the plant to cope with a SBO.

Therefore, based on the considerations given above, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: David T. Conley, Senior Counsel—Manager Legal Department, Progress Energy Service Company, LLC, Post Office Box 1551, Raleigh, NC 27602.

NRC Acting Branch Chief: Jessie Quichocho.

Carolina Power and Light Company, Docket Nos. 50–325 and 50–324, Brunswick Steam Electric Plant, Units 1 and 2, Brunswick County, North Carolina; Florida Power Corporation, et al., Docket No. 50–302, Crystal River Unit 3 Nuclear Generating Plant, Citrus County, Florida

Carolina Power & Light Company, et al., Docket No. 50–400, Shearon Harris Nuclear Power Plant, Unit 1, Wake and Chatham Counties, North Carolina; Carolina Power & Light Company, Docket No. 50–261, H. B. Robinson Steam Electric Plant, Unit 2, Darlington County, South Carolina

Date of amendment request: September 12, 2012.

Description of amendment request: The proposed license amendments would revise the Facility Operating Licenses for the Brunswick Steam Electric Plant, Units 1 and 2, H. B. Robinson Steam Electric Plant, Unit 2, Shearon Harris Nuclear Power Plant, Unit 1, and Crystal River Unit No. 3 Nuclear Generating Plant. The NRC issued license amendments, dated July 29, 2011, that approved the licensees' cyber security plan and associated implementation milestone schedule. Milestone 6 requires the identification, documentation, and implementation of cyber security controls for critical digital assets that could adversely impact the design function of physical security target set equipment by no later than December 31, 2012. The license amendment request would change the existing facility operating licenses for the Physical Protection/Security license condition for these plants to reference the change to an implementation schedule milestone and a proposed Revised Cyber Security Plan Implementation Schedule for the scope of Milestone 6.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change to the Cyber Security Plan Implementation Schedule is administrative in nature. This change does not alter accident analysis assumptions, add any initiators, or affect the function of plant systems or the manner in which systems are operated, maintained, modified, tested, or inspected. The proposed change does not require any plant modifications which affect the performance capability of the structures, systems, and components relied upon to mitigate the consequences of postulated accidents and has no impact on the probability or consequences of an accident previously evaluated.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change to the Cyber Security Plan Implementation Schedule is administrative in nature. This proposed change does not alter accident analysis assumptions, add any initiators, or affect the function of plant systems or the manner in which systems are operated, maintained, modified, tested, or inspected. The proposed change does not require any plant modifications which affect the performance capability of the structures, systems, and components relied upon to mitigate the consequences of postulated accidents and does not create the possibility of a new or different kind of accident from any accident previously evaluated.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

Plant safety margins are established through limiting conditions for operation, limiting safety system settings, and safety limits specified in the technical specifications. The proposed change to the Cyber Security Plan Implementation Schedule is administrative in nature. Because there is no change to these established safety margins as result of this change, the proposed change does not involve a significant reduction in a margin of safety.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, 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: Lara S. Nichols, Deputy General Counsel, Duke Energy Corporation, 550 South Tyron Street, Mail Code DEC45A, Charlotte, NC 28202.

NRC Acting Branch Chief: Jessie Quichocho.

Carolina Power and Light Company, Docket No. 50–261, H. B. Robinson Steam Electric Plant, Unit 2, (HBRSEP) Darlington County, South Carolina

Date of amendment request: August 6, 2012.

Description of amendment request: The proposed change would revise the Technical Specification (TS) requirements for inoperable snubbers by adding Limiting Condition for Operation (LCO) 3.0.8. The change is consistent with NRC approved Revision 4 to Technical Specification Task Force (TSTF) Standard Technical Specification Change Traveler, TSTF–372, ''Addition of LCO 3.0.8, Inoperability of Snubbers.''

The NRC staff issued a notice of availability of a model safety evaluation and model no significant hazards consideration (NSHC) determination for referencing in license amendment applications in the **Federal Register** on May 4, 2005 (70 FR 23252). The licensee affirmed the applicability of the model NSHC determination in its application dated August 6, 2012.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change allows a delay time for entering a supported system TS when the inoperability is due solely to an inoperable

snubber if risk is assessed and managed. The postulated seismic event requiring snubbers is a low-probability occurrence and the overall TS system safety function would still be available for the vast majority of anticipated challenges. Therefore, the probability of an accident previously evaluated is not significantly increased, if at all. The consequences of an accident while relying on allowance provided by proposed LCO 3.0.8 are no different than the consequences of an accident while relying on the TS required actions in effect without the allowance provided by proposed LCO 3.0.8. Therefore, the consequences of an accident previously evaluated are not significantly affected by this change. The addition of a requirement to assess and manage the risk introduced by this change will further minimize possible concerns.

Therefore, this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any previously evaluated?

Response: No.

The proposed change does not involve a physical alteration of the plant (no new or different type of equipment will be installed). Allowing delay times for entering supported system TS when inoperability is due solely to inoperable snubbers, if risk is assessed and managed, will not introduce new failure modes or effects and will not, in the absence of other unrelated failures, lead to an accident whose consequences exceed the consequences of accidents previously evaluated. The addition of a requirement to assess and manage the risk introduced by this change will further minimize possible concerns.

Thus, this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in the margin of safety?

Response: No.

The proposed change allows a delay time for entering a supported system TS when the inoperability is due solely to an inoperable snubber, if risk is assessed and managed. The postulated seismic event requiring snubbers is a low-probability occurrence and the overall TS system safety function would still be available for the vast majority of anticipated challenges. The risk impact of the proposed TS changes was assessed following the three-tiered approach recommended in RG [Regulatory Guide] 1.177. A bounding risk assessment was performed to justify the proposed TS changes. This application of LCO 3.0.8 is predicated upon the licensee's performance of a risk assessment and the management of plant risk. The net change to the margin of safety is insignificant.

Therefore, this change 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: David T. Conley, Manager—Senior Counsel—Legal Department, Progress Energy Service Company, LLC, Post Office Box 1551, Raleigh, North Carolina 27602.

NRC Acting Branch Chief: Jessie F. Quichocho.

Carolina Power & Light Company, Docket No. 50–261, H. B. Robinson Steam Electric Plant, Unit 2, (HBRSEP) Darlington County, South Carolina

Date of amendment request: August 29, 2012.

Description of amendment request: The proposed change combines two changes that affect the same Technical Specification (TS) sections into one license amendment. The first part proposes to implement revisions consistent with Technical Specification Task Force (TSTF)–510, Revision 2, ''Revision to Steam Generator (SG) Program Inspection Frequencies and Tube Sample Selection.'' The second part proposes to permanently revise TS 5.5.9 ''Steam Generator Program'' to exclude portions of the SG tube below the top of the SG tubesheet from periodic inspections by implementing the permanent alternate repair criteria ''H.*'' References 2, 3, 8, 23 and 32 referred to in the licensees analysis can be found in the license amendment request under ADAMS Accession No. ML12275A176.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The previously analyzed accidents are initiated by the failure of plant structures, systems, or components. The proposed change modifies steam generator tube inspection frequencies and tube selection consistent with TSTF–510 and excludes the lower portion of steam generator tubes from inspection by implementing the alternate repair criteria (H*) on a permanent basis and does not have a detrimental impact on the integrity of any plant structure, system, or component that initiates an analyzed event. The proposed change will not alter the operation of, or otherwise increase the failure probability of any plant equipment that initiates an analyzed accident.

Of the applicable accidents previously evaluated, the limiting transients with consideration to the proposed change to the SG tube inspection and repair criteria are the SG tube rupture (SGTR) event and the main steam line break (MSLB) postulated accident.

The proposed SG tube inspection frequency and sample selection criteria will continue to ensure that the SG tubes are inspected such that the probability of a SGTR is not increased. The consequences of a SGTR are bounded by the conservative assumptions in the design basis accident analysis. The proposed SG tube inspection frequency and sample selection criteria will not cause the consequences of a SGTR to exceed those assumptions.

With respect to the SGTR event, the required structural integrity margins of the SG tubes and the tube-to-tubesheet joint over the H* distance will be maintained. Tube rupture in tubes with cracks within the tubesheet is precluded by the constraint provided by the presence of the tubesheet and the tube-to-tubesheet joint. Tube burst cannot occur within the thickness of the tubesheet. The tube-to-tubesheet joint constraint results from the hydraulic expansion process, thermal expansion mismatch between the tube and tube sheet, and from the differential pressure between the primary and secondary side, and tube sheet rotation. The structural margins against burst, as discussed in Regulatory Guide [RG] 1.121, ''Bases for Plugging Degraded PWR [Pressurized-Water Reactor] Steam Generator Tubes'' (Reference 32) and [Nuclear Energy Institute] NEI 97–06, ''Steam Generator Program Guidelines,'' (Reference 8) are maintained for both normal and postulated accident conditions.

For the portion of the tube outside of the tubesheet, the proposed change also has no impact on the structural or leakage integrity. Therefore, the proposed change does not result in a significant increase in the probability of the occurrence of a SGTR accident.

At normal operating pressures, leakage from degradations below the proposed limited inspection depth is limited by the tube-to-tubesheet crevice. Consequently, negligible normal operating leakage is expected from degradation below the inspected depth within the tubesheet region. The consequences of an SGTR event are affected by the primary to secondary leakage flow during the event. However, primary to secondary leakage flow through a postulated tube that has been pulled out of the tubesheet is not affected by the proposed changes since the tubesheet enhances the tube integrity in the region of the hydraulic expansion by precluding tube deformation beyond its initial hydraulically expanded outside diameter. Therefore, the proposed change does not result in a significant increase in the consequences of an SGTR. In addition, the selected H* value envelopes the depth within the tubesheet required to prevent a tube pullout.

The probability of a MSLB event is unaffected by the potential failure of a SG tube as the failure of a tube is not an initiator for a MSLB event. Therefore the proposed SG tube inspection frequency and sample selection criteria and the structural integrity margins of the SG tubes and the tube-to-tubesheet joint over the H* distance do not increase the probability of a MSLB event.

The leak rate factor of 1.82 for HBRSEP, for a postulated MSLB, has been calculated as shown in References 2, 3 and 23. HBRSEP Unit No. 2 will apply the factor of 1.82 to the normal operating leakage associated with the tubesheet expansion region in the condition monitoring and operational assessment. Through application of the limited tube sheet inspection scope, the existing operating leakage limit provides assurance that excessive leakage (i.e., greater than accident analysis assumptions) will not occur.

When the TS operational leak rate limit of 75 [gallons per day] gpd or about 0.052 gallons per minute (gpm) through any one SG is multiplied by the MSLB leak rate factor applicable to HBRSEP Unit No. 2 of 1.82 (Table 9–7 in [Westinghouse Commercial Atomic Power Report] WCAP–17091–P, Reference 3) the maximum primary to secondary accident induced leak rate is less than 0.095 gpm and is bounded by the value of 0.11 gpm through the faulted SG used in the MSLB accident analyses. Since the existing limit on operational leakage continues to ensure that the MSLB assumed accident induced leakage will not be exceeded, the consequences of a MSLB accident are not increased.

For the condition monitoring assessment, the component of leakage from the prior cycle from below the H* distance will be multiplied by a factor of 1.82 and added to the total leakage from any other source and compared to the allowable accident induced leak rate. For the operational assessment, the difference in the leakage between the allowable leakage and the calculated accident induced leakage from sources other than the tubesheet expansion region will be divided by 1.82 and compared to the observed operational leakage.

Based on the above, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change modifies steam generator tube inspection frequencies and tube selection consistent with TSTF–510 and excludes the lower portion of steam generator tubes from inspection by implementing the alternate repair criteria (H*) on a permanent basis. The proposed change does not introduce any new equipment, create new failure modes for existing equipment, or create any new limiting single failures resulting from tube degradation. The proposed change does not affect the design of the SGs or their method of operation. In addition, the proposed change does not impact any other plant system or component. Plant operation will not be altered, and all safety functions will continue to perform as previously assumed in accident analyses.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the change involve a significant reduction in the margin of safety?

Response: No.

The SG tubes in pressurized water reactors are an integral part of the reactor coolant pressure boundary and, as such, are relied upon to maintain the primary system's pressure and inventory. As part of the reactor coolant pressure boundary, the SG tubes are unique in that they are also relied upon as a heat transfer surface between the primary and secondary systems such that residual heat can be removed from the primary system. In addition, the SG tubes also isolate the radioactive fission products in the primary coolant from the secondary system. In summary, the safety function of a SG is maintained by ensuring the integrity of its tubes. Steam generator tube integrity is a function of the design, environment, and the physical condition of the tube. The proposed change does not affect tube design or operating environment. The proposed change will continue to require monitoring of the physical condition of the SG tubes but will limit inspection within the tubesheet to the portion of the tube from the top of the tubesheet to a distance H* below the top of the tubesheet.

The proposed change modifies steam generator tube inspection frequencies and tube selection consistent with TSTF–510 and limits required inspection to the safety significant portion of the steam generator tubes. WCAP–17345, Rev. 2 (Reference 2) identifies the specific inspection depth (H*) below which any type of tube degradation is shown to have no impact on the performance criteria in NEI 97–06 Rev. 3, ''Steam Generator Program Guidelines'' (Reference 8) and TS 5.5.9, ''Steam Generator (SG) Program.'' Changes associated with inspection frequency and tube selection criteria are consistent with TSTF–510 and are based on recent industry experience and are more effective in managing the frequency of verification of tube integrity and sample selection than those required by current TSs.

The proposed change maintains the required structural margins of the SG tubes for both normal and accident conditions. Nuclear Energy Institute 97–06, ''Steam Generator Program Guidelines'' (Reference 8), and NRC Regulatory Guide 1.121 ''Bases for Plugging Degraded PWR Steam Generator Tubes'' (Reference 32), are used as the bases in the development of the limited tubesheet inspection depth methodology for determining that SG tube integrity considerations are maintained within acceptable limits. Regulatory Guide 1.121 describes a method acceptable to the NRC for meeting General Design Criteria (GDC) 14, ''Reactor Coolant Pressure Boundary,'' GDC 15, ''Reactor Coolant System Design,'' GDC 31, ''Fracture Prevention of Reactor Coolant Pressure Boundary,'' and GDC 32, ''Inspection of Reactor Coolant Pressure Boundary,'' by reducing the probability and consequences of a SGTR. Regulatory Guide 1.121 concludes that by determining the limiting safe conditions for tube wall degradation, the probability and consequences of a SGTR are reduced. This Regulatory Guide uses safety factors on loads for tube burst that are consistent with the requirements of Section III of the American Society of Mechanical Engineers (ASME) Code.

For axially oriented cracking located within the tubesheet, tube burst is precluded due to the presence of the tubesheet. For circumferentially oriented cracking, Westinghouse WCAP–17091–P, Rev. 0 (Reference 3) and WCAP–17345, Rev. 2 (Reference 2) define a length of degradation-free expanded tubing that provides the necessary resistance to tube pullout due to the pressure induced forces, with applicable safety factors applied. Application of the limited hot and cold leg tubesheet inspection criteria will preclude unacceptable primary to secondary leakage during all plant conditions. When the TS operational leak rate limit of 75 gpd or about 0.052 gpm through any one SG is multiplied by the MSLB leak rate factor applicable to HBRSEP Unit No. 2 of 1.82 (Table 9–7 in WCAP–17091–P (Reference 3) the maximum primary to secondary accident induced leak rate is less than 0.095 gpm and is bounded by the value of 0.11 gpm through the faulted SG used in the MSLB accident analyses.

Therefore, the proposed change does not involve a significant reduction in any margin of safety.

The NRC staff has reviewed the license'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: David T. Conley, Manager—Senior Counsel—Legal Department, Progress Energy Service Company, LLC, Post Office Box 1551, Raleigh, North Carolina 27602.

NRC Acting Branch Chief: Jessie F. Quichocho.

Dominion Energy Kewaunee, Inc., Docket No. 50–305, Kewaunee Power Station (KPS), Kewaunee County, Wisconsin

Date of amendment request: July 30, 2012.

Description of amendment request: The proposed amendment would modify KPS Technical Specifications requirements regarding steam generator tube inspections and reporting as described in Technical Specification Task Force (TSTF)–510, Revision 2, ''Revision to Steam Generator Program Inspection Frequencies and Tube Sample Selection.''

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of any accident previously evaluated?

Response: No.

The proposed change revises the Steam Generator (SG) Program to modify the frequency of verification of SG tube integrity and SG tube sample selection. A steam generator tube rupture (SGTR) event is one of the design basis accidents that are analyzed as part of a plant's licensing basis. The proposed SG tube inspection frequency and sample selection criteria will continue to ensure that the SG tubes are inspected such that the probability of a SGTR is not increased. The consequences of a SGTR are bounded by the conservative assumptions in the design basis accident analysis. The proposed change will not cause the consequences of a SGTR to exceed those assumptions.

Therefore, it is concluded that this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes to the Steam Generator Program will not introduce any adverse changes to the plant design basis or postulated accidents resulting from potential tube degradation. The proposed change does not affect the design of the SGs or their method of operation. In addition, the proposed change does not impact any other plant system or component.

Therefore, it is concluded that this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in the margin of safety?

Response: No.

The SG tubes in pressurized water reactors are an integral part of the reactor coolant pressure boundary and, as such, are relied upon to maintain the primary system's pressure and inventory. As part of the reactor coolant pressure boundary, the SG tubes are unique in that they are also relied upon as a heat transfer surface between the primary and secondary systems such that residual heat can be removed from the primary system. In addition, the SG tubes also isolate the radioactive fission products in the primary coolant from the secondary system. In summary, the safety function of a SG is maintained by ensuring the integrity of its tubes.

Steam generator tube integrity is a function of the design, environment, and the physical condition of the tube. The proposed change does not affect tube design or operating environment. The proposed change will continue to require monitoring of the physical condition of the SG tubes such that there will not be a reduction in the margin of safety compared to the current requirements.

Therefore, it is concluded that the proposed change 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: Lillian M. Cuoco, Senior Counsel, Dominion Resources Services, Inc., Counsel for Dominion Energy Kewaunee, Inc., 120 Tredegar Street, Richmond, VA 23219.

NRC Acting Branch Chief: Istvan Frankl.

Entergy Nuclear Operations, Inc., Docket No 50–286, Indian Point Nuclear Generating Unit 3, Westchester County, New York

Date of amendment request: August 14, 2012.

Description of amendment request: The proposed amendment would revise Technical Specification 3.5.4, ''Refueling Water Storage Tank,'' such that the non-seismically qualified piping of the spent fuel pool purification system may be connected to the refueling water storage tank (RWST) seismic piping by manual operation of a RWST seismically qualified boundary valve under administrative controls for a limited period of time (i.e., 14 days per fuel cycle for filtration for removal of suspended solids from the RWST water). This change will only be applicable until Refueling Outage 18 (Spring 2015) ends.

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 use of the SFP [spent fuel pool] Purification Loop to re-circulate the RWST does not involve any changes or create any new interfaces with the reactor coolant system or main steam system piping. Therefore, the connection of the SFP Purification Loop to the RWST would not affect the probability of these accidents occurring. The SFP Purification Loop is not credited for safe shutdown of the plant or accident mitigation. Administrative controls ensure that the SFP Purification Loop can be isolated as necessary in sufficient time to assure that the RWST volume will be adequate to perform the safety function as designed. Since the RWST will continue to perform its safety function and overall system performance is not affected, the consequences of the accident are not increased.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The design of the RWST and the SFP Purification Loop to allow recirculation and purification has not been altered. Procedures for the operation of the plant have not been revised to create the possibility of a new or different type of accident. Contingent upon manual operator action, a SFP Purification Loop line break will not result in a loss of the RWST safety function. Similarly, an active or passive failure in the SFP Purification Loop will not be significantly different whether aligned to the SFP or the RWST.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The SFP Purification Loop is not credited for safe shutdown of the plant or accident mitigation. Adequate RWST volume will be maximized prior to purification and timely operator action can be taken to isolate the non seismic system from the RWST to assure it can perform its function. This will result in no significant reduction in the margin of safety.

Therefore, the proposed change does not significantly reduce the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. William C. Dennis, Assistant General Counsel, Entergy Nuclear Operations, Inc., 440 Hamilton Avenue, White Plains, NY 10601.

NRC Branch Chief: George Wilson.

Entergy Nuclear Operations, Inc., Docket No. 50–286, Indian Point Nuclear Generating Unit 3, Westchester County, New York

Date of amendment request: August 14, 2012.

Description of amendment request: The amendment changes the licensing basis regarding the emergency diesel generator (EDG) fuel oil storage requirements. The current licensing basis, which requires sufficient EDG fuel oil to operate two EDGs at minimum safeguards for seven days, will be revised to provide sufficient EDG fuel oil to operate three EDGs at modified rated capacity for seven days. The Conditions, Required Actions, and Completion Times of Technical Specification (TS) 3.8.3, ''Diesel Fuel Oil, and Starting Air,'' will be modified

to be more consistent with the Nuclear Regulatory Commission's improved Standard Technical Specifications. Finally, TS 3.8.3 will be modified to relocate specific numerical values for EDG fuel oil storage requirements from the TSs to the TS Bases in accordance with TS Task Force (TSTF) 501 Revision 1.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change relocates the volume of diesel fuel oil required to support 7 day operation of the onsite diesel generators to licensee control, revises the action statement to reflect the volume equivalent to a 6 day supply and locates the volume in the TS Bases under licensee control, consolidates surveillance requirements and recalculates the fuel oil volume required for the EDG. The revised specific volume of fuel oil equivalent to a 7 and 6 day supply is calculated consistent with the NRC approved methodology described in Regulatory Guide 1.137, Revision 1, ''Fuel Oil Systems for Standby Diesel Generators'' and ANSI N195–1976, ''Fuel Oil Systems for Standby Diesel Generators.'' Because the requirement to maintain a 7 day supply of diesel fuel oil is not changed and is revised to be more consistent with the assumptions in the accident analyses, the consolidated surveillances are more conservative, and the actions taken when the volume of fuel oil is less than a 6 day supply have not changed, neither the probability or the consequences of any accident previously evaluated will be affected.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The change does not involve a physical alteration of the plant (i.e., no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. The change does not alter assumptions made in the safety analysis but ensures that the diesel generator operates as assumed in the accident analysis. The proposed change is consistent with the safety analysis assumptions.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change relocates the volume of diesel fuel oil required to support 7 day operation of the onsite diesel generators, revises the action statement to reflect the volume equivalent to a 6 day supply, locates the volume in the TS Bases under licensee control, consolidates surveillance requirements and recalculates the fuel oil volume required for the EDG. Although the bases for the existing limits on diesel fuel oil are changed, no change is made to the accident analysis assumptions and no margin of safety is reduced as part of this change.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. William C. Dennis, Assistant General Counsel, Entergy Nuclear Operations, Inc., 440 Hamilton Avenue, White Plains, NY 10601.

NRC Branch Chief: George Wilson.

South Carolina Electric and Gas Docket Nos.: 52–027 and 52–028, Virgil C. Summer Nuclear Station (VCSNS) Units 2 and 3, Fairfield County, South Carolina

Date of amendment request: August 29, 2012.

Description of amendment request: The proposed change would amend Combined License Nos.: NPF–93 and NPF–94 for Virgil C. Summer Nuclear Station (VCSNS) Units 2 and 3, respectively, by adding four non-Class 1E containment electrical penetration assemblies (EPAs). Containment EPAs are a passive extension of containment which provide the passage of the electric conductors through a single aperture in the nuclear containment structure, while providing a pressure barrier between the inside and the outside of the containment structure.

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 additional containment EPAs are a passive extension of containment and provide a pathway for communication [sic, passage] of non-Class 1E electrical signals [sic, conductors] between the Auxiliary Building and Containment. The proposed containment electrical penetration assemblies are similar in form, fit and function to the current non-Class 1E containment electrical penetration assemblies. The maximum allowable leakage rate allowed by Technical Specifications is also unchanged. The new EPAs will meet the same design function as current EPAs; therefore, the additional penetrations do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed containment electrical penetration assemblies are similar in form, fit, and function to the current non-Class 1E containment electrical penetration assemblies. The new EPAs will meet the same design function as current EPAs. Because the new EPAs are virtually identical in design and function to the current EPAs, no new type of failure modes exist.

Therefore, the proposed change will not create the possibility of a new or different kind of accident.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed containment electrical penetration assemblies are similar in form, fit and function to the current non-Class 1E containment electrical penetration assemblies. The additional containment electrical penetration assemblies are an engineered passive extension of containment, and, therefore, do not affect containment or its ability to perform its design function. The addition of the new EPAs does not exceed or alter a design basis or safety limit and, therefore, does not significantly reduce the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Ms. Kathryn M. Sutton, Morgan, Lewis & Bockius LLC, 1111 Pennsylvania Avenue NW., Washington, DC 20004–2514.

NRC Branch Chief: Mark E. Tonacci.

Virginia Electric and Power Company, Docket Nos. 50–280 and 50–281, Surry Power Station, Units 1 and 2, Surry County, Virginia

Date of amendment request: July 31, 2012.

Description of amendment request: The proposed amendment would modify the Technical Specifications requirements regarding steam generator tube inspections and reporting as described in TSTF–510, Revision 2, ''Revision to Steam Generator Program Inspection Frequencies and Tube Sample Selection.''

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change revises the Steam Generator (SG) Program to modify the frequency of verification of SG tube integrity and SG tube sample selection. A steam generator tube rupture (SGTR) event is one of the design basis accidents that are analyzed as part of a plant's licensing basis. The proposed SG tube inspection frequency and sample selection criteria will continue to ensure that the SG tubes are inspected such that the probability of a SGTR is not increased. The consequences of a SGTR are bounded by the conservative assumptions in the design basis accident analysis. The proposed change will not cause the consequences of a SGTR to exceed those assumptions. The proposed change to reporting requirements and clarifications of the existing requirements have no affect on the probability or consequences of SGTR.

Therefore, it is concluded that this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes to the Steam Generator Program will not introduce any adverse changes to the plant design basis or postulated accidents resulting from potential tube degradation. The proposed change does not affect the design of the SGs or their method of operation. In addition, the proposed change does not impact any other plant system or component.

Therefore, it is concluded that this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The SG tubes in pressurized water reactors are an integral part of the reactor coolant pressure boundary and, as such, are relied upon to maintain the primary system's pressure and inventory. As part of the reactor coolant pressure boundary, the SG tubes are unique in that they are also relied upon as a heat transfer surface between the primary and secondary systems such that residual heat can be removed from the primary system. In addition, the SG tubes also isolate the radioactive fission products in the primary coolant from the secondary system. In summary, the safety function of a SG is maintained by ensuring the integrity of its tubes.

Steam generator tube integrity is a function of the design, environment, and the physical condition of the tube. The proposed change does not *affect* tube design or operating environment. The proposed change will continue to require monitoring of the physical condition of the SG tubes such that there will not be a reduction in the margin of safety compared to the current requirements.

Therefore, it is concluded that the proposed change does not involve a significant reduction in a margin of safety. Based on the above, Dominion concludes that the proposed change presents no significant hazards consideration under the standards set forth in 10 CFR 50.92(c), and, accordingly, a finding of ''no significant hazards consideration'' is justified. 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: Lillian M. Cuoco, Senior Counsel, Dominion Resources Services, Inc., 120 Tredegar St., RS–2, Richmond, VA 23219.

NRC Branch Chief: Robert J. Pascarelli.

Notice of Issuance of Amendments to Facility Operating Licenses and Combined Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or combined license, as applicable, 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 NRC's Public Document Room (PDR), located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through the Agencywide Documents Access and Management System (ADAMS) in the NRC Library at *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's Reference staff at 1–800–397–4209, 301–415–4737 or by email to *pdr.resource@nrc.gov.*

Dominion Nuclear Connecticut, Inc., Docket No. 50–423, Millstone Power Station, Unit 3, New London County, Connecticut

Date of amendment request: November 17, 2011.

Description of amendment request: The proposed amendment would add Optimized ZIRLO™ as an allowable fuel rod cladding material and add the Westinghouse topical report on Optimized ZIRLO™ to the Millstone Power Station, Unit 3 Technical Specifications. In addition, a typographical error would be corrected.

Date of issuance: September 24, 2012.

Effective date: As of the date of issuance, and shall be implemented within 60 days. *Amendment No.:* 253.

Renewed Facility Operating License No. NPF–69: Amendment revised the License and Technical Specifications.

Date of initial notice in **Federal Register**: May 15, 2012 (77 FR 28629).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 24, 2012.

No significant hazards consideration comments received: No.

Dominion Nuclear Connecticut, Inc., Docket No. 50–423, Millstone Power Station, Unit 3, New London County, Connecticut

Date of amendment request: July 23, 2012.

Description of amendment request: The proposed amendment would conform the Millstone Power Station Unit 3 (MPS3) licenses to reflect a name change for Central Vermont Public Service Corporation (CVPS) resulting

from a subsequent restructuring in which CVPS will be consolidated with Gaz Métro's other electric utility subsidiary in Vermont, Green Mountain Power Corporation.

Date of issuance: October 3, 2012.

Effective date: As of the date of issuance, and shall be implemented within 30 days. *Amendment No.:* 254.

Renewed Facility Operating License No. NPF–49: Amendment revised the License.

Date of initial notice in **Federal Register**: July 20, 2012 (77 FR 42768).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 21, 2012.

No significant hazards consideration comments received: No.

Duke Energy Carolinas, LLC, Docket Nos. 50–369 and 50–370, McGuire Nuclear Station, Units 1 and 2, Mecklenburg County, North Carolina

Date of application for amendments: September 26, 2011, as supplemented April 16, 2012.

Brief description of amendments: The amendments revised the Technical Specifications (TSs) to incorporate aspects of NUREG–1431, ''Standard Technical Specifications—Westinghouse [Electric Company] Plants,'' STS 3.8.3, ''Diesel Fuel Oil, Lube Oil, and Starting Air,'' Condition E, regarding Diesel Generator starting air receiver pressure limits.

Date of issuance: September 28, 2012.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance.

Amendment Nos.: Unit 1—267 and Unit 2—247.

Renewed Facility Operating License Nos. NPF–9 and NPF–17: Amendments revised the licenses and the technical specifications.

Date of initial notice in **Federal Register**: May 29, 2012 (77 FR 31659).

The supplement dated April 16, 2012, 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.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated September 28, 2012.

No significant hazards consideration comments received: No.

Duke Energy Carolinas, LLC, Docket Nos. 50–369 and 50–370, McGuire Nuclear Station, Units 1 and 2, Mecklenburg County, North Carolina

Date of application for amendments: December 5, 2011.

Brief description of amendments: The amendments revised Technical Specification (TS) 3.3.1, Table 3.3.1–1, ''Reactor Trip System Instrumentation,'' Function 16(e) to replace the phrase ''Turbine Impulse Pressure'' with ''Turbine Inlet Pressure.''

Date of issuance: October 1, 2012.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance.

Amendment Nos.: Unit 1—268 and Unit 2—248.

Renewed Facility Operating License Nos. NPF–9 and NPF–17: Amendments revised the licenses and the technical specifications.

Date of initial notice in **Federal Register**: August 9, 2012 (77 FR 47677).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated October 1, 2012.

No significant hazards consideration comments received: No.

Duke Energy Carolinas, LLC, Docket No. 50–269, Oconee Nuclear Station, Unit 1, Oconee County, South Carolina

Date of application of amendments: April 3, 2012

Brief description of amendments: The amendment revised the Technical Specifications related to the integrated leak rate test of the reactor containment building.

Date of Issuance: October 1, 2012.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance.

Amendment No.: 381.

Renewed Facility Operating License No. DPR–38: Amendment revised the license and the technical specifications.

Date of initial notice in **Federal Register**: July 10, 2012, 77 FR 40651.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated October 1, 2012.

No significant hazards consideration comments received: No.

Entergy Gulf States Louisiana, LLC, and Entergy Operations, Inc., Docket No. 50–458, River Bend Station, Unit 1 (RBS), West Feliciana Parish, Louisiana

Date of amendment request: September 12, 2011, as supplemented by letters dated October 13, 2011, March 22, 2012, and April 3, 2012.

Brief description of amendment: The amendment approved a change to the site Emergency Plan to relocate the existing backup emergency operations facility for RBS from its current location at the Entergy Operations-Baton Rouge Division Office, located at 1509 Government Street in Baton Rouge, Louisiana, approximately 23 miles southeast of RBS, to the Entergy Customer Service Center, located at 5564 Essen Lane in Baton Rouge, Louisiana, approximately 28 miles southeast of RBS.

Date of issuance: September 24, 2012.

Effective date: As of the date of issuance and shall be implemented 60 days from the date of issuance.

Amendment No.: 175.

Facility Operating License No. NPF–47: The amendment revised the RBS Emergency Plan.

Date of initial notice in **Federal Register**: December 27, 2011 (76 FR 80975). The supplemental letters dated October 13, 2011, March 22, 2012, and April 3, 2012, 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 September 24, 2012.

No significant hazards consideration comments received: No.

Entergy Nuclear Operations, Inc., Docket No. 50–333, James A. FitzPatrick Nuclear Power Plant, Oswego County, New York

Date of application for amendment: August 16, 2011, as supplemented by letters dated March 30, June 13, August 1, August 16, and September 14, 2012.

Brief description of amendment: The amendment revises the James A. FitzPatrick's (JAF's) current licensing basis, in the Updated Final Safety Analysis Report, to support installation of new reserve station service transformers (RSST) with on-load tap changers (OLTC). The new RSSTs with OLTCs will compensate for the wider range of offsite power voltage variations so that acceptable voltages at the safety-related equipment will be better maintained. The new RSSTs provided with OLTCs would facilitate operations in the automatic mode.

The OLTCs are sub-components of two new RSSTs that will be installed at JAF during the refueling outage scheduled for September 2012.

Date of issuance: September 26, 2012.

Effective date: As of the date of issuance, and shall be implemented

within 90 days The implementation of the amendment shall include revision of the Updated Final Safety Analysis Report as described in the licensee's application for this amendment.

Amendment No.: 302.

Renewed Facility Operating License No. DPR–59: The amendment revised the License and the Updated Final Safety Analysis Report.

Date of initial notice in **Federal Register**: November 15, 2011 (76 FR 70768).

The supplements dated March 30, June 13, August 1, August 16, and September 14, 2012 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 September 26, 2012.

No significant hazards consideration comments received: No.

FirstEnergy Nuclear Operating Company, Docket Nos. 50–334 and 50–412, Beaver Valley Power Station (BVPS), Units 1 and 2, Beaver County, Pennsylvania; Docket No. 50–346, Davis-Besse Nuclear Power Station (DBNPS), Unit 1, Ottawa County, Ohio; Docket No. 50–440, Perry Nuclear Power Plant (PNPP), Unit 1, Lake County, Ohio

Date of application for amendments: September 20, 2011, as supplemented by letter dated June 21, 2012.

Brief description of amendments: The proposed amendments would change the licenses of BVPS, Units 1 and 2, DBNPS, and PNPP to reflect the name change of an owner licensee from ''FirstEnergy Nuclear Generation Corp.'' to ''FirstEnergy Nuclear Generation, LLC.'' The proposed amendment is administrative in nature. The proposed amendment will also correct errors regarding the name of FirstEnergy Nuclear Generation Corp in the DBNPS and PNNP Facility Operating Licenses.

Date of issuance: October 2, 2012.

Effective date: At date of issuance.

Amendment Nos.: No. 290 to Facility Operating License No. DPR–66 and No. 177 to Facility Operating License No. NPF–73 for BVPS, Units 1 and 2, respectively, and No. 286 to Facility Operating License No. NPF–3 for DBNPS, and No. 161 to Facility Operating License No. NPF–58 for PNPP.

Facility Operating License Nos. DPR–66, NPF–73, NPF–3, and NPF–58: The amendments revised the Facility Operating Licenses.

Date of initial notice in **Federal Register**: October 18, 2011 (76 FR 64391).

The supplemental letter dated June 21, 2012, 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 finding of no significant hazards consideration determination published in the **Federal Register**.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated October 2, 2012.

No significant hazards consideration comments received: No.

Florida Power and Light Company, et al., Docket Nos. 50–389, St. Lucie Plant, Unit 2, St. Lucie County, Florida.

Date of application for amendment: February 25, 2011, as supplemented by the letters dated November 4 and December 8, 2011, and April 30 and May 4 and 7, 2012.

Brief description of amendment: This amendment raises the maximum fuel enrichment for fresh fuel storage from a maximum of 4.5 weight percent uranium-235 to a maximum lattice averaged value of 4.6 weight percent uranium-235. The Technical Specification changes associated with fuel stored in the spent fuel pool include increasing the maximum initial enrichment from 4.5 weight percent uranium-235 to a maximum planar average initial enrichment of 4.6 weight percent uranium-235, credit for empty storage locations, credit for use of METAMIC™ inserts, credit for installation of full-length full-strength, five-fingered control element assemblies, and definition of three special configurations referred to in the nuclear criticality safety analysis as inspection and maintenance configurations.

Date of issuance: September 18, 2012.

Effective date: This license amendment is effective as of its date of issuance and shall be implemented within 60 days.

Amendment No: 162.

Renewed Facility Operating License No. NPF–16: Amendment revised the Operating License and the Technical Specifications.

Date of initial notice in **Federal Register**: September 1, 2011 (76 FR 54503).

The supplemental letters provided additional information that clarified the application and did not expand the scope of the application as originally noticed and published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 18, 2012.

No significant hazards consideration comments received: No.

Florida Power and Light Company, et al., Docket Nos. 50–389, St. Lucie Plant, Unit 2, St. Lucie County, Florida.

Date of application for amendment: February 25, 2011 as supplemented by letters dated February 25, May 24, July 22, August 18 (three letters), August 25 (three letters), August 29, September 2, September 8 (two letters), September 22, October 5, October 10, October 12 (two letters), October 31, November 2, November 3, November 4, November 7, November 14 (three letters), November 23 (three letters), December 8, December 14, December 20, December 27, December 29, 2011, January 14, 2012 (two letters), January 18 (two letters), January 21 (two letters), February 29, March 6 (two letters), March 8, March 15, March 16, March 17 (two letters), March 25, March 31 (two letters), April 5 (two letters), April 6, April 10, April 19 (seven letters), April 30, May 4, May 7, May 18, and July 23, 2012.

Brief description of amendments: The proposed amendments would increase the licensed core power level for St. Lucie Unit 2 from 2070 megawatts thermal (MWt) to 3020 MWt. This represents a net increase in the core thermal power of approximately 11.85 percent, including a 10-percent power uprate and a 1.7 percent measurement uncertainty recapture, over the current licensed thermal power level and is defined as an extended power uprate. The proposed amendments would change the renewed facility operating license and the technical specifications (TSs) to support operation at the increased core thermal power level, including changes to the maximum licensed reactor core thermal power, reactor core safety limits, and reactor protection system and engineered safety feature actuation system limiting safety system settings. Additional TS changes include reactor coolant system heatup and cooldown limitations, accumulator and refueling water storage tank boron concentrations, main steam safety valve lift settings, emergency diesel generator fuel storage and core operating limits report references. A complete list of the proposed TS changes and the licensee's basis for change can be found in Attachment 1 of the licensee's application (ADAMS Accession No. ML110730116).

Date of issuance: September 24, 2012.

Effective date: This license amendment is effective as of its date of issuance and shall be implemented within 60 days.

Amendment No.: 163.

Renewed Facility Operating License No. NPF–16: Amendment revised the Operating License and the Technical Specifications.

Date of initial notice in **Federal Register**: September 1, 2011 (76 FR 54503).

The supplemental letters provided additional information that clarified the application and did not expand the scope of the application as originally noticed and published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 24, 2012.

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: September 16, 2011, as supplemented by letters dated May 2, May 24, and September 17, 2012.

Brief description of amendment: The amendment revised the Cooper Nuclear Station Technical Specifications (TS) and Operating License to implement a 24-month fuel cycle and adopt TS Task Force (TSTF) Traveler TSTF–493, Revision 4, ''Clarify Application of Setpoint Methodology for LSSS [Limiting Safety System Settings] Functions,'' Option A. Specifically, the amendment revised certain TS Surveillance Requirement frequencies that are specified as ''18 months'' by changing them to ''24 months'' in accordance with the guidance provided in NRC Generic Letter 91–04, ''Changes in Technical Specification Surveillance Intervals to Accommodate a 24-Month Fuel Cycle.''

Date of issuance: September 28, 2012.

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment No.: 242.

Renewed Facility Operating License No. DPR–46: Amendment revised the Facility Operating License and Technical Specifications.

Date of initial notice in **Federal Register**: March 6, 2012 (77 FR 13371). The supplemental letters dated May 2, May 24, and September 17, 2012, 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 September 28, 2012.

No significant hazards consideration comments received: No.

NextEra Energy Duane Arnold, LLC, Docket No. 50–331, Duane Arnold Energy Center (DAEC), Linn County, Iowa

Date of application for amendments: May 1, 2012, as supplemented by letters dated June 27, 2012, and July 26, 2012.

Brief description of amendments: The amendment revises existing TS 3.3.5.1, on a one-time basis only, by adding a note to TS Table 3.3.5.1–1, Function 1d, Modes 4 and 5. This one-time license amendment enables DAEC to re-coat the internal surface of the Suppression Chamber during Refueling Outage 23.

Date of issuance: September 27, 2012.

Effective date: This license amendment is effective as of the date of issuance and shall be implemented within 30 days from date of issuance.

Amendment No.: 283.

Renewed Facility Operating License No. DPR–49: Amendment revised the Renewed Facility Operating License and Technical Specifications.

Date of initial notice in **Federal Register**: July 10, 2012 (77 FR 40654).

The licensee's June 27, 2012, and July 26, 2012, supplemental letters contained clarifying information, did not change the scope of the original amendment request, did not change the NRC staff's initial proposed finding of no significant hazards consideration determination, and did not expand the scope of the original **Federal Register** notice.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 27, 2012.

No significant hazards consideration comments received: Yes.

Tennessee Valley Authority, Docket Nos. 50–327 and 50–328, Sequoyah Nuclear Plant, Units 1 and 2, Hamilton County, Tennessee

Date of application for amendment: June 17, 2011, supplemented by letters dated July 27, 2011, November 14, 2011, March 23, April 26, May 15, May 24, and June 26, 2012 (TS–SQN–2011–07).

Brief description of amendment: The amendments revised the licensing basis and the Technical Specifications (TSs) to permit the use of a more robust AREVA Advanced W17 high thermal performance fuel. This new fuel has been selected to address fuel assembly distortion and its resultant fuel-handling issues. The AREVA Advanced W17 HTP fuel assembly design consists of standard uranium dioxide fuel pellets with gadolinium oxide burnable poison and M5™ cladding. The new fuel design ensures mechanical compatibility with the existing fuel, reactor core, control rods, steam supply system, and fuel-handling system. The transition from the existing fuel (AREVA Mark-BW) to new fuel is planned to occur over two refueling cycles for each unit.

Date of issuance: September 26, 2012.

Effective date: As of the date of issuance and shall be implemented prior to startup from fall 2013 refueling outage (RFO) for Unit 1, and prior to startup from fall 2012 RFO for Unit 2.

Amendment Nos.: 331 and 324.

Facility Operating License Nos. DPR–77 and DPR–79: Amendments revised the License and TSs.

Date of initial notice in **Federal Register**: August 23, 2011 (76 FR 52703). The supplement letters dated July 27, 2011, November 14, 2011, March 23, April 26, May 15, May 24, and June 26, 2012, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 26, 2012.

No significant hazards consideration comments received: No.

For The Nuclear Regulatory Commission.

Dated at Rockville, Maryland, this 5th day of October 2012.

Michele G. Evans,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2012–25240 Filed 10–15–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0240]

Proposed Revision to Emergency Action Level Development Guidance Document

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of availability and opportunity for public comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is making available for comment a

proposed revision to the Nuclear Energy Institute (NEI) 99–01, proposed Revision 6, ''Development of Emergency Action Levels for Non-Passive Reactors,'' dated September 2012. This document is intended to be used by the industry in the development of an emergency action level (EAL) scheme. The NRC is publishing this proposed revision to inform the public and solicit comments.

DATES: Submit comments by November 15, 2012. Comments submitted after this date will be considered if it is practical to do so, but assurance of consideration cannot be given except for comments received on or before this date.

ADDRESSES: You may access information and comment submissions related to this document, which the NRC possesses and are publically available, by searching on *http://www.regulations.gov* under Docket ID NRC–2012–0240. You may submit comments by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0240. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.
- *Fax comments to:* RADB at 301–492–3446.

For additional direction on accessing information and submitting comments, see ''Accessing Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Don A. Johnson, Office of Nuclear Security and Incident Response, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–4040 or by email at: *Don.Johnson@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2012–0240 when contacting the NRC about the availability of information regarding this document. You may access information related to this document by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0240.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly-available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents''* and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced. The proposed revision to NEI 99–01 is under ADAMS Accession No. ML12257A236.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2012–0240 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will posts all comment submissions at *http://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Further Information

The NRC is requesting comment on this proposed revision to NEI 99–01. This document is intended to provide guidance to licensees in the development of a comprehensive EAL scheme using site-specific information.

Dated at Rockville, Maryland, this 10th day of October 2012.

For the Nuclear Regulatory Commission.

Mark Thaggard,

Deputy Director for Emergency Preparedness, Division of Preparedness and Response, Office of Nuclear Security and Incident Response.

[FR Doc. 2012–25363 Filed 10–15–12; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Excepted Service

AGENCY: U.S. Office of Personnel Management (OPM).

ACTION: Notice.

SUMMARY: This notice identifies Schedule A, B, and C appointing authorities applicable to a single agency that were established or revoked from August 1, 2012, to August 31, 2012.

FOR FURTHER INFORMATION CONTACT: Senior Executive Resources Services, Executive Resources and Employee Development, Employee Services, 202–606–2246.

SUPPLEMENTARY INFORMATION: In accordance with 5 CFR 213.103, Schedule A, B and C appointing authorities available for use by all agencies are codified in the Code of Federal Regulations (CFR). Schedule A, B and C appointing authorities applicable to a single agency are not codified in the CFR, but the Office of Personnel Management (OPM) publishes a notice of agency-specific authorities established or revoked each month in the **Federal Register** at *www.gpo.gov/fdsys/.* OPM also publishes annually a consolidated listing of all Schedule A, B and C appointing authorities current as of June 30 as a notice in the **Federal Register**.

Schedule A

Schedule A authorities to report during August 2012.

06. Department of Defense, (Sch. A, 213.3106)

(b) Entire Department (including the Office of the Secretary of Defense and the Departments of the Army, Navy, and Air Force)—

(10) Temporary or time-limited positions in direct support of U.S. Government efforts to rebuild and create an independent, free and secure Iraq and Afghanistan. This authority may only be used when no other appropriate appointing authority applies. In general, the duties of these positions must be performed in Iraq or Afghanistan. No new appointments may be made under this authority after October 1, 2014.

Schedule B

No schedule B authorities to report during August 2012.

Schedule C

The following Schedule C appointing authorities were approved during August 2012.

Agency name	Organization name	Position title	Authorization No.	Effective date
Department of Agriculture	Department of Agriculture	Special Assistant	DA120098	8/10/2012
	Office of the Under Secretary for Rural Development.	Georgia State Director	DA120064	8/13/2012
Department of Commerce	Office of Policy and Strategic Planning.	Special Assistant	DC120148	8/7/2012
	Office of the Chief Economist	Special Assistant	DC120149	8/7/2012
	Office of Under Secretary	Senior Advisor for Oceans and Atmosphere, and the Principal Deputy Under Secretary.	DC120127	8/13/2012
	Office of the Under Secretary	Chief Communications Officer	DC120150	8/13/2012
	Office of the Chief of Staff	Confidential Assistant	DC120152	8/13/2012
Commission on Civil Rights	Commissioners	Special Assistant	CC120004	8/27/2012
Department of Defense	Office of the Under Secretary of Defense.	Staff Assistant	DD120100	8/1/2012
	Office of Assistant Secretary of Defense (Legislative Affairs).	Special Assistant	DD120105	8/13/2012
Department of the Army	Office Assistant Secretary Army (Installations and Environment).	Special Advisor (Installations and Environments).	DW120035	8/13/2012
Department of the Navy	Office of the Under Secretary of the Navy.	Special Assistant	DN120047	8/13/2012
Department of Education	Office of the Under Secretary	Deputy Director of the White House Initiative on American Indian and Alaska Native Education.	DB120072	8/1/2012
	Office of Planning, Evaluation and Policy Development.	Senior Advisor for STEM	DB120084	8/1/2012
	Office of Vocational and Adult Education.	Special Assistant	DB120074	8/10/2012
	Office of the Under Secretary	Confidential Assistant	DB120071	8/16/2012
	Office of Planning, Evaluation and Policy Development.	Special Assistant	DB120086	8/20/2012
Department of Energy	Office of Economic Impact and Diversity.	Special Advisor	DE120116	8/13/2012
	Office of Assistant Secretary for Policy and International Affairs.	Special Advisor	DE120125	8/13/2012
	Office of Public Affairs	Speechwriter	DE120130	8/13/2012
Environmental Protection Agency	Office of the Associate Administrator for External Affairs and Environmental Education.	Deputy Associate Administrator for External Affairs and Environmental Education.	EP120042	8/7/2012
General Services Administration	Office of the Administrator	Deputy Chief of Staff	GS120024	8/14/2012
Department of Health and Human Services.	Administration for Community Living.	Special Assistant	DH120130	8/10/2012
Department of Homeland Security	Office of the Assistant Secretary for Public Affairs.	Special Projects Coordinator	DM120153	8/1/2012
	Office of the Assistant Secretary for Public Affairs.	New Media Specialist	DM120154	8/1/2012
	Office of the Assistant Secretary for Public Affairs.	Director of Communications and Advisor.	DM120156	8/1/2012
	Office of the Chief of Staff	Special Assistant	DM120158	8/1/2012
	Office of the Executive Secretary for Operations and Administration.	Secretary Briefing Book Coordinator.	DM120162	8/14/2012
Department of Housing and Urban Development.	Office of Public Affairs	Assistant Press Secretary	DU120043	8/1/2012
Department of the Interior	Bureau of Land Management	Advisor	DI120061	8/16/2012
Department of Justice	Office of Legal Policy	Researcher	DJ120089	8/20/2012
Office of National Drug Control Policy.	Office of the Director	Senior Policy Analyst	QQ120005	8/10/2012
Office of Personnel Management	Office of the Director	Special Assistant	PM120019	8/22/2012
Presidents Commission on White House Fellowships.	Presidents Commission on White House Fellowships.	Special Assistant	WH120003	8/23/2012
Small Business Administration	Office of the Administrator	Special Advisor	SB120033	8/9/2012
	Office of the Administrator	Policy Advisor	SB120032	8/10/2012
	Office of Capital Access	Deputy Associate Administrator for Capital Access.	SB120034	8/16/2012
	Office of International Trade	Senior Advisor for International Trade.	SB120035	8/20/2012

Agency name	Organization name	Position title	Authorization No.	Effective date
Department of State	Bureau of Legislative Affairs	Legislative Management Officer	DS120103	8/3/2012
	Foreign Policy Planning Staff	Special Assistant	DS120111	8/23/2012
Department of Transportation	Administrator	Director, Office of Congressional and Public Affairs.	DT120079	8/6/2012
United States International Trade Commission.	Office of the Chairman	Staff Assistant (Legal)	TC120007	8/14/2012

The following Schedule C appointing authorities were revoked during August 2012.

Agency	Organization	Position title	Authorization No.	Vacate date
Department of Commerce	Economic Development Administration.	Special Advisor	DC110090	8/10/2012
	Office of the Deputy Secretary	Special Assistant	DC120003	8/25/2012
Department of Education	Office Of Vocational And Adult Education.	Confidential Assistant	DB110004	8/11/2012
	Office of Communications and Outreach.	Confidential Assistant	DB110044	8/17/2012
	Office of Planning, Evaluation and Policy Development.	Confidential Assistant	DB110050	8/25/2012
	Office of Vocational and Adult Education.	Deputy Assistant Secretary For Policy and Strategic Initiatives.	DB110091	8/25/2012
	Office of Postsecondary Education	Confidential Assistant	DB120026	8/25/2012
Department of Energy	Office of Management	Deputy Scheduler	DE110134	8/3/2012
Department of Homeland Security	Office of the Chief of Staff	Confidential Assistant to the Chief of Staff.	DM110138	8/11/2012
	Office of the Assistant Secretary for Public Affairs.	Press Secretary	DM110237	8/11/2012
Department of Justice	Office of Legal Policy	Research Assistant	DJ100174	8/3/2012
	Antitrust Division	Senior Counsel	DJ120028	8/11/2012
Department of the Navy	Department of the Navy	Special Assistant	DN090075	8/25/2012
Office of the Secretary of Defense	Office of the Assistant Secretary of Defense (Asian and Pacific Security Affairs).	Special Assistant to the Deputy Assistant Secretary of Defense (East Asia).	DD090251	8/10/2012
	Office of the Assistant Secretary of Defense (International Security Affairs).	Special Assistant to the Deputy Assistant Secretary of Defense (Russia, Ukraine and Eurasia).	DD090247	8/21/2012
	Office of the Assistant Secretary of Defense (Asian and Pacific Security Affairs).	Special Assistant to the Deputy Assistant Secretary of Defense (Central Asia).	DD090233	8/25/2012
Small Business Administration	Office of Field Operations	Regional Administrator, Region VIII, Denver Colorado.	SB090060	8/10/2012
	Office of the Administrator	Policy Advisor to the Administrator	SB120003	8/11/2012
	Office of Capital Access	Senior Advisor to the Associate Administrator for Capital Access.	SB100044	8/15/2012

Authority: 5 U.S.C. 3301 and 3302; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2012–25418 Filed 10–15–12; 8:45 am]

BILLING CODE 6325–39–P

RAILROAD RETIREMENT BOARD

Proposed Collection; Comment Request

Summary: In accordance with the requirement of Section 3506 (c)(2)(A) of the Paperwork Reduction Act of 1995 which provides opportunity for public comment on new or revised data collections, the Railroad Retirement Board (RRB) will publish periodic summaries of proposed data collections.

Comments are invited on: (a) Whether the proposed information collection is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the RRB's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden related to the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

1. Title and purpose of information collection: Vocational Report; OMB 3220–0141.

Section 2 of the Railroad Retirement Act (RRA) provides for payment of disability annuities to qualified employees and widow(ers). The establishment of permanent disability for work in the applicants ''regular occupation'' or for work in any regular employment is prescribed in 20 CFR 220.12 and 220.13 respectively.

The RRB utilizes Form G–251, *Vocational Report,* to obtain an applicant's work history. This information is used by the RRB to

determine the effect of a disability on an applicant's ability to work. Form G–251 is designed for use with the RRB's disability benefit application forms and is provided to all applicants for employee disability annuities and to those applicants for a widow(er)'s disability annuity who indicate that they have been employed at some time.

Completion is required to obtain or retain a benefit. One response is requested of each respondent. The RRB proposes no changes to Form G–251.

ESTIMATE OF ANNUAL RESPONDENT BURDEN

[The estimated annual respondent burden is as follows]

Form No.	Annual responses	Time (Minutes)	Burden (Hours)
G–251 (with assistance)	5,730	30	2,865
G–251 (without assistance)	270	40	180
Total	6,000		3,045

2. Title and purpose of information collection: Job Information Report, OMB 3220–0193.

In July of 1997, the Railroad Retirement Board (RRB) adopted standards for the adjudication of occupational disabilities under the Railroad Retirement Act (RRA). As part of these standards, the RRB requests job information to determine an applicant's eligibility for an occupational disability. The job information received from the railroad employer and railroad employee is compared, reconciled (if needed), and then used in the occupational disability determination process. The process of obtaining information from railroad employers used to determine an applicant's eligibility for an occupational disability is outlined in 20 CFR 220.13(b)(2)(e).

To determine an occupational disability, the RRB must decide if the employee is precluded from performing the full range of duties of his or her regular railroad occupation. This is accomplished by comparing the restrictions an impairment(s) causes against an employee's ability to perform his/her normal duties. To collect information needed to determine the effect of a disability on an employee applicant's ability to work, the RRB needs the employee applicant's work history. To obtain this information from the employee applicant, the RRB utilizes Form G–251, *Vocational Report* (OMB 3220–0141. **Note:** Form G–251 is provided to *all* applicants for employee disability annuities and to those applicants for a widow or widower's disability annuity who indicate that they have been employed at some time.

In accordance with the standards, the RRB also requests pertinent job information from employers. The employer is given thirty days from the date of the notice to respond. The responses are not required, but are voluntary. If the job information is received timely, it is compared to the job information provided by the employee. Any material differences are resolved by an RRB disability examiner. Once resolved, the information is compared to the restrictions caused by the medical impairment. If the restrictions prohibit the performance of the regular railroad occupation, the claimant is found occupationally disabled.

To obtain the job information from the railroad employer, the RRB uses the following two forms. RRB Form G–251a, *Employer Job Information—Job Description,* is released to an employer when an application for an occupational disability is filed by an employee whose regular railroad occupation is one of the more common types of railroad jobs (locomotive engineer, conductor, switchman, etc.) It is accompanied by a ''generic job description'' for that particular railroad job. The generic job description describes how the select occupation is generally performed in the railroad industry. However, because not all occupations are performed the same way from railroad to railroad, the employer is given an opportunity to comment on whether the job description matches the employee's actual duties. If the employer concludes that the generic job description accurately describes the work performed by the applicant, no further action is necessary. If the employer determines that the tasks are different, it may provide the RRB with a description of the actual job tasks. The employer has thirty days from the date the form is released to respond.

Form G–251b, *Employer Job Information—General,* is released to an employer when an application for an RRB occupational disability is filed by an employee whose regular railroad occupation does not have a generic job description. It notifies the employer that the employee has filed for a disability annuity and that, if the employer wishes, it may provide the RRB with job duty information. The type of information the RRB is seeking is outlined on the form. The employer has thirty days from the date the form is released to reply.

Completion is voluntary. The RRB proposes no changes to Forms G–251a and G–251b.

ESTIMATE OF ANNUAL RESPONDENT BURDEN

[The estimated annual respondent burden is as follows]

Form No.	Annual responses	Time (Minutes)	Burden (Hours)
G–251a	125	20	42
G–251b	305	20	102
Total	430		144

Additional Information or Comments: To request more information or to obtain a copy of the information collection justification, forms, and/or supporting material, contact Dana Hickman at (312) 751–4981 or *Dana.Hickman@RRB.GOV*. Comments regarding the information collection should be addressed to Charles Mierzwa, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–2092 or emailed to *Charles.Mierzwa@RRB.GOV*. Written comments should be received within 60 days of this notice.

Charles Mierzwa,

Chief of Information Resources Management.

[FR Doc. 2012–25403 Filed 10–15–12; 8:45 am]

BILLING CODE 7905–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. IC–30228; 812–14011]

Permal Hedge Strategies Fund, *et al.;* Notice of Application

October 9, 2012.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 18(c) and 18(i) of the Act.

Summary of Application: Applicants request an order to permit certain registered closed-end management investment companies to issue multiple classes of shares with varying sales loads and asset-based distribution and service fees.

Applicants: Permal Hedge Strategies Fund (''Fund''), Legg Mason Partners Fund Advisor, LLC (the ''Adviser''), Permal Asset Management Inc., (''Sub-Adviser'' and, together with the Adviser, the ''Advisers'') and Legg Mason Investors Services, LLC (the ''Distributor'').

Filing Dates: The application was filed on March 2, 2012, and amended on July 3, 2012. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in this notice.

Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on November 2, 2012, and should be accompanied by proof of service on the applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090; Applicants, c/o Robert I. Frenkel, Esq., Legg Mason & Co., LLC, 100 First Stamford Place, 6th Floor, Stamford, CT 06902.

FOR FURTHER INFORMATION CONTACT: Emerson S. Davis, Senior Counsel, at (202) 551–6811 or Daniele Marchesani, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations:

1. The Fund is a non-diversified closed-end management investment company registered under the Act. The Fund is organized as a Maryland statutory trust. The Adviser serves as investment adviser and the Sub-Adviser as a subadviser to the Fund. The Distributor, a broker-dealer registered under the Securities Exchange Act of 1934 (''1934 Act''), acts as principal underwriter for the Funds. The Distributor is an affiliated person, as defined in section 2(a)(3) of the Act, of the Adviser and of the Sub-Adviser.

2. The Fund continuously offers its shares (''Shares'') under the Securities Act of 1933. The Shares are not offered or traded in a secondary market and are not listed on any securities exchange or traded on any over-the counter system. Applicants do not expect that any secondary market will ever develop for the Shares.

3. The Fund currently offers an initial class of Shares (''Initial Class'') at net asset value subject to a sales load and an ongoing asset-based service and distribution fee and proposes to offer multiple classes of Shares. The Fund may offer a new Share class at net asset value that would not be subject to a front-end sales load or a service and distribution fee, but would be subject to a minimum purchase requirement. The Fund intends to continue to offer Initial Class Shares at net asset value subject to a sales load, a service and distribution fee, and minimum purchase requirements. The Fund may in the future adopt this or another structure with respect to distribution and service expenses. The Fund does not plan to offer exchange privileges.[1]

4. In order to provide a limited degree of liquidity to Shareholders, the Funds may from time to time offer to repurchase Shares at net asset value in accordance with rule 13e-4 under the 1934 Act pursuant to written tenders by shareholders. A Fund will repurchase Shares at the times, in the amounts and on the terms as may be determined by the Board of Trustees (''Board'') of the Fund in its sole discretion. The Adviser expects to recommend ordinarily that the Board authorize each Fund to offer to repurchase Shares from Shareholders quarterly.

5. Applicants request that the order also apply to any other continuously offered registered closed-end management investment companies existing now or in the future for which the Advisers, the Distributor, or any entity controlling, controlled by or under common control with the Adviser or the Distributor acts as investment adviser or principal underwriter, and which provides periodic liquidity with respect to its Shares pursuant to rule 13e–4 under the 1934 Act (such investment companies, together with the Fund, the ''Funds'').[2]

6. Applicants represent that any asset-based service and distribution fees will comply with the provisions of rule 2830(d) of the Conduct Rules of the National Association of Securities Dealers, Inc. (''NASD Conduct Rule 2830'').[3] Applicants also represent that each Fund will disclose in its prospectus, the fees, expenses and other characteristics of each class of Shares offered for sale by the prospectus as is required for open-end multiple class funds under Form N–1A. The Fund will disclose fund expenses in shareholder reports as if it were an open-end management investment company, and disclose any arrangements that result in

[1] The Fund also will not impose either an early withdrawal charge, or repurchase fee or a contingent deferred sales charge.

[2] Any Fund relying on this relief in the future will do so in a manner consistent with the terms and conditions of the application. Applicants represent that any person presently intending to rely on the requested relief is listed as an applicant.

[3] All references to NASD Conduct Rule 2830 include any successor or replacement rule that may be adopted by the Financial Industry Regulatory Authority (''FINRA'').

breakpoints in, or elimination of, sales loads.[4] The Fund and Distributor will also comply with any requirements that may be adopted by the Commission or FINRA regarding disclosure at the point of sale and in transaction confirmations about the costs and conflicts of interest arising out of the distribution of open-end investment company shares, and regarding prospectus disclosure of sales loads and revenue sharing arrangements as if those requirements applied to the Fund and the Distributor.[5]

7. All expenses incurred by the Fund will be allocated among its various classes of Shares based on the respective net assets of the Fund attributable to each class, except that the net asset value and expenses of each class will reflect distribution fees, service fees, and any other incremental expenses of that class. Expenses of a Fund allocated to a particular class of Shares will be borne on a pro rata basis by each outstanding Share of that class. Applicants state that each Fund will comply with the provisions of rule 18f-3 under the Act as if it were an open-end investment company.

Applicants' Legal Analysis:

Multiple Classes of Shares

1. Section 18(c) of the Act provides, in relevant part, that a closed-end investment company may not issue or sell any senior security if, immediately thereafter, the company has outstanding more than one class of senior security. Applicants state that the creation of multiple classes of Shares of the Funds may be prohibited by section 18(c).

2. Section 18(i) of the Act provides that each share of stock issued by a registered management investment company will be a voting stock and have equal voting rights with every other outstanding voting stock. Applicants state that permitting multiple classes of Shares of the Funds may violate section 18(i) of the Act because each class would be entitled to exclusive voting rights with respect to matters solely related to that class.

3. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction or any class or classes of persons, securities or transactions from any provision of the Act, or from any rule under the Act, if and to the extent such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants request an exemption under section 6(c) from sections 18(c) and 18(i) to permit the Funds to issue multiple classes of shares.

4. Applicants submit that the proposed allocation of expenses and voting rights among multiple classes is equitable and will not discriminate against any group or class of shareholders. Applicants submit that the proposed arrangements would permit a Fund to facilitate the distribution of its Shares and provide investors with a broader choice of shareholder services. Applicants assert that the proposed closed-end investment company multiple class structure does not raise the concerns underlying section 18 of the Act to any greater degree than open-end investment companies' multiple class structures that are permitted by rule 18f–3 under the Act.

Applicants' Condition:

Applicants agree that any order granting the requested relief will be subject to the following condition:

Applicants will comply with the provisions of rules 12b–1 and 18f–3 under the Act, as amended from time to time or replaced, as if those rules applied to closed-end management investment companies, and will comply with the NASD Conduct Rule 2830, as amended from time to time, as if that rule applied to all closed-end management investment companies. Additionally, to the extent the Fund may determine to waive, impose scheduled variations of, or eliminate sales charges, it will do so consistently with the requirements of rule 22d–1 under the Act, as amended from time to time or replaced, as if that rule applied to closed-end management investment companies.

For the Commission, by the Division of Investment Management, under delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25335 Filed 10–15–12; 8:45 am]

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[4] See Shareholder Reports and Quarterly Portfolio Disclosure of Registered Management Investment Companies, Investment Company Act Release No. 26372 (Feb. 27, 2004) (adopting release) (requiring open-end investment companies to disclose fund expenses in shareholder reports); and Disclosure of Breakpoint Discounts by Mutual Funds, Investment Company Act Release No. 26464 (June 7, 2004) (adopting release) (requiring open-end investment companies to provide prospectus disclosure of certain sales load information).

[5] See, e.g., Confirmation Requirements and Point of Sale Disclosure Requirements for Transactions in Certain Mutual Funds and Other Securities, and Other Confirmation Requirement Amendments, and Amendments to the Registration Form for Mutual Funds, Investment Company Act Release No. 26341 (Jan. 29, 2004) (proposing release).

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, October 18, 2012 at 2:00 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Paredes, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting scheduled for Thursday, October 18, 2012 will be:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

An adjudicatory matter; and

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 551–5400.

Dated: October 11, 2012.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2012–25497 Filed 10–12–12; 11:15 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68005; File No. SR–NYSEARCA–2012–106]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Establishing Fees for Certain Proprietary Options Market Data Products

October 9, 2012.

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 September 26, 2012, 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, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to establish fees for certain proprietary options market data products. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to establish fees for certain proprietary options market data products. The products covered by the fees are ArcaBook for Arca Options—Trades, ArcaBook for Arca Options—Top of Book, ArcaBook for Arca Options—Depth of Book, ArcaBook for Arca Options—Complex, ArcaBook for Arca Options—Series Status, and ArcaBook for Arca Options—Order Imbalance (collectively, the ''Arca Options Products'').[4] The fees set forth below, which will be implemented on October 1, 2012, are for all six of the Arca Options Products collectively; at this time, the Exchange is not establishing separate pricing for each of the individual products.

Access and Redistribution Fees

The Exchange proposes to charge an Access Fee of $3,000 per month and a Redistribution Fee of $2,000 per month.

Professional End-User [5] Fee

For the receipt and use of the Arca Options Products, the Exchange proposes to charge Professional End-Users $50 per month for each ''User per Source.'' [6] A ''Source'' is a Professional End-User-controlled source of data from a Redistributor,[7] such as a data feed; in this case, it is the Arca Options Products. Professional End-Users must receive approval to report User per Source by way of a license with the Exchange; without such approval, the Professional End-User must report each access identifier (''Access ID''). An Access ID is a unique identifier that a Professional End-User has assigned to a natural person, application, or device (each, a ''User''),[8] which identifier the Professional End-User's Entitlement System uses to administer technical controls over access to market data.[9]

Controlled Access

The unit-of-count for Redistributors of controlled accesses to market data, such as display devices and single-use application program interfaces (''APIs''), is each Access ID. Redistributors must ensure, by way of their agreements with clients, that Access IDs are not shared among Users. If a Professional End-User cannot or does not disclose in advance its restrictions relating to Access ID sharing, thereby enabling simultaneous access by multiple Users, the maximum number of potential accesses (i.e., the greatest number of natural persons, applications, and devices that can access the market data) will be chargeable.

Reporting Internal Use

Professional End-Users approved for User per Source reporting may report the total number of natural persons per each Source rather than the number of Access IDs per Source. For example, if a natural person has two Access IDs receiving data from a single Redistributor's data feed, the Professional End-User may report a count of one. If a natural person has one Access ID receiving data from two Redistributors' data feeds, however, the Professional End-User must report a count of two. Likewise, if a natural person has two Access IDs receiving data feeds from two separate Redistributors, the Professional End-User must report a count of two.

In order to report User per Source, the Professional End-User must identify the User associated with each Access ID. Possible methods to identify the User include using human resources or other

[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. 67720 (Aug. 23, 2012); 77 FR 52769 (Aug. 30, 2012) (SR–NYSEArca–2012–89).

[5] A Professional End-User is a person or entity that receives market data from the Exchange or a Redistributor and uses that market data solely for its own internal purposes. A Professional End-User is not permitted to redistribute that market data to any person or entity outside of its organization.

[6] The Exchange notes that the User per Source reporting policy differs from the unit-of-count policy used for other Exchange market data products, such as NYSE Arca Trades and NYSE Arca BBO. *See* Securities Exchange Act Release No. 62188 (May 27, 2010), 75 FR 31484 (June 3, 2010) (SR–NYSEArca–2010–23). Because the Arca Options Products are new and the Exchange has not charged for them before, the Exchange has determined to utilize an updated methodology that it believes may be easier for it and its customers to administer. Based on its experience with these products, the Exchange will consider adopting User per Source reporting for other market data products in the future.

[7] A Redistributor is any entity that makes market data available to any person other than the Redistributor and its employees, directors, officers and partners, irrespective of the means of transmission or access.

[8] An Access ID may be a User name, but is not limited to a User name. For example, it could be a host name, Internet protocol (''IP'') address, or a MAC/network address. A User may have more than one Access ID assigned to control access to market data. Sharing of passwords and/or Access IDs among Users is prohibited, as is simultaneous access by multiple Users using the same Access ID. Simultaneous access by an individual User is allowed if the Professional End-User discloses in advance the technical and/or process controls that prohibit the sharing of Access IDs or other means of accessing data.

[9] The Exchange considers any mechanism that controls access to market data to constitute an Entitlement System. Examples of an Entitlement System include a system that a Redistributor provides for permissioning Users to receive and use market data, a dedicated system that a Professional End-User develops internally, a server-based market data application that controls access to a limited group of authorized Users, and a closed network in which physical access to the network determines a User's ability to access market data. Each Professional End-User must use an Entitlement System to control all data distribution. Each Entitlement System should control or track simultaneous access, generate authentic entitlement reports, control Access IDs and passwords, and maintain an audit trail.

corporate identifiers associated with a User in an inventory system. Where an Access ID cannot be associated to a natural person User, the Professional End-User must treat that Access ID as a User per Source.

This aspect of User per Source reporting applies only to a Professional End-User's controlled internal distribution of data, and does not apply to Redistributor-controlled access as described above; therefore, a Professional End-User may not net internal Users against Access IDs for a Redistributor's controlled access, such as a device or API, as described in the preceding section.

Application Usage

Some internal distribution networks feature downstream applications that control access to market data without using a centralized Entitlement System. The Access IDs of each such application must be reported, and Professional End-Users must ensure that audit trails are maintained. Professional End-Users that have been approved for User per Source reporting may report each of the Users of the application and not the Access IDs of these systems; however, Professional End-Users must ensure that all Users are reported across all Entitlement Systems and applications. For example, a User that has an Access ID from an Entitlement System and an Access ID from a downstream application each receiving data from a single Redistributor source would be reported once.

Counting Users in Closed Networks

In a Closed Network, a Professional End-User has an environment whereby market data is published on an intranet or subnet with no other access control such as an Entitlement System. In environments such as this, all assigned IP addresses on the network range are considered a User per Source and are therefore reportable. In the case of a closed network in which physical access to the network determines a User's ability to access market data, the Professional End-User must report any device that has physical access to the network as a separate User per Source.

In closed networks that employ virtual devices, the Professional End-User must report all physical and virtual devices. For example, if a server provides five different market data products through five different IP addresses, each of which is capable of accessing market data, the Professional End-User must report all five IP addresses for each of the five products. That is, the Professional End-User must report virtual devices (in the form of IP addresses) as well as physical devices, and not just the physical server.[10]

Audit Trails

In order to remove an Access ID from the reporting and fee obligations for the Arca Options Products, the Professional End-User must disable the ability of the Access ID to receive such data entirely. The Professional End-User must maintain an audit trail to evidence the disabling of an Access ID for any period. In the absence of an adequate audit trail, all Access IDs that connect to the server remain fee liable. If the Professional End-User cannot limit or track the number of Access IDs, it must report all Access IDs.

Same User Name for Multiple Uses

Frequently, Users are assigned the same User name to log into multiple services and applications that do not share a common Entitlement System. For example, a natural person might elect to use the same User name to gain access to Redistributor A's services as it uses to gain access to Redistributor B's services. Or, he or she may use the same User name to access Redistributor A's Service X as he or she uses to gain access to Redistributor A's Service Y. Or, he or she may use the same User name to access Application A with Redistributor A's data as he or she may use to access Application B with Redistributor A's data. Despite the use of the same User name for multiple purposes, each use of a User name by a separate Entitlement System must be treated as a separate Access ID.

Simultaneous Access and Contention-Based Entitlement Systems

Simultaneous Access is the capability of a single Access ID to be used concurrently on two or more devices identified on a network by their host name, IP address, or other system-level identifier for network access. Entitlement Systems must control and track the number of simultaneous accesses by a single Access ID.

Contention-Based Entitlement Systems are not consistent with User per Source reporting. Those are systems for which a limited number of ''tokens'' or ''accesses'' that control the number of simultaneous Users are shared among Users. As is the case if a Professional End-User cannot or does not disclose in advance its restrictions relating to Access ID sharing, thereby enabling simultaneous access by multiple Users, the maximum number of potential accesses (i.e., the greatest number of natural persons, applications, and devices that can access the market data) will be chargeable.

Nonprofessional End-User Fees

The Exchange proposes to charge each Redistributor $1.00 per month for each Nonprofessional End-User to whom it provides Arca Options Products. The Exchange proposes to impose the charge on the Redistributor, rather than on the Nonprofessional End-User. In addition, the Exchange proposes to cap the Nonprofessional End-User Fee at $5,000 per month for each Redistributor. The Exchange proposes to apply the same criteria for qualification as a Non-Professional End-User as it does for non-professional subscribers to its other products.[11]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Securities Exchange Act of 1934 (the ''Act'')[12] in general and with Section 6(b)(4) and 6(b)(5) of the Act[13] in particular in that it provides an equitable allocation of reasonable fees among users and recipients of the data and is not designed to permit unfair discrimination among customers, issuers, and brokers. The proposed Arca Options Products fees are reasonable, equitable, and not unfairly discriminatory because they will provide additional data to the marketplace and give investors greater choices at prices that are comparable to other similar products. For example, the Chicago Board Options Exchange (''CBOE'') offers CBOE Streaming Markets, a streaming data feed that includes best bids and offers (''BBOs''), trades, customer vs. non-customer breakdown of the BBOs, contingent

[10] If a physical or virtual device (including an IP address) is capable of receiving a market data product, the Professional End-User must report the device regardless of whether a User uses the device to gain access to the market data product.

[11] The Exchange defines a nonprofessional subscriber as a natural person who receives market data solely for his or her personal, non-business use and who is not a ''Securities Professional,'' meaning that the person is not (1) registered or qualified with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (2) engaged as an ''investment adviser'' as that term is defined in Section 202(a)(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that statute); or (3) employed by a bank or other organization that is exempt from registration under federal and/or state securities laws to perform functions that would require him or her to be so registered or qualified if he or she were to perform such function for an organization not so exempt. The nonprofessional subscriber policy is available at *http://www.nyxdata.com/Docs/Market-Data/Policies.*

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(4) and (5).

prices (all-or-none orders) better than or equal to the BBOs, and BBO data and last sale data for complex strategies.[14] CBOE charges a direct connect fee of $3,500 per connection per month, a per user fee of $25 per month per Authorized User or Device, and $500 per month per data port for receipt of this data.[15] NASDAQ PHLX offers PHLX Depth of Market, a data product that provides order and quotation information for individual quotes and orders on the PHLX book, last sale information for trades executed on PHLX, and an imbalance message, for which it charges $4,000 per month for internal distribution and $4,500 per month for external distribution.[16] The Exchange also notes that it offers an integrated equities market data feed and equity depth-of-book product that are priced comparably to the proposed Arca Options Products pricing.[17] The Exchange further believes that the proposed Arca Options Products fees are equitable and not unfairly discriminatory because the general categories of fees—Direct Access, Redistributor, Professional End-User, and Non-Professional End-User—are comparable to the fee categories already established by the Exchange as well as other exchanges for market data products and the fees will apply equally to all persons in the respective categories that choose to purchase the Arca Options Product.

The Exchange believes that the proposed User per Source reporting methodology is reasonable, equitable, and not unfairly discriminatory because it will help to simplify market data administration. The Exchange recognizes that each Redistributor and Professional End-User may use Arca Options Products differently, and the reporting methodology takes into account the various uses and provides a means to avoid duplicative counting that will allow data recipients to better manage their costs. Moreover, the reporting methodology does not discriminate among data recipients and users, as the reporting methodology would apply equally to all Professional End-Users that choose to utilize it.

The existence of alternatives to the Arca Options Products, including real-time consolidated data, free delayed consolidated data, and proprietary data from other sources, ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect such alternatives. The recent decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC,* No. 09–1042 (DC Cir. 2010), upheld the Commission's reliance upon the existence of competitive market mechanisms to set reasonable and equitably allocated fees for proprietary market data:

> In fact, the legislative history indicates that the Congress intended that the market system 'evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed' and that the SEC wield its regulatory power 'in those situations where competition may not be sufficient,' such as in the creation of a 'consolidated transactional reporting system.'

NetCoalition at 15 (quoting H.R. Rep. No. 94–229 at 92 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 321, 323). The court agreed with the Commission's conclusion that ''Congress intended that 'competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.' ''[18]

As explained below in the Exchange's Statement on Burden on Competition, the Exchange believes that there is substantial evidence of competition in the marketplace for data and that the Commission can rely upon such evidence in concluding that the fees established in this filing are the product of competition and therefore satisfy the relevant statutory standards.[19]

As the *NetCoalition* decision noted, the Commission is not required to undertake a cost-of-service or ratemaking approach, and the Exchange incorporates by reference into this proposed rule change its analysis of this topic in another recent rule filing.[20]

For these reasons, the Exchange believes that the proposed fees are reasonable, equitable, and not unfairly discriminatory.

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. An exchange's ability to price its data feed products is constrained by (1) competition among exchanges in a variety of dimensions, (2) the existence of inexpensive real-time consolidated data and free delayed consolidated data, and (3) the inherent contestability of the market for proprietary data.

The market for proprietary data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous options exchanges compete with each other for trades and market data, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange in a vigorously competitive market.

It is common for broker-dealers to further exploit this competition by sending their order flow to multiple markets, rather than providing it all to a single market. The current options market structure is dispersed and complex with trading volume dispersed among many highly automated trading centers that compete for order flow in the same options, with trading centers offering a wide range of services that are designed to attract different types of market participants with varying trading needs.[21]

Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products and therefore constrain markets from overpricing proprietary market data. The U.S. Department of Justice recently

[14] *See* Securities Exchange Act Release No. 66486 (Feb. 28, 2012), 77 FR 13166 (Mar. 5, 2012) (SR–CBOE–2012–016).

[15] *Id.*

[16] *See* Securities Exchange Act Release No. 67466 (July 19, 2012), 77 FR 43629 (July 25, 2012) (SR–Phlx–2012–93) (''PHLX Filing'').

[17] The proposed Access Fee of $3,000 per month is the same as the $3,000 Direct Access Fee for the NYSE Arca Integrated Data Feed, an equities market data product that includes NYSE Arca BBO, NYSE Arca Trades, NYSE ArcaBook, and certain additional market data. The proposed Redistribution Fee of $2,000 per month is less than the $3,000 Redistribution Fee for the NYSE Arca Integrated Feed. The proposed Non-Professional End-User Fee of $1.00 per month (capped at $5,000) is less than the $10 per month Non-Professional Subscriber Fee (capped at $20,000) charged by the Exchange for NYSE ArcaBook. The Professional End-User Fee of $50 per month per User per Source is more than the NYSE ArcaBook $30 per month Professional Subscriber Fee. *See* Securities Exchange Act Release Nos. 66128 (Jan. 10, 2012), 77 FR 2331 (Jan. 17, 2012) (SR–NYSEArca–2011–96), and 63291 (Nov. 9, 2010), 75 FR 70311 (Nov. 17, 2010) (SR–NYSEArca–2010–97). However, the Exchange believes that the difference in the Professional fees is reasonable and equitable because the Arca Options Products offer more data than the NYSE Arca Integrated Feed.

[18] *NetCoalition* at 16.

[19] Section 916 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act'') amended paragraph (A) of Section 19(b)(3) of the Act, 15 U.S.C. 78s(b)(3), to make clear that all exchange fees for market data may be filed by exchanges on an immediately effective basis.

[20] *See* Securities Exchange Act Release No. 63291 (Nov. 9, 2010), 75 FR 70311 (Nov. 17, 2010) (SR–NYSEArca–2010–97).

[21] *See, e.g.,* Securities Exchange Act Release No. 49175, Concept Release: Competitive Developments in the Options Markets (Feb. 3, 2004), 69 FR 6124, 6125–6126 (Feb. 3, 2004) (S7–07–04).

acknowledged the aggressive competition among exchanges. In announcing the abandoned bid for NYSE Euronext by NASDAQ OMX Group Inc. and IntercontinentalExchange Inc., Assistant Attorney General Christine Varney stated that exchanges ''compete head to head to offer real-time equity data products. These data products include the best bid and offer of every exchange and information on each equity trade, including the last sale.''[22] Similarly, the options markets vigorously compete with respect to options data products.[23]

Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade execution are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platform where the order can be posted, including the execution fees, data quality, and price and distribution of its data products. Without trade executions, exchange data products cannot exist. Further, data products are valuable to many end-users only insofar as they provide information that end-users expect will assist them or their customers in making trading decisions. In that respect, the Exchange believes that the Arca Options Products will offer options market data information that is useful for both professionals and non-professionals in making trading and investment decisions.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence.[24] The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, an exchange's broker-dealer customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A broker-dealer will direct orders to a particular exchange only if the expected revenues from executing trades on the exchange exceed net transaction execution costs and the cost of data that the broker-dealer chooses to buy to support its trading decisions (or those of its customers). The choice of data products is, in turn, a product of the value of the products in making profitable trading decisions. If the cost of the proprietary product exceeds its expected value, the broker-dealer will choose not to buy it.

Moreover, if broker-dealers choose to direct fewer orders to a particular exchange, the value of that exchange's market data product to those broker-dealers decreases for two reasons. First, the product will contain less information because executions of fewer orders will be reflected in it. Second, and perhaps more importantly, the product will be less valuable to broker-dealers that choose to direct their orders to other venues because it does not provide information about the venues to which they are directing their orders. Data from the competing venues to which the broker-dealers are directing orders would become correspondingly more valuable.

Similarly, in the case of products that are distributed through market data vendors, the vendors provide price discipline for proprietary data products because they control the primary means of access to certain end-users. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and Thomson Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end-users will not purchase in sufficient numbers. Internet portals, such as Google, impose a discipline by providing only data that will enable them to attract ''eyeballs'' that contribute to their advertising revenue.

Other market participants have noted that the liquidity provided by the order book, trade execution, core market data, and non-core market data are joint products of a joint platform and have common costs.[25] The Exchange agrees with and adopts those discussions and the arguments therein. The Exchange also notes that the economics literature confirms that there is no way to allocate common costs between joint products that would shed any light on competitive or efficient pricing.[26]

The Exchange believes that retail broker-dealers, such as Schwab and Fidelity, offer their customers proprietary data only if it promotes trading and generates what they believe is sufficient commission revenue to justify the cost of acquiring that data. Although the business models may differ, these vendors' pricing discipline is the same: They can simply refuse to purchase any proprietary data product that fails to provide what they believe is sufficient value. The Exchange and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to market proprietary data products successfully. Moreover, the Exchange believes that products can enhance order flow to the Exchange by providing more widespread distribution of information about transactions in real time, thereby encouraging wider participation in the market. Conversely, less order flow to a venue decreases the value of that venue's market data products to distributors and investors because the products contain less content.

Analyzing the cost of market data distribution in isolation from the cost of all of the inputs supporting the creation of market data will inevitably

[22] Press Release, U.S. Department of Justice, ''Assistant Attorney General Christine Varney Holds Conference Call Regarding NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. Abandoning Their Bid for NYSE Euronext'' (May 16, 2011), available at *http://www.justice.gov/iso/opa/atr/speeches/2011/at-speech-110516.html.*

[23] *See* PHLX Filing, *supra* note 16 [sic], which describes a variety of options market data products and their pricing.

[24] Although the Exchange charges an Options Regulatory Fee, it does not offset the full cost of the Exchange's regulatory program, e.g., non-customer trading activity. *See* Securities Exchange Act Release No. 64399 (May 4, 2011), 76 FR 27114 (May 10, 2011) (SR–NYSEArca–2011–20).

[25] *See* Securities Exchange Act Release No. 62887 (Sept. 10, 2010), 75 FR 57092, 57095 (Sept. 17, 2010) (SR–Phlx–2010–121); Securities Exchange Act Release No. 62907 (Sept. 14, 2010), 75 FR 57314, 57317 (Sept. 20, 2010) (SR–NASDAQ–2010–110); and Securities Exchange Act Release No. 62908 (Sept. 14, 2010) (SR–NASDAQ–2010–111), 75 FR 57321, 57324 (Sept. 20, 2010) (''all of the exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.''); *see also* August 1, 2008 Comment Letter of Jeffrey S. Davis, Vice President and Deputy General Counsel, NASDAQ OMX Group, Inc., Statement of Janusz Ordover and Gustavo Bamberger (''because market data is both an input to and a byproduct of executing trades on a particular platform, market data and trade execution services are an example of 'joint products' with 'joint costs.' ''), attachment at pg. 4, available at *www.sec.gov/comments/34–57917/3457917–12.pdf.*

[26] *See generally* Mark Hirschey, Fundamentals of Managerial Economics, at 600 (2009) (''It is important to note, however, that although it is possible to determine the separate marginal costs of goods produced in variable proportions, it is impossible to determine their individual average costs. This is because common costs are expenses necessary for manufacture of a joint product. Common costs of production—raw material and equipment costs, management expenses, and other overhead—cannot be allocated to each individual by-product on any economically sound basis. * * * Any allocation of common costs is wrong and arbitrary.''). This is not new economic theory. *See, e.g.,* F. W. Taussig, ''A Contribution to the Theory of Railway Rates,'' *Quarterly Journal of Economics* V(4) 438, 465 (July 1891) (''Yet, surely, the division is purely arbitrary. These items of cost, in fact, are jointly incurred for both sorts of traffic; and I cannot share the hope entertained by the statistician of the Commission, Professor Henry C. Adams, that we shall ever reach a mode of apportionment that will lead to trustworthy results.'').

underestimate the cost of the data. Thus, because it is impossible to create data without a fast, technologically robust, and well-regulated execution system, system costs and regulatory costs affect the price of market data. It would be equally misleading, however, to attribute all of an exchange's costs to the market data portion of an exchange's joint product. Rather, all of an exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.

Competition among trading platforms can be expected to constrain the aggregate return that each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. For example, some platforms may choose to pay rebates to attract orders, charge relatively low prices for market information (or provide information free of charge), and charge relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower rebates (or no rebates) to attract orders, setting relatively high prices for market information, and setting relatively low prices for accessing posted liquidity. In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering.

The level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including 10 self-regulatory organization (''SRO'') options markets. Plans to launch two new options exchanges have been announced.[27] Each SRO market competes to produce transaction reports via trade executions. The large number of SROs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including but not limited to the Exchange, NYSE MKT, CBOE, C2, ISE, NASDAQ OMX, NASDAQ PHLX, NASDAQ BX, and BATS. Because market data users can thus find suitable substitutes for most proprietary market data products, a market that overprices its market data products stands a high risk that users may substitute another source of market information for its own.

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid, inexpensive, and profitable. The history of electronic trading is replete with examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TrackECN, BATS Trading and Direct Edge.[28] As noted above, two new options exchanges recently have been proposed.[29]

In this environment, a super-competitive increase in the fees charged for either transactions or data has the potential to impair revenues from both products. A broker-dealer that shifted its order flow from one platform to another in response to order execution price differentials would both reduce the value of that platform's market data and reduce its own need to consume data from the disfavored platform. If a platform increases its market data fees, the change may affect the overall cost of doing business with the platform, and affected market participants will assess whether they can lower their trading costs by directing orders elsewhere, thereby lessening the need for the more expensive data, or simply not purchase the data.

In establishing the fees for the Arca Options Products, the Exchange considered the competitiveness of the market for data and all of the implications of that competition. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish fair, reasonable, and not unreasonably discriminatory fees and an equitable allocation of fees among all users. The existence of numerous alternatives to the Exchange's product, including real-time consolidated data, free delayed consolidated data, and proprietary data from other sources, ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect these alternatives. Accordingly, the Exchange believes that the acceptance of data feed products in the marketplace demonstrates the consistency of these fees with applicable statutory standards.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[30] of the Act and subparagraph (f)(2) of Rule 19b–4[31] thereunder, because it establishes a due, fee, or other charge imposed by NYSE Arca.

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 email to *rule-comments@sec.gov.* Please include File Number SR–NYSEARCA–2012–106 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.

[27] Nina Mehta and Nikolaj Gammeltoft, ''Miami Options Exchange Moves Closer to Becoming 11th U.S. Venue,'' Bloomberg.com (Aug. 16, 2012), available at *http://www.bloomberg.com/news/2012–08–16/miami-options-exchange-moves-closer-to-becoming-11th-u-s-venue.html.*

[28] Today, BATS provides data at no charge on its Web site in order to attract more order flow, and uses market data revenue rebates from resulting additional executions to maintain low execution charges for its users. This is simply a securities market-specific example of the well-established principle that in certain circumstances more sales at lower margins can be more profitable than fewer sales at higher margins; this example is additional evidence that market data is an inherent part of a market's joint platform.

[29] *See supra* note 28 [sic].

[30] 15 U.S.C. 78s(b)(3)(A).

[31] 17 CFR 240.19b–4(f)(2).

All submissions should refer to File Number SR–NYSEARCA–2012–106. This file number should be included on the subject line if email 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 10:00 a.m. and 3:00 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 Number SR–NYSEARCA–2012–106 and should be submitted on or before November 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[32]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25320 Filed 10–15–12; 8:45 am]

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[32] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68009; File No. SR–C2–2012–035]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Order Routing Rules

October 9, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 4, 2012, C2 Options Exchange, Incorporated (the ''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its order routing rules. The text of the proposed rule change is available on the Exchange's Web site (*http://www.c2exchange.com/Legal/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Rule 6.36 governs the Exchange's process for routing sweep orders to other markets pursuant to intermarket linkage rules and states that the Exchange may contract with one or more routing brokers that are not affiliated with the Exchange to route sweep orders to other exchanges. The Rule imposes certain obligations on the Exchange and routing brokers. In particular, Rule 6.36(e) provides that the Exchange will determine the logic that provides when, how and where orders are routed away to other exchanges. Additionally, Rule 6.36(f) provides that a routing broker cannot change the terms of an order or the routing instructions, nor does the routing broker have any discretion about where to route an order.

The proposed rule change adds Interpretation and Policy .01 to Rule 6.36 to clarify that the Rule does not prohibit a routing broker from designating a preferred market-maker (or equivalent market participant) at the other exchange to which an outbound sweep order is being routed. The proposed rule change has no impact on customer orders, which receive the same level of order protection and trade at the best market prices regardless of whether the routing broker designates a preferred market-maker recipient at the destination exchange. The Exchange still makes the sole determination as to which exchange an order will be routed, as well as when and how the order will be routed. Additionally, routing brokers are still prohibited from changing the terms of an order or the Exchange's routing instructions and still have no discretion about to which exchange an order will be routed.

The proposed rule change merely clarifies that a routing broker may indicate which market-maker at the away exchange may trade against the routed order in accordance with the order terms and the Exchange's routing instructions. In other words, if a routing broker preferences a customer order that is to be routed to another exchange, the order is not handled any differently by the routing broker than if the routing broker did not preference the order.[3] Further, the order is executed at the same exchange and at the same price and in accordance with the same order terms as it would if the routing broker did not preference the order. Therefore, the proposed rule change does not disadvantage customers in any way. The Exchange believes that other exchanges allow this practice and that its routing brokers should be able to do the same.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[4] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[5] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange notes that orders that may be routed to other exchanges under Rule 6.36 are all immediate-or-cancel orders. Therefore, routed orders would not be subject to any automated price improvement mechanisms that may exist under other exchanges' rules.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest.

In particular, the proposed rule change helps remove impediments to and perfect the mechanism for a free and open market and a national market system because it still provides customer order protection and facilitates trading at away exchanges so that customer orders trade at the best market prices. Additionally, customer orders still trade in compliance with the Exchange's routing instructions in accordance with the Options Order Protection and Locked/Crossed Market Plan. The proposed rule change also protects investors and the public interest because it clarifies in the rules an existing practice of the Exchange's routing brokers, which the Exchange believes other exchanges allow their routing brokers to do as well. Finally, codifying this practice in the Rules provides additional transparency to Trading Permit Holders regarding routing of their orders to away exchanges.

B. Self-Regulatory Organization's Statement on Burden on Competition

C2 does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

A. significantly affect the protection of investors or the public interest;

B. impose any significant burden on competition; and

C. become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)[6] of the Act and Rule 19b–4(f)(6)[7] thereunder.[8]

At any time within 60 days of the filing of this 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 email to *rule-comments@sec.gov.* Please include File Number SR–C2–2012–035 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–C2–2012–035. This file number should be included on the subject line if email 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 10:00 a.m. and 3:00 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 Number SR–C2–2012–035 and should be submitted on or before November 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

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[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6).

[8] In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of 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 Exchange has satisfied this requirement.

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68015; File No. SR–NASDAQ–2012–111]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Provide for Automatic Cancellation of Midpoint Peg Post-Only Orders at Market Close

October 9, 2012.

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 September 28, 2012, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by NASDAQ. 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

NASDAQ proposes a rule change to provide for automatic cancellation of Midpoint Peg Post-Only Orders at market close. The text of the proposed rule change is available at *http://nasdaq.cchwallstreet.com,* at NASDAQ's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASDAQ included statements concerning the purpose of and basis for

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASDAQ has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

A Midpoint Peg Post-Only Order is a non-displayed order that is priced at the midpoint between the national best bid and best offer (''NBBO'') (as determined using the consolidated tape). However, like a Post-Only Order, the Midpoint Peg Post-Only Order does not remove liquidity from the System upon entry if it would lock a non-displayed order on the NASDAQ Market Center system (the ''System''). Rather, the Midpoint Peg Post-Only Order will post and lock the pre-existing order, but will remain undisplayed.[3]

Midpoint Peg Post-Only Orders that post to the book and lock a pre-existing non-displayed order will execute against an incoming order only if the price of the incoming buy (sell) order is higher (lower) than the price of the pre-existing order. If a Midpoint Peg Order and a Midpoint Peg Post-Only Order are locked, and a Midpoint Peg Order is entered on the same side of the market as the Midpoint Peg Post-Only Order, the new order will execute against the original Midpoint Peg Order. This is the case because the market participant entering the Midpoint Peg Post-Only Order has expressed its intention not to execute against posted liquidity, and therefore cedes execution priority to the new order.

NASDAQ believes that demand for the use of Midpoint Peg Post-Only Orders is limited to regular market hours, since the wider spreads generally prevailing during pre-market and post-market trading sessions would result in execution prices more at variance from the NBBO than would be the case during regular market hours. To this end, Midpoint Peg Post-Only Orders are accepted only during regular market hours. The proposed rule change clarifies this restriction by adding it to the rule text. At present, however, a Midpoint Peg Post-Only Order that is accepted during regular market hours but not executed and/or cancelled during regular market hours will continue to rest on the book until it is removed by another order, cancelled by the user or its Time-in-Force expires. To assist market participants in managing the use of these orders, NASDAQ is proposing to cancel all Midpoint Peg Post-Only Orders on the NASDAQ book at 4:00 p.m. In addition, the change provides that Midpoint Peg Post-Only Orders may execute during regular market hours only. This change will help ensure that market participants entering these orders are not subject to executions at prices that deviate from the NBBO by a greater extent that [sic] would be the case during regular market hours. Moreover, because such orders may execute during regular market hours only, they are not eligible for participation in the NASDAQ Opening Cross or the NASDAQ Closing Cross.

2. Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[4] in general, and with Section 6(b)(5) of the Act,[5] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Specifically, NASDAQ believes that the proposed change will help promote efficient market operations by providing for automatic cancellation of resting Midpoint Peg Post-Only Orders at 4:00 p.m. This change will assist market participants in managing the use of these orders and help ensure that they are not subject to executions at prices that deviate from the NBBO by a greater extent that [sic] would be the case during regular market hours.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Specifically, NASDAQ does not believe that the proposed change will affect competition in any respect.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing 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 for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[6] and subparagraph (f)(6) of Rule 19b–4 thereunder.[7]

The Exchange has requested that the Commission waive the 30-day operative delay provided for in Rule 19b–4(f)(6)(iii).[8] NASDAQ believes that the proposed rule change will advance the protection of investors by ensuring that market participants entering Midpoint Peg Post-Only Orders will not be subject to executions at prices that deviate from the NBBO by a greater extent than would be the case during regular market hours. NASDAQ also believes that the proposed rule change will thereby minimize the likelihood of executions during post-market hours that do not reflect the intentions of market participants. The Commission believes that minimizing the likelihood of unintended executions after hours should benefit investors. The Commission believes that waiver of the operative delay is consistent with investor protection and the public interest. As a result, the Commission is hereby waiving the 30-day operative delay.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

[3] SEC Rule 610(d) under Regulation NMS, 17 CFR 242.610(d), restricts displayed quotations that lock protected quotations in NMS Stocks, but does not apply to non-displayed trading interest.

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6).

[8] 17 CFR 240.19b–4(f)(6)(iii).

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 email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2012–111 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–NASDAQ–2012–111. This file number should be included on the subject line if email 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 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2012–111, and should be submitted on or before November 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25334 Filed 10–15–12; 8:45 am]

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[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68033; File No. SR–CHX–2012–13]

Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change, as Modified by Amendments Nos. 1 and 2, To Establish Listing Standards for Issuers' Compensation Committees

October 10, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1], and Rule 19b–4[2] thereunder, notice is hereby given that on September 26, 2012, the Chicago Stock Exchange, Inc. (''CHX'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which filing was amended and replaced in its entirety by Amendment No. 2 thereto on October 10, 2012, which Items have been prepared by the Exchange.[3] 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 amend Article 22, Rule 2 (Admittance to Listing), Rule 4 (Removal of Securities) and Rule 19 (Corporate Governance) to comport with Section 10(C) of the Exchange Act[4] and Rule 10C–1[5] thereunder that directs the Exchange to establish listing standards, among other things, that require each member of a listed issuer's compensation committee to be an independent member of its board of directors and relating to compensation committees and their use of compensation consultants, independent legal counsel and other advisers (collectively, ''compensation advisers''). The text of this proposed rule change is available on the Exchange's Web site at (*www.chx.com*) and in the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Commission notes that Amendment No. 1 was submitted on October 2, 2012 to indicate that the Board of Directors had approved the proposal.

[4] 15 U.S.C. 78j–3.

[5] 17 CFR 240.10C–1.

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 CHX included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The CHX has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

This Amendment No. 2 to SR–CHX–2012–13 (the ''filing'') amends and replaces in its entirety the Filing as originally submitted on September 26, 2012. Amendment No. 2 corrects several technical errors under this Rule 19b–4 form, Exhibit 1 and Exhibit 5. Moreover, substantive amendments were made to the Exhibit 5 and corresponding amendments were also made to this Exhibit 1 and 19b–4 form. Item 2 of this 19b–4 filing has been amended to indicate that this proposal was approved by the Exchange's Board of Directors on September 27, 2012.[6] Proposed Rule 19(d)(1) was amended to require issuers to have a compensation committee composed entirely of independent directors, subject to the general independence requirements of proposed Rule 19(p)(3)(A) and additional specific requirements for compensation committees under proposed Rule 19(p)(3)(B). Moreover, proposed Rule 19(d)(1) was amended to define ''compensation committee'' as independent directors functioning within either formal committees of the board of directors or a non-committee group. Proposed Rule 19(d)(2) was amended to include a charter requirement for compensation committees and removes the definition of ''compensation committee'' and ''functional equivalent,'' which has been restated under proposed Rule 19(d)(1)(A)–(C). The exceptions under proposed Rule 19(d)(5)(B) were amended to be numerically consistent with proposed paragraph .03 of the Interpretations and Policies of Rule 19. Proposed Rule 19(d)(5)(B)(iii) was amended to narrow the scope of the passive business organizations

[6] The Commission notes that this change was filed as Amendment No. 1. *See supra* note 3.

exemption. Proposed Rule 19(d)(5)(B)(iv) was amended to include a phase-in period for foreign issuers who no longer qualify as such. Proposed Rule 19(d)(5)(C) was amended to solely refer to the smaller reporting companies exemption and includes a phase-in period for issuers that no longer qualify as such. Proposed Rule 19(p)(3) was amended to reorganize the bright line tests for independent directors and to allow the inclusion of proposed paragraph (B), which outlines additional independent director requirements specific to compensation committee membership. Proposed Rule 19(p)(5) was amended to make the terms ''small business issuer'' and ''smaller reporting company'' interchangeable for the purposes of CHX rules. Proposed paragraph .03 of the Interpretations and Policies of Rule 19 was amended to remove a listed exemption for small business issuers. Finally, proposed paragraph .05(6) of the Interpretations and Policies of Rule 19 outlines an amended transition period for compliance with the proposed listing standards.

The Exchange proposes to amend Article 22, Rule 2 (Admittance to Listing), Rule 4 (Removal of Securities) and Rule 19 (Corporate Governance) to comport with Section 10(C) of the Exchange Act [7] and Rule 10C–1 [8] thereunder, which directs the Exchange to establish listing standards that require each member of a listed issuer's compensation committee to be an independent member of its board of directors and listing standards relating to compensation committees and their use of compensation advisers.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act'') established Section 10C of the Exchange Act, which directed the Securities and Exchange Commission (''Commission'' or ''SEC'') to require national securities exchanges and associations to prohibit the listing of any equity security of an issuer that is not in compliance with Section 10C's compensation committee and compensation adviser requirements.[9] Specifically, section 10C(a)(1) of the Exchange Act required the Commission to adopt rules directing the exchanges to establish listing standards that require each member of a listed issuer's compensation committee to be a member of the board of directors and to be ''independent.'' [10] Moreover, Section 10C(a)(4) [11] of the Exchange Act required the Commission to permit the exchanges to exempt particular relationships from the independence requirements, as each exchange determines is appropriate, taking into consideration the size of an issuer and any other relevant factors and section 10C(f)(3) [12] required the Commission to permit the exchanges to exempt categories of issuers from the requirements of section 10C, as each exchange determines is appropriate, taking into consideration of the impact of section 10C on smaller reporting issuers. In addition, Section 10C(f) [13] of the Exchange Act required the Commission to adopt rules directing the exchanges to establish listing standards that provide for requirements relating to compensation committees and compensation consultants, independent legal counsel and other advisers (collectively, ''compensation advisers''), as set forth in paragraphs (b)–(e) of Section 10C. Finally, Section 10C(c)(2) required each issuer to disclose in any proxy or consent solicitation material for an annual meeting of shareholders (or a special meeting in lieu of the annual meeting), in accordance with Commission regulations, whether the issuer's compensation committee retained or obtained the advice of a compensation consultant; whether the work of the compensation consultant has raised any conflict of interest; and, if so, the nature of the conflict and how the conflict is being addressed.[14]

On June 27, 2012, the Commission promulgated Exchange Act Rule 10C–1 to implement the compensation committee listing requirements of Sections 10C of the Exchange Act. As such, the Exchange now proposes to amend its rules to comport with the new requirements.

Proposed Amendments to CHX Article 22

The Exchange proposes to amend portions of Article 22, Rule 2 (Admittance to Listing), Rule 4 (Removal of Securities) and Rule 19 (Corporate Governance) to establish listing standards that require each member of a listed issuer's compensation committee to be an ''independent'' member of its board of directors, to adopt standards relating to compensation committees' authority to use compensation advisers and to clarify the consequences to issuers for failure to comply with these proposed amendments. It is important to note that virtually all of the proposed amendments are in Rule 19(d), which currently outlines all of the listing standards with respect to issuers' compensation committees.

Proposed Rule 2 and Rule 4(a)

Proposed Rule 2 provides that the Exchange's Board of Governors may list securities once the requirements of Article 22 are met and upon terms, conditions and payment of fees as the Exchange's board of directors may from time to time prescribe. In doing so, proposed Rule 2 adopts much of the current Rule 2, while only clarifying that the Board of Governors may only admit securities ''once the requirements of this Article are met.'' Also, proposed Rule 4(a) provides that securities may be removed from the list, with notice, by either the issuer or the Exchange, for any reason, including an issuer's failure to comply with the listing standards of this Article 22. In doing so, proposed Rule 4(a) adopts much of the current Rule 4(a), while inserting language that states that securities may be delisted by either the issuer or the Exchange and clarifies that securities may be removed for any reason, including an issuer's failure to comply with the requirements of this Article, which includes proposed Rule 19(d). Current Rule 4(b)–(g) establish the procedures under which a security may be delisted, to which the Exchange proposes no amendments.

As such, proposed Rule 2 and Rule 4, considered in conjunction with current Article 22, Rule 1 [15], comport with Exchange Act Rule 10C–1(a)(1) that requires the Exchange to ''prohibit the *initial and continued* listing of any equity security of an issuer that is not in compliance with the requirements of any portion of paragraph (b) or (c) of this section.'' That is, the purpose of these proposed amendments is to clarify the potential consequences of an issuer's failure to comply with CHX Article 22, which includes the proposed compensation committee listing standards.

Proposed Rule 19(d)(1) and 19(p)(3)

Proposed Rule 19(d)(1) [16] states that an issuers must have a ''compensation

[7] *Supra* note 4.

[8] *Supra* note 5.

[9] 15 U.S.C. 78j–3.

[10] 15 U.S.C. 78j–3(a).

[11] 15 U.S.C. 78j–3(a)(4).

[12] 15 U.S.C. 78j–3(f)(3)(A).

[13] 15 U.S.C. 78j–3(f).

[14] 15 U.S.C. 78j–3(c)(2).

[15] CHX Article 22, Rule 1 states, in pertinent part, that ''the requirements, set forth in this Article, must be met in order for the Exchange to entertain an application for listing.''

[16] In order to implement proposed Rule 19(d)(1), the Exchange proposes to delete current Rule 19(d)(1), which outlines how the compensation of a chief executive officer is to be determined and current Rule 19(d)(2), which outlines how a the compensation of other officers are to be determined,

Continued

committee'' composed entirely of ''independent directors,'' as defined under proposed Rule 19(p)(3) and that also meet the additional independence requirements specific to compensation committees, under proposed Rule 19(p)(3)(B). The proposed rule continues to define ''compensation committee'' as: (A) a committee of the board of directors that is designated as the compensation committee; (B) in the absence of a committee of the board of directors that is designated as the compensation committee, a committee of the board of directors performing functions typically performed by a compensation committee, including oversight of the executive compensation, even if it is not designated as the compensation committee or also performs other functions; or (C) in the absence of one of the aforementioned committees, the members of the board of directors who oversee executive compensation matters on behalf of the board of directors, who together must comprise a majority of the board's independent directors.

In turn, proposed Rule 19(p)(3) defines ''independent director'' as a person who is a member of the issuer's board of directors, other than an officer or employee of the issuer or its subsidiaries or any other individual having a relationship, which, in the opinion of the issuer's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of an independent director and places the affirmative duty of making such a determination on the board of directors. Furthermore, proposed Rule 19(p)(3)(A) provides that a director may not be deemed to be independent if such director has a relationship with the issuer which violates any one of seven ''bright line'' tests.[17] Proposed Rule 19(p)(3)(B) establishes additional independent director requirements specific to compensation committees that states that in affirmatively determining the independence of any director who will serve on the compensation committee of the issuer's board of directors, the board must consider all factors specifically relevant to determining whether a director has a relationship to the issuer which is material to that director's ability to be independent from management in connection with the duties of a compensation committee member, including, but not limited to, two factors. First, (i) the board must consider the source of compensation of such director, including any consulting, advisory or other compensatory fee paid by the issuer to such director. Proposed subparagraph (i) explains that this factor requires that when considering the sources of a director's compensation, the board should consider whether the director receives compensation from any person or entity that would impair her ability to make independent judgments about the issuer's executive compensation. Second, (ii) the board must consider whether such director is affiliated with the issuer, a subsidiary of the issuer or an affiliate of a subsidiary of the issuer. The proposed subparagraph (ii) explains that this factor requires that when considering such affiliate relationships in determining her independence for purposes of compensation committee service, the board should consider whether the affiliate relationship places the director under the direct or indirect control of the issuer or its senior management, or creates a direct relationship between the director and members of senior management, in each case of a nature that would impair her ability to make independent judgments about the issuer's executive compensation.

As such, proposed Rule 19(d)(1) and Rule 19(p)(3) comport with the requirements of Exchange Act Rule 10C–1(b)(1)(i) and (ii). Initially, as mandated by Exchange Act Rule 10C–1(b)(1)(i), which states, ''each member of a compensation committee must be a member of the board of directors of the listed issuer, and must otherwise be independent,'' proposed Rule 19(d)(1) requires members of an issuer's compensation committee be ''independent directors'' and, in turn, proposed Rule 19(p)(3) defines a ''director,'' in relevant part, as a ''person who is member of the issuer's board of directors.'' Additionally, the Exchange proposes to require issuers to have a compensation committee, similar to Section 303A.05 of the NYSE Listed Company Manual.[18] The Exchange submits that its proposed definition of ''compensation committee,'' which adopts Exchange Act Rule 10C–1(c)(2)[19] almost verbatim, does not require issuers to do anything more than what they are already required to do, which is to have either ''a majority of the independent directors or a compensation committee comprised solely of independent directors'' determine or recommend executive compensation.[20]

Moreover, proposed Rule 19(p)(3) comports with Exchange Act Rule 10C–1(b)(1)(ii). Specifically, Exchange Act Rule 10C–1(b)(1)(ii)(A) requires the Exchange to consider ''the source of compensation of a member of the board of directors of an issuer, including any consulting, advisory or other compensatory fee paid by the issuer to such a member of the board of directors,'' whereas Exchange Act Rule 10C–1(b)(1)(ii)(B) requires the Exchange to consider ''whether a member of the board of directors of an issuer is affiliated with the issuer,[21] a subsidiary of the issuer or an affiliate of a subsidiary of the issuer.'' The Exchange

and restate those rules with amendments, as proposed Rule 19(d)(4), which is discussed below.

[17] Proposed Rule 19(p)(3)(A)(i)–(vii) virtually adopts current Rule 19(p)(3)(A)–(G) and provides that the following persons shall not be considered independent: (i) A director who is, or during the past three years, was employed by the issuer or its parent or subsidiary; (ii) a director or an immediately family member of a director who had accepted payments from the issuer or its parent or subsidiary in excess of $120,000 in the current fiscal year or any of the past three fiscal years, with exceptions for payments received for services to the board, payments arising from investments in the issuer's securities, compensation paid to an immediate family member who is an employee, but not an executive officer, of the issuer, benefits under a tax-qualified retirement plan, non-discretionary compensation or loans permitted under Section 13(k) of the Exchange Act; (iii) a director who is an immediate family member of an individual who is, or at any time during the past three years was, employed by the issuer or by any parent or subsidiary of the issuer as an executive officer; (iv) a director who is, or has an immediate family member who is, a partner in, or a controlling shareholder or an executive officer of, any organization to which the issuer made, or from which the issuer received, payments for property or services, in the current or any of the past three fiscal years, that exceed 5% of the recipient's consolidated gross revenues for that year, or $200,000, whichever is more, other than payments arising solely from investments in the issuer's securities or payments under non-discretionary charitable contribution matching programs; (v) a director of the issuer who is, or has an immediate family member who is, employed as an executive officer of another entity where, at any time during the past three years, any of the executive officers of the issuer served on the compensation committee of such other entity; (vi) A director who is, or has an immediate family member who is, a current partner of the issuer's outside auditor, or who has a partner or employee of the issuer's outside auditor who worked on the issuer's audit at any time during the past three years; (vii) In the case of an investment company, in lieu of paragraphs (i)–(vi), a director who is an ''interested person'' of the company as defined in section 2(a)(19) of the Investment Company Act of 1940, other than in his or her capacity as a member of the board of directors or any board committee.

[18] Section 303A.05 of the NYSE Listed Company Manual states, ''listed companies must have a compensation committee composed entirely of independent directors.''

[19] 17 CFR 240.10C–1(c)(2).

[20] CHX Article 22, Rule 19(d)(1) and Rule 19(d)(2).

[21] The Exchange understands ''affiliated with issuer'' to have a similar meaning as ''affiliated with a specified person'' defined under Exchange Act Rule 12b–2 [17 CFR 240.12b02 [sic] as ''a person that directly, or indirectly through one more intermediaries, controls, or is controlled by, or is under common control with, the person specified.''

submits that Exchange Act Rule 10C–1(b)(1)(ii) is largely already addressed via proposed Rule 19(p)(3)(A)(i)–(vii) [22] and is fully incorporated through proposed Rule 19(p)(3)(B).

Proposed Rule 19(p)(3)(A)(i) precludes from being considered independent a director who currently is or was, during the past three years, employed by the issuer or parent or subsidiary of the issuer. This preclusion is based, in part, on Exchange Act Rule 16b–3(b)(3)(i),[23] which excludes from the definition of a ''non-employee director'' a director who is an officer of the issuer or a parent or subsidiary of the issuer, or otherwise currently employed by the issuer or a parent or subsidiary of the issuer. The Exchange submits that a director who is or was an executive officer or employee of the issuer should not be considered independent due to the nature of the professional relationships that are formed in an employment setting and the consequences therefrom. For example, a director who is employed by the issuer may have her employee compensation (*i.e.* salary, bonuses, etc. * * *) affected by her actions as a member of the compensation committee. Moreover, a director who recently ended her employment with the issuer may still maintain personal relationships with executive officers that may compromise independent judgment. Consequently, the look-back provision is necessary, because the nature of such personal relationships may remain unchanged for sometime after the director ceased being employed by the issuer.

Proposed Rule 19(p)(3)(A)(ii) precludes from being considered independent a director who had or an immediate family member of the director who had accepted payments from the issuer or parent or subsidiary of the issuer in excess of $120,000 in the current fiscal year or any of the past three fiscal years, excluding (1) compensation for board or board committee service; (2) payments arising solely from investments in the issuer's securities; (3) compensation paid to an immediate family member who is a non-executive employee of the issuer or a parent or subsidiary of the issuer; (4) benefits under a tax-qualified retirement plan; (5) non-discretionary compensation; or (6) loans permitted under Section 13(k) of the Act. The only difference between proposed Rule 19(p)(3)(A)(ii) and current Rule 19(p)(3)(B) is the proposal to increase the cap amount from $60,000 to $120,000, so as to remain in lockstep with other exchanges, such as BATS [24] and disclosure guidelines under Item 404(a) of Regulation S–K,[25] both of which set threshold amounts at $120,000.

Similar to subparagraph (i), proposed subparagraph (ii) is also based in part on Exchange Act Rule 16b–3(b)(3)(i), which excludes from the definition of ''non-employee director,'' a director who receives compensation, either directly or indirectly, from the issuer or a parent or subsidiary of the issuer for services rendered as a consultant or in any capacity other than as a director, except for an amount that does not exceed $120,000, pursuant to Item 404(a) of Regulation S–K.[26] The Exchange acknowledges that a director who meets the definition of a ''non-employee director'' is not necessarily ''independent.'' However, the Exchange submits that a cap of $120,000 on affected payments are adequately high to allow a director or immediate family member to receive payments for permissible services to the issuer, while sufficiently low as to not preclude director independence. Moreover, a cap on such payments is preferable to an absolute rule that precludes director independence for any payments made. This is because the category of services contemplated by this subparagraph (ii), such as consulting services, are inherently independent from the ordinary business function of the issuer, in contrast to payments received in the context of employment. Given these considerations, the Exchange submits that payments that arise from independent permissible services should not *per se* disqualify a director from being considered independent.

Moreover, due to the intimate nature of the relationship between a director and an immediate family member,[27] the Exchange submits that immediate family members of a director that fall under the purview of subparagraph (ii) should also preclude such a director from being considered independent. For the same reason, the Exchange has also included a director's relationship to such immediate family members within the purview of paragraphs (iii)–(vi). With respect to the six categories of payments that excluded [sic] from the cap requirement of this subparagraph (B), the Exchange submits that such exceptions are appropriate because those payments are nondiscretionary and/or predetermined payments. As such, these payments are immaterial to a director's ability to be independent, where it is unlikely that these payments could be unilaterally altered by any executive officer, at least without the knowledge of the board of directors.

Proposed Rule 19(p)(3)(A)(iii) precludes a director who is an immediate family member of an individual who currently is or was, during the past three years, employed as an executive officer of the issuer or parent or subsidiary of the issuer. Given the intimate nature of the relationship between immediate family members, the Exchange submits that where a director's immediate family member is an executive officer of the issuer, the director is *per se* not independent. This is because the nature of the personal relationship between the director and immediate family member who is an executive officer will likely compromise independent judgment, especially in the context of determining the compensation of the immediate family member. It is important to note that although this paragraph does not include immediate family members who are non-executive employees of the issuer, Rule 19(p)(3) still allows for a board of directors to nonetheless find that such a relationship would preclude a director from being independent. However, the Exchange submits that establishing an absolute rule would be inappropriate and that an issuer's boards of directors is better equipped to assess such relationships on a case by case basis.

Proposed Rule 19(p)(3)(A)(iv) precludes from being independent a director who is or has an immediate family member who is a partner in or a

[22] As mentioned above, *supra* note 16, proposed Rule 19(p)(3)(A)(i)–(vii) virtually mirrors current Rule 19(p)(3)(A)–(G), but for a few minor substantive amendments, that are discussed below.

[23] 17 CFR 240.16b–3(b)(3)(i).

[24] BATS Rule 14.10(c)(1)(B) states, in pertinent part, that an '''independent director' means a person other than an Executive Officer or employee of the Company or any other individual having a relationship which, in the opinion of the Company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director'' and paragraph (c)(1)(B)(ii) precludes from being considered independent ''a director who accepted or who has a Family Member who accepted any compensation from the Company in excess of $120,000 during any period of twelve consecutive months within the three years preceding the determination of independence.''

[25] 17 CFR 229.404.

[26] Item 404(a) of Regulation S–K [17 CFR 229.404] mandates disclosure requirements for transactions exceeding $120,000 in which the registrant was a participant and in which any ''related person'' has a direct or indirect material interest. In the context of Item 404(a), a ''related person'' includes any director of the registrant.

[27] Pursuant to CHX Rule 19(p)(2), an ''immediate family member'' includes a person's spouse, parents, children, siblings, mothers and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law and any person who has the same residence.

controlling shareholder or an executive officer of any organization to which the issuer made or from which received payments for property or services, in the current or any of the past three fiscal years, that exceed 5% of the recipient's consolidated gross revenues for that year, or $200,000, whichever is more, excluding payments arising (1) solely from investments in the issuer's securities or (2) payment under non-discretionary charitable contribution matching programs. The purpose of this rule is to scrutinize directors who benefit from their business activities with the issuer when determining their ability to exercise independent judgment. Similar to subparagraph (ii), the Exchange submits that placing a cap on value of property or services received or given is preferable to a rule that precludes director independence for any such activity. This is because the nature of corporate governance is as such that directors are frequently affiliated with multiple corporate entities in the same or related fields and inevitably, these various entities deal with each other in the ordinary course of their respective businesses. Thus, the Exchange submits that so long as such activities do not exceed 5% of the payment recipient's consolidated gross revenues for that year or $200,000, whichever is more, the activity is ordinary enough so as to not preclude director independence. In addition, the exclusions to this paragraph are necessary so as to exclude categories of payments that are non-discretionary and pre-determined, therefore immaterial to the independence assessment.

Proposed Rule 19(p)(3)(A)(v) precludes from being independent a director who is or has an immediate family member who is employed as an executive officer of another entity where, at any time during the past three years, any of the executive officers of the issuer served on the compensation committee of the other entity. The Exchange submits that a director cannot be independent where the director is charged with determining the compensation of an executive, who in turn, is charged with determining the director's compensation in her capacity as an executive officer of the other entity. This scenario is obviously improper, as it may open the door to, among other things, undue influence and breaches of fiduciary duty. Certainly, a director subjected to such forces would not be able to exercise independent judgment. Also, given the personal nature of family relationships, directors who have immediate family members who are employed as executive officers by the aforementioned other entity should also be disqualified from being considered independent.

Proposed Rule 19(p)(3)(A)(vi) precludes from being independent a director (1) who is or has an immediate family member who is a current partner of the issuer's outside auditor or (2) who was a partner or employee of the issuer's outside auditor who worked on the issuer's audit at any time during the past three years. The primary purpose of this subparagraph is to prevent a director, who has or had a direct association with the issuer's outside auditor, from being placed on the issuer's audit committee.

Proposed Rule 19(p)(3)(A)(vii) applies to investment companies in lieu of subparagraphs (i)–(vi) and precludes from being independent a director who is an ''interested person,'' as that term is defined under section 2(a)(19) of the Investment Company Act of 1940 (''Investment Company Act'').[28] The Exchange proposes to maintain the exemption of open-ended and closed-ended investment companies, as those terms are defined under section 4 and 5(a) of the Investment Company Act,[29] from the compensation committee requirements of this proposed Rule 19(d). The exemptions are discussed in detail below through proposed Rule 19(d)(5)(B)(ii).

Moreover, proposed Rule 19(p)(3)(B) comports with Exchange Act Rule 10C–1(b)(ii) by requiring an issuer's board of directors to consider all factors specifically relevant to determining whether a director has a relationship to the issuer which is material to that director's ability to be independent from management in connection with the duties of a compensation committee member, including, but not limited to, the two factors explicitly enumerated in Rule 10C–1(b)(ii). When considering the sources of a director's compensation in determining her independence for purposes of compensation committee service, proposed Rule 19(p)(3)(B)(i) states the board should consider whether the director receives compensation from any person or entity that would impair her ability to make independent judgments about the issuer's executive compensation. Similarly, when considering any affiliate relationship a director has with the issuer, a subsidiary of the issuer, or an affiliate of a subsidiary of the issuer, in determining her independence for purposes of compensation committee service, the proposed Rule 19(p)(3)(B)(ii) provides that the board should consider whether the affiliate relationship places the director under the direct or indirect control of the issuer or its senior management, or creates a direct relationship between the director and members of senior management, in each case of a nature that would impair her ability to make independent judgments about the issuer's executive compensation.

However, the Exchange does not propose to adopt any specific numerical tests with respect to the factors specified in proposed Rule 19(p)(3)(B) or to adopt a requirement to consider any other specific factors. In particular, the Exchange does not intend to adopt an absolute prohibition on a board making an affirmative finding that a director is independent solely on the basis that the director or any of the director's affiliates are shareholders owning more than some specified percentage of the issuer. In the adopting release for Rule 10C–1 (''adopting release''),[30] the SEC recognized that the exchange might determine that not all affiliate relationships would adversely affect a director's ability to be independent from management.[31] Consistent with the view of commentators on the SEC's rules as originally proposed, the Exchange believes that, rather than adversely affecting a director's ability to be independent from management as a compensation committee member, share ownership in the issuer aligns the director's interest with those of unaffiliated shareholders, as their stock ownership gives then the same economic interest in ensuring that the issuer's executive compensation is not excessive.

In sum, the Exchange believes that its existing ''bright line'' independence standards as set forth in proposed Rule 19(p)(3)(A) and the additional independence requirement as set forth in proposed Rule 19(p)(3)(B) are sufficiently broad to encompass the types of relationships which would generally be material to a director's independence for compensation committee service. In addition, there is language in current Rule 19(p)(3), adopted in proposed Rule 19(p)(3) that already requires the board to consider

[28] 15 USCS [sic] 80a–2(a)(19).

[29] Pursuant to Section 4 and 5(a)(1) of the Investment Company Act [15 USCS [sic] 80a–4 and 80a–5(a)(1)], an ''open-end company'' means a management company, other than a unit investment trust or face-amount certificate company, which is offering for sale or has outstanding any redeemable security of which it is the issuer. Pursuant to section 5(a)(2) [15 USCS 80a–5(a)], a ''closed-end company'' means any management company other than an open-end company.

[30] *See* Listing Standards for Compensation Committees, Release No. 33–9330 (June 27, 2012) [17 CFR Parts 229 and 240].

[31] *See* Adopting Release at 24.

any other material relationships between the director and the issuer or its management that are not subject of ''bright line'' tests in proposed Rule 19(p)(3)(A). The Exchange believes that these requirements with respect to general director independence, when combined with the additional requirements of proposed Rule 19(p)(3)(B), represent an appropriate standard for compensation committee independence that is consistent with the requirements of Exchange Act Rule 10C–1.

Proposed Rule 19(d)(2)

Proposed Rule 19(d)(2) establishes a formal written charter or board resolution requirement for all issuers, with respect to compensation committees. Specifically, the proposed rule states that each issuer must adopt a formal written charter or board resolution, as applicable, addressing at minimum (A) the scope of the compensation committee's responsibilities and how it carries out those responsibilities, including structure, process and membership requirements; (B) the compensation committee's responsibility for determining or recommending to the board for determination, the compensation of the chief executive officer and all other officers of the issuer as set forth in proposed Rule 19(d)(3); and (C) the specific compensation committee responsibilities and authority set forth in proposed Rule 19(d)(4).

The Exchange submits that requiring issuers to adopt such a charter or board resolution is necessary to facilitate compliance with the proposed amendments to the compensation committee listing standards. Moreover, the proposed rule is consistent with other CHX corporate governance rules requiring a written charter or board resolution [32] and is also modeled on proposed NASDAQ Rule 5065(d)(1).[33]

Proposed Rule 19(d)(3)

Proposed Rule 19(d)(3) is a consolidated restatement of current Rule 19(d)(1) and 19(d)(2). In doing so, current Rule 19(d)(3)(A) has been deleted and restated as proposed Rule 19(d)(5)(A)(i), with some syntax amendments to improve logical flow and organization and current Rule 19(d)(3)(B) has been deleted and restated under proposed Rule 19(d)(5)(B)(i). Specifically, proposed Rule 19(d)(3) states that the function of a compensation committee or functional equivalent is to determine or recommend to the issuer's board of directors for determination the compensation of issuer's chief executive officer and other officers. It continues that the chief executive officer shall not be present during the deliberations regarding her own compensation, but that the chief executive officer may be present during deliberations regarding compensation of other officers, but may not vote. Aside from syntax, the only difference between this proposed rule and current Rule 19(d)(1) and Rule 19(d)(2) is that the proposed rule omits the portions of the current rules that mention that compensation of executive officers shall be determined or recommended to the board ''either by (A) a majority of the issuer's independent directors or (B) a compensation committee comprised solely of independent directors.'' [34] The reason for this omission is that ''compensation committee'' and ''majority of the issuer's independent directors'' have been combined and defined under proposed Rule 19(d)(1) as ''compensation committee.'' The Exchange submits that this organizational amendment is necessary for the logical flow of the proposed Rule 19(d).

Proposed Rule 19(d)(4)

Proposed Rule 19(d)(4)(A)–(E) outlines listing standards mandated under Exchange Act Rule 10C–1(b)(2), concerning the authority of compensation committees to retain compensation consultants, outside legal counsel and other advisers (collectively ''compensation advisers'').

Specifically, pursuant to Exchange Act Rule 10C–1(b)(2)(i), proposed subparagraph (A) provides that a compensation committee may, in its sole discretion, retain or obtain the advice of a compensation consultant, independent legal counsel or other adviser. Also, pursuant to Exchange Act Rule 10C–1(c)(2)(iii), proposed subparagraph (A) continues by stating that it shall not apply to issuers that do not maintain a formal committee of the board of directors for determining executive compensation. The reason behind this exclusion is that since an action by independent directors acting outside of a formal committee structure would generally be considered action by the full board of directors, it is unnecessary to apply this requirement to directors acting outside of a formal committee structure, as they retain all the powers of the board of directors in making executive compensation determinations.[35]

Also, pursuant to Exchange Act Rule 10C–1(b)(2)(ii), proposed subparagraph (B) provides that the compensation committee shall be directly responsible for the appointment, compensation and oversight of the work of any compensation consultant, independent legal counsel and other adviser retained by the compensation committee. Furthermore, pursuant to Exchange Act Rule 10C–1(b)(2)(iii), proposed subparagraph (C) states that nothing in this proposed Rule 19(d)(3) shall be construed to require the compensation committee to implement or act consistently with the advice or recommendations of the compensation consultant, independent legal counsel or other adviser nor to affect the ability or obligation of a compensation committee to exercise its own judgment in fulfillment of its duties.

Moreover, pursuant to Exchange Act Rule 10C–1(b)(3), proposed subparagraph (D) states that an issuer that maintains a compensation committee shall provide for appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to a compensation consultant, independent legal counsel or any other adviser retained by the compensation committee. Similar to proposed

[32] Proposed Rule 19(d)(3) is modeled on CHX Article 22, Rule 19(c)(2), which requires each issuer to adopt a formal written charter or board resolution, as applicable, addressing the nominations process and any related matters as may be required under federal securities law.

[33] Proposed NASDAQ Rule 5605(d)(1) states, ''each Company must certify that it has adopted a formal written compensation committee charter and that the compensation committee will review and reassess the adequacy of the formal written charter on an annual basis. The charter must specify: (A) The scope of the compensation committee's responsibilities, and how it carries out those responsibilities, including structure, process and membership requirements; (B) the compensation committee's responsibility for determining or recommending to the board for determination, the compensation of the chief executive officer and all other Executive Officers of the Company; (C) that the chief executive officer may not be present during voting or deliberations on his or her compensation; and (D) the specific compensation committee responsibilities and authority set forth in Rule 5605(d)(3).''

[34] Currently, CHX Article 22, Rule 19(d)(1) states ''compensation of the issuer's chief executive officer shall be determined, or recommended to the board for determination, either by (A) a majority of the independent directors or (B) a compensation committee comprised solely of independent directors. The chief executive officer may not be present during voting or deliberations'' and Rule 19(d)(2) states ''compensation of the issuer's other officers, as that term is defined in Section 16 of the Act, shall be determined, or recommended to the board for determination, either by (A) a majority of the issuer's independent directors or (B) a compensation committee comprised solely of independent directors. The chief executive officer may be present during deliberations regarding compensation of other officers, but may not vote.''

[35] *See* Listing Standards for Compensation Committees, Release No. 33–9330 (June 27, 2012) [17 CFR Parts 229 and 240], at p. 12.

subparagraph (A), pursuant to Exchange Act Rule 10C–1(c)(2)(iii), proposed subparagraph (D) continues by stating that it shall not apply to issuers that do not maintain a formal committee of the board of directors, pursuant to Exchange Act Rule 10C–1(c)(2)(iii).[36]

Finally, pursuant to Exchange Act Rule 10C–1(b)(4), proposed subparagraph (E) states that the compensation committee may select a compensation consultant, legal counsel or other adviser, other than in-house legal counsel, only after taking into consideration the following six factors: (i) The provision of other services to the issuer by the person that employs the compensation consultant, legal counsel or other adviser; (ii) the amount of fees received from the issuer by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser; (iii) the policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest; (iv) any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee; (v) any stock of the issuer owned by the compensation consultant, legal counsel or other adviser; and (vi) any business or personal relationship of the compensation consultant, legal counsel, or other adviser or the person employing the adviser with an executive officer of the issuer. The Exchange agrees with the Commission that these six factors, when considered together, are competitively neutral, as they will require compensation committees and functional equivalents to consider a variety of factors that may bear upon the likelihood that a compensation adviser can provide independent advice to the compensation committee, but will not prohibit committees from choosing any particular adviser or type of adviser.[37] Therefore, the Exchange proposes to add no further requirements or factors to be considered under this subparagraph (E).

Proposed Rule 19(d)(5), Rule 19(p)(5) and Paragraph .03 of the Interpretations and Policies of Rule 19

Proposed Rule 19(d)(5) outlines exceptions to the listing standards of this proposed Rule 19(d), pursuant to Exchange Act Rule 10C–1(b)(1)(iii), which exempts specified categories of issuers and gives the Exchange discretion to exempt certain director relationships from the requirements of Rule 10C–1(b)(1) and Rule 10C–1(b)(5), which gives the Exchange discretion to exempt from the requirements of Exchange Act Rule 10C–1 any category of issuer, after considering relevant factors. In establishing these exemptions, proposed Rule 19(d)(5) distinguishes between (A) *temporary exemptions,* (B) *general exemptions* and a (C) *limited exemption for smaller reporting companies.*

Proposed Rule 19(d)(5) lists the *temporary exemptions* from proposed Rule 19(d). Proposed Rule 19(d)(5)(A)(i) is a restatement of current Rule 19(d)(3), which allows an issuer, under exceptional and limited circumstances, to temporarily appoint a non-independent director to its compensation or functional equivalent one director who is not independent, for a term that shall not exceed two years from the date of appointment (unless the director becomes independent prior to the end of the two year period), if (1) the compensation committee or functional equivalent is comprised of at least three persons, including the proposed non-independent director; (2) the non-independent director is not a current officer or employee nor is an immediate family member of a current officer or employee; and (3) the issuer's board of directors determines that (a) the membership of the non-independent director on the compensation committee or functional equivalent is required by the best interests of the company and its shareholders and (b) the board discloses, in the proxy statement for the next annual meeting subsequent to such determination (or, if the issuer does not file a proxy, in its Form 10–K or 20–F), the nature of the relationship and the reasons for the determination.

The purpose of this exemption is to allow issuers to efficiently deal with unforeseen and exceptional circumstances, so as to ensure the smooth function of its compensation committee or functional equivalent. While doing so, the exemption clearly establishes guidelines to minimize the risk of abuse by requiring that the non-independent director's appointment be temporary, that such a director will not be an employee of the issuer and that such a director's appointment is made clear to the shareholders via a proxy statement or Form 10–K or 20F. Furthermore, the Exchange submits that it would not be in the public interest to burden issuers confronted with unforeseen and exceptional circumstances, especially where inaction by a compensation committee may result in a loss of executive talent to the detriment of shareholders. It is important to note that the same temporary exemption, with some differences for context, can be found in CHX Article 22, Rule 19(b)(1)(C)(i)[38] and given the similarities between that rule for audit committees and this proposed rule for compensation committees, the Exchange submits that this exemption is wholly appropriate and necessary.

In addition, proposed Rule 19(d)(5)(A)(ii) outlines an opportunity to cure defects, almost precisely as stated in Exchange Act Rule 10C–1(a)(3) and current CHX Article 22, Rule 19(b)(1)(C)(ii).[39] Specifically, it states that if a member of an issuer's compensation committee or functional equivalent ceases to be an independent director for reasons outside the member's reasonable control, that member, with prompt notice by the issuer to the Exchange, may remain a member of the compensation committee or functional equivalent until the earlier of the next annual shareholders meeting of the issuer or one year from the occurrence of the event that caused the member to be no longer an independent director.

Proposed Rule 19(d)(5)(B)(i)–(viii) list the *general exemptions* from proposed Rule 19(d). All of the exemptions listed under this subparagraph are (1) specific

[36] *Id.*

[37] *See* Listing Standards for Compensation Committees, Release No. 33–9330 (June 27, 2012) [17 CFR Parts 229 and 240], at p. 40.

[38] CHX Article 22, Rule 19(b) governs listing standards for ''audit committees'' and Rule 19(b)(1)(C)(i) states ''one director who is not independent as required by section (b)(1)(A)(i) above, but who meets the criteria set forth in SEC Rule 10A–3 and who is not a current officer or employee (or an immediate family member of a current officer or employee) may be appointed to the audit committee, if the issuer's board under exceptional and limited circumstances, determines that membership on the committee by the individual is required by the best interests of the corporation and its shareholders, and the board discloses, in the proxy statement for the next annual meeting subsequent to such determination (or, if the issuer does not file a proxy, in its Form 10–K, 20–F or other applicable annual disclosure filed with the SEC), the nature of the relationship and the reasons for that determination. A member appointed under this exception may not serve on the audit committee for more than two years under this exception (unless he or she ultimately satisfies the definition of an independent director) and may not chair the audit committee.''

[39] CHX Article 22, Rule 19(b) governs listing standards for ''audit committees'' and Rule 19(b)(1)(C)(ii) and Rule 19(b)(1)(C)(ii) states ''if a member of an audit committee ceases to meet the independence criteria set forth in SEC Rule 10A–3 for reasons outside the person's reasonable control, that person may remain a member of the committee until the earlier of the next annual shareholders' meeting or one year from the occurrence of the event that caused the member to no longer meet the independence criteria. The issuer must promptly notify the Exchange if this circumstance occurs.''

exemptions required under Exchange Act Rule 10C–1(b)(5); (2) proposed expansions of specific exemptions listed under Exchange Act Rule 10C–1(b)(1)(iii); or (3) exemptions already in effect under CHX Rules and proposed pursuant to Exchange Act Rule 10C–1(b)(5)(i). Some of the proposed exemptions fall under one or more of these categories and each exemption will discussed in this context.

Proposed subparagraph (i) exempts limited partnerships and companies in bankruptcies from the requirements of proposed Rule 19(d). Such issuers are already exempt from the current compensation committee requirements under paragraph .03(1) of the Interpretations and Policies of Rule 19.[40] Although Exchange Act Rule 10C–1(b)(1)(iii)(A)(1) and (2) already mandate that such companies be exempt from the independence requirements, subparagraph (ii) proposes to expand that exemption to all requirements under Exchange Act Rule 10C–1, pursuant to the Exchange's authority granted under Exchange Act Rule 10C–1(b)(5)(i). A ''limited partnership'' is defined as a form of business ownership and association consisting of one or more general partners who are fully liable for the debts and obligations of the partnership and one or more limited partners whose liability is limited to the amount invested.[41] As such, limited partnerships are already exempt from the current compensation committee requirements because the ownership/management structure of limited partnerships renders the independent director requirements inapplicable. The Exchange submits that this same reasoning renders the compensation adviser requirements unnecessary as well. With respect to companies in bankruptcy, the purpose behind this exemption is to not overburden issuers that are struggling to emerge from bankruptcy. That is, it would not be in public interest to burden such companies with additional listing standards where such companies are subject to a host of bankruptcy requirements that will fundamentally impact its survival. Given these considerations, the Exchange submits that it would be wholly appropriate to exempt limited partnerships and companies in bankruptcy from all of the requirements of proposed Rule 19(d).

Proposed subparagraph (ii) exempts from the requirements of proposed Rule 19(d) ''closed-end and open-end management companies'' registered under the Investment Company Act,[42] as already stated in CHX rules as paragraph .03(2) of the Interpretations and Policies of Rule 19.[43] Although Exchange Act Rule 10C–1(b)(1)(iii)(A)(3) only exempts open-end management investment companies from the independence requirement of the Rule 10C–1(b), the Exchange proposes to expand that exemption, pursuant to Rule 10C–1(b)(5)(i) to include both open-end and closed-end management investment companies and to apply the exemption to all the requirements of Rule 10C–1. The Exchange submits that since registered investment companies are already subject to the requirements of the Investment Company Act, including, in particular, requirements concerning potential conflicts of interest related to investment adviser compensation,[44] requiring such companies to comport with the requirements of this proposed Rule 19(d) would be duplicative and unnecessary.

Proposed subparagraph (iii) exempts from the requirements of proposed Rule 19(d) passive business organizations, such as royalty trusts, or derivatives and special purpose entities, pursuant to the Exchange's discretion to exempt certain categories of issuers under Exchange Act Rule 10C–1(b)(5)(iii). Such issuers are already exempt from the current compensation committee requirements under paragraph .03(3) of the Interpretations and Policies of Rule 19.[45] The reasoning behind exempting passive business organizations, such as royalty trusts, is that such entities are structured fundamentally different from conventional equities issuers. For instance, in the case of royalty trusts, such entities do not have employees and virtually all profits earned are distributed to shareholders. As such, these entities have no need for compensation committees. Moreover, special purpose entities are frequently utilized to securitize receivables, such as loans. Similar to the reasoning behind exempting clearing agencies[46] that issue futures products and standardized options, purchasers of securities issued by such special purpose entities do not make an investment decision based on the issuer, but rather, the underlying security. As a result, information about the special purpose entities, its officers and directors and its financial statements is much less relevant to investors in these securities than information about the underlying security.

Proposed subparagraph (iv) exempts from the requirements of proposed Rule 19(d) any ''foreign private issuer'' that discloses in its annual report the reasons that it does not have an independent compensation committee, subject to the additional requirements of paragraph .03(4) of the Interpretations and Policies of Rule 19.[47] Moreover,

[40] Paragraph .03(1) of the Interpretations and Policies of Rule 19 states that ''limited partnerships and companies in bankruptcies are not required to comply with sections (a), (c) and (d) above.''

[41] *See* Unif. Ltd. P'ship Act sections 102, 303 and 404 (2001).

[42] *Supra* note 29.

[43] Paragraph .03(2) of the Interpretations and Policies of Rule 19 entitled, ''Closed-End and Open-End Management Companies'' states, ''(A) Closed-end management companies that are registered under the Investment Company Act of 1940 are not required to comply with sections (a) through (f) of this Rule; except that closed-end funds must (i) maintain an audit committee of at least three persons; and (ii) comply with the provisions of SEC Rule 10A–3 and the provisions of paragraphs (b)(1)(A)(iv), (b)(1)(B), (b)(2), (b)(3) and (f), above, subject to applicable exceptions. Additionally, these issuers must establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting related services for the investment company, as well as employees of the investment company. (B) Business development companies, which are a type of closed-end management investment company defined in Section 2(a)(48) of the Investment Company Act of 1940 that are not registered under that Act, are required to comply with all of the provisions of this Rule. (C) Open-end funds (including open-end funds that can be listed or traded as investment company units) are not required to comply with the provisions of sections (a) through (f) of this Rule; except that these funds must comply with the provisions of sections (b) and (f)(2), above, to the extent required by SEC Rule 10A–3. Additionally, these issuers must establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting related services for the investment company, as well as employees of the investment company and must address this responsibility in the audit committee charter.''

[44] 15 USCS 80a–2, 15 USCS 80a–3, 15 USCS 80a–15, 15 USCS 80a–17, 15 USCS 80a–35 [sic].

[45] Paragraph .03(3) of the Interpretations and Policies of Rule 19 states, ''passive business organizations (such as royalty trusts) or derivatives and special purpose entities that are exempt from the requirements of SEC Rule 10A–3 are not subject to any requirement under sections (a) through (f) of this rule. To the extent that Rule 10A–3 applies to a passive business organization, derivative or special purpose security, such entities are required to comply with the provisions of paragraphs (b) and (f)(2) above, to the extent required by SEC Rule 10A–3.''

[46] *See* Listing Standards for Compensation Committees, Release No. 33–9330 (June 27, 2012) [17 CFR Parts 229 and 240], at p. 51.

[47] Paragraph .03(4) of the Interpretations and Policies of Rule 19 states, ''foreign issuers will be permitted to comply with their home country practices with respect to corporate governance (and thus are exempt from the requirements of sections (a)–(f), above), except to the extent that SEC Rule 10A–3 requires compliance with specific audit committee requirements in sections (b) and (f)(2) above. Foreign issuers must provide English language disclosure of any significant ways in which their corporate governance practices differ from those required for domestic issuers under this Rule 19. This disclosure may be provided either on

Continued

subparagraph (v) adopts the definition of ''foreign private issuer'' as stated under Exchange Act Rule 3b–4.[48] Pursuant to Exchange Act Rule 10C–1(b)(4)(ii), the Exchange proposes to expand the Exchange Act Rule 10C–1(b)(1)(iii)(A)(4) exemption of foreign private issuers from only the independence requirements to all requirements under Rule 10C–1. This is because foreign private issuers are already subject to corporate regulations of their respective home countries and requiring such issuers to comport with Exchange Act Rule 10C–1 would be cumulative, if not contradictory. In addition, the Exchange further proposes include a phase-in provision, nearly identical to proposed Section 303A.00 (Compliance Dates/A Company Ceases to Qualify as a Foreign Private Issuer) of the NYSE Listing Company Manual,[49] which requires compliance with the proposed compensation committee rules within six months of the date on which it failed to qualify as a foreign private issuer.

Proposed subparagraph (v) exempts from the requirements of proposed Rule 19(d) issuers listing only preferred or debt securities on the Exchange that are subject to the multiple listing exception described in paragraph .04 of the Interpretations and Policies of Rule 19, pursuant to the Exchange's discretion to exempt certain categories of issuers under Exchange Act Rule 10C–1(b)(5)(iii). Such issuers are already exempt from the current compensation committee requirements under paragraph .03(5) of the Interpretations and Policies of Rule 19.[50] The reasoning behind this exemption is that issuers of preferred or debt securities are already subject to the requirements of the rules of the exchange on which they are primarily listed. As such, this proposed exemption prevents such issuers from having to comport with multiple sets of rules. Moreover, holders of listed preferred stock have significantly greater protections with respect to their rights to receive dividends and a liquidation preference upon dissolution of the issuer. In addition, investors typically regard preferred stocks as a fixed income investment comparable to debt securities. Furthermore, debt securities are not equity securities, as they do not impart an ownership interest to the holder of such securities. Given these considerations, preferred and debt securities fall outside the scope of Exchange Act Rule 10C–1(a)(1) and should be generally exempt.

Proposed subparagraph (vi) exempts controlled companies from the requirements of proposed Rule 19(d), as mandated by Exchange Act Rule 10C–1(b)(5)(ii), with certain additional requirements.[51] Such issuers are already exempt from the current compensation committee requirements under current Rule 19(d)(3)(B).[52] Under Rule 19(p)(1), a ''controlled company'' is defined as a company in which an individual, group or another company, holds more than 50 percent of the voting power. This definition is consistent with Exchange Act Rule 10C–1(c)(3), which defines a ''controlled company'' as an issuer that is listed on a national securities exchange or by national securities association and of which more than 50 percent of the voting power for the election of directors is held by an individual, a group or another company. The Exchange further proposes to include this exemption under paragraph .03 of the Interpretations and Policies of Rule 19, as proposed paragraph .03(6).

Proposed subparagraph (vii) exempts from the requirements of proposed Rule 19(d) clearing agencies that are registered pursuant to Section 17A of the Exchange Act or that are exempt from the registration requirements of section 17A(b)(7)(A) of the Exchange Act that clear and list a security futures product or standardized option, pursuant to Exchange Act Rule 10C–1(b)(5)(iii) and (b)(5)(iv). The Exchange further proposes to include this exemption under paragraph .03 of the Interpretations and Policies of Rule 19, as proposed paragraph .03(7).

Moreover, proposed Rule 19(d)(5)(C) establishes a *limited exemption for smaller reporting companies* to proposed Rule 19(d) and proposed Rule 19(p)(5) merely states that the terms ''small business issuer'' and ''smaller reporting company'' means any issuer that meets the definition of ''smaller reporting company'' set out in SEC Rule 12b–2. Specifically, the limited exemption narrows the scope of the general exemption under Exchange Act Rule 10C–1(b)(5)(ii) and exempts smaller reporting companies only from the compensation adviser requirements of proposed Rule 19(d)(4) and the additional independent director requirements specific to compensation committees of proposed Rule 19(p)(3)(B). This is because under current CHX rules, small business issuers are already subject to independent director requirements for its compensation committees and, as such, the Exchange submits that requiring such issuers to continue to comply with similar proposed rules is not overly burdensome. Moreover, the proposed rule includes a phase-in provision similar to proposed Rule 19(d)(5)(B)(iv) for foreign private issuers and proposed Section 303A.00 (Compliance Dates/A Company Ceases to Qualify as a Smaller Reporting Company) of the NYSE Listing Company Manual,[53] which states that if the smaller reporting company ceases to qualify as such under SEC rules, it is required to (i) meet the additional

the issuer's Web site or in the annual report distributed to shareholders in the U.S. If the disclosure is made only on an issuer's Web site, the issuer must note that fact in its annual report and provide the Web address at which the disclosure may be reviewed.''

[48] Exchange Act Rule 3b–4(c) [17 CFR 240.3b–4(c)] defines ''foreign private issuer'' as ''any foreign issuer other than a foreign government, except for an issuer that has more than 50% of its outstanding voting securities held of record by U.S. residents and any of the following: A majority of its officers and directors are citizens or residents of the United States, more than 50% of its assets are located in the United States, or its business is principally administered in the United States.''

[49] Section 303A.00 (Compliance Dates/A Company Ceases to Qualify as a Foreign Private Issuer) of the NYSE Listing Company Manual states, in pertinent part, ''to the extent a foreign private issuer ceases to qualify as such under SEC rules (so that is required to file on domestic forms with the SEC), such company is required to comply with Section 303A domestic company requirements as follows: [* * *] The company must have fully independent nominating and compensation committees as required by Sections 303A.04 and 303A.05, if applicable, within six months of the Foreign Private Issuer Determination Date.'' The Commission notes that a portion of this language is proposed in NYSE–2012–049.

[50] Paragraph .03(5) of the Interpretations of Policies of Rule 19 states, ''issuers listing only preferred or debt securities on the Exchange typically will not be required to adhere to the requirements set out in sections (a)–(f) because they will be subject to the multiple listing exception described in Interpretation .04, below. To the extent required by SEC Rule 10A–3, these issuers will only be required to comply with sections (b) and (f)(2) above.''

[51] Pursuant to CHX paragraph .02 of the Interpretations and Policies of Rule 19, controlled companies that rely on this exemption are required to disclose in its annual proxy (or Form 10–K, 20–F, or other applicable annual disclosure filed with the SEC) that it is a controlled company and the basis for that determination.

[52] Current Rule 19(d)(3)(B) states, ''controlled company is exempt from the requirements of this paragraph (d).''

[53] Section 303A.00 (Compliance Dates/A Company Ceases to Qualify as a Smaller Reporting Company) states, in pertinent part, ''under SEC Rule 12b–2, a company tests its status as a smaller reporting company on an annual basis at the end of its most recently completed second fiscal quarter [* * *] To the extent a smaller reporting company ceases to qualify as such under SEC rules, it is required, if applicable, to: (1) Have a compensation committee of which all of the members meet the independence standards of Section 303A.02(a)(ii) within six months of the Smaller Reporting Company Determination Date; and (II) comply with Section 303A.05(c)(iv) as of the Smaller Reporting Company Determination Date.'' The Commission notes that this is language proposed in NYSE–2012–049.

independent director requirements of proposed Rule 19(p)(3)(B) within six months of the date on which the issuer failed to qualify as a smaller reporting company and (ii) comply with the compensation adviser requirements of proposed Rule 19(d)(4) as of the date on which the issuer failed to qualify as a smaller reporting company.

Proposed Paragraph .05 of the Interpretations and Policies

Pursuant to the exemptive authority provided to the exchanges under Exchange Act Rule 10C–1(b)(1)(iii), the Exchange proposes to amend paragraph .05 (Transition Periods and Compliance Dates) of the Interpretations and Policies of Rule 19 to establish a transition period for issuers to conform to the requirements of proposed Rule 19, as proposed paragraph .05(6). Specifically, proposed paragraph .05(6) establishes that proposed Rule 19(d), Rule 19(p)(3), Rule 19(p)(5) and paragraphs .03 and .05 of the Interpretations and Policies of Rule 19 (which are all of the provisions that have been amended under this proposed rule filing) will become immediately operative upon approval by the SEC. However, issuers shall have until the earlier of its first annual shareholders meeting after January 15, 2014 or October 31, 2014 to comply with the compensation committee charter requirements of proposed Rule 19(d)(2), the compensation adviser requirements of proposed Rule 19(d)(4) and the additional independent director requirements of proposed Rule 19(p)(3)(B). That is, the amendments that do not require issuers to do anything in addition to what they are already required to do, under current rules, will become operative immediately upon approval and the amendments that place additional requirements on the issuers will be subject to the longer transition period.

This proposed transition period is similar to proposed Section 303A.00 (Transition Periods for Compensation Committee Requirements) of the NYSE Listed Company Manual, which provides that listed companies will have until the earlier of their first annual meeting after January 15, 2014 or October 31, 2004, to comply with the new standards with respect to compensation committees. The only difference between the NYSE proposed transition period and this proposed paragraph .05(6) is that the NYSE proposes to maintain current rule language operative through June 30, 2013, whereas the Exchange proposes to make amended rule language that does not substantively change the current compensation committee listing standards immediately operative. However, the Exchange submits that both approaches are practically similar and the differences are based on how CHX rules are organized.

2. Statutory Basis

The proposed rule change in relation to the Exchange's compensation committee requirements and the proposed compensation committee consultant independence requirements are consistent with the requirements of Rule 10C–1, with respect to the adoption by national securities exchange of compensation committee listing standards. Moreover, the proposed rule changes are consistent with Section 6(b) of the Act [54] in general, and furthers the objectives of Section 6(b)(5) [55] in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transaction in securities, to remove impediments and perfect the mechanisms of a free and open market, and, in general, to protect investors and the public interest. Specifically, the Exchange believes that the proposed rule change supports the objective of the Exchange Act by providing harmonization between CHX Rules and rules of all other organization subject to the requirements of Exchange Act Rule 10C–1, which would result in less burdensome and more efficient regulatory compliance. Moreover, the Exchange submits that the proposed amendments to its compensation committee listing standards are consistent with the protection of investors and the public interest in that they strengthen the independence requirements for compensation committee membership, provide additional authority to compensation committees and require compensation committees to consider the independence of compensation consultants.

Furthermore, the Exchange submits that the exemptions from the proposed requirements that it is granting to limited partnerships and companies in bankruptcies, management companies registered under the Investment Company Act of 1940, passive business organizations or derivatives and special purpose entities that are exempt from the requirements of Exchange Act 10A–3, foreign private issuers, issuer's listing only preferred or debt securities, controlled companies and clearing agencies that clear and list securities futures products or standardized options are consistent with Section 10C and Rule 10C–1 for the reasons stated above in the ''Purpose'' section. Specifically, Rule 10C–1(b)(5)(ii) explicitly exempts smaller reporting companies and foreign private issuers will comply with their home country law and, if they avail themselves of the exemption, will be required to disclose that fact under existing Exchange listing requirements. Moreover, the Exchange submits it is an appropriate use of its exemptive authority under Rule 10C–1(b)(5)(i), and that it is not unfairly discriminatory under Section 6(b)(5) of the Act, to provide general exemptions under the proposed rules to issuers whose only listed class of equity securities on the Exchange is a preferred stock, as holders of listed preferred stock have significantly greater protections with respect to their rights to receive dividends and a liquidation preference upon dissolution of the issuer, and preferred stocks are typically regarded by investors as a fixed income investment comparable to debt securities, the issuers of which are exempt from compliance with Rule 10C–1. In addition, the Exchange submits that it is an appropriate use of its exemptive authority under Rule 10C–1(b)(5)(i) and that is not unfairly discriminatory under Section 6(b)(5) of the Exchange Act, to provide general exemptions under the proposed rules for all of the other categories of issuers that are not currently subject to the Exchange's compensation committee requirement, for the structural reasons discussed in the ''Purpose'' section and because it would be a significant and unnecessarily burdensome alteration in their governance structures to require them to comply with the proposed new requirements.

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 either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i)

[54] 15 U.S.C. 78f(b).

[55] 15 U.S.C. 78f(b)(5).

as the Commission may designated up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CHX–2012–13 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–CHX–2012–13. This file number should be included on the subject line if email 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 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CHX–2012–13, and should be submitted on or before November 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[56]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25407 Filed 10–15–12; 8:45 am]

BILLING CODE 8011–01–P

[56] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68030; File No. SR–NYSEArca–2012–88]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change to List and Trade Shares of the RiverFront Strategic Income Fund under NYSE Arca Equities Rule 8.600

October 10, 2012.

I. Introduction

On August 10, 2012, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the RiverFront Strategic Income Fund (''Fund'') under NYSE Arca Equities Rule 8.600. The proposed rule change was published for comment in the **Federal Register** on August 28, 2012.[3] The Commission received no comments on the proposal. This order grants approval of the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to list and trade the Shares of the Fund pursuant to NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares on the Exchange. The Shares will be offered by ALPS ETF Trust (''Trust''), a statutory trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company.[4] The Fund will be managed by WisdomTree Asset Management, Inc. (''WisdomTree'' or the ''Adviser''). RiverFront Investment Group, LLC (''RiverFront'') is the investment sub-adviser for the Fund (the ''Sub-Adviser''). The Exchange represents that, while the Adviser is not affiliated with a broker-dealer, the Sub-Adviser is affiliated with a broker-dealer and has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the portfolio.[5]

RiverFront Strategic Income Fund

The investment objective of the Fund is to seek total return with an emphasis on income as the source of that total return by investing in a global portfolio of fixed income securities of various maturities, ratings and currency denominations. The Fund intends to utilize various investment strategies in a broad array of fixed income sectors. The Fund will allocate its investments based upon the analysis of the Sub-Adviser of the pertinent economic and market conditions, as well as yield, maturity and currency considerations.

The Fund may purchase fixed income securities issued by U.S. or foreign corporations [6] or financial institutions, including debt securities of all types and maturities, convertible securities and preferred stocks. The Fund also may purchase securities issued or guaranteed by the U.S. Government or foreign governments (including foreign states, provinces and municipalities) or their agencies and instrumentalities or issued or guaranteed by international organizations designated or supported

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 67715 (August 22, 2012), 77 FR 52083 (''Notice'').

[4] The Trust is registered under the Investment Company Act of 1940 (''1940 Act''). On February 23, 2012, the Trust filed with the Commission an amendment to its registration statement on Form N–1A under the Securities Act of 1933 (''Securities Act'') and under the 1940 Act relating to the Fund (File Nos. 333–148826 and 811–22175) (''Registration Statement''). In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. *See* Investment Company Act Release No. 28471 (October 27, 2008) (File No. 812–13458).

[5] *See* Commentary .06 to NYSE Arca Equities Rule 8.600. The Exchange represents that in the event (a) the Adviser or Sub-Adviser becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser becomes affiliated with a broker-dealer, it will implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the portfolio and will be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding such portfolio.

[6] The Fund will invest only in securities that the Adviser or Sub-Adviser deems to be sufficiently liquid. While foreign corporate debt generally must have $200 million or more par amount outstanding and significant par value traded to be considered as an eligible investment, at least 80% of issues of foreign corporate debt held by the Fund will have $200 million or more par amount outstanding.

by multiple government entities to promote economic reconstruction or development. The average maturity or duration of the Fund's portfolio of fixed income securities will vary based on the Sub-Adviser's assessment of economic and market conditions.

The Fund may invest in mortgage-backed securities (''MBS'') issued or guaranteed by federal agencies and/or U.S. government sponsored instrumentalities, such as the Government National Mortgage Administration (''Ginnie Mae''), the Federal Housing Administration (''FHA''), the Federal National Mortgage Association (''Fannie Mae'') and the Federal Home Loan Mortgage Corporation (''Freddie Mac'').[7] The MBS in which the Fund may invest will be either pass-through securities or collateralized mortgage obligations (''CMOs'').[8] The Fund may purchase or sell securities on a when issued, delayed delivery or forward commitment basis. The Fund may also invest in other fixed income investment companies, including exchange-traded funds (''ETFs'')[9] and/or closed-end funds.

The Fund may invest without limitation in debt securities denominated in foreign currencies and in U.S. dollar-denominated debt securities of foreign issuers, including securities of issuers located in emerging markets. The Sub-Adviser may attempt to reduce currency risk by entering into contracts with banks, brokers or dealers to purchase or sell securities or foreign currencies at a future date (''forward contracts''). The Fund may enter into foreign currency forward and foreign currency futures contracts to facilitate local securities settlements or to protect against currency exposure in connection with its distributions to shareholders.

The Fund has not established any credit rating criteria for the fixed income securities in which it may invest, and it may invest entirely in high yield securities (''junk bonds''). Junk bonds are debt securities that are rated below investment grade by nationally recognized statistical rating organizations (''NRSROs''), or are unrated securities that the Sub-Adviser believes are of comparable quality. The Sub-Adviser considers the credit ratings assigned by NRSROs as one of several factors in its independent credit analysis of issuers.

The Fund may also invest in money market instruments, including repurchase agreements or other funds which invest exclusively in money market instruments, structured notes (notes on which the amount of principal repayment and interest payments are based on the movement of one or more specified factors, such as the movement of a particular bond or bond index), and, in accordance with the Exemptive Order, in swaps, options and futures contracts. The Fund may also invest in municipal securities. The Fund may invest up to 5% of its assets in MBS (which may include commercial mortgage-backed securities (''CMBS'')) or other asset-backed securities issued or guaranteed by private issuers. The Fund may also invest in money market instruments or other short-term fixed income instruments as part of a temporary defensive strategy to protect against temporary market declines.

The Fund may invest in commercial paper and other short-term corporate instruments.[10] The Fund may purchase participations in corporate loans. Participation interests generally will be acquired from a commercial bank or other financial institution (a ''Lender'') or from other holders of a participation interest (a ''Participant''). The purchase of a participation interest either from a Lender or a Participant will not result in any direct contractual relationship with the borrowing company (the ''Borrower''). The Fund generally will have no right directly to enforce compliance by the Borrower with the terms of the credit agreement. Instead, the Fund will be required to rely on the Lender or the Participant that sold the participation interest, both for the enforcement of the Fund's rights against the Borrower and for the receipt and processing of payments due to the Fund under the loans. Under the terms of a participation interest, the Fund may be regarded as a member of the Participant, and thus the Fund is subject to the credit risk of both the Borrower and a Participant. Participation interests are generally subject to restrictions on resale. Generally, the Fund considers participation interests to be illiquid and therefore subject to the Fund's percentage limitations for investments in illiquid securities.

The Fund may invest in securities that have variable or floating interest rates which are readjusted on set dates (such as the last day of the month or calendar quarter) in the case of variable rates or whenever a specified interest rate change occurs in the case of a floating rate instrument. Variable or floating interest rates generally reduce changes in the market price of securities from their original purchase price because, upon readjustment, such rates approximate market rates. Accordingly, as interest rates decrease or increase, the potential for capital appreciation or depreciation is less for variable or floating rate securities than for fixed rate obligations. Many securities with variable or floating interest rates purchased by the Fund are subject to payment of principal and accrued interest (usually within seven days) on the Fund's demand. The terms of such demand instruments require payment of principal and accrued interest by the issuer, a guarantor and/or a liquidity provider. The Sub-Adviser will monitor the pricing, quality and liquidity of the variable or floating rate securities held by the Fund.

The Fund may enter into repurchase agreements, which are agreements pursuant to which securities are acquired by the Fund from a third party with the understanding that they will be repurchased by the seller at a fixed price on an agreed date. These agreements may be made with respect to any of the portfolio securities in which the Fund is authorized to invest. Repurchase agreements may be characterized as loans secured by the underlying securities.

The Fund may enter into reverse repurchase agreements, which involve the sale of securities with an agreement to repurchase the securities at an agreed-upon price, date and interest payment and have the characteristics of borrowing. The securities purchased with the funds obtained from the agreement and securities collateralizing the agreement will have maturity dates no later than the repayment date.

The Fund may purchase when-issued securities. Purchasing securities on a ''when-issued'' basis means that the date for delivery of and payment for the securities is not fixed at the date of purchase, but is set after the securities

[7] A third-party pricing service will be used to value some or all of the Fund's MBS.

[8] Pass-through securities represent a right to receive principal and interest payments collected on a pool of mortgages, which are passed through to security holders. CMOs are created by dividing the principal and interest payments collected on a pool of mortgages into several revenue streams (tranches) with different priority rights to portions of the underlying mortgage payments. The Fund will not invest in CMO tranches which represent a right to receive interest only (''IOs''), principal only (''POs'') or an amount that remains after other floating-rate tranches are paid (an inverse floater). If the Fund invests in CMO tranches (including CMO tranches issued by government agencies) and interest rates move in a manner not anticipated by Fund management, it is possible that the Fund could lose all or substantially all of its investment.

[9] The Fund will not invest in leveraged or leveraged inverse ETFs.

[10] Commercial paper consists of short-term promissory notes issued primarily by corporations. Commercial paper may be traded in the secondary market after its issuance. As of July 31, 2012, the amount of commercial paper outstanding (seasonally adjusted) was approximately $1000.5 billion. *See http://www.federalreserve.gov/releases/CP/default.htm.*

are issued. The payment obligation and, if applicable, the interest rate that will be received on the securities are fixed at the time the buyer enters into the commitment. The Fund will only make commitments to purchase such securities with the intention of actually acquiring such securities, but the Fund may sell these securities before the settlement date if it is deemed advisable.

The Fund may not hold more than 15% of its net assets in: (1) Illiquid securities (which include participation interests); and (2) Rule 144A securities.[11] The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid securities. Illiquid securities include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.[12]

The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600. The Exchange represents that, for initial and/or continued listing, the Fund will be in compliance with Rule 10A–3 [13] under the Exchange Act, as provided by NYSE Arca Equities Rule 5.3. A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the net asset value (''NAV'') and the Disclosed Portfolio will be made available to all market participants at the same time. The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage. The Fund will not invest in non-US equity securities.

Additional information regarding the Trust and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions and taxes, among other things, can be found in the Notice and Registration Statement, as applicable.[14]

III. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 of the Act [15] and the rules and regulations thereunder applicable to a national securities exchange.[16] In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[17] which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission notes that the Fund and the Shares must comply with the requirements of NYSE Arca Equities Rule 8.600 to be listed and traded on the Exchange.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,[18] which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. Quotation and last-sale information for the Shares will be available via the Consolidated Tape Association (''CTA'') high-speed line. In addition, the Portfolio Indicative Value (''PIV''), as defined in NYSE Arca Equities Rule 8.600(c)(3), will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Exchange's Core Trading Session.[19] On each business day before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund will disclose on its Web site the Disclosed Portfolio, as defined in NYSE Arca Equities Rule 8.600(c)(2), that will form the basis for the Fund's calculation of the net asset value (''NAV'') at the end of the business day.[20] The Fund's custodian will calculate the NAV per Share as of the close of normal trading on the New York Stock Exchange (normally, 4:00 p.m. Eastern Time) on each day that such exchange is open. In addition, information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services, and information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. The Web site for the Fund will include a form of the prospectus for the Fund, additional data relating to NAV, and other applicable quantitative information. Intra-day and end-of-day prices for all debt securities or other financial instruments held by the Fund will be available through major market data vendors and broker-dealers. Further, a basket composition file disclosing the Fund's portfolio securities that will be applicable that day to redemption requests, which includes the security names and share quantities required to be delivered in exchange for Fund Shares, together with estimates and actual cash components, will be publicly disseminated daily prior to the opening of the NYSE via the National Securities Clearing Corporation. The basket represents one ''Creation Unit'' of the Fund.

The Commission further believes that the proposal to list and trade the Shares

[11] Rule 144A securities are securities which, while privately placed, are eligible for purchase and resale pursuant to Rule 144A. According to the Registration Statement, Rule 144A permits certain qualified institutional buyers, such as the Fund, to trade in privately placed securities even though such securities are not registered under the Securities Act.

[12] The Commission has stated that long-standing Commission guidelines have required open-end funds to hold no more than 15% of their net assets in illiquid securities and other illiquid assets. *See* Investment Company Act Release No. 28193 (March 11, 2008), 73 FR 14618 (March 18, 2008), footnote 34. *See also,* Investment Company Act Release No. 5847 (October 21, 1969), 35 FR 19989 (December 31, 1970) (Statement Regarding ''Restricted Securities''); Investment Company Act Release No. 18612 (March 12, 1992), 57 FR 9828 (March 20, 1992) (Revisions of Guidelines to Form N–1A). A fund's portfolio security is illiquid if it cannot be disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the fund. *See* Investment Company Act Release No. 14983 (March 12, 1986), 51 FR 9773 (March 21, 1986) (adopting amendments to Rule 2a–7 under the 1940 Act); Investment Company Act Release No. 17452 (April 23, 1990), 55 FR 17933 (April 30, 1990) (adopting Rule 144A under the Securities Act).

[13] 17 CFR 240.10A–3.

[14] *See* Notice and Registration Statement, *supra* notes 3 and 4, respectively.

[15] 15 U.S.C. 78f.

[16] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[17] 15 U.S.C. 78f(b)(5).

[18] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[19] According to the Exchange, several major market data vendors widely disseminate PIVs taken from CTA or other data feeds. *See* Notice, *supra* note 3, 77 FR 52083 at 52087.

[20] On a daily basis, the Adviser will disclose for each portfolio security and other financial instrument of the Fund the following information on the Fund's Web site: ticker symbol (if applicable), name of security and financial instrument, number of shares, if applicable, and dollar value of financial instruments held in the portfolio, and percentage weighting of the security and financial instrument in the portfolio. The Web site information will be publicly available at no charge.

is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Commission notes that the Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.[21] In addition, the Exchange will halt trading in the Shares under the specific circumstances set forth in NYSE Arca Equities Rule 8.600(d)(2)(D), and may halt trading in the Shares if trading is not occurring in the securities and/or the financial instruments comprising the Disclosed Portfolio of the Fund, or if other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.[22] The Exchange will consider the suspension of trading in or removal from listing of the Shares if the PIV is no longer calculated or available or the Disclosed Portfolio is not made available to all market participants at the same time.[23] The Exchange represents that the Adviser is not affiliated with a broker-dealer. The Exchange further represents that the Sub-Adviser is affiliated with a broker-dealer and has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the portfolio.[24] The Commission notes that Adviser and Sub-Adviser personnel who make decisions on the Fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the Fund's portfolio.[25] Further, the Commission notes that the Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the actual components of the portfolio.[26] The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees. While not all components of the Disclosed Portfolio for the Fund may trade on markets that are members of the Intermarket Surveillance Group (''ISG'') or with which the Exchange has in place a comprehensive surveillance sharing agreement, the Exchange may obtain information via the ISG from other exchanges that are members of ISG or with which the Exchange has entered into a surveillance sharing agreement.

The Exchange further represents that the Shares are deemed to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. In support of this proposal, the Exchange has made representations, including:

(1) The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600.

(2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

(3) The Exchange's surveillance procedures applicable to derivative products, which include Managed Fund Shares, are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

(4) Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders in an Information Bulletin (''Bulletin'') of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (a) The procedures for purchases and redemptions of Shares in Creation Unit aggregations (and that Shares are not individually redeemable); (b) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its Equity Trading Permit Holders to learn the essential facts relating to every customer prior to trading the Shares; (c) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated PIV will not be calculated or publicly disseminated; (d) how information regarding the PIV is disseminated; (e) the requirement that Equity Trading Permit Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(5) For initial and/or continued listing, the Fund will be in compliance with Rule 10A–3 under the Act,[27] as provided by NYSE Arca Equities Rule 5.3.

(6) The Fund may not hold more than an aggregate amount of 15% of its net assets in illiquid securities (which include participation interests), including Rule 144A securities.

(7) The Fund will not invest in non-U.S. equity securities.

(8) The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage.

(9) A minimum of 100,000 Shares of each Fund will be outstanding at the commencement of trading on the Exchange.

This approval order is based on the Exchange's representations and description of the Fund, including those set forth above and in the Notice.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act[28] and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[29] that the proposed rule change (SR–NYSEArca–2012–88) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25358 Filed 10–15–12; 8:45 am]

BILLING CODE 8011–01–P

[21] *See* NYSE Arca Equities Rule 8.600(d)(1)(B).

[22] With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.

[23] *See* NYSE Arca Equities Rule 8.600(d)(2)(C)(ii).

[24] *See supra* note 5 and accompanying text. The Commission notes that an investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (''Advisers Act''). As a result, the Adviser, the Sub-Adviser, and their related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[25] *See* Commentary .06 to NYSE Arca Equities Rule 8.600.

[26] *See* NYSE Arca Equities Rule 8.600(d)(2)(B)(ii).

[27] *See* 17 CFR 240.10A–3.

[28] 15 U.S.C. 78f(b)(5).

[29] 15 U.S.C. 78s(b)(2).

[30] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68029; File No. SR–NASDAQ–2012–114]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Non-Penny Pilot and Penny Pilot Options

October 10, 2012.

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 October 1, 2012, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASDAQ. 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 NASDAQ Stock Market LLC proposes to modify Chapter XV, entitled ''Options Pricing,'' at Section 2 governing pricing for NASDAQ members using the NASDAQ Options Market (''NOM''), NASDAQ's facility for executing and routing standardized equity and index options. Specifically, NOM proposes to amend the Non-Penny Pilot Options and Penny Pilot [3] Options pricing.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaq.cchwallstreet.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ proposes to modify Chapter XV, entitled ''Options Pricing,'' at Section 2(1) governing the rebates and fees assessed for option orders entered into NOM. The Exchange is proposing to amend the Non-Penny Pilot pricing and the Penny Pilot Options pricing. This proposal seeks to incentivize NOM Participants to send additional Customer order flow to the Exchange in both Penny Pilot Options and Non-Penny Pilot Options in order to obtain rebates.

The Exchange proposes to assess fees and pay rebates on options overlying the Nasdaq 100 Index traded under the symbol NDX (''NDX'') as a Non-Penny Pilot Option. Today, NDX has its own pricing separate and apart from other Non-Penny Pilot pricing. The Exchange proposes to eliminate the separate NDX pricing and instead assess fees and pay rebates for NDX as a Non-Penny Pilot Option. In addition, the Exchange proposes to assess a surcharge to all market participants, except Customers, for transactions in NDX of $0.10 per contract. The surcharge would be in addition to both the Fee for Adding Liquidity and the Fee for Removing Liquidity in Non-Penny Pilot Options. Customers would not be assessed a surcharge for transactions in NDX.

The Exchange also proposes to amend the Non-Penny Pilot Option pricing (including NDX) to be equivalent to the rebates and fees currently in place for options overlying Facebook, Inc. (''FB''), Google Inc. (''GOOG'') and Groupon, Inc. (''GRPN''), except for the proposed changes to the Customer Rebate to Add Liquidity, which the Exchange is amending as described herein.[4] The Exchange would also eliminate the FB, GOOG and GRPN separate pricing as those symbols would be subject to the Non-Penny Pilot Option pricing pursuant to this proposal.

The Exchange proposes to amend the Non-Penny Pilot Option Pricing, which will include NDX, FB, GOOG and GRPN, by increasing the Professional Fee for Adding Liquidity from $0.30 to $0.45 per contract and decreasing the NOM Market Maker Fee for Adding Liquidity from $0.30 to $0.25 per contract. Pursuant to this proposal, a Professional transacting NDX would be assessed a decreased Fee for Adding Liquidity, from $0.70 to $0.45 per contract,[5] and a NOM Market Maker would be assessed an increased or decreased fee depending on the market participant that was on the contra-side of the order. For example, today, if a NOM Market Maker transacts an order in NDX and the contra-party is a Professional, Firm, NOM Market Maker or Non-NOM Market Maker, the NOM Market Maker is paid a Rebate to Add Liquidity of $0.20 per contract or would be assessed a $0.65 per contract Fee to Add Liquidity if the contra-party is a Customer. The Exchange proposes to assess a NOM Market Maker a $0.25 per contract Fee for Adding Liquidity in Non-Penny Pilot Options, regardless of the contra-party and proposes to not pay a NOM Market Maker a Rebate to Add Liquidity.

Likewise, a Customer today receives a Rebate to Add Liquidity of $0.20 per contra when the contra-party is a Professional, Firm, NOM Market Maker or Non-NOM Market Maker, and is assessed a Fee to Add Liquidity of $0.65 per contract when contra to another Customer. Under this proposal, a Customer would be assessed no Fee for Adding Liquidity in Non-Penny Pilot Options and would receive a Rebate to Add Liquidity of $0.75 per contract or $0.77 per contract as described more fully below.

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] The Penny Pilot was established in March 2008 and in October 2009 was expanded and extended through December 31, 2012. *See* Securities Exchange Act Release Nos. 57579 (March 28, 2008), 73 FR 18587 (April 4, 2008) (SR–NASDAQ–2008–026) (notice of filing and immediate effectiveness establishing Penny Pilot); 60874 (October 23, 2009), 74 FR 56682 (November 2, 2009) (SR–NASDAQ–2009–091) (notice of filing and immediate effectiveness expanding and extending Penny Pilot); 60965 (November 9, 2009), 74 FR 59292 (November 17, 2009) (SR–NASDAQ–2009–097) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 61455 (February 1, 2010), 75 FR 6239 (February 8, 2010) (SR–NASDAQ–2010–013) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 62029 (May 4, 2010), 75 FR 25895 (May 10, 2010) (SR–NASDAQ–2010–053) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 65969 (December 15, 2011), 76 FR 79268 (December 21, 2011) (SR–NASDAQ–2011–169) (notice of filing and immediate effectiveness extension and replacement of Penny Pilot); and 67325 (June 29, 2012), 77 FR 40127 (July 6, 2012) (SR–NASDAQ–2012–075) (notice of filing and immediate effectiveness and extension and replacement of Penny Pilot through December 31, 2012). *See also* NOM Rules, Chapter VI, Section 5.

[4] The Exchange currently assesses FB, GOOG and GRPN the following Fees for Adding Liquidity: Customers are not assessed a fee, Professionals, Firms and Non-NOM Market Makers are assessed a $0.45 per contract fee and NOM Market Makers are assessed a $0.25 per contract fee. The Fees for Removing Liquidity are as follows: Customers and NOM Market Makers are assessed a $0.79 per contract fee and Professionals, Firms and Non-NOM Market Makers are assessed an $0.85 per contract fee. FB, GOOG and GRPN Customer transactions receive a Rebate to Add Liquidity of $0.77 per contract. This rebate is being amended by this proposal for the Non-Penny Pilot Options.

[5] Today a Professional is assessed a Fee to Add Liquidity of $0.70 per contract in NDX.

The Exchange is proposing to increase the current Customer Rebate to Add Liquidity in Non-Penny Pilot Options (including NDX) from $0.20 to $0.75 per contract, unless a market participant adds Customer liquidity in either or both Penny or Non-Penny Pilot Options of 115,000 contracts per day in a month, in which case the rebate would be increased to $0.77 per contract. The Exchange also proposes to permit NOM Participants under 75 percent common ownership or control to aggregate their Customer volume to obtain the higher rebate.[6] The Exchange is also proposing to eliminate the Customer Rebate to Remove Liquidity in NDX along with other NDX pricing. The Exchange is not proposing to offer a Rebate to Remove Liquidity in Non-Penny Pilot Options.[7]

The Exchange proposes to eliminate note 1 which relates to the NDX Rebate to Add Liquidity and Fee to Add Liquidity, which pricing is eliminated with this proposal. The Exchange also proposes to rename note ''+'' as note 1. The Exchange also proposes to add a new note 2 to describe the $0.10 per contract NDX surcharge described herein as well as a new note 3 to reflect the Customer Rebates to Add Liquidity applicable to Non-Penny Pilot Options described herein. The Exchange also proposes to delete the pricing for options on the one-tenth value of the Nasdaq 100 Index traded under the symbol MNX (''MNX''). This option was delisted on September 13, 2012 from NOM. The Exchange is proposing to eliminate the MNX pricing from Sec. 2, Chapter XV of the NOM Rules because the pricing is no longer necessary.

The Exchange also proposes to amend the Non-Penny Pilot Option (including NDX) Fee for Removing Liquidity by increasing those fees as follows: a Customer that is today assessed $0.45 per contract would be assessed an increased fee of $0.79 per contract; a Professional, Firm and Non-NOM Market Maker that today is assessed a $0.50 per contract fee would be assessed an increased fee of $0.85 per contract; and a NOM Market Maker that today is assessed $0.50 per contract fee would be assessed a $0.79 per contract fee. With respect to NDX, a Customer transacting NDX today is not assessed a Fee for Removing Liquidity. The Customer would now be assessed an increased Fee for Removing Liquidity of $0.79 per contract in Non-Penny Pilot Options (including NDX). A Professional, Firm or Non-NOM Market Maker that today pays $0.70 per contract would pay an increased Fee for Removing Liquidity of $0.85 per contract in Non-Penny Pilot Options (including NDX). Finally, a NOM Market Maker that today pays a $0.70 Fee for Removing Liquidity in NDX would pay a $0.79 per contract fee in Non-Penny Pilot Options (including NDX).

The Exchange also proposes to amend its Penny Pilot Option Customer Rebate to Add Liquidity. The Exchange proposes to amend Tier 1 which currently pays a $0.26 per contract rebate to market participants that add Customer liquidity of up to 14,999 contracts per day in a month. The Exchange would continue to pay a $0.26 per contract rebate, but would increase the level of contracts from 14,999 to 34,999 contracts per day. The Exchange proposes to eliminate current Tier 2 which pays a $0.38 per contract rebate for market participants that add Customer liquidity of 15,000 to 49,999 contracts per day in month. The Exchange proposes to renumber Tier 3 as Tier 2. Tier 3 today pays market participants $0.43 per contract for market participants that add Customer liquidity between 50,000 and 74,999 contracts per day in a month. The Exchange would continue to pay $0.43 per contract for newly named Tier 2 but would lower the level of contracts to between 35,000 to 74,999 contracts per day in a month. The Exchange proposes to renumber Tier 4 as Tier 3, Tier 5 as Tier 4 and Tier 6 as Tier 5 and not otherwise amend these tiers.[8] The Exchange also proposes to conform notes a, b and c to the new tiers by reassigning the proper letters to coordinate to the same tiers as today.

The Exchange also proposes to amend the Penny Pilot Option Fee for Removing Liquidity which today provides that Professionals, Firms, Non-NOM Market Makers and NOM Market Makers Penny Pilot Options Fees for Removing Liquidity will be reduced by $0.01 per contract for transactions in which the same NOM Participant is the buyer and seller. The Exchange proposes to also permit NOM Participants under common ownership to also receive the $0.01 per contract reduction if a NOM Participant under common ownership is the buyer and seller. The Exchange is not amending the Penny Pilot Option Fees for Removing Liquidity otherwise.[9]

2. Statutory Basis

NASDAQ believes that the proposed rule changes are consistent with the provisions of Section 6 of the Act,[10] in general, and with Section 6(b)(4) of the Act,[11] in particular, in that they provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls.

The Exchange believes that the proposed elimination of separate fees and rebates for NDX and inclusion of NDX in the Non-Penny Pilot Options is reasonable, equitable and not unfairly discriminatory because the Exchange is proposing to amend the Non-Penny Pilot Options fees and rebates to approximate those fees and rebates currently subject to FB, GOOG and GRPN pricing. The Exchange believes that it is reasonable to assess NDX the amended Non-Penny Pilot Option fees which are substantially similar to the fees assessed today for FB, GOOG and GRPN [12] because NDX has the same minimum trading increments as other Non-Penny Pilot Options. Additionally, the Exchange believes that it is reasonable to pay Customers transacting options in NDX the amended Non-Penny Pilot Options Rebate to Add Liquidity because the higher Customer Rebate to Add Liquidity of $0.75 per contract with the possibility of qualifying for a $0.77 per contract rebate approximates the rebates currently offered for FB, GOOG and GRPN.[13] The Exchange would also not assess Customers a Fee for Adding Liquidity,

[6] As noted previously, the NDX pricing would be removed from Section 2(1) of Chapter XV. Today, a Customer receives a Rebate to Remove Liquidity of $0.40 per contract.

[7] No other market participant, other than a Customer receives a Customer Rebate to Remove Liquidity today.

[8] Tier 4 today pays $0.44 per contract for market participants that add Customer liquidity of 75,000 or more contract per day in a month. Tier 5 today pays market participants $0.42 per contact if they (1) add Customer liquidity of 25,000 or more contracts per day in a month, (2) have certified for the Investor Support Program set forth in Rule 7014; and (3) executed at least one order on NASDAQ's equity market. Tier 6 today pays market participants $0.45 per contract if they have total volume of 130,000 contracts per day in a month. The Exchange is simply proposing to renumber these last three tiers.

[9] Today, the Exchange assesses the following Penny Pilot Option Fees for Removing Liquidity: Customers pay $0.45 per contract and Professionals, Firms, Non-NOM Market Makers and NOM Market Makers pay a $0.47 per contract fee.

[10] 15 U.S.C. 78f.

[11] 15 U.S.C. 78f(b)(4).

[12] The Exchange currently assesses FB, GOOG and GRPN the following Fees for Adding Liquidity: Customers are not assessed a fee, Professionals, Firm and Non-NOM Market Makers are assessed a $0.45 per contract fee and NOM Market Makers are assessed a $0.25 per contract fee. The Fees for Removing Liquidity are as follows: Customers and NOM Market Makers are assessed a $0.79 per contract fee and Professionals, Firms and Non-NOM Market Makers are assessed an $0.85 per contract fee. FB, GOOG and GRPN Customer transactions receive a Rebate to Add Liquidity of $0.77 per contract. This rebate is being amended by this proposal for the Non-Penny Pilot Options.

[13] Today, FB, GOOG and GRPN pay a Customer Rebate to Add Liquidity of $0.77 per contract.

as is the case today with FB, GOOG and GRPN and would also not continue to pay a Rebate to Remove Liquidity as that rebate would be eliminated. The Exchange believes that it is reasonable to assess Non-Penny Pilot Option fees and pay rebates similar to FB, GOOG and GRPN today, with the amended Customer Rebate to Add Liquidity, and eliminate NDX, FB, GRPN and GOOG pricing, as well as the delisted MNX pricing which is no longer necessary from Section 2, Chapter XV.

The Exchange believes that it is equitable and not unfairly discriminatory to assess/pay the Non-Penny Pilot Option pricing to the various market participants as noted in this proposal and not assess/pay separate pricing for NDX, FB, GRPN and GOOG. All market participants transacting Non-Penny Pilot Options would be subject to the fees and rebates noted herein. The Exchange would no longer pay a Rebate to Remove Liquidity to any market participant under the proposal. Customers would be subject to a $0.79 per contract Fee to Remove Liquidity in Non-Penny Pilot Options as compared to no fee today in NDX. Also, NOM Market Makers would be assessed a $0.25 per contract Fee for Adding Liquidity regardless of the contra-party and would no longer be entitled to a Rebate to Add Liquidity as is the case with NDX today.[14] Professionals would be subject to the same decreased $0.45 per contract Fee for Adding Liquidity as Firms and Non-NOM Market Makers.[15] Also, the elimination of the MNX pricing is equitable and not unfairly discriminatory because no market participant is subject to this pricing as of the date it was delisted. In summary, the Exchange believes that assessing all Non-Penny Pilot Options securities the amended Non-Penny Pilot Option pricing is reasonable, equitable and not unfairly discriminatory for the reasons discussed hereafter which describes the basis for the amendments to that pricing. These amendments conform the pricing for all Non-Penny Pilot options symbols. Also, the additional $0.10 per contact NDX surcharge that will be added to the Fees for Adding and Removing Liquidity in Non-Penny Pilot Options for transactions in NDX, except for Customers, is reasonable, equitable and not unfairly discriminatory because the Exchange currently pays a license fee[16] to list NDX on NOM and is seeking to recoup a portion of that fee.[17]

The Exchange believes that increasing the Professional Fee for Adding Liquidity and the Fees for Removing Liquidity in Non-Penny Pilot Options is reasonable because the higher fees would enable the Exchange to reward Customers that remove liquidity with higher Customer Rebates to Add Liquidity in Non-Penny Pilot Options. The Exchange believes that its success at attracting Customer order flow benefits all market participants by improving the quality of order interaction and executions at the Exchange. Additionally, the proposed fees and rebates for Non-Penny Pilot Options are similar to fees and rebates currently in place at the BATS Exchange, Inc. (''BATS'').[18] The Exchange also believes that decreasing the NOM Market Maker Fee for Removing [sic] Liquidity in Non-Penny Pilot Options is reasonable because the Exchange seeks to encourage NOM Market Makers to post liquidity on NOM.

The Exchange believes that increasing the Professional Fee for Adding Liquidity in Non-Penny Pilot Options is equitable and not unfairly discriminatory because Professionals, Firms and Non-NOM Market Makers will be assessed the same $0.45 per contract fee. The Exchange also believes that not assessing a Customer a Fee for Adding Liquidity in Non-Penny Pilot Options and assessing a NOM Market Maker a lower Fee for Adding Liquidity of $0.25 per contract, as compared to Professionals, Firms and Non-NOM Market Makers is equitable and not unfairly discriminatory because Customers and NOM Market Makers differ from other market participants. Customer order flow benefits all market participants by improving liquidity, the quality of order interaction and executions at the Exchange. Also, NOM Market Makers have obligations to the market and regulatory requirements,[19] which normally do not apply to other market participants. A NOM Market Maker has the obligation to make continuous markets, engage in course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and not make bids or offers or enter into transactions that are inconsistent with course of dealings. The proposed differentiation as between Customers and NOM Market Makers and other market participants recognizes the differing contributions made to the liquidity and trading environment on the Exchange by Customers and NOM Market Makers, as well as the differing mix of orders entered. The Exchange believes that increasing the Professional, Firm and Non-NOM Market Maker Fees for Removing Liquidity in Non-Penny Pilot Options to $0.85 per contract is equitable and not unfairly discriminatory because Professionals, Firms and Non-NOM Market Makers will be assessed the same fee. Customers and NOM Market Makers would be assessed a lower Fee for Removing Liquidity in Non-Penny Pilot Options as compared to Professionals, Firms and Non-NOM Market Makers because as mentioned herein the fees recognize the differing contributions made to the liquidity and trading environment on the Exchange by Customers and NOM Market Makers, as well as the differing mix of orders entered.

The Exchange also believes that overall the higher Fees for Removing Liquidity are equitable and not unfairly discriminatory because in the current U.S. options market, many of the contracts are quoted in pennies. Under this pricing structure, the minimum penny tick increment equates to a $1.00 economic value difference per contract, given that a single standardized U.S. option contract covers 100 shares of the underlying stock. Where contracts are quoted in $0.05 increments (non-pennies), the value per tick is $5.00 in proceeds to the investor transacting in these contracts. Liquidity rebate and

[14] Today, NOM Market Makers are assessed a $0.65 per contract Fee to Add Liquidity when transacting an order in NFX [sic] contra a Customer and are paid a Rebate to Add Liquidity of $0.20 per contract when transacting an order in NDX contra a Professional, Firm, Non-NOM Market Maker or NOM Market Maker.

[15] Professionals currently are assessed a $0.70 per contract Fee to Add Liquidity in NDX similar to Firms and Non-NOM Market Makers.

[16] NOM is assessed a license fee of $0.22 per contract to list NDX.

[17] Non-Penny Pilot Options, other than NDX, are not subject to a license fee.

[18] *See* BATS BZX Exchange Fee Schedule. BATS assesses a Non-Penny Pilot Option Fee for Accessing Liquidity of $0.80 per contract for a Professional, Firm or Market Maker order that removes liquidity from the BATS Options order book and a $0.75 per contract rebate for a Customer order that remove liquidity from the BATS Options order book. Additionally, BATS pays a $0.70 per contract rebate for a Professional, Firm or Market Maker order that adds liquidity to the BATS Options order book and a $0.75 rebate per contract for a Customer order that adds liquidity to the BATS Options order book. Also, the Fees for Removing Liquidity for FB, GOOG and GRPN as well as the Fees for Adding Liquidity are the same as those proposed for Non-Penny Pilot Options.

[19] Pursuant to Chapter VII (Market Participants), Section 5 (Obligations of Market Makers), in registering as a market maker, an Options Participant commits himself to various obligations. Transactions of a Market Maker in its market making capacity must constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and Market Makers should not make bids or offers or enter into transactions that are inconsistent with such course of dealings. Further, all Market Makers are designated as specialists on NOM for all purposes under the Act or rules thereunder. *See* Chapter VII, Section 5.

access fee structures on the make-take exchanges, including NOM, for securities quoted in penny increments are commonly in the $0.30 to $0.45 per contract range.[20] A $0.30 per contract rebate in a penny quoted security is a rebate equivalent to 30% of the value of the minimum tick. A $0.45 per contract fee in a penny quoted security is a charge equivalent to 45% of the value of that minimum tick. In other words, in penny quoted securities, where the price is improved by one tick with an access fee of $0.45 per contract, an investor paying to access that quote is still $0.55 better off than trading at the wider spread, even without the access fee ($1.00 of price improvement—$0.45 access fee = $0.55 better economics). This computation is equally true for securities quoted in wider increments. Rebates and access fees near the $0.85 per contract level equate to only 17% of the value of the minimum tick in Non-Penny Pilot Options, less than the experience today in Penny Pilot Options. For example, a retail investor transacting a single contract in a non-penny quoted security quoted a single tick tighter than the rest of the market, and paying an access fee of $0.79 per contract, is receiving an economic benefit of $4.21 ($0.05 improved tick = $5.00 in proceeds − $0.79 access fee = $4.21). The Exchange believes that encouraging NOM Market Makers to quote more aggressively by reducing transaction fees[21] and incentivizing Customer orders to post on NOM will narrow the spread in Non-Penny Pilot Options to the benefit of investors and all market participants by improving the overall economics of the resulting transactions that occur on the Exchange, even if the access fee paid in connection with such transactions is higher. Accordingly, the Exchange believes that the proposed fees and rebates for the Non-Penny Pilot Options are reasonable, equitable and not unfairly discriminatory.

The Exchange believes that its proposal to offer a higher Customer Rebate to Add Liquidity in Non-Penny Pilot Options (from $0.20 to $0.75 per contract) is reasonable, equitable and not unfairly discriminatory because other market participants will benefit from the increased order flow to the Exchange. The proposal to offer an even higher Customer Rebate to Add Liquidity in Non-Penny Pilot Options ($0.77 per contract), provided a market participant adds Customer liquidity of 115,000 contracts per day in a month in either or both a Penny Pilot or Non-Penny Pilot Option, is reasonable, equitable and not unfairly discriminatory because the benefits to the Exchange of increased liquidity will benefit all market participants because market participants will strive to post and remove liquidity on NOM to achieve the higher rebate.

The Exchange believes that the proposed amendments to the notes associated with the Penny and Non-Penny Pilot Options Pricing, specifically renumbering note ''+'' as note 1, eliminating current note 1 and adding notes 3 and 4, are reasonable, equitable and not unfairly discriminatory because the notes add more clarity to the rule.

The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to permit NOM Participants with 75 percent common ownership to aggregate their volume for purposes of obtaining a higher Customer Rebate to Add Liquidity in Non-Penny Pilot Options. Certain NOM Participants chose to segregate their businesses into different legal entities for purposes of conducting business. The Exchange believes that these NOM Participants should be treated as one entity for purposes of qualifying for the increased Customer Rebate to Add Liquidity in Non-Penny Pilot Options as long as there is at least 75% common ownership or control among the NOM Participants. The Exchange also believes that it is reasonable, equitable and not unfairly discriminatory to provide that Professionals, Firms, Non-NOM Market Makers, and NOM Market Makers Penny Pilot Option Fees will be reduced by $0.01 per contract for transactions in which the same NOM Participant *or a NOM Participant under common ownership* is the buyer and the seller. For the reasons mentioned herein, the Exchange believes that NOM Participants that chose to segregate their businesses into different legal entities should still be afforded the opportunity to receive the discount as if they were the same NOM Participant on both sides of the transaction.

The Exchange's proposed amendments to the Customer Rebate to Add Liquidity in Penny Pilot Options are reasonable because the Exchange is attempting to incentivize market participants to send additional Customer order flow to the Exchange. By increasing the Tier 1 to encompass up to 34,999 contracts per day in a month and amending new Tier 2 to between 35,000 and 74,999 contracts, the Exchange is attempting to encourage market participants that are receiving rebates by qualifying for Tiers 1 and 2 to send additional orders to the Exchange to continue to qualify for those rebates. The Customer liquidity that the Exchange attracts by offering Customer rebates benefits all market participants. The Exchange believes that the amendments to the Customer Rebate to Add Liquidity in Penny Pilot Options are equitable and not unfairly discriminatory because there is no required minimum volume of Customer orders to qualify for a Customer Rebate to Add Liquidity. Tier 1 will pay a rebate for NOM Participants that add Customer liquidity from 1 contract to 34,999 contracts under the proposal. All NOM Participants that transact Customer orders in Penny Pilot Options are eligible for the Customer rebates.

The Exchange believes that the technical amendments to the Customer Rebate to Add Liquidity in Penny Pilot Options which assign a new letter to the tiers to coordinate with the amended rule are reasonable, equitable and not unfairly discriminatory because they clarify the Rule.

The Exchange operates in a highly competitive market comprised of ten U.S. options exchanges in which sophisticated and knowledgeable market participants can and do send order flow to competing exchanges if they deem fee levels at a particular exchange to be excessive or rebate opportunities to be inadequate. The Exchange believes that the proposed rebate scheme and fees are competitive and similar to other fees, rebates and tier opportunities in place on other exchanges. The Exchange believes that this competitive marketplace materially impacts rebates and fees present on the Exchange today and substantially influences the proposal set forth above.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule changes will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. To the contrary, NASDAQ has designed its rebates and fees to compete effectively for the execution and routing of options contracts and to reduce the overall cost to investors of options trading. The Exchange believes that

[20] NOM is proposing to only pay a Customer a Rebate to Add Liquidity in Non-Penny Pilot Options. Other market participants would not be entitled to a rebate.

[21] The Exchange notes that the proposed $0.25 per contract NOM Market Maker Fee for Adding in FB, GOOG and GRPN is significantly less than transaction fees plus payment for order flow fees assessed by other options exchanges. For example, on NASDAQ OMX PHLX LLC (''Phlx''), the combined payment for order flow fee plus the transaction fee is $0.92 per contract. *See* Phlx's Pricing Schedule. Unlike Penny Pilot Options, the Exchange believes this significant reduction in fees for adding liquidity will have the same effect as a rebate in non-Penny Pilot Options in terms of a narrower spread.

incentivizing NOM Participants to transact greater Customer volume on the Exchange benefits all market participants because of the increased liquidity to the market.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[22] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2012–114 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–NASDAQ–2012–114. This file number should be included on the subject line if email 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 10:00 a.m. and 3:00 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–NASDAQ–2012–114 and should be submitted on or before November 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25357 Filed 10–15–12; 8:45 am]

BILLING CODE 8011–01–P

[22] 15 U.S.C. 78s(b)(3)(A)(ii).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68024; File No. SR–NYSE–2012–51]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Section 902.03 of the New York Stock Exchange LLC Listed Company Manual To Amend Annual Fees and Certain Other Listing Fees Included Therein and To Make Technical and Conforming Changes

October 10, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on September 28, 2012, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Section 902.03 of its Listed Company Manual to amend certain of the fees included therein and to make technical and conforming changes. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Section 902.03 of its Listed Company Manual to amend certain of the fees included therein and to make technical and conforming changes. The Exchange proposes to immediately reflect the proposed changes in the Listed Company Manual, but not to implement the proposed changes until January 1, 2013.[3]

The Exchange proposes to amend Section 902.03 of the Listed Company Manual, which currently provides, in part, for minimum Listing Fees for subsequent listing of additional equity securities. The Exchange proposes to increase the minimum Listing Fee from $5,000 to $7,500. Section 902.03 also currently provides, in part, for a fee for applications for changes that involve modifications to Exchange records (*e.g.,* changes of name, par value, title of security or designation) and for applications relating to poison pills. The

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange has proposed changes to the Listed Company Manual, as reflected in the Exhibit 5 attached hereto, in a manner that would permit readers of the Listed Company Manual to identify the changes that would be implemented on January 1, 2013.

Exchange proposes to increase this fee from $5,000 to $7,500. Section 902.03 also currently provides, in part, for Annual Fees for listed equity securities. Currently, the Annual Fee for an issuer's primary class of common shares and, if no class of common shares is listed, preferred stock is the greater of $38,000 or $0.00093 per share. The Exchange proposes to increase the $38,000 threshold to $42,000.[4]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[5] in general, and furthers the objectives of Section 6(b)(4) of the Act,[6] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers, or dealers.

The Exchange believes that amending Section 902.03 of the Listed Company Manual to increase the minimum Listing Fee for subsequent listing of additional equity securities from $5,000 to $7,500 and to increase the fixed Annual Fee for shares of common stock and preferred stock from $38,000 to $42,000 is reasonable because the resulting fees would better reflect the Exchange's cost related to such listings and the resulting value that such listings provide to the issuers. In this regard, the Exchange notes that it has not recently increased these fees, but continually enhances and upgrades the level of service it provides in the listings area, including with respect to technology, compliance and other regulatory matters related to listings.[7] The Exchange believes that the proposed change is reasonable because the increased fees would be used by the Exchange to offset, in part, the cost the Exchange incurs to provide listing services. Listing service costs include, but are not limited to, rulemaking initiatives, listing administration processes, issuer services, and administration of other regulatory functions related to listing. The Exchange also believes that the proposed changes are equitable and not unfairly discriminatory because they would apply equally to all issuers on the Exchange.

The Exchange believes that amending Section 902.03 of the Listed Company Manual to increase the fee for certain changes and for poison pills from $5,000 to $7,500 is reasonable because the Exchange has not increased such fees since 2005, while the salaries of the staff that are responsible for processing the applications for these certain changes and inputting the data in the Exchange's systems and disseminating relevant information to the marketplace have all increased, as have the costs associated with maintaining and updating the computer systems used in these processes.[8] The Exchange also believes that the proposed changes are equitable and not unfairly discriminatory because they would apply equally to all issuers on the Exchange.

The Exchange does not believe that the proposed fee changes would in any way negatively affect its ability to continue to adequately fund its regulatory program or the services the Exchange provides to issuers.

Additionally, the Exchange believes that the non-substantive changes that are proposed, which are technical and conforming changes, are reasonable because they will result in the removal of obsolete text from the Listed Company Manual. These changes are also equitable and not unfairly discriminatory because they will benefit all issuers and all other readers of the Listed Company Manual.

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 foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[9] of the Act and subparagraph (f)(2) of Rule 19b–4[10] thereunder, because it establishes a due, fee, or other charge imposed by the NYSE.

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 email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2012–51 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–2012–51. This file number should be included on the subject line if email 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 10:00 a.m. and 3:00 p.m.. Copies of the filing will also be available for Web site viewing and printing at the NYSE's principal office and on its Internet Web site at *www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal

[4] The Exchange also proposes a non-substantive change to remove the related asterisk and accompanying text that currently provides that these fees are applicable as of January 1, 2006, all of which is obsolete text.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

[7] *See* Securities Exchange Act Release No. 52696 (October 28, 2005), 70 FR 66881 (November 3, 2005) (SR–NYSE–2005–35). *See also* Securities Exchange Act Release No. 52463 (September 16, 2005), 70 FR 55933 (September 23, 2005) (SR–NYSE–2005–35), at 55934 [sic].

[8] *Id.*

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(2).

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–2012–51 and should be submitted on or before November 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25356 Filed 10–15–12; 8:45 am]

BILLING CODE 8011–01–P

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68032; File No. SR–ISE–2012–83]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Route Out Fees for Priority Customers

October 10, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 1, 2012, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange Commission the proposed rule change, as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The ISE is proposing to adopt a fee related to the execution of Priority Customer orders subject to linkage handling. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.com*), at the principal office of the Exchange, 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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to adopt a fee related to the execution of Priority Customer[3] orders subject to linkage handling (''Linkage Fee'') in symbols that are not currently subject to a Linkage Fee.

On August 31, 2009, the Exchange implemented the new Options Order Protection and Locked/Crossed Market Plan (''Distributive Linkage'') and the use of Intermarket Sweep Orders (''ISOs''). Consistent with Distributive Linkage and pursuant to ISE rules, the Exchange's Primary Market Makers (''PMMs'') have an obligation to address customer[4] orders when there is a better market displayed on another exchange. ISE's PMMs meet this obligation via the use of ISOs. In meeting their obligations, PMMs may incur fees when they send ISOs, especially when sending ISOs to exchanges that charge ''taker'' fees. To minimize the PMM's financial burden and help offset such fees, the ISE adopted a rebate for the PMM of $0.20 per contract on all ISO orders sent to an away exchange (regardless of the fee charged by the exchange where the ISO order sent away was executed).[5] The rebate for PMMs for Priority Customer orders in the Select Symbols is equal to the fee charged by the away exchange.[6]

With the costs associated with servicing Priority Customer orders that must be executed at another exchange coupled with the cost of funding the existing fee credit, the Exchange recently adopted a Linkage Fee for executions that result from the PMM routing ISOs to another exchange in a limited number of symbols.[7] The Linkage Fee is currently $0.35 per contract[8] and is only charged for Priority Customer orders that are routed to an away exchange in symbols that are subject to the Exchange's modified maker/taker pricing model. These symbols, which currently number 93, are identified on the Exchange's Schedule of Fees as Select Symbols. Priority Customer orders that are routed out to another exchange are charged the Linkage Fee at the current rate instead of the standard taker fee applicable to the Select Symbols. The purpose of this proposed rule change is to extend the current Linkage Fee to Priority Customer orders that are routed to an away exchange in all symbols traded on the Exchange.

The Linkage Fee allows the Exchange to equitably assess reasonable fees incurred for processing such orders, and permits the Exchange to recoup administrative and other costs. However, because the fees assessed by other exchanges vary considerably, the Exchange has determined to simply rebate to PMMs the actual transaction fee assessed by the exchange to which the order is routed, while requiring the PMM to make every effort, all things being equal, to route the order to the lowest cost away market.[9]

The Exchange notes that it currently has a similar fee and credit for Professional Customer orders. Specifically, the Exchange currently charges Professional Customers a fee of $0.45 per contract for executions of orders that are routed to one or more exchanges in connection with Distributive Linkage, and also provides PMMs with a credit equal to the fee charged by the destination exchange for such Professional Customer orders, but not more than $0.45 per contract.[10] This routing fee and credit applies to all the symbols that are traded on the Exchange.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the ''Exchange Act'') for this proposed rule change is the requirement under Section 6(b)(4)[11] of the Exchange Act that an exchange have an equitable allocation of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Pursuant to ISE Rule 100(37A), a Priority Customer is a person or entity that is not a broker or dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account.

[4] Pursuant to ISE Rule 1900(f) of the Distributive Linkage rules, a customer is an individual or organization that is not a broker-dealer.

[5] *See* Securities and Exchange Act Release No. 60791 (October 5, 2009), 74 FR 52521 (October 13, 2009) (SR–ISE–2009–74).

[6] *See* Securities and Exchange Act Release No. 66746 (April 5, 2012), 77 FR 21833 (April 11, 2012) (SR–ISE–2012–28).

[7] *See* Securities and Exchange Act Release No. 66589 (March 14, 2012), 77 FR 16311 (March 20, 2012) (SR–ISE–2012–13).

[8] *See* Securities and Exchange Act Release No. 66746 (April 5, 2012), 77 FR 21833 (April 11, 2012) (SR–ISE–2012–28).

[9] *See* ISE Schedule of Fees, Section E. PMM Linkage Credit.

[10] *See* Securities and Exchange Act Release No. 61855 (April 6, 2010), 75 FR 19441 (April 14, 2010) (SR–ISE–2010–26).

[11] 15 U.S.C. 78f(b)(4).

reasonable dues, fees and other charges among its members and other persons using its facilities. In particular, the Exchange believes charging a route-out fee for Priority Customer orders is reasonable if doing so provides the Exchange the ability to recover the costs of funding a credit the Exchange provides to its PMMs, who, in the course of meeting their obligation, are incurring a financial burden. The Exchange further believes it is equitable and reasonable to assess the proposed fee to recoup costs associated with routing Priority Customer orders to away markets. The Exchange also believes that the proposed fees are equitable and not unfairly discriminatory because the fees would be uniformly applied to all Priority Customer orders. ISE notes that a number of other exchanges currently charge a variety of routing related fees associated with customer and non-customer orders that are subject to linkage handling. The Exchange further notes that the fees proposed herein are substantially lower than the level of fees charged by some of the Exchange's competitors.[12]

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[13] 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ISE–2012–83 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–ISE–2012–83. This file number should be included on the subject line if email 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 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of ISE. 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–ISE–2012–83, and should be submitted on or before November 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25346 Filed 10–15–12; 8:45 am]

BILLING CODE 8011–01–P

[12] *See* NASDAQ OMX PHLX Fee Schedule, Section V.

[13] 15 U.S.C. 78s(b)(3)(A)(ii).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68031; File No. SR–ISE–2012–84]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees

October 10, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 1, 2012, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange Commission the proposed rule change, as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE proposes to amend its Schedule of Fees. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.com*), at the principal office of the Exchange, 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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange currently assesses per contract transaction fees and provides rebates to market participants that add or remove liquidity from the Exchange for certain Regular Orders [3] in 65 option classes (''Special Non-Select Penny Pilot Symbols'').[4] Specifically, for ISE Market Maker,[5] Firm Proprietary/Broker-Dealer and Professional Customer [6] orders that trade against Priority Customer [7] orders in the Special Non-Select Penny Pilot Symbols, the Exchange currently charges a taker fee of $0.30 per contract; for Non-ISE Market Maker [8] orders that trade against Priority Customer orders, the Exchange currently charges a taker fee of $0.40 per contract. The taker fee for Priority Customer orders that trade against other Priority Customer orders is $0.00 per contract. Additionally, the Exchange provides Market Makers with a two cent discount when trading against Priority Customer orders that are preferenced to them. This discount is applicable when Market Makers add or remove liquidity in the Special Non-Select Penny Pilot Symbols. Market Makers that remove liquidity in the Special Non-Select Penny Pilot Symbols when trading against Priority Customer orders that are preferenced to them are currently charged $0.28 per contract.

The Exchange now proposes to increase the taker fee for Market Maker orders that trade against Priority Customer orders from $0.30 per contract to $0.32 per contract, and to increase the taker fee for Firm Proprietary/Broker-Dealer and Professional Customer orders that trade against Priority Customer orders from $0.30 per contract to $0.35 per contract. Market Makers that remove liquidity in the Special Non-Select Penny Pilot Symbols when trading against Priority Customer orders that are preferenced to them will be charged $0.30 per contract. The Exchange does not propose any change to the taker fee for Non-ISE Market Maker and Priority Customer orders that trade against Priority Customer orders in the Special Non-Select Penny Pilot Symbols.

2. Basis

The Exchange believes that its proposal to amend its Schedule of Fees is consistent with Section 6(b) of the Act [9] in general, and furthers the objectives of Section 6(b)(4) of the Act [10] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members and other persons using its facilities. The impact of the proposal upon the net fees paid by a particular market participant will depend on a number of variables, most important of which will be its propensity to interact with and respond to certain types of orders.

The Exchange believes it is reasonable and equitable to charge a taker fee of $0.32 per contract for Market Maker orders, and $0.35 per contract for Firm Proprietary/Broker-Dealer and Professional Customer orders in the Special Non-Select Penny Pilot Symbols that trade against Priority Customer interest. The Exchange notes that the proposed fees are comparable to fees currently in place at other exchanges for Penny Pilot symbols.[11] Additionally, the Exchange believes that the proposed fees are fair, equitable and not unfairly discriminatory because they are consistent with price differentiation that exists today at other option exchanges.

The Exchange believes that it is reasonable and equitable to provide a two cent discount to Market Makers on preferenced orders as an incentive for them to quote in the regular order book. Accordingly, Market Makers who remove liquidity in the Special Non-Select Penny Pilot Symbols will be charged $0.30 per contract when trading with Priority Customer orders that are preferenced to them. ISE notes that with this proposed fee change, the Exchange will continue to maintain a two cent differential that was previously in place.

The Exchange believes it remains an attractive venue for market participants to trade as its fees remain competitive with those charged by other exchanges for similar trading strategies. The Exchange operates in a highly competitive market in which market participants can readily direct order flow to another exchange if they deem fee levels at a particular exchange to be excessive. With this proposed fee change, the Exchange believes it remains an attractive venue for market participants to trade at favorable prices.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[12] 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

[3] A Regular Order is an order that consists of only a single option series and is not submitted with a stock leg. *See* Schedule of Fees, Preface.

[4] See Securities Exchange Act Release Nos. 67201 (June 14, 2012), 77 FR 37082 (June 20, 2012) (SR–ISE–2012–49); and 67627 (August 9, 2012), 77 FR 49046 (August 15, 2012 (SR–ISE–2012–70). The Special Non-Select Penny Pilot Symbols are identified by their ticker symbol on the Exchange's Schedule of Fees.

[5] The term ''Market Makers'' refers to ''Competitive Market Makers'' and ''Primary Market Makers'' collectively. *See* ISE Rule 100(a)(25).

[6] A Professional Customer is a person who is not a broker/dealer and is not a Priority Customer.

[7] A Priority Customer is defined in ISE Rule 100(a)(37A) as a person or entity that is not a broker/dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s).

[8] A Non-ISE Market Maker, or Far Away Market Maker (''FARMM''), is a market maker as defined in Section 3(a)(38) of the Securities Exchange Act of 1934 registered in the same options class on another options exchange.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4).

[11] *See* NASDAQ OMX PHLX LLC Pricing Schedule at *http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLXTools/PlatformViewer.asp?selectednode=chp%5F1%5F4%5F1&manual=%2Fnasdaqomxphlx%2Fphlx%2Fphlx%2Drulesbrd%2F.*

[12] 15 U.S.C. 78s(b)(3)(A)(ii).

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–ISE–2012–84 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–ISE–2012–84. This file number should be included on the subject line if email 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 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of ISE. 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–ISE–2012–84, and should be submitted on or before November 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25345 Filed 10–15–12; 8:45 am]

BILLING CODE 8011–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68028; File No. SR–BATS–2012–041]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Fees for Use of BATS Exchange, Inc.

October 10, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 1, 2012, BATS Exchange, Inc. (the ''Exchange'' or ''BATS'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the fee schedule applicable to Members[5] and non-members of the Exchange pursuant to BATS Rules 15.1(a) and (c). Changes to the fee schedule pursuant to this proposal will be effective upon filing.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify the ''Options Pricing'' section of its fee schedule effective immediately, in order to modify pricing related to executions that occur on the NASDAQ Options Market (''NOM''). NOM implemented certain pricing changes effective October 1, 2012,[6] including a modification of the fee charged to participants to remove liquidity in non-Penny Pilot Securities.[7] In order to maintain routing fees that approximate the routing costs to NOM, the Exchange proposes to adopt pricing for orders routed to NOM in non-Penny Pilot Securities that is identical to pricing for orders routed by the Exchange to NOM in Specified Symbols, as described below.

The Exchange currently charges certain flat rates for routing to other options exchanges that have been placed into groups based on the approximate cost of routing to such venues. The grouping of away options exchanges is based on the cost of transaction fees assessed by each venue as well as costs to the Exchange for routing (i.e., clearing fees, connectivity and other infrastructure costs, membership fees, etc.) (collectively, ''Routing Costs''). Based on recent changes to NOM pricing, the Exchange adopted two categories for NOM under which it charges: (i) A fee of $0.50 per contract for Customer[8] orders and $0.57 per contract for Professional,[9] Firm, or

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

[6] *See* Options Trader Alert #2012–56, *NOM and PHLX Pricing, Effective October 1, 2012* (September 28, 2012) (the ''NOM Notice'').

[7] As defined on the Exchange's fee schedule, ''Penny Pilot Securities'' are those issues quoted pursuant to Exchange Rule 21.5, Interpretation and Policy .01. The options designated by the Exchange as Penny Pilot Securities are the same options as those designated by NOM as penny pilot issues.

[8] As defined on the Exchange's fee schedule, the term ''Customer'' applies to any transaction identified by a member for clearing in the Customer range at the Options Clearing Corporation (''OCC''), excluding any transaction for a ''Professional'' as defined in Exchange Rule 16.1.

[9] The term ''Professional'' is defined in Exchange Rule 16.1 to mean any person or entity that (A) is not a broker or dealer in securities, and (B) places more than 390 orders in listed options per day on

Continued

Market Maker[10] orders routed to and executed at NOM in all options other than Specified Symbols; and (ii) separate fees for orders routed to and executed at NOM in Specified Symbols, which are described in further detail below. In order to establish new pricing for non-Penny Pilot Securities, as described below, the Exchange proposes to explicitly state that current pricing for orders routed to and executed at NOM in non-Specified Symbols also applies to Penny Pilot Securities and that pricing for orders routed to and executed at NOM in Specified Symbols also applies to non-Penny Pilot Securities, as described below.

As noted above, NOM currently imposes specific fees for options on specified securities that the Exchange identifies on its fee schedule as ''NOM Specified Symbols.'' Such NOM Specified Symbols currently include options on Facebook (''FB''), Google (''GOOG'') and Groupon (''GRPN''). The fee charged by NOM to remove liquidity in NOM Specified Symbols is $0.79 per contract for NOM customer and NOM market maker orders and $0.85 per contract for all other participant capacities. NOM recently announced adoption of identical pricing for non-Penny Pilot Securities.[11] As noted above, the Exchange generally imposes routing fees that approximate the fee to remove liquidity from other options exchanges as well as associated Routing Costs. Accordingly, the Exchange proposes to charge the same fee for orders routed to and executed in non-Penny Pilot Securities as it charges for orders routed to and executed at NOM in Specified Symbols. Specifically, the Exchange proposes to charge $0.90 for Customer orders and $0.95 for Professional, Firm, or Market Maker orders routed to and executed at NOM in non-Penny Pilot Securities.

In addition, the Exchange currently charges a flat fee of $0.95 per contract for Directed ISOs to NOM in NOM Specified Symbols and $0.60 per contract for any other Directed ISO. In order to cover the cost of removing liquidity in non-Penny Pilot Securities at NOM, including Routing Costs, the Exchange proposes to charge the same fee as it does for Directed ISOs to NOM in NOM Specified Symbols, $0.95 per contract, for Directed ISOs to NOM in non-Penny Pilot Securities.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.[12] Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[13] in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive.

The Exchange believes that the proposed modifications to routing fees applicable for orders routed to and executed at NOM is fair, equitable and reasonable because the fees are an approximation of the cost to the Exchange for routing orders to NOM. The Exchange believes that its flat fee structure for orders routed to various venues is a fair and equitable approach to pricing, as it provides certainty with respect to execution fees at groups of away options exchanges. Each destination market's transaction charge varies and there is a standard clearing charge for each transaction incurred by the Exchange along with other administrative and technical costs that are incurred by the Exchange. Under its flat fee structure, taking all costs to the Exchange into account, the Exchange may operate at a slight gain or a slight loss for orders routed to and executed at NOM. As a general matter, the Exchange believes that the proposed fees will allow it to recoup and cover its costs of providing routing services to NOM. Specifically, the Exchange believes that the proposed routing fees will enable the Exchange to recover the remove fees assessed for the Exchange's routing of orders in non-Penny Pilot Securities to NOM, plus other Routing Costs associated with the execution of such orders that have been routed to NOM. The Exchange also believes that its increase to fees for Directed ISO's to NOM in non-Penny Pilot Securities to $0.95 per contract (from the current charge of $0.60 per contract for all Directed ISO's other than in NOM Specified Symbols) is fair, equitable and reasonable because the fees are also an approximation of the cost to the Exchange for routing orders to NOM in non-Penny Pilot Securities. The Exchange also believes that the proposed fee structure for orders routed to and executed at NOM, including Directed ISOs in non-Penny Pilot Securities, is not unreasonably discriminatory, again, because it is based on and intended to approximate the cost of routing to NOM.

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 not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the change to routing fees will assist the Exchange in recouping costs for routing orders to NOM on behalf of its participants, and absent such change, the Exchange would be subsidizing routing to NOM by Exchange participants. The Exchange also notes that Users may choose to mark their orders as ineligible for routing to avoid incurring routing fees.[14]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change From Members, Participants, or Others

No written comments were solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to Section 19(b)(3)(A)(ii) of the Act[15] and Rule 19b–4(f)(2) thereunder,[16] the Exchange has designated this proposal as establishing or changing a due, fee, or other charge applicable to the Exchange's Members and non-members, which renders the proposed rule change effective upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and

average during a calendar month for its own beneficial account(s).

[10] As defined on the Exchange's fee schedule, the terms ''Firm'' and ''Market Maker'' apply to any transaction identified by a member for clearing in the Firm or Market Maker range, respectively, at the OCC.

[11] *See* NOM Notice, supra note 6.

[12] 15 U.S.C. 78f.

[13] 15 U.S.C. 78f(b)(4).

[14] *See* BATS Rule 21.1(d)(8) (describing ''BATS Only'' orders for BATS Options) and BATS Rule 21.9(a)(1) (describing the BATS Options routing process, which requires orders to be designated as available for routing).

[15] 15 U.S.C. 78s(b)(3)(A)(ii).

[16] 17 CFR 240.19b–4(f)(2).

arguments concerning the foregoing, including whether the proposal 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 email to *rule-comments@sec.gov.* Please include File Number SR–BATS–2012–041 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–BATS–2012–041. This file number should be included on the subject line if email 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 10:00 a.m. and 3:00 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–BATS–2012–041 and should be submitted on or before November 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25344 Filed 10–15–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68027; File No. SR–BYX–2012–021]

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Fees for Use of BATS Y-Exchange, Inc.

October 10, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 28, 2012, BATS Y-Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend the fee schedule applicable to Members[5] and non-members of the Exchange pursuant to BYX Rules 15.1(a) and (c). While changes to the fee schedule pursuant to this proposal will be effective upon filing, the changes will become operative on October 1, 2012.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify its fee schedule effective October 1, 2012, in order to amend the fees for certain routing strategies based on a change of fees at the New York Stock Exchange LLC (''NYSE''). NYSE is implementing certain pricing changes effective October 1, 2012, including modification from a fee to remove liquidity of $0.0023 per share to a fee of $0.0025 per share.

The Exchange has previously provided a discounted fee for Destination Specific Orders routed to certain of the largest market centers measured by volume (NYSE, NYSE Arca and NASDAQ), which, in each instance has been $0.0001 less per share for orders routed to such market centers by the Exchange than such market centers currently charge for removing liquidity. The Exchange also provides a rebate that is $0.0001 more per share for Destination Specific Orders routed to EDGA. Thus, this routing pricing is referred to by the Exchange as ''One Under/Better'' pricing. Based on the changes in pricing at NYSE, BATS is proposing to increase its fee for Destination Specific Orders executed at NYSE so that the fee remains $0.0001 less per share for orders routed to NYSE. Specifically, the Exchange proposes to increase the fee charged for BATS + NYSE Destination Specific Orders executed at NYSE from $0.0022 per share to $0.0024 per share.

In addition, the Exchange offers a variety of routing strategies, including ''SLIM'' and ''TRIM,'' each of which has a specific fee for an execution that occurs at NYSE. Consistent with its One Under/Better pricing model, the Exchange currently charges $0.0022 per share for executions that occur at NYSE through SLIM and TRIM. Based on the

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[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

increased fee at NYSE, the Exchange proposes to increase the fee charged for SLIM and TRIM orders executed at NYSE from $0.0022 per share to $0.0024 per share.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.[6] Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[7] in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The Exchange believes that the proposed changes to certain of the Exchange's non-standard routing fees and strategies are equitably allocated, fair and reasonable, and non-discriminatory in that they are equally applicable to all Members and are designed to provide a reduced fee for orders routed to NYSE through Exchange routing strategies as compared to applicable fees for executions if such routed orders were instead executed directly by the Member at NYSE.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Because the market for order execution is extremely competitive, Members may readily opt to disfavor the Exchange's routing services if they believe that alternatives offer them better value. For an order routed through the Exchange and executed at NYSE through the applicable routing strategies, the proposed fee change is designed to maintain a slight discount compared to the fee the Member would have paid if such routed order was instead executed directly by a Member at NYSE.

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.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to Section 19(b)(3)(A)(ii) of the Act[8] and Rule 19b–4(f)(2) thereunder,[9] the Exchange has designated this proposal as establishing or changing a due, fee, or other charge applicable to the Exchange's Members and non-members, which renders the proposed rule change effective upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BYX–2012–021 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.

All submissions should refer to File Number SR–BYX–2012–021. This file number should be included on the subject line if email 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 10:00 a.m. and 3:00 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 Number SR–BYX–2012–021 and should be submitted on or before November 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25343 Filed 10–15–12; 8:45 am]

BILLING CODE 8011–01–P

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 17 CFR 240.19b–4(f)(2).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68026; File No. SR–BATS–2012–040]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Fees for Use of BATS Exchange, Inc.

October 10, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on September 28, 2012, BATS Exchange, Inc. (the ''Exchange'' or ''BATS'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2)

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend the fee schedule applicable to Members [5] and non-members of the Exchange pursuant to BATS Rules 15.1(a) and (c). While changes to the fee schedule pursuant to this proposal will be effective upon filing, the changes will become operative on October 1, 2012.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify the ''Equities Pricing'' section of its fee schedule effective October 1, 2012, in order to amend the fees for certain routing strategies based on a change of fees at the New York Stock Exchange LLC (''NYSE''). NYSE is implementing certain pricing changes effective October 1, 2012, including modification from a fee to remove liquidity of $0.0023 per share to a fee of $0.0025 per share.

The Exchange has previously provided a discounted fee for Destination Specific Orders routed to certain of the largest market centers measured by volume (NYSE, NYSE Arca and NASDAQ), which, in each instance has been $0.0001 less per share for orders routed to such market centers by the Exchange than such market centers currently charge for removing liquidity (referred to by the Exchange as ''One Under'' pricing). Based on the changes in pricing at NYSE, BATS is proposing to increase its fee for Destination Specific Orders executed at NYSE so that the fee remains $0.0001 less per share for orders routed to NYSE. Specifically, the Exchange proposes to increase the fee charged for BATS + NYSE Destination Specific Orders executed at NYSE from $0.0022 per share to $0.0024 per share.

In addition, the Exchange offers a variety of routing strategies, including ''SLIM'' and ''TRIM,'' each of which has a specific fee for an execution that occurs at NYSE. Consistent with its One Under pricing model, the Exchange currently charges $0.0022 per share for executions that occur at NYSE through SLIM and TRIM. Based on the increased fee at NYSE, the Exchange proposes to increase the fee charged for SLIM and TRIM orders executed at NYSE from $0.0022 per share to $0.0024 per share.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.[6] Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[7] in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The Exchange believes that the proposed changes to certain of the Exchange's non-standard routing fees and strategies are equitably allocated, fair and reasonable, and non-discriminatory in that they are equally applicable to all Members and are designed to provide a reduced fee for orders routed to NYSE through Exchange routing strategies as compared to applicable fees for executions if such routed orders were instead executed directly by the Member at NYSE.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Because the market for order execution is extremely competitive, Members may readily opt to disfavor the Exchange's routing services if they believe that alternatives offer them better value. For an order routed through the Exchange and executed at NYSE through the applicable routing strategies, the proposed fee change is designed to maintain a slight discount compared to the fee the Member would have paid if such routed order was instead executed directly by a Member at NYSE.

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.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to Section 19(b)(3)(A)(ii) of the Act [8] and Rule 19b–4(f)(2) thereunder,[9] the Exchange has designated this proposal as establishing or changing a due, fee, or other charge applicable to the Exchange's Members and non-members, which renders the proposed rule change effective upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File

[4] 17 CFR 240.19b–4(f)(2).

[5] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 17 CFR 240.19b–4(f)(2).

Number SR–BATS–2012–040 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.

All submissions should refer to File Number SR–BATS–2012–040. This file number should be included on the subject line if email 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 10:00 a.m. and 3:00 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 Number SR–BATS–2012–040 and should be submitted on or before November 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25342 Filed 10–15–12; 8:45 am]

BILLING CODE 8011–01–P

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68025; File No. SR–OCC–2012–18]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Reduce the Per Contract Clearing Fee for Routing Trades Executed in Accordance With the Options Order Protection and Locked/Crossed Market Plan to $.01 Per Contract

October 10, 2012.

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 September 28, 2012, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared substantially by OCC. OCC filed the proposal pursuant to Section 19(b)(3)(A)(ii)[3] of the Act and Rule 19b–4(f)(2)[4] thereunder so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

OCC proposes to reduce the per contract clearing fee for routing trades executed in accordance with the Options Order Protection and Locked/Crossed Market Plan (''Plan'') to $.01 per contract.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections (A), (B) and (C) below, of the most significant aspects of such statements.[5]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] The Commission has modified the text of the summaries provided by OCC.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of this proposed rule change is to amend OCC's Schedule of Fees to set the per contract clearing fee for routing trades executed in accordance with the Plan at $.01 per contract. (Such fee is identified as a ''Linkage Fee'' on OCC's Schedule of Fees).

OCC calculates clearing fees for valid trades using its fee schedule, which takes into consideration the type of trade, size of the trade, and any new product discounts that may be applicable. In 2009, OCC's participant exchanges created the Plan, which was designed to promote fair markets by ensuring that public customer orders receive the best price available across participating exchanges. If an exchange receiving a customer option order is not at the National Best Bid/Offer (''NBBO''), the exchange will use a private routing broker to send the order to an exchange at the NBBO. Once the order is filled at the away exchange, the routing broker assumes the other side of the trade at the NBBO and fills the original customer order at the originating exchange. The routing broker in this situation essentially has executed a ''scratch trade''[6] across exchanges (''Routed Broker Scratch Trade''). Such trades are currently subject to OCC's standard fee schedule even though they may be considered scratch trades that serve to facilitate fair and orderly markets.

Conversely, trades originated by market makers or specialists are eligible for a reduction in fees if they deemed ''scratch trades'' (''Market Maker/Specialist Scratch Trades''). OCC considers Market Maker/Specialist Scratch Trades to be the same day purchase and sale of identical option contracts in the same quantity and price by a market maker on the same exchange or across exchanges. Such trades are subject to a reduced clearing fee of $.01 per contract in recognition of a market maker's obligation to continuously maintain a fair and orderly market.

In response to a request from its participant exchanges, OCC determined that the same $.01 per contract Market Maker/Specialist Scratch Trade fee should apply to Routed Broker Scratch Trades since the two trades are both ''scratch trades'' that facilitate fair and orderly markets. OCC proposes to

[6] A purchase and sale of the same securities, at the same quantity and price, and at or around the same time (e.g., one day).

amend its Schedule of Fees so that it may charge the same, $.01 per contract for fee, for both Routed Broker Scratch Trades and Market Maker/Specialist Scratch Trades.

The changes to OCC's billing system that are necessary to implement the proposed revision to the Schedule of Fees would be installed in 2013. Prior to such installation date, OCC would manually calculate the difference between the clearing fees determined by its billing system for clearly identifiable routing trades versus those provided for in the Schedule of Fees and credit the excess of such fees on a quarterly basis to the clearing member that acts as or otherwise represents the routing broker.

* * * * *

The proposed rule change is consistent with Section 17A of the Securities Exchange Act of 1934, as amended (the ''Act''), because it reduces the clearing fee applied to Routed Broker Scratch Trades so that it is equivalent to the rate applied to Market Maker/Specialist Scratch Trades. As a result, the proposed change charges the same fee rate for analogous trades, thereby providing for the equitable application of fees. The proposed rule change is not inconsistent with any rules of OCC, including any other rules proposed to be amended.

(B) Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments on the proposed rule change were not and are not intended to be solicited with respect to the proposed rule change and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(ii) [7] of the Act and Rule 19b–4(f)(2) [8] thereunder because it establishes or changes a due, fee, or other charge applicable only to a member. OCC will delay the implementation of the rule change until it is deemed certified under CFTC Regulation § 40.6. At any time within 60 days of the filing of such 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 email to *rule-comments@sec.gov.* Please include File Number SR–OCC–2012–18 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–OCC–2012–18. This file number should be included on the subject line if email 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, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings will also be available for inspection and copying at the principal office of OCC and on OCC's Web site (*http://www.theocc.com/about/publications/bylaws.jsp*).

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–OCC–2012–18 and should be submitted on or before November 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25341 Filed 10–15–12; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(A)(ii).

[8] 17 CFR 240.19b–4(f)(2).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68010; File No. SR–CBOE–2012–096]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Order Routing Rules

October 9, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 4, 2012, Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its order routing rules. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Rule 6.14B governs the Exchange's process for routing sweep orders to other markets pursuant to intermarket linkage rules and states that the Exchange may contract with one or more routing brokers that are not affiliated with the Exchange to route sweep orders to other exchanges. The Rule imposes certain obligations on the Exchange and routing brokers. In particular, Rule 6.14B(e) provides that the Exchange will determine the logic that provides when, how and where orders are routed away to other exchanges. Additionally, Rule 6.14B(f) provides that a routing broker cannot change the terms of an order or the routing instructions, nor does the routing broker have any discretion about where to route an order.

The proposed rule change adds Interpretation and Policy .01 to Rule 6.14B to clarify that the Rule does not prohibit a routing broker from designating a preferred market-maker (or equivalent market participant) at the other exchange to which an outbound sweep order is being routed. The proposed rule change has no impact on customer orders, which receive the same level of order protection and trade at the best market prices regardless of whether the routing broker designates a preferred market-maker recipient at the destination exchange. The Exchange still makes the sole determination as to which exchange an order will be routed, as well as when and how the order will be routed. Additionally, routing brokers are still prohibited from changing the terms of an order or the Exchange's routing instructions and still have no discretion about to which exchange an order will be routed.

The proposed rule change merely clarifies that a routing broker may indicate which market-maker at the away exchange may trade against the routed order in accordance with the order terms and the Exchange's routing instructions. In other words, if a routing broker preferences a customer order that is to be routed to another exchange, the order is not handled any differently by the routing broker than if the routing broker did not preference the order.[3] Further, the order is executed at the same exchange and at the same price and in accordance with the same order terms as it would if the routing broker did not preference the order. Therefore, the proposed rule change does not disadvantage customers in any way. The Exchange believes that other exchanges allow this practice and that its routing brokers should be able to do the same.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[4] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[5] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest.

In particular, the proposed rule change helps remove impediments to and perfect the mechanism for a free and open market and a national market system because it still provides customer order protection and facilitates trading at away exchanges so that customer orders trade at the best market prices. Additionally, customer orders still trade in compliance with the Exchange's routing instructions in accordance with the Options Order Protection and Locked/Crossed Market Plan. The proposed rule change also protects investors and the public interest because it clarifies in the rules an existing practice of the Exchange's routing brokers, which the Exchange believes other exchanges allow their routing brokers to do as well. Finally, codifying this practice in the Rules provides additional transparency to Trading Permit Holders regarding routing of their orders to away exchanges.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

A. Significantly affect the protection of investors or the public interest;

B. impose any significant burden on competition; and

C. become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)[6] of the Act and Rule 19b–4(f)(6)[7] thereunder.[8]

At any time within 60 days of the filing of this 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 email to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2012–096 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission,

[3] The Exchange notes that orders that may be routed to other exchanges under Rule 6.14B are all immediate-or-cancel orders. Therefore, routed orders would not be subject to any automated price improvement mechanisms that may exist under other exchanges' rules.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6).

[8] In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of 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 Exchange has satisfied this requirement.

100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2012–096. This file number should be included on the subject line if email 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 10:00 a.m. and 3:00 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 Number SR–CBOE–2012–096 and should be submitted on or before November 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25333 Filed 10–15–12; 8:45 am]

BILLING CODE 8011–01–P

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68008; File No. SR-Phlx-2012–120]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Routing Fees to NOM

October 9, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1], and Rule 19b–4 [2] thereunder, notice is hereby given that, on October 1, 2012, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt certain Routing Fees to recoup costs incurred by the Exchange when routing to the NASDAQ Options Market LLC (''NOM'').

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXfilings,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects 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 recoup costs that the Exchange incurs for routing and executing certain orders in equity options to NOM in Non-Penny Pilot Options.

The Exchange's Pricing Schedule at Section V currently includes the following Routing Fees for routing Customer, Professional,[3] Firm, Broker-Dealer, Market Maker [4] and Specialist [5] orders to away markets.

[3] The term ''professional'' means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). *See* Rule 1000(b)(14).

[4] A ''Market Maker'' includes Registered Options Traders (''ROTs'') (Rule 1014(b)(i) and (ii), which include Streaming Quote Traders (''SQTs'') (*See* Rule 1014(b)(ii)(A)) and Remote Streaming Quote Traders (''RSQTs'') (*See* Rule 1014(b)(ii)(B)).

[5] A Specialist is an Exchange member who is registered as an options specialist pursuant to Rule 1020(a).

Exchange	Customer	Professional	Firm/broker-dealer/specialist/market maker
NYSE AMEX	$0.11	$0.31	$0.55
BATS Penny	0.55	0.55	0.55
BATS non-Penny	0.86	0.91	0.91
BOX	0.11	0.11	0.55
BX Options	0.11	0.54	0.54
CBOE	0.11	0.31	0.55
CBOE orders greater than 99 contracts in RUT, RMN, NDX, MNX, ETFs, ETNs and HOLDRs	0.29	0.31	0.55
C2	0.55	0.56	0.55
ISE	0.11	0.29	0.55
ISE Select Symbols [13]	0.31	0.39	0.55
NYSE ARCA (Penny Pilot)	0.55	0.55	0.55
NYSE ARCA (Standard)	0.11	0.11	0.55
NOM	0.54	0.54	0.55
NOM—MNX	0.56	0.56	0.55
NOM—NDX	0.11	0.81	0.81
NOM—FB, GOOG and GRPN	0.86	0.91	0.91

[13] These fees are applicable to orders routed to ISE that are subject to Rebates and Fees for Adding and Removing Liquidity in Select Symbols. See ISE's Schedule of Fees for the complete list of symbols that are subject to these fees.

The Exchange proposes to adopt NOM Routing Fees for Non-Penny Pilot Options. NOM recently filed an immediately effective rule change that amended its Non-Penny Pilot Options transaction fees in Section 2 of Chapter XV to mirror the Fees for Removing Liquidity for options overlying Facebook, Inc. (''FB''), Google Inc. (''GOOG'') and Groupon, Inc. (''GRPN'').[6] NOM eliminated pricing for options overlying the Nasdaq 100 Index traded under the symbol NDX (''NDX'') and amended its pricing for Non-Penny Pilot Options, which includes NDX.[7] NOM also eliminated the FB, GOOG, GRPN and MNX pricing in that filing.[8] The Exchange proposes to rename the current ''NOM'' Routing Fees as ''NOM Penny Pilot Options'' to distinguish those Routing Fees from the new Routing Fees the Exchange is proposing to adopt for Non-Penny Pilot Options. The Exchange proposes to rename the current ''NOM—FB, GOOG and GRPN'' Routing Fees as ''NOM Non-Penny Pilot Options'' and not otherwise amend those Routing Fees as they represent the amended pricing for Non-Penny Pilot Options as described below. This new category of Routing Fees would apply to all Non-Penny Pilot Options which would include NDX, FB, GOOG and GRPN. Finally, NOM proposes to eliminate the ''NOM—NDX,'' and ''NOM—MNX'' Routing Fees as the NOM—NDX Routing Fees will be replaced by the NOM Non-Penny Pilot Options Routing Fees and the NOM—MNX Routing Fees are no longer necessary as NOM delisted those options.[9] The NOM Routing Fees would therefore be as follows:

Exchange	Customer	Professional	Firm/broker-dealer/specialist/market maker
NYSE AMEX	$0.11	$0.31	$0.55
BATS Penny	0.55	0.55	0.55
BATS non-Penny	0.86	0.91	0.91
BOX	0.11	0.11	0.55
BX Options	0.11	0.54	0.54
CBOE	0.11	0.31	0.55
CBOE orders greater than 99 contracts in RUT, RMN, NDX, MNX, ETFs, ETNs and HOLDRs	0.29	0.31	0.55
C2	0.55	0.56	0.55
ISE	0.11	0.29	0.55
ISE Select Symbols [13]	0.31	0.39	0.55
NYSE ARCA (Penny Pilot)	0.55	0.55	0.55
NYSE ARCA (Standard)	0.11	0.11	0.55
NOM Penny Pilot Options	0.54	0.54	0.55
NOM Non-Penny Pilot Options	0.86	0.91	0.91

[13] These fees are applicable to orders routed to ISE that are subject to Rebates and Fees for Adding and Removing Liquidity in Select Symbols. See ISE's Schedule of Fees for the complete list of symbols that are subject to these fees.

In May 2009, the Exchange adopted Rule 1080(m)(iii)(A) to establish Nasdaq Options Services LLC (''NOS''), a member of the Exchange, as the Exchange's exclusive order router.[10] NOS is utilized by the Exchange's fully

[6] *See* SR–NASDAQ–2012–114 (not yet published). This immediately effective rule filing amended the NOM Non-Penny Pilot Fees for Removing Liquidity to assess Customers and NOM Marker Makers a $0.79 per contract fee and Professionals, Firms and Non-NOM Marker Makers a $0.85 per contract fee. NDX, FB, GOOG and GRPN no longer have separate pricing, but rather are assessed the fees for Non-Penny Pilot Options. MNX pricing was also removed from the NOM's pricing in this rule change because MNX was delisted on September 13, 2012.

[7] *Id.*

[8] *Id.*

[9] NOM delisted MNX on September 13, 2012.

[10] *See* Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR–Phlx–2009–32).

automated options trading system, PHLX XL,[11] to route orders in options listed and open for trading on the PHLX XL system to destination markets. Each time NOS routes to away markets NOS is charged a 0.06 clearing fee and, in the case of certain exchanges, a transaction fee is also charged in certain symbols, which fees are passed through to the Exchange. The Exchange currently recoups clearing and transaction charges incurred by the Exchange as well as certain other costs incurred by the Exchange when routing to away markets, such as administrative and technical costs associated with operating NOS, membership fees at away markets, and technical costs associated with routing options.[12]

As with all fees, the Exchange may adjust these Routing Fees in response to competitive conditions by filing a new proposed rule change.

2. Statutory Basis

The Exchange believes that its proposal to amend its Pricing Schedule is consistent with Section 6(b) of the Act[13] in general, and furthers the objectives of Section 6(b)(4) of the Act[14] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members.

The Exchange believes that the proposed NOM Non-Penny Pilot Options Routing Fees are reasonable because they seek to recoup costs that are incurred by the Exchange when routing Customer, Professional, Firm, Broker-Dealer, Specialist and Market Maker orders to NOM on behalf of members, respectively. Each destination market's transaction charge varies and there is a standard clearing charge for each transaction incurred by the Exchange along with other administrative and technical costs that are incurred by the Exchange. The Exchange believes that the proposed Routing Fees would enable the Exchange to recover the remove fees assessed to market participants by NOM when routing Non-Penny Pilot Options (including NDX, FB, GOOG and GRPN), plus clearing and other administrative and technical fees for the execution of Customer, Professional, Firm, Broker-Dealer, Specialist and Market Maker orders when routed to NOM. The Exchange also believes that the proposed NOM Non-Penny Pilot Options Routing Fees are equitable and not unfairly discriminatory because they would be uniformly applied to all Customer, Professional, Firm, Broker-Dealer, Specialist and Market Maker orders that are routed to NOM.

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 not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, Phlx Routing Fees seek to recoup costs for Routing Orders to other exchanges on behalf of its members. Options Participants may choose to mark the order as ineligible for routing to avoid incurring these fees.[15]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[16] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2012–120 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–Phlx–2012–120. This file number should be included on the subject line if email 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 10:00 a.m. and 3:00 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–Phlx–2012–120 and should be submitted on or before November 6, 2012.

[11] This proposal refers to ''PHLX XL'' as the Exchange's automated options trading system. In May 2009 the Exchange enhanced the system and adopted corresponding rules referring to the system as ''Phlx XL II.'' *See* Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR–Phlx–2009–32). The Exchange intends to submit a separate technical proposed rule change that would change all references to the system from ''Phlx XL II'' to ''PHLX XL'' for branding purposes.

[12] In addition to membership fees and transaction fees, the Exchange also incurs an Options Regulatory Fee when routing to an away market that assesses that fee. The Exchange's proposed Routing Fees for NOM Non-Penny Pilot Options include NOM's Fees for Removing Liquidity of $0.79 per contract fee for Customers and NOM Market Makers and $0.85 per contract fee for Professionals, Firms and Non-NOM Market Makers (which Fees for Removing Liquidity were the same fees assessed for FB, GOOG and GRPN), as well as a 0.06 clearing cost and another 0.05 per contract fee associated with administrative and technical costs for operating NOS. At this time, the Exchange has determined to assess a maximum fee of 0.91 per contract for routing Non-Penny Pilot Options to NOM. While this does not recover all of the Exchange's costs, the Exchange has determined at this time to not assess more than a $0.91 per contract Routing Fee.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(4).

[15] *See* Rule 1066(h) (Certain Types of Orders Defined) and 1080(b)(i)(A) (PHLX XL and PHLX XL II).

[16] 15 U.S.C. 78s(b)(3)(A)(ii).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25331 Filed 10–15–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68017; File No. SR–NYSE–2012–47]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Section 902.02 of the New York Stock Exchange Listed Company Manual Regarding Waivers for Certain Listing Fees

October 9, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on September 25, 2012, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Section 902.02 of the New York Stock Exchange Listed Company Manual.

The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Listed Company Manual and to implement the proposed changes immediately upon filing.

The Exchange proposes to amend Section 902.02 of the Listed Company Manual, which currently provides, in part, that Listing Fees are waived for issuers (i) listing following emergence from bankruptcy; (ii) listing a class of stock that is not listed on a national securities exchange but is registered under the Securities Exchange Act of 1934 (the ''Act''); or (iii) transferring the listing of any class of equity securities, any structured product or any closed-end fund from any other national securities exchange.

The Exchange proposes to specify that waiver (i) would only be applicable to an issuer that is listing within 36 months following emergence from bankruptcy and that has not had a security listed on a national securities exchange during such period. In addition, the Exchange proposes to specify that waiver (ii) would only be applicable to an issuer that is relisting a class of stock that is registered under the Act that was delisted from a national securities exchange and only if such delisting was (a) within the previous 12 calendar months, and (b) due to the issuer's failure to file a required periodic financial report with the Commission or other appropriate regulatory authority.[3] In addition to the substantive changes proposed herein for Section 902.02 of the Listed Company Manual, the Exchange also proposes certain non-substantive changes.[4]

The Exchange does not expect the financial impact of this proposed rule change to be material in terms of the level of Listing Fees collected from issuers on the Exchange. Specifically, the Exchange anticipates that only a very limited number of issuers will be qualified and seek to list on the Exchange that are eligible to qualify for the waivers, as amended. Accordingly, the Exchange believes that the proposed rule change will not impact the Exchange's resource commitment to its regulatory oversight of the listing process or its regulatory programs.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[5] in general, and furthers the objectives of Section 6(b)(4) of the Act,[6] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers, or dealers.

The Exchange believes that it is reasonable to waive the Listing Fees for an issuer within 36 months following emergence from bankruptcy, so long as such issuer has not had a security listed

[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] As a result, this waiver would no longer apply to an issuer listing a class of stock that is registered under the Act and (i) was delisted from a national securities exchange within the previous 12 calendar months for a non-financial-reporting reason, (ii) was not listed on a national securities exchange within the previous 12 calendar months, or (iii) is being listed on a national securities exchange for the first time. The Exchange notes that the NASDAQ Stock Market LLC (''NASDAQ'') similarly waives the ''entry'' and ''application'' fees for issuers that were suspended and/or delisted from NASDAQ solely for their failure to file a required periodic financial report with the Commission or other appropriate regulatory authority. *See* NASDAQ IM–5900–5 (Waiver of Fees upon Relisting for Companies Removed for Late Filings). The Exchange is not proposing any changes to waiver (iii) to Listing Fees.

[4] First, the Exchange proposes to remove obsolete text that provides that, with retroactive effect from January 1, 2008, issuers transferring the listing of their primary class of common shares from NYSE Alternext US (which is now known as NYSE MKT LLC (''NYSE MKT'')) are not required to pay Annual Fees with respect to that primary class of common shares or any other class of securities transferred in conjunction therewith for the remainder of the calendar year in which the transfer occurs. Instead, the Exchange proposes to include the reference to NYSE MKT with an existing reference to NYSE Arca, Inc. (''NYSE Arca'') that similarly provides that issuers transferring the listing of their primary class of common shares from NYSE Arca are not required to pay Annual Fees with respect to that primary class of common shares or any other class of securities transferred in conjunction therewith for the remainder of the calendar year in which the transfer occurs. The Exchange proposes to relocate the combined NYSE Arca and NYSE MKT reference under the ''Annual Fees'' subheading of Section 902.02 of the Listed Company Manual, where it is more appropriate. Second, the Exchange proposes that, instead of using an asterisk to mark the text that provides that none of the Listing Fee waivers are applicable to the transfer of any class of securities if the issuer's primary class of common stock remains listed on another national securities exchange, such text would be moved within the main body of text describing the waivers. Additionally, ''transfer'' would be changed to ''listing,'' which would more accurately describe the process. Finally, the Exchange proposes to correct a cross-reference to the one-time special charge payable in connection with the listing of any new class of common shares. The reference currently states that the special charge is $37,500, but the actual amount is $50,000, as provided in Section 902.03, under ''Listing Fee Schedule.'' *See* Securities Exchange Act Release No. 60868 (October 22, 2009), 74 FR 55883 (October 29, 2009) (SR–NYSE–2009–83).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

on a national securities exchange during such period, because this will incentivize such issuers to list their security on the Exchange, which will result in increased transparency and liquidity with respect to the issuer's security, thereby benefiting investors. In this regard, the Exchange notes that the issuer, like all other listing applicants, would be required to satisfy the Exchange's listings standards as well as the other governance requirements and standards that the Exchange requires of issuers listed on the Exchange. Accordingly, the Exchange believes that it is in the public's interest, and the interest of the issuer, to provide an opportunity for the increased transparency and liquidity that is attendant with listing on the Exchange and therefore that it is reasonable to waive the Listing Fees for such issuers. The Exchange believes that the number of additional issuers that will qualify for this waiver, as proposed, will be limited. The Exchange also believes that limiting the waiver to 36 months following emergence from bankruptcy is reasonable because, in the Exchange's opinion, it is a period of time that is sufficient for the issuer to proceed with its reorganization and meet the Exchange's qualifications for listing.

The Exchange also believes that it is reasonable to limit the waiver to issuers that have emerged from bankruptcy but have not yet had a security listed on a national securities exchange during such period because, if an issuer has already listed its security post-emergence, it has already exposed itself to the requirements and transparency associated with listing on a national securities exchange, which is what the Exchange is incentivizing by waiving the Listing Fees. The Exchange also believes that this is equitable and not unfairly discriminatory because the goal of the waiver is to incentivize listing, and the transparency and public benefits (*e.g.,* increased liquidity) that is attendant therewith. Accordingly, these goals would already be achieved for an issuer that has already listed on another national securities exchange post-emergence, and to waive the Listing Fees would therefore be inconsistent with the waiver's purpose.

The Exchange also believes that it is reasonable to provide a waiver of the Listing Fees to an issuer listing a class of stock that is registered under the Act that was delisted from a national securities exchange if such delisting was (a) within the previous 12 calendar months, and (b) due to the issuer's failure to file a required periodic financial report with the Commission or other appropriate regulatory authority. When the current Listing Fee waiver was added, the Exchange anticipated that a significant percentage of potential new listings of companies that had a registered class of common stock but that were not currently listed on a national securities exchange would relate to formerly listed companies that were delisted as a result of a failure to timely file annual reports with the Commission.[7] The Exchange anticipated that these would be companies that were otherwise in good standing with the Exchange or another national securities exchange, but that fell behind on their Act reporting because their auditors or the Commission required restatements of their financial statements and that these companies would relist on the Exchange (or another national securities exchange) as soon as their filings were up to date.[8] When proposed, the Exchange believed that it was appropriate to waive initial listing fees for these companies and that such a waiver did not constitute an inequitable or unfairly discriminatory allocation of fees because such companies would have previously paid initial listing fees to the Exchange or another national securities exchange, and that to make them pay these fees again would further penalize them unnecessarily.[9]

The Exchange continues to believe that a waiver for issuers that were delisted for financial reporting reasons is reasonable because, except for the non-compliance with the financial reporting requirement, such issuers would otherwise be in good standing at the time of delisting from a listing standards perspective and would have already paid a fee for listing on the Exchange or another national securities exchange. The Exchange also believes that limiting the waiver to 12 months after delisting is reasonable because the waiver would apply to issuers that were delisted within a relatively recent time frame.

The Exchange noted, when the current waivers to the Listing Fee were adopted, that there could be an initial listing on the Exchange of a company that was trading in the over-the-counter market immediately prior to listing and that was not previously delisted as a result of a failure to timely file annual reports with the Commission.[10] The Exchange believed that very few of these companies could meet the Exchange's listing requirements and, therefore, the Exchange expected the number of such listings and the related loss of fee revenue to be immaterial.[11]

The Exchange believes that the changes proposed to this aspect of the waiver, such that it would no longer apply to issuers that were delisted for reasons other than financial reporting, is equitable and not unfairly discriminatory because these other issuers would not have been in good standing at the time of delisting from a listing standards perspective and such lack of good standing would be due to reasons other than for financial reporting. Similarly, the Exchange believes that it is equitable and not unfairly discriminatory to charge Listing Fees to issuers that are registered under the Act but not previously listed on a national securities exchange because such issuers would not have previously paid listing fees.

The Exchange also believes that this aspect of the proposed change is equitable and not unfairly discriminatory because, in addition to applying equally to all issuers whose securities are listed on the Exchange, it would differentiate between those issuers whose securities are delisted solely for financial reporting reasons and those issuers whose securities were delisted for other reasons or were not previously listed on a national securities exchange. In this regard, the Exchange believes that these issuers would not be unfairly penalized if they are required to pay Listing Fees.

Overall, the Exchange believes that instances of these waivers being granted to issuers that apply to list on the Exchange will be relatively rare. Accordingly, the Exchange does not anticipate that it will experience any meaningful diminution in revenue as a result of the proposed waivers and therefore does not believe that the proposed waivers would in any way negatively affect its ability to continue to adequately fund its regulatory program or the services the Exchange provides to issuers.

Additionally, the Exchange believes that the non-substantive changes that are proposed, which are technical and conforming changes, are reasonable because they will ensure that the proposed substantive changes are incorporated in a clear and accurate manner. These changes are also

[7] *See* Securities Exchange Act Release No. 55742 (May 10, 2007), 72 FR 27893 (May 17, 2007) (SR–NYSE–2007–19).

[8] *Id.*

[9] *Id.*

[10] *Id.* at n. 5.

[11] *Id.* In this regard, the Exchange notes that there have been a number of such issuances. For example, to date in 2012 five issuers have availed themselves of this waiver by listing securities on the Exchange that were not previously listed on a national securities exchange and, therefore, had not previously paid initial listing fees.

equitable and not unfairly discriminatory because they will benefit all issuers and all other readers of the Listed Company Manual.

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 foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [12] of the Act thereunder, because it establishes a due, fee, or other charge imposed by NYSE.

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 email to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2012–47 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–2012–47. This file number should be included on the subject line if email 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 10:00 a.m. and 3:00 p.m.. Copies of the filing will also be available for Web site viewing and printing at the NYSE's principal office and on its Internet Web site at *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–NYSE–2012–47 and should be submitted on or before November 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25321 Filed 10–15–12; 8:45 am]

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[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68021; File No. SR–NYSE–2012–50]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Implementing Changes to Certain Fees and Credits Within the New York Stock Exchange LLC Price List

October 9, 2012.

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 September 26, 2012, New York Stock Exchange LLC (the ''Exchange'' or ''NYSE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to make changes to certain fees and credits within its Price List, which the Exchange proposes to become operative on October 1, 2012. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to make changes to certain fees and credits within its Price List, which the Exchange proposes to become operative on October 1, 2012.

Transaction Fees

The Exchange currently provides a per share credit per transaction when adding liquidity to the Exchange in a security with a per share price of $1.00 or more (displayed and non-displayed orders) of $0.0015, or $0.0010 if it is a non-displayed reserve order. The Exchange proposes to add two additional per share credits that would apply in lieu of the current adding liquidity credit, if certain thresholds are met:

- First, the Exchange proposes to provide a $0.0018 per share credit per transaction when adding displayed liquidity to the Exchange if either (i) the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

member organization has average daily volume (''ADV'') that adds liquidity to the Exchange during the billing month (''Adding ADV,'' which shall exclude any liquidity added by a Designated Market Maker (''DMM'')) that is at least 1.5% of consolidated average daily volume in NYSE-listed securities during the billing month (''NYSE CADV''), and executes market at-the-close (''MOC'') and limit at-the-close (''LOC'') orders of at least 0.375% of NYSE CADV, or (ii) the member organization has Adding ADV that is at least 0.8% of NYSE CADV, executes MOC and LOC orders of at least 0.12% of NYSE CADV, and adds liquidity to the Exchange as a Supplemental Liquidity Provider (''SLP'') for all assigned SLP securities in the aggregate (including shares of both a SLP proprietary trading unit (''SLP-Prop'') and a SLP market maker (''SLMM'') of the same member organization) of more than 0.25% of NYSE CADV.

• Second, the Exchange proposes to provide a $0.0017 per share credit per transaction when adding displayed liquidity to the Exchange if the member organization has Adding ADV that is at least 0.20% of NYSE CADV and executes MOC and LOC orders of at least 0.10% of NYSE CADV.

Currently, the transaction fee for certain transactions in stocks with a per share price of $1.00 or more depends on the characteristics of the transaction, including order type.[3] Those transactions that do not have a specified per share charge based on their characteristics (''all other'' transactions) are currently subject to an equity per share charge of $0.0023 per transaction for non-floor broker transactions or $0.0022 per transaction for Floor broker transactions. The Exchange proposes to increase this charge, such that for all other non-floor broker transactions (i.e., when taking liquidity from the Exchange), the Exchange proposes to increase the per share charge from $0.0023 to $0.0025 per transaction. The Exchange proposes to raise the per share charge for all other floor broker transactions from $0.0022 to $0.0024 per transaction.

In addition, the Exchange proposes to raise the credit per share for executions of orders sent to a floor broker for representation on the Exchange when adding liquidity to the NYSE Display Book system from $0.0017 to $0.0019 per transaction.

Lastly, the Exchange proposes to include an additional credit per share of $0.0002 for member organizations and floor brokers that provide displayed liquidity to the Exchange in the following ten active securities (''Active Securities''), which were selected based on year-to-date CADV:

Company name	Symbol
Bank of America Corp.	BAC.
Citigroup Inc.	C.
Ford Motor Company	F.
General Electric	GE.
JPMorgan Chase & Co.	JPM.
Nokia Corporation	NOK.
PFIZER Inc.	PFE.
Sprint Nextel Corporation	S.
AT&T Inc.	T.
Wells Fargo & Co.	WFC.

The credit will apply to transactions in the Active Securities and is in addition to any other credit for floor and non-floor transactions.[4]

DMMs

The Exchange proposes to increase the per share charge for DMMs that take liquidity from the Exchange from $0.0023 to $0.0025.

DMMs are currently eligible for a per share credit when adding liquidity in More Active Securities[5] if the More Active Security has a stock price of $1.00 or more, the DMM meets both the More Active Securities Quoting Requirement[6] and the More Active Securities Quoted Size Ratio Requirement,[7] and the DMM's providing liquidity meets certain thresholds, as follows:

• $0.0026 per share if the DMM's providing liquidity is 10% or less of the NYSE's total intraday adding liquidity in each such security for that month;[8]

• $0.0030 per share if the DMM's providing liquidity is more than 10% but less than or equal to 20% of the NYSE's total intraday adding liquidity in each such security for that month; and

• $0.0029 per share if the DMM's providing liquidity is more than 20% of the NYSE's total intraday adding liquidity in each such security for that month.[9]

The Exchange proposes to change the level of providing liquidity for DMMs to be eligible for the credits. Specifically, DMMs would be eligible for a per share credit when adding liquidity in More Active Securities if the More Active Security has a stock price of $1.00 or more, the DMM meets both the More Active Securities Quoting Requirement and the More Active Securities Quoted Size Ratio Requirement, and the DMM's providing liquidity meets certain thresholds, as follows:

• $0.0026 per share if the DMM's providing liquidity is 15% or less of the NYSE's total intraday adding liquidity in each such security for that month;

• $0.0030 per share if the DMM's providing liquidity is more than 15% but less than or equal to 30% of the NYSE's total intraday adding liquidity in each such security for that month; and

• $0.0029 per share if the DMM's providing liquidity is more than 30% of the NYSE's total intraday adding liquidity in each such security for that month.

Lastly, the Exchange proposes to include an additional credit per share of $0.0002 for DMMs that provide displayed liquidity to the Exchange in the Active Securities. The credit will apply to transactions in the Active Securities and is in addition to any other credit for DMMs.

SLPs

The Exchange proposes to increase the credit per share for SLPs that add liquidity to the Exchange in securities with a per share price of $1.00 or more, if the SLP (i) meets the 10% average or more quoting requirement in an assigned security pursuant to Rule 107B (quotes of an SLP-Prop and an SLMM of the same member organization shall not be aggregated) and (ii) adds liquidity for all assigned SLP securities in the

[3] For example, the Exchange charges $0.0005 per share (subject to a monthly cap) for at the opening or at the opening only orders, $0.0055 per share per transaction for all MOC and LOC orders from any member organization executing an ADV of MOC/LOC activity on the Exchange in that month of at least 14 million shares, and $0.0095 per share per transaction for all other MOC and LOC orders.

[4] The credit will not apply to transactions in the Active Securities in the Retail Liquidity Program.

[5] ''More Active Securities'' are those with an ADV in the previous month equal to or greater than one million shares.

[6] A DMM meets the ''More Active Securities Quoting Requirement'' when a More Active Security has a stock price of $1.00 or more and the DMM quotes at the National Best Bid or Offer (''NBBO'') in the applicable security at least 10% of the time in the applicable month.

[7] A DMM meets the ''More Active Securities Quoted Size Ratio Requirement'' when the DMM Quoted Size for an applicable month is at least 15% of the NYSE Quoted Size. The ''NYSE Quoted Size'' is calculated by multiplying the average number of shares quoted on the NYSE at the NBBO by the percentage of time the NYSE had a quote posted at the NBBO. The ''DMM Quoted Size'' is calculated by multiplying the average number of shares of the applicable security quoted at the NBBO by the DMM by the percentage of time during which the DMM quoted at the NBBO.

[8] The NYSE total intraday adding liquidity is totaled monthly and includes all NYSE adding liquidity, excluding NYSE open and NYSE close volume, by all NYSE participants, including SLPs, customers, Floor brokers and DMMs.

[9] The Exchange notes that the $0.0029 per-share credit is applicable to all of the member organization's adding liquidity in each such security for that month, not just the incremental liquidity that is more than 30% of the NYSE's total intraday adding liquidity.

aggregate (including shares of both an SLP-Prop and an SLMM of the same member organization) of an ADV of more than 0.22% of NYSE CADV from $0.0021 to $0.0023 per transaction, and from $0.0016 to $0.0018 per transaction for non-displayed reserve orders.

The Exchange proposes to include an additional credit per share of $0.0025 per transaction for SLPs that add liquidity to the Exchange in securities with a per share price of $1.00 or more, if the SLP (i) meets the 10% average or more quoting requirement in an assigned security pursuant to Rule 107B (quotes of an SLP-Prop and an SLMM of the same member organization shall not be aggregated), (ii) adds liquidity for all assigned SLP securities in the aggregate (including shares of both an SLP-Prop and an SLMM of the same member organization) of an ADV of more than 0.22% of NYSE CADV, (iii) adds liquidity for all assigned SLP securities in the aggregate (including shares of both an SLP-Prop and an SLMM of the same member organization) of an ADV during the billing month that is at least a 0.18% increase over the SLP's September 2012 Adding ADV (''SLP Baseline ADV''), and (iv) has a minimum provide ADV for all assigned SLP securities of 12 million shares.

Lastly, the Exchange proposes to include an additional credit per share of $0.0002 for SLPs that provide displayed liquidity to the Exchange in the Active Securities. The credit will apply to transactions in the Active Securities and is in addition to any other credit for SLPs.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[10] in general, and furthers the objectives of Section 6(b)(4) of the Act,[11] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers, or dealers.

The Exchange believes the two new transaction fee credits and the increased credit for executions of orders in securities with a per share price of $1.00 or more sent to the floor broker for representation on the Exchange when adding liquidity to the NYSE Display Book system are reasonable because they encourage additional displayed liquidity on the Exchange. The Exchange believes the new credits are equitable and not unfairly discriminatory because they are open to all member organizations on an equal basis, provide discounts that are reasonably related to the value to the Exchange's market quality associated with higher volumes, and, in the case of the $0.0018 per share credit, the Exchange has provided alternative methods for achieving the credit.

The Exchange believes that increasing the per share charge for floor broker and non-floor broker transactions in securities with a per share price of $1.00 or more is reasonable in light of the increased credits the Exchange is proposing in order to increase liquidity on the Exchange. The Exchange believes that the additional credit for transactions in Active Securities is reasonable because it will encourage liquidity and competition in actively traded securities on the Exchange. The Exchange believes the new charges and credits for member organizations and floor brokers are equitably allocated and not unfairly discriminatory because similarly situated member organizations and floor brokers will be subject to the same fee structure, and it allocates a higher rebate to member organizations and floor brokers that make significant contributions to market quality and that contribute to price discovery by providing higher volumes of liquidity.

The Exchange believes that increasing the per share charge for DMMs that take liquidity from the Exchange is reasonable in light of the changes to the DMM credits the Exchange is proposing, which are designed to attract liquidity to the Exchange. The Exchange believes that the additional credit for DMM transactions in Active Securities is reasonable because it will encourage greater liquidity and competition in actively traded securities on the Exchange. The Exchange recognizes that the credit for a DMM whose providing liquidity is currently between 10–15% of the NYSE's total intraday adding liquidity will decrease from $0.0030 to $0.0026. The Exchange believes that this change is reasonable, equitable, and not unfairly discriminatory because it would result in credits being applied that are more representative of the amount of liquidity added by such a DMM. In this regard, the Exchange believes that a DMM that meets both the More Active Securities Quoting Requirement and the More Active Securities Quoted Size Ratio Requirement is likely to also be providing liquidity that is reasonably close to, but not greater than, 15% of the NYSE's total intraday adding liquidity in each such security for that month. In contrast, the Exchange believes that a DMM whose providing liquidity is greater than 15% of the NYSE's total intraday adding liquidity would be adding liquidity above the amount associated with meeting both the More Active Securities Quoting Requirement and the More Active Securities Quoted Size Ratio Requirement. Accordingly, the Exchange considers it reasonable, equitable and not unfairly discriminatory to provide a higher credit for a DMM whose providing liquidity is greater than 15% of the NYSE's total intraday adding liquidity in each such security for that month. Additionally, the Exchange believes that reducing the credit for DMMs that provide relatively less liquidity (10–15%) is reasonable, equitable, and not unfairly discriminatory, because it would offset the cost of providing a higher credit to DMMs that provide more liquidity (20–30%). The Exchange also believes that increasing the credit for a DMM whose providing liquidity is between 20–30% of the NYSE's total intraday adding liquidity is reasonable, equitable, and not unfairly discriminatory, because it will increase the incentive for DMMs to provide liquidity but still promote multiple sources of liquidity by decreasing the credit slightly when the DMM provides liquidity that is more than 30% of the NYSE's total intraday adding liquidity. The Exchange believes that the proposed changes are equitable and not unfairly discriminatory because all similarly situated DMMs will be subject to the same fee structure.

The Exchange believes that increasing the credit per share for SLPs that add liquidity to the Exchange with a per share price of $1.00 or more if the SLP meets certain requirements is reasonable because the incentives are reasonably related to an SLP's liquidity obligations. The Exchange believes the new SLP credit for adding liquidity is reasonable because it provides an added incentive for SLPs to provide liquidity in their assigned securities. The Exchange believes that the additional credit for SLP transactions in Active Securities is reasonable because it will encourage liquidity and competition in actively traded securities on the Exchange. The Exchange believes the credits are equitable and not unfairly discriminatory because they are open to all SLPs on an equal basis and provide discounts that are reasonably related to the value to the Exchange's market quality associated with higher volumes.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4).

an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

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 foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [12] of the Act and subparagraph (f)(2) of Rule 19b–4 [13] thereunder, because it establishes a due, fee, or other charge imposed by the NYSE.

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 email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2012–50 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–2012–50. This file number should be included on the subject line if email 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 10:00 a.m. and 3:00 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–2012–50 and should be submitted on or before November 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25322 Filed 10–15–12; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(2).

[14] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13252 and #13253]

New Mexico Disaster Number NM–00029

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of New Mexico (FEMA–4079–DR), dated 08/24/2012.

Incident: Flooding.

Incident Period: 06/22/2012 through 07/12/2012.

Effective Date: 10/03/2012.

Physical Loan Application Deadline Date: 10/23/2012.

Economic Injury (EIDL) Loan Application Deadline Date: 05/24/2013.

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: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of NEW MEXICO, dated 08/24/2012, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Los Alamos; and the Mescalero Apache Tribe.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Joseph P. Loddo,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2012–25313 Filed 10–15–12; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13241 and #13242]

Oklahoma Disaster Number OK–00063

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 3.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Oklahoma (FEMA–4078–DR), dated 08/22/2012.

Incident: Freedom and Noble Wildfires.

Incident Period: 08/03/2012 through 08/14/2012.

DATES: *Effective Date:* 10/05/2012.

Physical Loan Application Deadline Date: 11/21/2012.

EIDL Loan Application Deadline Date: 05/22/2013.

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: The notice of the President's major disaster declaration for the State of OKLAHOMA, dated 08/22/2012 is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to 11/21/2012.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2012–25327 Filed 10–15–12; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13317 and #13318]

Alabama Disaster Number AL–00044

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Alabama (FEMA–4082–DR), dated 09/21/2012.

Incident: Hurricane Isaac.

Incident Period: 08/26/2012 through 09/05/2012.

Effective Date: 10/03/2012.

Physical Loan Application Deadline Date: 11/20/2012.

Economic Injury (EIDL) Loan Application Deadline Date: 06/21/2013.

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: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Alabama, dated 09/21/2012, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Covington, Dallas, Geneva, Monroe, Perry.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Joseph P. Loddo,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2012–25314 Filed 10–15–12; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

SBIR/STTR Phase I to Phase II Transition Benchmarks

AGENCY: U.S. Small Business Administration.

ACTION: Notice of Small Business Innovation Research and Small Business Technology Transfer Programs Phase I to Phase II Transition Benchmarks.

SUMMARY: The Small Business Administration (SBA) is publishing the Small Business Innovation Research (SBIR) and the Small Business Technology Transfer (STTR) Phase I to Phase II transition rate benchmarks for the 11 participating agencies for public comment. The rates are the minimum required ratio of past Phase II to Phase I awards that an awardee firm must maintain to be eligible for a new Phase I award from a particular agency. This requirement is described in Section 4(a) of the SBIR Policy Directive and the STTR Policy Directive which implements section 5165 of the SBIR/STTR Reauthorization Act of 2011.

DATES: *Effective Date:* December 17, 2012 and when published on *www.sbir.gov.*

Comment Date: Comments to this notice must be received on or before November 15, 2012.

ADDRESSES: Comments on this notice may be submitted to Edsel Brown, Jr., Assistant Director, Office of Innovation, Small Business Administration, 409 Third Street SW., Washington, DC 20416; telephone (202) 205–6450; email (*Technology@sba.gov*).

FOR FURTHER INFORMATION CONTACT: Edsel Brown, Jr., Assistant Director, Office of Innovation, Small Business Administration, 409 Third Street SW., Washington, DC 20416; telephone (202) 205–6450; email (*Technology@sba.gov*).

SUPPLEMENTARY INFORMATION: Section 4(a)(3)(iii) of the SBIR Policy Directive, which was published on August 6, 2012, at 77 FR 46806 and the STTR Policy Directive, which was published the same day at 77 FR 46855, requires each agency to establish an SBA-approved Phase I-Phase II Transition Rate benchmark. The Phase I-Phase II Transition Rate benchmark sets, for each agency, the minimum required number of Phase II awards the applicant must have received for a given number of Phase I awards during a specified period. If an applicant has won prior SBIR/STTR awards, and does not meet the benchmark rate of the agency to which it is applying, the applicant is not eligible for an SBIR or STTR Phase I award from that agency for a period of one year from the date of submission of the proposal or application. A firm's Phase II transition rate is calculated over a specified 5, 10, or 15 year period, as the ratio of previous Phase II awards to previous Phase I awards, expressed as a percentage. Each of the participating agencies has selected a rate and time period. These are presented below in Table 1.

SBA has reviewed and approved these benchmarks However, § 5165 of the SBIR/STTR Reauthorization Act of 2011 requires SBA to publish, at least 60 days before becoming effective, each agency's system and minimum performance standard, and each approval by SBA. SBA will review all comments received in response to this notice and issue the final transition rates within 60 days of the date this notice is published. These rates will be available at *www.sbir.gov.*

TABLE 1

Agency	Benchmark rate (Phase II/ Phase I)	Length of period (years)
Department of Agriculture	0.25	5
Department of Commerce (National Institute of Standards and Technology)	0.25	5
Department of Commerce (National Oceanic and Atmospheric Administration)	0.25	5
Department of Defense	0.25	5
Department of Education	0.25	10
Department of Energy	0.25	5

TABLE 1—Continued

Agency	Benchmark rate (Phase II/ Phase I)	Length of period (years)
Department of Health and Human Services	0.25	5
Department of Homeland Security	0.25	5
Department of Transportation	0.45	5
Environmental Protection Agency	0.25	10
National Aeronautics and Space Administration	0.25	5
National Science Foundation	0.25	5

For greater detail on the Phase I to Phase II transition rates, see Section 4(a)(3)(iii) of the SBIR Policy Directive and the STTR Policy Directive. [*www.sbir.gov/node/379093*]

Authority: 15 U.S.C. 638(9).

Sean J. Greene,

Associate Administrator for Investment and Innovation.

[FR Doc. 2012–25328 Filed 10–15–12; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2012–0282]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA).

ACTION: Notice of applications for exemption from the diabetes mellitus requirement; request for comments.

SUMMARY: FMCSA announces receipt of applications from 14 individuals for exemption from the prohibition against persons with insulin-treated diabetes mellitus (ITDM) operating commercial motor vehicles (CMVs) in interstate commerce. If granted, the exemptions would enable these individuals with ITDM to operate CMVs in interstate commerce.

DATES: Comments must be received on or before November 15, 2012.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2012–0282 using 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, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* 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.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket numbers for this notice. 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 below for further information.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 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 acknowledgment 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 may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** 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: Elaine M. Papp, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal Motor Carrier Safety Regulations for a 2-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.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The 14 individuals listed in this notice have recently requested such an exemption from the diabetes prohibition in 49 CFR 391.41(b)(3), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by the statutes.

Qualifications of Applicants

Darrell G. Brave

Mr. Brave, age 61, has had ITDM since 2006. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Brave understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Brave meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from Washington.

Joseph A. Capille

Mr. Capille, 56, has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no

severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Capille understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Capille meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A Commercial Driver's License (CDL) from Alabama.

Robert E. Carroll

Mr. Carroll, 49, has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Carroll understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Carroll meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Florida.

Ronald J. Coleman

Mr. Coleman, 47, has had ITDM since 2010. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Coleman understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Coleman meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from New Jersey.

Thomas L. Gilmore

Mr. Gilmore, 63, has had ITDM since 1969. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Gilmore understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Gilmore meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he has stable proliferative diabetic retinopathy. He holds a Class D operator's license from Iowa.

David J. Heppelmann

Mr. Heppelmann, 52, has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Heppelmann understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Heppelmann meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Minnesota.

Dennis R. Johnson

Mr. Johnson, 58, has had ITDM since 2009. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Johnson understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Johnson meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Tennessee.

Steve M. Knezevich

Mr. Knezevich, 43, has had ITDM since 2011. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Knezevich understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Knezevich meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class C Chauffer's license from Michigan.

Phillip J. Kunkel

Mr. Kunkel, 64, has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Kunkel understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Kunkel meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Indiana.

Joseph M. Polkowski, Sr.

Mr. Polkowski, 59, has had ITDM since 2007. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Polkowski understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Polkowski meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have

diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

John F. Robinson

Mr. Robinson, 51, has had ITDM since 2006. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Robinson understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Robinson meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from South Carolina.

Cody R. Sheehan

Mr. Sheehan, 21, has had ITDM since 2001. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Sheehan understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Sheehan meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Massachusetts.

Michael D. Suchecki

Mr. Suchecki, 38, has had ITDM since 2005. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Suchecki understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Suchecki meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Illinois.

Mark A. Welch, Jr.

Mr. Welch, 33, has had ITDM since 1992. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Welch understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Welch meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Pennsylvania.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated in the date section of the notice.

FMCSA notes that section 4129 of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users requires the Secretary to revise its diabetes exemption program established on September 3, 2003 (68 FR 52441).[1] The revision must provide for individual assessment of drivers with diabetes mellitus, and be consistent with the criteria described in section 4018 of the Transportation Equity Act for the 21st Century (49 U.S.C. 31305).

Section 4129 requires: (1) Elimination of the requirement for 3 years of experience operating CMVs while being treated with insulin; and (2) establishment of a specified minimum period of insulin use to demonstrate stable control of diabetes before being allowed to operate a CMV.

In response to section 4129, FMCSA made immediate revisions to the diabetes exemption program established by the September 3, 2003 notice. FMCSA discontinued use of the 3-year driving experience and fulfilled the requirements of section 4129 while continuing to ensure that operation of CMVs by drivers with ITDM will achieve the requisite level of safety required of all exemptions granted under 49 U.S.C. 31136(e).

Section 4129(d) also directed FMCSA to ensure that drivers of CMVs with ITDM are not held to a higher standard than other drivers, with the exception of limited operating, monitoring and medical requirements that are deemed medically necessary.

The FMCSA concluded that all of the operating, monitoring and medical requirements set out in the September 3, 2003 notice, except as modified, were in compliance with section 4129(d). Therefore, all of the requirements set out in the September 3, 2003 notice, except as modified by the notice in the **Federal Register** on November 8, 2005 (70 FR 67777), remain in effect.

Issued on: October 2, 2012.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2012–25372 Filed 10–15–12; 8:45 am]

BILLING CODE 4910–EX–P

[1] Section 4129(a) refers to the 2003 notice as a ''final rule.'' However, the 2003 notice did not issue a ''final rule'' but did establish the procedures and standards for issuing exemptions for drivers with ITDM.

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Early Scoping Notification for the Alternatives Analysis of the Federal Way Transit Extension From SeaTac to Federal Way, WA

AGENCY: Federal Transit Administration, DOT.

ACTION: Notification of early scoping meetings.

SUMMARY: The Federal Transit Administration (FTA) and the Central Puget Sound Regional Transit Authority (Sound Transit) issue this early scoping notice to advise other agencies and the public that they intend to explore potential alternatives for improving public transit service between the cities of SeaTac and Federal Way in King County, Washington to improve connections to the regional transit system and major activity centers.

The early scoping notice is intended to invite public comments on the scope of the alternatives analysis study, including the project's purpose and need, transportation problems to be addressed, the range of alternatives, the transportation and community impacts and benefits to be considered, the capital and operating costs, and other factors that the public and agencies believe should be considered in analyzing the alternatives. If preparation of an environmental impact statement (EIS) is warranted following the completion of the alternatives analysis,

a notice of intent to prepare an EIS will be published.

The early scoping process is intended to support the alternatives analysis and a future National Environmental Policy Act (NEPA) scoping process, as appropriate. In addition, it supports FTA planning requirements associated with the New Starts (''Section 5309'') funding program for certain kinds of major capital investments. While recent legislation may lead to changes in the New Starts process, Sound Transit will comply with relevant FTA requirements relating to planning and project development to help it analyze and screen alternatives in preparation for the NEPA process.

Public meeting times and locations are described immediately below. Following that is a more detailed discussion of the project and the early scoping process.

DATES: Two public scoping meetings and one tribal/agency scoping meeting will be held at the following times and locations:

1. November 8, 2012, 4:00 p.m. to 7:00 p.m., Highline Community College, Building 2, 2400 S. 240th Street, Des Moines, WA 98198.

2. November 13, 2012, 4:00 p.m. to 7:00 p.m., Harry S. Truman High School, Gymnasium, 31455 28th Avenue, Federal Way, WA 98003.

3. (Agency and Tribal Meeting), November 7, 2012, 2:00 p.m. to 3:00 p.m.

The agency and tribal meeting will be conducted in a webinar format, accessible via the internet and by teleconference. Invitations to the on-line agency scoping meeting and the public scoping meetings will be sent to the appropriate federal, tribal, state, and local governmental units. Invitations will include details on how to participate in the on-line meeting.

Supplemental information about the project is provided below. Also, Sound Transit will provide information on the alternatives analysis at the public meetings, along with opportunities for spoken or written comments. Additional information is available on Sound Transit's Web site at: *http://www.soundtransit.org/FWextension.* Written scoping comments are requested by November 19, 2012 and can be sent or emailed to the address below, submitted at the public meetings, or provided at the Web site address above.

ADDRESSES: Federal Way Transit Extension (c/o Kent Hale, Senior Environmental Planner), Sound Transit, 401 S. Jackson Street, Seattle, WA 98104–2826, or by email to *FWTE@soundtransit.org.*

FOR FURTHER INFORMATION CONTACT: J. Steve Saxton, Transportation Program Specialist, FTA Region 10, email: *fta.tro10mail@dot.gov.*

SUPPLEMENTARY INFORMATION:

Early Scoping. Early scoping is intended to generate public comments on the scope of a planning effort called ''alternatives analysis.'' The alternatives analysis lets an agency evaluate the costs, benefits, and impacts of a range of transportation alternatives designed to address mobility problems and other locally identified objectives in a defined transportation corridor, and helps the agency determine which particular investment strategy should receive more focused study and development. Early scoping for the Federal Way Transit Extension is being conducted in support of NEPA requirements and in accordance with the Council on Environmental Quality's and FTA's regulations and guidance for implementing NEPA (40 CFR 1501.2 through 8 and 23 CFR 771.111), which encourage federal agencies to initiate NEPA early in their planning processes. Early scoping allows the scoping process to begin as soon as there is enough information to describe the proposal so that the public and relevant agencies can participate effectively. This is particularly useful in situations when a proposed action involves a broadly defined corridor with an array of alignment alternatives under consideration. This early scoping notice invites the public to comment on the scope of the planning alternatives analysis, including (a) the purpose and need for the project, (b) the range of alternatives to study, and (c) the environmental, transportation and community impacts and benefits to consider.

The Federal Way Transit Extension and the Regional Transit System. The Federal Way Transit Extension corridor is approximately 7.6 miles long and extends from the future S. 200th Street Link light rail station in SeaTac to the Federal Way Transit Center. It parallels State Route 99 (SR 99) and Interstate 5 (I–5) and generally follows a topographic ridge between Puget Sound and the Green River Valley where the city limits of SeaTac, Des Moines, Kent, and Federal Way meet.

Sound Move, the first phase of regional transit investments, was approved and funded by voters in 1996. Sound Transit is now completing its implementation. It includes light rail, commuter rail and regional express bus infrastructure and service, including the Central Link light rail system. In 2009, Sound Transit began light rail operations between downtown Seattle and Sea-Tac Airport, and an extension to the University of Washington is under construction and scheduled to open in 2016.

In 2004, Sound Transit began planning for the next phase of investment to follow *Sound Move.* This work included updating Sound Transit's Long-Range Plan and associated environmental review. After several years of Sound Transit system planning work, voters in 2008 authorized funding to extend light rail south to Federal Way as part of the Sound Transit 2 (ST2) Plan. Link light rail south from Sea-Tac Airport to S. 200th Street is now under construction and is scheduled to open in 2016. The ST2 Plan also extends light rail from downtown Seattle east to Bellevue and Redmond, and from the University of Washington north to Northgate and Lynnwood.

The Purpose of and Need for the Federal Way Transit Extension. The purposes of the project are to:

- Provide a reliable and efficient two-way, peak and off-peak transit service of sufficient capacity to meet the projected demand between the communities and activity centers between the cities of SeaTac and Federal Way and the other urban centers in the Central Puget Sound area;
- Provide a mobility alternative to travel on congested roadways and improve connections to the Central Puget Sound regional multimodal transportation system;
- Support South King County communities and the region's adopted vision for land use, transportation and economic development, a vision that promotes the well-being of people and communities, ensures economic vitality and preserves a healthy environment;
- Support the long-range vision, goals, and objectives for transit service established by Sound Transit's Regional Transit Long-Range Plan for high quality regional transit service between Seattle and Tacoma.

The project is needed to:

- Meet the growing needs of the corridor and of the region's future residents and workers by increasing mobility, access, and transportation capacity connecting regional growth and activity centers in the study area and the rest of the region, as called for in the region's adopted plans, including the PSRC's VISION 2040 and Transportation 2040, as well as related county and city comprehensive plans;
- Address the problems of increasing and unreliable travel times for transit users in the study area, who are now

dependent on the corridor's highly congested roadway and HOV systems;

• Provide an alternative to automobile trips on I–5 and SR 99, the two primary highways serving the corridor, which provide unreliable travel times throughout the day;

• Help implement Sound Transit's Regional Transit Long-Range Plan and allow the future extension of HCT south to Tacoma;

• Expand and enhance transit options serving transit-dependent residents and low-income and minority populations concentrated in the study area;

• Provide the transit infrastructure needed to support SeaTac and Federal Way, two designated regional growth centers that provide housing, employment, public services, and multimodal transportation connections;

• Help the state and region reduce transportation-related energy consumption and greenhouse gas emissions, consistent with goals established in RCW 47.01.440, and Chapter 70.235 RCW.

Potential Alternatives. Previous planning work for the ST2 Plan examined conceptual light rail alignments between SeaTac and Federal Way along portions of SR 99 and I–5 to help develop cost estimates and establish ridership potential for transit improvements in the project corridor. General station locations near Highline Community College, Redondo/Star Lake park-and-ride lots, and the Federal Way Transit Center were identified. Sound Transit invites comments on the alternative transit alignments, and station locations to be studied, and on the proposed evaluation framework and criteria to be used to compare alternatives.

As part of this alternatives analysis, Sound Transit will explore alternative alignment, station, and design configurations that could meet the project's purpose and need. Alternatives could include alternatives on SR 99 or I–5, or other alternatives that arise during the early scoping comment period. The alternatives will reflect a range of high- and low-cost capital improvements, including a ''no-build'' alternative which can serve as a ''baseline'' for measuring the merits of higher level investments. Sound Transit will identify measures for evaluating the relative merits of alternatives, and technical methodologies for generating the information used to support such measures. These measures typically include disciplines such as travel forecasting, capital and operations and maintenance costs, and corridor-level environmental and land use analyses.

At the end of the alternatives analysis process, Sound Transit and the FTA anticipate narrowing the range of alternatives for further evaluation in a NEPA document. If the resulting range of alternatives involves the potential for significant environmental impacts requiring an environmental impact statement (EIS), FTA and Sound Transit will publish a Notice of Intent to Prepare an EIS in the **Federal Register**, and invite public and agency comment on the scope of the EIS at that time.

Issued on: October 10, 2012.

Richard Krochalis,

Regional Administrator.

[FR Doc. 2012–25414 Filed 10–15–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2012–0074; Notice 1]

BMW of North America, LLC, a Subsidiary of BMW AG, Receipt of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Receipt of petition.

SUMMARY: BMW North America, LLC,[1] a subsidiary of BMW AG. (collectively referred to as BMW)[2] has determined that certain model year 2012 BMW X3 SAV multi-purpose passenger vehicles manufactured between April 1, 2011 and March 14, 2012, do not fully comply with paragraph S4.3.3 of Federal Motor Vehicle Safety Standard (FMVSS) No. 110, *Tire selection and rims and motor home/recreation vehicle trailer load carrying capacity information for motor vehicles with a GVWR of 4,536 kilograms (10,000 pounds) or less.* BMW has filed an appropriate report dated March 28, 2012, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.*

Pursuant to 49 U.S.C. 30118(d) and 30120(h) (see implementing rule at 49 CFR part 556), BMW submitted a petition for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of BMW's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

Vehicles Involved: Affected are approximately 1,409 model year 2012 BMW X3 SAV multipurpose passenger vehicles manufactured between April 1, 2011 through March 14, 2012.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, these provisions only apply to the subject 1,409[3] vehicles that BMW no longer controlled at the time it determined that the noncompliance existed.

Noncompliance: BMW's explained that the noncompliance is that the certification label required by 49 CFR part 567 does not list rim information for the tires installed on the vehicles as original equipment as required by paragraph S4.3.3 of FMVSS No. 110.

Rule Text: Paragraph S4.3.3 of FMVSS No. 110 requires in pertinent part:

S4.3.3 *Additional labeling information for vehicles other than passenger cars.* Each vehicle shall show the size designation and, if applicable, the type designation of rims (not necessarily those on the vehicle) appropriate for the tire appropriate for use on that vehicle, including the tire installed as original equipment on the certification label required by part 567.4 or part 567.5 of this chapter. This information shall be in the English language, lettered in block capitals and numerals not less than 2.4 millimeters high and in the following format:

GVWR: 2,441 kilograms (5381 pounds).
GAWR: Front—1,299 kilograms (2,864 pounds) with P265/70R16 tires, 16 x 8.0 rims at 248 kPa (36 psi) cold single.
GAWR: Rear—1,299 kilograms (2,864 pounds) with P265/70R16 tires, 16 x 8.00 rims, at 248 kPa (36 psi) cold single.

Summary of BMW's Analysis and Arguments

BMW states that while the certification label required by 49 CFR

[1] BMW North America, LLC, is a U.S. company that manufactures and imports motor vehicles.

[2] BMW AG, is a German company that manufactures motor vehicles.

[3] BMW's petition, which was filed under 49 CFR part 556, requests an agency decision to exempt BMW as a vehicle manufacturer from the notification and recall responsibilities of 49 CFR part 573 for the 1,409 affected vehicles. However, a decision on this petition will not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after BMW notified them that the subject noncompliance existed.

part 567 does not contain tire and rim information for tires and rims that were installed as original equipment, the information pertains to tires and rims that are appropriate for use on the vehicles. BMW also argues that the noncompliance is inconsequential to motor vehicle safety for the following reasons:

1. If a driver only checks the certification label (which indicates either 17-inch tires or 18-inch tires) or if the driver checks the certification label and the FMVSS No. 110 tire and loading information Vehicle Placard (which shows the size of the tires originally installed on the vehicle), and is unsure as to the proper inflation pressure and the size of the tires installed on the vehicle, there are a number of information sources and services available which can be used to inform the driver of the correct tire size and tire pressure.

a. A driver could check the specific tires installed on the vehicle. The information that is stamped onto the sidewall of those tires corresponds to the information contained on the FMVSS No. 110 tire and loading information Vehicle Placard. A driver would be able to determine that the tires installed on the vehicle correspond to the tires indicated on the FMVSS 110 tire and loading information Vehicle Placard. Therefore, a driver would be able to add the correct amount of air pressure to the tires in order to achieve the proper inflation level.

b. If the driver were to use the tire size shown on the certification label in order to look up the associated tire pressure in the owner's manual and then pressurize the tires to that pressure the Tire Pressure Monitoring System would not need to initiate.

c. The driver will also be able to refer to the vehicle's Owner's Manual which contains information pertaining to the various tire sizes and tire pressures for the affected vehicles.

d. BMW also offers Roadside Assistance and BMW Assist (only included with Premium Package and as a stand-alone option) which are available 24 hours/day with representatives that are available to provide drivers with all of the available tires sizes and specifications for the affected vehicles.

BMW has received no customer complaints and are unaware of any accidents or injuries regarding this noncompliance of the affected vehicles.

BMW has additionally informed NHTSA that it has corrected future production and that all other required markings are present and correct.

BMW also explains that NHTSA has previously granted similar petitions.

In summation, BMW believes that the described noncompliance of its certification labels is inconsequential to motor vehicle safety, and that its petition, to exempt from providing recall notification of noncompliance as required by 49 U.S.C. 30118 and remedying the recall noncompliance as required by 49 U.S.C. 30120 should be granted.

Comments: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited at the beginning of this notice and be submitted by any of the following methods:

a. By mail addressed to: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

b. By hand delivery to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except Federal holidays.

c. Electronically: by logging onto the Federal Docket Management System (FDMS) Web site at *http://www.regulations.gov/.* Follow the online instructions for submitting comments. Comments may also be faxed to 1–202–493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Documents submitted to a docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the Internet at *http://www.regulations.gov* by following the online instructions for accessing the dockets. DOT's complete Privacy Act Statement is available for review in the **Federal Register** published on April 11, 2000, (65 FR 19477–78).

The petition, supporting materials, and all comments received before the close of business on the closing date indicated below will be filed and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated below.

Comment Closing Date: November 15, 2012.

Authority: (49 U.S.C. 30118, 30120: delegations of authority at CFR 1.95 and 501.8)

Issued on: October 4, 2012.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2012–25413 Filed 10–15–12; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Senior Executive Service; Departmental Offices Performance Review Board Members

AGENCY: Treasury Department.

ACTION: Notice of members of the Departmental Offices Performances Review Board.

SUMMARY: Pursuant to 5 U.S.C. 4314(c)(4), this notice announces the appointment of members of the Departmental Offices Performance Review Board (PRB). The purpose of this Board is to review and make recommendations concerning proposed performance appraisals, ratings, bonuses and other appropriate personnel actions for incumbents of SES positions in the Departmental Offices, excluding the Legal Division. The Board will perform PRB functions for other bureau positions if requested.

Composition of Departmental Offices PRB: The Board shall consist of at least three members. In the case of an appraisal of a career appointee, more than half the members shall consist of career appointees. The names and titles of the Board members are as follows:

- Baukol, Andy P., Deputy Assistant Secretary for Mid-East and Africa
- Banks, Carol, Director, Office of Accounting and Internal Controls
- Blair, Anita K., Deputy Assistant Secretary for Human Resources and Chief Human Capital Officer
- Bynum, Nicole, Chief of Management Operations for the Office of Financial Stability
- Cavella, Charles J., Deputy Assistant Secretary for Security
- Cole, Lorraine, Director, Office of Minority and Women Inclusion
- Corwin, Manal S., Deputy Assistant Secretary for International Tax Affairs

- Dohner, Robert S., Deputy Assistant Secretary for South and East Asia
- East, Robyn C., Deputy Assistant Secretary and Chief Information Officer
- Gerardi, Geraldine, Director for Business and International Taxation
- Hammerle, Barbara C., Deputy Director, Office of Foreign Assets Control
- Hampl, Eric E., Director, Executive Office of Asset Forfeiture
- Harvey, Mariam G., Associate Chief Human Capital Officer for Civil Rights and Diversity
- Jaskowiak, Mark M., Deputy Assistant Secretary for Investment Security
- Johnson, Nicole, Associate Chief Human Capital Officer for Human Capital Strategic Management
- Madon, Michael P., Deputy Assistant Secretary for Intelligence Community Integration
- McDonald, William L., Deputy Assistant Secretary for Technical Assistance Policy
- McGlynn, Arthur D., Deputy Assistant Secretary for Analysis and Production
- Ostrowski, Nancy, Director, Office of DC Pensions
- Pabotoy, Barbara, Associate Chief Human Capital Officer for Human Capital Services
- Reger, Mark Anthony, Deputy Assistant Secretary for Accounting Policy
- Roth, Dorrice, Deputy Chief Financial Officer
- Sharpe, Thomas A., Director, Office of Procurement
- Sobel, Mark D., Deputy Assistant Secretary for International Monetary and Financial Policy
- Steele, Charles M., Associate Director, Office of Enforcement, Office of Foreign Assets Control

DATES: *Effective Date:* Membership is effective on the date of this notice.

FOR FURTHER INFORMATION CONTACT: Mario R. Minor, Senior Human Resources Specialist, 1500 Pennsylvania Avenue NW., ATTN: Room 6W529, 6th Floor, Washington, DC 20220, Telephone: 202–622–0774.

This notice does not meet the Department's criteria for significant regulations.

Barbara B. Pabotoy,

Associate Chief Human Capital Officer, Human Capital Services.

[FR Doc. 2012–25308 Filed 10–15–12; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Senior Executive Service; Departmental Performance Review Board Members

AGENCY: Treasury Department.

ACTION: Notice of members of the Departmental Performance Review Board (PRB).

SUMMARY: Pursuant to 5 U.S.C. 4314(c)(4), this notice announces the appointment of members of the Departmental PRB. The purpose of this PRB is to review and make recommendations concerning proposed performance appraisals, ratings, bonuses and other appropriate personnel actions for incumbents of SES positions for which the Secretary or Deputy Secretary is the appointing authority. These positions include SES bureau heads, deputy bureau heads and certain other positions. The Board will perform PRB functions for other key bureau positions if requested.

Composition of Departmental PRB: The Board shall consist of at least three members. In the case of an appraisal of a career appointee, more than half the members shall consist of career appointees. The names and titles of the PRB members are as follows:

Nani A. Coloretti, Deputy Assistant Secretary for Management and Budget (Acting Assistant Secretary for Management)
Daniel L. Glaser, Assistant Secretary for Terrorist Financing
Mark Mazur, Assistant Secretary for Tax Policy
Richard L. Gregg, Fiscal Assistant Secretary
Rosa G. Rios, Treasurer of the United States
Anita K. Blair, Deputy Assistant Secretary for Human Resources and Chief Human Capital Officer
Christopher J. Meade, Principal Deputy General Counsel (Acting General Counsel)
Steven T. Miller, Deputy Commissioner, Services and Enforcement, Internal Revenue Service
Elizabeth Tucker, Deputy Commissioner, Operations Support, Internal Revenue Service
John J. Manfreda, Administrator, Alcohol and Tobacco Tax and Trade Bureau
Mary G. Ryan, Deputy Administrator, Alcohol and Tobacco Tax and Trade Bureau
Jennifer Shasky Calvery, Director, Financial Crimes Enforcement Network
Peter Alvarado, Deputy Director, Financial Crimes Enforcement Network
David A. Lebryk, Commissioner, Financial Management Service and Bureau of the Public Debt
Wanda J. Rogers, Deputy Commissioner, Financial Services and Operations, Financial Management Service and Bureau of the Public Debt
Anita D. Shandor, Deputy Commissioner, Finance and Administration, Financial Management Service and Bureau of the Public Debt
Cynthia Z. Springer, Deputy Commissioner, Accounting and Shared Services, Financial Management Service and Bureau of the Public Debt
Larry R. Felix, Director, Bureau of Engraving and Printing
Pamela J. Gardiner, Deputy Director, Bureau of Engraving and Printing
Richard A. Peterson, Deputy Director, U.S. Mint

DATES: Membership is effective on the date of this notice.

FOR FURTHER INFORMATION CONTACT: Julia J. Markham, Human Resources Specialist (Executive Resources), 1500 Pennsylvania Avenue NW., ATTN: Met Square 445, Washington, DC 20220, Telephone: (202) 927–4370.

This notice does not meet the Department's criteria for significant regulations.

Catherine R. Schmader,

Executive Resources Program Manager.

[FR Doc. 2012–25311 Filed 10–15–12; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Senior Executive Service; Legal Division Performance Review Board Members

AGENCY: Department of the Treasury.

ACTION: Notice of members of the Legal Division Performance Review Board (PRB).

SUMMARY: Pursuant to 5 U.S.C. 4314(c)(4), this notice announces the appointment of members of the Legal Division PRB. The purpose of this Board is to review and make recommendations concerning proposed performance appraisals, ratings, bonuses, and other appropriate personnel actions for incumbents of SES positions in the Legal Division.

DATES: *Effective Date:* October 16, 2012.

FOR FURTHER INFORMATION CONTACT: Office of the General Counsel, Department of the Treasury, 1500 Pennsylvania Avenue NW., Room 3000, Washington, DC 20220, Telephone: (202) 622–0283 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Composition of Legal Division PRB:

The Board shall consist of at least three members. In the case of an appraisal of a career appointee, more than half the members shall consist of career appointees. Composition of the specific PRBs will be determined on an ad hoc basis from among the individuals listed in this notice.

The names and titles of the PRB members are as follows:

Peter A. Bieger, Assistant General Counsel (Banking and Finance);
George Bostick, Benefits Tax Counsel;
Bill Bradley, Chief Counsel, Financial Crimes Enforcement Network;
Himamauli Das, Assistant General Counsel (International Affairs);
Margaret Depue, Chief Counsel, Financial Management Service;
Rochelle F. Granat, Assistant General Counsel (General Law, Ethics and Regulation);
Elizabeth Horton, Deputy Assistant General Counsel (Ethics);
Mark Kaizen, Associate Chief Counsel (General Legal Services), Internal Revenue Service;
Catherine E. Livingston, Special Counsel to the Chief Counsel Healthcare Program, Internal Revenue Service;
Lee Kelley, Deputy Benefits Tax Counsel;
M.J.K. Maher, Jr., Deputy Assistant General Counsel (Enforcement & Intelligence);
Kevin Rice, Chief Counsel, Bureau of Engraving and Printing;
Joseph Samarias, Deputy Chief Counsel, Office of Financial Stability;
Daniel P. Shaver, Chief Counsel, United States Mint;
Brian Sonfield, Deputy Assistant General Counsel (General Law and Regulation);
Christian A. Weideman, Deputy General Counsel and;
Paul Wolfteich, Chief Counsel, Bureau of the Public Debt.

Dated: October 5, 2012.

Christian A. Weideman,

Deputy General Counsel.

[FR Doc. 2012–25310 Filed 10–15–12; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designations, Foreign Narcotics Kingpin Designation Act

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (''OFAC'') is publishing the names of two entities whose property and interests in property have been blocked pursuant to the Foreign Narcotics Kingpin Designation Act (''Kingpin Act'') (21 U.S.C. 1901–1908, 8 U.S.C. 1182). In addition, OFAC is publishing additions to the identifying information for two individuals previously designated pursuant to the Kingpin Act.

DATES: The designation by the Director of OFAC of the two entities identified in this notice pursuant to section 805(b) of the Kingpin Act is effective on October 10, 2012.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Sanctions Compliance & Evaluation, Office of Foreign Assets Control, U.S. Department of the Treasury, Washington, DC 20220, Tel: (202) 622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available on OFAC's Web site at *http://www.treasury.gov/ofac* or via facsimile through a 24-hour fax-on-demand service at (202) 622–0077.

Background

The Kingpin Act became law on December 3, 1999. The Kingpin Act establishes a program targeting the activities of significant foreign narcotics traffickers and their organizations on a worldwide basis. It provides a statutory framework for the imposition of sanctions against significant foreign narcotics traffickers and their organizations on a worldwide basis, with the objective of denying their businesses and agents access to the U.S. financial system and the benefits of trade and transactions involving U.S. companies and individuals.

The Kingpin Act blocks all property and interests in property, subject to U.S. jurisdiction, owned or controlled by significant foreign narcotics traffickers as identified by the President. In addition, the Secretary of the Treasury, in consultation with the Attorney General, the Director of the Central Intelligence Agency, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, the Secretary of State, and the Secretary of Homeland Security may designate and block the property and interests in property, subject to U.S. jurisdiction, of persons who are found to be: (1) Materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a person designated pursuant to the Kingpin Act; (2) owned, controlled, or directed by, or acting for or on behalf of, a person designated pursuant to the Kingpin Act; or (3) playing a significant role in international narcotics trafficking.

On October 10, 2012, the Director of OFAC designated the following two entities whose property and interests in property are blocked pursuant to section 805(b) of the Kingpin Act:

1. SOCIALIKA RENTAS Y CATERING, S.A. DE C.V. (a.k.a. TERRAZA 9140), Blvd. Lopez Mateos No. 9140, Col. El Palomar, Zapopan, Jalisco C.P. 45238, Mexico; Cancun, Quintana Roo, Mexico; R.F.C. SRC–080222–274 (Mexico) [SDNTK].
2. URBANIZADORA NUEVA ITALIA, S.A. DE C.V., Calle Morelos No. 2223, Colonia Arcos Vallarta, Guadalajara, Jalisco C.P. 44130, Mexico; R.F.C. UNI–031118–2I6 (Mexico) [SDNTK].

In addition, OFAC is publishing additions to the identifying information for the following two individuals previously designated pursuant to the Kingpin Act:

1. ESPARRAGOZA GASTELUM, Brenda Guadalupe, Calle Calkini Manzana 11 Lote 1, Colonia Residencia Sol del Mayab, Benito Juarez, Quintana Roo C.P. 77533, Mexico; Calle Morelos No. 2223, Colonia Arcos Vallarta, Guadalajara, Jalisco C.P. 44130, Mexico; Circuito Fuentes de Pedregal No. 478 Interior 1103, Colonia Fuentes de Pedregal, Delegacion Tlalpan, Mexico City, Distrito Federal C.P. 14140, Mexico; Avenida de la Patria No. 685 Interior 1, Fraccionamiento Jardines Universidad, Zapopan, Jalisco, Mexico; DOB 27 Mar 1978; POB Guadalajara, Jalisco, Mexico; R.F.C. EAGB780327UB5 (Mexico); C.U.R.P. EAGB780327MJCSSR11 (Mexico) (individual) [SDNTK] Linked To: GRUPO IMPERGOZA, S.A. DE C.V.
2. GONZALEZ PARADA, Juvencio Ignacio; DOB 09 Jan 1947; POB Tepeaca, Puebla, Mexico; C.U.R.P. GOPJ470109HPLNRV00 (Mexico) (individual) [SDNTK] Linked To: GRUPO CINJAB, S.A. DE C.V.; Linked To: GRUPO IMPERGOZA, S.A. DE C.V.

The listings for these two individuals now appear as follows:

1. ESPARRAGOZA GASTELUM, Brenda Guadalupe, Calle Calkini Manzana

11 Lote 1, Colonia Residencia Sol del Mayab, Benito Juarez, Quintana Roo C.P. 77533, Mexico; Calle Morelos No. 2223, Colonia Arcos Vallarta, Guadalajara, Jalisco C.P. 44130, Mexico; Circuito Fuentes de Pedregal No. 478 Interior 1103, Colonia Fuentes de Pedregal, Delegacion Tlalpan, Mexico City, Distrito Federal C.P. 14140, Mexico; Avenida de la Patria No. 685 Interior 1, Fraccionamiento Jardines Universidad, Zapopan, Jalisco, Mexico; DOB 27 Mar 1978; POB Guadalajara, Jalisco, Mexico; R.F.C. EAGB780327UB5 (Mexico); C.U.R.P. EAGB780327MJCSSR11 (Mexico) (individual) [SDNTK] Linked To: GRUPO IMPERGOZA, S.A. DE C.V.; Linked To: SOCIALIKA RENTAS Y CATERING, S.A. DE C.V.

2. GONZALEZ PARADA, Juvencio Ignacio; DOB 09 Jan 1947; POB Tepeaca, Puebla, Mexico; C.U.R.P. GOPJ470109HPLNRV00 (Mexico) (individual) [SDNTK] Linked To: GRUPO CINJAB, S.A. DE C.V.; Linked To: GRUPO IMPERGOZA, S.A. DE C.V.; Linked To: URBANIZADORA NUEVA ITALIA, S.A. DE C.V.

Dated: October 10, 2012.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2012–25304 Filed 10–15–12; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Unblocking of Specially Designated Nationals and Blocked Persons Pursuant to the Foreign Narcotics Kingpin Designation Act

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (''OFAC'') is publishing the names of two individuals and four entities whose property and interests in property have been unblocked pursuant to the Foreign Narcotics Kingpin Designation Act (''Kingpin Act'') (21 U.S.C. Sections 1901–1908, 8 U.S.C. Section 1182). In addition, OFAC is publishing an amendment to the identifying information of one individual previously designated pursuant to the Kingpin Act.

DATES: The unblocking and removal from the list of Specially Designated Nationals and Blocked Persons (''SDN List'') of the two individuals and four entities identified in this notice whose property and interests in property were blocked pursuant to the Kingpin Act, is effective on October 10, 2012.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Sanctions Compliance & Evaluation, Department of the Treasury, Office of Foreign Assets Control, Washington, DC 20220, Tel: (202) 622–2420.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site at *www.treasury.gov/ofac* or via facsimile through a 24-hour fax-on demand service at (202) 622–0077.

Background

On December 3, 1999, the Kingpin Act was signed into law by the President of the United States. The Kingpin Act provides a statutory framework for the President to impose sanctions against significant foreign narcotics traffickers and their organizations on a worldwide basis, with the objective of denying their businesses and agents access to the U.S. financial system and to the benefits of trade and transactions involving U.S. persons and entities.

The Kingpin Act blocks all property and interests in property, subject to U.S. jurisdiction, owned or controlled by significant foreign narcotics traffickers as identified by the President. In addition, the Secretary of the Treasury consults with the Attorney General, the Director of the Central Intelligence Agency, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, the Secretary of State, and the Secretary of Homeland Security when designating and blocking the property or interests in property, subject to U.S. jurisdiction, of persons or entities found to be: (1) Materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a person designated pursuant to the Kingpin Act; (2) owned, controlled, or directed by, or acting for or on behalf of, a person designated pursuant to the Kingpin Act; and/or (3) playing a significant role in international narcotics trafficking.

On October 10, 2012, the Director of OFAC removed from the SDN List the two individuals and four entities listed below, whose property and interests in property were blocked pursuant to the Kingpin Act:

Individuals

1. ROMERO BARRERA, Benedicto, c/o AGROFUTURO R.H. Y CIA. S.C.S., Medellin, Colombia; c/o COLOMBIAN GREEN STONE CORPORATION LTDA., Bogota, Colombia; c/o ONLYTEX S.A., Sabaneta, Antioquia, Colombia; DOB 06 Jan 1964; POB Campohermoso, Boyaca, Colombia; Cedula No. 1015491 (Colombia) (individual) [SDNTK].

2. ROMERO VARELA, Carlos Ali (a.k.a. MARTINEZ, Richard), c/o LOS GNOMOS LTDA., Cali, Colombia; c/o SOCIEDAD DE COMERCIALIZACION INTERNACIONAL POSEIDON S.A., Sabaneta, Antioquia, Colombia; DOB 19 Mar 1959; alt. DOB 19 Feb 1959; Cedula No. 13447909 (Colombia); Passport B0088212 (Venezuela) (individual) [SDNTK].

Entities

1. AGROFUTURO R.H. Y CIA. S.C.S., Calle 80 Sur No. 47D–65 Bod. 114, Medellin, Colombia; NIT # 811039023–0 (Colombia) [SDNTK].

2. LOS GNOMOS LTDA., Calle 5 No. 61–82, Apt. 412B, Cali, Valle, Colombia; NIT # 800165614–2 (Colombia) [SDNTK].

3. ONLYTEX S.A., Calle 80 Sur No. 47D–65, Sabaneta, Antioquia, Colombia; NIT # 811029489–6 (Colombia) [SDNTK].

4. SOCIEDAD DE COMERCIALIZACION INTERNACIONAL POSEIDON S.A. (f.k.a. C.I. COMERCIALIZADORA INTERNACIONAL POSEIDON S.A.; a.k.a. C.I. POSEIDON S.A.), Calle 79 Sur No. 48B–56, Sabaneta, Antioquia, Colombia; NIT # 800173090–7 (Colombia) [SDNTK].

In addition, OFAC has amended the identifying information for the following individual previously designated pursuant to the Kingpin Act:

1. ISAZA ALVAREZ, Carlos Arturo, c/o AGROFUTURO R.H. Y CIA. S.C.S., Medellin, Colombia; c/o COMERCIALIZADORA AUTOMOTORA MATECANA LTDA., Pereira, Colombia; c/o COMERCIALIZADORA EL PROVEEDOR LTDA., Villavicencio, Colombia; c/o INVERSIONES BUENOS AIRES LTDA., Pereira, Colombia; c/o INVERSIONES Y DISTRIBUCIONES COLOMBIANAS EL OASIS LTDA., Villavicencio, Colombia; c/o PROVEEDORES Y DISTRIBUIDORES NACIONALES S.A., Bogota, Colombia; DOB 15 Aug 1947; Cedula No. 8281272 (Colombia) (individual) [SDNTK].

The listing for this individual now appears as follows:

1. ISAZA ALVAREZ, Carlos Arturo; DOB 15 Aug 1947; Cedula No. 8281272 (Colombia) (individual) [SDNTK] Linked to: COMERCIALIZADORA AUTOMOTORA MATECANA LTDA.; Linked to: COMERCIALIZADORA EL PROVEEDOR LTDA.; Linked to: INVERSIONES BUENOS AIRES LTDA.; Linked to: INVERSIONES Y DISTRIBUCIONES COLOMBIANAS EL OASIS LTDA.; Linked to: PROVEEDORES Y DISTRIBUIDORES NACIONALES S.A..

Dated: October 10, 2012.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2012–25302 Filed 10–15–12; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Unblocking of Specially Designated Nationals and Blocked Persons Pursuant to Executive Order 12978

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (''OFAC'') is publishing the names of 24 individuals and 6 entities whose property and interests in property have been unblocked pursuant to Executive Order 12978 of October 21, 1995, ''Blocking Assets and Prohibiting Transactions With Significant Narcotics Traffickers''.

DATES: The unblocking and removal from the list of Specially Designated Nationals and Blocked Persons (''SDN List'') of the 24 individuals and 6 entities identified in this notice whose property and interests in property were blocked pursuant to Executive Order 12978 of October 21, 1995, is effective on October 10, 2012.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Sanctions Compliance & Evaluation, Department of the Treasury, Office of Foreign Assets Control, Washington, DC 20220, Tel: (202) 622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*www.treasury.gov/ofac*) or via facsimile through a 24-hour fax-on demand service at (202) 622–0077.

Background

On October 21, 1995, the President, invoking the authority, *inter alia,* of the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) (''IEEPA''), issued Executive Order 12978 (60 FR 54579, October 24, 1995) (the ''Order''). In the Order, the President declared a national emergency to deal with the threat posed by significant foreign narcotics traffickers centered in Colombia and the harm that they cause in the United States and abroad.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, or that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, of: (1) The foreign persons listed in an Annex to the Order; (2) any foreign person determined by the Secretary of Treasury, in consultation with the Attorney General and the Secretary of State: (a) To play a significant role in international narcotics trafficking centered in Colombia; or (b) to materially assist in, or provide financial or technological support for or goods or services in support of, the narcotics trafficking activities of persons designated in or pursuant to the Order; and (3) persons determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to be owned or controlled by, or to act for or on behalf of, persons designated pursuant to the Order.

On October 10, 2012, the Director of OFAC removed from the SDN List the 24 individuals and 6 entities listed below, whose property and interests in property were blocked pursuant to the Order:

Individuals:

1. ARANA MARIA, Jairo Abraham, c/o DESARROLLOS URBANOS ''DESARROLLAR'' LTDA., Barranquilla, Colombia; Calle 74 No. 53–30, Barranquilla, Colombia; c/o INMOBILIARIA DEL CARIBE LTDA., Barranquilla, Colombia; c/o INMOBILIARIA HOTELERA DEL CARIBE LTDA., Barranquilla, Colombia; c/o INVERSIONES HOTELERAS DEL LITORAL LTDA., Barranquilla, Colombia; c/o INVERSIONES PRADO TRADE CENTER LTDA., Barranquilla, Colombia; c/o NEGOCIOS Y PROPIEDADES DEL CARIBE LTDA., Barranquilla, Colombia; c/o SURAMERICANA DE HOTELES LTDA., Barranquilla, Colombia; c/o GRAN COMPANIA DE HOTELES LTDA., Barranquilla, Colombia; c/o HOTELES E INMUEBLES DE COLOMBIA LTDA., Barranquilla, Colombia; c/o EDIFICACIONES DEL CARIBE LTDA., Barranquilla, Colombia; DOB 08 Feb 1953; alt. DOB 02 May 1946; alt. DOB 21 May 1946; Cedula No. 7450538 (Colombia); Passport Z4966601 (Colombia); alt. Passport K1030420 (Colombia) (individual) [SDNT].
2. ARIAS DE RESTREPO, Mariella, c/o DISTRIBUIDORA AGROPECUARIA COLOMBIANA S.A., Cali, Colombia; c/o MATERIAS PRIMAS Y SUMINISTROS S.A., Bogota, Colombia; c/o AGRO MASCOTAS S.A., Bogota, Colombia; DOB 19 Nov 1958; Cedula No. 38437571 (Colombia) (individual) [SDNT].
3. BEDOYA DE SANCLEMENTE, Maria Ninive, c/o DISTRIBUCIONES GLOMIL LTDA., Cali, Colombia; DOB 13 Jul 1938; Cedula No. 29645304 (Colombia); Passport 29645304 (Colombia); NIT # 29645304–8 (Colombia) (individual) [SDNT].
4. ESPANA CUELLAR, Irlena, c/o COLPHAR S.A., Bogota, Colombia; DOB 28 Feb 1965; Cedula No. 40764759 (Colombia); Passport 40764759 (Colombia) (individual) [SDNT].
5. FERNANDEZ VIEJO, Alfredo, c/o INVERSIONES EL PROGRESO S.A., Cartagena, Colombia; DOB 15 Dec 1954; Cedula No. 206946 (Extranjeria) (Colombia) (individual) [SDNT].
6. FORERO SALAMANCA, Sonia Viviana, c/o COPSERVIR LTDA., Bogota, Colombia; c/o CREDIREBAJA S.A., Cali, Colombia; c/o INTERFARMA S.A., San Jose, Costa Rica; c/o JOMAGA DE COSTA RICA S.A., San Jose, Costa Rica; DOB 16 Oct 1975; Cedula No. 52342283 (Colombia); Passport 52342283 (Colombia) (individual) [SDNT].
7. FRANCO VALENCIA, Fabio Hernan, Carrera 4 No. 11–45 Ofc. 506, Cali, Colombia; c/o COMPANIA DE FOMENTO MERCANTIL S.A., Cali, Colombia; c/o GEOPLASTICOS S.A., Cali, Colombia; c/o CIA. MINERA DAPA S.A., Bogota, Colombia; c/o CIA. ANDINA DE EMPAQUES LTDA., Cali, Colombia; c/o OCCIDENTAL DE PAPELES LTDA., Cali, Colombia; DOB 06 Dec 1940; POB Cali, Valle, Colombia; Cedula No. 6076743 (Colombia); Passport 6076743 (Colombia) (individual) [SDNT].

8. GARZON RESTREPO, Juan Leonardo, c/o BLANCO PHARMA S.A., Bogota, Colombia; c/o PENTACOOP LTDA., Bogota, Colombia; c/o PENTA PHARMA DE COLOMBIA S.A., Bogota, Colombia; c/o DISTRIBUIDORA MYRAMIREZ S.A., Cali, Colombia; c/o ALFA PHARMA S.A., Bogota, Colombia; c/o INVERSIONES ARA LTDA., Cali, Colombia; Carrera 7P No. 76–90, Cali, Colombia; Diagonal 53 No. 38A–20 apt. 103, Bogota, Colombia; c/o LABORATORIOS GENERICOS VETERINARIOS DE COLOMBIA S.A., Bogota, Colombia; c/o LABORATORIOS KRESSFOR DE COLOMBIA S.A., Bogota, Colombia; c/o DROGAS LA REBAJA, Cali, Colombia; c/o VALORES MOBILIARIOS DE OCCIDENTE S.A., Bogota, Colombia; c/o FARMATODO S.A., Bogota, Colombia; DOB 14 Jan 1962; Cedula No. 16663709 (Colombia) (individual) [SDNT].
9. GIRALDO RUBIO, Marleni, c/o MAGEN LTDA., Bogota, Colombia; c/o DISFOGEN LTDA., Bogota, Colombia; Cedula No. 51760752 (Colombia); Passport 51760752 (Colombia) (individual) [SDNT].
10. GIRALDO SARRIA, Rosa Amelia, c/o INMOBILIARIA U.M.V. S.A., Cali, Colombia; DOB 18 Aug 1974; Cedula No. 43821679 (Colombia) (individual) [SDNT].
11. GONZALEZ MARTINEZ, Francisco Javier, c/o ADMINISTRADORA DE SERVICIOS VARIOS CALIMA S.A., Cali, Colombia; c/o CHAMARTIN S.A., Cali, Colombia; c/o SERVICIOS DE LA SABANA E.U., Bogota, Colombia; Cedula No. 16693353 (Colombia); Passport 16693353 (Colombia) (individual) [SDNT].
12. JARAMILLO ARIAS, Gustavo Alfonso, c/o FARMATEL E.U., Bogota, Colombia; Cedula No. 16601998 (Colombia); Passport 16601998 (Colombia) (individual) [SDNT].
13. MARTIN DIAZ, John Edward, c/o AGRO MASCOTAS S.A., Bogota, Colombia; DOB 20 Jun 1974; Cedula No. 79668278 (Colombia); Passport 79668278 (Colombia) (individual) [SDNT].
14. MENDOZA RODRIGUEZ, Ana Janeth, c/o ADMACOOP, Bogota, Colombia; c/o CREDISOL, Bogota, Colombia; DOB 06 Jul 1963; Cedula No. 51721267 (Colombia); Passport 51721267 (Colombia) (individual) [SDNT].
15. MONSALVE HERNANDEZ, Laris, c/o COMERCIALIZADORA DE PRODUCTOS FARMACEUTICOS LTDA., Ibague, Colombia; c/o MATERIAS PRIMAS Y SUMINISTROS S.A., Bogota, Colombia; DOB 10 Apr 1953; Cedula No. 41590169 (Colombia); Passport 41590169 (Colombia) (individual) [SDNT].
16. RAMIREZ AZA, Hernan, c/o IMPORT MAPRI LTDA., Bogota, Colombia; Cedula No. 17083264 (Colombia); Passport 17083264 (Colombia) (individual) [SDNT].
17. RAMIREZ AZA, Jose Manuel, c/o IMPORT MAPRI LTDA., Bogota, Colombia; c/o WORLD TRADE LTDA., Ibague, Colombia; DOB 14 Aug 1939; Cedula No. 2889531 (Colombia); Passport 2889531 (Colombia) (individual) [SDNT].
18. RAMIREZ GACHA, Ivan, c/o MATERIAS PRIMAS Y SUMINISTROS S.A., Bogota, Colombia; DOB 30 Sep 1963; Cedula No. 79310808 (Colombia); Passport 79310808 (Colombia) (individual) [SDNT].
19. RODRIGUEZ LINARES, Oswaldo, c/o DROFARCO, Barranquilla, Colombia; DOB 13 Nov 1969; Cedula No. 76310365 (Colombia); Passport 76310365 (Colombia) (individual) [SDNT].
20. SANTACOLOMA JARAMILLO, Gloria Maria (a.k.a. SANTACOLOMA DE JARAMILLO, Gloria Maria; a.k.a. SANTACOLOMA HOYOS, Gloria Maria), c/o REPRESENTACIONES Y DISTRIBUCIONES HUERTAS Y ASOCIADOS S.A., Bogota, Colombia; c/o FARMATEL E.U., Bogota, Colombia; DOB 26 Jul 1962; Cedula No. 31886388 (Colombia); Passport 31886388 (Colombia) (individual) [SDNT].
21. SERRANO SILVA, Luz Esperanza, c/o MAGEN LTDA., Bogota, Colombia; Cedula No. 51822684 (Colombia); Passport 51822684 (Colombia) (individual) [SDNT].
22. VIEDMA ABONCE, Marisol, c/o ALMACEN Y COMPRAVENTA LOS 3 OROS, Cartago, Valle, Colombia; c/o MOTEL MOMENTOS E.U., Cartago, Valle, Colombia; Calle 10B No. 14A–90 Manz. C Casa 14, Cartago, Valle, Colombia; DOB 30 Mar 1970; Cedula No. 31415437 (Colombia) (individual) [SDNT].
23. VILLEGAS BOLANOS, Silver Amido, c/o CONSULTORIA EMPRESARIAL ESPECIALIZADA LTDA., Cali, Colombia; c/o GANADERIAS DEL VALLE S.A., Cali, Colombia; c/o CONCRETOS CALI S.A., Cali, Colombia; c/o ADMINISTRACION INMOBILIARIA BOLIVAR S.A., Cali, Colombia; DOB 15 Aug 1954; Cedula No. 10480869 (Colombia) (individual) [SDNT].
24. VILLOTA GALVIS, Eliseo Fernando, c/o LABORATORIOS KRESSFOR DE COLOMBIA S.A., Bogota, Colombia; c/o FARMACOOP, Bogota, Colombia; c/o CODISA, Bogota, Colombia; c/o JOMADA DE COSTA RICA S.A., San Jose, Costa Rica; c/o MATSUM S.A., Bogota, Colombia; DOB 13 May 1945; Cedula No. 17118703 (Colombia); Passport 17118703 (Colombia) (individual) [SDNT].

Entities:

1. AGRO MASCOTAS S.A. (a.k.a. AGROPECUARIA 100%; a.k.a. AGROPECUARIA EL ARBOLITO; a.k.a. AGROPECUARIA EL GALLO; a.k.a. AGROPECUARIA LA COLMENA; a.k.a. AGROPECUARIA LA HORMIGA; a.k.a. AGROTODO; a.k.a. AGROTORO), Avenida 3 Bis No. 23CN–13, Cali, Colombia; Calle 19 No. 12–36, Tunja, Colombia; Calle 1N No. 4–36, Popayan, Colombia; Calle 28 No. 27–06, Palmira, Colombia; Calle 3 No. 11–104, Santander de Quilichao, Colombia; Calle 35 No. 27–69, Villavicencio, Colombia; Calle 35 No. 27–83, Villavicencio, Colombia; Carrera 1 No. 14–41, Ibague, Colombia; Carrera 10 No. 11–14 Esq., Jamundi, Colombia; Carrera 10 No. 12–02 Esq., Girardot, Colombia; Carrera 10 No. 18–02, Pereira, Colombia; Carrera 13 No. 13–41, Bogota, Colombia; Carrera 13 No. 15–42, Santa Rosa, Colombia; Carrera 14 No. 18–51, Armenia, Colombia; Carrera 16 No. 43–15, Dos Quebradas, Colombia; Carrera 18 No. 22–17, Manizales, Colombia; Carrera 19 No. 11–52, Dutaima, Colombia; Carrera 2 No. 13–17, Puerto Boyaca, Colombia; Carrera 23 No. 29–03, Tulua, Colombia; Carrera 2A No. 15–10, Dorada, Colombia; Carrera 33 No. 19–35, Villavicencio, Colombia; Carrera 4 No. 16–87, Soacha, Colombia; Carrera 7 No. 12–58, Cartago, Colombia; Transversal 29 No. 39–92, Bogota, Colombia; NIT # 815002808–1 (Colombia) [SDNT].
2. CREDISOL (a.k.a. COOPERATIVA DE AHORRO Y CREDITO PARA EL PROGRESO SOCIAL; a.k.a. COOPERATIVA MULTIACTIVA CREDISOL), Calle 39 Bis A No. 27–16, Bogota, Colombia; Transversal 29 No. 39–92, Bogota, Colombia; NIT # 830033943–3 (Colombia) [SDNT].
3. FARMATEL E.U. (a.k.a. TELEFARMA E.U.), Calle 93 No. 16–75, Bogota, Colombia [SDNT].

4. INVERSIONES BOMBAY S.A. (a.k.a. AGROVETERINARIA EL TORO; a.k.a. AGROVETERINARIA EL TORO #2), Transversal 29 No. 39–92, Bogota, Colombia; Calle 12B No. 28–50, Bogota, Colombia; Avenida 3 Bis Norte No. 23CN–69, Cali, Colombia; Calle 7 No. 25–69, Cali, Colombia; NIT # 830019226–2 (Colombia) [SDNT].
5. LABORATORIOS GENERICOS VETERINARIOS DE COLOMBIA S.A, Carrera 71 No. 57–07, Bogota, Colombia [SDNT].
6. TECNOVET LTDA.TECNICAS VETERINARIAS TECNOVET LTDA. (a.k.a. TECNOVET LTDA.), Carrera 13 No. 13–41, Bogota, Colombia; NIT # 830092117–8 (Colombia) [SDNT].

Dated: October 10, 2012.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2012–25295 Filed 10–15–12; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Information Collection Tools

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 REG–109481–99 (TD 9076—final), Special Rules Under Section 417(a)(7) for Written Explanation Provided by Qualified Retirement Plan After Annuity Starting Dates (§ 1.417(e)–1); REG–105946–00 (TD 8995—final), Mid-Contract Change in Taxpayer (§ 1.460–6); Form 972, Consent of Shareholder To Include Specific Amount in Gross Income; Form 6118, Claim of Income Tax Return Preparer Penalties; Form 5500–EZ, Annual Return of One-Participant (Owners and Their Spouses) Retirement Plan; and T.D. 8418, Arbitrage Restrictions on Tax-exempt Bonds (§§ 1.148–1, 1.148–2, 1.148–3, 1.148–4, 1.148–5, 1.148–6, 1.148–7, 1.148–8, and 1.148–11).

DATES: Written comments should be received on or before December 17, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224. Please send separate comments for each specific information collection listed below. You must reference the information collection's title, form number, reporting or recordkeeping requirement number, and OMB number (if any) in your comment.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the collection tools should be directed to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3634, or through the internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION: Currently, the IRS is seeking comments concerning the following information collection tools, reporting, and recordkeeping requirements:

(1) *Title:* Special Rules Under Section 417(a)(7) for Written Explanation Provided by Qualified Retirement Plan After Annuity Starting Dates.

OMB Number: 1545–1724.

Form Number: REG–109481–99.

Abstract: The collection of information requirement in section 1.417(e)–1(b)(3)(iv)(B) and 1.417(e)–1(b)(3)(v)(A) is required to ensure that a participant and the participant's spouse consent to a form of distribution from a qualified plan that may result in reduced periodic payments.

Type of Review: Extension of currently approved collection.

Affected Public: Individuals or households, business or other for-profit organizations, and not-for-profit institutions.

Estimated Number of Respondents: 50,000.

Estimated Time per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 12,500.

(2) *Title:* Mid-Contract Change in Taxpayer.

OMB Number: 1545–1732.

Form Number: REG–105946–00.

Abstract: The information is needed by taxpayers who assume the obligation to account for the income from long-term contracts as the result of certain nontaxable transactions.

Current Actions: There are no changes being made to the revenue procedure at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 5,000.

Estimated Time per Respondent: 2 hrs.

Estimated Total Annual Reporting Burden Hours: 10,000.

(3) *Title:* Consent of Shareholder To Include Specific Amount in Gross Income.

OMB Number: 1545–0043.

Form Number: 972.

Abstract: Form 972 is filed by shareholders of corporations who agree to include a consent dividend in gross income as a taxable dividend. The IRS uses Form 972 as a check to see if an amended return is filed by the shareholder to include the amount in income and to determine if the corporation claimed the correct amount as a deduction on its tax return.

Current Actions: There is no change in the paperwork burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 100.

Estimated Time per Respondent: 3 hrs, 51 min.

Estimated Total Annual Burden Hours: 385.

(4) *Title:* Claim of Income Tax Return Preparer Penalties.

OMB Number: 1545–0240.

Form Number: 6118.

Abstract: Form 6118 is used by tax return preparers to file for a refund of penalties incorrectly charged. The information enables the IRS to process the claim and have the refund issued to the tax return preparer.

Current Actions: There is no change in the paperwork burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations and individuals or households.

Estimated Number of Respondents: 10,000.

Estimated Time per Respondent: 1 hrs., 8 min.

Estimated Total Annual Burden Hours: 11,400.

(5) *Title:* Annual Return of One-Participant (Owners and Their Spouses) Retirement Plan.

OMB Number: 1545–0956.

Form Number: 5500–EZ.

Abstract: Form 5500–EZ is an annual return filed by a one-participant or one-

participant and spouse pension plan. The IRS uses this data to determine if the plan appears to be operating properly as required under the Internal Revenue Code or whether the plan should be audited.

Current Actions: There is no change in the paperwork burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, and farms.

Estimated Number of Respondents: 250,000.

Estimated Time per Respondent: 27 hrs., 5 min.

Estimated Total Annual Burden Hours: 6,770,000.

(6) *Title:* Arbitrage Restrictions on tax-exempt Bonds.

OMB Number: 1545–1098.

Form Number: T.D. 8418.

Abstract: This regulation requires state and local governmental issuers of tax-exempt bonds to rebate arbitrage profits earned on nonpurpose investments acquired with the bond proceeds. Issuers are required to submit a form with the rebate. The regulations provide for several elections, all of which must be in writing.

Current Actions: There is no change in the paperwork burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: State, local, or tribal governments, and not-for-profit institutions.

Estimated Number of Respondents: 3,100.

Estimated Time per Respondent: 2 hrs., 45 min.

Estimated Total Annual Burden Hours: 8,550.

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: October 10, 2012.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 2012–25305 Filed 10–15–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Information Collection Tools

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 the Authorized Cyber Assistant Host Application form; Form 11–C, Occupational Tax and Register Return for Wagering; Form 8816, Special Loss Discount Account and Special Estimated Tax Payments for Insurance Companies; IA–54–90 (TD 8459), Settlement Funds (§§ 1.468B–1, 1.468B–2, 1.468B–3, and 1.468B–5); and Revenue Procedure 97–48, Automatic Relief for Late S Corporation Elections.

DATES: Written comments should be received on or before December 17, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224. Please send separate comments for each specific information collection listed below. You must reference the information collection's title, form number, reporting or record-keeping requirement number, and OMB number (if any) in your comment.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the collection tools should be directed to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202)622–3634, or through the internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION: Currently, the IRS is seeking comments concerning the following information collection tools, reporting, and record-keeping requirements:

(1) *Title:* Authorized Cyber Assistant Host Application.

OMB Number: 1545–2170.

Form Number: N/A.

Abstract: The IRS web-based software program, referred to as Cyber Assistant, will guide applicants for tax-exempt status through the preparation of Form 1023, *Application for Recognition of Exemption under Section 501(c)(3).* The program, similar to tax preparation software, ensures that an application is complete before allowing the applicant to print out a PDF version of the completed Form 1023 for submission to the IRS. As the Forms 1023 completed using Cyber Assistant will not be electronically transmitted to the IRS, bar codes included on applications completed via Cyber Assistant will allow the IRS to scan the complete Form 1023 upon receipt from the applicant, making all of the data available electronically instead of the limited number of items that are currently transcribed from standard paper applications..

Type of Review: Extension of currently approved collection.

Affected Public: Business or other for-profit organizations and other not-for-profit institutions.

Estimated Number of Respondents: 100.

Estimated Time per Respondent: 2 hr.

Estimated Total Annual Burden Hours: 200.

(2) *Title:* Occupational Tax Wagering.

OMB Number: 1545–0236.

Form Number: 11–C.

Abstract: Form 11–C is used to register persons accepting wagers, as required by Internal Revenue Code section 4412. The IRS uses this form to register the respondent, collect the annual stamp tax imposed by Code section 4411 and to verify that the tax on wagers is reported on Form 730, Tax on Wagering.

Current Actions: There are no changes being made to the revenue procedure at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations and individuals.

Estimated Number of Respondents: 23,000.

Estimated Time per Respondent: 5 hrs., 21 min.

Estimated Total Annual Reporting Burden Hours: 126,175.

(3) *Title:* Special Loss Discount Account and Special Estimated Tax Payments for Insurance Companies.

OMB Number: 1545–1130.

Form Number: 8816.

Abstract: Form 8816 is used by insurance companies claiming an additional deduction under Internal Revenue Code section 847 to reconcile estimated tax payments and to determine their tax benefit associated with the deduction. The information is needed by the IRS to determine that the proper additional deduction was claimed and to insure the proper amount of special estimated tax was computed and deposited.

Current Actions: There is no change in the paperwork burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 3,000.

Estimated Time Per Respondent: 6 hrs, 37 min.

Estimated Total Annual Burden Hours: 19,830.

(4) *Title:* Settlement Funds.

OMB Number: 1545–1299.

Form Number: IA–54–90.

Abstract: This regulation prescribes reporting requirements for settlement funds, which are funds established or approved by a governmental authority to resolve or satisfy certain liabilities, such as those involving tort or breach of contract. The regulation relates to the tax treatment of transfers to these funds, the taxation of income earned by the funds, and the tax treatment of distributions made by the funds.

Current Actions: There is no change in the paperwork burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals, business or other for-profit organizations, not for-profit institutions, farms and Federal, state, local or tribal governments.

Estimated Number of Respondents: 1,500.

Estimated Time Per Respondent: 2 hrs., 22 min.

Estimated Total Annual Burden Hours: 3,542.

(5) *Title:* Automatic Relief for Late S Corporation Elections.

OMB Number: 1545–1562.

Form Number: Revenue Procedure 97–48.

Abstract: The Small Business Job Protection Act of 1996 provides the IRS with the authority to grant relief for late S corporation elections. This revenue procedure provides that, in certain situations, taxpayers whose S corporation election was filed late can obtain relief by filing Form 2553 and attaching a statement explaining that the requirements of the revenue procedure have been met.

Current Actions: There is no change in the paperwork burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other-for-profit organizations.

Estimated Number of Respondents: 100.

Estimated Time Per Respondent: 1 hrs.

Estimated Total Annual Burden Hours: 100.

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: October 10, 2012.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 2012–25306 Filed 10–15–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Announcement of Competition Under the America COMPETES Reauthorization Act of 2011: Veterans Medical Appointment Scheduling System

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: To encourage development of systems that help Veterans schedule appointments to receive care from the Veterans Health Administration and to reduce risks in the future procurement and deployment of those systems, the Secretary of Veterans Affairs (VA) announces a prize contest under Section 105 of the America COMPETES Reauthorization Act of 2011, Public Law 111–358 (2011), 15 USC 3719 (the ''Act'').

DATES: Entries will be accepted until 10:59 p.m. EDT on March 1, 2013. Winners will be announced on or about 90 days after the entry deadline.

ADDRESSES: The official contest Web site is *http://vascheduling.challenge.gov.* Contestants must register via the official contest Web site as provided in Section 4 of the Rules set forth in this notice. Entries must be submitted electronically as specified in Section 5 of the Rules.

FOR INFORMATION CONTACT: Michael A. Moore, Special Assistant to Chief Technology Officer, Office of the Secretary, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420; (202) 461–5764. (This is not a toll-free number.) *Also, see Section 11, below.*

SUPPLEMENTARY INFORMATION:

Introduction

VA uses the Medical Scheduling Package (MSP), a component in its VistA electronic health record (EHR) system, to perform multiple interrelated functions to bring patients, clinicians and other resources together so care can be delivered. The MSP also captures data which allows VA to measure, manage and improve access to care, quality of care, operating efficiency and operating and capital resources.

VA's current MSP is more than 25 years old. It does not meet current

requirements and does not provide the flexibility to support new and emerging models of care. VA will be replacing the MSP.

Using the authority of the Act and this contest, VA will obtain information that will allow it to understand various risks and thus reduce risks inherent in the procurement and deployment of highly complex mission critical software which integrates with VA's VistA system.

VA's Health Delivery System

VA's Veterans Health Administration (VHA) operates one of the largest integrated health delivery systems in the United States, delivering comprehensive care to approximately six million Veterans through a network of health care facilities owned and staffed by VA, academic medical affiliates and other contracted providers, contracted networks, and episodic fee-for-service purchases. Veterans scheduled approximately 80 million outpatient clinical visits—more than 300,000 each working day in FY 2011.

VA delivers care through 21 Veterans Integrated Services Networks (VISNs) which administer:

- 152 hospitals, sometimes known as VA Medical Centers or VAMCs,
- 971 outpatient clinics—most of which are extensions of a parent hospital, and
- 133 community living centers which deliver skilled nursing and extended care.

VHA sites of care are distributed across the United States and Puerto Rico with additional clinics in Guam and the Philippines. Veterans are administratively aligned with the hospital of their choice but may receive care through any hospital.

VA's care delivery model is centered in the Patient Aligned Care Team (PACT), VA's implementation of the Patient Centered Medical Home.

- PACTs consist of multidisciplinary clinical and support staff that deliver all primary care and coordinate the remainder of patients' needs, including specialty care.
- Veterans assigned to a PACT may schedule appointments with any member of the team.
- Routine appointments with specialists are often scheduled based on a PACT referral; specialty care referrals can also come from clinicians providing inpatient care, the Emergency Department, community providers, or patients themselves.
- Veterans generally schedule their own follow-up appointments with specialists or specialty care services without the intervention of the PACT.

Appointment scheduling is currently performed primarily via telephone, in person, or mail. The intervention of a VA employee is currently required to make appointments. VA needs to enable Veterans to schedule their own appointments electronically via online and mobile devices.

VA also needs to schedule and coordinate care across internal and external administrative, or system, boundaries. As examples:

- Veterans may choose to live in different states at different times of the year and need to make appointments to receive care where they live when they need it.
- A clinician who can provide needed care for a Veteran may be located at a different hospital, in different VISN or at an external academic affiliate or contract medical group.
- A physician who will be examining a Veteran to determine nature and extent of a service-related disability may also be located at a different hospital, VISN, or be delivering examination services under contract.
- Telemedicine technologies can support care delivery by a clinician who is physically located at a different hospital or even in a different VISN than the physical location where the Veteran will receive the care.
- PACTS need to coordinate care with non-VA community providers when Veterans choose to receive care both inside and outside the VA system.
- Support services such as non-VA transportation services must be coordinated.

VA currently relies on the MSP to perform non-scheduling functions including workload data capture and a broad range of workload and other management reports.

VA's Technical Infrastructure

VA's current medical MSP is a component (application) of its VistA electronic health record (EHR) system.

The MSP is tightly integrated with VistA; it reads data from more than 130 other VistA applications and has read/write functionality with more than 30 additional applications.

VistA systems are localized at the hospital level and will remain so for at least the near-term future. Each hospital operates a separate instance of VistA. Portions of the VistA code are identical in each instance; different instances of VistA may have different interfaces between the MSP and other VistA applications.

Any replacement product must not negatively impact any current applications that interface with the MSP or its data.

Replacing VA's Medical Scheduling Software

VA intends to replace the current MSP with a scheduling product [1] which is a standards-based, modular, extensible and scalable, certified as compliant and fully interoperable with the production version of VistA now held by the Open Source Electronic Health Record Agent (OSEHRA), *http://www.osehra.org/.*

The replacement product must effectively perform VA's scheduling-centric and scheduling-related legacy business functions. It must also demonstrate it can meet non-functional requirements including integration with multiple instances of VistA.[2]

Role of This Contest in Replacement of VA's Medical Scheduling Software

This contest will achieve two significant goals in replacement of VA's MSP.

- First, it will mitigate risks which VA has identified as contributing to the failure of previous attempts to replace the MSP.
- Second, it will encourage commercial software vendors to actively engage in development of solutions, by providing a basis on which VA can rate proposals in any subsequent procurement of a replacement for the MSP.

Risk Mitigation. VA's previous attempts to replace the MSP module in VistA were not successful. Assessments of the reasons for these failures identified three critical risks that VA will mitigate via this contest:

- *Market Research:* One of the reasons VA was not successful was lack of sufficient knowledge about the actual capabilities of vendors to meet VA's business needs. Via this contest, VA will obtain valuable information about industry's current ability to meet VA's business needs via actual demonstration of product capabilities in a VA-defined test environment. Additionally, VA will be able to assess industry's ability to perform not just scheduling-centric functions offered by most robust scheduling products, but also scheduling-related workload-capture and data-reporting functions that are

[1] As used in this notice, ''product'' means either a discrete software module which is installed on VA servers or a software service.

[2] The replacement product will, as a part of the overall VistA EHR, deliver privacy, security, data integrity, patient accessibility, interoperability and other services required by federal law, regulations and VA policy. Many of these services are delivered by other components of VistA.

unique to VA. This contest will also provide VA with valuable information about changes in business workflows that will be needed when a replacement product is deployed.

• *Integration issues:* Another reason why earlier attempts were not successful was VA's inability to effectively integrate replacement software with the VistA system. Since then, VA has elected to place VistA in the open source community and to prefer software products which are openly architected to integrate with VistA. Via this contest, VA will be able to assess industry's ability to technically integrate its products with Open Source VistA.

• *Test environment:* Analyses for the previous lack of success also found that VA was unable to effectively test replacement software to assure it met functional and technical requirements. To support this contest VA will develop and deploy a test environment, judge contest entries using that test environment, assess the effectiveness of the test environment, then use the results of that assessment to adjust the test environment as needed to support testing in a procurement of a deployable scheduling replacement product.

Via this contest, VA will obtain the needed information in a lower-risk-of-failure context than if directly procuring a deployable replacement product. VA believes the information it obtains via direct evaluation of entries in this contest will be superior in quality and can be obtained in significantly less time via this contest route than by custom development. VA also believes the aggregate cost of the contest is highly competitive with the cost of acquiring the same types of information via other arrangements. If industry is not able to demonstrate it can meet VA's needs then no prize will be awarded.

Effect on Subsequent Procurement. VA anticipates that compatibility with Open Source VistA will be among the requirements in any subsequent procurement of a replacement for the MSP. Demonstration of open source compatibility in this contest may be taken into consideration in the rating of proposals in any subsequent procurement.

Contest Requirements and Rules

1. *Subject of the Contest.* The goal of this contest is to encourage creation of systems that help Veterans make appointments to receive outpatient and ambulatory care [3] from the Veterans Health Administration. VA also seeks to obtain information which will allow it to reduce the risks inherent in procurement and deployment of a replacement medical scheduling product.

2. *Numbers and Amounts of Prizes.*

a. VA will award monetary prizes of as much as $3 Million to as many as three entrants that deliver demonstration software or service which the judges determine delivers the required functionality and is compatible with Open Source VistA, as described in this notice.

b. Judges will determine the number and amount of monetary prizes. Judges may determine that no prize will be awarded.

c. VA may consider compatibility with Open Source VistA as demonstrated in this contest when considering proposals in any subsequent procurement of MSP-related product(s).

3. *Basis on which a winner will be selected.* (See section 6 for judging procedures and point system.) Winners will be selected from entries that demonstrate [4] to the satisfaction of the judges that they:

a. Perform as required by these rules while interfaced with VA-provided VistA instances running on VA-provided virtual machines. Performance with other versions or instances of VistA will not be considered.

b. Perform each of the scheduling-centric business functions defined by VA on Attachment A to this notice, including particularly:

1. Automated scheduling of an appointment at any VA site from any location by a Veteran using online or mobile devices or by a VA employee acting as a scheduler,[5] and

2. Where semi-automated scheduling is performed, use of a calendar-view format presentation of available resource(s), with support for point-and-click scheduling when the calendar view shows needed resources to be available.[6]

c. Perform all or some of the designated Scheduling-Related/VA-Specific business functions set forth on Attachment B to this notice, including functions related to workload capture, data analysis and reporting, operational and capital planning and travel reimbursement.

d. Perform each of the non-functional requirements set forth on Attachment C to this notice.

e. Do so using open APIs, including open source code for the interfaces between the product and VistA, and at the option of the entrant, using open source modules to support some or all of the product's additional functions. *Note:* Entries that consist of proprietary code are not precluded, so long as interfaces with VistA use open APIs and the software implementing the interfaces is made available as open source code.

4. *Registration for this Contest.*

a. Not later than 10:59 p.m. EST February 1, 2013, potential entrants must request registration for the contest by submitting a letter via the ''Submissions'' section of the official contest Web site, *http://vascheduling.challenge.gov.* The letter must be signed by the entrant if an individual or by a corporate officer if the entrant is a corporation. The letter must:

1. Attest that the potential entrant is eligible to participate in this contest per the requirements of this notice and the Act,

2. Attest that disqualifying factors for participation in the contest, as defined in this notice and the Act, do not exist,

3. Contain a listing (which may be an attachment) of all owners of all intellectual property (IP) which the potential entrant will incorporate or use in its entry,

4. Contain a listing (which may be an attachment) of all components of the entry that the potential entrant will designate as open source,

5. Attest that the potential entrant is the owner or licensee of any and all intellectual property (IP) to be incorporated in the entry, and by virtue of such ownership or license has full right and authority to authorize, and does authorize VA (and any of VA's consultants, contractors or collaborating federal agencies) to reproduce, test, demonstrate and use such IP for any purpose related to this contest, including judging,

6. Attest that the potential entrant:

a. Is the owner or licensee of any and all IP in open source modules designated by the entrant to be incorporated in the entry;

b. Has full right and authority to convey all rights set forth in an Apache 2.0 license [7] in the designated open source modules; and

c. Will, if selected as a winner in this contest, apply the Apache 2.0 license to the designated source modules and contribute the software to OSEHRA.

[3] Scheduling of inpatient, surgical, and extended nursing care is excluded.

[4] Winning products will be used for demonstration only and will not be deployed in VA facilities except for testing or demonstration purposes.

[5] *See, e.g.,* Attachment A, sections 1.4.1, 1.4.5, 2.7, 3

[6] *See, e.g.,* Attachment A, sections 1.2.5, 3, 3.5, 3.7.

[7] Text available at *http://www.apache.org/licenses/LICENSE-2.0.*

7. Attest that the potential entrant agrees it is bound by all rules, assumes all risks, and has acquired or will acquire any insurance required by this notice.

8. State whether the potential entry will be an installable software, software as a service (SaaS) or contain components of both, and whether the contestant intends to supply resources external to the virtual machines to be provided by VA to support or execute the contestant's entry (*e.g.,* servers that support SaaS), and identifying those resources.

9. State the name, business and email address and telephone number of the individual who is the designated contact for and who will receive all communications related to this contest.

a. The letter, attachments, and any additional written materials must be submitted electronically in a format fully compatible with both Microsoft Word 2007 and Adobe Acrobat Pro 9.

b. Letters which do not include each of the items stated in paragraph 4(a) and in the required formats will not be effective to register the potential entrant.

c. At the option of the potential entrant, letters may be accompanied by additional written materials describing the potential entrant or the entry not exceeding ten 8½ by 11 inch pages in length. These materials will be in a format fully compatible with Microsoft Word 2007 or Adobe Acrobat Pro 9.

d. Letters and all attachments are subject to file size limits of the official contest Web site.

5. *Procedures for Submitting Entries; Confidentiality of Entries.*

a. Potential entrants that submit a letter meeting the requirements set forth in Section 4, above, will be registered for this contest.

1. Registered contestants will be sent an email at the address provided by the contestant. The email will contain instructions on how to access VA-supplied virtual machine space to integrate, configure, and test their solution prior to submission as an entry.

2. Depending on the number of potential entrants that register for this contest and the ready availability of virtual machines, there may be a delay between submission of a letter requesting registration and an email accepting the letter. There may also be delay in actual availability of virtual machines. Potential entrants assume all risk of such delays and the possibility that any delay may leave them insufficient time before the entry deadline to fully integrate, configure and test their solution.

b. Each contestant will be supplied with three virtual machines.

1. Each machine will be loaded with a sample instance of VistA with sample data, each with a different patch level and each set to operate in a different time zone. This will permit configuration and testing of multiple-site scheduling functions.

2. Two of the virtual machines will use the Red Hat Enterprise Linux 6.1 (64 bit) operating system. The third machine will use the Windows Server 2008 (32 bit) operating system.

3. Contestants may begin installation and testing of their product immediately upon receipt of access to the virtual space.

c. Contestants may provide resources in addition to the virtual machines provided by VA, *e.g.,* servers which support SaaS.

1. Integration of all external resources with the virtual machines provided by VA will be the sole responsibility of the contestant.

2. All expenses related to any additional resources will be at the sole cost and expense of the contestant.

d. VA will post Screening Use Cases in the ''Updates'' section on the contest Web site, *http://vascheduling.challenge.gov.* These Use Cases will be used in the evaluation of the functional and technical capabilities of entries.

e. Each contestant will integrate their solution with the provided VistA instances, and will provide test plans and automated test scripts that demonstrate performance of the functional requirements on Attachments A, B, and C in the context of the Screening Use Cases.

f. Test scripts must meet the following requirements:

1. Scripts must be submitted as open source software, in accordance with the criteria posted on the contest Web site, including documentation and OSI-approved open source licenses, with the Apache 2.0 license applied to all code. The submittal must include instructions for execution and a copy of results for comparison.

2. Scripts must operate in the OSEHRA CTEST environment.

3. Scripts must be repeatable, that is, they must include separated executable automated code that restores all data values to their previous state, allowing the test to be rerun with consistent results.

4. If any changes are made to the provided VistA instances, those changes must also be submitted as open source code, compliant with the criteria posted on the contest Web site including documentation and OSI-approved open source licenses, with the Apache 2.0 license applied to all code. This includes the VistA-side components of any interface code, such as Applications Program Interfaces (APIs).

5. Contestant must submit repeatable open source test scripts for all specified use cases in accordance with the instructions posted on the contest Web site, with instructions and results from their testing.

g. Each registered contestant that wishes its or their product to be formally entered in the contest shall, not later than 10:59 p.m. EST March 1, 2013, submit a letter via the ''Submissions'' section of the official contest Web site, *http://vascheduling.challenge.gov.* The letter must be signed by the entrant if an individual or by a corporate officer if the entrant is a corporation. The letter must state:

1. The registered contestant has completed installation of its or their product, test plans and automated test scripts on the virtual servers provided by VA, has completed testing to its or their satisfaction, and formally submits the contents of the virtual machines as their entry in the contest.

2. The letter submitted by the registered contestant at the time of registration is incorporated by reference and the contents of that letter are in all respects ratified and confirmed. *Provided, however,* that contestants may at their option amend the contents of the following sections of the registration letter:

a. Section 4(a)(3), relating to a listing of the owners of all IP incorporated into the contestant's entry;

b. Section 4(a)(4), relating to the components of the entry which the contestant will designate as open source;

c. Section 4(a)(8), relating to whether the entry is installable software, SaaS, or contains components of both and whether resources external to the VA-supplied virtual machines is or will be used by the contestant to support or execute contestant's entry.

d. Section 4(a)(9), relating to contact information.

e. Section 4(d), relating to optional descriptive materials.

3. If resources external to the VA-supplied virtual machines is or will be used by a contestant to support or execute contestant's entry, the letter shall also state: ''[I/We] certify that from and after the submission of this letter until the announcement of the contest winners, no changes whatsoever will be made to any of the external software or resources [I/we] have designated to support or execute [my/our] entry.''

4. Registered contestants that do not submit a letter as required by this subsection will be deemed to have withdrawn from the contest and the

contents of virtual machines assigned to them will not be judged.

5. Letters formally submitting entries for judging, along with all attachments, are subject to file size limits of the official contest Web site.

h. All virtual machine environments will be frozen as of 10:59 p.m. EST March 1, 2013. If a registered contestant has submitted a letter as provided in section 5(g), then the contestant's entry in this contest will be deemed to be the code and other content installed on the virtual machines at the time the virtual machine environment is frozen, as well as the code and other contest installed on external resources if any, at that time.

i. Submissions or entries will not be readily available to other entrants or to the public. These materials may, however, be disclosable as determined solely by VA pursuant to its obligation to comply with the Freedom of Information Act (FOIA), 5 U.S.C. 552.

6. *Judging of Entries.*

a. *Method.* VA may use any technical means it determines suitable to evaluate any entry, award points and determine any winner in this contest. All or any part of the evaluation may be conducted by third parties under VA supervision. VA may use an entrant's submitted testing scripts, routines and software to perform all or part of any evaluation and judging. VA may, at its option, request an entrant to demonstrate its or their entry either in-person or via web-based technologies.

b. *Technical Evaluation.* VA contemplates it will judge entries as follows.

1. An entry will first be evaluated to determine Open Source VistA Compatibility, *i.e.*:

a. Whether it is compatible with the three separate VistA instances on the VA-supplied virtual machines, *and*

b. Whether the interfaces between the product and VistA are based on software code that either is or can become open source.

VA contemplates substantial portions of this evaluation will be conducted by OSEHRA. Any entry that does not demonstrate Open Source VistA Compatibility to the satisfaction of the judges will be disqualified and will not be further considered for a prize.

2. An entry which demonstrates Open Source VistA Compatibility will then be evaluated to determine whether it performs all Non-Functional requirements set forth on Attachment C. Any entry which does not demonstrate to the satisfaction of the judges that it can perform the Non-Functional Requirements on Attachment C will be disqualified and will not be further considered for a prize.

3. Entries which demonstrate Open Source VistA Compatibility and also demonstrate they meet Non-functional Requirements will be deemed to be Technically Compatible.

c. *Functional Evaluation.* VA will evaluate an entry that has demonstrated Technical Compatibility to determine whether it can perform the Scheduling-centric functions defined on Attachment A. An entry that does not demonstrate to the satisfaction of the judges that it can perform the Scheduling-centric functions defined on Attachment A will be disqualified and will not be further considered for a prize.

d. *VA-Specific Functions.* An entry that demonstrates Technical Compatibility and also demonstrates it can perform all of the Scheduling-centric functions on Attachment A will then be evaluated to determine whether it can perform any of the Scheduling-related or VA-specific functions defined on Attachment B.

1. Judges will award the designated points for each function defined on Attachment B that they determine is performed by the entry.

2. A maximum of 120 points can be awarded for performance of functions defined on Attachment B.

e. *Open Source Content.* An entry that demonstrates Technical Compatibility and also demonstrates it can perform all of the Scheduling-centric functions on Attachment A will also be evaluated by the judges to determine the extent to which it uses software modules, as designated by the entrant, which are or will become open source.

1. Interfaces between the product and VistA will not be considered in this phase of the judging, as they are a required component of Open Source Compatibility.

2. Judges will evaluate the significance of the designated open source modules in delivering required functions. For example, judges may determine that modules that provide common platform services or business logic are more significant than modules that deliver the presentation layer.

3. Judges may award a maximum of 30 points for significant open source modules incorporated in an entry.

Points awarded by the judges will determine the winners of this contest.

7. *Eligibility.* To be eligible to participate in this contest and win a prize:

a. Entrants must register for this contest as set forth in Section 4 and submit a letter formally entering their product in the contest as set forth in Section 5.

b. If an individual, an entrant must be a citizen of or permanent resident of the United States. If an entity, an entrant must be incorporated in and maintain a primary place of business in the United States.

c. An entrant may not be a Federal entity or Federal employee acting in the scope of the employee's employment.

d. Entrants shall be responsible for obtaining insurance they deem necessary to cover claims by any third party for death, bodily injury, or property damage or loss resulting from an activity carried out in connection with or participation in this contest.

e. Entrants must have complied with all requirements of this notice and all requirements established by the Act.

f. By registering for or submitting an entry in this contest, contestants and entrants agree to assume any and all risks and waive any claims against the Federal Government and its related entities (except in the case of willful misconduct) for any injury, death, damage, or loss of property, revenue or profits, whether direct, indirect, or consequential, arising from their participation in this contest, whether the injury, death, damage, or loss arises through negligence of otherwise. *Provided, however,* that by registering or submitting an entry, contestants and entrants do not waive claims against VA arising out of the unauthorized use or disclosure by the agency of the intellectual property, trade secrets, or confidential information of the entrant.

8. *Intellectual Property (IP).*

a. VA is not responsible for a registered contestant's or entrant's lack of compliance with copyright, trademark, patent or other Federal law. Contestants and entrants will hold harmless, defend, and indemnify the Federal Government and any agency or component thereof from and against any suit, claim, demand, liability, damages, costs and expenses (including attorneys' fees and costs of defense), of whatever nature, whether groundless, false or fraudulent, arising out of any use, licensing or relicensing of any IP that is incorporated in the entrant's entry.

b. Without limiting the generality of the foregoing and in explanation but not limitation of sections 4(a)(5) and 4(a)(6), contestants and entrants are responsible for obtaining all third-party licenses required to allow the VA and its contractors to receive any and all IP installed on any virtual machine, to run any and all testing software or scripts, and to demonstrate an entrant's product. Windows and Linux operating systems will be accepted; however contestants and entrants will need to obtain proper licenses for running any Windows in

any resource external to the VA-supplied virtual machines that is or will be used by the contestant to support or execute contestant's entry.

c. The winner(s) of this contest will, in consideration of the prize to be awarded, apply the Apache 2.0 license to the designated open source modules (including the interfaces between winner's product and VistA) and contribute the modules to OSEHRA.[8]

d. VA may in its sole and absolute discretion choose to negotiate with any entrant to acquire, license, use or convey any other intellectual property developed in connection with this contest.

9. *Judges and Judging Procedures.*

a. Subject to the requirements of 15 U.S.C. 3719(k), the VA Assistant Secretary for Information Technology, acting on behalf and with the authority of the Secretary of VA, will appoint one or more qualified individuals to act as judges of this contest and may appoint himself as a judge. Judges may include individuals from outside VA, including from the private sector. Judges will operate in a transparent manner.

b. A judge may not have a personal or financial interest in, or be an employee, officer, director, or agent of any entity that is a registered entrant in this contest, and may not have a familial or financial relationship with an individual who is a registered entrant.

c. Specific tasks related to the judging process may be delegated to VA employees or employees of a collaborating Federal agency. Third parties may perform judging tasks subject to supervision by VA or by a collaborating Federal agency.

d. Judges shall have the authority to disregard any minor error in any entry that does not create any substantial benefit or detriment to any entrant.

e. Judges shall have the authority to obtain from any entrant additional information, clarification of information, or assistance in resolving any technical issues relating to the installation, use, testing or evaluation of any entry, so long as no substantial benefit or detriment to any entrant occurs thereby.

f. Decisions of the judges are final.

10. *Payment of Prizes.*

a. Prior to payment of any prize, an apparent winner must execute (at VA's option, under oath or affirmation) such documents as VA may reasonably require, including but not limited to:

1. Declarations and certifications that relate to the apparent winner's eligibility to participate in this contest, the absence of any disqualifying factor, the assumption of risks and acquisition of any insurance required by the rules,

2. The conveyance of any intellectual property required by the rules, and

3. Any other matter that VA may reasonably require, including but not limited to information reasonably necessary for VA to make payment via electronic funds transfer and issue IRS Forms 1099 according to VA's fiscal policy.

11. *Procedures for obtaining additional information.*

a. During the period of the contest, potential contestants or entrants may submit questions or comments to VA using the ''Discussions'' section on the official contest Web site, *http://vascheduling.challenge.gov.*

b. VA may choose not to respond to any question or comment or to delete questions or comments that it determines are not relevant to the competition or which seek technical guidance. VA's responses on the ''Discussion'' section of the contest Web site are not official guidance.

c. VA may also provide information and official guidance related to this contest on the ''Updates'' section of the official contest Web site, *http://vascheduling.challenge.gov.* An entrant is bound by official guidance on the ''Updates'' section that is posted prior to formal submission of their entry.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on October 11, 2012, for publication.

Dated: October 11, 2012.

Robert C. McFetridge,

Director, Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

ATTACHMENT A—SCHEDULING—CENTRIC FUNCTIONAL REQUIREMENTS

Business need (BN)	Revised owner No.	Owner requirement (OWNR)
BN 1: Manage National Medical Scheduling Setup—The scheduling system shall provide the capability to configure and manage business rules and standards at a national level including establishing parameters for role-based user access and security and supporting a process to monitor and evaluate results of audit reports.	1.1	The system shall have the capability to provide integrated, electronic access to and from other VistA applications.
	1.2	Maintain and Modify Scheduling Configuration—The system shall provide the capability to establish and maintain national, VISN, VAMC, clinic, provider-level configuration standards. Configuration shall be enabled for facility-level within business rules and parameters.
	1.2.1	The system shall have the capability to provide on-line help.
	1.2.2	The system shall have the capability to maintain an audit trail of changes to resource configuration.
	1.2.3	The system shall have the capability to create, modify, and delete configurable business rules that are used in the scheduling process.
	1.2.4	The system shall provide the capability to configure resources at the National, VISN, facility, clinic and provider levels.

[8] *http://www.osehra.org/page/osehra-code-repository.*

ATTACHMENT A—SCHEDULING—CENTRIC FUNCTIONAL REQUIREMENTS—Continued

Business need (BN)	Revised owner No.	Owner requirement (OWNR)
	1.2.5	The system shall provide synchronization with individual (patient or provider) Office Automation calendar for multiple types of end user devices, including mobile applications irrespective of operating system.
	1.3	Flexible Appointment Scheduling—The scheduling system shall provide the capability to configure schedule parameters.
	1.3.1	The system shall allow configuration of scheduling to accommodate holidays.
	1.3.2	The system shall allow flexible schedule options for urgent care and walk-in appointments.
	1.3.3	The system shall allow scheduling between facilities located in different time zones.
	1.3.4	The system shall have the capability to allow users to specify timing relationships between activities (*e.g.,* coordinate multiple activities in specified order).
	1.3.5	The system shall be configurable to display only available resources.
	1.3.6	The system shall have the capability to allow users to define a standard set of appointment types with default appointment lengths.
	1.3.7	The system shall have the capability to search for available appointments using specific parameters and to display results for multiple resources in a single view.
	1.4	User Access—The system shall provide the ability to maintain and modify user access.
	1.4.1	The system shall provide role-based security for access control and provide improved remote access for Veterans to make and view appointments over the internet, email and other mobile devices.
	1.4.2	The system shall have the ability to create, configure, and maintain role-based user (staff and veteran) access and authorization.
	1.4.3	The system shall allow configuration and tailoring of user access roles at the national, VISN, facility, clinic, and provider levels based on business rules and policies.
	1.4.4	The system shall have the capability to enforce rules concerning what roles can overbook appointments for a service or resource.
	1.4.5	The system shall have the capability to allow, in certain circumstances, Veterans to schedule appointments via remote access mechanisms such as phone, internet, email and other mobile devices.
	1.5	Resources and Groups—The system shall provide the capability to create, modify, manage, delete, and report on resources and groups.
	1.6	Audit Trails—The system shall have the capability to display business and technical audit trails.
	1.6.1	The system shall provide the ability to record data to produce audit trails for items including: user access activities, modifications to schedules.
	1.7	Templates—The system shall have the capability to create, modify, change status, and manage of templates which include notifications, letters, and scheduling events. The system shall allow the templates to be shared and saved.
	1.7.1	The system shall allow the templates to be shared.
	1.7.2	The system shall allow the templates to be saved.
	1.8	The system shall allow for the configuration of notifications, flags and alerts for scheduling process.
BN 2: Manage Veteran Information—The system shall have the ability to access and manage, update and maintain accurate Veteran information. Veteran special needs and preferences shall be accessible and able to be updated in ''real-time''.	2.1	The system shall have the capability to provide alerts if patient information is missing, out of date, or requires verification (*e.g.,* eligibility, means test, demographics).
	2.2	The system shall have the capability to maintain and present appointment information (past and future) within a specified date range (*e.g.,* including appointments kept, providers, cancellations and no-show history).
	2.3	The system shall have the capability to display eligibility information necessary for appropriate scheduling.

ATTACHMENT A—SCHEDULING—CENTRIC FUNCTIONAL REQUIREMENTS—Continued

Business need (BN)	Revised owner No.	Owner requirement (OWNR)
	2.4	The system shall have the ability to notify/inform schedulers of patient preferences.
	2.5	The system shall have the capability to receive notification of deceased patients and allow the authorized user to cancel future appointments/ancillary services/orders once notification has been received from an authoritative source.
	2.6	The system shall have the capability to establish and update patient information (enrollment status, eligibility, demographics, preferences and special needs, means test status, provider assignments, etc.).
	2.7	The system shall have the capability to allow patient appointments with multiple providers at multiple facilities.
	2.8	The system shall provide the ability to identify and verify the identification of the Veteran.
	2.9	The system shall support user configuration preferences for data display and entry screens within security and standards constraints.
BN 3: Manage Request—Through the use of a calendar view, the scheduler is able to view all providers, services, facilities, and Veterans from a variety of calendar views such as: daily, weekly, monthly with multiple providers, services or facilities in view on a single screen. The scheduling system shall accommodate appointment requests from multiple inputs sources, including Veterans and providers via different sources such as MyHeatheVet, walk-ins, email and other communication modes. This forms the basis of non-solicited demand. Solicited demand emerges in the form of unfulfilled appointments based on missed opportunities or requests outside the scheduling appointment horizon.	3.1	Variable Appointment Types and Lengths—The system shall have the capability to allow variable appointment types and variable appointment lengths [*e.g.,* Compensation & Pension (C&P), Mental Health Clinic (MHC), Primary Care Clinic (PCC), New, Follow-up, Pre-op, Post-op].
	3.1.1	The scheduling system shall display any other scheduled or requested appointments for the patient when an appointment is requested.
	3.1.2	The system shall have the capability to allow users to schedule an appointment for a specific, user-defined, length of time, based on role-based access rules.
	3.1.3	The system shall have the capability to establish recurring appointments.
	3.1.4	The system shall provide the ability to verify patient information, display eligibility, and display a warning if there is an inconsistency between service requested and eligibility.
	3.2	Appointment Selection—The system shall have the capability to manage the appointment selection process.
	3.3	Providers Per Schedule—The system shall have the capability to coordinate appointment scheduling based on resource availability.
	3.4	Access Restrictions for Scheduling Appointments—The system shall have the capability to filter available appointments based on patient preferences, appointment availability, geographic considerations, facility, date range, resource type, and other special needs.
	3.5	Waiting Lists—The system shall provide the capability to process various lists.
	3.5.1	The system shall have the capability to provide a waiting list that appears when making or canceling appointments.
	3.5.2	The system shall apply configurable business rules to the management of a long-term appointment request list.
	3.5.3	The system shall have the capability to maintain a list of patients that can fill a cancelled appointment on short notice.
	3.5.4	The system shall have the capability to provide users the ability to view available appointments beyond one year.
	3.5.5	The system shall have the capability to maintain an electronic waiting list.
	3.6	Appointment Rescheduling—The system shall identify appointments to be rescheduled and route them automatically to the reschedule status or pending list.
	3.6.1	The system shall have the capability to disposition rebooking of no-shows.

ATTACHMENT A—SCHEDULING—CENTRIC FUNCTIONAL REQUIREMENTS—Continued

Business need (BN)	Revised owner No.	Owner requirement (OWNR)
	3.6.2	The system shall have the capability to link associated appointments so that if one is cancelled, all linked appointments can be dispositioned together.
	3.6.3	The system shall be capable of finding and displaying available appointment slots due to appointment cancellations, additional resources, etc. based upon configuration parameters.
	3.6.4	The system shall have the capability to permit automatic rebooking of patients into comparable appointment slots.
	3.6.5	The system shall have the capability to merge, purge, or distribute scheduled appointments from one resource to another.
	3.7	Optimize Resource Utilization—The system shall incorporate mechanisms that support optimization of resources.
	3.7.1	The system shall have the capability to capture the coded reason for cancellations/no-shows, *e.g.,* death of patient, lack of transportation, snow day.
	3.7.2	The system shall have the capability to book or cancel recurring appointments (*e.g.,* recurring appointments to same resource) all at once.
	3.7.3	The system shall have the capability to provide users the capability to view available appointments based on configuration parameters.
	3.7.4	The system shall have the capability to receive notification of expired/deceased patients from authoritative source and take appropriate action such as cancel future appointments/ancillary services/orders, etc.
	3.7.5	The system shall have the capability to detect and notify users if patients have similar appointments (service; provider) scheduled close together (*e.g.,* possible duplicate or both can be seen at one time).
	3.7.6	The system shall check availability and status of all resources, including telecommunications system availability, for a clinical video telehealth session.
	3.8	Appointment Requests—The system shall have the capability to manage appointment requests.
	3.8.1	The system shall have the ability to place Veterans on an appointment list which is accessible throughout the scheduling process.
	3.8.2	The system shall have the ability to merge, purge, or distribute scheduled appointments from one resource to another when emergency scheduling changes occur.
	3.8.3	The system shall have the ability to capture attempts to contact patient.
BN 4: Manage Appointment—Through the use of a calendar view, the scheduler is able to view all providers, services, facilities, and Veterans from a variety of calendar views such as: daily, weekly, monthly with multiple providers, services or facilities in view on a single screen.	4.1	The system shall have the ability to display co-pay requirements.
	4.1.1	The scheduling system will display patient special needs and preferences when an appointment is requested and made.
	4.1.2	The system should allow configuration to require approved authorizations prior to processing an appointment request.
	4.1.3	The system shall have the capability to create and manage various appointment types.
	4.1.4	The system shall have the capability to manage scheduling process, such as overbooking, no-shows, cancels, reschedules, etc.
	4.1.5	The system shall support the ability to change or edit appointments as necessary.
	4.1.6	The system shall have the capability to configure and enforce business rules at the clinical service level, clinic level, provider, and appointment type level (*e.g.,* females in Obstetrics/Gynecology clinic).
	4.1.7	The system shall provide the ability for providers to request appointments.
	4.2	Linking—The system shall have the ability to automatically link relevant appointments/resources.

ATTACHMENT A—SCHEDULING—CENTRIC FUNCTIONAL REQUIREMENTS—Continued

Business need (BN)	Revised owner No.	Owner requirement (OWNR)
	4.2.1	The system shall have the capability to provide alerts when ancillary tests/specialty consults have been scheduled/missed.
	4.2.2	The system shall have the capability to search for the available appointment across multiple resources.
	4.2.3	The system shall have the capability to provide information to assist schedulers to consolidate appointments in one day when possible (*e.g.,* flag the fact that a patient is scheduled to show up +X days of desired new appointment date).
	4.2.4	The system shall have the capability to create, re-schedule, or cancel recurring appointments all at once with appropriate desired date.
	4.2.5	The system shall have the capability to define individual schedules in terms of a single resource or as a pre-defined set of multiple resources.
	4.2.6	The system shall have the capability to create groups of resources for scheduling a single event (*e.g.,* room, equipment, and ancillary staff).
	4.2.7	The system shall have the capability to cancel/restore resources and all linked appointments over multiple days (not just one day at a time).
	4.3	Assign and Configure Time Slots—The system shall provide the capacity to assign and configure time slots for appointments.
	4.3.1	The system shall have the capability to block time slots in user-defined increments.
	4.3.2	The system shall have the capability to present alerts and reminders for a variety of reasons (*e.g.,* eligibility not verified, means test or insurance information out of date).
	4.3.3	The system should have the capability to support automated coordination and consolidation (*e.g.,* onto one day) of multiple appointments per patient.
	4.3.4	The system shall be capable of changing appointment types for an appointment or a request at any time (within business constraints).
	4.3.5	The system shall have the capability to configure the amount of time allowed between appointments for a patient with multiple appointments.
	4.3.6	The system shall not permit booking appointments into invalid time slots based upon configured business rules.
	4.4	System Prompt Patient Notifications—The system will provide the ability to establish and provide appointment notifications.
	4.4.1	The system shall have the capability to generate a list of future appointment reminders.
	4.4.2	The system shall have the capability to produce appointment notifications in a variety of formats (*e.g.,* letter, phone, e-mail, text messaging, pending appointment list, or card). Each option shall be capable of being enabled or disabled based upon patient preferences.
	4.4.3	The system shall have the capability to filter/select appointment notifications based on user defined criteria.
	4.4.4	The system shall have the capability to tailor appointment notifications to meet specific clinic needs.
	4.4.5	The system shall have the capability to provide configurable notification requests such as: alerting staff when to contact patients about upcoming appointments.
BN 5: Coordinate Associated and Occasions of Service—The scheduling system shall provide schedulers the ability to coordinate medical services throughout the VA, for other agencies, with private practices, and for various delivery modes and causes.	5.1	External Data Exchange—The system shall have the capability to provide secure, automated interfaces with external systems for data exchange.
	5.1.1	The system shall have the ability to allow inter-facility scheduling, including non-VA facilities.
	5.1.2	The system shall have the capability to link unscheduled CPRS consults to the scheduling system for viewing.

ATTACHMENT A—SCHEDULING—CENTRIC FUNCTIONAL REQUIREMENTS—Continued

Business need (BN)	Revised owner No.	Owner requirement (OWNR)
	5.1.3	The system shall have the capability to support coordinating multiple appointments (*e.g.,* provide information helpful in scheduling all appointments on one day, multidisciplinary team appointments).
	5.2	The system shall provide the ability to allow display of primary and associate providers designated by facilities.
	5.2.1	Ability to schedule a patient and resource on both the VistA system where the health care resource is located and the VistA system where the Veteran is located. This combination should be handled across VistA systems and time zones as appropriate as a synchronized event.
	5.2.2	The system shall provide the capability to capture and to select locations of patient and healthcare resources, including non-VA facilities (*e.g.,* Veteran home, DoD, academic affiliate, contract provider, etc.).
	5.2.3	The system shall provide the ability to create, cancel and update Clinical Video Telehealth (CVT) appointment sets (patient and provider) as a single event (to prevent creation of orphans), including the following resources: • CVT Rooms. • CVT Equipment. • Telepresenter.
	5.2.4	The system shall provide the ability to modify a CVT appointment pair (patient and provider) as needed to prevent creation of orphans or to correct errors.
	5.3	Ancillary Services—The system shall have the capability to accommodate different service types such as C&P, ancillary services and specialty services.
	5.3.1	The system shall have the capability to link ancillary tests to appointments (if they are changed, ancillary tests can be updated without canceling order and re-ordering).
	5.3.2	The system shall have the capability to link ancillary tests to appointments.
	5.3.3	The system shall provide the capability to establish links to activities that require coordination with appointments (*e.g.,* ancillary services).
	5.3.4	The system shall have the capability to coordinate appointments with related ancillary services.
	5.4	The system shall have the capability to provide a patient preference field that informs clerks to special transportation concerns or other issues that limit availability (*e.g.,* specific days and times).
BN 6: Manage Encounter of Care—The system will have the capability to differentiate between encounter data and appointment data. The encounter data is not tracked by the scheduler, but by providers in the electronic health record.	6.1	The system shall have the capability to provide check-in, check-out, cancellation reasons, and no-show data.
	6.2	The system shall have the capability to provide facility-wide visibility for a patient (*i.e.* checked-in or out, in treatment room etc.).
	6.3	The system shall provide statistics for appointments such as: no-shows, left without being seen, etc.
BN 7: Reporting—The system should have the capability to produce, display and format reports, and should be able to be saved in various formats such as PDF, CSV, etc. Reports containing personally identifiable information that are required to be transmitted, retrieved, viewed, or printed meet all VA Handbook 6500 requirements. These reports represent the as-is process. It is expected that report requirements will be further defined with the business owners throughout the system development and acquisition process.	7.1	General Reporting Needs
	7.1.1	Ad Hoc Reports—The system shall have the capability to support user-created ad hoc report generation (without reprogramming) and provide the capability to save the report definition for future use and to save the reports in various standard exportable formats.

ATTACHMENT A—SCHEDULING—CENTRIC FUNCTIONAL REQUIREMENTS—Continued

Business need (BN)	Revised owner No.	Owner requirement (OWNR)
	7.1.2	The system shall have the capability to report on scheduling measures and metrics across the VHA at many levels, including but not limited to National, VISN, Facility/Station/Clinic/Community-Based Outpatient Clinic (CBOC), and shall have the capability to ''roll-up'' data from the most granular level (*i.e.* clinic or station level) to the highest level for reporting purposes (*i.e.* National level) as defined by the business.
	7.1.3	The system shall have the capability to establish and ensure the use of consistent metrics and measures across different areas of the VHA; *i.e.,* ensure that all business level facilities measure, capture and report the same data in the same ways.
	7.2	Operational reports are generated by a facility, VISN, station or clinic to facilitate day-to-day operations. These can range from printing daily appointment lists for a clinic to printing a listing of patients who missed appointments or who left without being seen. Operational reports are also generated to track performance metrics, access to care metrics, utilization of staff, workload measurement/workload leveling and workload planning.
	7.2.1	The system shall have the capability to generate and display a work list based on unfulfilled appointments at the operational level to capture the source of a request, type of request, and status of a request along a timeline. Work list (queue) is automatically updated based on tasks that need to be completed by the scheduler.

ATTACHMENT B—SCHEDULING-RELATED AND VA-SPECIFIC REQUIREMENTS AND POINT ALLOCATIONS

Requirement	Description	Points
1	The system shall have the capability to provide for the enforcement and modification of national-level data standards including procedure and diagnosis codes as currently defined in VistA.	3
2	Flexible Schedule Component Organization—The solution shall have a mechanism to oversee and manage potential impacts to the system as a result of policies, directives, etc.	5
3	The system shall provide the flexibility to accommodate new functional requirements based on business needs (*e.g.,* primary care home (PACT) based care appointments, telehealth, etc.).	5
4	The system shall have the capability to alert VA staff when appointments are scheduled about patient scheduling reliability (show/no-show rate) averaged over a period of time configured by the authorized end user.	3
5.1	The system will, when managing the appointment selection process, shall have the capability to capture the desired date for the appointment.	5
5.2	The system shall allow for administrative closure of consults	1
5.3	The system shall have the ability to integrate unscheduled CPRS consults with the scheduling system	2
6	The system shall associate each appointment type with the correct DSS stop code/credit stop; see: *http://www1.va.gov/vhapublications/ViewPublication.asp?pub_ID=1788*.	5
7.1	Telehealth—The scheduling system shall provide the capability for national Clinical Video Telehealth (CVT) scheduling which ensures resources at multiple ends of a telehealth visit are coordinated with the patient across different VistA systems and capture workload data.	5
7.2	The system shall have the ability to capture whether appointment is scheduled vs. unscheduled to support travel reimbursement determination.	3
7.3	The system shall provide reports for consults obtained outside of VHA	5
8	The system shall have the ability to disposition for travel reimbursement	3
9.1	The system shall have the capability to generate reports containing scheduling data from both the solution application and legacy systems.	3
9.2	The system will collect currently used wait time metrics including create date and desired date, scheduled appointment date and completed appointment date.	5
9.3	National Reports: National reporting is generated by national program managers, VISN management and by facility management to review performance, trends, analytics, as well as access to care and payment issues. National reports are populated by ''rolling up'' information from the various stations, clinics, and facilities across VHA.	
9.3.1	The system shall have the ability to capture and provide the data necessary to conduct capacity planning through complete visibility into supply (provider, equipment, facility, support staff) and demand (enrolled and/or empaneled Veteran requests for appointments).	3
9.3.2	The system shall have the capability to generate wait time metrics and measures based on clinic operational metrics.	5
9.3.3	The system shall have the capability to generate reports based on cost reporting metrics and measures (*i.e.* DSS stop codes and other financial metrics and measures as defined by the business) that are tied to the scheduling appointment. Examples of existing reports include, but are not limited to the following:.	
	• DSS Outpatient Encounter and Workload	3
9.3.4	The system shall have the capability to generate reports based on provider utilization and provider credentialing	3

ATTACHMENT B—SCHEDULING-RELATED AND VA-SPECIFIC REQUIREMENTS AND POINT ALLOCATIONS—Continued

Requirement	Description	Points
9.3.5	The system shall have the capability to generate performance reports. Performance measures include access measures, clinical measures and scheduling measures.	5
9.3.6	The system shall have the capability to generate patient complaint tracking and status metrics and measures reports. Examples of existing reports which work now and must continue to work include (but are not limited to) the following types of reports: • Survey of Healthcare Experiences of Patients (SHEP) Inpatient and Outpatient Survey Reports. • Patient Advocate Profiles. • Number of Complaint Issues by Type of Care Patient Advocate Tracking System (PATS). • Summary of Responses to Patient Complaint Data in Outpatient SHEP (OQP). • Compliments/Complaints as % of Total (PATS) Report. • All Complaint Issue Trending (PATS). • Complaint Clinical Appeal Data (PATS).	3
9.3.7	The system shall have the capability to generate reports based on metrics and measures related to Clinic Resources as defined by the business.	4
9.3.8	The system shall have the capability to generate on-demand reports containing current data to be presented to Congress.	5
9.3.9	The system shall have the capability to generate reports based on metrics and measures related to Mental Health appointments.	5
9.3.10	The system shall have the capability to generate reports based on Workload and Utilization Management metrics	5
9.3.11	The system shall have the capability to generate reports based on unfulfilled appointment request	5
9.4.1	The system shall have the capability to generate reports based on metrics and measures related to Workload management at the local level.	3
9.4.2	The system shall have the capability to generate reports based on metrics and measures related to patient information relevant to supporting the episode of care, the continuity of care, and missed opportunities of all patients.	5
9.4.3	The system shall have the capability to generate reports based on metrics and measures related to appointments and clinics, including availability and utilization, case load, cancellations, check-ins, general/random appointment information, notifications and letters, and audits by supervisors.	5
9.4.4	The system shall have the capability to generate QA reports to ensure the proper disposition of incomplete appointment information. Examples of current reports that rely upon this data and must be maintained include, but are not limited to, the following: • Encounter Activity Report. • Encounter 'Action Required' Report. • Means Test/Eligibility/Enrollment Report. • Outpatient Encounter Workload Statistics. • Performance Monitor Summary Report. • Performance Monitor Detailed Report. • Trend of Facility Uniques by 12 Month Date Ranges. • Error Listing. • Transmission History Report—Full. • Transmission History for Patient. • Scheduling/PCE Bad Pointer Count. • Alpha List of Incomplete Encounters. • Incomplete Encounter Error Report. • Summary Report—IEMM. • Correct Incomplete Encounters. • Provider/Diagnosis Report. • Visit Report by Transmitted OPT Encounter.	5
9.4.5	The system shall have the capability to generate reports based on metrics and measures related to diagnostic and procedural information that ranks each by frequency and for a specific date range. Examples of current reports that must be maintained include, but are not limited to, the following: • Outpatient Diagnosis/Procedure Frequency Report • Management Report for Ambulatory Procedures	3

ATTACHMENT C—NON-FUNCTIONAL REQUIREMENTS

NFR characteristic	NFR sub-characteristic	NFR Statement
3.1 Functionality		3.1.1.8 The Scheduling Solution shall be capable of providing configurable error messages, work flows, and alerts.
	3.1.2 Accuracy	3.1.1.11 The Scheduling Solution shall display appointment time with appropriate time zones.
	3.1.3 Interoperability	3.1.3.2 The Scheduling Solution shall support content transportation standards and implementation specifications set forth in 45 CFR 170.205.
		3.1.3.5 The Scheduling Solution shall be capable of navigating seamlessly among related modules throughout the end-to-end scheduling process.
	3.1.5 Security	3.1.5.1 The Scheduling Solution shall be able to support secure messaging.

ATTACHMENT C—NON-FUNCTIONAL REQUIREMENTS—Continued

NFR characteristic	NFR sub-characteristic	NFR Statement
3.3 Usability	3.3.1 Understandability	3.3.1.1 The Scheduling Solution shall be self-descriptive and explain itself through cues (*e.g.,* screen, area, and group titles indicating the purpose of the respective interface element; on-screen instructions/diagrams; explanations/answers that are available on request; no implicit assumptions about how users are expected to behave that would contradict users' expectations; and feedback is given on user actions, system actions, and the system state.
		3.3.3.2 The Scheduling Solution shall be usable across multiple operating systems, browsers, and platforms.
3.5 Maintainability	3.5.1 Analyzability	3.5.1.1 The Scheduling Solution shall be capable of providing transaction logs, error logs and audit trails for pertinent scheduling transactions.
	3.5.4 Testability	3.5.4.1 The Scheduling Solution shall provide criteria to enable the measurement to test pieces of code or functionality, or a provision added in software so that test plans and scripts can be executed systematically.

[FR Doc. 2012–25408 Filed 10–15–12; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Notice of Extension of Public Comment Period for Environmental Impact Statement for the San Francisco Veterans Affairs Medical Center (SFVAMC) Long Range Development Plan (LRDP)

AGENCY: Department of Veterans Affairs (VA).

ACTION: Notice of Extension of Comment Period.

SUMMARY: The Department of Veterans Affairs (VA) is extending the public comment period for the Environmental Impact Statement for the San Francisco Veterans Affairs Medical Center (SFVAMC) Long Range Development Plan (LRDP). VA published a notice in the **Federal Register** on August 17, 2012 (77 FR 49865), that provided for a public comment period ending on October 16, 2012. This notice extends the public comment period to October 31, 2012.

DATES: Several individuals representing federal and community organizations have requested an extension of the public comment period. The Agency has decided to act in accordance with these requests; therefore, comments on the Draft Environmental Impact Statement (EIS) for the SFVAMC LRDP will now be accepted through October 31, 2012. Comments received or postmarked after October 31, 2012 will be considered to the extent practicable.

ADDRESSES: Submit written comments on the SFVAMC LRDP Draft EIS through www.regulations.gov. Please refer to: ''SFVAMC LRDP Draft EIS'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Chief Engineer, Engineering Service (138), San Francisco Veterans Affairs Medical Center, 4150 Clement Street, San Francisco, CA 94121 or by telephone, (415) 221–4810, extension 2009. The SFVAMC LRDP and Draft EIS are available for viewing on the SFVAMC Web site: *http://www.sanfrancisco.va.gov/planning.*

Dated: October 11, 2012.

Robert C. McFetridge,

Director, Regulation Policy and Management (02REG), Office of the General Counsel.

[FR Doc. 2012–25409 Filed 10–15–12; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Structural Safety of Department of Veterans Affairs Facilities, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. App. 2, that a meeting of the Advisory Committee on Structural Safety of Department of Veterans Affairs Facilities will be held on October 29–30, 2012, in Room 6W405, 425 I Street NW., Washington, DC. The session on October 29 will be from 9 a.m. until 5 p.m., and the session on October 30 will be from 8:30 a.m. until 12:30 p.m. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on matters of structural safety in the construction and remodeling of VA facilities and to recommend standards for use by VA in the construction and alteration of its facilities.

On October 29, the Committee will review developments in the fields of fire safety issues and structural design as they relate to seismic and other natural hazards impact on the safety of buildings. On October 30, the Committee will receive appropriate briefings and presentations on current seismic, natural hazards, and fire safety issues that are particularly relevant to facilities owned and leased by the Department. The Committee will also discuss appropriate structural and fire safety recommendations for inclusion in VA's standards.

No time will be allocated for receiving oral presentations from the public. However, members of the public may submit written statements for review by the Committee to Krishna K. Banga, Senior Structural Engineer, Facilities Standard Service, Office of Construction & Facilities Management (003C2B), Department of Veterans Affairs, 425 I Street NW., Washington, DC 20001, or by email at *Krishna.banga@va.gov.* Any member of the public wishing to attend the meeting or seeking additional information should contact Mr. Banga at (202) 632–4694.

Dated: October 10, 2012.

By Direction of the Secretary:

Vivian Drake,

Committee Management Officer.

[FR Doc. 2012–25329 Filed 10–15–12; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Disability Compensation, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. App. 2, that the Advisory Committee on Disability Compensation will meet on October 26, 2012, at the Veterans Health Administration National Conference Center, 2011 Crystal Drive, Suite 150A, Arlington, Virginia. The session will begin at 8:30 a.m. and end at 4 p.m. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the maintenance and periodic readjustment of the VA Schedule for

Rating Disabilities. The Committee is to assemble and review relevant information relating to the nature and character of disabilities arising during service in the Armed Forces, provide an ongoing assessment of the effectiveness of the rating schedule, and give advice on the most appropriate means of responding to the needs of Veterans relating to disability compensation.

The Committee will receive briefings on issues related to compensation for Veterans with service-connected disabilities and other VA benefits programs. Time will be allocated for receiving public comments in the afternoon. Public comments will be limited to three minutes each. Individuals wishing to make oral statements before the Committee will be accommodated on a first-come, first-served basis. Individuals who speak are invited to submit 1–2 page summaries of their comments at the time of the meeting for inclusion in the official meeting record.

The public may submit written statements for the Committee's review to Nancy Copeland, Acting Designated Federal Officer, Department of Veterans Affairs, Veterans Benefits Administration, Compensation Service, Regulation Staff (211D), 810 Vermont Avenue NW., Washington, DC 20420, or email at *nancy.copeland@va.gov.* Any member of the public wishing to attend the meeting or seeking additional information should contact Mrs. Copeland at (202) 461–9685.

Dated: October 10, 2012.

By Direction of the Secretary:

Vivian Drake,

Committee Management Officer.

[FR Doc. 2012–25330 Filed 10–15–12; 8:45 am]

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Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Proposed Endangered Status for the Neosho Mucket, Threatened Status for the Rabbitsfoot, and Designation of Critical Habitat for Both Species; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–ES–R4–2012–0031; 4500030113]

RIN 1018–AX73

Endangered and Threatened Wildlife and Plants; Proposed Endangered Status for the Neosho Mucket, Threatened Status for the Rabbitsfoot, and Designation of Critical Habitat for Both Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose to list the Neosho mucket (*Lampsilis rafinesqueana*), a freshwater mussel, as endangered and rabbitsfoot (*Quadrula cylindrica cylindrica*), a freshwater mussel, as threatened under the Endangered Species Act; and propose to designate critical habitat for both species. This rule fulfills our obligation under a settlement agreement. The effect of this regulation is to conserve the Neosho mucket and rabbitsfoot and their habitats under the Endangered Species Act.

DATES: We will accept comments received or postmarked on or before December 17, 2012. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in the **ADDRESSES** section by November 30, 2012.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Keyword box, enter Docket No. FWS–R4–ES–2012–0031, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on ''Send a Comment or Submission.''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R4–ES–2012–0031; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: James F. Boggs, Field Supervisor, U.S. Fish and Wildlife Service, Arkansas Ecological Services Office, 110 South Amity Road, Suite 300, Conway, AR 72032, by telephone 501–513–4470 or by facsimile 501–513–4480. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION: This document consists of: (1) A proposed rule to list the Neosho mucket (*Lampsilis rafinesqueana*) as endangered and rabbitsfoot (*Quadrula cylindrica cylindrica)* as threatened; and (2) a proposed critical habitat designation for both species.

Executive Summary

Why we need to publish a rule. Under the Endangered Species Act (Act), a species may warrant protection through listing if it is endangered or threatened throughout all or a significant portion of its range. The Neosho mucket and rabbitsfoot are highly restricted in their ranges and the threats occur throughout their ranges; therefore, the species qualify for listing. We are proposing to list the Neosho mucket as an endangered species and rabbitsfoot as a threatened species. Their protection under the Act can only be done by issuing a rule.

- We estimate the Neosho mucket has been extirpated (no longer in existence) from approximately 62 percent of its historical range with only 9 of the 16 historical populations remaining (extant). This mussel is declining rangewide (eight of the nine extant populations) with only one remaining large viable population.
- We estimate the rabbitsfoot has been extirpated from approximately 64 percent of its historical range. While 51 of the 140 historical populations are extant (remain), only 11 populations (22 percent of extant populations or 8 percent of the historical populations) are viable; 23 populations (45 percent of extant populations) are at risk of extirpation; and 17 populations (33 percent of extant populations) show limited recruitment with little evidence of sustainability. Rabbitsfoot is extirpated from 2 States within its historical range.
- The majority (8 of the 11 or 73 percent) of the viable rabbitsfoot populations live in waters considered impaired under section 303(d) of the Clean Water Act or have numerous tributaries in their watersheds also listed as impaired. Thus, these mussels are subjected to water quality and quantity and sediment quality constraints. These constraints (impairment) are expected to be exacerbated by increased water demand, habitat degradation, and climate change. Therefore, the viability of the majority of rabbitsfoot populations is uncertain.
- The majority of extant rabbitsfoot populations are marginal to small (40 of 51 extant populations (78 percent)) and isolated (41 of 51 extant populations (80 percent)); because of the isolation, it is unlikely that recruitment between populations or establishment of new populations could occur naturally.
- We are proposing to list the Neosho mucket as an endangered species in Arkansas, Kansas, Missouri, and Oklahoma and the rabbitsfoot as a threatened species in Alabama, Arkansas, Georgia, Kansas, Kentucky, Illinois, Indiana, Louisiana, Mississippi, Missouri, Ohio, Oklahoma, Pennsylvania, Tennessee, and West Virginia.

The basis for our action. Under the Endangered Species Act, a species may be determined to be endangered or threatened based on any of five factors: (1) Destruction, modification, or curtailment of its habitat or range; (2) overuse; (3) disease or predation; (4) inadequate existing regulations; or (5) other natural or manmade factors.

We have determined that both species are threatened by destruction, modification, or curtailment of habitat or range, inadequate existing regulatory mechanisms, and other manmade factors:

This rule designates critical habitat for each species.

- We are proposing to designate critical habitat for the Neosho mucket in Arkansas, Kansas, Missouri, and Oklahoma and for the rabbitsfoot in Alabama, Arkansas, Illinois, Indiana, Kansas, Kentucky, Mississippi, Missouri, Ohio, Oklahoma, Pennsylvania, and Tennessee.
- In total, approximately 779 river kilometers (rkm) (484 river miles (rmi)) in the Cottonwood, Elk, Fall, Illinois, Neosho, Shoal, Spring, North Fork Spring, and Verdigris Rivers are being proposed for designation as critical habitat for the Neosho mucket in Arkansas, Kansas, Missouri, and Oklahoma.
- The proposed critical habitat for the Neosho mucket is located in:
  - Benton and Washington Counties, Arkansas;

○ Allen, Chase, Cherokee, Coffey, Elk, Greenwood, Labette, Montgomery, Neosho, Wilson, and Woodson Counties, Kansas;

○ Jasper, Lawrence, McDonald, and Newton Counties, Missouri; and

○ Adair, Cherokee, and Delaware Counties, Oklahoma.

• In total, approximately 2,662 rkm (1,654 rmi) in the Neosho, Spring (Arkansas River system), Verdigris, Black, Buffalo, Little, Ouachita, Saline, Middle Fork Little Red, Spring (White River system), South Fork Spring, Strawberry, White, St. Francis, Big Sunflower, Big Black, Paint Rock, Duck, Tennessee, Red, Ohio, Allegheny, Green, Tippecanoe, Walhonding, Middle Branch North Fork Vermilion, and North Fork Vermilion Rivers and Bear, French, Muddy, Little Darby and Fish Creeks in Alabama, Arkansas, Kansas, Kentucky, Illinois, Indiana, Mississippi, Missouri, Ohio, Oklahoma, Pennsylvania, and Tennessee are being proposed for designation as critical habitat for the rabbitsfoot.

• The proposed critical habitat for the rabbitsfoot is located in:

○ Colbert, Jackson, Madison, and Marshall Counties, Alabama;

○ Arkansas, Ashley, Bradley, Clark, Cleveland, Dallas, Drew, Fulton, Grant, Hot Spring, Independence, Izard, Jackson, Lawrence, Little River, Marion, Monroe, Montgomery, Newton, Ouachita, Randolph, Saline, Searcy, Sevier, Sharp, Van Buren, White, and Woodruff Counties, Arkansas;

○ Allen and Cherokee Counties, Kansas;

○ Ballard, Green, Hart, Livingston, Logan, Marshall, and McCracken Counties, Kentucky;

○ Massac, Pulaski, and Vermilion Counties, Illinois; Carroll, Pulaski, Tippecanoe, and White Counties, Indiana; Hinds, Sunflower, Tishomingo, and Warren Counties, Mississippi;

○ Jasper, Madison, and Wayne Counties, Missouri;

○ Coshocton, Madison, Union, and Williams Counties, Ohio;

○ McCurtain and Rogers Counties, Oklahoma; Crawford, Erie, Mercer, and Venango Counties, Pennsylvania; and

○ Hardin, Hickman, Marshall, Maury, and Robertson Counties, Tennessee.

Peer review of our methods. During the public comment period, we will obtain review and opinions from knowledgeable individuals with scientific expertise on our technical assumptions, analysis, adherence to regulations, and whether or not we used the best available information in developing the proposed rule.

Information Requested

We intend that any final action resulting from this proposal 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 the public, other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested party concerning this proposed rule. We particularly seek comments concerning:

(1) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to these species and regulations that may be addressing those threats.

(2) Additional information concerning the historical and current status, range, distribution, and population size of these species, including the locations of any additional populations of these species.

(3) Any information on the biological or ecological requirements of the species and ongoing conservation measures for the species and their habitat.

(4) Any information regarding water quality data that may be helpful in determining the water quality parameters necessary for Neosho mucket and rabbitsfoot.

(5) The reasons why we should or should not designate habitat as ''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.

(6) Specific information on:

(a) The amount and distribution of Neosho mucket and rabbitsfoot habitat;

(b) What areas, that were occupied at the time of listing (or are currently occupied) and that contain features essential to the conservation of the species, should be included in the designation and why;

(c) What areas not occupied at the time of listing are essential for the conservation of the species and why.

(7) Land use designations and current or planned activities in the areas occupied by the species or proposed to be designated as critical habitat, and possible impacts of these activities on these species and proposed critical habitat.

(8) Information on the projected and reasonably likely impacts of climate change on the Neosho mucket and rabbitsfoot and proposed critical habitat.

(9) Any foreseeable economic, national security, or other relevant impacts that may result from designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities, and the benefits of including or excluding areas from the proposed designation that are subject to these impacts.

(10) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

(11) The likelihood of adverse social reactions to the designation of critical habitat and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species must be made ''solely on the basis of the best scientific and commercial data available.''

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We request that you send comments only by the methods described in the **ADDRESSES** section.

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.* Please include sufficient information with your comments to allow us to verify any scientific or commercial information you include.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Arkansas Ecological Services Office, Conway, Arkansas (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

Neosho Mucket

The Neosho mucket was first identified as a candidate for protection under the Act in the May 22, 1984, **Federal Register** (49 FR 21664) notice. As a candidate, it was assigned a status Category 2 designation, which was given to those species with some evidence of vulnerability but for which additional biological information was needed to support a proposed rule to list as endangered or threatened. In our Notices of Review dated January 6, 1989 (54 FR 554), November 21, 1991 (56 FR 58804), and November 15, 1994 (59 FR 58982), we retained a status Category 2 designation for this species. We discontinued assigning categories to candidate species in our Notice of Review dated February 28, 1996 (61 FR 7596), and only species for which the Service had sufficient information on biological vulnerability and threats to support issuance of a proposed rule were regarded as candidate species. Thus, Neosho mucket was no longer considered a candidate species.

On October 30, 2001, we identified the Neosho mucket in the **Federal Register** (66 FR 54808) as a candidate species based on available information to support a proposed rule. Candidate species are assigned listing priority numbers (LPNs) based on immediacy and magnitude of threats, as well as taxonomic status. The lower the LPN, the higher priority that species is for us to determine appropriate action using our available resources. We assigned an LPN of 5 to Neosho mucket. In our Notices of Review dated June 13, 2002 (67 FR 40657), and May 4, 2004 (69 FR 24876), we maintained an LPN of 5.

We published a petition finding for the Neosho mucket on May 11, 2005 (70 FR 24870), in response to a petition received on May 11, 2004, stating in the finding that the Neosho mucket would retain an LPN of 5. In our Notices of Review dated September 12, 2006 (71 FR 53756), December 6, 2007 (72 FR 69034), and December 8, 2008 (73 FR 75176), we maintained an LPN of 5, reflecting the nonimminent threats of high magnitude. The LPN was elevated to 2 in our Notice of Review dated November 10, 2010 (75 FR 69222), to reflect the change from nonimminent to imminent threats of high magnitude.

Rabbitsfoot

The rabbitsfoot was first identified as a candidate for protection under the Act in the November 15, 1994, **Federal Register** (59 FR 58982). As a candidate, it was assigned a status Category 2 designation. The category 2 list was eliminated in 1996 (61 FR 7596). On November 9, 2009, we added the rabbitsfoot to our candidate list in the **Federal Register** (74 FR 57804) with an LPN of 9. An LPN of 9 indicates threats of a moderate magnitude; some of the threats are nonimminent, most are ongoing, and the threats are imminent overall. In our Notice of Review dated November 10, 2010 (75 FR 69222), it was again identified as a candidate species with an LPN of 9.

Status Assessment for Neosho Mucket and Rabbitsfoot

Background

It is our intent to discuss below only those topics directly relevant to the listing of the Neosho mucket as endangered and the rabbitsfoot as threatened in this section of the proposed rule.

Introduction

North American freshwater mussel fauna is the richest in the world and historically numbered around 300 species (Williams *et al.* 1993, p. 6). Freshwater mussels are in decline, however, and in the past century have become more imperiled than any other group of organisms (Williams *et al.* 2008, p. 55). Approximately 66 percent of North America's freshwater mussel species are considered vulnerable to extinction or possibly extinct (Williams *et al.* 1993, p. 6). Within North America, the southeastern United States is the hot spot for mussel diversity. Seventy-five percent of southeastern mussel species are in varying degrees of rarity or possibly extinct (Neves *et al.* 1997, pp. 47–51). The central reason for the decline of freshwater mussels is the modification and destruction of their habitat, especially from sedimentation, dams, and degraded water quality (Neves *et al.* 1997, p. 60). These two mussels, like many other southeastern mussel species, have undergone reductions in total range and population density.

General Biology

Freshwater mussels generally live embedded in the bottom of rivers, streams, and other bodies of water. They siphon water into their shells and across four gills that are specialized for respiration and food collection. Food items include algae, bacteria, detritus (disintegrated organic debris), and microscopic animals (Strayer *et al.* 2004, pp. 430–431). It also has been surmised that dissolved organic matter may be a significant source of nutrition (Strayer *et al.* 2004, p. 430). Adults are filter feeders and generally orient themselves on or near the substrate surface to take in food and oxygen from the water column. Juveniles typically burrow completely beneath the substrate surface and are pedal (foot) feeders (bringing food particles inside the shell for ingestion that adhere to the foot while it is extended outside the shell) until the structures for filter feeding are more fully developed (Yeager *et al.* 1994, pp. 200–221; Gatenby *et al.* 1996, p. 604).

Sexes in unionid (refers to taxonomic family Unionidae) mussels, such as the Neosho mucket and rabbitsfoot, are usually separate. Males release sperm into the water column, which are drawn in by females through their siphons during feeding and respiration. Fertilization takes place inside the shell, and success is apparently influenced by mussel density and water flow conditions (Downing *et al.* 1993, pp. 153–154). The eggs are retained in the gills of the female until they develop into mature larvae called glochidia. The glochidia of most freshwater mussel species, including the two species addressed in this rule, have a parasitic stage during which they must attach to the gills, fins, or skin of a fish to transform into a juvenile mussel. Depending on the mussel species, females release glochidia either separately, in masses known as conglutinates (gelatinous or jelly-like), or in one large mass known as a super-conglutinate. The duration of the parasitic stage varies by mussel species, water temperature, and perhaps host fish species. When the transformation is complete, the juvenile mussels drop from their fish host and sink to the stream bottom where, given suitable conditions, they grow and mature into adults. Host specificity is discussed in more detail below.

Growth rates for mussels are highly variable among individual mussel species, but overall, mussels tend to grow relatively rapidly for the first few years (Scruggs 1960, pp. 28–30; Negus 1966, pp. 517–518) then slow appreciably (Bruenderman and Neves 1993, p. 88; Hove and Neves 1994, pp. 34–36). This reduction in growth rate is correlated to sexual maturity, probably as a result of energy being diverted from growth to gamete production (Baird 2000, pp. 63–71). Heavy-shelled species, such as Neosho mucket and rabbitsfoot, grow slowly relative to thin-shelled species (Coon *et al.* 1977, pp. 19–21; Hove and Neves 1994, p. 38).

Strayer (1999a, pp. 468 and 472) demonstrated that mussels in streams occur chiefly in ''flow refuges'' (relatively stable areas that displayed little movement of substrate particles during flood events). Other researchers

also concluded that mussel location and density are greatest in areas where shear stress (stream's ability to entrain and transport bed material created by the flow acting on the bed material) is low and sediments remain generally stable during flooding (Layzer and Madison 1995, p. 341; Strayer 1999a, pp. 468 and 472; Hastie *et al.* 2001, pp. 111–114). These ''flow refuges'' conceivably allow relatively immobile mussels, such as the Neosho mucket and rabbitsfoot, to remain in the same general location throughout their life span. However, these areas may be more important for the rabbitsfoot since it typically does not burrow like the Neosho mucket, making it more susceptible to displacement into unsuitable habitat. However, flow refuges are not created equally and other habitat variables are important, but poorly understood (Roberts 2008, pers. comm.).

Taxonomy, Life History, and Distribution

The Neosho mucket and rabbitsfoot are freshwater mussels in the family Unionidae. Both species are currently deemed valid by the Committee on Scientific and Vernacular Names of Mollusks of the Council of Systematic Malacologists and the American Malacological Union (Turgeon *et al.* 1998, pp. 35 and 37).

Neosho Mucket

Neosho mucket was originally described as *Lampsilis rafinesqueana* from Indian Creek, McDonald County, Missouri (Frierson 1927, pp. 69–70). There is no synonomy (scientific names previously describing the same species) of the Neosho mucket. Frierson (1927, pp. 69–70) described the Neosho mucket as a dimorphic (male and female shape differs) species; the male is elliptical, rounded before biangulate behind, with dorsal and basal margin equally arched, while the female is ovate with a widely expanded fan-shaped posterior. The shell is up to 9.5 centimeters (cm) (4 inches (in)), compressed, and relatively thin (Oesch 1984, pp. 219–221). The epidermis is olive-yellow to brown, becoming darker brown with age; green rays cover the surface, but are often discontinuous. Oesch (1984, pp. 219–221) describes the left valve as having two stout, divergent, striated, triangular pseudocardinal teeth. The two lateral teeth are short, stout, and slightly curved. The right valve has a single, tall, triangular to columnar, striated pseudocardinal tooth. The nacre (crystalline carbonate shell material of freshwater mussels) is bluish white to white.

Neosho mucket glochidia are an obligate parasite on smallmouth bass (*Micropterus dolomieu*), largemouth bass (*Micropterus salmoides*), and spotted bass (*Micropterus punctulatus*) (Barnhart and Roberts 1997, p. 18; U.S. Fish and Wildlife Service 2005, p. 7). Neosho mucket is unusual among other *Lampsilis* species in the timing of reproduction. Neosho mucket spawns in late April and May, and female brooding occurs May through August. Most other *Lampsilis* spawn in the late summer or fall and brood glochidia throughout the winter months into the following spring or summer. Barnhart (2003, p. 9) reported an average fecundity to be approximately 1.3 million glochidia per female in the Spring River, Kansas. The female Neosho mucket inflates and extends a pair of mantle flaps (actually an extension of the inner lobe of the mantle edge) that, from a side angle, remarkably resembles a small fish. Each mantle flap in addition to its fish-like shape has pigmentation that resembles an eyespot as well as a fish's lateral line. Muscular contractions of the mantle flaps create an undulating or ''swimming'' motion that suffices to lure fish hosts (Obermeyer 2000, p. 9).

The Neosho mucket is associated with shallow riffles and runs comprising gravel substrate and moderate to swift currents. The species is most often found in areas with swift current, but in Shoal Creek and the Illinois River it prefers near-shore areas or areas out of the main current (Oesch 1984, p. 221; Obermeyer 2000, pp. 15–16). Neosho mucket historically occurred in at least 16 streams within the Illinois, Neosho, and Verdigris River basins covering four states (Arkansas, Kansas, Oklahoma, and Missouri). It is endemic to the Arkansas River system (Gordon 1980, pp. 318 and 347; Harris and Gordon 1987, pp. 53–54; Obermeyer 1996, pp. 3–4; Vaughn 1996, pp. 3–5; Mather 1990, pp. 7–13; Obermeyer *et al.* 1997a, pp. 44–47; Harris *et al.* 2009, p. 68). The Neosho mucket's known river and creek occurrences and current status are shown in Table 1.

For the purposes of this rule, a population is considered extant if live individuals or fresh dead specimens have been located since 1985. A population is considered viable if it is sizeable, comprised of different age classes, recruiting juveniles, and able to sustain itself over several decades without human intervention (Butler 2005, p. 23). Population trend estimates were generally made with a 20- to 30-year perspective when adequate historical information was available. Populations were deemed to have improving, stable, declining, or unknown status (Table 1).

TABLE 1—NEOSHO MUCKET RIVER AND CREEK OCCURRENCES AND CURRENT POPULATION STATUS

River basin	River/Creek	State(s)	Current status	Date of last observation
Neosho River	Neosho River	KS, OK	Declining	2000.
	Cottonwood River	KS	Unknown	2011.
	South Fork Cottonwood River	KS	Extirpated	Pre-1979.
	Spring River	KS, MO, OK	Stable	2010.
	North Fork Spring River	MO	Declining	1995.
	Center Creek	KS, MO	Extirpated	1995.
	Shoal Creek	KS, MO	Declining	2001.
	Elk River	MO, OK	Declining	1995.
	Indian Creek	MO	Extirpated	Pre-1980.
	Little Sugar Creek	MO	Extirpated	Pre-1980.
Illinois River	Illinois River	AR, OK	Declining	2008
Verdigris River	Verdigris River	KS, OK	Declining	2010
	Otter Creek	KS	Extirpated	Pre-1993.
	Fall River	KS	Declining	2004.
	Elk River	KS	Extirpated	Pre-1979.
	Caney River	KS, OK	Extirpated	Pre-1979.

Neosho River Basin

Neosho River: The Neosho River drains southeast through Kansas and Oklahoma. Historical data of Neosho mucket densities for the Neosho River are not available prior to the late 1970s (Obermeyer *et al.* 1997b, p. 112). Mussel harvest records from the early 1900s provide useful insight on the abundance of mussels in the river. From 1911 through 1912, the Neosho River provided 17 percent or approximately 85 million mussels used in the nation's pearl button industry. Many of the 30 tons of mussel shells processed weekly in 1918 at a shell blank factory in Iola, Kansas, came from the Neosho River near LeRoy, Kansas (Obermeyer *et al.* 1997b, p. 112).

Since the 1990s, extant populations have been found downstream of John Redmond Reservoir Dam to near Parsons, Kansas, in Allen, Coffey, Labette, and Neosho Counties, Kansas. In addition, fresh dead or relict (shell shows no sign of recent mortality, such as tissue inside shell or outer shell material (periostracum) is weathered) shells were collected at 11 sites extending to near the Kansas–Oklahoma state line in Cherokee County, Kansas (Obermeyer *et al.* 1997a, pp. 44–46; Obermeyer 2000, pp. 8–9). In 1994, Obermeyer *et al.* (1995, p. 24) collected 32 live Neosho mucket specimens (relative abundance = 0.6 percent) at 7 of 19 sites in Kansas. The Neosho mucket is becoming increasingly rare in the Oklahoma segment of the river (Tabor 2011, pers. comm.) with searches yielding no live or recently dead specimens. However, relict Neosho mucket shells confirm the historical presence of the species (Mather 1990, pp. 16–17; Vaughn 1996, p. 3; 1997, pp. 7–9).

Cottonwood River: The Cottonwood River drains easterly through eastern Kansas. There are few historical records of Neosho mucket from the Cottonwood River prior to the late 1970s. Obemeyer *et al.* (1997a, p. 111) collected 59 live mussels from 6 sites surveyed from 1993 through 1995, but only found weathered dead shells of Neosho mucket. Neosho mucket was considered extirpated from the Cottonwood River until Kansas Department of Wildlife and Parks (KDWP) reintroduced mature male and brooding female Neosho mucket individuals at two sites east of Cottonwood Falls, Chase County, Kansas, in 2011 (Tabor and Barnhart 2012, pers. comm.).

Spring River: The Spring River drains southwesterly through southwest Missouri, southeast Kansas, and eastern Oklahoma. There are few historical records of Neosho mucket from the Spring River prior to the late 1970s. Miscellaneous records from 1979 to 2010 report 10 localities yielding 119 live Neosho mucket specimens between Missouri Highway 97 near Stott City, Lawrence County, Missouri, and the Missouri and Kansas state line (McMurray 2011, pers. comm.). Cope (1985, pp. 19–20, 26–27, 33–34) collected 424 live Neosho mucket specimens out of 993 live mussels collected in 79 total one-square-meter quadrat samples from three Kansas sites upstream of Empire Lake.

Obermeyer (1996, p. 11) provides the most comprehensive status assessment of Neosho mucket in the Spring River. He collected 1,104 live Neosho mucket specimens from 13 of 20 sites extending from Missouri Highway 97 downstream to near the Turkey Creek confluence in Kansas. The KDWP surveyed a site approximately 0.5 to 0.8 rkm (0.3 to 0.5 rmi) downstream of the Kansas and Missouri state line in 2003 and collected 201 live Neosho mucket specimens (approximately 30 percent of live mussels collected). In 2006, KDWP collected 141 live Neosho mucket specimens (approximately 30 percent of live mussels collected) at a site just upstream of the Kansas and Missouri Highway YY (Miller 2011, pers. comm.). Eight to 10 percent of live Neosho mucket specimens collected at the 2006 site were quantitatively aged at less than 5 years (Tabor 2008, pers. comm.). A 2010 survey, 6 km (4 miles) east of Crestline, Kansas, found 400 live mussel specimens, of which approximately half were Neosho mucket (Tabor 2011, pers. comm.). The Spring River Neosho mucket population represents the only viable population rangewide.

North Fork Spring River: The North Fork Spring River is a tributary of the Spring River in Missouri. There are no historical records for Neosho mucket in the North Fork Spring River prior to 1980. Neosho mucket distribution is limited to a few sites downstream of the Dry Fork confluence southwest of Jasper, Jasper County, Missouri. Three sites yielded 136 live Neosho mucket specimens in the mid 1990s (Obermeyer *et al.* 1997a, p. 45; McMurray 2011, pers. comm.).

Shoal Creek: Shoal Creek is a southern tributary of the Spring River draining portions of southwest Missouri and southeast Kansas. There are few historical records for Neosho mucket in Shoal Creek prior to 1979. Surveys of Shoal Creek conducted from 1979 to 2001 from Missouri Highway W near Ritchey, Missouri, to Empire Lake, Cherokee County, Kansas, yielded 75 live Neosho mucket specimens from 11 sites (Obermeyer *et al.* 1995, p. 45; McMurray 2011, pers. comm.). No specimens were found in the Kansas portion of Shoal Creek.

Elk River: The Elk River, a tributary of the Spring River, drains southwestern Missouri and northeastern Oklahoma. The Oklahoma reach downstream of Buffalo Creek just west of the Missouri and Oklahoma state line is inundated by Grand Lake O' the Cherokees, resulting in the loss of Neosho mucket habitat. Live Neosho mucket individuals have been collected from two sites in Missouri, eight individuals in 1978 and two individuals in 1995, and the species is rare from Noel, Missouri, to the Kansas and Missouri state line (McMurray 2011, pers. comm.). Brooding Neosho mucket females and juveniles were reported in this reach at two sites in 1992 and 1998 (Barnhart 2008, pers. comm.).

Illinois River Basin

Illinois River: The Illinois River drains portions of northwest Arkansas and northeast Oklahoma. There are few historical records of Neosho mucket from the Illinois River prior to the late 1970s. In 1978, Gordon *et al.* (1979, pp. 35–36) surveyed 16 sites between Hogeye and Siloam Springs, Arkansas, but only report Neosho mucket as part of the mussel fauna. Eighteen live Neosho mucket specimens were reported from four Arkansas locations in the early 1990s, including the only specimen ever collected from the Muddy Fork Illinois River (Harris 1991, p. 7; Environmental and Gas Consulting, Inc. 1994, pp. field data sheets). Harris (1998) conducted a status survey of the Neosho mucket and found live specimens at 19 of 22 sites in the 48 rkm (30 rmi) reach, Washington and Benton Counties, Arkansas. Neosho mucket was the third most abundant species collected, but there was little evidence of recent recruitment (Harris 1998, p. 5).

In 2005, 92 live Neosho mucket specimens were collected from two Benton County, Arkansas, sites (Robinson Road Bridge and 800 m (2,624 feet) downstream of Chambers Spring Road, Benton County, Arkansas; Posey 2005, pers. comm.). The Arkansas Game and Fish Commission (AGFC) and the Service conducted a comprehensive status survey for Neosho mucket in the Arkansas portion of the Illinois River in 2008. Live specimens of Neosho mucket were collected at 9 of 15 survey sites. There was a 32 and 53 percent decline in number of extant (still in existence) mussel sites and sites inhabited by live Neosho mucket specimens, respectively, versus the Harris (1998) status survey. Sixty-seven percent of the sites with

Neosho mucket present were represented by three or fewer live specimens. Neosho mucket was the fourth most abundant species in this portion of the river, but 3 sites accounted for 85 percent of live Neosho mucket specimens (52 individuals) collected during this survey. Of the 15 survey sites, only 2 appear stable with the rest in decline, indicating imminent extirpation. No mussels were collected at the sites AGFC sampled in 2005 in 2008 further documenting the precipitous decline of mussels in the Arkansas portion of the Illinois River (Davidson 2011, pers. comm.).

Neosho mucket was locally common prior to the late 1990s in approximately 89 rkm (55 rmi) of the Illinois River from the Oklahoma and Arkansas state line downstream to Lake Tenkiller, Cherokee County, Oklahoma (Mather 1990, pp. 7–11). The population within the survey reach was estimated at more than 1,200 individuals in 1990. In 1995, Vaughn (1995, p. 3; 1997, p. 14) estimated the Neosho mucket population in the same reach surveyed by Mather in 1990 at between 500 and 1,000 individuals and locally common at 9 of 52 sites. Although some evidence of reproductive potential was observed during 1990 and 1995 (for example, gravid females displaying mantle lures), there was little evidence of recruitment into the population. Neosho mucket specimens were not found in or downstream of Lake Tenkiller.

Verdigris River Basin

Fall River: The Fall River is a southern tributary of the Verdigris River in southeast Kansas. There are few historical records from the Fall River prior to the mid 1990s (Obermeyer *et al.* 1995, p. 24). In 1994, Obermeyer *et al.* (1995 p. 24) found 34 live specimens (relative abundance = 1.7 percent) from 5 sites in the Fall River, with little evidence of recruitment into the population. In 2004, two sites were resurveyed and Neosho mucket composed 1.0 and 0.5 percent of qualitative and quantitative surveys, respectively (Tabor 2008, pers. comm.). All specimens were found downstream of Fall River Lake in Greenwood, Elk, and Wilson Counties (Obermeyer *et al.* 1995, p. 24).

Verdigris River: The Verdigris River flows through southeast Kansas and northeast Oklahoma until it reaches the Arkansas River in Oklahoma. There are few historical records from the Verdigris River in either State prior to the 1990s. Obermeyer *et al.* (1997a, p. 44; 1997b, p. 111) collected five Neosho mucket specimens from 4 of 14 sites from 1993 to 1995, representing 0.2 percent of the total sample from the Verdigris River between Altoona, Wilson County, Kansas, and Sycamore, Montgomery County, Kansas. The KDWP surveyed eight sites between the Fall and Verdigris River and Elk and Verdigris River confluences in 2003 and 2010. Six live Neosho mucket specimens were collected from two of these sites in 2003 (0.1 percent of the total mussel community) and seven live specimens from four sites in 2010 (0.2 percent of the total mussel community). Overall relative abundance of Neosho mucket in the Verdigris River in Kansas has ranged between 0.1 to 0.3 percent in the years from 1993 to 2010 (Miller 2011, pp. 1–2).

The majority of the Oklahoma reach has been inundated (Oologah Lake) and channelized as part of the McClellan-Kerr Arkansas River Navigation System. In 1996 and 1997, searches in the Verdigris in Oklahoma found no live Neosho mucket specimens at 32 sites. However, relict Neosho mucket shells confirmed the historical presence of the species (Vaughn 1996, p. 3; 1997, pp. 7–9). In 2008, researchers confirmed that the species is still extirpated from the Oklahoma reach (Boeckman 2008, pers. comm.).

Summary of Neosho Mucket Rangewide Population Status

The Neosho mucket is declining rangewide, with the exception of one population. Based on historical and current data, Neosho mucket has been extirpated from approximately 1,342 rkm (834 rmi) of its historical range (62 percent). Most of this extirpation has occurred within the Oklahoma and Kansas portions of its range. The extirpation of this species from numerous streams and stream reaches within its historical range signifies that substantial population losses have occurred. Extant populations are disjunct (not contiguous) in approximately 819 rkm (509 rmi). The Spring River in Missouri supports the only viable population based on the presence of a large number of individuals and evidence of recent recruitment. Given this compilation of current distribution, abundance, and status trend information, the Neosho mucket exhibits range reductions and population declines throughout its range.

Rabbitsfoot

The rabbitsfoot was originally described as *Unio cylindricus* (Say, 1817, no pagination but p. 13 of publication). The type locality is the Wabash River (Parmalee and Bogan 1998, p. 210), probably in the vicinity of New Harmony, Posey County, Indiana, and adjacent Illinois. Parmalee and Bogan (1998, p. 210) summarize the synonomy of the rabbitsfoot. The rabbitsfoot has been considered a member of the genera *Unio, Mya, Margarita, Margaron,* and *Orthonymus* at various times in history. It was first considered a member of the genus *Quadrula* by Lewis (1870, p. 218). The description of *U. cylindricus strigillatus* B.H. Wright, 1898 (=*Q. cylindrica strigillata,* the federally endangered rough rabbitsfoot; Turgeon *et al.* 1998, p. 37), rendered the rabbitsfoot, *Q. c. cylindrica,* a subspecies for *Q. cylindrica.* Davis and Fuller (1981, p. 241) and Sproules *et al.* (2006, p. 3) conducted taxonomic and genetic studies on the rough rabbitsfoot (*Q. c. strigillata*) and rabbitsfoot (*Q. c. cylindrica*). Although discussion continues over the correct taxonomic placement of the rabbitsfoot, the designation of the rabbitsfoot as a species would not affect its qualification for listing under the Act as it would qualify as a listable entity whether it was a subspecies or a species.

The rabbitsfoot is a medium to large mussel, elongate and rectangular, reaching 12 cm (6 inches) in length (Oesch 1984, pp. 91–93). Parmalee and Bogan (1998, pp. 210–212) describe the beaks as moderately elevated and raised only slightly above the hinge line. Beak sculpture consists of a few strong ridges or folds continuing onto the newer growth of the umbo (raised or domed part of the dorsal margin of the shell) as small tubercles (small, rounded projection on surface of the shell). Shell sculpture consists of a few large, rounded, low tubercles on the posterior slope, although some individuals will have numerous small, elongated pustules (small raised spots) particularly on the anterior. The periostracum (external shell surface) is generally smooth and yellowish, greenish, or olive in color becoming darker and yellowish-brown with age and usually covered with dark green or nearly black chevrons and triangles pointed ventrally (Say 1817, p. 13). These patterns are absent in some individuals.

Internally, the color of the nacre is white and iridescent, often with a grayish-green tinge in the umbo cavity. Specimens from the southern periphery of its range are occasionally purplish. Soft parts generally have an orange coloration (Oesch 1984, p. 91; Parmalee and Bogan 1998, pp. 211–212). However, Vidrine (1993, p. 55) noted that the rabbitsfoot in the Ouachita River system in Louisiana had black soft parts. Aspects of the soft anatomy are

described by Ortmann (1912, pp. 256–257), Utterback (1915, pp. 148–149), Davis and Fuller (1981, pp. 228–233 and 241), and Oesch (1984, p. 91).

Suitable fish hosts for rabbitsfoot populations west of the Mississippi River include blacktail shiner (*Cyprinella venusta*) from the Black and Little River and cardinal shiner (*Luxilus cardinalis*), red shiner (*C. lutrensis*), spotfin shiner (*C. spiloptera*), and bluntface shiner (*C. camura*) from the Spring River, but host suitability information is lacking for the eastern range (Fobian 2007, p. ii). In addition, rosyface shiner (*Notropis rubellus*), striped shiner (*L. chrysocephalus*), and emerald shiner (*N. atherinoides*) served as hosts for rabbitsfoot, but not in all stream populations tested (Fobian 2007, p. 69).

Rabbitsfoot populations west of the Mississippi River reach sexual maturity between the ages of 4 to 6 years (Fobian 2007, p. 50). Rabbitsfoot exhibit seasonal movement towards shallower water during brooding periods, a strategy to increase host fish exposure but one that also leaves them more vulnerable to predation and fluctuating water levels, especially downstream of dams (Fobian 2007, pp. 48–49; Barnhart 2008, pers. comm.). It is a short–term brooder, with females brooding between May and late August (Fobian 2007, pp. 15–16). Similar to other species of *Quadrula,* the rabbitsfoot uses all four gills as a marsupium (pouch) for its glochidia (Fobian 2007, p. 26). Female rabbitsfoot release glochidia as conglutinates (matrices holding numerous glochidia together and embryos and undeveloped ova), which mimic flatworms or similar fish prey. Fecundity (capacity of abundant production) in river basins west of the Mississippi River ranged from 46,000 to 169,000 larvae per female (Fobian 2007, p. 19).

Rabbitsfoot is primarily an inhabitant of small to medium sized streams and some larger rivers. It usually occurs in shallow water areas along the bank and adjacent runs and shoals with reduced water velocity. Specimens also may occupy deep water runs, having been reported in 2.7 to 3.7 m (9 to 12 feet) of water. Bottom substrates generally include gravel and sand (Parmalee and Bogan 1998, pp. 211–212). This species seldom burrows but lies on its side (Watters 1988, p. 13; Fobian 2007, p. 24).

Rabbitsfoot historically occurred in 140 streams within the lower Great Lakes Subbasin and Mississippi River Basin (Table 2). The historical range included Alabama, Arkansas, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Ohio, Oklahoma, Pennsylvania, Tennessee, and West Virginia. Rabbitsfoot populations are considered to be extant in 51 streams in 13 states (Butler 2005, pp. 18–20; Boeckman 2008, pers. comm.), representing a 64 percent decline (51 extant streams of 140 historical populations). In streams where it remains extant, populations are highly fragmented and restricted to short reaches. Based upon existing habitat use (need for flowing vs. impounded habitats) and fish host (small minnow species with limited individual ranges) data, it is unlikely that recruitment between populations or establishment of new populations could occur naturally.

Although quantitative historical abundance data are rare for rabbitsfoot, relative abundance information can be gathered from museum lots. Historical museum data indicated stable rabbitsfoot populations occurred in the Ohio, Walhonding, Big Sandy, Scioto, Olentangy, Nolin, Wabash, North Fork Vermilion, Obey, Tennessee, White, Black, Spring (White River system), Strawberry, Illinois, Glover and Cossatot Rivers (Butler 2005, p. 20). Call (1895, p. 15) considered the rabbitsfoot ''abundant in the St. Francis, Saline, and Ouachita Rivers in Arkansas.''

TABLE 2—RABBITSFOOT RIVER AND CREEK OCCURRENCES AND CURRENT POPULATION STATUS

River basin	River/Creek	States	Current status	Date of last observation
Lower Great Lakes	Maumee River	IN, OH	Extirpated	1927.
	St. Joseph River	IN, OH	Extirpated	1967.
	Fish Creek	IN, OH	Declining	2009.
	Feeder Canal	IN	Extirpated	1908.
	St. Mary's River	IN	Extirpated	Circa 1920.
	Auglaize River	OH	Extirpated	Mid 1900s.
Ohio River	Ohio River	IL, IN, KY, OH, PA, WV.	Stable	2005.
	Allegheny River	PA	Declining	2007.
	French Creek	PA	Stable	2008.
	Le Boeuf Creek	PA	Unknown	2006.
	Muddy Creek	PA	Declining	2003.
	Conneautee Creek	PA	Unknown	2006.
	Monongahela River	PA	Extirpated	Circa 1890.
	West Fork River	WV	Extirpated	Pre-1913.
	Beaver River	PA	Extirpated	1898.
	Shenango River	PA	Unknown	2009.
	Pymatuning Creek	PA	Extirpated	1909.
	Mahoning River	OH, PA	Extirpated	Unknown.
	Muskingum River	OH	Declining	2007.
	Tuscarawas River	OH	Extirpated	Circa 1990.
	Walhonding River	OH	Declining	2009.
	Killbuck Creek	OH	Extirpated	Pre-1990.
	Mohican River	OH	Extirpated	1977.
	Black Fork Mohican River	OH	Extirpated	Pre-1990.
	Little Kanawha River	WV	Extirpated	Circa 1900.
	Elk River	WV	Extirpated	Unknown.
	Big Sandy River	KY	Extirpated	Circa 1800.
	Levisa Fork	KY	Extirpated	1909.
	Scioto River	OH	Extirpated	1962.
	Olentangy River	OH	Extirpated	1962.
	Whetstone Creek	OH	Extirpated	Pre-1930.

TABLE 2—RABBITSFOOT RIVER AND CREEK OCCURRENCES AND CURRENT POPULATION STATUS—Continued

River basin	River/Creek	States	Current status	Date of last observation
	Big Walnut Creek	OH	Extirpated	1961.
	Alum Creek	OH	Extirpated	1961.
	Walnut Creek	OH	Extirpated	Pre-1990.
	Big Darby Creek	OH	Declining	2002.
	Little Darby Creek	OH	Declining	2000.
	Deer Creek	OH	Extirpated	Pre-1980.
	Ohio Brush Creek	OH	Extirpated	1970.
	Little Miami River	OH	Extirpated	Circa 1900.
	Licking River	KY	Extirpated	Circa 1990.
	South Fork Licking River	KY	Extirpated	Pre-1980.
	Kentucky River	KY	Extirpated	Circa 1920.
	South Fork Kentucky River	KY	Declining	1998.
	Salt River	KY	Extirpated	Pre-1980.
	Green River	KY	Improving	2009.
	Russell Creek	KY	Extirpated	1908.
	Nolin River	KY	Extirpated	1983.
	Barren River	KY	Declining	1993.
	Drakes Creek	KY	Extirpated	1926.
	West Fork Drakes Creek	KY	Extirpated	1927.
	Rough River	KY	Declining	1993.
	Wabash River	IL, IN	Declining	1988.
	Mississinewa River	IN	Extirpated	Pre-1990.
	Eel River	IN	Declining	2007.
	Tippecanoe River	IN	Stable	2005.
	Vermilion River	IL	Extirpated	Pre-1990.
	North Fork Vermilion River	IL	Declining	2006.
	Middle Branch North Fork Vermilion River	IL	Declining	2002.
	Middle Fork Vermilion River	IL	Extirpated	1918.
	Salt Fork Vermilion River	IL	Extirpated	Circa 1920.
	Sugar Creek	IN	Extirpated	1932.
	Embarras River	IL	Extirpated	Circa 1980.
	White River	IN	Extirpated	Circa 1960.
	East Fork White River	IN	Extirpated	1964.
	Driftwood River	IN	Extirpated	Circa 1940s.
	Big Blue River	IN	Extirpated	Early 1900s.
	Brandywine Creek	IN	Extirpated	Pre-1990.
	Sugar Creek	IN	Extirpated	Mid 1990s.
	Flatrock River	IN	Extirpated	Mid 1900s.
	West Fork White River	IN	Extirpated	Pre-1990.
	Black Creek	IN	Extirpated	Unknown.
Cumberland River	Cumberland River	KY, TN	Extirpated	1979.
	Rockcastle River	KY	Extirpated	1911.
	Big South Fork	KY	Extirpated	1911.
	Beaver Creek	KY	Extirpated	1949.
	Obey River	TN	Extirpated	1939.
	East Fork Obey River	TN	Extirpated	Unknown.
	Caney Fork	TN	Extirpated	1961.
	Stones River	TN	Extirpated	1964.
	East Fork Stones River	TN	Declining	2002.
	West Fork Stones River	TN	Extirpated	1966.
	Harpeth River	TN	Extirpated	Late 1800s.
	Red River	KY, TN	Declining	1992.
	Whippoorwill Creek	KY	Extirpated	Pre-1980.
Tennessee River	Tennessee River	AL, KY, MS, TN	Stable	2009.
	Holston River	TN	Extirpated	1915.
	French Broad River	TN	Extirpated	Unknown.
	Little Pigeon River	TN	Extirpated	Unknown.
	Little Tennessee River	TN	Extirpated	Unknown.
	Clinch River	TN	Extirpated	1935.
	Lookout Creek	GA	Extirpated	1973.
	Sequatchie River	TN	Extirpated	Pre-1925.
	Paint Rock River	AL	Improving	2007.
	Hurricane Creek	AL	Extirpated	1991.
	Estill Fork	AL	Extirpated	1970.
	Larkin Fork	AL	Extirpated	1966.
	Flint River	AL	Extirpated	1955.
	Elk River	TN	Declining	2006.
	Shoal Creek	AL, TN	Extirpated	Pre-1990.
	Bear Creek	AL, MS	Declining	2005.
	Duck River	TN	Improving	2009.
	Big Rock Creek	TN	Extirpated	Pre-1990.

TABLE 2—RABBITSFOOT RIVER AND CREEK OCCURRENCES AND CURRENT POPULATION STATUS—Continued

River basin	River/Creek	States	Current status	Date of last observation
	Buffalo River	TN	Extirpated	1969.
Lower Mississippi River	St. Francis River	AR, MO	Declining	2008.
	Big Creek	MO	Extirpated	1976.
	Yazoo River	MS	Extirpated	Unknown.
	Big Sunflower River	MS	Declining	2004.
	Big Black River	MS	Declining	1980.
White River	White River	AR, MO	Stable	2004.
	War Eagle Creek	AR	Unknown	2004.
	Buffalo River	AR	Declining	1995.
	North Fork White River	AR	Extirpated	1914.
	Black River	AR, MO	Declining	2005.
	Current River	AR	Declining	1983.
	Spring River	AR	Declining	2004.
	South Fork Spring River	AR	Declining	2002.
	Strawberry River	AR	Unknown	2006.
	Little Red River	AR	Extirpated	Circa 1970.
	Middle Fork Little Red River	AR	Stable	2009.
	Reeses Fork Cache River	AR	Extirpated	1980.
Arkansas River	Verdigris River	KS, OK	Unknown	2009.
	Fall River	KS	Extirpated	Circa 1900.
	Neosho River	KS, OK	Declining	1999.
	Cottonwood River	KS	Extirpated	Pre-1990.
	Spring River	KS, MO	Declining	2006.
	Center Creek	MO	Extirpated	Circa 1920.
	Shoal Creek	MO	Extirpated	Pre-1920.
	Illinois River	AR, OK	Declining	2008.
Red River	Blue River	OK	Extirpated	Circa 1900.
	Little River	AR, OK	Stable	2006.
	Glover River	OK	Declining	1996.
	Mountain Fork Little River	OK	Extirpated	1968.
	Cossatot River	AR	Declining	2007.
	Ouachita River	AR, LA	Stable	2007.
	Caddo River	AR	Extirpated	Pre-1986.
	Little Missouri River	AR	Declining	1996.
	Saline River	AR	Declining	2006.
	North Fork Saline River	AR	Extirpated	Pre-1986.
	Bayou Bartholomew	LA	Declining	2005.

Butler (2005, pp. 89–90) categorized the extant populations of rabbitsfoot into three groups based on population size, general distribution, evidence of recent recruitment, and assessment of current viability. Sizeable populations with evidence of recent recruitment were categorized as viable. Small populations were categorized based on limited levels of recent recruitment, generally highly restricted distribution, or doubtful or limited viability increasing its susceptibility to extirpation in the near future. Marginal populations were considered rare, with no evidence of recent recruitment, of doubtful viability, and possibly on the verge of extirpation in the immediate future.

Many of the small and marginal populations are demonstrably (clearly evident) declining (Table 2). Of 21 streams with marginal populations, 9 streams (43 percent) are represented by a single recent living or fresh dead specimen. Although we have sporadic collections from the last century, trends indicate declining populations in other streams as well (for example, Allegheny River, Walhonding River, Cossatot River, Buffalo River, and Bear Creek). The following is a summary of relative abundance and trends of extant rabbitsfoot populations by river basin.

Lower Great Lakes Subbasin

The Great Lakes Basin represents the most zoogeographically (geographic distribution of an animal) distinct population center for the rabbitsfoot. All known records for the rabbitsfoot in the Great Lakes Basin are from the Maumee River system, a tributary of western Lake Erie. Populations historically occurred in five streams in addition to a canal in this system, but Fish Creek is the only remaining stream population.

Fish Creek: Fish Creek is a tributary of the St. Joseph River, flowing through Indiana and eastward into Ohio. In 1988, rabbitsfoot comprised 1.2 percent relative abundance of all mussels in the stream (Watters 1988, p. 17). From 1996 to 2005, 17 live specimens were collected during 3 surveys (Watters 1996 *in* Butler 2005, p. 23; Watters 2000 *in* Butler 2005, p. 23; Brady *et al.* 2004 *in* Butler 2005, pp. 23–24; Tetzloff 2009, pers. comm.). In 2009, Ahlstedt (2009, p. 3) found one fresh dead rabbitsfoot specimen in Fish Creek. This population is categorized as marginal.

Ohio River Basin

Historically, rabbitsfoot populations were found in 66 streams within the Ohio River basin, the largest eastern tributary of the Mississippi River. Today, rabbitsfoot is extant in 20 streams, a 70 percent decline from historical stream occurrences. Several of the extant populations are represented by single living or fresh dead specimens in recent years (Muskingum, Wabash, Eel, South Fork Kentucky, Barren, and Rough Rivers and Big Darby Creek).

Ohio River: Historically, about 60 records for rabbitsfoot have been reported over 1,570 rkm (981 rmi) of the main stem (Butler 2005, p. 25). Linear river kilometers of mussel beds in the river declined greater than 20 percent from 1967 to 1982 (Williams and Schuster 1989, pp. 7–10). By 1982, a

1,069-rkm (664-rmi) mussel survey of the Ohio River (Ohio River Mile 317.0 to 981.0) yielded one rabbitsfoot specimen from near the mouth of the Green River, Kentucky (Williams and Schuster 1989, p. 23).

Currently, two extant rabbitsfoot populations exist in the Ohio River. One population is located near Spencer County, Indiana and Hancock County, Kentucky (Clarke 1995, p. 81). The largest Ohio River rabbitsfoot population is located downstream of Lock and Dam 52 and 53. Numerous live or fresh dead rabbitsfoot specimens have been reported over the past 25 years from this reach, mostly downstream of Lock and Dam 52 (approximately Ohio River km 1,511.2 or mile 939) near Paducah, Kentucky (Butler 2005, p. 26). In addition, the rabbitsfoot population downstream of Lock and Dam 52 and 53 includes multiple age or size classes (Butler 2005, p. 26). The Ohio River and lower Tennessee River (downstream of Kentucky Lake Dam) populations may be considered a single meta–population due to the absence of a significant barrier separating them and are considered to be a sizeable population (Butler 2005, p. 26).

Allegheny River: The Allegheny River begins in northwestern Pennsylvania, flows into New York, and then continues south into Pennsylvania before converging with the Monongahela River near Pittsburgh, Pennsylvania, to form the Ohio River. Historical records from Pennsylvania indicate rabbitsfoot was sporadically known from at least Armstrong County upstream to Warren County, Pennsylvania (Butler 2005, p. 28), but little sampling effort was performed over the past 100 years. Five live rabbitsfoot specimens were found from 1998 to 2001 at three of four intensely sampled sites at Kennerdell, Venango County, Pennsylvania (Villella 2008, pers. comm.). During surveys from 2001 to 2002 (25 sites) and 2007 (63 sites) encompassing 129 rkm (80 rmi), rabbitsfoot was found only at four sites, with very low densities. Three of four sites were downstream of the French Creek confluence (Villella 2008, pers. comm.). A 2006–2007 survey yielded no evidence of rabbitsfoot at five pools within the Allegheny River, approximately 60 rkm (37 rmi) (Smith and Meyer 2010, p. 558). The lower Allegheny River and French Creek likely represent a metapopulation because no barriers exist between the streams, but the Alleghany population is considered marginal (Butler 2005, p. 29).

French Creek: French Creek is a major tributary of the Allegheny River, with rabbitsfoot known from downstream of Union City Reservoir to approximately 11 rkm (7 rmi) above the Allegheny River confluence, a total of 121 rkm (75 rmi) (Butler 2005, p. 31). Museum records from 1985 to 1994 indicate that rabbitsfoot was known from 12 sites (Butler 2005, p. 30). Intensive quantitative sampling at 4 sites in Venango County from 1998 to 1999 yielded 205 live rabbitsfoot specimens (Butler 2005, p. 30). In 2003 and 2004, timed searches (qualitative) yielded 41 live rabbitsfoot specimens from 12 of 25 sites in Erie, Crawford, Mercer, and Venango Counties, Pennsylvania, while a quantitative survey at 7 of 10 sites yielded 57 live rabbitsfoot specimens (Smith and Crabtree (2010 p. 391–398). Rabbitsfoot abundance at the seven sites was estimated to be from 43 to 372 individuals (standard error = 30 to 123). Evidence of recent recruitment was found at three sites (Smith and Crabtree 2010, p. 400). The French Creek population appears to be healthy and stable, with evidence of recruitment.

LeBoeuf and Conneautee Creeks: LeBoeuf and Conneautee Creeks are tributaries of French Creek in Pennsylvania. Historical surveys for rabbitsfoot in these creeks are restricted to one relict found in 1991 from LeBoeuf Creek. In 2006, live rabbitsfoot specimens were confirmed near the confluence of each creek with French Creek. Recruitment has not been confirmed in either creek and the populations are considered marginal and likely a single meta–population with French Creek.

Muddy Creek: Muddy Creek is a tributary of French Creek in Crawford County, Pennsylvania. Dennis (1984 p. 34) first reported the rabbitsfoot from Muddy Creek in the 1970s from a site near its confluence with French Creek. Three live rabbitsfoot specimens were collected at 3 of 20 sites in 2003, a 3-rkm (2 rmi) reach located 6 rkm (4 rmi) upstream of its confluence with French Creek (Butler 2005 p. 32; Mohler *et al.* 2006, pp. 574 and 581). The rabbitsfoot population is categorized as small.

Walhonding River: The Walhonding River converges with the Tuscarawas River to create the Muskingum River near Coshocton, Coshocton County, Ohio. The rabbitsfoot was historically common at some sites in the Walhonding River (Butler 2005, p. 32). While subsequent surveys in the early 1990's collected live mussels, relative abundance of rabbitsfoot was 0.3 percent with limited evidence of recruitment (Hoggarth 1995–1996, pp. 157, 166–174). In 2009, five live rabbitsfoot were collected from four sites located 1,203 m (3,947 ft) to 2,014 m (6,608 ft) upstream of Six Mile Dam. No live or dead rabbitsfoot individuals were collected from Six Mile Dam downstream 2,267 m (7,438 ft) (EnviroScience 2010, Figure 5). The rabbitsfoot population is categorized as small and appears to be in decline (Butler 2005, p. 33).

Shenango River: The Shenango River is a tributary of the Beaver River in Mercer County, Pennsylvania. Nelson and Villelo (2010, p. 1) surveyed the Shenango River from Pymatuning Reservoir to Shenango River Lake in 2009 and they collected 34 live rabbitsfoot specimens (relative abundance = 1.1 percent) from this reach (Nelson and Villelo 2010, pp. 9–10). Prior to this survey, rabbitsfoot was believed to be extirpated from the Shenango River (Butler 2005, p. 96).

Muskingum River: The Muskingum River is a major tributary of the Ohio River. Rabbitsfoot was believed to be extirpated circa 1980 until two live specimens were found in 2007 near Dresden, Muskingum County, Ohio (Service 2010, p. 10). This population is categorized as marginal.

Big Darby Creek: Big Darby Creek is a tributary of the Scioto River in central Ohio. Watters (1994, p. 99) claimed the creek had the highest mussel diversity of any stream its size in North America. Many rabbitsfoot records exist for Big Darby Creek, dating back to the late 1950's (Butler 2005, p. 34). However, only weathered rabbitsfoot specimens were found during two intensive sampling years, 1986 and 1990 (Watters 1990, p. 31; 1994, p. 101). Since 1990, live and fresh dead rabbitsfoot records are limited to five live specimens from two localities (Tetzloff 2008, pers. comm.; Butler 2005, p. 35). Currently, the population is considered marginal.

Little Darby Creek: Little Darby Creek is the main tributary for Big Darby Creek. Rabbitsfoot were known from Little Darby Creek dating back to circa 1960, primarily in Madison County, Ohio (Butler 2005, p. 35–36). Watters (1994, p. 101) located seven live rabbitsfoot specimens at three sites during a 1990 survey. The population in Little Darby Creek, although categorized as small, appears to be persisting and stable in approximately 32 rkm in Union and Madison Counties, Ohio (20 rmi) (Watters 1994, p. 106; Tetzloff 2008, pers. comm.).

South Fork Kentucky River: The South Fork Kentucky River is a tributary of the Kentucky River in southeastern Kentucky that essentially converges to form the latter near Beattyville, Lee County, Kentucky. The rabbitsfoot was

first discovered in the river in the late 1990s in Owsley County; a single relict rabbitsfoot specimen was collected in 1996 and a single live specimen was observed in 1998. The population is considered marginal and of questionable viability (Butler 2005, p. 37).

Green River: The Green River is a major Ohio River tributary, located in west–central Kentucky. Rabbitsfoot occurrences span almost 241 rkm (150 rmi) of the upper Green River (Butler 2005, p. 37). Historical rabbitsfoot records date back to circa 1900 (Butler 2005, p. 38). Periodic sampling from 1984 to 1996 produced live and fresh dead rabbitsfoot specimens from nine Green River sites between Green River Lake Dam and Munfordville, Kentucky (Cicerello 1999, p. 23). Cicerello (1999, Figure 1 and Table 1) sampled 40 sites from 1996 to 1998 over the 153-rkm (95-rmi) reach between Mammoth Cave National Park and Green River Lake Dam and reported the rabbitsfoot to be ''uncommon'' at 13 sites extending from Green River km 373.0 to 489.1 (mile 231.8 to 303.9; relative abundance of 0.1 percent) upstream of Munfordville, Kentucky. Sampling from 2000 to present has produced high numbers of fresh dead and numerous living specimens in Adair, Green, and Hart Counties (Butler 2005, pp. 38–39). The Green River population is one of a few rabbitsfoot populations that appear to be sizeable and improving, based on evidence of recruitment.

Barren River: The Barren River is the largest tributary of the Green River and flows in a northwesterly direction towards its confluence with the Green River in west–central Kentucky. Historical records of rabbitsfoot in the Barren River prior to the 1990s are limited to a couple collections in the 1920s and 1940s (Butler 2005, p. 40). Two surveys since the 1990s have yielded one live rabbitsfoot and relicts in small numbers (Gordon and Sherman 1995, Appendix A). If extant, the rabbitsfoot population in the Barren River is marginal and its viability is highly doubtful (Butler 2005, p. 41).

Rough River: The Rough River is a major Green River tributary flowing westward towards its confluence in western Kentucky. There are no historical rabbitsfoot records from the Rough River prior to the 1990s (Butler 2005, p. 41). A single fresh dead specimen collected in 1993 is the only known record of the rabbitsfoot in the Rough River (Gordon and Sherman 1995, Appendix A). This single specimen suggests a marginal and nonviable population (Butler 2005, p. 41).

Wabash River: The Wabash River is the largest northern tributary of the Ohio River. It originates in west–central Ohio, flows across Indiana, and then forms the boundary between southwestern Indiana and southeastern Illinois. The rabbitsfoot was once widespread throughout the Wabash River prior to the 1960s (Cummings and Mayer 1997, p. 137). Surveys conducted from the 1960s through 2004 yielded a single live rabbitsfoot specimen and a few relicts (Cummings *et al.* 1992, p. 3; Butler 2005, p. 42). Fisher (2006, p. 107) considered the rabbitsfoot ''functionally extirpated (in the Wabash River) and restricted to the tributaries.''

Eel River: The Eel River is a northern tributary of the Wabash River in north-central Indiana. Historical records from the Eel River prior to 1997 are sparse (Henschen 1987 *in* Butler 2005, p. 43), but rabbitsfoot was considered common by Daniels (1903, p. 651). Collections since 1997 are limited to nine live rabbitsfoot specimens found at sites in Miami and Cass Counties, Indiana (Butler 2005, p. 43). The rabbitsfoot is no longer considered common in the Eel River, restricted to less than 32 rkm (20 rmi) of the lower main stem, and is now categorized as marginal (Butler 2005, p. 43).

Tippecanoe River: The Tippecanoe River flows across north-central Indiana until reaching its confluence with the Wabash River. Daniels (1903, p. 651) considered the rabbitsfoot to be common in the Tippecanoe River. Surveys conducted between 1987 and 2001 yielded numerous live rabbitsfoot specimens at numerous sites (Cummings and Berlocher 1990, pp. 84–87; Ecological Specialists, Inc. 1993, pp. 47–50, 55–67, 84). Survey efforts over the past decade continue to produce similar results (EnviroScience, Inc. 2005, p. 35; Ecological Specialists, Inc. 2003, p. 9–15; Fisher 2008 and 2009, pers. comm.). The rabbitsfoot population is sizable, stable and viable in the Tippecanoe River, but at disjunct localities within the lower two–thirds of the river in Fulton, Pulaski, White, Carroll, and Tippecanoe Counties (Butler 2005, p. 45).

North Fork Vermilion River: The North Fork Vermilion River flows south out of western Indiana into eastern Illinois until reaching its confluence with the Wabash River. Through 45 years of collection history, four sites in an approximately 10-rkm (6-rmi) reach have produced rabbitsfoot records. Since 1980, researchers have documented 28 live and 6 fresh dead rabbitsfoot specimens (Illinois Natural History Survey (INHS) museum records; Cummings *et al.* 1998, p. 99). Cummings *et al.* (1998, p. 92) considered the North Fork to have ''perhaps the last reproducing population of the rabbitsfoot in the state [Illinois].'' The North Fork Vermilion River is considered a small metapopulation with the Middle Branch North Fork Vermilion River population (Butler 2005, p. 47).

Middle Branch North Fork Vermilion River: The Middle Branch North Fork Vermilion River is a tributary of the North Fork Vermilion River. Headwaters of the Middle Branch drain northwestern Warren County, Indiana, and northeastern Vermilion County, Illinois. The rabbitsfoot was discovered in the lowermost reach of the Middle Branch North Fork Vermilion River in 1998 (Butler 2005, p. 47). Since that time, a few live and fresh dead rabbitsfoot specimens are known from two sites sampled in 2000 and 2002. The population is very small and apparently contiguous with the rabbitsfoot population occurring in the North Fork Vermilion River (Butler 2005, p. 47).

Cumberland River Basin

The Cumberland River is a large southern tributary of the Ohio River. Historically, the rabbitsfoot was known from the main stem and 12 tributaries. Most records for the species were prior to 1950. Parmalee *et al.* (1980, pp. 93–95) found shells of the rabbitsfoot in shellers cull and stock piles in 1977, 1978, and 1979. Rabbitsfoot was considered rare at the time, comprising less than one percent of 1,000 specimens. No more recent records exist for the main stem. Recent collections suggest populations may still exist in only two tributaries of the Cumberland River, an 85 percent decline of stream populations. The East Fork Stones and Red Rivers are the only tributaries with extant populations, and their continued survival is tenuous.

East Fork Stones River: The East Fork Stones River is one of two major headwater tributaries, the other being the West Fork Stones River, which converge to form the Stones River. Researchers sampled numerous pre-impoundment sites from 1964 to 1967 on the East Fork Stones River, reporting rabbitsfoot from two sites but never more than three live specimens per site (Butler 2005, p. 49). Schmidt *et al.* (1989, pp. 56–59) sampled 23 East Fork Stones River sites during 1980 to 1981 and reported the rabbitsfoot to be ''rare'' at two lower sites. Sampling in 2002 at these two sites produced a single fresh dead specimen (Butler 2005, p. 48). The rabbitsfoot in the East Fork Stones River is considered very rare and declining;

thus it is categorized as marginal (Butler 2005, p. 49).

Red River: The Red River is a large tributary of the lower Cumberland River that drains southwestern Kentucky and northwestern Tennessee. Despite its size, no thorough survey of the stream has ever been attempted, although there are intermittent sampling dates to the 1960s. Records indicate that a small population of the rabbitsfoot existed from a few sites on the main stem in Logan County, Kentucky, and Robertson County, Tennessee. From 1988 to 1990, the rabbitsfoot has been found live and fresh dead at five sites in Kentucky (Butler 2005, p. 49). Subsequent sampling efforts in Kentucky have yielded no additional specimens. In 1990 and 1992, the Aquatic Resources Center (ARC) (1993, p. 1 and Appendix 1) qualitatively surveyed a reach of the Red River in Tennessee and collected a total of four live rabbitsfoot (relative abundance of 2.1 and 1.3 percent, respectively). The Red River rabbitsfoot population is categorized as marginal due to its small size, distribution and doubtful viability (Butler 2005, p. 50).

Tennessee River Basin

The Tennessee River is the largest tributary of the Ohio River. Historically the rabbitsfoot was known from the entire length of the Tennessee River and 17 of its tributaries. Today, it is known only from five streams in the Tennessee River basin, a 71 percent reduction in stream populations. Almost the entire length of the 1,046-rkm (650-rmi) Tennessee River main stem has been impounded beginning in 1925, destroying hundreds of km of riverine habitat for the rabbitsfoot. Extant rabbitsfoot populations persist in the two lowermost tail waters of the Tennessee River, Duck River, Paint Rock River, Elk River, and Bear Creek.

Tennessee River: The Tennessee River is formed from the confluence of the Holston and French Broad Rivers near Knoxville, Tennessee. Historically, the rabbitsfoot was found throughout the length of the Tennessee River (Ortmann 1925, p. 337). Today, extant populations only occur in the two lowermost tail waters, downstream of Pickwick Landing Dam and Kentucky Dam (Hubbs 2008, pers. comm.).

Over 20 live rabbitsfoot specimens were located along the marginal shelf of the Pickwick Lake tail waters in 1991 (Butler 2005, p. 51). From 1993 to 2000, live and fresh dead rabbitsfoot specimens were found at Tennessee River km 316.7 (mile 196.8, Diamond Island) and km 321.9 (mile 200). Fresh dead rabbitsfoot specimens aged at less than 10 years have been found in this same general reach of river as late as 2003 (Butler 2005, p. 124). This portion of the rabbitsfoot population exhibited recruitment in the 1990s (Hubbs 2010, pers. comm.).

Downstream of Kentucky Lake Dam, the rabbitsfoot has been found live and fresh dead at several sites in low numbers from 1985 to 2005 (Butler 2005, p. 52). In 1999, a 3.0-cm (1.2-inch) fresh dead rabbitsfoot juvenile was found at Tennessee River km 28.2 (mile 17.5) (Butler 2005, p. 52). In 2011, surveyors found greater than 80 live rabbitsfoot from Kentucky Lake Dam to the confluence with the Ohio River. Rabbitsfoot were found to occur most frequently in a narrow band of transitional substrate from clay and silt to sand and gravel along the toe of descending banks. Although not considered common, there were a few locations at which rabbitsfoot occurred in greater numbers (Koch 2012, pers. comm.). This population is likely contiguous with the population in the lower Ohio River, although the rabbitsfoot appears to be concentrated from Tennessee River km 16 to 32 (mile 10 to 20) (Butler 2005, p. 52). The Tennessee River rabbitsfoot population is considered sizable and viable (Butler 2005, pp. 89–90).

Paint Rock River: The Paint Rock River is a northern Alabama tributary of the Tennessee River. Historically, the three headwater tributaries, Estill and Larkin Forks and Hurricane Creek, of the Paint Rock River had metapopulations of rabbitsfoot. Live rabbitsfoot specimens were collected at three of five Paint Rock River sites in 1965 and 1967 (Isom and Yokley 1973, pp. 444–445). In 1980, only two live rabbitsfoot specimens were found in the middle reaches of the river during the first comprehensive survey (18 sites; Ahlstedt 1991a, p. 168). Ahlstedt (1995–96a, pp. 69–73) sampled 18 sites in 1991 and reported good numbers of rabbitsfoot. He collected 35 live rabbitsfoot specimens at 8 of 18 main stem sites. Seven tributary sites also were sampled, but no rabbitsfoot were found in tributaries.

During more recent sampling efforts in 1995 and 2002, three fresh dead and nine relict shells were found at a main stem site and a single live specimen upstream of the Larkin Fork confluence, respectively (McGregor and Shelton 1995, Appendix A; Godwin 2002, pp. 10–11, 22–23). In 2004, two live and some fresh dead rabbitsfoot specimens were found at a site on the lower main stem (Butler 2005, p. 54). An intensive survey (42 main stem and 5 Estill Fork sites) in 2008 found 218 live and fresh dead rabbitsfoot at 19 sites. Rabbitsfoot was the second most abundant species (Fobian *et al.* 2008, pp. 6–37). This population is categorized as sizeable and viable (Butler 2005, pp. 89–90).

Elk River: The Elk River is a tributary of the Tennessee River draining portions of south-central Tennessee to north-central Alabama. From 1965 to 1967, Isom *et al.* (1973, pp. 438–440) found the rabbitsfoot at three locations on the Elk River. Survey efforts on Elk River tributaries, Sugar and Richland Creek, did not yield any rabbitsfoot. In 1980, Ahlstedt (1983, pp. 44–45) found 10 live rabbitsfoot specimens at 6 of 108 sites in the Elk River, Lincoln County, Tennessee (Ahlstedt 1983, pp. 46–49). Two live rabbitsfoot specimens were found at approximately Elk River km 122 (mile 76) in 1999 (Service 1999, p. 6). Tennessee Valley Authority conducted a survey in 2006 and found three live individuals, one objectively aged at 6 or 7 years (Chance 2008, pers. comm.). This population is categorized as marginal (Butler 2005, pp. 89–90).

Bear Creek: Bear Creek is a southern tributary of the Tennessee River in northwestern Alabama and northeastern Mississippi. Historical records indicate rabbitsfoot occurred in 72 rkm (45 rmi; Ortmann 1925, p. 337; Butler 2005, pp. 56–57). In 1977, three live rabbitsfoot specimens were found at approximately Bear Creek km 90 (rmi 56) in Alabama (Butler 2005, p. 56). A 1991 record of a single fresh dead specimen is known from approximately Bear Creek km 40 (mile 25) in Colbert County, Alabama. McGregor and Garner (2004, p. 64) conducted the only comprehensive survey of the system from 1996 to 2001 and found rabbitsfoot live or fresh dead at two sites. It occurred on the main stem in the immediate vicinity of the Natchez Trace Parkway of the National Park Service (NPS) system in Colbert County, Alabama (Bear Creek km 39.4 and 40.9; mile 24.5 and 25.4). In Mississippi, one live and eight fresh dead specimens were found in a four-rkm (2.5-rmi) reach in 2002 and 2005 (Jones 2011, pers. comm.). Bear Creek is categorized as a small population (Butler 2005, pp. 89–90).

Duck River: The Duck River is a large tributary of the lower Tennessee River in central Tennessee. Ortmann (1924, pp. 24–33) documented the presence of rabbitsfoot in the early 1920s, considering it ''all over the interior region (and elsewhere).'' Surveys conducted between 1965 and 1979 found similar results (Isom and Yokley 1968, p. 36; Ahlstedt 1981, p. 62; Ahlstedt 1991, pp. 142–147).

Using stratified random sampling, Barr *et al.* (1993–94, p. 205) in 1981 estimated that 591 live rabbitsfoot

occurred at Lillards Mill. Twenty rabbitsfoot were collected from Lillards Mill and translocated to a site in Bedford County in 1988 (Layzer and Gordon 1993, pp. 89–91). Resampling the Bedford County site in 2002, evidence of recruitment was noted by Ahlstedt *et al.* (2004, p. 101). Madison *et al.* (1999, Table 1) reported 34 live rabbitsfoot specimens from a Maury County site in 1998.

Ahlstedt *et al.* (2004, p. 101) conducted an extensive mussel survey in the system beginning in 2000. They reported 403 live and fresh dead rabbitsfoot specimens from 31 of 78 sites sampled (a few sites were sampled more than once). An average of 13 live or fresh dead rabbitsfoot specimens was found per site of occurrence. The rabbitsfoot population on the Duck River is primarily located between rkm 209 to 288 (miles 179 to 130), and scattered in the lower river (rkm 60 to 61; rmi 37 to 38; Hickman County) (Hubbs 1995, p. 46; Schilling and Williams 2002, p. 409; Butler 2005, p. 59). The extant rabbitsfoot population extends over at least 274 rkm (170 rmi; approximately Duck River km 60 to 333, mile 37 to 207) and ''* * * represents one of the best known populations rangewide'' (Ahlstedt *et al.* (2004, p. 101).

Lower Mississippi River Subbasin

The rabbitsfoot is known from five streams within the lower Mississippi River subbasin (excluding the White, Arkansas, and Red River systems). The five streams include St. Francis River, Big Creek, Yazoo River, Big Sunflower River, and Big Black River. Rabbitsfoot is extirpated from Big Creek and the Yazoo River (Butler 2005, p. 61).

St. Francis River: The St. Francis River is a tributary of the Mississippi River draining portions of southeastern Missouri and northeastern Arkansas. In the 1800s the rabbitsfoot was considered abundant in the St. Francis River (Call 1895, p. 15). Extant rabbitsfoot records are from the upper part of the river in Butler and Wayne Counties, Missouri (Butler 2005, p. 61). Hutson and Barnhart (2004, pp. 84, 109) in 2002 found 16 live rabbitsfoot specimens at 3 sites upstream of Lake Wappapello, Missouri; including 11 at rkm 277.0 (rmi 172.1), 3 at rkm 294.5 (rmi 183.0), and 2 at rkm 306.6 (rmi 190.5). At rkm 277.0 (rmi 172.1), 35 live rabbitsfoot specimens were found in the 1970s, but only 8 and 11 live specimens were found in 2001 and 2002, respectively. In 2005, seven live rabbitsfoot specimens were sampled at a site in the same reach (Butler 2005, p. 62). With the exception of Call's description, no rabbitsfoot have been found in the St. Francis River, Arkansas (Butler 2005, p. 61). The rabbitsfoot is rare in the St. Francis River, may be at risk from extirpation (Hutson and Barnhart 2004, p. 84), and is categorized as a small population (Butler 2005, pp. 89–90).

Big Sunflower River: A major tributary of the Yazoo River, the Big Sunflower River drains a large portion of the Mississippi Delta in west-central Mississippi. The rabbitsfoot was first reported in 1969 from the lower portion of the river (Florida Museum of Natural History, museum lot # 233299). Currently, rabbitsfoot occurs in a 32-rkm (20-rmi) reach upstream of the Quiver River confluence in Sunflower County. From 2000 to 2010, live and fresh dead rabbitsfoot specimens were collected at Blaine Road west of Blaine, Mississippi, downstream to near the Quiver River confluence (Jones 2011, pers. comm.). Butler (2005, pp. 89–90) categorized this population as small.

Big Black River: The Big Black River is a tributary to the lower Mississippi draining central and southwestern Mississippi. Hartfield and Rummel (1985, pp. 117–119) sampled the lower three-quarters of this 426-rkm (265-rmi) long river. The rabbitsfoot is restricted to a small portion of the lower river cutting through the Loess Hills physiographic division where mussels were generally found in gravel riffles and runs. At that time, 19 dead rabbitsfoot specimens were recorded at nine sites in Hinds and Warren Counties (Butler 2005, p. 64). The only other record is for a dead specimen located in 2000. Rabbitsfoot is still considered extant in this reach (Jones 2011, pers. comm.), and the population is categorized as small.

White River Basin

Historically, 13 rivers within the White River system harbored rabbitsfoot populations. Extant populations occur in 9 of 13 (69 percent) rivers in the basin. Further, no other major river basin has as many sizeable populations. At one time, the main stem of White River and 11 of its tributaries had a large metapopulation of rabbitsfoot (Butler 2005, p. 65). Three of the streams may still contain a metapopulation (Black, Spring, and Strawberry Rivers). Unfortunately, many of the tributaries appear to have declining populations (Buffalo, Black, Current, Spring, and South Fork Spring Rivers).

White River: The White River is a large western tributary of the Mississippi River. The rabbitsfoot population once extended throughout most of the 1,110-rkm (690-rmi) length of the White River and site records date back to circa 1910, but now it is restricted to the lower reaches downstream of Batesville, Independence County, Arkansas (Harris *et al.* 2009, p. 73). Historical abundance data are scarce. However, records indicate that the population was large (Butler 2005, p. 65).

From the 1980s to late 2000s, numerous live and fresh dead rabbitsfoot specimens have been found at numerous sites in two disjunct reaches of the White River (rkm 319 and 410; rmi 198 and 255 and rkm 92 to 146; rmi 57 to 91) (Bates and Dennis 1983, p. 42; AGFC Mussel Database 2011). In 1992, Christian (1995, pp. 146–197) estimated the total rabbitsfoot population from 13 sites on the lower White River at 928 individuals. The rabbitsfoot population is categorized as sizable, but remains extant in two disjunct reaches separated by approximately 161 rkm (100 rmi). The uppermost reach extends from the Batesville Dam at Batesville, Independence County, Arkansas, downstream to the Little Red River confluence north of Georgetown, White and Woodruff Counties, Arkansas. The lowermost reach extends from U.S. Highway 79 at Clarendon, Monroe County, Arkansas, downstream to Arkansas Highway 1 near St. Charles, Arkansas County, Arkansas (Butler 2005, p. 66; AGFC mussel database 2011).

War Eagle Creek: War Eagle Creek is a small, eastern White River tributary located in northwest Arkansas. Rabbitsfoot was not documented in War Eagle Creek until 1974. Since 1979, one live specimen was collected in 1981, and two fresh dead were found in 2004 (AGFC mussel database 2011). Little is known about the viability of this population. Therefore, it has been categorized as marginal (Butler 2005, pp. 89–90).

Buffalo River: The Buffalo River is a western White River tributary in north-central Arkansas. Rabbitsfoot was first documented in the Buffalo River in 1910 by Meek and Clark (1912, pp. 7–20). They reported rabbitsfoot as ''common'' at 11 of 26 sites; almost all specimens were located within the lower 40 rkm (25 rmi) within Searcy County, Arkansas. Two comprehensive surveys of the Buffalo River mussel fauna in 1995 and 2004 to 2005 found live rabbitsfoot specimens concentrated between Arkansas Highway 7 in Newton County to near the Cedar Creek confluence downstream of Rush, Arkansas (Harris 1996, p. 12; Matthews *et al.* 2009, pp. 116 and 122). NPS staff collected four live rabbitsfoot in 2008 from a site near the Cedar Creek

confluence near Rush, Arkansas (Hodges 2011, pers. comm.). During a 2011 survey of this same site, changes in channel geomorphology caused by 2009 and 2011 flooding resulted in the entire site being covered with sand. Few live mussels were encountered, but one live rabbitsfoot was found and relocated to more suitable habitat downstream. While no live rabbitsfoot were encountered at the downstream relocation site, 2 fresh dead and 23 weathered rabbitsfoot shells were found at this site. Two live rabbitsfoot also were collected in 2011 at two sites located between Arkansas Highway 7 and U.S. Highway 65. The Buffalo River population is small and very susceptible to extirpation based on recent surveys (Davidson 2011, pers. comm.).

Black River: The Black River is the largest White River tributary draining southeastern Missouri and northeastern Arkansas. Based on data from the 1970s and 1980s, the rabbitsfoot was abundant at some Arkansas sites in the lower main stem between the confluences of the Current and Strawberry Rivers (approximately 121 rkm, 75 rmi; Ohio State University Museum of Biological Diversity (OSUM) museum lot #s 47673 and 47933; Miller and Hartfield 1986, pp. 8–9). In 1992, Rust (1993, Appendix 1.1) surveyed 48 sites in the Black River, finding rabbitsfoot live at 4 sites, and a combined population estimate of 1,503 individuals, between rkm 105 to 124 (rmi 65 to 77). A 2000 to 2003 survey at 51 sites in Missouri did not locate any rabbitsfoot (Hutson and Barnhart 2004, pp. 162–169). In 2005, AGFC collected 25 live rabbitsfoot specimens from a site located approximately two rkm (1 rmi) upstream of U.S. Highway 63 at Black Rock, Arkansas (AGFC Mussel Database 2011). The Black River population is considered one of the largest remaining range-wide (Butler 2005, pp. 89–90).

Current River: The Current River is a Black River tributary draining southeastern Missouri and northeastern Arkansas. The rabbitsfoot is known only from the Arkansas portion of the stream. Few records exist for the species in the Current River, including several live and dead specimens in 1983–1984 and 1994 (AGFC mussel database). The rabbitsfoot population in the Current River is categorized as marginal.

Spring River: The Spring River is a Black River tributary draining south-central Missouri and northeastern Arkansas. Based on pre-1986 records, the rabbitsfoot was once known from at least 14 sites in the 80-rkm (50-rmi) reach downstream of the South Fork Spring River confluence (Harris *et al.* 1997, pp. 80–82). Records from the 1980s also indicate that the rabbitsfoot was ''relatively common'' (Miller and Hartfield 1986, pp. 9–10; Harris and Gordon 1987, p. 54; ANSP 359907). A survey upstream of the South Fork Spring River confluence in 1985 did not find any rabbitsfoot (Miller and Hartsfield 1986, p. 9). In 1991, Rust (1993, Appendices 1.2 and 1.4) estimated rabbitsfoot relative abundance at 1.9 to 4.0 percent at 5 of 6 sites and total population size at 563 individuals at 3 of these sites. Sixty-eight live rabbitsfoot were collected in the river reach from near Ravenden to Imboden, Arkansas, during 2004 to 2005 (Harris *et al.* 2007, p. 16). The rabbitsfoot population appears to be recruiting, but the numbers of individuals are decreasing from the high numbers found in the mid-1980s (Butler 2005, p. 72). For this reason, the Spring River is categorized as a small rabbitsfoot population.

South Fork Spring River: The South Fork Spring River is a Spring River tributary draining portions of Howell County, Missouri, and Fulton and Sharp Counties, Arkansas. The rabbitsfoot was discovered in the South Fork Spring River in 2002 in central Fulton County, Arkansas (Butler 2005, p. 72). Judging from the number of fresh dead and relict shells found, it appears to have been the dominant species at this site, although no live mussels were located (Butler 2005, pp. 72–73). In 2006, a qualitative survey to assess mussel communities at 35 sites in the South Fork Spring River did not yield any rabbitsfoot (Martin *et al.* 2009, pp. 106–107). However, one live rabbitsfoot specimen was located on the river a week later, representing the only live specimen ever collected from the river (AGFC mussel database 2011). Based on limited information collected over the past decade on the rabbitsfoot status in the South Fork Spring River, this population is categorized as small.

Strawberry River: The Strawberry River is a Black River tributary draining portions of northeastern Arkansas. The most upstream record of live rabbitsfoot in the Strawberry River was collected 2.9 rkm (1.8 rmi) upstream of Hars Creek southeast of Franklin, Arkansas, in 1998 (AGFC Mussel Database 2011). From 1983 to 2006, 84 live rabbitsfoot specimens, including some juveniles, have been collected from 14 sites extending from the most upstream record downstream through Sharp and Lawrence counties (greater than 80 rkm or 50 rmi) (Rust 1993, p. 30; Harris *et al.* 2007, pp. 23–27; INHS 27526). The Strawberry River rabbitsfoot population is categorized as sizable.

Middle Fork Little Red River: The Middle Fork Little Red River is a headwater tributary of the Little Red River in north-central Arkansas. Rabbitsfoot was first discovered in the Middle Fork in 1991 with a single specimen from 26 sites (Harris 1992, p. 64). The Middle Fork Little Red River has been extensively surveyed during the past decade. Winterringer (2003, p. 46 and Appendix F) found 28 live rabbitsfoot specimens, including 2 juveniles, at 2 sites sampled in 2001 downstream of Little Tick Creek. The AGFC and Service collected seven live rabbitsfoot, including one juvenile, from two sites in this same reach in 2009 (Davidson 2011, pers. comm.). The rabbitsfoot population is categorized as small.

Arkansas River Basin

The rabbitsfoot distribution in the Arkansas River system is restricted to tributaries draining the western fringe of the Ozark Plateaus and adjacent Central Lowlands physiographic provinces located to the west. The rabbitsfoot range in the system includes east-central and southeastern Kansas, northeastern Oklahoma, extreme northwestern Arkansas, and extreme southwestern Missouri. Rabbitsfoot was once distributed throughout hundreds of km (miles) of streams in the basin, with populations in the Fall and Cottonwood Rivers and Center and Shoal Creeks now extirpated (50 percent reduction in stream populations). Scammon (1906, pp. 348–349) described rabbitsfoot as ''seeming to be nowhere abundant, it is not a rare species in [the Spring, Neosho, and Verdigris Rivers].'' Rabbitsfoot is now confined to reduced portions of the Verdigris, Neosho, Spring, and Illinois Rivers.

Neosho River: The Neosho River is a large northern tributary to the Arkansas River in eastern Kansas and northeastern Oklahoma. Historical evidence indicates rabbitsfoot was present in almost the entire 740-rkm (460-rmi) main stem of the Neosho River (Butler 2005, p. 75). Live rabbitsfoot specimens, including some juveniles, have been collected in a 12.8-rkm (8-rmi) reach from near Iola to Humboldt, Allen County, Kansas, from 1994 to 1999 (Obermeyer *et al.* 1995, pp. 31–32; Mulhern *et al.* 2002, p. 243; Butler 2005, p. 76). Relict shells were collected at 8 of 21 additional main stem sites from 1993 to 1995 (Obermeyer *et al.* 1995, p. 63). The rabbitsfoot is thought to be extirpated from the Oklahoma portion and remaining stretches in Kansas. The extant population in Kansas is categorized as small.

Spring River: The Spring River is a Neosho River tributary draining portions of southwest Missouri, southeast Kansas, and northeast

Oklahoma. Rabbitsfoot is extant in the Spring River from Missouri Highway 96 in Carthage, Jasper County, Missouri, downstream to the confluence of Turkey Creek north of Empire, Cherokee County, Kansas. Six live rabbitsfoot specimens were collected from four Missouri sites in the early 1990's and 2006 (Obermeyer *et al.* 1995, p. 48; Missouri Natural Heritage Database 2011). In 2003, a Kansas site (known as the Pierce Site) located approximately 0.5 to 0.8 rkm (0.3 to 0.5 rmi) yielded 10 live rabbitsfoot, including 7 gravid females (Miller 2011). In 2006, KDWP collected eight live rabbitsfoot specimens from one 30 m^2 quadrat sample (1.9 percent of live mussels collected) at a site just upstream of Kansas and Missouri Highway YY. This rabbitsfoot population is categorized as small.

Illinois River: The Illinois River is an Arkansas River tributary draining portions of northwest Arkansas and northeast Oklahoma. Gordon *et al.* (1979, p. 35) surveyed 11 sites in Arkansas in the 1970s and found only a single shell. In 1994, Harris (1998, p. 4) found 34 live rabbitsfoot specimens at 7 of 22 sites in a 48-rkm (30-rmi) reach in Washington and Benton counties, Arkansas. In 1995, Vaughn (1997, pp. 28–30) surveyed 45 sites in Oklahoma and found live rabbitsfoot at 2 sites. A 2008 survey in Benton and Washington Counties found 10 live rabbitsfoot at 2 of 15 sites extending from just upstream of Muddy Fork to the Arkansas Highway 59 Bridge (Davidson 2011, pers. comm.). This population is categorized as marginal.

Verdigris River: The Verdigris River is an Arkansas River tributary draining portions of Kansas and Oklahoma. Rabbitsfoot is extant in a short reach from Oologah Lake dam north of Claremore, Oklahoma, downstream to Interstate 44 (Will Rogers Turnpike) west of Catoosa, Rogers County, Oklahoma. Numerous live rabbitsfoot specimens were collected at three sites clustered upstream and downstream of Oklahoma Highway 20 west of Claremore, Oklahoma, in 2006 and 2007 (Boeckman 2008, pers. comm.). Rabbitsfoot has been extirpated from reaches of the Verdigris River upstream of Oologah Lake in Kansas and Oklahoma. This population is categorized as marginal due to its restricted distribution.

Red River Basin

Streams within the Red River basin primarily drain the Ouachita Mountains in southeastern Oklahoma and southwestern Arkansas, but extant populations still occur in three stream reaches within the Gulf Coastal Plain ecoregion in southern Arkansas and northern Louisiana. The rabbitsfoot is extant in 7 of 11 historical streams (64 percent) within the Red River basin.

Little River: The Little River is a Red River tributary draining portions of southeastern Oklahoma and southwestern Arkansas. Isley (1924, p. 57) discovered one specimen in 1910. In 1983, six live individuals were located in Sevier County, Arkansas (AGFC mussel database 2011). Vaughn and Taylor (1999, p. 920) collected live rabbitsfoot specimens at six sites in the Little River located downstream of the Glover River confluence. Its ''abundance,'' defined as the number of mussels found per hour spent searching, ranged from 0.6 to 8.0 at these sites. In 2002, survey work occurred in the lowermost section, downstream of Millwood Reservoir, and no rabbitsfoot were located at any of the 14 sites surveyed (Farris *et al.* 2003, Appendix A). From 2006 to 2008, the AGFC and Service collected 89 live rabbitsfoot specimens from 13 Little River sites extending from near the Arkansas and Oklahoma state line to near U.S. Highway 71 north of Ashdown, Arkansas (AGFC Mussel Database, 2011). The rabbitsfoot population is sizeable and considered viable in this reach of the Little River (Davidson 2011, pers. comm.).

Glover River: The Glover River is a Little River tributary draining portions of southeastern Oklahoma. Museum records indicate a healthy population of rabbitsfoot once occupied a 48-rkm (30-rmi) reach of the river (Butler 2005, p. 82). An unspecified number of specimens were located in a 1993 to 1995 survey (Vaughn 2000, pp. 229). In 1996, researchers systematically surveyed 22 sites, and rabbitsfoot relative abundance was 0.7 and 3.0 percent at 2 sites (Vaughn 2003, p. 3). The Glover River appears to support a marginal population of rabbitsfoot that is greatly diminished from historical accounts (Vaughn 2003, p. 1).

Cossatot River: The Cossatot River is a Little River tributary draining portions of southwestern Arkansas. Few mussel collections have been made in the Cossatot River. Rabbitsfoot was first collected in 1970, with evidence of population recruitment (Butler 2005, p. 83). Twelve specimens were found in 1983 at a site in Sevier County, Arkansas (AGFC mussel database 2011). In 2004, four live specimens were found at one site (AGFC mussel database 2011). Viability of the population is doubtful, based on its small size and isolated location, and the population is categorized as marginal. However, no comprehensive survey data for the river exists (Butler 2005, p. 83).

Ouachita River: The Ouachita River is the largest tributary of the Red River, draining a large portion of southern Arkansas and eastern Louisiana. Wheeler (1918, pp. 122–123) observed rabbitsfoot in the Ouachita River and declared it ''in nearly every mussel bed of the river.'' Call (1895, p. 15) also considered the rabbitsfoot ''abundant.'' The rabbitsfoot is extant in a short reach (two sites) of the Ouachita River from Arkansas Highway 379 south of Oden, Montgomery County, Arkansas, downstream to Arkansas Highway 298 east of Pencil Bluff, Montgomery County, Arkansas (AGFC Mussel Database, 2011). Three reservoirs (Lakes Ouachita, Hamilton, and Catherine) separate the headwaters in the Ouachita Mountains from the Gulf Coastal Plain reaches in southern Arkansas and Louisiana.

Researchers collected 38 live specimens from 1992 to 2005 at 8 sites in Clark, Hot Spring, and Ouachita Counties, Arkansas (Posey 1997, Appendix 1.3; Butler 2005, p. 84, Harris 2006, Appendix 1e—1i; AGFC Mussel Database, 2011). Posey (1997, Appendix 1.3) estimated the rabbitsfoot population at 1,456 individuals in the Ouachita River from rkm 547 to 563 (rmi 340 to 350). Rabbitsfoot has not been observed in the Louisiana reach of the Ouachita River in over 100 years (Butler 2005, p. 84). The Ouachita River population is categorized as small due to its greatly diminished distribution and limited evidence of recent recruitment.

Little Missouri River: The Little Missouri River originates in the Ouachita Mountains and flows southeast to the Ouachita River in southwest Arkansas. The rabbitsfoot is known from a single collection in 1996 in the lower main stem in Clark County, Arkansas (Davidson 1997, pp. 46 and 130). The Little Missouri population likely is a metapopulation with the Ouachita River population and is categorized as marginal (Butler 2005, p. 85).

Saline River: The Saline River flows southward through south-central Arkansas before converging with the Ouachita River at Felsenthal National Wildlife Refuge (NWR) north of the Arkansas and Louisiana State line. Call (1895, p. 15) considered the rabbitsfoot ''abundant'' in the Saline River. Two fresh dead and one live specimen were documented in 1993 and 2006, respectively, in Grant County (AGFC Mussel database 2011). Davidson (1997) surveyed the Saline River from the northern boundary of Felsenthal NWR to its confluence with the Ouachita

River and was unable to locate any live rabbitsfoot. Davidson and Clem (2002, p. 17; 2004, p. 16) collected 26 live rabbitsfoot specimens from 13 of 230 sites from near Tull, Arkansas, to the northern boundary of Felsenthal NWR. Rabbitsfoot comprised 0.2 percent of the total mussel community. In 2005, Harris (2006, Appendix 1b–1d) quantitatively sampled three of the sites sampled by Davidson and Clem in 2004. He collected 24 live rabbitsfoot, representing 0.1 to 0.8 percent of the total mussel community per site. These sites were resampled in 2011 and four live rabbitsfoot were collected, representing zero to 0.1 percent of the total mussel community (Davidson 2012, pers. comm.). In 2011, the AGFC and Service collected 33 live rabbitsfoot, representing 0.1 to 0.3 percent of the total mussel community. Numerous dead rabbitsfoot were observed near the shoreline, apparently having succumbed to desiccation caused by severe drought conditions (Davidson 2012, pers. comm.). The rabbitsfoot population is categorized as small due to its ''patchy'' distribution, but there is evidence of recent recruitment (Davidson and Clem 2004, p. 16; Davidson 2011, pers. comm.).

Bayou Bartholomew: Bayou Bartholomew originates in southeast Arkansas and flows south into Louisiana before converging with the Ouachita River. The first record of rabbitsfoot in Bayou Bartholomew is from 1992 in Louisiana (Butler 2005, p. 87). One live specimen was found in Louisiana between 2000 and 2001 (Alley 2005, p. 75). From 2004 to 2005, two sites yielded five live and six dead specimens. A 2004 survey at 50 sites in the Arkansas portion of Bayou Bartholomew did not yield any live, dead, or relict rabbitsfoot specimens (Brooks *et al.* 2008, pp. 9–10). All records since 2000 are from three sites in Louisiana, two in the middle Louisiana reach and one near the Arkansas state line (Butler 2005, p. 87). This population is categorized as marginal.

Summary of Rabbitsfoot Rangewide Population Status

Based on historical and current data, the rabbitsfoot is declining rangewide. In ten of the 15 States comprising the rabbitsfoot's historical range, the species is considered by State law to be endangered (Illinois, Indiana, Kansas, Mississippi, Ohio, and Pennsylvania); threatened (Kentucky and Tennessee); of special concern (Arkansas); or it is assigned an uncategorized conservation status (Alabama). The American Malacological Union and American Fisheries Society also consider the rabbitsfoot to be threatened (*in* Butler 2005, p. 21). It is presently extant in 51 of the 140 streams of historical occurrence, a 64 percent decline. Further, in the streams where it is extant, populations with few exceptions are highly fragmented and restricted to short reaches. In addition, the species has been extirpated from West Virginia and Georgia. The extirpation of this species from numerous streams and stream reaches within its historical range signifies that substantial population losses have regularly occurred in each of the past several decades. Seventeen streams (33 percent of extant populations or 12 percent of historical populations) have small populations with limited levels of recruitment and are generally highly restricted in distribution, making their viability unlikely and making them extremely susceptible to extirpation in the near future. In addition, 15 of those 17 streams (88 percent) have populations that are declining. In many of these streams, rabbitsfoot is only known from one or two documented individuals in the past decade. Its viability in these streams is doubtful and additional extirpations may occur if this downward population trend is not eliminated. Eleven populations located in historical streams (22 percent of extant populations or 8 percent of historical populations; Ohio, Green, Tippecanoe, Tennessee, Paint Rock, Duck, White, Black, Strawberry, and Little Rivers and French Creek) are considered viable (Butler 2005, p. 88; Service 2010, p. 16). Given this compilation of current distribution, abundance, and status trend information, the rabbitsfoot exhibits range reductions and population declines throughout its range.

Summary of Factors Affecting the Species

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations at 50 CFR part 424 set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may list a species 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; and (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination. Each of these factors is discussed below.

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The habitats of freshwater mussels are vulnerable to water quality degradation and habitat modification from a number of activities associated with modern civilization. The decline, extirpation, and extinction of mussel species are often attributed to habitat alteration and destruction (Neves *et al.* 1997, pp. 51–52). Bogan (1993, pp. 599–600 and 603–605) linked the decline and extinction of mussels to a wide variety of threats including siltation, industrial and municipal effluents, modification of stream channels, impoundments, pesticides, heavy metals, invasive species, and the loss of host fish. Chief among the causes of decline in distribution and abundance of the Neosho mucket and rabbitsfoot, and in no particular order of ranking, are impoundment, channelization, sedimentation, chemical contaminants, mining, and oil and natural gas development (Mather 1990, pp. 18–19; Obermeyer *et al.* 1997b, pp. 113–115; Neves *et al.* 1997, pp. 63–72; Davidson 2011, pers. comm.). Neosho mucket and rabbitsfoot are both found within medium to large river drainages exposed to a variety of landscape uses. These threats to mussels in general (and Neosho mucket and rabbitsfoot where specifically known) are individually discussed below.

Impoundments

Dams eliminate and alter river flow within impounded areas, trap silt leading to increased sediment deposition, alter water quality, change hydrology and channel geomorphology, decrease habitat heterogeneity, affect normal flood patterns, and block upstream and downstream movement of mussels and fish (Layzer *et al.* 1993, pp. 68–69; Neves *et al.* 1997, pp. 63–64; Watters 2000, pp. 261–264). Within impounded waters, decline of mussels has been attributed to direct loss of supporting habitat, sedimentation, decreased dissolved oxygen, temperature levels, and alteration in resident fish populations (Neves *et al.* 1997, pp. 63–64; Pringle *et al.* 2000, pp. 810–815; Watters 2000, pp. 261–264). Downstream of dams, mussel declines are associated with changes and fluctuation in flow regime, channel scouring and bank erosion, reduced dissolved oxygen levels and water temperatures, and changes in resident fish assemblages (Williams *et al.* 1992, p. 7; Layzer *et al.* 1993, p. 69; Neves *et*

al. 1997, pp. 63–64; Watters 2000, pp. 265–266; Pringle *et al.* 2000, pp. 810–815). Dams that are low to the water surface, or have water passing over them (small low head or mill dams) can have some of these same effects on mussels and their fish hosts, particularly reducing species richness and evenness and blocking fish host movements (Watters 2000, pp. 261–264; Dean *et al.* 2002, pp. 235–238). The decline of mussels within the Arkansas, Red, White, Tennessee, Cumberland, Mississippi, and Ohio River basins has been directly attributed to construction of numerous impoundments (Miller *et al.* 1984, p. 109; Williams and Schuster 1989, pp. 7–10; Layzer *et al.* 1993, pp. 68–69; Neves *et al.* 1997, pp. 63–64; Obermeyer *et al.* 1997b, pp. 113–115; Watters 2000, pp. 262–263; Sickel *et al.* 2007, pp. 71–78; Hanlon *et al.* 2009, pp. 11–12; Watters and Flaute 2010, pp. 3–7). Population losses due to impoundments have likely contributed more to the decline of the Neosho mucket and rabbitsfoot than any other factor. River habitat throughout the ranges of the Neosho mucket and rabbitsfoot has been impounded, leaving short, isolated patches of suitable habitat that sometimes lacks suitable fish hosts. Neither Neosho mucket nor rabbitsfoot occur in reservoirs lacking riverine characteristics. They are unable to successfully reproduce and recruit under these conditions (Obermeyer *et al.* 1997b, p. 114; Butler 2005, p. 96). On the other hand, rabbitsfoot may persist and even exhibit some level of recruitment in some large rivers with locks and dams where appropriate habitat quality and quantity remain (Ohio and Tennessee Rivers in riverine reaches between a few locks and dams) (Butler 2005, p. 96).

The majority of the main stem Ohio, Cumberland, Tennessee, and White Rivers and many of their largest tributaries are impounded, in many cases resulting in tail water (downstream of dam) conditions unsuitable for rabbitsfoot (Butler 2005, p. 96). There are 36 major dams within the Tennessee River basin (Holston, Little Tennessee, Clinch, Elk, Flint, and Sequatchie Rivers, and Bear Creek) that have resulted in the impoundment of 3,680 rkm (2,300 rmi) of the Tennessee River and its largest tributaries (Butler 2005, p. 95). Only three of these rivers support viable populations—Tennessee, Paint Rock, and Duck Rivers. Ninety percent of the Cumberland River downstream of Cumberland Falls (rkm 866, rmi 550) as well as numerous tributaries are either directly impounded or otherwise adversely affected by cold tail water releases from dams. Rabbitsfoot and its fish hosts are warm water species and the change in temperature to cold water below the dams further reduces suitable habitat for the species and may eliminate fish hosts that cannot adapt to colder water temperatures (see the Temperature section below for more information). Other tributary impoundments that adversely affected rabbitsfoot and its fish hosts within the Ohio River basin include, but are not limited to, the Walhonding, Barren, Rough, and Eel Rivers and two rivers with viable populations, Green and Tippecanoe Rivers. The majority (7 of 11 populations or 64 percent) of viable rabbitsfoot populations (Ohio, Green, Tippecanoe, Tennessee, Duck, White, and Little Rivers) occur downstream of main stem impoundments that make these populations more susceptible to altered habitat quality and quantity associated with the impoundment or dam operation, which may be exacerbated during stochastic events such as droughts and floods.

Navigational improvements on the Ohio River began in 1830, and now include 21 lock and dam structures stretching from Pittsburgh, Pennsylvania, to Olmsted, Illinois, near its confluence with the Mississippi River. Lock and dam structures convert riverine habitat to unsuitable static habitat for the mussel and prevent movement of their fish hosts. Numerous Ohio River tributaries also have been altered by lock and dam structures. For example, a 116-rkm (72-rmi) stretch of the Allegheny River in Pennsylvania has been altered with nine locks and dams from Armstrong County to Pittsburgh. A series of six locks and dams were constructed on the lower half of the Green River decades ago that extend upstream to the western boundary of Mammoth Cave National Park, Kentucky. The declines of rabbitsfoot populations are attributable to navigational locks and dams on the Ohio, Allegheny, Monongahela, Muskingum, Kentucky, Green, Barren, and White Rivers, and are widespread throughout the species range.

Impoundments have eliminated a large portion of the Neosho mucket population and habitat in the Arkansas River basin. For example, mussel habitat in the Neosho River in Kansas has been adversely affected by at least 15 city dams and 2 Federal dams, both with regulated flows. Almost the entire length of the river in Oklahoma is now impounded or adversely affected by tail water releases from three major dams (Matthews *et al.* 2005, p. 308). Several reservoirs and numerous small watershed lakes have eliminated suitable mussel habitat in several larger Neosho River tributaries in Kansas and Missouri (Spring, Elk and Cottonwood Rivers and Shoal Creek). The Verdigris River (Kansas and Oklahoma) has two large reservoirs with regulated flows, and the lower section has been channelized as part of the McClellan–Kerr Arkansas River Navigation System. All the major Verdigris River tributaries in Kansas and Oklahoma have been partially inundated by reservoirs with regulated flows and numerous flood control watershed lakes (Obermeyer *et al.* 1995, pp. 7–21). Construction of Lake Tenkiller eliminated Neosho mucket populations and habitat in the lower portion of the Illinois River, Oklahoma (Davidson 2011, pers. comm.).

Dam construction has a secondary effect of fragmenting the ranges of mussel species by leaving relict habitats and populations isolated upstream or between structures as well as creating extensive areas of deep uninhabitable, impounded waters. These isolated populations are unable to naturally recolonize suitable habitat downstream and become more prone to further extirpation from stochastic events, such as severe drought, chemical spills, or unauthorized discharges (Layzer *et al.* 1993, pp. 68–69; Cope *et al.* 1997, pp. 235–237; Neves *et al.* 1997, pp. 63–75; Watters 2000, pp. 264–265, 268; Miller and Payne 2001, pp. 14–15; Pringle *et al.* 2000, pp. 810–815; Watters and Flaute 2010, pp. 3–7). We conclude that habitat effects due to impoundment are a significant and ongoing threat to the Neosho mucket and rabbitsfoot.

Channelization

Dredging and channelization activities have profoundly altered riverine habitats nationwide. Hartfield (1993, pp. 131–139), Neves *et al.* (1997, pp. 71–72), and Watters (2000, pp. 268–269) reviewed the specific upstream and downstream effects of channelization on freshwater mussels. Channelization affects a stream physically (accelerates erosion, increases sediment bed load, reduces water depth, decreases habitat diversity, creates geomorphic (natural channel dimensions) instability, eliminates riparian canopy) and biologically (decreases fish and mussel diversity, changes species composition and abundance, decreases biomass, and reduces growth rates) (Hartfield 1993, pp. 131–139). Channel modification for navigation has been shown to increase flood heights (Belt 1975, p. 684), partly as a result of an increase in stream bed slope (Hubbard *et al.* 1993, p. 137). Flood events are exacerbated, conveying large quantities of sediment, potentially

with adsorbed contaminants, into streams. Channel maintenance often results in increased turbidity and sedimentation that often smothers mussels (Stansbery 1970, p. 10).

Channel maintenance operations for commercial navigation have affected habitat for the rabbitsfoot in many large rivers rangewide. Periodic navigation maintenance activities (such as dredging and snag removal) may continue to adversely affect this species in the lower portions of the Ohio, Tennessee, and White Rivers, which represent 44 percent of the viable rabbitsfoot populations. In the Tennessee River, a plan to deepen the navigation channel has been proposed (Hubbs 2009, pers. comm.). Some rabbitsfoot streams were ''straightened'' to decrease distances traversed by barge traffic (for example, Verdigris River). Hundreds of miles of many midwestern (Eel, North Fork Vermilion, and Embarras Rivers) and southeastern (Paint Rock and St. Francis Rivers and Bear Creek) streams with rabbitsfoot populations were channelized decades ago to reduce the probability and frequency of flood events. Because mussels are relatively immobile they require a stable substrate to survive and reproduce and are particularly susceptible to channel instability (Neves *et al.* 1997, p. 23) and alteration. Channel and bank degradation have led to the loss of stable substrates in numerous rivers with commercial navigation throughout the range of rabbitsfoot. While dredging and channelization have had a greater effect on rabbitsfoot, the Neosho mucket has been affected by these activities in the Verdigris River. We conclude that habitat effects due to channelization are a significant and ongoing threat to the Neosho mucket and rabbitsfoot.

Sedimentation

Excessive sediments are believed to adversely affect riverine mussel populations requiring clean, stable streams (Ellis 1936, pp. 39–40; Brim Box and Mossa 1999, p. 99). Adverse effects resulting from sediments have been noted for many components of aquatic communities. Potential sediment sources within a watershed include virtually all activities that disturb the land surface. Most localities occupied by the Neosho mucket and rabbitsfoot, including viable populations, are currently being affected to varying degrees by sedimentation.

Sedimentation has been implicated in the decline of mussel populations nationwide, and remains a threat to Neosho mucket and rabbitsfoot (Ellis 1936, pp. 39–40; Vannote and Minshall 1982, pp. 4105–4106; Dennis 1984, p. 212; Brim Box and Mosa 1999, p. 99; Fraley and Ahlstedt 2000, pp. 193–194; Poole and Downing 2004, pp. 119–122). Specific biological effects include reduced feeding and respiratory efficiency from clogged gills, disrupted metabolic processes, reduced growth rates, limited burrowing activity, physical smothering, and disrupted host fish attraction mechanisms (Ellis 1936, pp. 39–40; Marking and Bills 1979, p. 210; Vannote and Minshall 1982, pp. 4105–4106; Waters 1995, pp. 173–175; Hartfield and Hartfield 1996, p. 373). In addition, mussels may be indirectly affected if high turbidity levels significantly reduce the amount of light available for photosynthesis, and thus, the production of certain food items (Kanehl and Lyons 1992, p. 7).

Studies tend to indicate that the primary effects of excess sediment levels on mussels are sublethal, with detrimental effects not immediately apparent (Brim Box and Mossa 1999, p. 101). The physical effects of sediment on mussel habitat appear to be multifold, and include changes in suspended and bed material load; bed sediment composition associated with increased sediment production and runoff in the watershed; channel changes in form, position, and degree of stability; changes in depth or the width and depth ratio that affects light penetration and flow regime; actively aggrading (filling) or degrading (scouring) channels; and changes in channel position. These effects to habitat may dislodge, transport downstream, or leave mussels stranded (Vannote and Minshall 1982, p. 4106; Kanehl and Lyons 1992, pp. 4–5; Brim Box and Mossa 1999, pp. 109–112). For example, many Kansas streams (such as Verdigris and Neosho Rivers) supporting mussels have become increasingly silted in over the past century, reducing habitat for the Neosho mucket and rabbitsfoot (Obermeyer *et al.* 1997a, pp. 113–114).

Increased sedimentation and siltation may explain in part why Neosho mucket and rabbitsfoot are experiencing recruitment failure in some streams. Interstitial spaces in the substrate provide crucial habitat (shelter and nutrient uptake) for juvenile mussel survival. When interstitial spaces are clogged, interstitial flow rates and spaces are reduced (Brim Box and Mossa 1999, p. 100), and this decreases habitat for juvenile mussels. Furthermore, sediment may act as a vector for delivering contaminants, such as nutrients and pesticides, to streams, and juvenile mussels may ingest contaminants adsorbed to silt particles during normal feeding activities. Neosho mucket and rabbitsfoot reproductive strategies depend on clear water (enables fish hosts to see mussel lures) during critical reproductive periods.

Agricultural activities are responsible for much of the sediment affecting rivers in the United States (Waters 1995, p. 170). Sedimentation associated with agricultural land use is cited as one of the primary threats to 7 of the 11 (64 percent) viable rabbitsfoot populations (French Creek, Tippecanoe, Paint Rock, Duck, White, Black, and Strawberry Rivers; Smith *et al.* 2009, Table 1; USACE 2011, pp. 21–22; Indiana Department of Environmental Management (IDEM) 2001, pp. 11–12; EPA 2001, p. 10; Brueggen 2010, pp. 1–2; MDC 2012, *http://mdc.mo.gov/landwater-care/stream-and-watershed-management/;* EPA Water Quality Assessment Tool, *http://ofmpub.epa.gov/tmdl_waters10/attains_nation_cy.control?p_report_type=T*). In addition, numerous stream segments in the Duck, White, Black, Little, and Strawberry River watersheds are listed as impaired waters under section 303(d) of the Clean Water Act (CWA) by EPA due to sedimentation associated with agriculture (USACE 2011, p. 21; EPA Water Quality Assessment Tool, *http://ofmpub.epa.gov/tmdl_waters10/attains_nation_cy.control?p_report_type=T*). An impaired water is a water body (i.e., stream reaches, lakes, water body segments) with chronic or recurring monitored violations of the applicable numeric or narrative water quality criteria. An impaired water cannot support one or more of its designated uses (e.g., swimming, the protection and propagation of aquatic life, drinking, industrial supply, etc.). Once a stream segment is listed as an impaired water, the State must complete a plan to address the issue causing the impairment; this plan is called a Total Maximum Daily Load (TMDL). A TMDL is a calculation of the maximum amount of a pollutant that a water body can receive and still safely meet water quality standards (WQS). Completion of the plan is generally all that is required to remove the stream segment from the 303(d) impaired water list and does not mean that water quality has changed. Once the TMDL is completed, the stream segment may be placed on the 305(b) list of impaired streams with a completed TMDL (*http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/intro.cfm*). For example, some stream segments within the White, Barren, Little River Mountain Fork, and Wabash Rivers, and French Creek have completed TMDL plans and have

attained WQS for low dissolved oxygen, pathogens, nutrients, polychlorinated biphenyls (PCBs), and siltation. However, some of these same stream segments still have not attained WQS for lead (Little River Mountain Fork) and mercury (Wabash River).

Impaired streams in the Duck River watershed (approximately 483 rkm (300 rmi)) are losing 5 to 55 percent more soil per year than the natural streams (USACE 2011, pp. 21–22). Unrestricted livestock access occurs on many streams and potentially threatens associated mussel populations (Fraley and Ahlstedt 2000, pp. 193–194). Grazing may reduce water infiltration rates and increase runoff; trampling and vegetation removal increases the probability of erosion (Armour *et al.* 1991, pp. 8–10; Brim Box and Mossa 1999, p. 103).

As discussed above, specific impacts on mussels from sediments include reduced feeding and respiratory efficiency, disrupted metabolic processes, reduced growth rates, increased substrata instability, and the physical smothering of mussels. Increased turbidity levels due to siltation can be a limiting factor that impedes the ability of sight-feeding fishes to forage. Turbidity within the rivers and streams during the times that the mussels attempt to attract host fishes may have contributed and may continue to contribute to the decline of the Neosho mucket and rabbitsfoot by reducing their efficiency at attracting the fish hosts necessary for reproduction. In addition, sediment can eliminate or reduce the recruitment of juvenile mussels, interfere with feeding activity, and act as a vector in delivering contaminants to streams. Because the Neosho mucket and rabbitsfoot are filter-feeders and may bury themselves in the substrate, they are exposed to these contaminants contained within suspended particles and deposited in bottom substrates. We conclude that biological and habitat effects due to sedimentation are a significant and ongoing threat to the Neosho mucket and rabbitsfoot.

Chemical Contaminants

Chemical contaminants are ubiquitous in the environment and are considered a major threat in the decline of mussel species (Richter *et al.* 1997, p. 1081; Strayer *et al.* 2004, p. 436; Wang *et al.* 2007a, p. 2029; Cope *et al.* 2008, p. 451). Chemicals enter the environment through point and nonpoint discharges including spills, industrial and municipal effluents, and residential and agricultural runoff. These sources contribute organic compounds, heavy metals, nutrients, pesticides, and a wide variety of newly emerging contaminants such as pharmaceuticals to the aquatic environment. As a result, water and sediment quality can be degraded to the extent that results in adverse effects to mussel populations.

Cope *et al.* (2008, p. 451) evaluated the pathways of exposure to environmental pollutants for all four freshwater mollusk life stages (free glochidia, encysted glochidia, juveniles, adults) and found that each life stage has both common and unique characteristics that contribute to observed differences in exposure and sensitivity. Almost nothing is known of the potential mechanisms and consequences of waterborne toxicants on sperm viability. In the female mollusk, the marsupial region of the gill is thought to be physiologically isolated from respiratory functions, and this isolation may provide some level of protection from contaminant interference with a female's ability to achieve fertilization or brood glochidia (Cope *et al.* 2008, p. 454). A major exception to this assertion is with chemicals that act directly on the neuroendocrine pathways controlling reproduction (see discussion below). Nutritional and ionic exchange is possible between a brooding female and her glochidia, providing a route for chemicals (accumulated or waterborne) to disrupt biochemical and physiological pathways (such as maternal calcium transport for construction of the glochidial shell). Glochidia can be exposed to waterborne contaminants for up to 36 hours until encystment occurs; between 2 and 36 hours, and then from fish host tissue burdens (for example, atrazine), that last from weeks to months and could affect transformation success of glochidia into juveniles (Ingersoll *et al.* 2007, pp. 101–104).

Juvenile mussels typically remain burrowed beneath the sediment surface for 2 to 4 years. Residence beneath the sediment surface necessitates deposit (pedal) feeding and a reliance on interstitial water for dissolved oxygen (Watters 2007, p. 56). The relative importance of exposure of juvenile Neosho mucket and rabbitsfoot to contaminants in overlying surface water, interstitial water, whole sediment, or food has not been adequately assessed. Exposure to contaminants from each of these routes varies with certain periods and environmental conditions (Cope *et al.* 2008, pp. 453 and 457).

The primary routes of exposure to contaminants for adult Neosho mucket and rabbitsfoot are surface water, sediment, interstitial (pore) water, and diet; adults can be exposed when either partially or completely burrowed in the substrate (Cope *et al.* 2008, p. 453). Adult mussels have the ability to detect toxicants in the water and close their valves to avoid exposure (Van Hassel and Farris 2007, p. 6). Adult mussel toxicity and relative sensitivity (exposure and uptake of toxicants) may be reduced at high rather than at low toxicant concentrations because uptake is affected by the prolonged or periodic toxicant avoidance responses (when the avoidance behavior of keeping their valves closed can no longer be sustained for physiological reasons (respiration and ability to feed) (Cope *et al.* 2008, p. 454). Toxicity results based on low-level exposure of adults are similar to estimates for glochidia and juveniles for some toxicants (for example, copper). The duration of any toxicant avoidance response by an adult mussel is likely to vary due to several variables, such as species, age, shell thickness and gape, properties of the toxicant, and water temperature. There is a lack of information on toxicant response(s) for Neosho mucket and rabbitsfoot, but results of tests using glochidia and juveniles may be valuable for protecting adults (Cope *et al.* 2008, p. 454).

Mussels are very intolerant of heavy metals (such as lead, zinc, cadmium, and copper) compared to commonly tested aquatic organisms. Metals occur in industrial and wastewater effluents and are often a result of atmospheric deposition from industrial processes and incinerators, but also are associated with mine water runoff (for example, Tri-State Mining Area in southwest Missouri) and have been attributed to mussel declines in streams such as Shoal, Center, and Turkey Creeks and Spring River in the Arkansas River basin (Angelo *et al.* 2007, pp. 485–489), which are streams with historical and extant Neosho mucket and rabbitsfoot populations. Heavy metals can cause mortality and affect biological processes, for instance, disrupting enzyme efficiency, altering filtration rates, reducing growth, and changing behavior of freshwater mussels (Keller and Zam 1991, p. 543; Naimo 1995, pp. 351–355; Jacobson *et al.* 1997, p. 2390; Valenti *et al.* 2005, p. 1244; Wang *et al.* 2007b, pp. 2039–2046; Wang *et al.* 2007c, pp. 2052–2055; Wang *et al.* 2010, p. 2053). Mussel recruitment may be reduced in habitats with low but chronic heavy metal and other toxicant inputs (Yeager *et al.* 1994, p. 217; Naimo 1995, pp. 347 and 351–352; Ahlstedt and Tuberville 1997, p. 75). Newly

transformed juveniles (age at 5 days) are more sensitive to acute toxicity than glochidia or older juveniles (age at 2 to 6 months) (Wang *et al.* 2010, p. 2062).

Mercury is another heavy metal that has the potential to negatively affect mussel populations. Mercury has been detected throughout aquatic environments as a product of municipal and industrial waste and atmospheric deposition from coal-burning plants. One study on rainbow mussel (*Villosa iris*) concluded that glochidia were more sensitive to mercury than were juvenile mussels, with a median lethal concentration value of 14 *u*g/L for glochidia and 114 *u*g/L for juvenile mussels (Valenti *et al.* 2005, p. 1242). The chronic toxicity is a test which usually measures sublethal effects (e.g., reduced growth or reproduction) in addition to lethality. These tests are usually longer in duration or conducted during some sensitive period of an organism's life cycle. For this species, the chronic toxicity test showed that juveniles exposed to mercury greater than or equal to 8 *u*g/L exhibited reduced growth (Valenti *et al.* 2005, p. 1245). Mercury also affects oxygen consumption, byssal thread production, and filtration rates (Naimo 1995, Jacobsen *et al.* 1997, and Nelson and Calabrese 1988 *in* Valenti *et al.* 2005, p. 1245). Effects to mussels from mercury toxicity may be occurring in some streams due to illegal dumping, spills, and permit violations. For example, acute mercury toxicity was determined to be the cause of extirpation of diverse mussel fauna for a 112-rkm (70-rmi) reach of the North Fork Holston River (Brown *et al.* 2005, pp. 1455–1457). Of the 11 viable rabbitsfoot populations, 4 populations (French Creek, Duck River, Green River, and Ohio River) currently inhabit river reaches that are impaired by mercury and are listed as impaired waters under section 303(d) of the CWA.

One chemical that is particularly toxic to early life stages of mussels is ammonia. Sources of ammonia include agricultural wastes (animal feedlots and nitrogenous fertilizers), municipal wastewater treatment plants, and industrial waste (Augspurger *et al.* 2007, p. 2026) as well as precipitation and natural processes (decomposition of organic nitrogen) (Goudreau *et al.* 1993, p. 212; Hickey and Martin 1999, p. 44; Augspurger *et al.* 2003, p. 2569; Newton 2003, p. 1243). Therefore, ammonia is considered a limiting factor for survival and recovery of some mussel species due to its ubiquity in aquatic environments and high level of toxicity, and because the highest concentrations typically occur in mussel microhabitats (Augspurger *et al.* 2003, p. 2574). In addition, studies have shown that ammonia concentrations increase with increasing temperature, pH, and low flow conditions (Cherry *et al.* 2005, p. 378; Cooper *et al.* 2005, p. 381; Wang *et al.* 2007, p. 2045), which may be exacerbated by the effects of climate change, and may cause ammonia (un-ionized and ionized) to become more problematic for juvenile mussels (Wang *et al.* 2007, p. 2045). Sublethal effects include, but may not be limited to, reduced time the valves are held open for respiration and feeding; impaired secretion of the byssal thread (used for substrate attachment), reduced ciliary action impairing feeding, depleted lipid, glycogen, and other carbohydrate stores, and altered metabolism (Goodreau *et al.* 1993, pp. 216–227; Augspurger *et al.* 2003, pp. 2571–2574; Mummert *et al.* 2003, pp. 2548–2552).

Polychlorinated biphenyls (PCBs) are ubiquitous contaminants in the environment due to their widespread use from the 1920s to 1970s as insulating material in electric equipment, such as transformers and capacitors, as well as in heat transfer fluids and in lubricants. PCBs have also been used in a wide range of products, such as plasticizers, surface coatings, inks, adhesives, flame retardants, paints, and carbonless duplicating paper. PCBs were still being introduced into the environment at many sites (such as landfills and incinerators) until the 1990s. The inherent stability and toxicity of PCBs have resulted in them being a persistent environmental problem (Safe 1994 *in* Lehmann *et al.* 2007, p. 356). PCBs are lipophilic (affinity to combine with fats or lipids), adsorb easily to soil and sediment, and are present in the sediment and water column in aquatic environments, making them available to bioaccumulate and induce negative effects in living organisms (Livingstone 2001 *in* Lehmann *et al.* 2007, p. 356). Studies have demonstrated increased PCB concentrations in native freshwater mussels (Ruessler *et al.* 2011, pp. 1, 7), marine bivalves (Krishnakumar *et al.* 1994, p. 249), and nonnative, invasive mollusks (zebra mussels and Asian clams) (Gossiaux *et al.* 1996, p. 379; Lehmann *et al.* 2007, p. 363) in areas with high levels of PCBs. Oxidative stress (imbalance in the normal redox state of cells that causes toxic effects that damage all components of the cell, including proteins, lipids, and DNA) is a direct consequence of exposure to PCBs. Relevant changes, whether directly or indirectly due to oxidative stress, may occur at the organ and organism levels and will likely result in mussel population-wide effects, including reduced fecundity and chronic maladies due to PCB exposure (Lehmann *et al.* 2007, p. 363). Two of the 11 viable rabbitsfoot populations (18 percent) inhabit waters listed as impaired due to PCBs under section 303(d) of the CWA.

Agriculture, timber harvest, and lawn management practices utilize nutrients and pesticides. These are two broad categories of chemical contaminants that have the potential to adversely impact mussel species. Nutrients, such as nitrogen and phosphorus, primarily occur in runoff from livestock farms, feedlots, heavily fertilized row crops and pastures (Peterjohn and Correll 1984, p. 1471), post timber management activities, and urban and suburban runoff, including leaking septic tanks, and residential lawns.

Studies have shown that excessive nitrogen concentrations can be lethal to the adult freshwater pearl mussel (*Margaritifera margaritifera*) and reduce the lifespan and size of other mussel species (Bauer 1988, p. 244; Bauer 1992, p. 425). Nutrient enrichment can result in an increase in primary productivity, and the associated algae respiration depletes dissolved oxygen levels. This may be particularly detrimental to juvenile mussels that inhabit the interstitial spaces in the substrate where lower dissolved oxygen concentrations are more likely than on the sediment surface where adults tend to live (Sparks and Strayer 1998, pp. 132–133). For example, Galbraith *et al.* (2008, pp. 48–49) reported a massive die-off of greater than 160 rabbitsfoot specimens at a long-term monitoring site in the Little River, Oklahoma. While the exact cause for the die-off is unknown, the authors speculate that the 2005 Oklahoma drought coupled with high water temperature and extensive blooms of filamentous algae may have resulted in extreme physiological stress. Over-enriched conditions are exacerbated by low flow conditions, such as those experienced during a typical summer season and that may occur with greater frequency and severity as a result of climate change. Three of the 11 viable rabbitsfoot populations (French Creek, Duck River, and Tippecanoe River) are listed as impaired waters under section 303(d) of the CWA due to nutrient enrichment.

Elevated concentrations of pesticide frequently occur in streams due to residential or commercial pesticide runoff, overspray application to row crops, and lack of adequate riparian buffers. Agricultural pesticide applications often coincide with the reproductive and early life stages of

mussels, and effects to mussels may be increased during a critical time period (Bringolf *et al.* 2007a, p. 2094). Recent studies tested the toxicity of glyphosate, its formulations, and a surfactant (MON 0818) used in several glyphosate formulations, to early life stages of the fatmucket (*Lampsilis siliquoidea*), a U.S. native freshwater mussel (Bringolf *et al.* 2007a, p. 2094). Studies conducted with juvenile mussels and glochidia determined that the surfactant (MON 0818) was the most toxic of the compounds tested and that *L. siliquoidea* glochidia were the most sensitive organism tested to date (Bringolf *et al.* 2007a, p. 2094). Roundup®, technical grade glyphosate isopropylamine salt, and isopropylamine were also acutely toxic to juveniles and glochidia (Bringolf *et al.* 2007a, p. 2097). The study of other pesticides, including atrazine, chlorpyrifos, and permethrin, on glochidia and juvenile life stages determined that chlorpyrifos was toxic to both *L. siliquoidea* glochidia and juveniles (Bringolf *et al.* 2007b, pp. 2101 and 2104). The above results indicate the potential toxicity of commonly applied pesticides and the threat to mussel species as a result of the widespread use of these pesticides.

There are instances where chemical spills have resulted in the loss of high numbers of mussels (Jones *et al.* 2001, p. 20; Brown *et al.* 2005, p. 1457; Schmerfeld 2006, pp. 12–13), and are considered a serious threat to mussel species. The Neosho mucket and rabbitsfoot are especially threatened by chemical spills because these spills can occur anywhere that highways with tanker trucks, industries, or mines overlap with their distribution.

Other examples of the influence of point and nonpoint-source pollutants on streams throughout the range of the Neosho mucket and rabbitsfoot include two documented mussel kills in Fish Creek (circa 1988) as a result of manure runoff from a hog farm and a diesel spill (Watters 1988, p. 18). Twelve point-source discharges occur on the Green River (Kentucky State Nature Preserves Commission and The Nature Conservancy 1998, pp. 15–19). The Illinois River, a tributary of the Arkansas River, is subject to nonpoint-source organic runoff from poultry farming and municipal wastewater.

Pharmaceutical chemicals used in commonly consumed drugs are increasingly found in surface waters. A recent nationwide study sampling 139 stream sites in 30 States detected the presence of numerous pharmaceuticals, hormones, and other organic wastewater contaminants downstream from urban development and livestock production areas (Kolpin *et al.* 2002, pp. 1208–1210). Another study in northwestern Arkansas found pharmaceuticals or other organic wastewater constituents at 16 of 17 sites in seven streams surveyed in 2004 (Galloway *et al.* 2005, pp. 4–22). Toxic levels of exposure to chemicals that act directly on the neuroendocrine pathways controlling reproduction can cause premature release of viable or nonviable glochidia. For example, the active ingredient in many human prescription antidepressant drugs belonging to the class of selective serotonin reuptake inhibitors may exert negative reproductive effects on mussels because of the drug's action on serotonin and other neuroendocrine pathways (Cope *et al.* 2008, p. 455). Pharmaceuticals or organic wastewater constituents are generally greater downstream of wastewater treatment facilities (Galloway *et al.* 2005, p. 28). Pharmaceuticals that alter mussel behavior and influence successful attachment of glochidia on fish hosts may have population-level implications for the Neosho mucket and rabbitsfoot.

The information presented in this section represents some of the threats from chemical contaminants that have been documented both in the laboratory and field and demonstrates that chemical contaminants pose a substantial threat to Neosho mucket and rabbitsfoot. A cursory examination of land use trends, non-point and point source discharges, and the list of impaired waters under section 303(d) of the CWA suggests that all 11 rabbitsfoot populations currently considered viable may be subjected to the subtle, pervasive effects of chronic, low-level contamination that is ubiquitous in these watersheds. For example, 8 of the 11 (73 percent) streams with viable rabbitsfoot populations are listed as impaired waters under section 303(d) of the CWA. Reasons for impairment include mercury, nutrients, organic enrichment and dissolved oxygen depletion, pathogens, turbidity (sediment), and PCBs. Potential effects from contaminant exposure may result in death, reduced growth, altered metabolic processes, or reduced reproduction. We conclude that biological and habitat effects due to chemical contaminants are a significant and ongoing threat contributing to the decline of Neosho mucket and rabbitsfoot populations.

Mining

Gravel, coal, and metal mining are activities negatively affecting water quality in Neosho mucket and rabbitsfoot habitat. Instream and alluvial gravel mining has been implicated in the destruction of mussel populations (Hartfield 1993, pp. 136–138; Brim Box and Mossa 1999, pp. 103–104). Negative effects associated with gravel mining include stream channel modifications (altered habitat, disrupted flow patterns, sediment transport), water quality modifications (increased turbidity, reduced light penetration, increased temperature), macroinvertebrate population changes (elimination), and changes in fish populations, resulting from adverse effects to spawning and nursery habitat and food web disruptions (Kanehl and Lyons 1992, pp. 4–10). Gravel mining activities continue to be a localized threat in several streams with viable rabbitsfoot populations (Ohio, Tennessee, White, Strawberry, and Little Rivers). In the lower Tennessee River, instream mining occurs in 18 reaches totaling 77.1 rkm (47.9 rmi) between the Duck River confluence and Pickwick Landing Dam (Hubbs 2010, pers. comm.).

Coal mining activities, resulting in heavy metal-rich drainage, and associated sedimentation has adversely affected many drainages with rabbitsfoot populations, including portions of the upper Ohio River system in Kentucky, Pennsylvania, and West Virginia; the lower Ohio River system in eastern Illinois; the Rough River drainage in western Kentucky; and the upper Cumberland River system in Kentucky and Tennessee (Ortmann 1909 *in* Butler 2005, p. 102; Gordon 1991, pp. 4 and 5; Layzer and Anderson 1992 *in* Butler 2005, p. 102). Numerous mussel toxicants, such as polycyclic aromatic hydrocarbons and heavy metals (copper, manganese, and zinc) from coal mining contaminate sediments when released into streams (Ahlstedt and Tuberville 1997, p. 75). Low pH commonly associated with mine runoff can reduce glochidial attachment rates on host fish (Huebner and Pynnonen 1990, pp. 2350–2353). Thus, acid mine runoff may have local effects on mussel recruitment and may lead to mortality due to improper shell development or erosion.

Metal mining (lead, cadmium, and zinc) in the Tri-State Mining Area (15,000 km^2; 5,800 mi^2 in Kansas, Missouri, and Oklahoma) has adversely affected Center and Shoal Creeks and the Spring River. It has been implicated in the loss of Neosho mucket and rabbitsfoot from portions of these streams (Obermeyer *et al.* 1997b, p. 114). A study by Kansas Department of Health and Environment documented a strong negative correlation between the distribution and abundance of native mussels, including Neosho mucket, and sediment concentrations of lead, zinc

and cadmium in the Spring River system (Angelo *et al.* 2007, pp. 477–493). Sediment and water quality samples exceeded EPA 2006 threshold effect concentrations for cadmium, lead, and zinc at numerous sampling locations within the Tri-State Mining Area (Gunter 2007, pers. comm.). These physical habitat threats combined with poor water quality and agricultural nonpoint-source pollution are serious threats to all existing mussel fauna in the basin.

In the St. Francis River basin, past metal mining and smelting (early eighteenth century through the 1940s) have resulted in continuing heavy metal (lead, iron, nickel, copper, cobalt, zinc, cadmium, chromium) contamination of surface waters in the area upstream of the extant rabbitsfoot population. Recent and historical metals mining and smelting produced large volumes of contaminated wastes. Most of these mining wastes are stored behind poorly constructed dams and impoundments (Roberts 2008, pers. comm.). Wappapello Reservoir and the confluence with Big Creek (with habitat degradation primarily from mining activities) may effectively limit the distribution of the rabbitsfoot in the St. Francis River. We conclude that biological and habitat effects due to mining activities are a significant and ongoing threat contributing to declining Neosho mucket and rabbitsfoot populations.

Oil and Natural Gas Development

Oil and natural gas resources are present in some of the watersheds that are known to support rabbitsfoot, including the Allegheny and Middle Fork Little Red Rivers and two watersheds with viable populations (White River and French Creek). Exploration and extraction of these energy resources can result in increased siltation, a changed hydrograph (graph showing changes in the discharge of a river over a period of time), and altered water quantity and quality even at considerable distances from the mine or well field because effects are carried downstream from the original source. Rabbitsfoot habitat in streams can be threatened by the cumulative effects of multiple mines and well fields (adapted from Service 2008, p. 11).

Recently, oil and gas exploration has been able to expand in areas of shale due to new technologies (i.e., hydraulic fracturing and horizontal drilling), making access possible to oil and gas reserves in areas that were previously inaccessible. Extraction of these resources, particularly natural gas, has increased dramatically in recent years in Arkansas, Oklahoma, Pennsylvania, and West Virginia. Although oil and natural gas extraction generally occurs away from the river, extensive road and pipeline networks are required to construct and maintain wells and transport the extracted resources. These road and pipeline networks frequently cross or occur near tributaries, contributing sediment to the receiving waterway. In addition, the construction and operation of wells may result in the discharge of chemical contaminants and subsurface minerals. Several of the viable rabbitsfoot populations occur in active shale basins (areas of shale gas formations) (*http://www.eia.gov/analysis/studies/worldshalegas/*). In 2006, more than 3,700 permits were issued for oil and gas wells by the Pennsylvania Department of Environmental Protection, which also issued 98 citations for permit violations at 54 wells (Hopey 2007; adapted from Service 2008, p. 13). A natural gas pipeline company pled guilty to three violations of the Act in 2011 for unauthorized take of a federally endangered mussel in Arkansas as a result of a large amount of sediment being transported from pipeline right-of-ways to tributary streams in the affected watershed (Department of Justice 2011, pers. comm.). Where oil and natural gas development occurs within the range of extant Neosho mucket and rabbitsfoot populations, we conclude that the resulting biological and habitat effects are a significant and ongoing threat contributing to the decline of both species.

Summary of Factor A

The decline of mussels in the eastern United States is primarily the result of long-lasting direct and secondary effects of habitat alterations such as impoundments, channelization, sedimentation, chemical contaminants, oil and gas development, and mining and it is reasonable to conclude that the changes in the river basins historically and currently occupied by the species are the cause of population level (river basin) effects. Historical population losses due to impoundments have probably contributed more to the decline and range reductions of the Neosho mucket and rabbitsfoot than any other single factor. Seven of the 11 (64 percent) viable rabbitsfoot populations (Ohio, Green, Tippecanoe, Tennessee, Duck, White, and Little Rivers) occur downstream of main stem impoundments that make these populations more susceptible to altered habitat quality and quantity associated with the impoundment and dam operation, which may be exacerbated during stochastic events such as droughts and floods. Sedimentation resulting from a variety of sources such as channelization, agricultural and silvicultural practices, and construction activities has degraded Neosho mucket and rabbitsfoot habitat and altered biological processes essential to their survival. For example, sedimentation associated with agricultural land use is cited as one of the primary threats to 7 of the 11 (64 percent) streams with viable rabbitsfoot populations. Land use conversion, particularly urbanization that increases impervious surfaces in watersheds (impervious surface increases flood intensity and duration), channelization, and instream gravel and sand mining alter natural hydrology and stream geomorphology characteristics that also degrade mussel habitat in streams that support the Neosho mucket and rabbitsfoot. Contaminants associated with industrial and municipal effluents, agricultural practices, and mining degrade water and sediment quality leading to environmental conditions that have lethal and sublethal effects to Neosho mucket and rabbitsfoot, particularly the highly sensitive early life stages. Eight of the 11 (73 percent) streams with viable rabbitsfoot populations are listed as impaired waters under section 303(d) of the CWA, which means that the rabbitsfoot may be subjected to the subtle, pervasive effects of chronic, low-level contamination that is ubiquitous in these watersheds. Chronic contamination can affect the mussels in a variety of ways including sublethal effects (such as suppressed immune systems and effects to reproduction and fecundity from neuroendocrine disrupters) and lethal effects (such as sediment smothers and disruption of other metabolic processes).

In summary, we have determined that impoundments, channelization, sedimentation, chemical contaminants, mining, and oil and natural gas development are significant, ongoing threats to the Neosho mucket and rabbitsfoot that are expected to continue into the future. Although efforts have been made to restore habitat in some areas, these threats are still ongoing, as evidenced by population declines and range reduction. Thus, these changes in the species' historical or current range are not expected to be ameliorated in the future; therefore, we find it reasonably likely that the effects of these threats on both species will continue at current levels or potentially increase.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

The Neosho mucket was valuable in the pearl button industry (1800s to early 1940s), and historical episodes of overharvest in the Neosho River may have contributed to its decline (Obermeyer *et al.* 1997b, p. 115). The rabbitsfoot was never a valuable shell for the commercial pearl button industry (Meek and Clark 1912, p. 15; Murray and Leonard 1962, p. 65), nor the cultured pearl industry (Williams and Schuster 1989, p. 23), and hence these activities were probably not significant factors in its decline. However, it was noted occasionally in commercial harvests as evidenced from mussel cull piles (Isely 1924; Parmalee *et al.* 1980, p. 101). Currently, Neosho mucket and rabbitsfoot are not commercially valuable species but may be increasingly sought by collectors as they become rarer. Although scientific collecting is not thought to represent a significant threat, unregulated collecting could adversely affect localized Neosho mucket and rabbitsfoot populations.

Commercial mussel harvest is illegal in some States (for example, Indiana and Ohio), but regulated in others (for example, Arkansas, Alabama, Kentucky, and Tennessee). These species may be inadvertently harvested by inexperienced commercial harvesters unfamiliar with species identification. Although illegal harvest of protected mussel beds occurs (Watters and Dunn 1995, pp. 225 and 247–250), commercial harvest is not known to have a significant effect on the Neosho mucket and rabbitsfoot.

Summary of Factor B

Though it is possible that the intensity of inadvertent or illegal harvest may increase in the future, there is no evidence that this stressor is currently increasing in severity. On the basis of this analysis, we find that overutilization for commercial, recreational, scientific, or educational purposes is not a current threat to the Neosho mucket or rabbitsfoot in any portion of their range at this time nor is likely to become so in the future.

C. Disease or Predation

Little is known about diseases in freshwater mussels (Grizzle and Brunner 2007, p. 6). However, mussel die-offs have been documented in streams inhabited by rabbitsfoot (Neves 1986, pp. 8–11), and some researchers believe that disease may be a factor contributing to the die-offs (Buchanan 1986, p. 53; Neves 1986, p. 11). Mussel parasites include water mites, trematodes, oligochaetes, leeches, copepods, bacteria, and protozoa (Grizzle and Brunner 2007, p. 4). Generally, parasites are not suspected of being a major limiting factor in the species' survival (Oesch 1984, p. 6). However, mite and trematode burdens can affect reproductive output and physiological condition, respectively, in mussels (Gangloff *et al.* 2008, pp. 28–30). Stressors that reduce fitness may make mussels more susceptible to parasites (Butler 2007, p. 90). Furthermore, nonnative mussels may carry diseases and parasites that are potentially devastating to the native mussel fauna on an individual or population level basis (river basin), including Neosho mucket and rabbitsfoot (Strayer 1999b, p. 88). However, while individual mussels or beds of mussels historically or currently may have been affected by disease or parasites, we have no evidence that the severity of disease or parasite infestations impact either mussel on a population level (river basin).

The muskrat (*Ondatra zibethicus*) is cited as the most prevalent mussel predator (Kunz 1898, p. 328; Convey *et al.* 1989, p. 654–655; Hanson *et al.* 1989, pp. 15–16). Muskrat predation may limit the recovery potential of endangered or threatened mussels or contribute to local extirpations of previously stressed populations, according to Neves and Odom (1989, p. 940), who consider it, however, primarily a seasonal or localized threat. Galbraith *et al.* (2008, p. 49) hypothesized that predation may have exacerbated rabbitsfoot mortality in the Little River, Oklahoma, during the 2005 drought. Harris *et al.* (2007, p. 31) reported numerous dead rabbitsfoot from muskrat middens (mound or deposit containing shells) in the Spring River, Arkansas. Other mammals (for example, raccoon, mink, otter, hogs, and rats), turtles, and aquatic birds also occasionally feed on mussels (Kunz 1898, p. 328; Neck 1986, pp. 64–65). Recently, predation of Neosho mucket by reintroduced otters has been documented in a mussel bed also supporting rabbitsfoot in the Spring River, Kansas (Barnhart 2003, pp. 16–17), and likely occurs elsewhere. Muskrat predation has been documented for Neosho mucket and rabbitsfoot, but the overall threat is generally considered insignificant.

Some species of fish feed on mussels (for example, common carp (*Cyprinus carpio),* freshwater drum (*Aplodinotus grunniens*), and redear sunfish (*Lepomis microlophus*)) and potentially on young Neosho mucket and rabbitsfoot. Various invertebrates, such as flatworms, hydra, nonbiting midge larvae, dragonfly larvae, and crayfish, feed on juvenile mussels (Zimmerman *et al.* 2003, p. 28). Although predation by naturally occurring predators is a normal aspect of the population dynamics of a healthy mussel population, predation may amplify declines in small populations of this species. In addition, the potential now exists for black carp (*Mylopharyngodon piceus*), a mollusk-eating Asian fish recently introduced into the waters of the United States (Strayer 1999b, p. 89), to eventually disperse throughout the range of the Neosho mucket and rabbitsfoot. However, we have no evidence that the severity of predation has reached levels where populations (river basin) of either mussel have been historically or recently impacted or should be impacted in the future based on current information.

The life cycle of freshwater mussels is intimately related to that of the freshwater fish they use as hosts for their parasitic glochidia. For this reason, diseases that affect populations of freshwater fishes also pose a significant threat to mussels in general. Viral hemorrhagic septicemia (VHS) disease has been confirmed from much of the Great Lakes and St. Lawrence River system. If the VHS virus successfully migrates out of Clearfork Reservoir or the Great Lakes and into the Ohio and Mississippi River basins, it could spread rapidly and cause fish kills throughout the river basins. Few Neosho mucket and rabbitsfoot populations are currently recruiting at sustainable levels, and fish kills, particularly if VHS infects suitable fish hosts, could further reduce glochidia encounters with fish hosts and exacerbate mussel recruitment reductions. However, we have no evidence that fish kills affecting potential fish hosts of these two mussel species have had population affects historically or recently.

Summary of Factor C

Disease in mussels is poorly known and not currently considered a threat rising to a level such that it would have an effect on the Neosho mucket, nor the rabbitsfoot, as a whole. Studies indicate that, in some localized areas, disease and predation may have negative effects on mussel populations. Though it is possible that the intensity of disease or predation may increase in the future, there is no evidence that this stressor is currently increasing in severity. Based on our analysis of the best available scientific and commercial data available, we find that neither disease nor predation is a significant threat to the overall status of Neosho mucket and

rabbitsfoot, nor is either likely to become so in the future.

D. The Inadequacy of Existing Regulatory Mechanisms

The objective of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA) (33 U.S.C. 1251 *et seq.*), is to restore and maintain the chemical, physical, and biological integrity of the nation's waters by preventing point and nonpoint pollution sources. The CWA has a stated goal that ''* * *wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983.'' States are responsible for setting and implementing water quality standards that align with the requirements of the CWA. Overall, implementation of the CWA could benefit both mussel species through the point and nonpoint programs.

Nonpoint source (NPS) pollution comes from many diffuse sources, unlike pollution from industrial and sewage treatment plants. NPS pollution is caused by rainfall or snowmelt moving over and through the ground. As the runoff moves, it transports natural and human-made pollutants. While some pollutants may be ''deposited'', some may remain in suspension (dissolved) as they are transported through various waterbodies. States report that nonpoint source pollution is the leading remaining cause of water quality problems. The effects of nonpoint source pollutants on specific waters vary and may not always be fully assessed. However, these pollutants have harmful effects on fisheries and wildlife (*http://www.epa.gov/owow_keep/NPS/whatis.html.*)

Sources of NPS pollution within the watersheds occupied by both mussels include timber clearcutting, clearing of riparian vegetation, urbanization, road construction, and other practices that allow bare earth to enter streams (The Nature Conservancy 2004, p. 13). Numerous stream segments in the Duck, White, Black, Little, and Strawberry River watersheds are listed as impaired waters under section 303(d) of the CWA by EPA due to sedimentation associated with agriculture (USACE 2011, p. 21; EPA Water Quality Assessment Tool, *http://ofmpub.epa.gov/tmdl_waters10/attains_nation_cy.control?p_report_type=T*). For example, impaired streams in the Duck River watershed (483 rkm (300 rmi)) are losing 5 to 55 percent more soil per year than streams not labeled as impaired (USACE 2011, pp. 21–22). Currently, the CWA may not adequately protect Neosho mucket and rabbitsfoot habitat from NPS pollution. The Service has no information concerning the implementation of the CWA regarding NPS pollution specific to protection of both mussels. However, insufficient implementation could become a threat to both mussel species if they continue to decline in numbers or if new information becomes available.

Point-source discharges within the range of the Neosho mucket and rabbitsfoot have been reduced since the enactment of the CWA. Despite some reductions in point source discharges, adequate protection may not be provided by the CWA for filter-feeding organisms that can be affected by extremely low levels of contaminants (see *Chemical Contaminants* discussion under Factor A). The Neosho mucket and rabbitsfoot continue to decline due to the effects of habitat destruction, poor water quality, contaminants, and other factors. Eight of the 11 (73 percent) streams with viable rabbitsfoot populations are listed as impaired waters under section 303(d) of the CWA. Reasons for impairment include mercury, nutrients, organic enrichment, dissolved oxygen depletion, pathogens, turbidity (sediment), and PCBs. In addition, numerous tributaries within watersheds supporting viable Neosho mucket and rabbitsfoot populations also are listed as impaired waters under section 303(d) of the CWA, which means that both species may be subjected to greater, albeit subtle, pervasive effects of chronic, low-level contamination that is ubiquitous in these watersheds. However, there is no specific information known about the sensitivity of the Neosho mucket and rabbitsfoot to common point source pollutants like industrial and municipal pollutants and very little information on other freshwater mussels. Because there is very little information known about water quality parameters necessary to fully protect freshwater mussels, such as the Neosho mucket and rabbitsfoot, it is difficult to determine whether the CWA is adequately addressing the threats to these species. However, given that a goal of the CWA is to establish water quality standards that protect shellfish and given that documented declines of these mussel species still continue due to poor water quality and other factors, we take a conservative approach in favor of the species and conclude that the CWA has been insufficient to significantly reduce or remove the threats to the Neosho mucket and rabbitsfoot. We invite public comment on this matter, and solicit information especially regarding water quality data that may be helpful in determining the water quality parameters necessary for these species' survival (see Information Requested, item #4).

Summary of Factor D

In summary, the CWA has a stated goal to establish water quality standards that protect aquatic species, including the Neosho mucket and rabbitsfoot. However, the CWA has generally been insufficient at protecting mussels, and adequate water quality criteria that are protective of all life stages, particularly glochidia and juveniles, may not be established. Little information is known about specific sensitivities of mussels to various pollutants, but both species continue to decline due to the effects of habitat destruction, poor water quality, contaminants, and other factors. Based on our analysis of the best available scientific and commercial data, we conclude that the CWA is inadequate to reduce or remove threats to the Neosho mucket and rabbitsfoot throughout all of their range.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Population Fragmentation and Isolation

Population fragmentation and isolation prohibit the natural interchange of genetic material between populations. Most of the remaining Neosho mucket and rabbitsfoot populations are small and geographically isolated, and, thus, are susceptible to genetic drift, inbreeding depression, and stochastic changes to the environment, such as toxic chemical spills (Smith 1990, pp. 311–321; Watters and Dunn 1995, pp. 257–258; Avise and Hamrick 1996, pp. 463–466). For example, the Spring River (White River basin) and Muddy Creek (Ohio River basin) rabbitsfoot populations are the only small populations not isolated from a viable population. Three marginal populations (Alleghany River and LeBoeuf and Conneauttee Creeks), considered metapopulations with French Creek, also are not isolated from a viable rabbitsfoot population (French Creek). However, 41 of 51 extant rabbitsfoot populations (80 percent) are isolated from other extant populations, excluding those discussed above and the Strawberry, Tennessee, and Ohio Rivers, which are viable populations that are not isolated from another viable population (Black River) or each other (lower Tennessee and Ohio Rivers).

Inbreeding depression can result in early mortality, decreased fertility, smaller body size, loss of vigor, reduced

fitness, and various chromosome abnormalities (Smith 1990, pp. 311–321). A species' vulnerability to extinction is increased when they are patchily distributed due to habitat loss and degradation (Noss and Cooperrider 1994, pp. 58–62; Thomas 1994, p. 373). Although changes in the environment may cause populations to fluctuate naturally, small and low-density populations are more likely to fluctuate below a minimum viable population size (the minimum or threshold number of individuals needed in a population to persist in a viable state for a given interval) (Shaffer 1981, p. 131; Shaffer and Samson 1985, pp. 148–150; Gilpin and Soulé 1986, pp. 25–33). Furthermore, this level of isolation makes natural repopulation of any extirpated population unlikely without human intervention. Population isolation prohibits the natural interchange of genetic material between populations, and small population size reduces the reservoir of genetic diversity within populations, which can lead to inbreeding depression (Avise and Hambrick 1996, p. 461).

Neosho mucket and rabbitsfoot were once widespread throughout their respective ranges with few natural barriers to prevent migration (via fish host species) among suitable habitats. However, construction of dams extirpated many Neosho mucket and rabbitsfoot populations and isolated others. Recruitment reduction or failure is a potential problem for many small Neosho mucket and rabbitsfoot populations rangewide, a potential condition exacerbated by their reduced range, increasingly small populations, and increasingly isolated populations. If these trends continue, further significant declines in total population size and subsequent reduction in long-term survivability may be observed in the future.

The likelihood is high that some rabbitsfoot and Neosho mucket populations are below the effective population size (EPS—the number of individuals in a population who contribute offspring to the next generation), based on restricted distribution and populations only represented by a few individuals, and achieving the EPS is necessary for a population to adapt to environmental change and maintain long-term viability. Isolated populations eventually are extirpated when population size drops below the EPS or threshold level of sustainability (Soulé 1980, pp. 162–164). Evidence of recruitment in many populations of these two species is scant, making recruitment reduction or outright failure suspect. These populations may be experiencing the bottleneck effect of not attaining the EPS. Small, isolated, below the EPS-threshold populations of short-lived species (most fish hosts) theoretically die out within a decade or so, while below-threshold populations of long-lived species, such as the Neosho mucket and rabbitsfoot, might take decades to die out even given years of total recruitment failure. Without genetic interchange, small, isolated populations could be slowly expiring, a phenomenon termed the extinction debt (Tilman *et al.* 1994, pp. 65–66). Even given the absence of existing or new anthropogenic threats, disjunct populations may be lost as a result of current below-threshold effective population size. Additionally, evidence indicates that general habitat degradation continues to decrease habitat patch size, further contributing to the decline of Neosho mucket and rabbitsfoot populations.

We find that fragmentation and isolation of small remaining populations of the Neosho mucket and rabbitsfoot are current and ongoing threats to both species throughout all of their ranges and will continue into the future. Further, stochastic events may play a magnified role in population extirpation when small, isolated populations are involved.

Invasive Nonindigenous Species

Various invasive or nonnative species of aquatic organisms are firmly established in the range of the Neosho mucket and rabbitsfoot. The nonnative, invasive species that poses the most significant threat is the zebra mussel, *Dreissena polymorpha,* introduced from Europe. Its invasion poses a threat to mussel faunas in many regions, and species extinctions are expected as a result of its continued spread in the eastern United States (Ricciardi *et al.* 1998, p. 613). Strayer (1999b, pp. 75–80) reviewed in detail the mechanisms by which zebra mussels affect native mussels. Zebra mussels attach in large numbers to the shells of live native mussels and are implicated in the loss of entire native mussel beds. Fouling effects include impeding locomotion (both laterally and vertically), interfering with normal valve movements, deforming valve margins, and locally depleting food resources and increasing waste products. Heavy infestations of zebra mussels on native mussels may overly stress the animals by reducing their energy stores. They may also reduce food concentrations to levels too low to support reproduction, or even survival in extreme cases. Zebra mussels also may affect Neosho mucket and rabbitsfoot through filtering and removing their sperm and possibly glochidia from the water column, thus reducing reproductive potential. Habitat for native mussels also may be degraded by large deposits of zebra mussel pseudofeces (undigested waste material passed out of the incurrent siphon) (Vaughan 1997, p. 11).

Overlapping much of the current range of the Neosho mucket and rabbitsfoot, zebra mussels have been detected or are established in Neosho mucket (Neosho and Verdigris Rivers) and rabbitsfoot streams (Ohio, Allegheny, Green, Tennessee, White, and Verdigris Rivers, and French and Bear Creeks). Zebra mussel populations appear to be maintained primarily in streams with barge navigation (Stoeckel *et al.* 2003, p. 334). As zebra mussels may maintain high densities in big rivers, large tributaries, and below infested reservoirs, rabbitsfoot populations in these affected areas have the potential to be significantly affected. In addition, there is long-term potential for zebra mussel invasions into other systems that currently harbor Neosho mucket and rabbitsfoot populations. However, evidence is mounting in some northern streams where there is no barge navigation (French Creek and Tippecanoe River) and southern ones with barge traffic (Tennessee River) that the zebra mussel threat to native mussels may be minimal because native freshwater mussel populations are able to survive when zebra mussel abundance is low (Butler 2005, p. 116; Fisher 2009, pers. comm.).

The Asian clam (*Corbicula fluminea*) has spread throughout the range of Neosho mucket and rabbitsfoot since its introduction in the early twentieth century. It competes with native mussels, particularly juveniles, for resources such as food, nutrients, and space (Neves and Widlak 1987, p. 6; Leff *et al.* 1990, p. 414), and may ingest sperm, glochidia, and newly metamorphosed juveniles of native mussels (Strayer 1999b, p. 82; Yeager *et al.* 2000, p. 255). Periodic die-offs of Asian clams may produce enough ammonia and consume enough dissolved oxygen to kill native mussels (Strayer 1999b, p. 82). Yeager *et al.* (2000, pp. 257–258) determined that high densities of Asian clams negatively affect the survival and growth of newly metamorphosed juvenile mussels and thus reduced recruitment. Dense Asian clam populations actively disturb sediments that may reduce habitat for juveniles of native mussels (Strayer 1999b, p. 82).

Asian clam densities vary widely in the absence of native mussels or in

patches with sparse mussel concentrations, but Asian clam density is never high in dense mussel beds, indicating that the clam is unable to successfully invade small-scale habitat patches with high unionid biomass (Vaughn and Spooner 2006, pp. 334–335). The invading clam therefore appears to preferentially invade sites where mussels are already in decline (Strayer 1999b, pp. 82–83; Vaughn and Spooner 2006, pp. 332–336) and does not appear to be a causative factor in the decline of mussels in dense beds. However, an Asian clam population that thrives in previously stressed, sparse mussel populations might exacerbate mussel decline through competition and by impeding mussel population expansion (Vaughn and Spooner 2006, pp. 335–336).

A molluscivore (mollusk eater), the introduced black carp (*Mylopharyngodon piceus*), is a potential threat to Neosho mucket and rabbitsfoot (Strayer 1999b, p. 89). It has been proposed for widespread use by aquaculturists to control snails, the intermediate host of a trematode (flatworm) parasite affecting catfish in ponds in the southeast and lower midwest. They are known to feed on various mollusks, including mussels and snails, in China. They are the largest of the Asiatic carp species, reaching more than 1.2 m (4 ft) in length (Nico and Williams 1996, p. 6). Foraging rates for a 4-year-old fish average 1.4–1.8 kg (3 or 4 pounds) a day, indicating that a single individual could consume 9,072 kg (10 tons) of native mollusks during its lifetime (MICRA 2005, p. 1). In 1994, 30 black carp escaped from an aquaculture facility in Missouri during a flood. The escape of nonsterile black carp is considered imminent by conservation biologists (Butler 2007, pp. 95–96). The black carp was officially added to the Federal list of injurious wildlife species on October 18, 2007 (72 FR 59019).

The round goby (*Neogobius melanostomus*) is another nonnative, invasive fish species released in the 1980s that is well established and likely to spread through the Mississippi River system (Strayer 1999b, pp. 87–88). This species is an aggressive competitor of similar-sized benthic fishes (sculpins and darters), as well as a voracious carnivore, despite its size (less than 25.4 cm (10 in.) in length), preying on a variety of foods, including small mussels and fishes that could serve as glochidial hosts (Strayer 1999b, p. 88; Janssen and Jude 2001, p. 325). Round gobies may, therefore, pose a threat to Neosho mucket and rabbitsfoot reproduction.

Nonnative, invasive species, such as those described above, are an ongoing threat to the Neosho mucket and rabbitsfoot. This threat is likely to increase as these and potentially other invasive species expand their occupancy within the ranges of the Neosho mucket and rabbitsfoot through displacement, recruitment interference, and direct predation of the mussels and their fish hosts.

Temperature

Natural temperature regimes can be altered by impoundments, tail water releases from dams, industrial and municipal effluents, and changes in riparian habitat. Exact critical thermal limits for survival and normal functioning of many freshwater mussel species are unknown. However, high temperatures can reduce dissolved oxygen concentrations in the water, which slows growth, reduces glycogen stores, impairs respiration, and may inhibit reproduction (Fuller 1974, pp. 240–241). Low temperatures can significantly delay or prevent metamorphosis (Watters and O'Dee 1999, pp. 454–455). Water temperature increases have been documented to shorten the period of glochidial encystment, reduce righting speed (various reflexes that tend to bring the body into normal position in space and resist forces acting to displace it out of normal position), increase oxygen consumption, and slow burrowing and movement responses (Fuller 1974, pp. 240–241; Bartsch *et al.* 2000, p. 237; Watters *et al.* 2001, p. 546; Schwalb and Pusch 2007, pp. 264–265). Several studies have documented the influence of temperature on the timing aspects of mussel reproduction (Gray *et al.* 2002, p. 156; Allen *et al.* 2007, p. 85; Steingraeber *et al.* 2007, pp. 303–309). Peak glochidial releases are associated with water temperature thresholds that can be thermal minimums or maximums, depending on the species (Watters and O'Dee 2000, p. 136).

Alterations in temperature regimes in streams, such as those described above, are an ongoing threat to the Neosho mucket and rabbitsfoot. This threat is likely to continue and increase in the future due to additional navigation or water supply projects and as land use conversion to urban uses increases within the entire ranges of the Neosho mucket and rabbitsfoot.

Climate Change

Our analyses under the Endangered Species Act include consideration of ongoing and projected changes in climate. The terms ''climate'' and ''climate change'' are defined by the Intergovernmental Panel on Climate Change (IPCC). ''Climate'' refers to the mean and variability of different types of weather conditions over time, with 30 years being a typical period for such measurements, although shorter or longer periods also may be used (IPCC 2007, p. 78). The term ''climate change'' thus refers to a change in the mean or variability of one or more measures of climate (e.g., temperature or precipitation) that persists for an extended period, typically decades or longer, whether the change is due to natural variability, human activity, or both (IPCC 2007, p. 78). Various types of changes in climate can have direct or indirect effects on species. These effects may be positive, neutral, or negative and they may change over time, depending on the species and other relevant considerations, such as the effects of interactions of climate with other variables (e.g., habitat fragmentation) (IPCC 2007, pp. 8–14, 18–19). In our analyses, we use our expert judgment to weigh relevant information, including uncertainty, in our consideration of various aspects of climate change.

Projected changes in climate and related effects can vary substantially across and within different regions of the world (e.g., IPCC 2007a, pp. 8–12). Thus, although global climate projections are informative and in some cases are the only or the best scientific information available, to the extent possible we use ''downscaled'' climate projections which provide higher resolution information that is more relevant to the spatial scales used to assess effects to a given species (see Glick *et al.* 2011, pp. 58–61 for a discussion of downscaling). With regard to our analysis for the Neosho mucket and the rabbitsfoot, downscaled projections of climate change are available, but projecting precise effects on these two species from downscaled models is difficult because of the large geographic areas inhabited by both species. However, projections for the change in annual air temperature by the year 2080 for the Neosho mucket ranges between an increase of 7 to 8 degrees F and, for the rabbitsfoot, an increase of 4.5 to 8 degrees F in annual air temperature (Maura *et al.* 2007, as displayed on *http://www.climatewizard.org/# 2012*).

Ficke *et al.* (2005, pp. 67–69; 2007, pp. 603–605) described the general potential effects of climate change on freshwater fish populations worldwide. Overall, the distribution of fish species is expected to change, including range shifts and local extirpations. Because freshwater mussels are entirely dependent upon a fish host for

successful reproduction and dispersal, any changes in local fish populations would also affect freshwater mussel populations. Therefore, mussel populations will reflect local extirpations or decreases in abundance of fish species.

Summary of Factor E

In summary, a variety of natural and manmade factors threatens the continued existence of Neosho mucket and rabbitsfoot. Forty-one of the 51 (80 percent) extant rabbitsfoot populations are isolated from viable populations. A lack of recruitment and genetic isolation pose a threat to the continued existence of these species. Invasive, nonindigenous species, such as zebra mussel, black carp, and Asian clam, have potentially adversely affected populations of the Neosho mucket and rabbitsfoot and their fish hosts, and these effects are expected to persist into the future. Based on the best available information, we are unable to predict the timing and scope of any changes to these mussel species that may occur as a result of climate change effects.

Cumulative Effects of Threats

The life-history traits and habitat requirements of the Neosho mucket and rabbitsfoot, and other freshwater mussels in general, make them extremely susceptible to environmental change. Unlike other aquatic organisms (e.g., aquatic insects and fish), mussels have limited refugia from stream disturbances (e.g., droughts, sedimentation, chemical contaminants). Mechanisms leading to the decline of Neosho mucket and rabbitsfoot, as discussed above, range from local (e.g., riparian clearing, chemical contaminants, etc.), to regional influences (e.g., altered flow regimes, channelization, etc.), to global climate change. The synergistic (interaction of two or more components) effects of threats are often complex in aquatic environments, making it difficult to predict changes in mussel and fish host(s) distribution, abundance, and habitat availability that may result from these effects. While these stressors may act in isolation, it is more probable that many stressors are acting simultaneously (or in combination) (Galbraith *et al.* 2010, p. 1176) on Neosho mucket and rabbitsfoot populations.

Summary of Threats

The decline of the Neosho mucket and rabbitsfoot (described by Butler 2005, entire; described by Service 2010, entire) is primarily the result of habitat loss and degradation (Neves 1991, p. 252). Chief among the causes of decline, but in no particular ranking order, are impoundments, sedimentation, channelization, chemical contaminants, oil and natural gas development, and mining (Neves 1991, p. 252; Neves 1993, pp. 4–6; Williams *et al.* 1993, pp. 7–9; Neves *et al.* 1997, pp. 60 and 63–75; Watters 2000, pp. 262–267). These stressors have had profound adverse effects on Neosho mucket and rabbitsfoot populations, their habitats, and fish hosts.

Regulations at the Federal level may not be providing the protection needed for the Neosho mucket and rabbitsfoot. For example, 8 of the 11 (73 percent) viable rabbitsfoot populations are located in waters listed as impaired under section 303(d) of the CWA. In addition, numerous tributaries within watersheds with viable Neosho mucket and rabbitsfoot populations also are listed as impaired waters under section 303(d) of the CWA. The CWA has a stated goal to establish water quality standards that protect aquatic species, including mussel species. However, the CWA has generally been insufficient at protecting mussels, and adequate water quality criteria that are protective of all mussel life stages, particularly glochidia and juveniles, may not be established. Little information is known about specific sensitivities of mussels to various pollutants, but both species continue to decline due to the effects of poor water quality, contaminants, and other factors.

The majority of extant Neosho mucket populations are small and isolated, with only one viable population remaining. The majority of extant rabbitsfoot populations are marginal and small (78 percent) and isolated (80 percent), with only two small (5 percent) and 4 viable populations (36 percent) not isolated from another viable population (Butler 2005, p. 22; Service 2010, pp. 3–8). The patchy distributional pattern of populations in short river reaches makes them more susceptible to extirpation from single catastrophic events, such as toxic chemical spills (Watters and Dunn 1995, p. 257). Furthermore, this level of isolation makes natural recolonization of extirpated populations virtually impossible without human intervention. Various nonnative species of aquatic organisms are firmly established in the range of the Neosho mucket and rabbitsfoot. The nonnative species that poses the most significant threat to the Neosho mucket and rabbitsfoot is the zebra mussel. Although there are ongoing attempts to alleviate some of these threats at some locations, there appear to be no populations without threats that are significantly impacting the species.

Proposed Determination

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Neosho mucket and the rabbitsfoot. Section 3(6) of the Act defines an endangered species as ''any species that is in danger of extinction throughout all or a significant portion of its range'' and defines a threatened species as ''any species that is likely to become endangered throughout all or a significant portion of its range within the foreseeable future.'' As described in detail above, these two species are currently at risk throughout all of their respective ranges due to the immediacy, severity, and scope of threats from habitat destruction and modification (Factor A), inadequacy of existing regulatory mechanisms (Factor D), and other natural or manmade factors affecting their continued existence (Factor E). Although there are ongoing actions to alleviate some threats, there appear to be no populations without current threats. These isolated species have a limited ability to recolonize historically occupied stream and river reaches and are vulnerable to natural or human-caused changes in their stream and river habitats.

Their range curtailment, small population size, and isolation make the Neosho mucket and rabbitsfoot more vulnerable to threats such as sedimentation, disturbance of riparian corridors, changes in channel morphology, point- and nonpoint-source contaminants, urbanization, invasive species, and to stochastic events (such as chemical spills).

Neosho mucket

The Neosho mucket has been extirpated (no longer in existence) from approximately 62 percent of its historical range with only 9 of the 16 historical populations remaining (extant). This mussel is declining rangewide (eight of the nine extant populations), with only one remaining large, viable population. Based on the best available scientific and commercial information, we have determined that the Neosho mucket is in danger of extinction throughout all of its range. Therefore, we are proposing to list it as an endangered species. In other words, we find that a threatened species status is not appropriate for the Neosho mucket due to its contracted range (nine extant river populations within three river basins) and only one remaining stable and viable population.

Rabbitsfoot

The rabbitsfoot has been extirpated from approximately 64 percent of its historical range. While this species is declining rangewide, it sustains recruitment and population viability consistently in 11 (8 percent of historical or 22 percent of extant distribution) large, extant river populations and, while reduced in numbers, it also sustains limited recruitment and distribution in another 17 river populations. Of the 17 river populations with limited recruitment and distribution, 15 of these populations (88 percent) are declining.

All remaining rabbitsfoot populations continue to be reduced in size or quality by habitat degradation as a result of impoundments and dams, navigation projects, commercial and residential development, agriculture, chemical contaminants, mining, and oil and natural gas development. Climate change could affect in-stream water temperatures, seasonal water flows, and mussel and fish host reproductive activities, including the availability of mussel fish host species. Invasive species occupying rabbitsfoot habitat cause displacement and recruitment interference. Eight of the 11 (73 percent) viable rabbitsfoot populations are in waters and have numerous tributaries in their watersheds that are listed as impaired waters under section 303(d) of the CWA. Regulatory mechanisms such as the CWA have been insufficient to significantly reduce or remove these types of threats to rabbitsfoot. The synergistic effects of threats such as these are often complex in aquatic environments and, while making it difficult to predict changes in mussel and fish host(s) distribution, abundance, and habitat availability, it is probable that these threats are acting simultaneously on the remaining rabbitsfoot populations with negative results and are expected to continue to do so. Thus, while rabbitsfoot sustains 11 viable populations, these populations continue to be at risk, and the rabbitsfoot's other extant populations are affected by isolation, fragmentation, limited recruitment and distribution, and population declines, which make the species particularly susceptible to extinction in the near future if threats continue or increase.

While we have determined that the rabbitsfoot is not currently in danger of extinction, because of the threats facing the species and impacts to its life history, we find that the species is likely to become in danger of extinction in the foreseeable future throughout all of its range. Therefore, we are proposing to list it as a threatened species. In other words, we find that endangered status is not appropriate for the rabbitsfoot because 8 percent of the historical populations or 22 percent of extant populations remaining in its historical streams can be considered viable, but are facing subtle, pervasive threats that are ubiquitous in each watershed.

Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is endangered or threatened throughout all or a significant portion of its range. The Act defines ''endangered species'' as any species which is ''in danger of extinction throughout all or a significant portion of its range,'' and ''threatened species'' as any species which is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The definition of ''species'' is also relevant to this discussion. The Act defines ''species'' as follows: ''The term 'species' includes any subspecies of fish or wildlife or plants, and any distinct population segment [DPS] of any species of vertebrate fish or wildlife which interbreeds when mature.'' The phrase ''significant portion of its range'' (SPR) is not defined by the statute, and we have never addressed in our regulations: (1) The consequences of a determination that a species is either endangered or likely to become so throughout a significant portion of its range, but not throughout all of its range; or (2) what qualifies a portion of a range as ''significant.''

Two recent district court decisions have addressed whether the SPR language allows the Service to list or protect less than all members of a defined ''species'': *Defenders of Wildlife* v. *Salazar,* 729 F. Supp. 2d 1207 (D. Mont. 2010), concerning the Service's delisting of the Northern Rocky Mountain gray wolf (74 FR 15123, April 2, 2009); and *WildEarth Guardians* v. *Salazar,* 2010 U.S. Dist. LEXIS 105253 (D. Ariz. September 30, 2010), concerning the Service's 2008 finding on a petition to list the Gunnison's prairie dog (73 FR 6660, February 5, 2008). The Service had asserted in both of these determinations that it had authority, in effect, to protect only some members of a ''species,'' as defined by the Act (i.e., species, subspecies, or DPS), under the Act. Both courts ruled that the determinations were arbitrary and capricious on the grounds that this approach violated the plain and unambiguous language of the Act. The courts concluded that reading the SPR language to allow protecting only a portion of a species' range is inconsistent with the Act's definition of ''species.'' The courts concluded that once a determination is made that a species (i.e., species, subspecies, or DPS) meets the definition of ''endangered species'' or ''threatened species,'' it must be placed on the list in its entirety and the Act's protections applied consistently to all members of that species (subject to modification of protections through special rules under sections 4(d) and 10(j) of the Act).

Consistent with that interpretation, and for the purposes of this finding, we interpret the phrase ''significant portion of its range'' in the Act's definitions of ''endangered species'' and ''threatened species'' to provide an independent basis for listing; thus there are two situations (or factual bases) under which a species would qualify for listing: A species may be endangered or threatened throughout all of its range; or a species may be endangered or threatened in only a significant portion of its range. If a species is in danger of extinction throughout a significant portion of its range, the species is an ''endangered species.'' The same analysis applies to ''threatened species.'' Based on this interpretation and supported by existing case law, the consequence of finding that a species is endangered or threatened in only a significant portion of its range is that the entire species shall be listed as endangered or threatened, respectively, and the Act's protections shall be applied across the species' entire range.

We conclude, for the purposes of this finding, that interpreting the significant portion of its range phrase as providing an independent basis for listing is the best interpretation of the Act because it is consistent with the purposes and the plain meaning of the key definitions of the Act; it does not conflict with established past agency practice (i.e., prior to the 2007 Solicitor's Opinion), as no consistent, long-term agency practice has been established; and it is consistent with the judicial opinions that have most closely examined this issue. Having concluded that the phrase ''significant portion of its range'' provides an independent basis for listing and protecting the entire species, we next turn to the meaning of ''significant'' to determine the threshold for when such an independent basis for listing exists.

Although there are potentially many ways to determine whether a portion of a species' range is ''significant,'' we conclude, for the purposes of this finding, that the significance of the portion of the range should be determined based on its biological

contribution to the conservation of the species. For this reason, we describe the threshold for ''significant'' in terms of an increase in the risk of extinction for the species. We conclude that a biologically based definition of ''significant'' best conforms to the purposes of the Act, is consistent with judicial interpretations, and best ensures species' conservation. Thus, for the purposes of this finding, and as explained further below, a portion of the range of a species is ''significant'' if its contribution to the viability of the species is so important that without that portion, the species would be in danger of extinction.

We evaluate biological significance based on the principles of conservation biology using the concepts of redundancy, resiliency, and representation. *Resiliency* describes the characteristics of a species and its habitat that allow it to recover from periodic disturbance. *Redundancy* (having multiple populations distributed across the landscape) may be needed to provide a margin of safety for the species to withstand catastrophic events. *Representation* (the range of variation found in a species) ensures that the species' adaptive capabilities are conserved. Redundancy, resiliency, and representation are not independent of each other, and some characteristic of a species or area may contribute to all three. For example, distribution across a wide variety of habitat types is an indicator of representation, but it may also indicate a broad geographic distribution contributing to redundancy (decreasing the chance that any one event affects the entire species), and the likelihood that some habitat types are less susceptible to certain threats, contributing to resiliency (the ability of the species to recover from disturbance). None of these concepts is intended to be mutually exclusive, and a portion of a species' range may be determined to be ''significant'' due to its contributions under any one or more of these concepts.

For the purposes of this finding, we determine if a portion's biological contribution is so important that the portion qualifies as ''significant'' by asking whether *without that portion,* the representation, redundancy, or resiliency of the species would be so impaired that the species would have an increased vulnerability to threats to the point that the overall species would be in danger of extinction (i.e., would be ''endangered''). Conversely, we would not consider the portion of the range at issue to be ''significant'' if there is sufficient resiliency, redundancy, and representation elsewhere in the species' range that the species would not be in danger of extinction throughout its range if the population in that portion of the range in question became extirpated (extinct locally).

We recognize that this definition of ''significant'' (a portion of the range of a species is ''significant'' if its contribution to the viability of the species is so important that, without that portion, the species would be in danger of extinction) establishes a threshold that is relatively high. On the one hand, given that the consequences of finding a species to be endangered or threatened in a significant portion of its range would be listing the species throughout its entire range, it is important to use a threshold for ''significant'' that is robust. It would not be meaningful or appropriate to establish a very low threshold whereby a portion of the range can be considered ''significant'' even if only a negligible increase in extinction risk would result from its loss. Because nearly any portion of a species' range can be said to contribute some increment to a species' viability, use of such a low threshold would require us to impose restrictions and expend conservation resources disproportionately to conservation benefit: Listing would be rangewide, even if only a portion of the range of minor conservation importance to the species is imperiled. On the other hand, it would be inappropriate to establish a threshold for ''significant'' that is too high. This would be the case if the standard were, for example, that a portion of the range can be considered ''significant'' only if threats in that portion result in the entire species' being currently endangered or threatened. Such a high bar would not give the significant portion of its range phrase independent meaning, as the Ninth Circuit held in *Defenders of Wildlife* v. *Norton,* 258 F.3d 1136 (9th Cir. 2001).

The definition of ''significant'' used in this finding carefully balances these concerns. By setting a relatively high threshold, we minimize the degree to which restrictions will be imposed or resources expended that do not contribute substantially to species conservation. But we have not set the threshold so high that the phrase ''in a significant portion of its range'' loses independent meaning. Specifically, we have not set the threshold as high as it was under the interpretation presented by the Service in the *Defenders* litigation. Under that interpretation, the portion of the range would have to be so important that current imperilment there would mean that the species would be *currently* imperiled everywhere. Under the definition of ''significant'' used in this finding, the portion of the range need not rise to such an exceptionally high level of biological significance. (We recognize that if the species is imperiled in a portion that rises to that level of biological significance, then we should conclude that the species is in fact imperiled throughout all of its range, and that we would not need to rely on the significant portion of its range language for such a listing.) Rather, under this interpretation we ask whether the species would be endangered everywhere without that portion, *i.e.,* if that portion were completely extirpated. In other words, the portion of the range need not be so important that even the species being in danger of extinction in that portion would be sufficient to cause the species in the remainder of the range to be endangered; rather, the *complete extirpation* (in a hypothetical future) of the species in that portion would be required to cause the species in the remainder of the range to be endangered.

The range of a species can theoretically be divided into portions in an infinite number of ways. However, there is no purpose to analyzing portions of the range that have no reasonable potential to be significant or to analyzing portions of the range in which there is no reasonable potential for the species to be endangered or threatened. To identify only those portions that warrant further consideration, we determine whether there is substantial information indicating that: (1) The portions may be ''significant,'' *and* (2) the species may be in danger of extinction there or likely to become so within the foreseeable future. Depending on the biology of the species, its range, and the threats it faces, it might be more efficient for us to address the significance question first or the status question first. Thus, if we determine that a portion of the range is not ''significant,'' we do not need to determine whether the species is endangered or threatened there; if we determine that the species is not endangered or threatened in a portion of its range, we do not need to determine if that portion is ''significant.'' In practice, a key part of the determination that a species is in danger of extinction in a significant portion of its range is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of

threats to the species occurs only in portions of the species' range that clearly would not meet the biologically based definition of ''significant,'' such portions will not warrant further consideration.

We evaluated the current range of the Neosho mucket and rabbitsfoot to determine if there is any apparent geographic concentration of potential threats for either species. The Neosho mucket and rabbitsfoot are highly restricted in their ranges, and the threats occur throughout their ranges. We considered the potential threats due to impoundments, sedimentation, channelization, chemical contaminants, oil and gas development, mining, and climate change. We found no concentration of threats because of the species limited and curtailed ranges, and uniformity of the threats throughout its entire range. Having determined that the Neosho mucket is endangered throughout its entire range, it is not necessary to evaluate whether there are any significant portions of its range. Having determined that the rabbitsfoot is threatened throughout its entire range, we must next consider whether there are any significant portions of the range where the rabbitsfoot is in danger of extinction or is likely to become endangered in the foreseeable future.

We found no portion of the rabbitsfoot's range where potential threats are significantly concentrated or substantially greater than in other portions of their range. Therefore, we find that factors affecting the species are essentially uniform throughout its range, indicating no portion of the range of the species warrants further consideration of possible endangered or threatened status under the Act. Therefore, we find there is no significant portion of the rabbitsfoot range that may warrant a different status.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in public awareness and conservation by Federal, State, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required of Federal agencies and the prohibitions against take and harm are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act requires the Service to develop and implement recovery plans for the conservation of endangered and threatened species, unless such a plan will not promote the conservation of the species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline shortly after a species is listed and after preparation of a draft and final recovery plan. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan identifies site–specific management actions that set a trigger for review of the five factors that control whether a species remains endangered or may be downlisted or delisted, and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (comprising species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our Web site (*http://www.fws.gov/endangered*), or from our Arkansas Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. Achieving recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

If these species are listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the States of Alabama, Arkansas, Indiana, Illinois, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Ohio, Oklahoma, Pennsylvania, and Tennessee would be eligible for Federal funds to implement management actions that promote the protection or recovery of the Neosho mucket and rabbitsfoot. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants.*

Although the Neosho mucket and rabbitsfoot are only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for these species. Additionally, we invite you to submit any new information on these species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Federal agencies are required to confer with us informally on any action that is likely to jeopardize the continued existence of a proposed species. Section 7(a)(4) requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may adversely affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal agency actions within these species' habitat that may require

conference or consultation or both as described in the preceding paragraph include, but are not limited to, the funding of, carrying out, or the issuance of permits for reservoir construction, navigation, natural gas extraction, stream alterations, discharges, wastewater facility development, water withdrawal projects, pesticide registration, mining, and road and bridge construction. This may include, but is not limited to, management and any other landscape-altering activities on Federal lands administered by the Department of Defense, and USDA Forest Service; issuance of Clean Water Act permits by the Army Corps of Engineers and Environmental Protection Agency; construction and maintenance of interstate power and natural gas transmission line right-of-ways by the Federal Energy Regulatory Commission; and construction and maintenance of roads or highways by the Federal Highway Administration.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. The prohibitions of section 9(a)(2) of the Act, codified at 50 CFR 17.21 for endangered wildlife, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt any of these), import, export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. Under the Lacey Act (18 U.S.C. 42–43; 16 U.S.C. 3371–3378), it is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered and threatened wildlife species under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22 for endangered species, and at 17.32 for threatened species. With regard to endangered wildlife, a permit must be issued for the following purposes: for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of species proposed for listing. The following activities could potentially result in a violation of section 9 of the Act; this list is not comprehensive:

(1) Collecting, handling, possessing, selling, delivering, carrying, or transporting of the species, including import or export across State lines and international boundaries that are unauthorized, except for properly documented antique specimens of these taxa at least 100 years old, as defined by section 10(h)(1) of the Act;

(2) Introduction of nonnative species that compete with or prey upon the Neosho mucket and rabbitsfoot, such as the introduction of a predator of mussels, the nonnative black carp to a water body (White River) in the State of Arkansas;

(3) The release of biological control agents that attack any life stage of Neosho mucket and rabbitsfoot that is unauthorized;

(4) Modification of the channel or water flow of any stream in which the Neosho mucket and rabbitsfoot are known to occur that are unauthorized or not covered under the Act for impacts to these species; and

(5) Discharge of chemicals or fill material into any waters supporting the Neosho mucket and rabbitsfoot that are unauthorized or not covered under the Act for impacts to these species.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Service's Field Office in the State where the proposed activities will occur. Requests for copies of the regulations concerning listed animals and general inquiries regarding prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Endangered Species Permits, 1875 Century Boulevard, Suite 200, Atlanta, GA 30345; telephone: 404–679–7140; facsimile: 404–679–7081.

If the Neosho mucket and rabbitsfoot are listed under the Act, the States of Kansas and Oklahoma's Endangered Species Act (Kansas Nongame and Endangered Species Conservation Act of 1975, Chapter 32. Wildlife, Parks and Recreation and Oklahoma Wildlife Conservation Code, Title 29, Game and Fish, Chapter 1, Article V. Game, Part 4, Protected Game, respectively) are automatically invoked, which would also prohibit take of these species and encourage conservation by State government agencies. Further, the State may enter into agreements with Federal agencies to administer and manage any area required for the conservation, management, enhancement, or protection of endangered species. Funds for these activities could be made available under section 6 of the Act (Cooperation with the States). Thus, the Federal protection afforded to these species by listing them as endangered and threatened species will be reinforced and supplemented by protection under State law.

Critical Habitat Designation for Neosho Mucket and Rabbitsfoot

Background

It is our intent to discuss below only those topics directly relevant to the designation of critical habitat for Neosho mucket and rabbitsfoot in this section of the proposed rule.

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the 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 the 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 an endangered or threatened species to the point at which the measures provided pursuant to 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, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise 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) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographic area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical and biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. Primary constituent elements are the elements of physical or 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 second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographic 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. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential to the conservation of the species and may be included in the critical habitat designation. We designate critical habitat in areas outside the geographic area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. Climate change will be a particular challenge for biodiversity because the interaction of additional stressors associated with climate change and current stressors may push species beyond their ability to survive (Lovejoy 2005, pp. 325–326). The synergistic implications of climate change and habitat fragmentation are the most threatening facet of climate change for biodiversity (Hannah and Lovejoy 2005, p. 4). Current climate change predictions for terrestrial areas in the Northern Hemisphere indicate warmer air temperatures, more intense precipitation events, and increased summer continental drying (Field *et al.* 1999, pp. 1–3; Hayhoe *et al.* 2004, p. 12422; Cayan *et al.* 2005, p. 6; Intergovernmental Panel on Climate Change (IPCC) 2007, p. 1181). Climate change may lead to increased frequency and duration of severe storms and droughts (Golladay *et al.* 2004, p. 504; McLaughlin *et al.* 2002, p. 6074; Cook *et al.* 2004, p. 1015). We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for 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 ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) section 9 of the Act's prohibitions on taking any individual of the species, including taking caused by actions that affect habitat. 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 these 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 new information available at the time of these planning efforts calls for a different outcome.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time the species is determined to be endangered or threatened. Our regulations (50 CFR 424.12(a)(1)) state that the designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or (2) such designation of critical habitat would not be beneficial to the species.

There is currently no impending threat of take attributed to collection or vandalism under Factor B for either of these species, and identification and mapping of critical habitat is not expected to initiate any such threat. In the absence of finding that the designation of critical habitat would increase threats to a species, if there are

any benefits to a critical habitat designation, then a prudent finding is warranted. Here, the potential benefits of designation include: (1) Triggering consultation under section 7 of the Act in new areas for actions in which there may be a Federal nexus where it would not otherwise occur because, for example, it is or has become unoccupied or the occupancy is in question; (2) focusing conservation activities on the most essential features and areas; (3) providing educational benefits to State or county governments or private entities; and (4) preventing people from causing inadvertent harm to the species. Therefore, because we have determined that the designation of critical habitat will not likely increase the degree of threat to the species and may provide some measure of benefit, we find that designation of critical habitat is prudent for the Neosho mucket and rabbitsfoot.

Critical Habitat Determinability

Having determined that designation of critical habitat is prudent, under section 4(a)(3) of the Act, we must find whether critical habitat is determinable for the two species. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where these species are located. This and other information represent the best scientific data available and led us to conclude that the designation of critical habitat is determinable for the Neosho mucket and rabbitsfoot.

Physical or 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 geographic area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features that are 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, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographic, and ecological distributions of a species.

We derive the specific physical or biological features required for Neosho mucket and rabbitsfoot from studies of these species' habitat, ecology, and life history as described below. Additional information can be found in the STATUS ASSESSMENT FOR NEOSHO MUCKET AND RABBITSFOOT section of this proposed rule. We have determined that the following physical or biological features are essential for Neosho mucket and rabbitsfoot.

Space for Individual and Population Growth and for Normal Behavior

The Neosho mucket is historically associated with the Illinois, Neosho, and Verdigris Rivers and their larger tributaries (Arkansas River basin). Generally, the Neosho mucket is found embedded in stable substrates associated with shallow riffles (areas where shallow, generally less than 1 m (3.3 ft) in depth, turbulent water passes through and over stones or gravel of somewhat similar size) and runs (intermediate areas between pools and riffles with moderate current) with gravel and sand substrate and moderate to swift currents (Oesch 1984, p. 221; Harris 1998, p. 5; Obermeyer 2000, pp. 15–16). However, in Shoal Creek and the Illinois River, the Neosho mucket prefers near-shore areas or areas out of the main current (Harris 1998, p. 5). These habitats are formed and maintained by water quantity, channel slope, and normal sediment input to the system.

The rabbitsfoot is historically associated with small- to medium-sized streams and some larger rivers in the Lower Great Lakes and Lower Mississippi River sub-basins and Ohio, Cumberland, Tennessee, White, Arkansas, and Red River basins. The rabbitsfoot usually occurs in shallow areas along the bank and adjacent runs and riffles with gravel and sand substrates where the water velocity is reduced, but it also may occur in deep runs (Parmalee and Bogan 1998, pp. 211–212). Unlike the Neosho mucket (Barnhart 2003, p. 17), the rabbitsfoot seldom burrows in the substrate, but lies on its side (Watters 1988, p. 13; Fobian 2007, p. 24).

Neosho mucket and rabbitsfoot, similar to other mussels, are dependent on areas with flow refuges where shear stress (the stream's ability to entrain and transport bed material created by the flow acting on the bed material) is low and sediments remain stable during flood events (Layzer and Madison 1995, p. 341; Strayer 1999a, pp. 468 and 472; Hastie *et al.* 2001, pp. 111–114). Flow refuges conceivably allow relatively immobile mussels such as the Neosho mucket and rabbitsfoot to remain in the same general location throughout their entire lives. These patches of stable habitat may be highly important for the rabbitsfoot since it typically does not burrow, making it more susceptible to displacement into unsuitable habitat. However, flow refuges are not created equally and there are likely other habitat variables that are important, but poorly understood (Roberts 2008, pers. comm.).

Natural river and creek channel stability are achieved by allowing the river or creek to develop a stable dimension, pattern, and profile, such that, over time, channel features are maintained and the river or creek system neither aggrades nor degrades. Channel instability occurs when the scouring (flushing) process leads to degradation or excessive sediment deposition results in aggradation. Stable rivers and creeks consistently transport their sediment load, both in size and type, associated with local deposition and scour (Rosgen 1996, pp. 1–3).

Habitat conditions described above provide space, cover, shelter, and sites for breeding, reproduction, and growth of offspring for the Neosho mucket and rabbitsfoot. These habitats are formed and maintained by water quantity, channel features (dimension, pattern, and profile), and sediment input to the system through periodic flooding, which maintains connectivity and interaction with the flood plain, and are dynamic. Changes in one or more of these parameters can result in channel degradation or aggradation, with serious effects to mussels. Therefore, we identify adequate water quantity, stream channel stability, and floodplain connectivity to be physical and biological features for Neosho mucket and rabbitsfoot that are essential in accommodating feeding, breeding, growth, and other normal behaviors of these species and in promoting gene flow within each species' populations and movement of their fish hosts.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

The Neosho mucket and rabbitsfoot are riverine-adapted species that depend upon adequate water flow and are not found in ponds or lakes. Continuously flowing water is a habitat feature associated with all surviving populations of these species. Flowing water maintains the river and creek bottoms and flow refuge habitats in riffles and runs where these species are found, transports food items to the sedentary juvenile and adult life stages, removes wastes, and provides oxygen for respiration of the Neosho mucket and rabbitsfoot. A natural flow regime that includes periodic flooding and maintains connectivity and interaction with the floodplain is critical for the exchange of nutrients, movement of and spawning activities for potential fish hosts, and maintenance of flow refuges in riffle and run habitats.

Mussels, such as the Neosho mucket and rabbitsfoot, filter algae, detritus, microscopic animals, and bacteria from the water column (Fuller 1974, p. 221; Silverman *et al.* 1997, pp. 1862–1865; Nichols and Garling 2000, pp. 874–876; Strayer *et al.* 2004, pp. 430–431). Encysted glochidia are nourished by their fish hosts and feed for a period of one week to several months. Nutrient uptake by glochidia is not well understood, but probably occurs through the microvillae of the mantle (Watters 2007, p. 55). For the first several months, juvenile mussels partially employ pedal (foot) feeding, extracting bacteria, algae, and detritus from the sediment, although they also may filter interstitial (pore) water (Yeager *et al.* 1994, pp. 217–221). However, their gills are rudimentary and generally incapable of filtering particles (Watters 2007, p. 56). Adult mussels also can obtain their food by deposit feeding, siphoning in food from the sediment and its interstitial (pore) water and pedal feeding directly from the sediment (Yeager *et al.* 1994, pp. 217–221; Vaughn and Hakenkamp 2001, pp. 1432–1438). Food availability and quality for the Neosho mucket and rabbitsfoot in their habitats are affected by habitat stability, floodplain connectivity, flow, and water and sediment quality.

The ranges of many water quality parameters that define suitable habitat conditions for the Neosho mucket and rabbitsfoot have not been investigated or are poorly understood. The pathways of exposure to a variety of environmental pollutants for all four mussel life stages (free and encysted glochidia, juveniles, and adults) and differences in exposure and sensitivity were previously discussed (Factor A). Environmental contamination is a causal (contributing) factor in the decline of mussel populations. We estimate that most numeric standards for pollutants and water quality parameters (for example, dissolved oxygen, pH, heavy metals) that have been adopted by the States under the Clean Water Act represent levels that are essential to the conservation of these mussels. However, some regulatory mechanisms may not adequately protect mollusks in some reaches (see Factor D). The Service is currently in consultation with the EPA to evaluate the protectiveness of criteria approved in EPA's water quality standards for endangered and threatened species and their critical habitat as described in the Memorandum of Agreement that our agencies signed in 2001 (66 FR 11201, February 22, 2001). Other factors that can potentially alter water quality are droughts and periods of low flow, nonpoint-source runoff from adjacent land surfaces (excessive amounts of sediments, nutrients, and pesticides), point-source discharges from municipal and industrial wastewater treatment facilities (excessive amounts of ammonia, chlorine, and metals), and random spills or unregulated discharge events. This could be particularly harmful during drought conditions when flows are depressed and pollutants are more concentrated.

As relatively sedentary animals, mussels must tolerate the full range of environmental stressors that occur within the streams where they persist. Both the amount (flow) and the physical and chemical conditions (sediment and water quality) where these species currently exist vary widely according to season, precipitation events, and seasonal human activities within the various watersheds. Conditions across their historical ranges vary even more due to geology, geography, and differences in human population densities and land uses. In general, these species survive in areas where the severity, frequency, duration, and seasonality of water flow is adequate to maintain stable flow refuges in riffle and run habitats (sufficient flow to remove fine particles and sediments without causing degradation), and where sediment and water quality is adequate for year-round survival (moderate to high levels of dissolved oxygen; low to moderate exposure to environmental pollutants such as nutrients, dissolved metals, and pharmaceuticals; and relatively unpolluted water and sediments). Adequate water flow, water quality, and sediment quality (as defined above) are essential for normal behavior, growth, and viability during all life stages of the Neosho mucket and rabbitsfoot and their potential larva fish hosts. Therefore, based on the information above, we identify water flow, water quality, and sediment quality to be physical or biological features for both these species.

Sites for Breeding, Reproduction, or Rearing

Mussels require a fish host for transformation of larval mussels (glochidia) to juvenile mussels (Williams *et al.* 2008, p. 68); therefore, presence of the appropriate fish host(s) is essential to the conservation of the Neosho mucket and rabbitsfoot (see STATUS ASSESSMENT FOR NEOSHO MUCKET AND RABBITSFOOT). Neosho mucket and rabbitsfoot juveniles require stable habitats with adequate water quantity and quality as previously described for growth and survival. Excessive sediments or dense growth of filamentous algae can expose juvenile mussels to entrainment or predation and be detrimental to the survival of juvenile mussels (Hartfield and Hartfield 1996, pp. 372–374). Geomorphic instability can result in the loss of interstitial habitats and juvenile mussels due to scouring or deposition (Hartfield 1993, pp. 372–373). Water quality, sediment quality, stable habitat, health of fish hosts, and diet (of all life stages) all influence survival of each life stage and subsequent reproduction and recruitment (Cope *et al.* 2008, p. 452).

Connections between the rivers and adjacent flood plains occur periodically during wet years and provide habitat for spawning and foraging fish hosts that require flood plain habitats for successful reproduction and recruitment to adulthood. Barko *et al.* (2006, pp. 252–256) found that several fish host or potential host species benefited from exploiting the resources of flood plain habitats that were not typically available for use during normal hydrology years. Furthermore, Kwak (1988, pp. 243–247) and Slipke *et al.* (2005, p. 289) indicated that periodic inundation of floodplain habitats increased successful fish reproduction, which leads to increased availability of native host fishes for mussel reproduction. However, Rypel *et al.* (2009, p. 502) indicated that mussels tended to exhibit minimal growth during high flow years. Therefore, optimal flooding of these habitats would not be too frequent and should occur at similar frequencies to that of the natural hydrologic regime of the rivers and creeks inhabited by the Neosho mucket

and rabbitsfoot. Based on the information above, we identify water quality, sediment quality, stable habitat, health of fish hosts, diet (of all life stages), and periodic flooding of floodplain habitat to be physical or biological features for these species.

Primary Constituent Elements (PCEs) for the Neosho Mucket and Rabbitsfoot

Under the Act and its implementing regulations, we are required to identify the physical or biological features (PBFs) essential to the conservation of Neosho mucket and the rabbitsfoot in areas occupied at the time of listing, focusing on the features' primary constituent elements. We consider primary constituent elements (PCEs) to be the elements of physical or 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.

In addition to the physical and biological features just described, we derive the PCEs from the biological needs of these species as described in the STATUS ASSESSMENT FOR NEOSHO MUCKET AND RABBITSFOOT section of this proposed rule. Little is known of the specific habitat requirements for the Neosho mucket and rabbitsfoot other than that they require flowing water, stable river channels, adequate food, suitable substrate, and adequate water and sediment quality. Neosho mucket and rabbitsfoot mussel larvae also require fish hosts for development to juvenile mussels (see STATUS ASSESSMENT FOR NEOSHO MUCKET AND RABBITSFOOT section). To identify the physical and biological needs of these species, we have relied on current conditions at locations where the species survive, the limited information available on these species and their close relatives, and factors associated with the decline and extirpation of these and other aquatic mollusks from extensive portions of the Lower Great Lakes and Lower Mississippi River subbasins and Ohio, Cumberland, Tennessee, White, Arkansas, and Red River Basins.

Based on the above needs and our current knowledge of the physical and biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the PCEs specific to the Neosho mucket and rabbitsfoot are:

(1) Geomorphically stable river channels and banks (channels that maintain lateral dimensions, longitudinal profiles, and sinuosity patterns over time without an aggrading or degrading bed elevation) with habitats that support a diversity of freshwater mussel and native fish (such as, stable riffles, sometimes with runs, and mid-channel island habitats that provide flow refuges consisting of gravel and sand substrates with low to moderate amounts of fine sediment and attached filamentous algae).

(2) A hydrologic flow regime (the severity, frequency, duration, and seasonality of discharge over time) necessary to maintain benthic habitats where the species are found and to maintain connectivity of rivers with the floodplain, allowing the exchange of nutrients and sediment for maintenance of the mussel's and fish host's habitat, food availability, spawning habitat for native fishes, and the ability for newly transformed juveniles to settle and become established in their habitats.

(3) Water and sediment quality (including, but not limited to, conductivity, hardness, turbidity, temperature, pH, ammonia, heavy metals, and chemical constituents) necessary to sustain natural physiological processes for normal behavior, growth, and viability of all life stages.

(4) The presence and abundance (currently unknown) of fish hosts necessary for recruitment of the Neosho mucket and rabbitsfoot. The occurrence of natural fish assemblages, reflected by fish species richness, relative abundance, and community composition, for each inhabited river or creek will serve as an indication of appropriate presence and abundance of fish hosts until appropriate host fish can be identified.

(5) Either no competitive or predaceous invasive (nonnative) species, or such species in quantities low enough to have minimal effect on survival of freshwater mussels.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographic area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection.

Various activities in or adjacent to each critical habitat unit described in this proposed rule may affect one or more of the physical or biological features and may require special management considerations or protection. Some of these activities include, but are not limited to, those previously discussed in the ''Summary of Factors Affecting the Species.'' The PBFs in all the proposed critical habitat units may require special management due to threats posed by channelization and other navigation related projects, dams, impoundments, land use runoff, and point or nonpoint-source water pollution, or both (see Factors A and D). Other activities that may affect the features and their component PCEs in the proposed critical habitat units include those listed in the ''Effects of Critical Habitat Designation'' section below.

In summary, we find that the areas we are proposing as critical habitat that are occupied at the time of listing contain the features essential to the conservation of the Neosho mucket and rabbitsfoot, and that these features may require special management considerations or protections. Special management considerations or protections may be required to eliminate, or to reduce to negligible levels, the threats affecting each unit and to preserve and maintain the essential physical and biological features that the proposed critical habitat units provide to the Neosho mucket and rabbitsfoot. Additional discussions of threats facing individual sites are provided in the individual unit descriptions.

Criteria Used To Identify Proposed Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. We review available information pertaining to the habitat requirements of the Neosho mucket and rabbitsfoot. 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 not currently proposing to designate any areas outside the geographic area occupied by the species because occupied areas are sufficient for the conservation of the species.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands usually lack physical or biological features for the species. Areas proposed as critical habitat for the Neosho mucket and rabbitsfoot include only stream channels within the ordinary high-water line, and do not contain any developed areas, structures, or areas inundated by lakes and reservoirs. The ordinary high-water line defines the stream channel

and is the point on the stream bank where water is continuous and leaves some evidence, such as erosion or aquatic vegetation. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of structures or other developed areas. Any such areas inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these areas 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 or biological features in the adjacent critical habitat.

We are proposing for designation of critical habitat areas that we have determined are occupied at the time of listing, as defined in this proposed rule, and contain sufficient elements of physical or biological features to support life-history processes essential for the conservation of the Neosho mucket and the rabbitsfoot. The Neosho mucket and rabbitsfoot persist in scattered portions of 38 rivers and creeks. Distribution and status information pertaining to the Neosho mucket and rabbitsfoot was previously discussed in the STATUS ASSESSMENT FOR NEOSHO MUCKET AND RABBITSFOOT section. River habitats are highly dependent upon upstream and downstream channel habitat conditions for their maintenance. Therefore, where one occurrence record was known from a river reach, we considered the entire reach between the uppermost and lowermost locations as occupied habitat, except lakes and reservoirs. We have defined occupied habitat for the Neosho mucket as those stream reaches known to be currently extant. For the rabbitsfoot, we have defined occupied habitat as those stream reaches that are sizeable and small populations as defined by Butler (2005), and the marginal populations of Fish Creek, Red River and Allegheny River that are the last extant populations in their respective basins (Great Lakes and Cumberland) and a metapopulation.

No unoccupied stream, as defined in this proposed rule, is proposed as critical habitat for Neosho mucket and rabbitsfoot. We find that unoccupied stream reaches are not essential for the conservation of either species for one or more of the following reasons:

(1) Unoccupied habitats are isolated from occupied habitats due to reservoir construction and dam operations (dam water releases have altered natural stream hydrology, geomorphology, water temperature, and native mollusk and fish communities);

(2) Unoccupied areas exhibit limited habitat availability, degraded habitat, or low potential value for management (Muskingum, Elk, Scioto, Little Miami, Licking, East Fork White, Cumberland, Holston, Clinch, Sequatchie, and Buffalo (Duck River system) Rivers);

(3) Collection records for these species indicate that these species have been extirpated from unoccupied areas for several decades or more; or

(4) There are no historical records of occurrence within the stream reach for Neosho mucket, rabbitsfoot, or both.

Our analysis concludes that inclusion of unoccupied habitats is not essential to conserve these species. While we recognize the importance to recovery of unoccupied habitat, in this case, unoccupied habitat also does not provide habitat for reintroduction, reduce the level of stochastic and human-induced threats, or decrease the risk of extinction:

(1) Unoccupied habitat does not currently contain sufficient physical and biological features or have the ability to be restored to support life-history functions of the Neosho mucket and rabbitsfoot (such characteristics as geomorphically stable channels, perennial water flows, adequate water quality, and appropriate benthic substrates);

(2) Unoccupied habitat does not support the once diverse mollusk communities, including the presence of closely related species requiring physical or biological features similar to the Neosho mucket and rabbitsfoot; or

(3) Unoccupied habitat is not adjacent to currently occupied areas where there is potential for natural dispersal and reoccupation by the Neosho mucket and rabbitsfoot. A total of 43 units are proposed for designation based on sufficient elements of physical or biological features being present to support Neosho mucket (8 units) and rabbitsfoot (35 units) life-history processes. Some units contained all of the identified elements of physical or biological features and supported multiple life-history processes. Some units contained only some elements of the physical or biological features necessary to support the Neosho mucket and rabbitsfoot particular use of that habitat.

Proposed Critical Habitat Designation

When designating critical habitat, we assess whether the areas within the geographical area occupied by the species at the time of listing contain features that are essential to the conservation of the species and whether those features may require special management considerations or protection. Three critical habitat units proposed for the Neosho mucket and rabbitsfoot are currently designated under the Act for the oyster mussel (*Epioblasma capsaeformis*) and Cumberlandian combshell (*Epioblasma brevidens*) encompassing the Duck River, Tennessee (74 rkm, 46 rmi) and Bear Creek, Alabama and Mississippi (40 rkm, 25 rmi) (50 CFR 17.95(f)) or proposed as critical habitat under the Act for the yellowcheek darter (*Etheostoma moorei*) in the Middle Fork Little Red River, Arkansas (23.2 rkm, 14.5 rmi; 76 FR 63360, October 12, 2011; Table 3). The existing critical habitat for the oyster mussel and Cumberlandian combshell completely overlaps Unit RF16 (Bear Creek), but the exact unit descriptions (length) differ due to mapping refinement since the earlier designation. In addition, five critical habitat units proposed for the Neosho mucket and rabbitsfoot are currently designated by the State of Kansas as critical habitat for both species in the Fall, Spring, Neosho, Cottonwood River, and Verdigris Rivers and Neosho mucket in Shoal Creek (K.S.A. 32–959; Table 3) and are afforded similar state-level protections as those provided under the Act. No other critical habitat units proposed for these species have been designated or proposed as critical habitat for other species under the Act.

TABLE 3—CRITICAL HABITAT AREAS PROPOSED FOR THE NEOSHO MUCKET AND RABBITSFOOT THAT ARE CURRENTLY DESIGNATED OR PROPOSED AS CRITICAL HABITAT FOR OTHER FEDERALLY AND STATE LISTED SPECIES

Unit (Unit #)	Species present in unit	Federal reference	State reference	Length of overlap (rkm/rmi)
Shoal Creek (NM3)	Neosho mucket, fluted shell, Ouachita kidneyshell, Western fanshell, redspot chub.		K.S.A. 32–959	9.7/6.0
Spring River (NM4 and RF1)	Neosho mucket, rabbitsfoot, elktoe, ellipse shell, Neosho madtom, fluted shell, Ouachita kidneyshell, Western fanshell, redspot chub.		K.S.A. 32–959	11.6/7.2
Fall River (NM6)	Neosho mucket, Western fanshell		K.S.A. 32–959	90.4/56.2
Verdigris River (NM6 and RF2).	Neosho mucket, rabbitsfoot, Ouachita kidneyshell, western fanshell, butterfly.		K.S.A. 32–959	80.6/50.1
Neosho River (NM7 and RF3).	Neosho mucket, rabbitsfoot, butterfly, Neosho madtom, Ouachita kidneyshell, western fanshell.		K.S.A. 32–959	245.9/152.8
Cottonwood River (NM8)	Neosho mucket, rabbitsfoot, butterfly, Ouachita kidneyshell, western fanshell.		K.S.A. 32–959	2.6/1.6
Middle Fork Little Red River (RF7).	Yellowcheek darter	76 FR 63360, October 12, 2011.		23.3/14.5
Bear Creek (RF16)	Oyster mussel, Cumberland combshell	50 CFR 17.95(f)		49.7/30.9
Duck River (RF19)	Oyster mussel, Cumberland Combshell	50 CFR 17.95(f)		74.0/46.0
Total				587.9/365.3

We are proposing eight units, totaling approximately 779 rkm (484 rmi), in four states (Arkansas, Kansas, Missouri, and Oklahoma) as critical habitat for the Neosho mucket (Table 4). We are proposing 35 units, totaling approximately 2,662 rkm (1,653.8 rmi), in 12 states (Alabama, Arkansas, Illinois, Indiana, Kansas, Kentucky, Missouri, Mississippi, Oklahoma, Ohio, Pennsylvania, and Tennessee) as critical habitat for the rabbitsfoot (Table 4). Four of the 43 units, Units NM4, NM7, RF1, and RF3 are occupied by both Neosho mucket and rabbitsfoot. Table 5 summarizes primary adjacent riparian landowners in each of the proposed Neosho mucket and rabbitsfoot critical habitat units by private, State, Tribal (jurisdictional not ownership), or Federal ownership. One Neosho mucket and two rabbitsfoot proposed critical habitat units, respectively, are located within Tribal jurisdictional areas, Unit NM1 (Illinois River, Oklahoma; 103.0 rkm (64.0 rmi)), Unit RF2 (Verdigris River; 45.5 rkm (28.3 rmi)), and Unit RF6 (Little River, Oklahoma; 41.4 rkm (25.7 rmi)).

Public lands adjacent to Neosho mucket and rabbitsfoot critical habitat units consist of approximately 505.3 rkm (314.0 rmi) of riparian lands in the following units.

- Unit NM1: Ozark National Forest, 20.3 rkm (12.7 rmi) Corps' Lake Tenkiller Project, 9.0 rkm (5.6 rmi), and Sparrowhawk Wildlife Management Area (WMA), 2.2 rkm (1.4 rmi);
- Units NM4 and RF1: Spring River Wildlife Area, 1.4 rkm (0.9 rmi);
- Unit RF2: Corps' Oologah Lake Project, 0.6 rkm (0.4 rmi) and Corps' McClellan-Kerr Arkansas River Navigation System Project, 3.4 rkm (2.1 rmi);
- Unit NM7: Neosho Wildlife Area 6.1 rkm (3.8 rmi);
- Unit RF4a: Ouachita National Forest, 21.8 rkm (13.6 rmi);
- Unit RF5: Jenkins' Ferry State Park, 22.2 rkm (13.9 rmi);
- Unit RF6: Little River NWR, 37.6 rkm (23.5 rmi), Ouachita National Forest 16.0 rkm (10.0 rmi), and Cossatot NWR, 11.5 rkm (7.2 rmi);
- Unit RF8a: Jacksonport State Park, 2.9 rkm (1.8 rmi) and Henry Gray-Hurricane Lake WMA, 7.8 rkm (4.9 rmi);
- Unit RF8b: White River NWR, 57.6 rkm (36.0 rmi);
- Unit RF9: Shirey Bay Rainey Brake WMA, 10.1 rkm (6.3 rmi);
- Unit RF10: Harold Alexander WMA, 1.1 rkm (0.7 rmi);
- Unit RF13: Buffalo National River, 113.6 rkm (70.6 rmi);
- Unit RF14: Sam A. Baker State Park 1.0 rkm (0.6 rmi) and Corps' Wappapello Lake Project 25.1 rkm (15.7 rmi);
- Unit RF16: Tishomingo State Park, 6.1 rkm (3.8 rmi), NPS Natchez Trace Parkway, 4.5 rkm (2.8 rmi), and TVA Pickwick Lake Project, 7.4 rkm (4.6 rmi);
- Unit RF18: Fern Cave NWR, 0.5 rkm (0.3 rmi);
- Unit RF19: Yanahli WMA, 38.9 rkm (24.3 rmi) and Santa Fe County Park, 1.4 rkm (0.9 rmi);
- Unit RF20a: Shiloh National Military Park, 2.6 rkm (1.6 rmi);
- Unit RF20b: Kentucky Dam Village State Resort Park, 0.6 rkm (0.4 rmi) and unnamed TVA land downstream of Kentucky Lake Dam, 2.4 rkm (1.5 rmi);
- Unit RF21: Massac Forest Nature Preserve, 2.2 rkm (1.4 rmi), West Kentucky WMA, 5.6 rkm (3.5 rmi), Ballard WMA, 2.6 rkm (1.6 rmi) and Chestnut Hills Nature Preserve, 2.4 rkm (1.5 rmi);
- Unit RF22: Mammoth Cave National Park, 17.0 rkm (10.6 rmi);
- Unit RF23: Pennsylvania State Game Land 277, 2.9 rkm (1.8 rmi) and Pennsylvania State Game Land 85, 0.6 rkm (0.4 rmi);
- Unit RF24: Clear Creek State Forest, 9.9 rkm (6.2 rmi);
- Unit RF25: Erie NWR, 16.2 rkm (10.1 rmi) in;
- Unit RF26: Prophetstown State Park, 2.1 rkm (1.3 rmi);
- Unit RF27: Muskingum Watershed Conservancy Land, 5.0 rkm (3.1 rmi);
- Unit RF28: Little Darby State Scenic Waterway–River Lands, 8.7 rkm (5.4 rmi);
- Unit RF30: Fish Creek Wildlife Area, 1.6 rkm (1.0 rmi); and
- Unit RF32: Corps' Shenango River Lake Project, 8.8 rkm (5.5 rmi).

TABLE 4—OCCUPANCY OF NEOSHO MUCKET AND RABBITSFOOT BY PROPOSED CRITICAL HABITAT UNITS

Species	Approximate river distances currently occupied by the species	
	River km	River miles
Neosho mucket	779.1	484.1
Rabbitsfoot	2,661.5	1,653.8
Total	3,440.6	2,137.9
Species, stream (unit), and State	Currently occupied	
Neosho mucket:		
Unit NM1, Illinois River AR, OK	146.1	90.8
Unit NM2, Elk River, MO, OK	20.3	12.6
Unit NM3, Shoal Creek, KS, MO	75.8	47.1
Unit NM4, Spring River, KS, MO	102.3	63.6
Unit NM5, North Fork Spring River, MO	16.4	10.2
Unit NM6, Fall and Verdigris Rivers, KS	171.1	106.3
Unit NM7, Neosho River, KS	244.5	151.9
Unit NM8, Cottonwood River, KS	2.6	1.6
Total	779.1	484.1
Rabbitsfoot:		
Unit RF1, Spring River, MO, KS	56.5	35.1
Unit RF2, Verdigris River, OK	45.5	28.3
Unit RF3, Neosho River, KS	26.6	16.5
Unit RF4a, Ouachita River, AR	21.9	13.6
Unit RF4b, Ouachita River, AR	157.9	98.1
Unit RF5, Saline River, AR	288.4	179.2
Unit RF6, Little River, OK, AR	139.7	86.8
Unit RF7, Middle Fork Little Red River, AR	23.3	14.5
Unit RF8a, White River, AR	188.3	117.0
Unit RF8b, White River, AR	68.9	42.8
Unit RF9, Black River, AR	92.2	57.3
Unit RF10, Spring River, AR	62.8	39.0
Unit RF11, South Fork Spring River, AR	16.4	10.2
Unit RF12, Strawberry River, AR	123.8	76.9
Unit RF13, Buffalo River, AR	113.6	70.6
Unit RF14, St. Francis River, MO	64.3	40.0
Unit RF15, Big Sunflower River, MS	51.5	32.0
Unit RF16, Bear Creek, AL, MS	49.7	30.9
Unit RF17, Big Black River, MS	43.3	26.9
Unit RF18, Paint Rock River, AL	81.0	50.3
Unit RF19, Duck River, TN	235.3	146.2
Unit RF20a, Tennessee River, TN	26.7	16.6
Unit RF20b, Tennessee River, KY	35.6	22.1
Unit RF21, Ohio River, KY, IL	45.9	28.5
Unit RF22, Green River, KY	175.6	109.1
Unit RF23, French Creek, PA	120.4	74.8
Unit RF24, Allegheny River, PA	57.3	35.6
Unit RF25, Muddy Creek, PA	20.1	12.5
Unit RF26, Tippecanoe River, IN	75.6	47.0
Unit RF27, Walhonding River, OH	17.5	10.9
Unit RF28, Little Darby Creek, OH	33.3	20.7
Unit RF29, North Fork Vermilion River and Middle Branch North Fork Vermilion River, IL	28.5	17.7
Unit RF30, Fish Creek, OH	7.7	4.8
Unit RF31, Red River, KY, TN	50.2	31.2
Unit RF32, Shenango River, PA	16.3	10.1
Total	2,661.5	1,653.8

States were granted ownership of lands beneath navigable waters up to the ordinary high-water line upon achieving statehood (*Pollard* v. *Hagan,* 44 U.S. (3 How.) 212 (1845)). Prior to statehood, the American colonies may have made grants to private parties that included lands below the ordinary high-water mark of some navigable waters that are included in this proposal. However, most, if not all, lands beneath the navigable waters included in this proposed rule are owned by the States. Riparian lands along the waters are either in private ownership, or owned by municipalities, States, or Federal entities (Table 5).

TABLE 5—PROPOSED CRITICAL HABITAT UNITS FOR NEOSHO MUCKET AND RABBITSFOOT AND OWNERSHIP OF RIPARIAN LANDS

Critical habitat units	Federal rkm; rmi	State & local government rkm; rmi	Private rkm; rmi	Tribal * (subset of private) rkm; rmi
Neosho Mucket				
Unit NM1: Illinois River	29.4; 18.3	2.3; 1.4	114.4; 71.1	103.0; 64.0
Unit NM2: Elk River	0	0	20.3; 12.6	0
Unit NM3: Shoal Creek	0	0	75.8; 47.1	0
Unit NM4: Spring River	0	1.4; 0.9	100.9; 62.7	0
Unit NM5: North Fork Spring River	0	0	16.4; 10.2	0
Unit NM6: Fall River	0	0	90.4; 56.2	0
Unit NM6: Verdigris River	0	0	80.6; 50.1	0
Unit NM7: Neosho River	0	6.1; 3.8	238.3; 148.1	0
Unit NM8: Cottonwood River	0	0	2.6; 1.6	0
Total	29.4; 18.3	9.8; 6.1	739.8; 459.7	103.0; 64.0
Rabbitsfoot				
Unit RF1: Spring River	0	1.4; 0.9	55.0; 34.2	0
Unit RF2: Verdigris River	4.0; 2.5	0	41.5; 25.8	41.5; 25.8
Unit RF3: Neosho River	0	0	26.6; 16.5	0
Unit RF4a: Ouachita River	3.9; 2.4	0	18.0; 11.2	0
Unit RF4b: Ouachita River	0	0	157.9; 98.1	0
Unit RF5: Saline River	0	22.3; 13.9	266.0; 165.3	0
Unit RF6: Little River	63.9; 39.7	0	75.8; 47.1	41.4; 25.7
Unit RF7: Middle Fork Little Red River	0	0	23.3; 14.5	0
Unit RF8a: White River	0	10.8; 6.7	177.5; 110.3	0
Unit RF8b: White River	57.9; 36.0	0	10.9; 6.8	0
Unit RF9: Black River	0	10.1; 6.3	82.1; 51.0	0
Unit RF10: Spring River	0	1.1; 0.7	61.6; 38.3	0
Unit RF11: South Fork Spring River	0	0	16.4; 10.2	0
Unit RF12: Strawberry River	0	0	123.8; 76.9	0
Unit RF13: Buffalo River	113.6; 70.6	0	0	0
Unit RF14: St. Francis River	25.2; 15.7	1.0; 0.6	38.1; 23.7	0
Unit RF15: Big Sunflower River	0	0	51.5; 32.0	0
Unit RF16: Bear Creek	11.9; 7.4	6.1; 3.8	31.7; 19.7	0
Unit RF17: Big Black River	0	0	43.3; 26.9	0
Unit RF18: Paint Rock River	0.5; 0.3	0	80.5; 50.0	0
Unit RF19: Duck River	0	40.5; 25.2	194.7; 121.0	0
Unit RF20a: Tennessee River	2.6; 1.6	0	24.1; 15.0	0
Unit RF20b: Tennessee River	2.4; 1.5	0.6; 0.4	32.5; 20.2	0
Unit RF21: Ohio River	0	12.9; 8.0	33.0; 20.5	0
Unit RF22: Green River	17.0; 10.6	0	158.5; 98.5	0
Unit RF23: French Creek	0	3.5; 2.2	116.8; 72.6	0
Unit RF24: Allegheny River	0	10.0; 6.2	47.3; 29.4	0
Unit RF25: Muddy Creek	16.3; 10.1	0	3.9; 2.4	0
Unit RF26: Tippecanoe River	0	2.1; 1.3	73.5; 45.7	0
Unit RF27: Walhonding River	0	5.0; 3.1	12.6; 7.8	0
Unit RF28: Little Darby Creek	0	8.7; 5.4	24.6; 15.3	0
Unit RF29: North Fork Vermilion River and Middle Branch North Fork Vermilion River	0	0	28.5; 17.7	0
Unit RF30: Fish Creek	0	1.6; 1.0	6.1; 3.8	0
Unit RF31: Red River	0	0	50.2; 31.2	0
Unit RF32: Shenango River	8.8; 5.5	0	7.4; 4.6	0
Total	328.1; 203.9	137.9; 85.7	2,195.7; 1,364.4	86.9; 54.0
Total for both species	357.6; 222.2	147.7; 91.8	2,935.6; 1,824.1	189.9; 118.0

Note: Distances may not sum due to rounding.
* Tribal Jurisdictional Area only, does not represent riparian land ownership by any tribe and is a subset of the private lands category.

We present brief descriptions of all units and reasons why they meet the definition of critical habitat for the Neosho mucket and rabbitsfoot. River-kilometer totals presented in the Unit descriptions below are the sums of Federal; State and local government; and private lands (Tribal lands are a subset of private lands). Proposed critical habitat units include the river channels within the ordinary high-water line. As defined in 33 CFR 329.11, the ordinary high-water mark on nontidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics, such as a clear, natural line impressed on the bank; shelving;

changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas. For each stream reach proposed as a critical habitat unit, the upstream and downstream boundaries are described generally below.

Neosho Mucket

Neosho mucket status and distribution for each critical habitat unit was previously described in the STATUS ASSESSMENT FOR NEOSHO MUCKET AND RABBITSFOOT section.

Unit NM1: Illinois River—Benton and Washington Counties, Arkansas; and Adair, Cherokee, and Delaware Counties, Oklahoma

Unit NM1 includes 146.1 rkm (90.8 rmi) of the Illinois River from the Muddy Fork Illinois River confluence with the Illinois River south of Savoy, Washington County, Arkansas, downstream to the Baron Creek confluence southeast of Tahlequah, Cherokee County, Oklahoma. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains PCEs 2, 3, 4, and 5. The PBFs in this unit may require special management considerations or protection to address changes in stream channel stability associated with urban development and clearing of riparian areas due to land use conversion in the watershed; alteration of water chemistry or water and sediment quality; and changes in stream bed material composition and quality from activities that would release sediments or nutrients into the water, such as urban development and associated construction projects, livestock grazing, confined animal operations, and timber harvesting (see Factor A). The majority of the adjacent riparian lands in this unit are in private ownership or private lands under tribal jurisdiction (Table 5).

Unit NM2: Elk River—McDonald County, Missouri; and Delaware County, Oklahoma

Unit NM2 includes a total of 20.3 rkm (12.6 rmi) of the Elk River from Missouri Highway 59 at Noel, McDonald County, Missouri, to the confluence of Buffalo Creek immediately downstream of the Oklahoma and Missouri State line, Delaware County, Oklahoma. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes in the existing flow regime due to such activities as impoundment, water diversion, or water withdrawal; alteration of water chemistry or water quality; and changes in stream bed material composition and sediment quality from activities that would release sediments or nutrients into the water, such as urban development and associated construction projects, livestock grazing, confined animal operations (turkey and chicken), timber harvesting, and mining (see Factor A). All the adjacent riparian lands in this unit are in private ownership (Table 5).

Unit NM3: Shoal Creek—Cherokee County, Kansas; and Newton County, Missouri

Unit NM3 includes approximately 75.8 rkm (47.1 rmi) of Shoal Creek from Missouri Highway W near Ritchey, Newton County, Missouri, to Empire Lake where inundation begins in Cherokee County, Kansas. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes to the same activities as discussed in Unit NM2 above and releases of chemical contaminants from industrial and municipal effluents (see Factor A). All adjacent riparian lands in this unit are in private ownership (Table 5).

Unit NM4: Spring River—Jasper and Lawrence Counties, Missouri; and Cherokee County, Kansas

Unit NM4 includes 102.3 rkm (63.6 rmi) of the Spring River from Missouri Highway 97 north of Stotts City, Lawrence County, Missouri, downstream to the confluence of Turkey Creek north of Empire, Cherokee County, Kansas. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes to the same activities as discussed in Unit NM2 above and releases of chemical contaminants from industrial and municipal effluents. Almost all (99 percent) of the adjacent riparian lands in this unit are in private ownership (Table 5).

Unit NM5: North Fork Spring River—Jasper County, Missouri

Unit NM5 includes 16.4 rkm (10.2 rmi) of the North Fork Spring River from the confluence of Buck Branch southwest of Jasper, Missouri, downstream to its confluence with the Spring River near Purcell, Jasper County, Missouri. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes to the same activities as discussed in Unit NM2 above. All adjacent riparian lands in this unit are in private ownership (Table 5).

Unit NM6: Fall River—Elk, Greenwood, and Wilson Counties, Kansas; Verdigris River—Montgomery and Wilson Counties, Kansas

Unit NM6 includes a total of 171.1 rkm (106.3 rmi) including 90.4 rkm (56.2 rmi) of the Fall River from Fall River Lake dam northwest of Fall River, Greenwood County, Kansas, downstream to its confluence with the Verdigris River near Neodesha, Wilson County, Kansas. Unit NM6 also includes 80.6 rkm (50.1 rmi) of the Verdigris River from Kansas Highway 39 near Benedict, Wilson County, Kansas downstream to the Elk River confluence near Independence, Montgomery County, Kansas. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes to the same activities as discussed in Unit NM2 above. All adjacent riparian lands in this unit are in private ownership (Table 5).

Unit NM7: Neosho River—Allen, Cherokee, Coffey, Labette, Neosho, and Woodson Counties, Kansas

Unit NM7 includes 244.5 rkm (151.9 rmi) of the Neosho River from Kansas Highway 58 west of LeRoy, Coffey County, Kansas, downstream to the Kansas and Oklahoma State line, Cherokee County, Kansas. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes previously to the same activities as discussed in Unit NM2 above and releases of chemical contaminants from industrial and municipal effluents and tail water releases downstream of John Redmond Reservoir. All adjacent riparian lands in this unit are in private ownership (Table 5).

Unit NM8: Cottonwood River—Chase County, Kansas

Unit NM8 includes 2.6 rkm (1.6 rmi) of the Cottonwood River from the South Fork Cottonwood River confluence downstream to the Kansas Road 140

(also known as Heins Road), east of Cottonwood Falls, Chase County, Kansas. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protection to address changes in stream channel stability associated with clearing of riparian areas due to land use conversion in the watershed; alteration of water chemistry or water and sediment quality; and changes in stream bed material composition and quality from activities that would release sediments or nutrients into the water, such as urban development and associated construction projects, livestock grazing, and release of contaminants from municipal effluents (see Factor A). All adjacent riparian lands in this unit are in private ownership (Table 5).

Rabbitsfoot

Rabbitsfoot status and distribution for each critical habitat unit was previously described in the STATUS ASSESSMENT FOR NEOSHO MUCKET AND RABBITSFOOT section.

The PBFs in units RF1 through RF32 may require special management considerations to address changes in the existing flow regime due to such activities as impoundment, water diversion, or water withdrawal; alteration of water chemistry or water quality; and changes in stream bed material composition and sediment quality from activities that would release sediments or nutrients into the water, such as urban development and associated construction projects, livestock grazing, confined animal operations (turkey and chicken), timber harvesting, and mining, and releases of chemical contaminants from industrial and municipal effluents (see Factor A). Where there are other activities in individual units requiring special management considerations, they are set forth in the individual unit descriptions.

Unit RF1: Spring River—Jasper County, Missouri; and Cherokee County, Kansas

Unit RF1 includes 56.5 rkm (35.1 rmi) of the Spring River from Missouri Highway 96 at Carthage, Jasper County, Missouri, downstream to the confluence of Turkey Creek north of Empire, Cherokee County, Kansas. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections described above. The majority of the adjacent riparian lands in this unit are in private ownership or private lands under tribal jurisdiction (Table 5).

Unit RF2: Verdigris River—Rogers County, Oklahoma

Unit RF2 includes 45.5 rkm (28.3 rmi) of the Verdigris River from Oologah Lake dam north of Claremore, Oklahoma, downstream to Interstate 44 (Will Rogers Turnpike) west of Catoosa, Rogers County, Oklahoma. This unit was occupied at the time of listing and contains all or some components of all four PBFs and in part, contains all five PCEs. It is possible that PCEs 1 and 2 are limiting factors for rabbitsfoot distribution and abundance from Oologah Lake dam downstream to the confluence of the Caney River; thus we are unable to determine at this time whether this reach contains PCEs 1 and 2. The PBFs in this unit may require special management considerations or protections as described above and changes in the existing flow regime due to such activities as impoundment, tail water releases from Oologah Lake dam, and channelization associated with the McClellan-Kerr Arkansas River Navigation System. The majority of the adjacent riparian lands in this unit are in private ownership or private lands under tribal jurisdiction (Table 5).

Unit RF3: Neosho River—Allen County, Kansas

Unit RF3 includes 26.6 rkm (16.5 rmi) of the Neosho River from the Deer Creek confluence northwest of Iola, Kansas, downstream to the confluence of Owl Creek southwest of Humboldt, Allen County, Kansas. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes described above except for releases of chemical contaminants from industrial and municipal effluents. Approximately 97 percent of the adjacent riparian lands in this unit are in private ownership and the remaining lands in State or local ownership (Table 5).

Unit RF4a: Ouachita River—Montgomery County, Arkansas

Unit RF4a includes 21.9 rkm (13.6 rmi) of the Ouachita River from Arkansas Highway 379 south of Oden, Montgomery County, Arkansas, downstream to Arkansas Highway 298 east of Pencil Bluff, Montgomery County, Arkansas. Units RF4a and RF4b are separated by three reservoirs (Lakes Ouachita, Hamilton, and Catherine). This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes described above. Approximately 82 percent of the adjacent riparian lands in this unit are in private ownership and the remaining 18 percent are in Federal ownership (Table 5).

Unit RF4b: Ouachita River—Clark, Hot Spring, and Ouachita Counties, Arkansas

Unit RF4b includes 157.9 rkm (98.1 rmi) of the Ouachita River from Interstate 30 at Malvern, Hot Spring County, Arkansas, downstream to U.S. Highway 79 at Camden, Ouachita County, Arkansas. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes described above. All the adjacent riparian lands in this unit are in private ownership (Table 5).

Unit RF5: Saline River—Ashley, Bradley, Cleveland, Dallas, Drew, Grant, and Saline Counties, Arkansas

Unit RF5 includes 288.4 rkm (179.2 rmi) of the Saline River from Interstate 30 near Benton, Saline County, Arkansas, to the Snake Creek confluence north of the northern boundary of Felsenthal NWR northwest of Crossett, Ashley, and Bradley Counties, Arkansas. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes described above. Approximately 92 percent of the adjacent riparian lands in this unit are in private ownership and 8 percent are in State or local ownership (Table 5).

Unit RF6: Little River—McCurtain County, Oklahoma; and Little River and Sevier Counties, Arkansas

Unit RF6 includes 139.7 rkm (86.8 rmi) of the Little River from the Glover River confluence northwest of Idabel, McCurtain County, Oklahoma, downstream to U.S. Highway 71 north of Wilton, Little River and Sevier Counties, Arkansas. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes described above. Adjacent riparian

lands in this unit are in private ownership (42 percent), Federal (35 percent), and private land under tribal jurisdiction (23 percent) (Table 5).

Unit RF7: Middle Fork Little River—Van Buren County, Arkansas

Unit RF7 includes 23.3 rkm (14.5 rmi) of the Middle Fork Little Red River from the confluence of Little Tick Creek north of Shirley, Arkansas, downstream to Greers Ferry Reservoir where inundation begins, Van Buren County, Arkansas. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes described above and natural gas development and hillside rock harvesting. All adjacent riparian lands in this unit are in private ownership (Table 5).

Unit RF8a: White River—Independence, Jackson, White, and Woodruff Counties, Arkansas

Unit RF8a includes 188.3 rkm (117.0 rmi) of the White River from the Batesville Dam at Batesville, Independence County, Arkansas, downstream to the Little Red River confluence north of Georgetown, White, and Woodruff Counties, Arkansas. There are no records of rabbitsfoot from the 160 rkm (100 rmi) reach separating Unit RF8a from Unit RF8b (Butler 2005, p. 66). This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains PCEs 2, 3, 4, and 5. The U.S. Army Corps of Engineers maintains a navigation channel, which involves routine dredging and snag removal, from Newport, Arkansas to its confluence with the Mississippi River. The PBFs in this unit may require special management considerations or protections described above except for releases of chemical contaminants from industrial and municipal effluents and including tail water releases from a series of reservoirs on the upper White River, row crop agriculture, increasing demand for instream sand from the White River upstream of Newport, Arkansas, to support natural gas development needs, natural gas development, and channelization. Adjacent riparian lands in this unit are in private ownership (94 percent) and State and local ownership (6 percent) (Table 5).

Unit RF8b: White River—Arkansas and Monroe Counties, Arkansas

Unit RF8b includes 68.9 rkm (42.8 rmi) of the White River from U.S. Highway 79 at Clarendon, Monroe County, Arkansas, downstream to Arkansas Highway 1 near St. Charles, Arkansas County, Arkansas. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains PCEs 2, 3, 4, and 5. The U.S. Army Corps of Engineers maintains a navigation channel, which involves routine dredging and snag removal, from Newport, Arkansas, to its confluence with the Mississippi River. The PBFs in this unit may require special management considerations or protections described above except for releases of chemical contaminants from industrial and municipal effluents and including tail water releases from a series of reservoirs on the upper White River, row crop agriculture, increasing demand for instream sand from the White River upstream of Newport, Arkansas, to support natural gas development needs, natural gas development, and channelization. Approximately 84 percent of the adjacent riparian lands in this unit are in Federal ownership and 16 percent are in private ownership (Table 5).

Unit RF9: Black River—Lawrence and Randolph Counties, Arkansas

Unit RF9 includes 92.2 rkm (57.3 rmi) of the Black River from U.S. Highway 67 at Pocahontas, Randolph County, Arkansas, downstream to the Strawberry River confluence southeast of Strawberry, Lawrence County, Arkansas. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes described above and including row crop agriculture. Approximately 89 percent of the adjacent riparian lands in this unit are in private ownership and 11 percent are in State or local ownership (Table 5).

Unit RF10: Spring River—Lawrence, Randolph, and Sharp Counties, Arkansas

Unit RF10 includes 62.8 rkm (39.0 rmi) of the Spring River from U.S. Highway 412 and 62 at Hardy in Sharp County, Arkansas, downstream to its confluence with the Black River east of Black Rock, Lawrence, and Randolph Counties, Arkansas. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes described above. Approximately 99 percent of the adjacent riparian lands in this unit are in private ownership and almost 1 percent is in State or local ownership (Table 5).

Unit RF11: South Fork Spring River—Fulton County, Arkansas

Unit RF11 includes 16.4 rkm (10.2 rmi) of the South Fork Spring River from Fulton County Road 198 north of Heart, Arkansas, downstream to Arkansas Highway 289 at Saddle, Fulton County, Arkansas. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes described above. All of the adjacent riparian lands in this unit are in private ownership (Table 5).

Unit RF12: Strawberry River—Izard, Lawrence, and Sharp Counties, Arkansas

Unit RF12 includes 123.8 rkm (76.9 rmi) of the Strawberry River from Arkansas Highway 56 south of Horseshoe Bend, Izard County, Arkansas, downstream to its confluence with the Black River southeast of Strawberry, Lawrence County, Arkansas. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes described above. All of the adjacent riparian lands in this unit are in private ownership (Table 5).

Unit RF13: Buffalo River—Newton and Searcy Counties, Arkansas

Unit RF13 includes 113.6 rkm (70.6 rmi) of the Buffalo River from the Cove Creek confluence southeast of Erbie, Newton County, Arkansas, downstream to U.S. Highway 65 west of Gilbert, Searcy County, Arkansas, and Arkansas Highway 14 southeast of Mull, Arkansas, downstream to the Leatherwood Creek confluence in the Lower Buffalo Wilderness Area, Arkansas. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes described above. All of the adjacent riparian lands in this unit are in Federal ownership (Table 5).

Unit RF14: St. Francis River—Madison and Wayne Counties, Missouri

Unit RF14 includes 64.3 rkm (40.0 rmi) of the St. Francis River from the Twelvemile Creek confluence west of

Saco, Madison County, Missouri, downstream to Lake Wappepello where inundation begins, Wayne County, Missouri. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes described above. Adjacent riparian lands in this unit are in private (59 percent), Federal (39 percent), and less than 2 percent in State or local ownership (Table 5).

Unit RF15: Big Sunflower River—Sunflower County, Mississippi

Unit RF15 includes 51.5 rkm (32.0 rmi) of the Big Sunflower River from Mississippi Highway 442 west of Doddsville, Mississippi, downstream to the Quiver River confluence east of Indianola, Sunflower County, Mississippi. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes described above and row crop agriculture and channelization. All of the adjacent riparian lands in this unit are in private ownership (Table 5).

Unit RF16: Bear Creek—Tishomingo County, Mississippi; and Colbert County, Alabama

Unit RF16 includes 49.7 rkm (30.9 rmi) of Bear Creek from the Alabama and Mississippi State line east of Golden, Tishomingo County, Mississippi, downstream to Alabama County Road 4 southwest of Sutton Hill, Colbert County, Alabama (just upstream of Pickwick Lake). Unit RF16 in its entirety is currently designated as critical habitat for the oyster mussel (*Epioblasma capsaeformis*) and Cumberlandian combshell (*Epioblasma brevidens;* 50 CFR 17.95(f)). This unit was occupied at the time of listing and contains all or some components of all four PBFs, except in the Bear Creek Floodway, which has been channelized for flood control and only contains components of PBF 2 and contains all five PCEs, except in the Bear Creek Floodway, which has been channelized for flood control and only contains PCEs 3, 4, and 5. The PBFs in this unit may require special management considerations or protections to address changes described above. Adjacent riparian lands in this unit are in private (64 percent), Federal (24 percent), and 12 percent in State or local ownership (Table 5).

Unit RF17: Big Black River—Hinds and Warren Counties, Mississippi

Unit RF17 includes 43.3 rkm (26.9 rmi) of Big Black River from Porter Creek confluence west of Lynchburg, Hinds County, Mississippi, downstream to Mississippi Highway 27 west of Newman, Warren County, Mississippi. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes described above, as well as row crop agriculture and channelization. All riparian lands in this unit are in private ownership (Table 5).

Unit RF18: Paint Rock River—Jackson, Madison, and Marshall Counties, Alabama

Unit RF18 includes 81.0 rkm (50.3 rmi) of the Paint Rock River from the convergence of Estill Fork and Hurricane Creek north of Skyline, Jackson County, Alabama, downstream to U.S. Highway 431 south of New Hope, Madison and Marshall Counties, Alabama. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes described above as well as row crop agriculture and channelization. Approximately 99 percent of the adjacent riparian lands in this unit are in private ownership and one percent is in Federal ownership (Table 5).

Unit RF19: Duck River—Hickman, Marshall, and Maury Counties, Tennessee

Unit RF19 includes 235.3 rkm (146.2 rmi) of the Duck River from Lillard Mill (RKM 288; rmi 179) west of Tennessee Highway 272, Marshall County, Tennessee, downstream to Interstate 40 near Bucksnort, Hickman County, Tennessee. Seventy-four rkm (46 rmi) in Unit RF19 from rkm 214 (rmi 133) upstream to Lillards Mill at rkm 288 (rmi 179) is currently designated as critical habitat for the oyster mussel and Cumberlandian combshell (50 CFR 17.95(f)).

This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes described above as well as row crop agriculture and channelization. Approximately 83 percent of the adjacent riparian lands in this unit are in private ownership and 17 percent are in State or local ownership (Table 5).

Unit RF20a: Tennessee River—Hardin County, Tennessee

Unit RF20a includes 26.7 rkm (16.6 rmi) of Tennessee River from Pickwick Lake Dam downstream to U.S. Highway 64 near Adamsville, Hardin County, Tennessee. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains PCEs 1, 3, 4, and 5. The PBFs in this unit may require special management considerations or protections to address changes described above as well as row crop agriculture, channelization, and channel stability associated with tail water releases. Approximately 90 percent of the adjacent riparian lands in this unit are in private ownership and 10 percent are in State or local ownership (Table 5).

Unit RF20b: Tennessee River—Livingston, Marshall, and McCracken Counties, Kentucky

Unit RF20b includes 35.6 rkm (22.1 rmi) of Tennessee River from Kentucky Lake Dam downstream to its confluence with the Ohio River, McCracken and Livingston Counties, Kentucky. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains PCEs 1, 3, 4, and 5. The PBFs in this unit may require special management considerations or protection to address changes described above. Approximately 93 percent of the adjacent riparian lands in this unit are in private ownership, 7 percent are in Federal ownership, and less than 1 percent is in State or local ownership (Table 5).

Unit RF21: Ohio River—Ballard, Livingston, and McCracken Counties, Kentucky; Massac and Pulaski Counties, Illinois

Unit RF21 includes 45.9 rkm (28.5 rmi) of the Ohio River from the Tennessee River confluence downstream to Lock and Dam 53 near Olmstead, Illinois. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains PCEs 1, 3, 4, and 5. The PBFs in this unit may require special management considerations or protection to address changes described above, as well as row crop agriculture, channelization, and channel stability associated with tail water releases. Approximately 72 percent of the adjacent riparian lands in this unit are in private ownership and 28 percent are in State or local ownership (Table 5).

Unit RF22: Green River—Green, Hart, and Taylor Counties, Kentucky

Unit RF22 includes 175.6 rkm (109.1 rmi) of the Green River from Green River Lake Dam south of Campbellsville, Taylor County, Kentucky, downstream to Maple Springs Ranger Station Road in Mammoth Cave National Park, Kentucky. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains PCEs 1, 3, 4, and 5. Releases from Green River Lake dam have altered hydrologic flows and temperature regimes in the tail water reach (Butler 2005, p. 39). The PBFs in this unit may require special management considerations or protection to address changes described above and row crop agriculture, channelization, and channel stability associated with tail water releases. Approximately 90 percent of the adjacent riparian lands in this unit are in private ownership and 10 percent are in Federal ownership (Table 5).

Unit RF23: French Creek—Crawford, Erie, Mercer, and Venango Counties, Pennsylvania

Unit RF23 includes 120.4 rkm (74.8 rmi) of French Creek from Union City Reservoir Dam northeast of Union City, Erie County, Pennsylvania, downstream to its confluence with the Allegheny River near Franklin, Venango County, Pennsylvania. The Allegheny River rabbitsfoot population (Unit RF24) is likely a single metapopulation with the French Creek population (Butler 2005, p. 31). This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes described above as well as row crop agriculture and oil and gas development. Approximately 97 percent of the adjacent riparian lands in this unit are in private ownership and 3 percent are in Federal ownership (Table 5).

Unit RF24: Allegheny River—Venango County, Pennsylvania

Unit RF24 includes 57.3 rkm (35.6 rmi) of the Allegheny River from the French Creek confluence near Franklin, Venango County, Pennsylvania, downstream to Interstate 80 near Emlenton, Venango County, Pennsylvania. The lower Allegheny River and French Creek (Unit RF23) populations likely represent a single metapopulation because no barriers exist between the streams (Butler 2005, p. 29). This unit contains all or some components of all four PBFs and likely functions as a metapopulation to French Creek (Unit RF23). This unit was occupied at the time of listing and contains PCEs 1, 3, 4, and 5 for the rabbitsfoot. A series of nine lock and dams and Kinzua Dam constructed over the past century has resulted in altered hydrologic flow regimes in the Allegheny River (Butler 2005, p. 29). The PBFS in this unit may require special management considerations or protections to address changes described above as well as row crop agriculture, oil and gas development, and channelization. Approximately 83 percent of the adjacent riparian lands in this unit are in private ownership and 17 percent are in State or local ownership (Table 5).

Unit RF25: Muddy Creek—Crawford County, Pennsylvania

Unit RF25 includes 20.1 rkm (12.5 rmi) of Muddy Creek from Pennsylvania Highway 77 near Little Cooley, Crawford County, Pennsylvania, downstream to its confluence with French Creek east of Cambridge Springs, Crawford County, Pennsylvania. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFS in this unit may require special management considerations or protections to address changes described above and oil and gas development. Approximately 81 percent of the adjacent riparian lands in this unit are in Federal ownership and 19 percent are in private ownership (Table 5).

Unit RF26: Tippecanoe River—Carroll, Pulaski, Tippecanoe, and White Counties, Indiana

Unit RF26 includes 75.6 rkm (47.0 rmi) of the Tippecanoe River from Indiana Highway 14 near Winamac, Pulaski County, Indiana, downstream to its confluence with the Wabash River northeast of Battle Ground, Tippecanoe County, Indiana, excluding Lakes Schafer and Freeman and the stream reach between the two lakes. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes described above. Approximately 97 percent of the adjacent riparian lands in this unit are in private ownership and 3 percent are in State or local ownership (Table 5).

Unit RF27: Walhonding River—Coshocton County, Ohio

Unit RF27 includes 17.5 rkm (10.9 rmi) of the Walhonding River from the convergence of the Kokosing and Mohican Rivers downstream to Ohio Highway 60 near Warsaw, Coshocton County, Ohio. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes described above. Approximately 83 percent of the adjacent riparian lands in this unit are in private ownership and 17 percent are in State or local ownership (Table 5).

Unit RF28: Little Darby Creek—Madison and Union Counties, Ohio

Unit RF28 includes 33.3 rkm (20.7 rmi) of Little Darby Creek from Ohio Highway 161 near Chuckery, Madison County, Ohio, downstream to U.S. Highway 40 near West Jefferson, Madison County, Ohio. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFS in this unti may require special management considerations or protections to address changes described above and row crop agriculture. All adjacent riparian lands in this unit are in private ownership (Table 5).

Unit RF29: North Fork Vermilion River and Middle Branch North Fork Vermilion River, respectively, Vermilion County, Illinois

Unit RF29 includes 28.5 rkm (17.7 rmi) of the North Fork Vermilion River from the confluence of Middle Branch North Fork Vermilion River downstream to Illinois Highway 1 and U.S. Highway 136 upstream of Lake Vermilion, Vermilion County, Illinois. Unit RF29 also includes 7.2 rkm (4.5 rmi) of the Middle Branch North Fork Vermilion River from the Jordan Creek confluence northwest of Alvin, Illinois, downstream to its confluence with North Fork Vermilion River west of Alvin, Vermilion County, Illinois. The rabbitsfoot in the North Fork Vermilion River is considered a metapopulation with the Middle Branch North Fork Vermilion River population (Butler 2005, p. 47). This unit was occupied at the time of listing and contains all or some components of all four PBFs, including connectivity between North Fork Vermilion River and Middle Branch North Fork Vermilion River. This unit contains all five PCEs. The PBFs in this unit may require special

management considerations or protections to address changes described above and channelization and row crop agriculture. All adjacent riparian lands in this unit are in private ownership (Table 5).

Unit RF30: Fish Creek—Williams County, Ohio

Unit RF30 includes 7.7 rkm (4.8 rmi) of Fish Creek from the Indiana and Ohio State line northwest of Edgerton, Ohio, downstream to its confluence with the St. Joseph's River north of Edgerton, Williams County, Ohio. This unit was occupied at the time of listing and contains all or some components of all four PBFs and sustains genetic diversity and historical distribution as the only remaining rabbitsfoot population in the Great Lakes subbasin. This unit contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes described above as well as row crop agriculture and confined animal operations (hogs). Approximately 90 percent of the adjacent riparian lands in this unit are in private ownership and 10 percent are in State or local ownership (Table 5).

Unit RF31: Red River—Logan County, Kentucky; and Robertson County, Tennessee

Unit RF31 includes 50.2 rkm (31.2 rmi) of the Red River from the South Fork Red River confluence west of Adairville, Kentucky, downstream to the Sulphur Fork confluence southwest of Adams, Tennessee. This unit was occupied at the time of listing and contains all or some components of all four PBFs and sustains genetic diversity and historical distribution as the largest of two remaining rabbitsfoot populations within the Cumberland River basin. This unit contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes described above as well as row crop agriculture and channelization. All adjacent riparian lands in this unit are in private ownership (Table 5).

Unit RF32: Shenango River—Mercer County, Pennsylvania

Unit RF32 includes 16.3 rkm (10.1 rmi) of the Shenango River from Kidds Mill Road near Greenville, Pennsylvania, downstream to the point of inundation by Shenango River Lake near Big Bend, Mercer County, Pennsylvania. This unit was occupied at the time of listing and contains all or some components of all four PBFs and contains all five PCEs. The PBFs in this unit may require special management considerations or protections to address changes described above. Approximately 54 percent of the adjacent riparian lands in this unit are in Federal ownership and 46 percent are in private ownership (Table 5).

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 United States Courts of Appeal for the Fifth and Ninth Circuits 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 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 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 or biological features to an extent that appreciably reduces the conservation value of critical habitat for Neosho mucket and the rabbitsfoot. 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 Neosho mucket and rabbitsfoot. These activities include, but are not limited to:

(1) Actions that would alter the geomorphology of their stream and river habitats. Such activities may include, but are not limited to, instream excavation or dredging, impoundment, channelization, sand and gravel mining, clearing riparian vegetation, and discharge of fill materials. These activities could cause aggradation or degradation of the channel bed elevation or significant bank erosion, result in entrainment or burial of these mollusks, and cause other direct or cumulative adverse effects to these species and their life cycles.

(2) Actions that would significantly alter the existing flow regime where these species occur. Such activities may include, but are not limited to, impoundment, channelization, urban development, water diversion, water withdrawal, and tail water releases downstream of dams. These activities could eliminate or reduce the habitat necessary for growth and reproduction of these mollusks and their life cycles including fish hosts.

(3) Actions that would significantly alter water chemistry or water quality (for example, temperature, pH, contaminants, conductivity, and excess nutrients). Such activities may include, but are not limited to, tail water releases downstream of dams, or the release of chemicals, biological pollutants, or heated effluents into surface water or connected groundwater at a point source or by dispersed release (nonpoint source). These activities could alter water conditions that are beyond the tolerances of these mussels or their fish hosts or both, and result in direct or cumulative adverse effects to the species and their life cycles.

(4) Actions that would significantly alter stream bed material composition and quality by increasing sediment deposition or filamentous algal growth. Such activities may include, but are not limited to, construction projects, gravel and sand mining, oil and gas development, livestock grazing, timber harvest, off-road vehicle use, and other watershed and floodplain disturbances that release sediments or contaminants into the water. These activities could eliminate or reduce habitats necessary for the survival, growth and reproduction of these mollusks or their fish hosts or both by causing excessive sedimentation and burial of Neosho mucket and rabbitsfoot or their habitats, sublethal effects from sediment exposure that are not readily apparent, acute and chronic exposure to chemical contaminants resulting in sublethal and lethal effects, and nutrification leading to excessive filamentous algal growth. Excessive filamentous algal growth can cause reduced nighttime dissolved oxygen levels through respiration and prevent mussel glochidia from settling into stream sediments.

Exemptions

Application of Section 4(a)(3) of the 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 resources 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.'' There are no Department of Defense lands with a completed INRMP within the proposed critical habitat designation for the Neosho mucket and rabbitsfoot.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary must 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, we 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.

We will announce the availability of our draft economic analysis as soon as it is completed, at which time we will seek public comment. During the development of a final designation, we will consider economic impacts, public comments, and other new information related to economic impacts, 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 determined that none of the lands within the proposed designation of critical habitat for the Neosho mucket and rabbitsfoot are owned or managed by the Department of Defense and, therefore, we anticipate no impact on national security. Consequently, the Secretary does not propose to exert 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 of lands 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.

In preparing this proposed rule, we have determined that there are currently no HCPs or other management plans for the Neosho mucket and rabbitsfoot. The proposed designation of critical habitat includes only tribal jurisdictional areas not lands managed by any Tribe. We anticipate no effect to tribal lands, partnerships, or HCPs from this proposed critical habitat designation. Accordingly, the Secretary does not propose to exert his discretion to exclude any areas from the final designation based on other relevant impacts.

Peer Review

In accordance with our joint policy 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 for each species regarding this proposed rule. The purpose of peer review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We have invited these peer reviewers to comment during this public comment period on our specific assumptions and conclusions in this proposed designation of critical habitat.

We will consider all comments and information received during this comment period on this proposed rule during our preparation of a final determination. Accordingly, the 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 must be received within 45 days after the date of publication of this proposed rule in the **Federal Register**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. 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 hearing.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

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 of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the 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 the 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.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include such businesses as manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and forestry and logging operations with fewer than 500 employees and annual business less than $7 million. To

determine whether small entities may be affected, we will consider the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

Importantly, the incremental impacts of a rule must be *both* significant and substantial to prevent certification of the rule under the RFA and to require the preparation of an initial regulatory flexibility analysis. If a substantial number of small entities are affected by the proposed critical habitat designation, but the per-entity economic impact is not significant, the Service may certify. Likewise, if the per-entity economic impact is likely to be significant, but the number of affected entities is not substantial, the Service may also certify.

Under the RFA, as amended, and following recent court decisions, Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself, and not the potential impacts to indirectly affected entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried by the Agency is not likely to adversely modify critical habitat. Therefore, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Under these circumstances, it is our position that only Federal action agencies will be directly regulated by this designation. Therefore, because Federal agencies are not small entities, the Service may certify that the proposed critical habitat rule will not have a significant economic impact on a substantial number of small entities.

We acknowledge, however, that in some cases, third-party proponents of the action subject to permitting or funding may participate in a section 7 consultation, and thus may be indirectly affected. We believe it is good policy to assess these impacts if we have sufficient data before us to complete the necessary analysis, whether or not this analysis is strictly required by the RFA. While this regulation does not directly regulate these entities, in our draft economic analysis we will conduct a brief evaluation of the potential number of third parties participating in consultations on an annual basis in order to ensure a more complete examination of the incremental effects of this proposed rule in the context of the RFA.

In conclusion, we believe that, based on our interpretation of directly regulated entities under the RFA and relevant case law, this designation of critical habitat will only directly regulate Federal agencies which are not by definition small business entities. And as such, certify that, if promulgated, this designation of critical habitat would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required. However, though not necessarily required by the RFA, in our draft economic analysis for this proposal we will consider and evaluate the potential effects to third parties that may be involved with consultations with Federal action agencies related to this action.

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. Although two of the proposed units are downstream of hydropower reservoirs, current and proposed operating regimes have been deemed adequate for the species, and therefore their hydropower operations are not anticipated to be affected by the proposed designation of critical habitat.

Natural gas and oil exploration and development activities occur or could potentially occur in the rabbitsfoot proposed critical habitat (6 of 35 critical habitat units). However, compliance with State regulatory requirements or voluntary BMPs would be expected to minimize impacts of natural gas and oil exploration and development in the areas of proposed critical habitat for both species. The measures for natural gas and oil exploration and development are generally not considered a substantial cost compared with overall project costs and are already being implemented by oil and gas companies. Coal mining occurs or could potentially occur in 5 of 35 proposed critical habitat units for the rabbitsfoot. Incidental take for listed species associated with surface coal mining activities is currently covered under a programmatic, no jeopardy biological opinion between the Office of Surface Mining and the Service completed in 1996 (Service 1996, entire). The biological opinion covers existing, proposed, and future endangered and threatened species that may be affected by the implementation and administration of surface coal mining programs under the Surface Mining Control and Reclamation Act of 1977. Through its analysis, the Service concluded that the proposed action (surface coal mining and reclamation activities) was not likely to jeopardize the continued existence of any endangered, threatened, or proposed species or result in adverse modification of designated or proposed critical habitat.

All other proposed units are remote from energy supply, distribution, or use activities. We do not expect the designation of this proposed critical habitat to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and 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 and neither would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments because the Neosho mucket and rabbitsfoot occur only in navigable waters in which the river bottom is generally owned by the State. However, the adjacent upland properties are owned by private, State, or Federal entities (see Table 5). As such, a Small Government Agency Plan is not required. We will, however, further evaluate this issue as we conduct our economic analysis and revise this assessment if appropriate.

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 Neosho mucket and rabbitsfoot 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 Neosho mucket and rabbitsfoot 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 Alabama, Arkansas, Illinois, Indiana, Kansas, Kentucky, Missouri, Mississippi, Oklahoma, Ohio, Pennsylvania, and Tennessee. The designation of critical habitat in areas currently occupied by the Neosho mucket and rabbitsfoot may impose nominal additional regulatory restrictions to those currently in place and, therefore, may have minor 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 or 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 or biological features essential to the conservation of the Neosho mucket and rabbitsfoot 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.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), need not be prepared in connection with listing a species as endangered or threatened under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

It is also 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 NEPA in connection with designating critical habitat under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). 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)). However, when the range of the species includes States within the Tenth Circuit, such as that of

the Neosho mucket (Oklahoma) and rabbitsfoot (Oklahoma and Kansas), under the Tenth Circuit ruling in *Catron County Board of Commissioners* v. *U.S. Fish and Wildlife Service,* 75 F.3d 1429 (10th Cir. 1996), we will undertake a NEPA analysis for critical habitat designation. Accordingly, we will notify the public of the availability of the draft environmental assessment for this proposal when it is finished.

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.

We have determined that there are tribal lands occupied at this time that contain the physical and biological features essential for the conservation of Neosho mucket and rabbitsfoot (1 of 8 Neosho mucket critical habitat units and 2 of 35 rabbitsfoot critical habitat units). However, these lands do not represent riparian land ownership by any Tribe, represent only tribal jurisdictional areas, are not manged by any Tribe, and are on otherwise privately owned lands. We contacted each Tribe in writing and considered their comments during preparation of this proposed rule. Their comments were limited to providing tribal land and jurisdictional area maps and biological data for the two mussels. At this time, we do not anticipate excluding any lands under tribal jurisdiction.

References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* at Docket No. FWS–R4–ES–2012–0031 and upon request from the Arkansas Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this package are staff of the Arkansas Ecological Services Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.11(h) add entries for ''Mucket, Neosho'' and ''Rabbitsfoot'' in alphabetical order under ''Clams'' to the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
CLAMS							
*	*	*	*	*	*		*
Mucket, Neosho	*Lampsilis rafinesqueana.*	U.S.A. (AR, KS, MO, OK).	NA	E		17.95(f)	NA
*	*	*	*	*	*		*
Rabbitsfoot	*Quadrula cylindrica cylindrica.*	U.S.A. (AL, AR, GA, IL, IN, KS, KY, LA, MS, MO, OH, OK, PA, TN, WV).	NA	T		17.95(f)	NA
*	*	*	*	*	*		*

3. In § 17.95, amend paragraph (f) by adding entries for ''Neosho Mucket *(Lampsilis rafinesqueana)''* and ''Rabbitsfoot *(Quadrula cylindrica cylindrica)''* after the entry for ''Georgia Pigtoe *(Pleurobema hanleyianum)''* to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(f) *Clams and Snails.*

* * * * *

Neosho Mucket (Lampsilis rafinesqueana)

(1) Critical habitat units for the Neosho mucket are depicted on the maps below in:

(i) Arkansas: Benton and Washington Counties.

(ii) Kansas: Allen, Chase, Cherokee, Coffey, Elk, Greenwood, Labette, Montgomery, Neosho, Wilson, and Woodson Counties.

(iii) Missouri: Jasper, Lawrence, McDonald, and Newton Counties.

(iv) Oklahoma: Adair, Cherokee, and Delaware Counties.

(2) Within these areas, the primary constituent elements of the physical and biological features essential to the conservation of the Neosho mucket consist of five components:

(i) Geomorphically stable river channels and banks (channels that maintain lateral dimensions, longitudinal profiles, and sinuosity patterns over time without an aggrading or degrading bed elevation) with habitats that support a diversity of freshwater mussel and native fish (such as stable riffles, sometimes with runs, and midchannel island habitats that provide flow refuges consisting of gravel and sand substrates with low to moderate amounts of fine sediment and attached filamentous algae).

(ii) A hydrologic flow regime (the severity, frequency, duration, and seasonality of discharge over time) necessary to maintain benthic habitats where the species are found and to maintain connectivity of rivers with the floodplain, allowing the exchange of nutrients and sediment for maintenance of the mussel's and fish host's habitat, food availability, spawning habitat for native fishes, and the ability for newly transformed juveniles to settle and become established in their habitats.

(iii) Water and sediment quality (including, but not limited to, conductivity, hardness, turbidity, temperature, pH, ammonia, heavy metals, and chemical constituents) necessary to sustain natural physiological processes for normal behavior, growth, and viability of all life stages.

(iv) The presence and abundance (currently unknown) of fish hosts necessary for recruitment of the Neosho mucket. The occurrence of natural fish assemblages, reflected by fish species richness, relative abundance, and community composition, for each inhabited river or creek will serve as an indication of appropriate presence and abundance of fish hosts until appropriate host fish can be identified.

(v) Either no competitive or predaceous invasive (nonnative) species, or such species in quantities low enough to have minimal effect on survival of freshwater mussels.

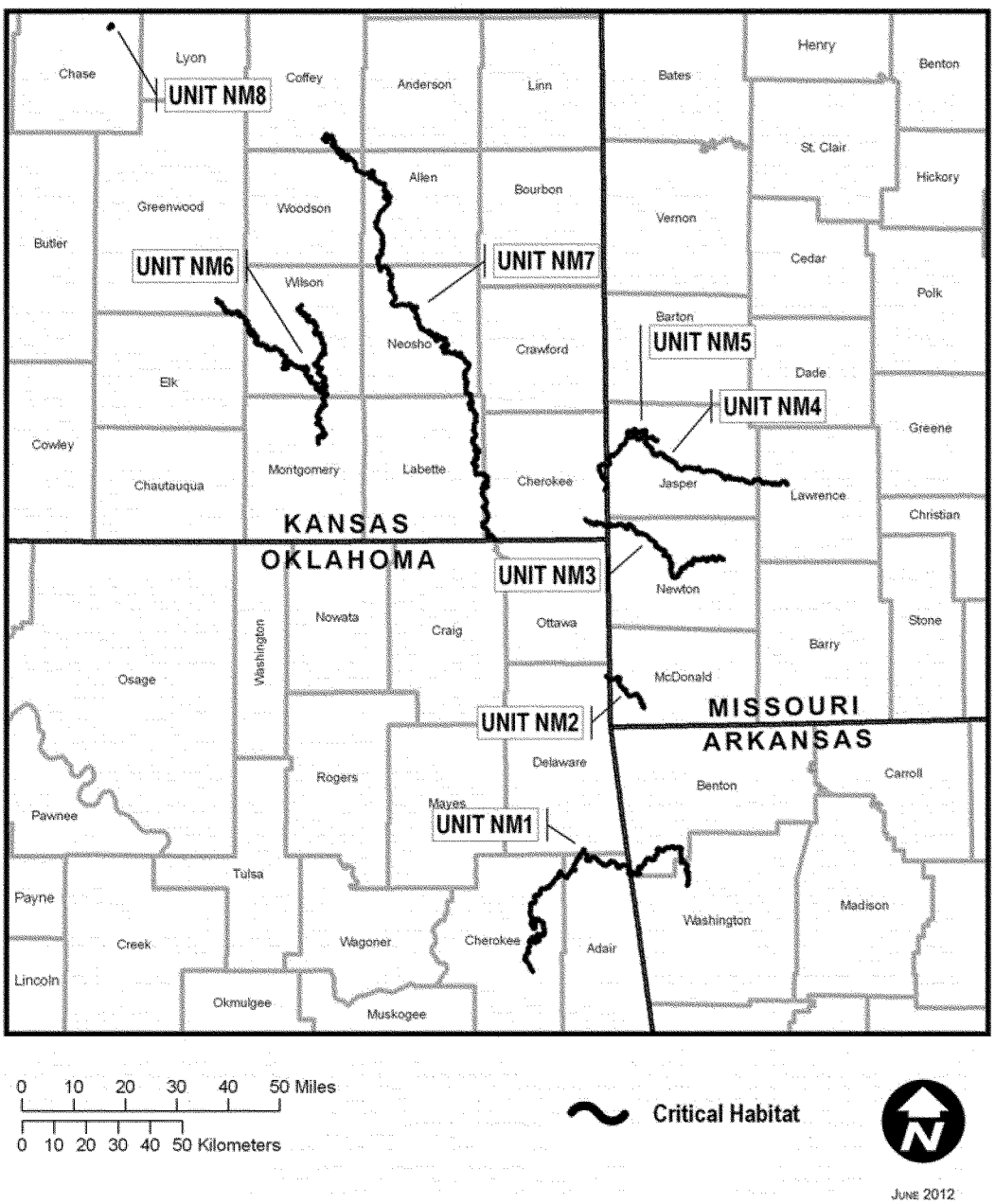
(3) Critical habitat does not include manmade structures (such as buildings, bridges, aqueducts, airports, roads, and other paved areas) and the land on which they are located exists within the legal boundaries on the effective date of this rule.

(4) *Critical habitat map units.* Unit maps were developed using ESRI ArcGIS mapping software along with various spatial data layers. Critical habitat unit upstream and downstream limits were delineated at the nearest road crossing or stream confluence of each occupied reach. Data layers defining map units were created with USGS National Hydrography Dataset (NHD) Medium Flowline data. ArcGIS was also used to calculate river kilometers and miles from the NHD dataset, and it was used to determine longitude and latitude coordinates in decimal degrees. The projection used in mapping and calculating distances and locations within the units was North American Albers Equal Area Conic, NAD 83.

(5) **Note:** Index map of critical habitat units for the Neosho mucket follows:

BILLING CODE 4310–55–P

Index map of critical habitat units for Neosho mucket

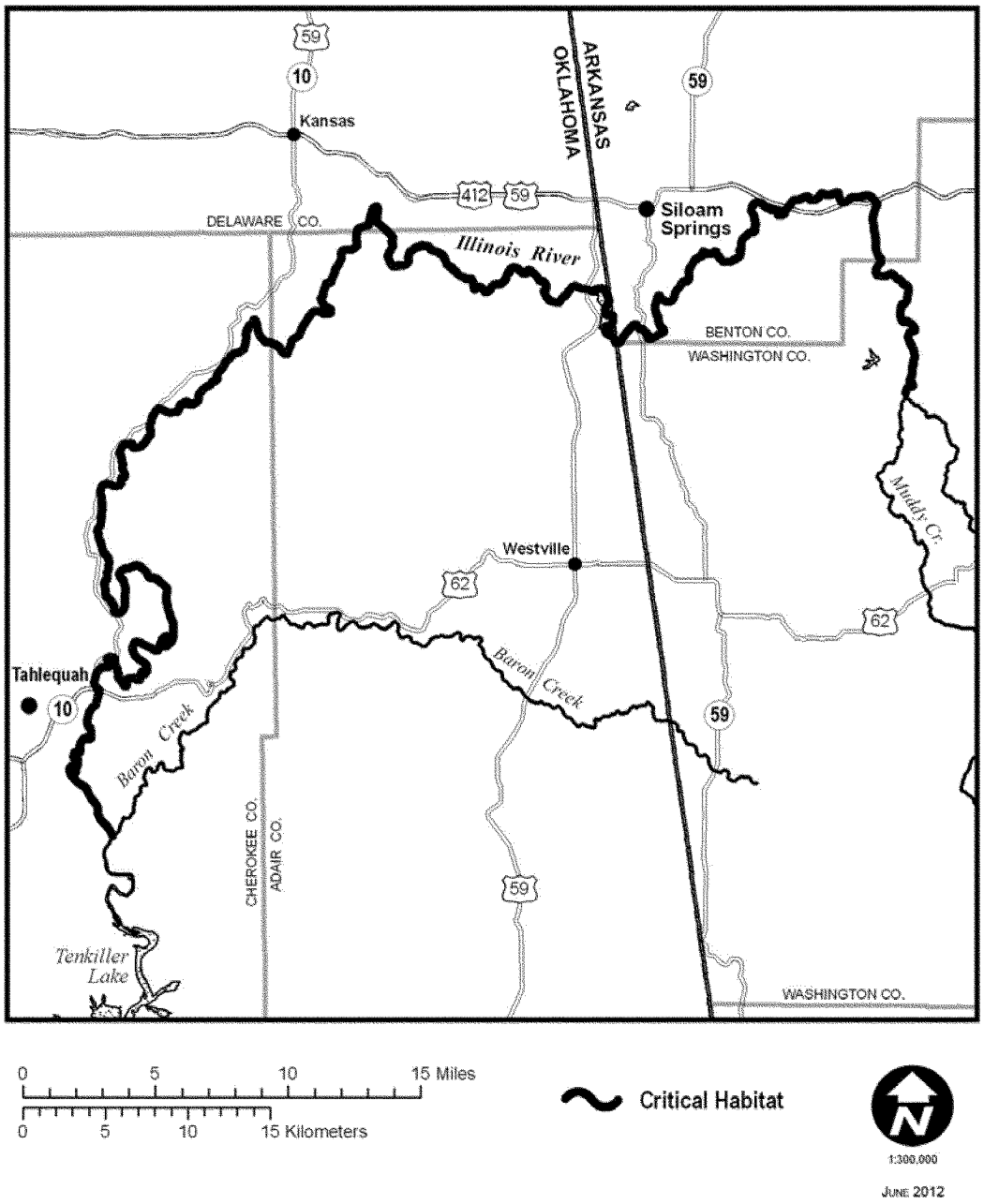


(6) Unit NM1: Illinois River—Benton and Washington Counties, Arkansas; and Adair, Cherokee, and Delaware Counties, Oklahoma.

(i) Unit NM1 includes 146.1 rkm (90.8 rmi) of the Illinois River from the Muddy Fork Illinois River confluence south of Savoy, Washington County, Arkansas, downstream to the Baron Creek confluence southeast of Tahlequah, Cherokee County, Oklahoma.

(ii) **Note:** Map of Unit NM1 (Illinois River) of critical habitat for Neosho mucket follows:

Map of Unit NM1 (Illinois River) of critical habitat for Neosho mucket

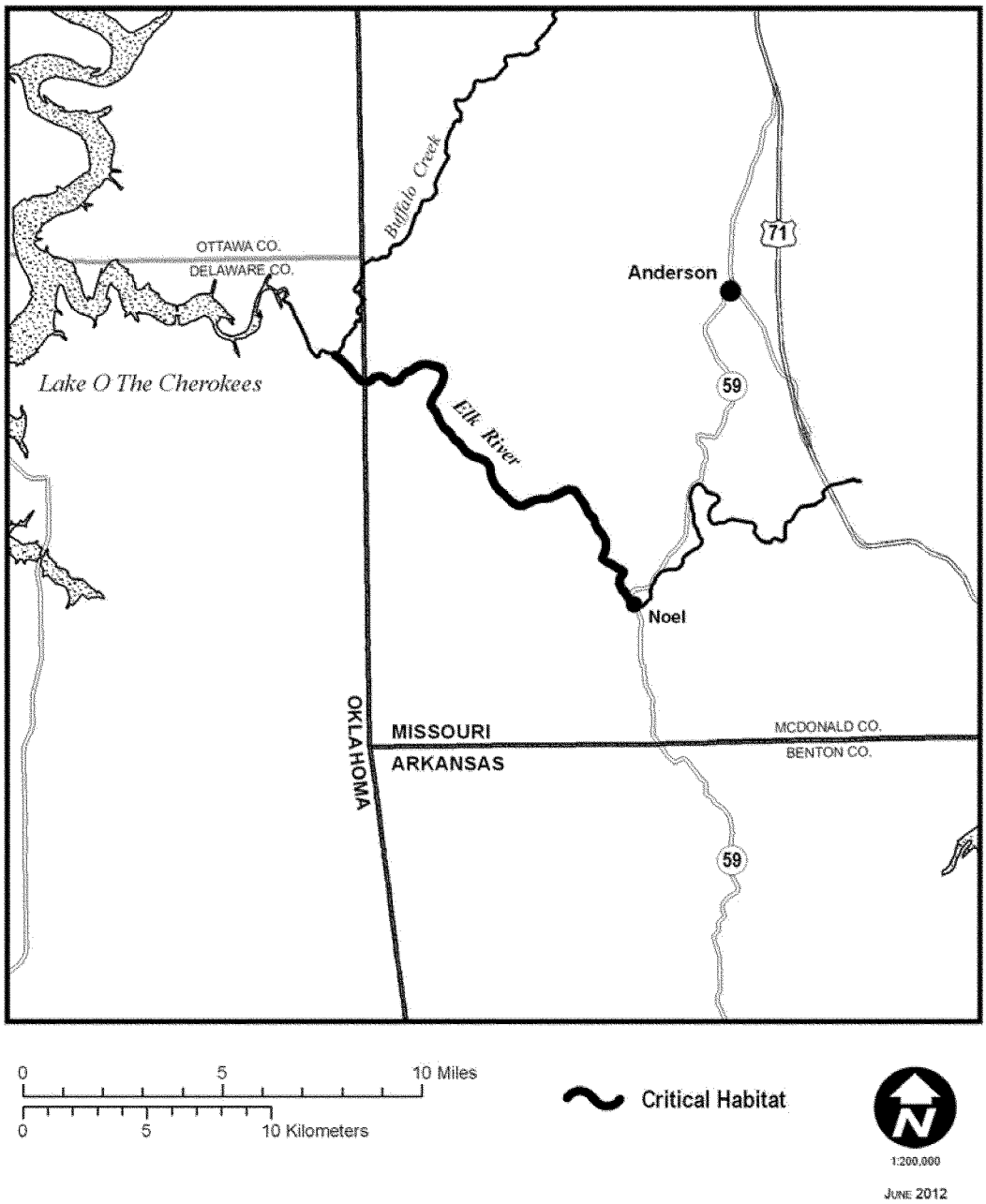


(7) Unit NM2: Elk River—McDonald County, Missouri; and Delaware County, Oklahoma.

(i) Unit NM2 includes 20.3 rkm (12.6 rmi) of the Elk River from Missouri Highway 59 at Noel, McDonald County, Missouri, downstream to the confluence of Buffalo Creek, Delaware County, Oklahoma.

(ii) **Note:** Map of Unit NM2 (Elk River) of critical habitat for Neosho mucket follows:

Map of Unit NM2 (Elk River) of critical habitat for Neosho mucket

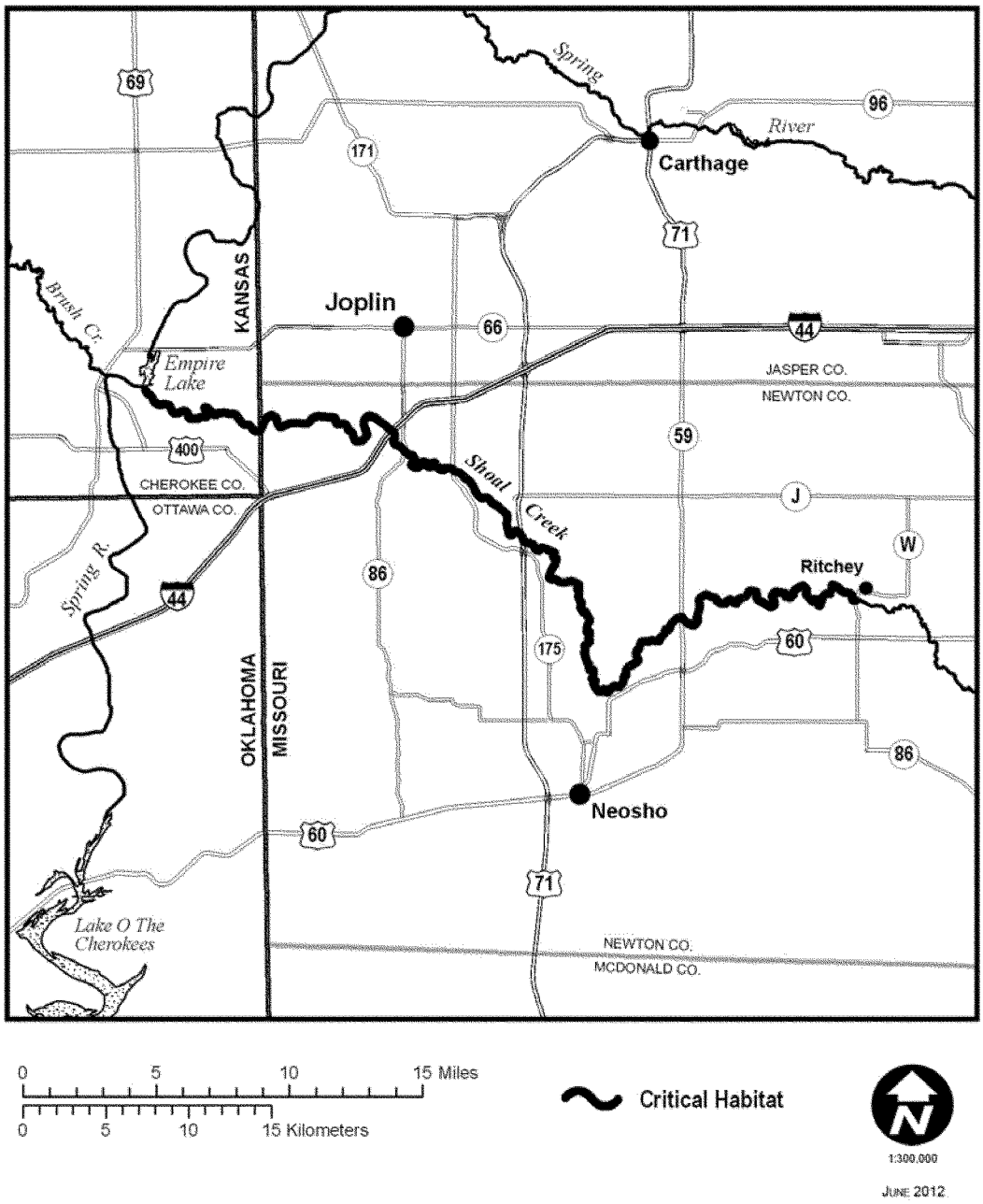


(8) Unit NM3: Shoal Creek—Cherokee County, Kansas; and Newton County, Missouri.

(i) Unit NM3 includes 75.8 rkm (47.1 rmi) of Shoal Creek from Missouri Highway W near Ritchey, Newton County, Missouri, downstream to the upstream point of inundation by Empire Lake, Cherokee County, Kansas.

(ii) **Note:** Map of Unit NM3 (Shoal Creek) of critical habitat for Neosho mucket follows:

Map of Unit NM3 (Shoal Creek) of critical habitat for Neosho mucket

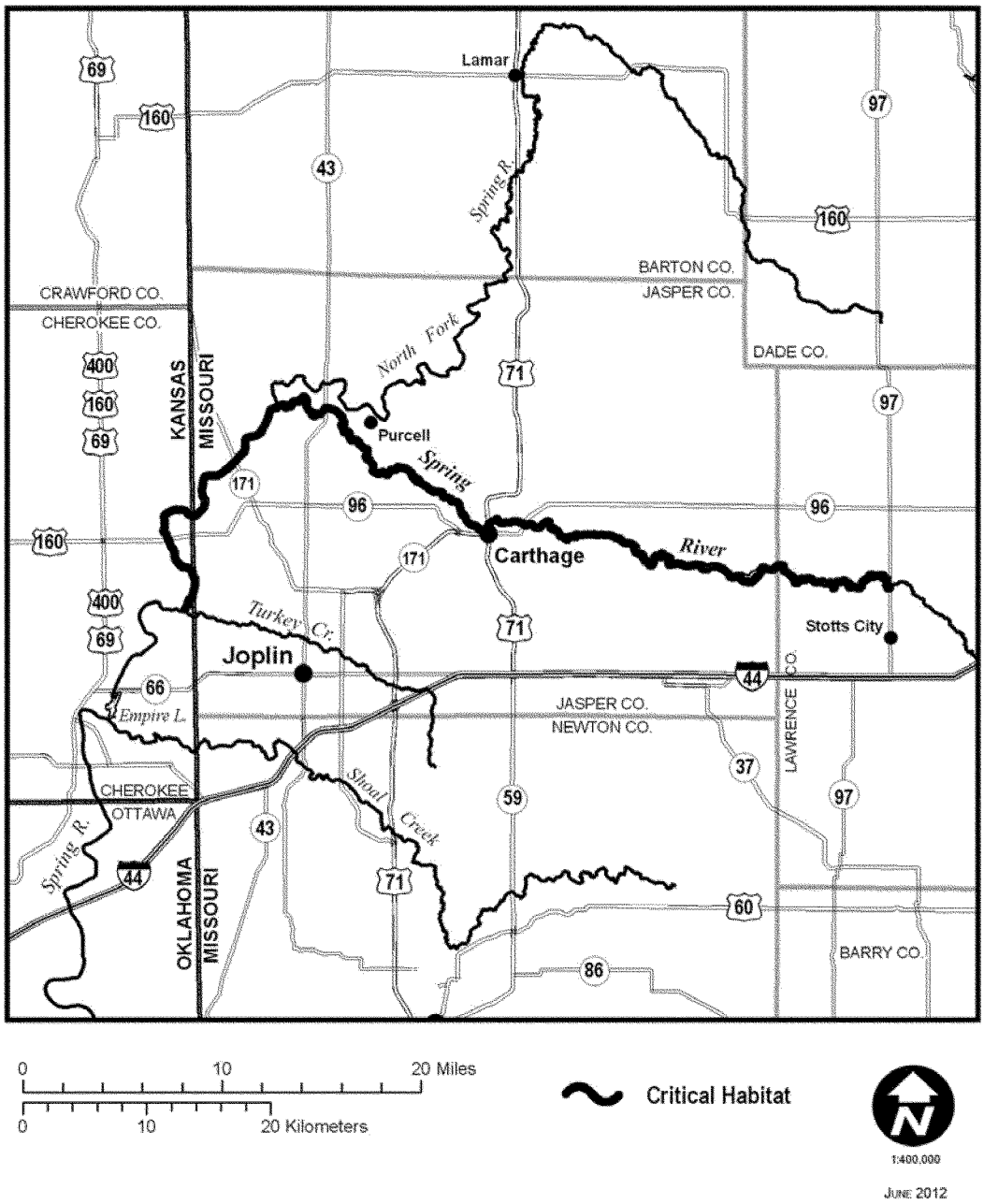


(9) Unit NM4: Spring River—Jasper and Lawrence Counties, Missouri; and Cherokee County, Kansas.

(i) Unit NM4 includes 102.3 rkm (63.6 rmi) of the Spring River from Missouri Highway 97 north of Stotts City, Lawrence County, Missouri, downstream to the confluence of Turkey Creek north of Empire, Cherokee County, Kansas.

(ii) **Note:** Map of Unit NM4 (Spring River) of critical habitat for Neosho mucket follows:

Map of Unit NM4 (Spring River) of critical habitat for Neosho mucket

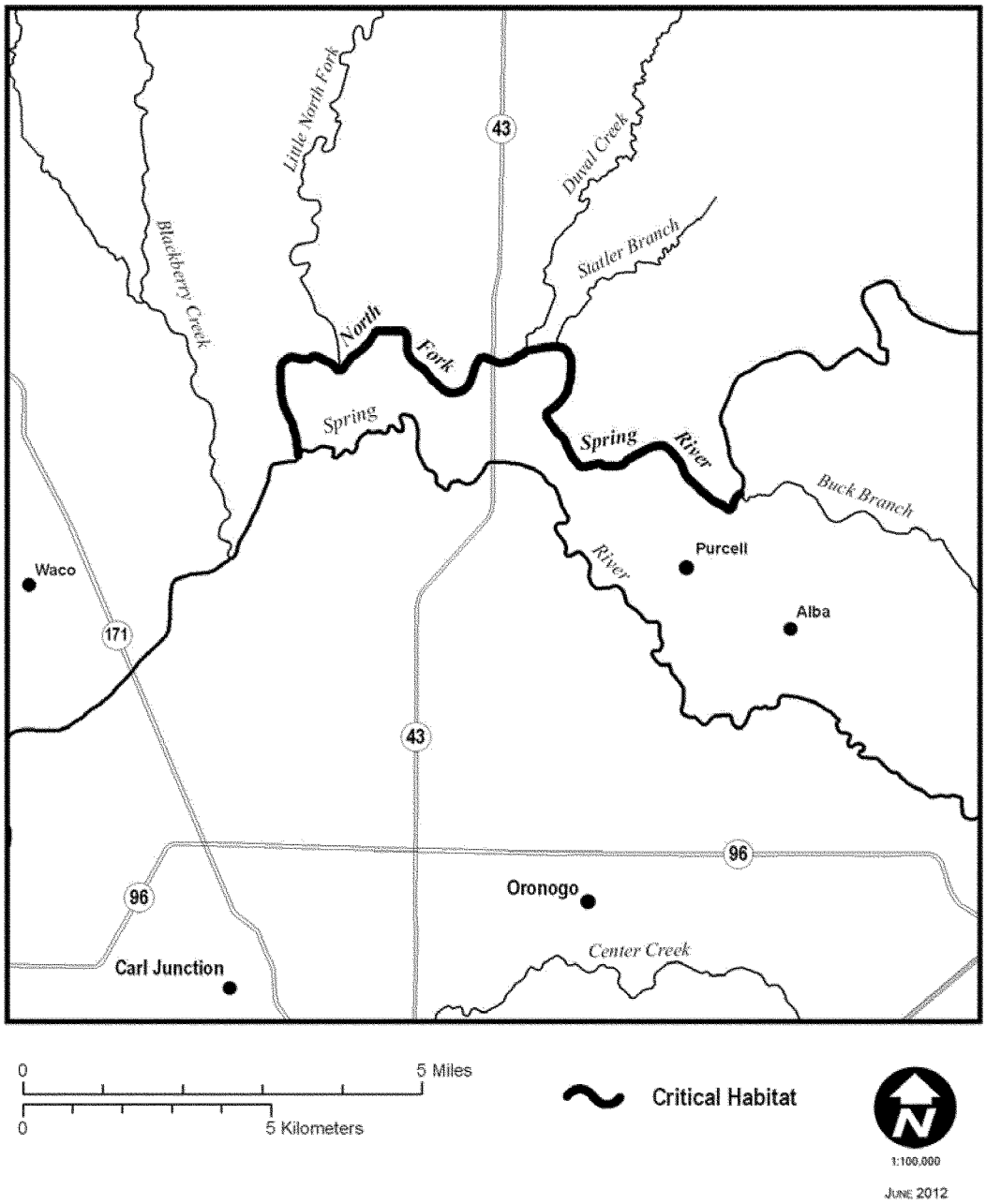


(10) Unit NM5: North Fork Spring River—Jasper County, Missouri.

(i) Unit NM5 includes 16.4 rkm (10.2 rmi) of the North Fork Spring River from the confluence of Buck Branch southwest of Jasper, Missouri, downstream to its confluence with the Spring River near Purcell, Jasper County, Missouri.

(ii) **Note:** Map of Unit NM5 (North Fork Spring River) of critical habitat for Neosho mucket follows:

Map of Unit NM5 (North Fork Spring River) of critical habitat for Neosho mucket

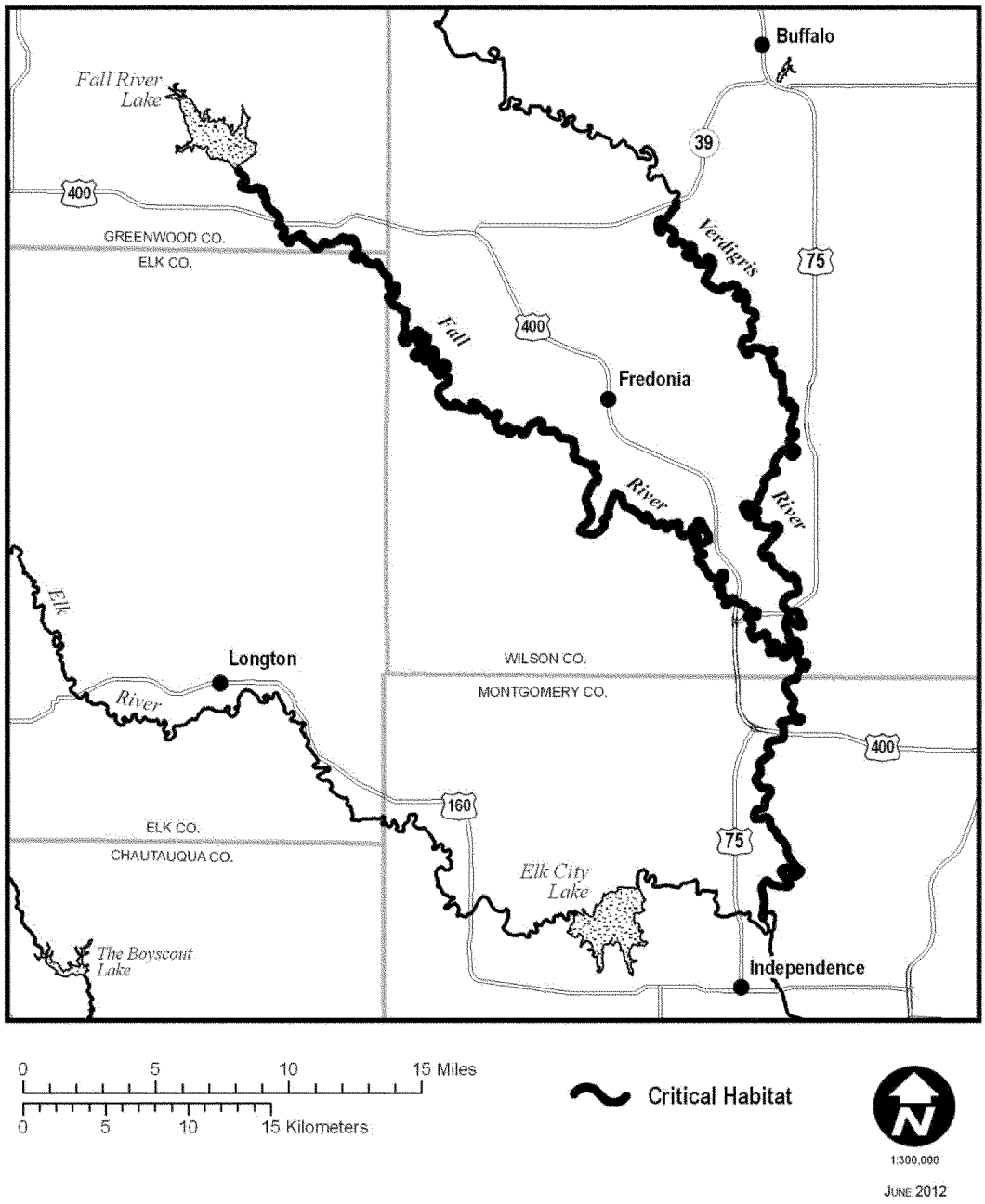


(11) Unit NM6: Fall River—Elk, Greenwood, and Wilson Counties, Kansas; Verdigris River—Montgomery and Wilson Counties, Kansas.

(i) Unit NM6 includes a total of 171.1 rkm (106.3 rmi) including 90.4 rkm (56.2 rmi) of the Fall River from Fall River Lake dam northwest of Fall River, Greenwood County, Kansas, downstream to its confluence with the Verdigris River near Neodesha, Wilson County, Kansas. Unit NM6 also includes 80.6 rkm (50.1 rmi) of the Verdigris River from Kansas Highway 39 near Benedict, Wilson County, Kansas, downstream to the Elk River confluence near Independence, Montgomery County, Kansas.

(ii) **Note:** Map of Unit NM6 (Fall and Verdigris Rivers) of critical habitat for Neosho mucket follows:

Map of Unit NM6 (Fall & Verdigris Rivers) of critical habitat for Neosho mucket

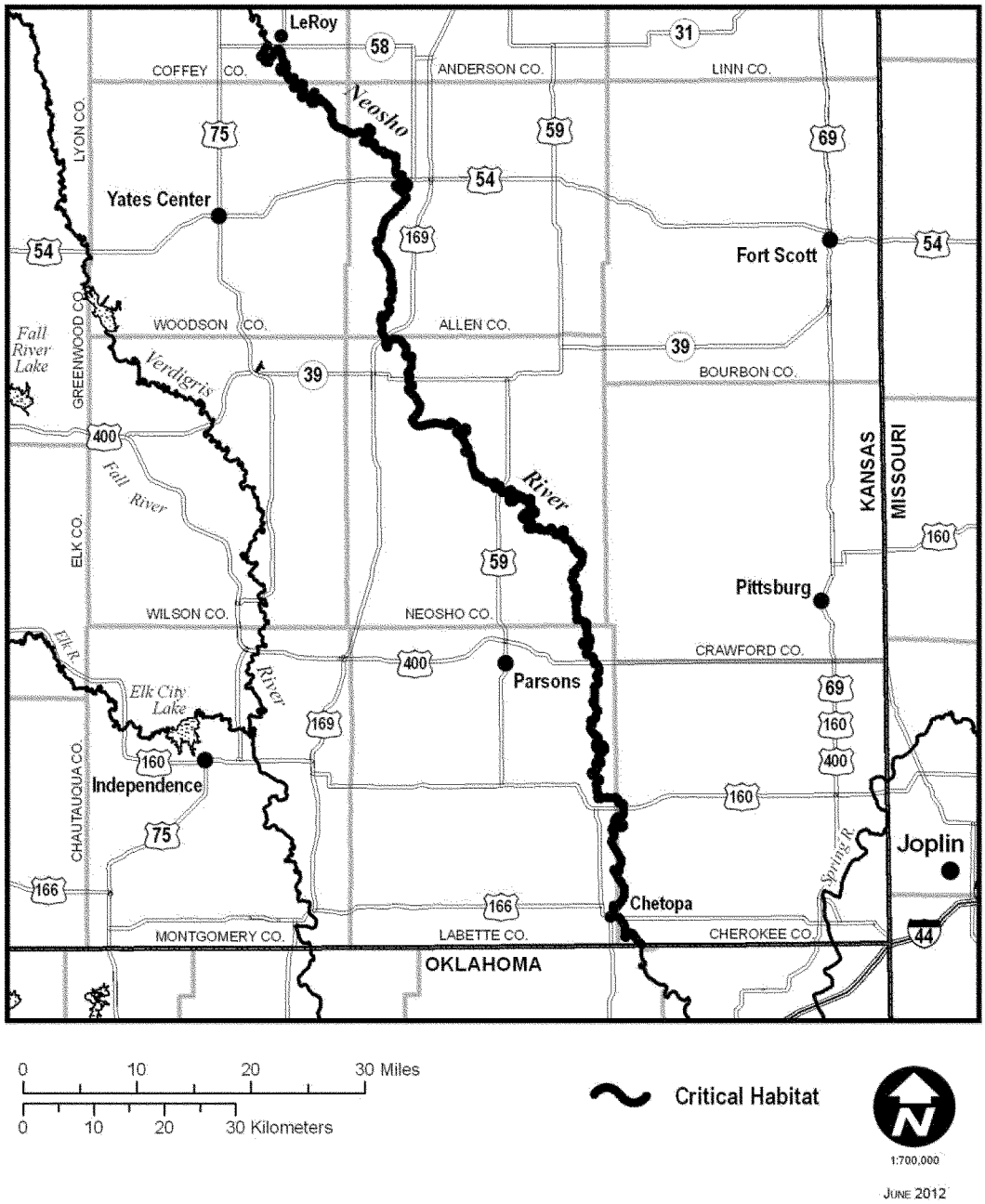


(12) Unit NM7: Neosho River—Allen, Cherokee, Coffey, Labette, Neosho, and Woodson Counties, Kansas.

(i) Unit NM7 includes 244.5 rkm (151.9 rmi) of the Neosho River from Kansas Highway 58 west of LeRoy, Coffey County, Kansas, downstream to the Kansas and Oklahoma State line, Cherokee County, Kansas.

(ii) **Note:** Map of Unit NM7 (Neosho River) of critical habitat for Neosho mucket follows:

Map of Unit NM7 (Neosho River) of critical habitat for Neosho mucket

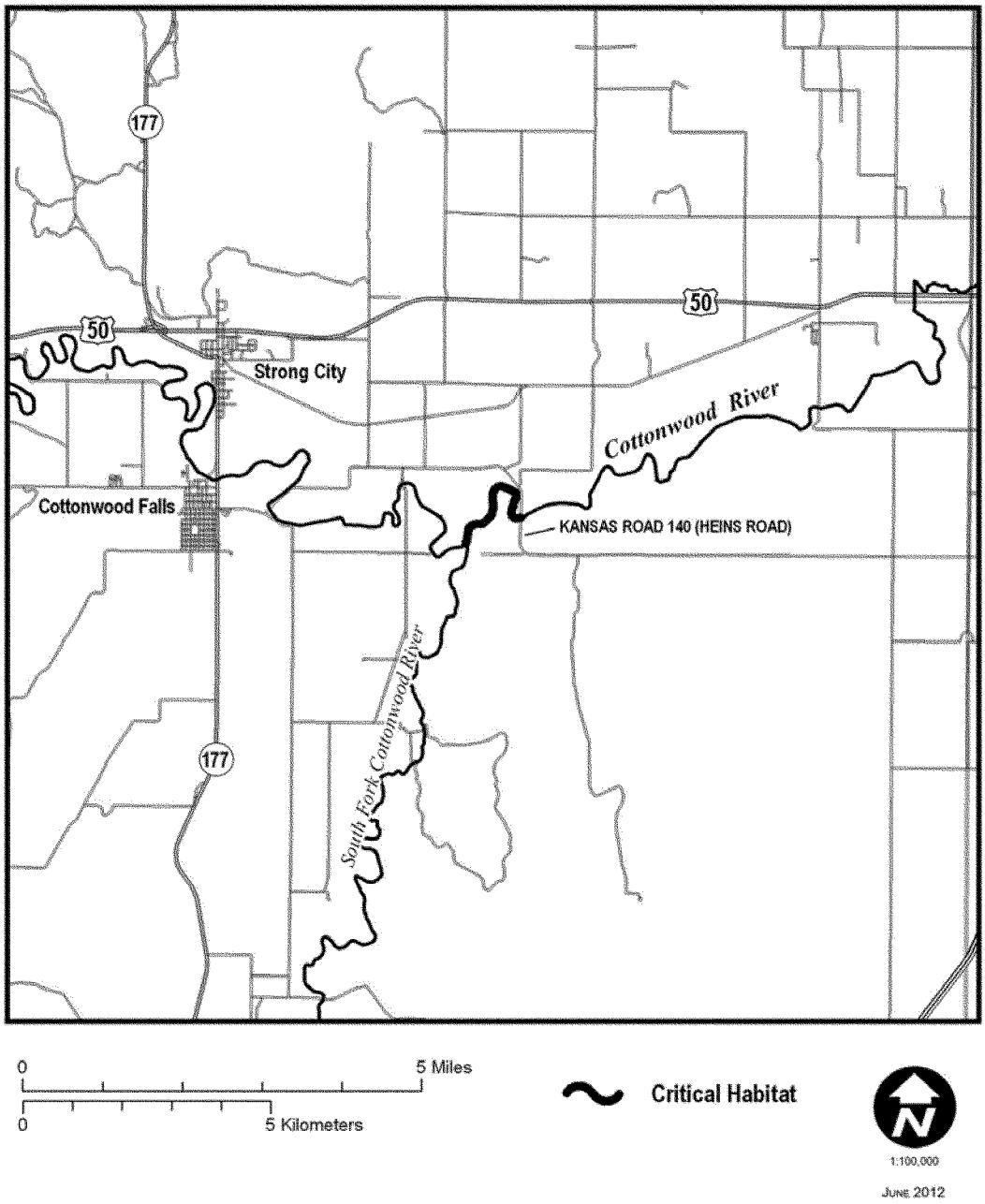


(13) Unit NM8: Cottonwood River—Chase County, Kansas.

(i) Unit NM8 includes 2.6 rkm (1.6 rmi) of the Cottonwood River from the South Fork Cottonwood River confluence downstream to the Kansas Road 140 (also known as Heins Road), east of Cottonwood Falls, Chase County, Kansas.

(ii) **Note:** Map of Unit NM8 (Cottonwood River) of critical habitat for Neosho mucket follows:

Map of Unit NM8 (Cottonwood River) of critical habitat for Neosho mucket



Rabbitsfoot *(Quadrula cylindrica cylindrica)*

(1) Critical habitat units are depicted for the rabbitsfoot in:

(i) Alabama: Colbert, Jackson, Madison, and Marshall Counties.

(ii) Arkansas: Arkansas, Ashley, Bradley, Clark, Cleveland, Dallas, Drew, Fulton, Grant, Hot Spring, Independence, Izard, Jackson, Lawrence, Little River, Marion, Monroe, Montgomery, Newton, Ouachita, Randolph, Saline, Searcy, Sevier, Sharp, Van Buren, White, and Woodruff Counties.

(iii) Kansas: Allen and Cherokee Counties.

(iv) Kentucky: Ballard, Green, Hart, Livingston, Logan, Marshall, and McCracken Counties.

(v) Illinois: Massac, Pulaski, and Vermilion Counties.

(vi) Indiana: Carroll, Pulaski, Tippecanoe, and White Counties.

(vii) Mississippi: Hinds, Sunflower, Toshimingo, and Warren Counties.

(viii) Missouri: Jasper, Madison, and Wayne Counties.

(ix) Ohio: Coshocton, Madison, Union, and Williams Counties.

(x) Oklahoma: McCurtain and Rogers Counties.

(xi) Pennsylvania: Crawford, Erie, Mercer, and Venango Counties.

(xii) Tennessee: Hardin, Hickman, Marshall, Maury, and Robertson Counties.

(2) Within these areas, the primary constituent elements of the physical and biological features essential to the conservation of the rabbitsfoot consist of five components:

(i) Geomorphically stable river channels and banks (channels that maintain lateral dimensions, longitudinal profiles, and sinuosity

patterns over time without an aggrading or degrading bed elevation) with habitats that support a diversity of freshwater mussel and native fish (such as stable riffles, sometimes with runs, and midchannel island habitats that provide flow refuges consisting of gravel and sand substrates with low to moderate amounts of fine sediment and attached filamentous algae).

(ii) A hydrologic flow regime (the severity, frequency, duration, and seasonality of discharge over time) necessary to maintain benthic habitats where the species are found and to maintain connectivity of rivers with the floodplain, allowing the exchange of nutrients and sediment for maintenance of the mussel's and fish host's habitat, food availability, spawning habitat for native fishes, and the ability for newly transformed juveniles to settle and become established in their habitats.

(iii) Water and sediment quality (including, but not limited to, conductivity, hardness, turbidity, temperature, pH, ammonia, heavy metals, and chemical constituents) necessary to sustain natural physiological processes for normal behavior, growth, and viability of all life stages.

(iv) The presence and abundance (currently unknown) of fish hosts necessary for recruitment of the rabbitsfoot. The occurrence of natural fish assemblages, reflected by fish species richness, relative abundance, and community composition, for each inhabited river or creek will serve as an indication of appropriate presence and abundance of fish hosts until appropriate host fish can be identified.

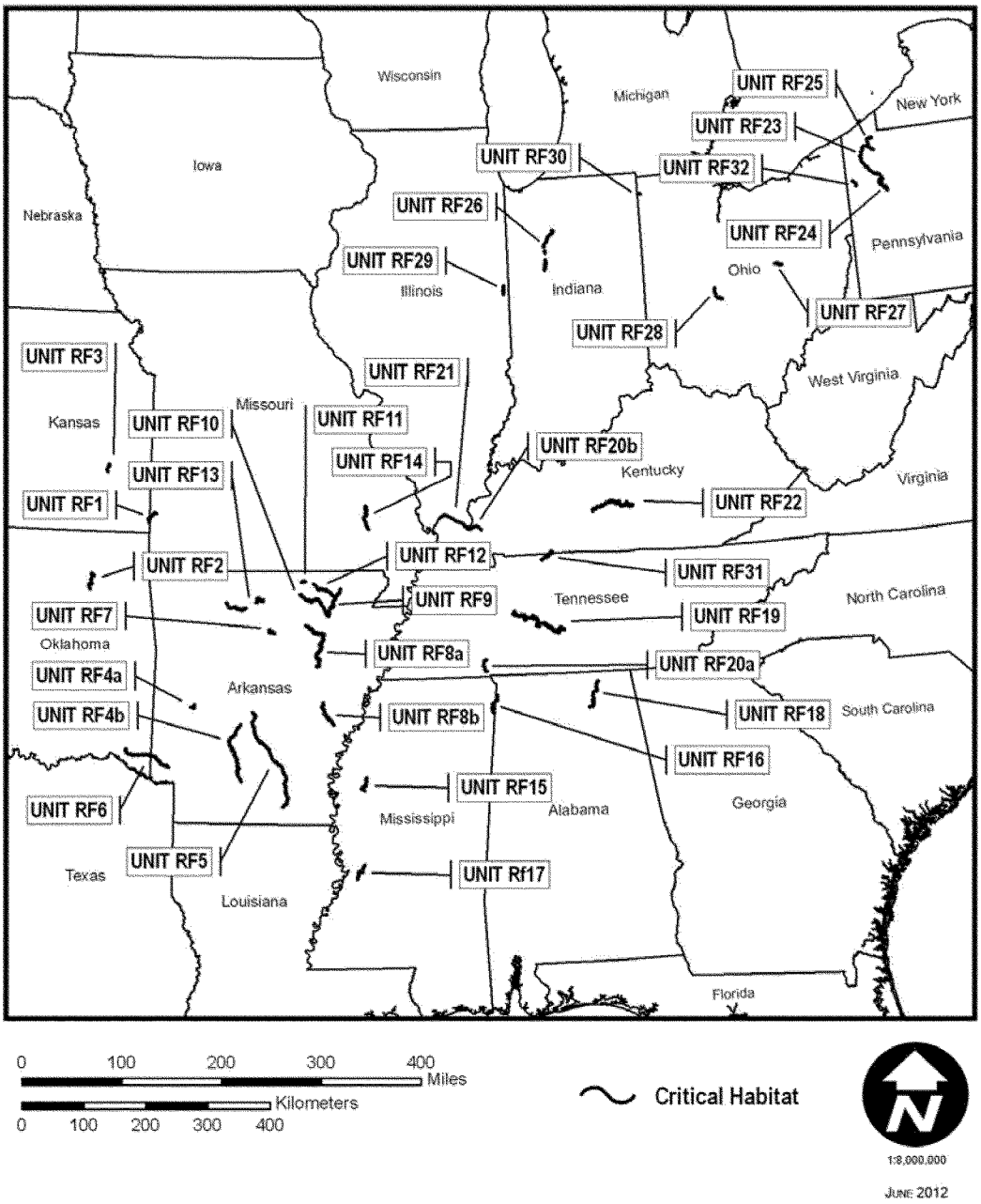
(v) Either no competitive or predaceous invasive (nonnative) species, or such species in quantities low enough to have minimal effect on survival of freshwater mussels.

(3) Critical habitat does not include manmade structures (such as buildings, bridges, aqueducts, airports, roads, and other paved areas) and the land on which they are located exists within the legal boundaries on the effective date of this rule.

(4) *Critical habitat map units.* Unit maps were developed using ESRI ArcGIS mapping software along with various spatial data layers. Critical habitat unit upstream and downstream limits were delineated at the nearest road crossing or stream confluence of each occupied reach. Data layers defining map units were created with USGS National Hydrography Dataset (NHD) Medium Flowline data. ArcGIS was also used to calculate river kilometers and miles from the NHD dataset, and it was used to determine longitude and latitude coordinates in decimal degrees. The projection used in mapping and calculating distances and locations within the units was North American Albers Equal Area Conic, NAD 83.

(5) **Note:** Index map of critical habitat units for the rabbitsfoot follows:

Index map of critical habitat units for Rabbitsfoot

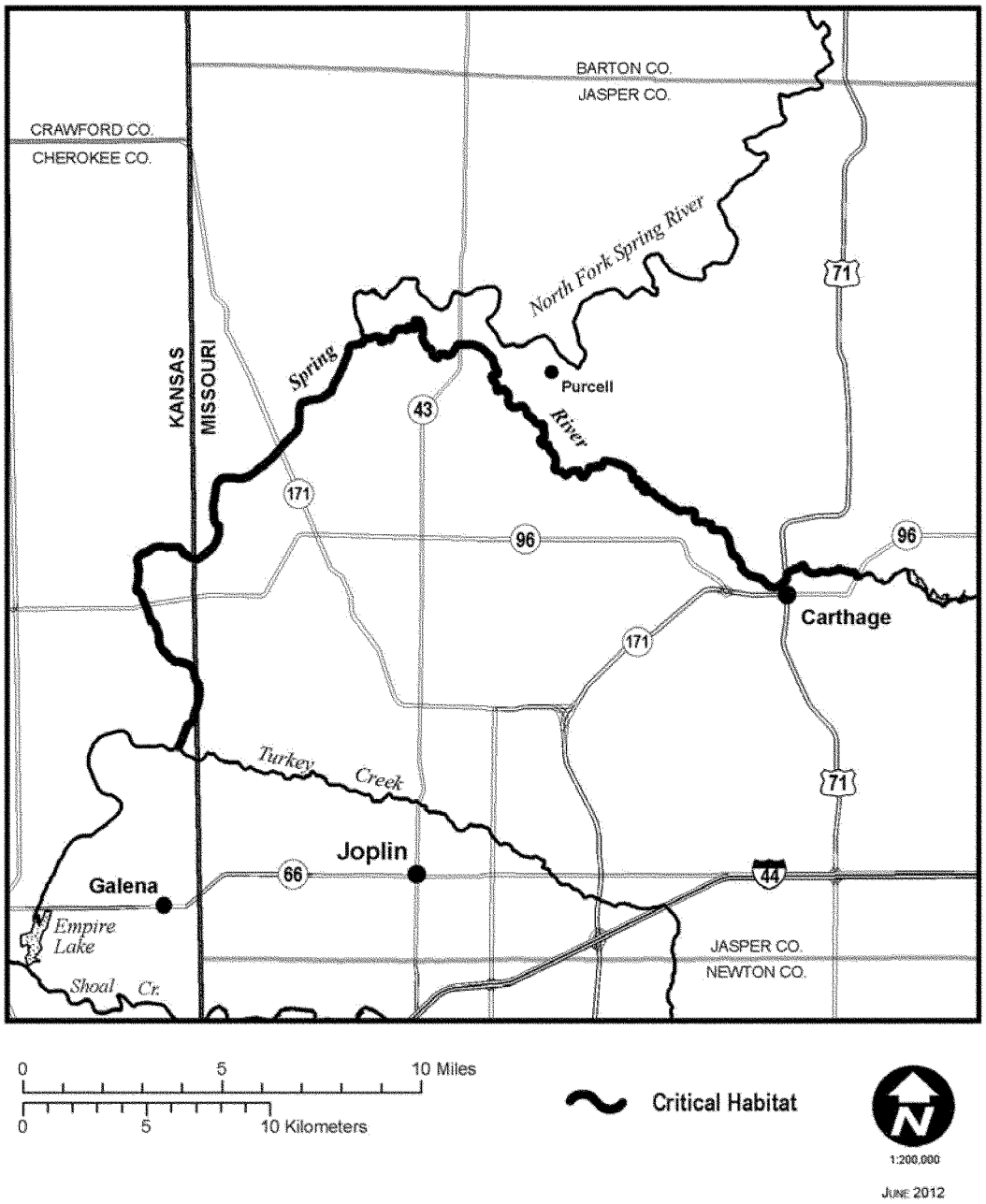


(6) Unit RF1: Spring River—Jasper County, Missouri; and Cherokee County, Kansas.

(i) Unit RF1 includes 56.5 rkm (35.1 rmi) of the Spring River from Missouri Highway 96 at Carthage, Jasper County, Missouri, downstream to the confluence of Turkey Creek north of Empire, Cherokee County, Kansas.

(ii) **Note:** Map of Unit RF1 (Spring River) of critical habitat for rabbitsfoot follows:

Map of Unit RF1 (Spring River) of critical habitat for Rabbitsfoot

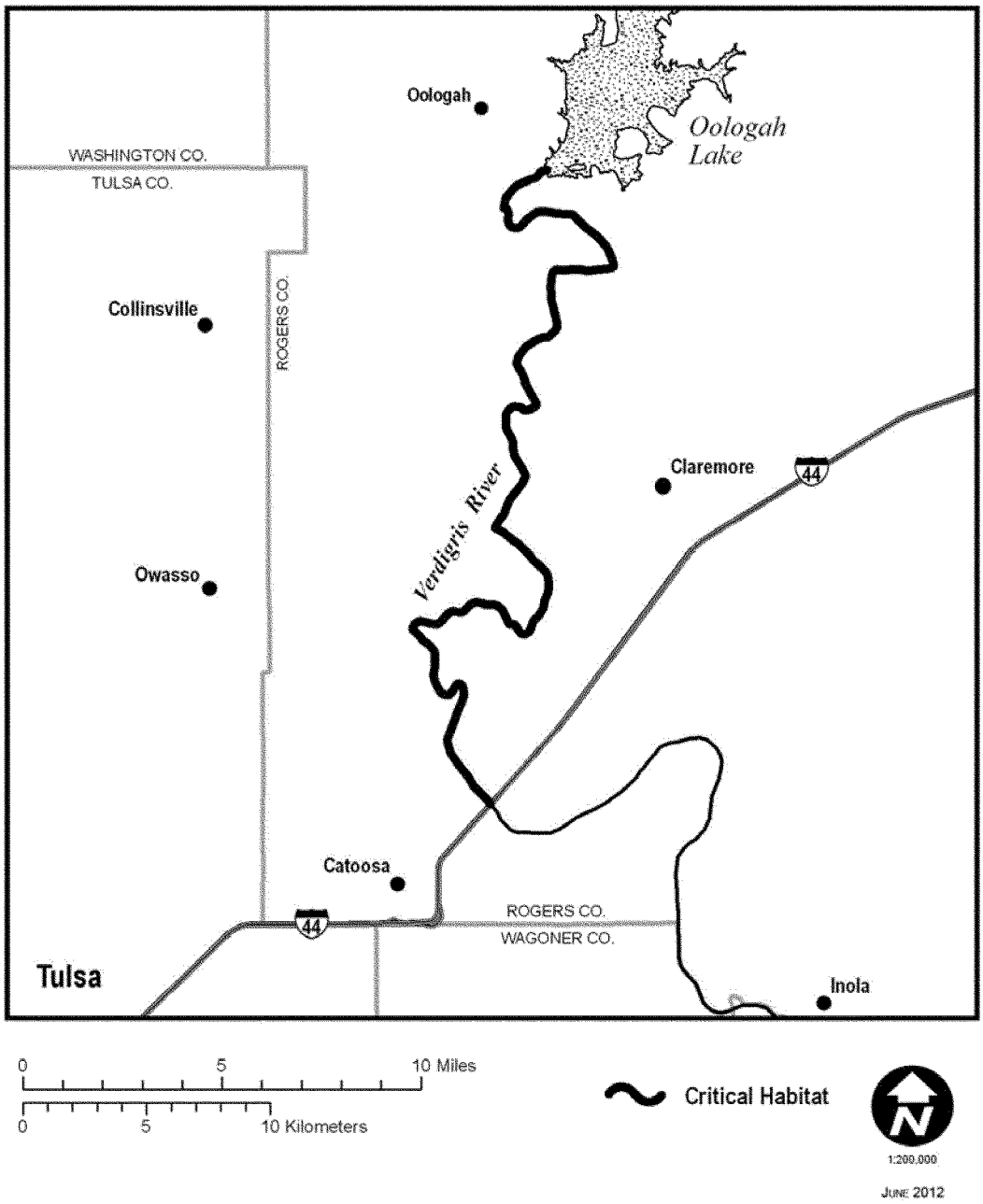


(7) Unit RF2: Verdigris River—Rogers County, Oklahoma.

(i) Unit RF2 includes 45.5 rkm (28.3 rmi) of the Verdigris River from Oologah Lake dam north of Claremore, Oklahoma, downstream to Interstate 44 (Will Rogers Turnpike) west of Catoosa, Rogers County, Oklahoma.

(ii) **Note:** Map of Unit RF2 (Verdigris River) of critical habitat for rabbitsfoot follows:

Map of Unit RF2 (Verdigris River) of critical habitat for Rabbitsfoot

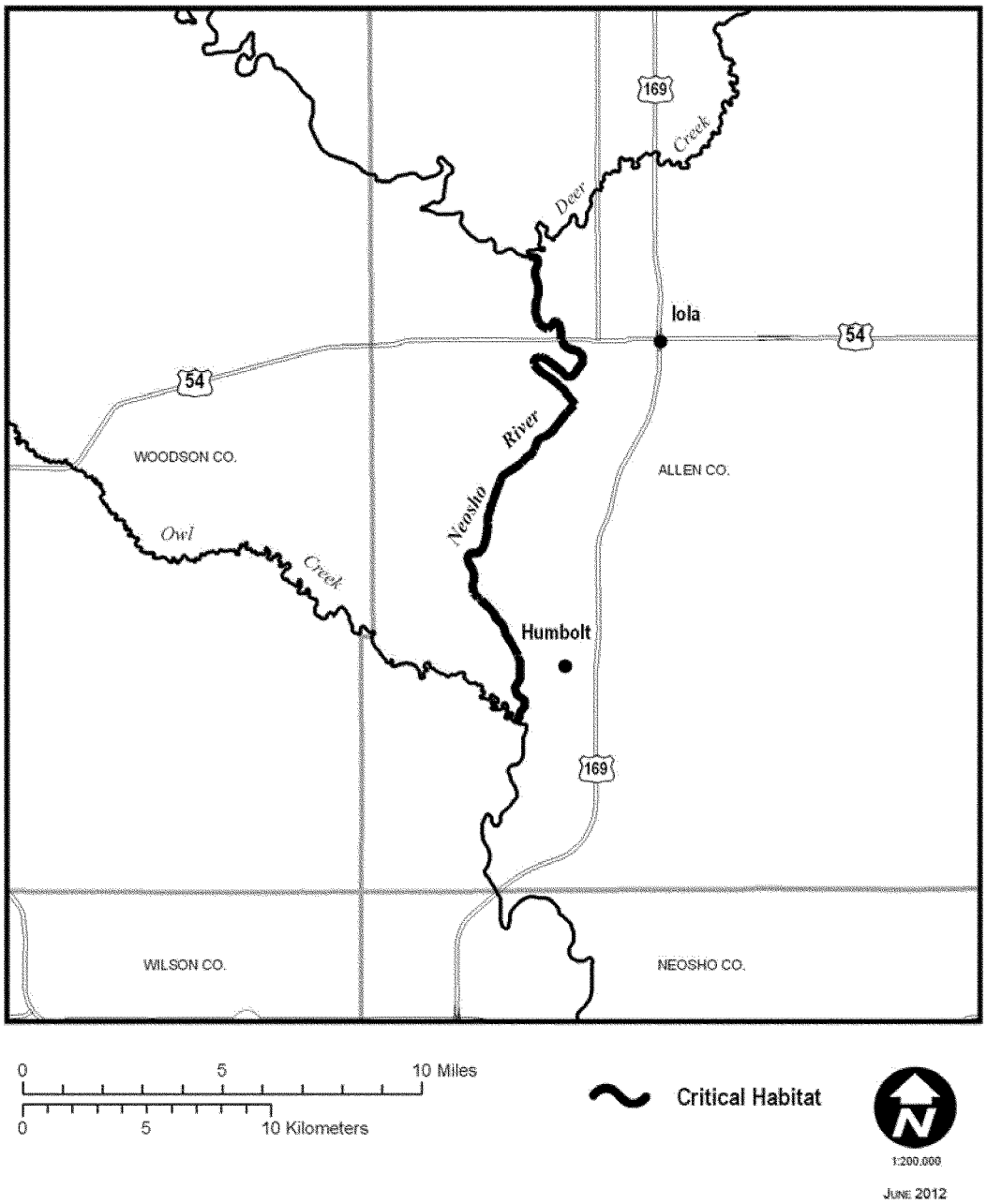


(8) Unit RF3: Neosho River—Allen County, Kansas.

(i) Unit RF3 includes 26.6 rkm (16.5 rmi) of the Neosho River from the Deer Creek confluence northwest of Iola, Kansas, downstream to the confluence of Owl Creek southwest of Humboldt, Allen County, Kansas.

(ii) **Note:** Map of Unit RF3 (Neosho River) of critical habitat for rabbitsfoot follows:

Map of Unit RF3 (Neosho River) of critical habitat for Rabbitsfoot

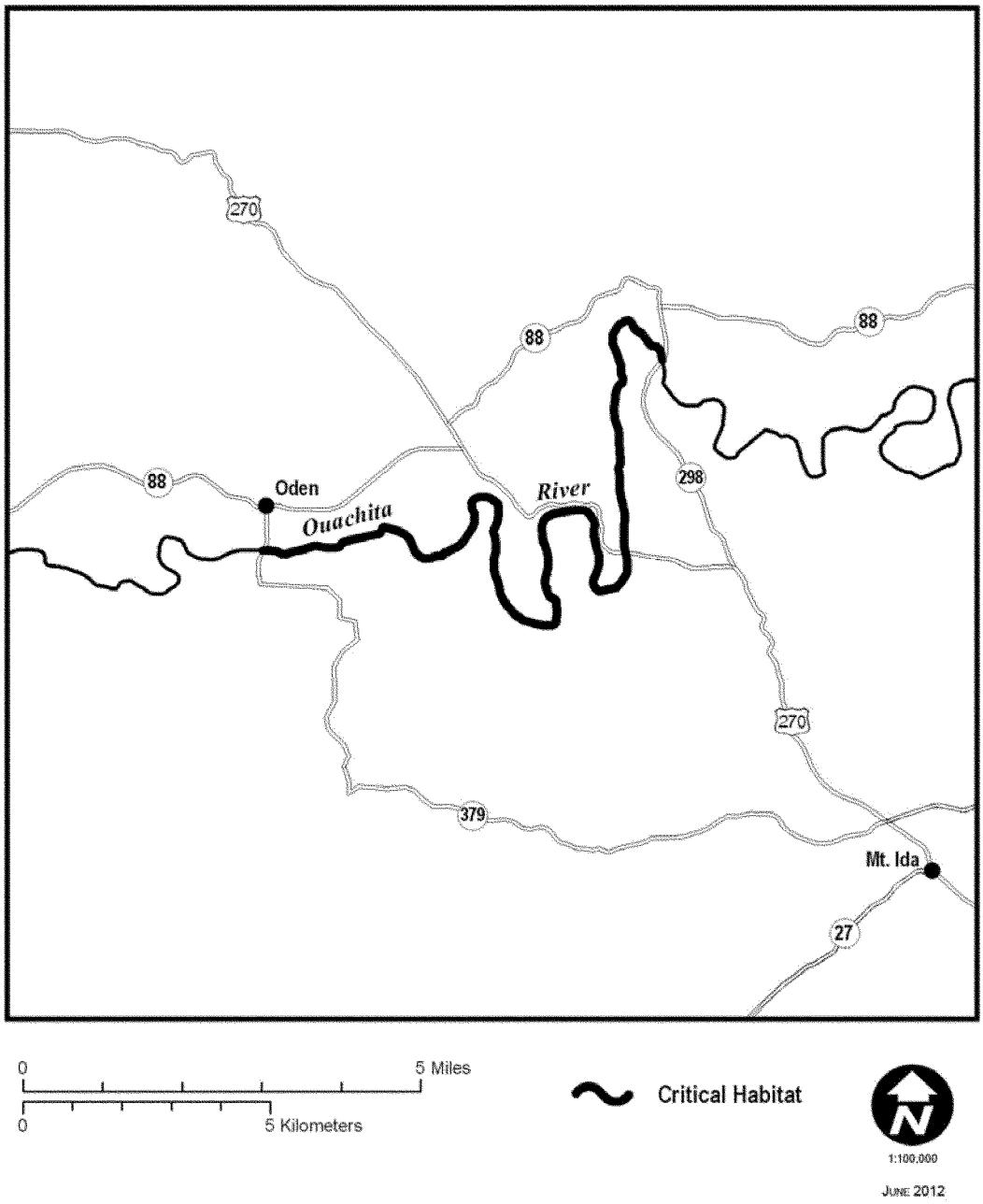


(9) Unit RF4a: Ouachita River—Montgomery County, Arkansas.

(i) Unit RF4a includes 21.9 rkm (13.6 rmi) of the Ouachita River from Arkansas Highway 379 south of Oden, Montgomery County, Arkansas, downstream to Arkansas Highway 298 east of Pencil Bluff, Montgomery County, Arkansas.

(ii) **Note:** Map of Unit RF4a (Ouachita River) of critical habitat for rabbitsfoot follows:

Map of Unit RF4a (Ouachita River) of critical habitat for Rabbitsfoot

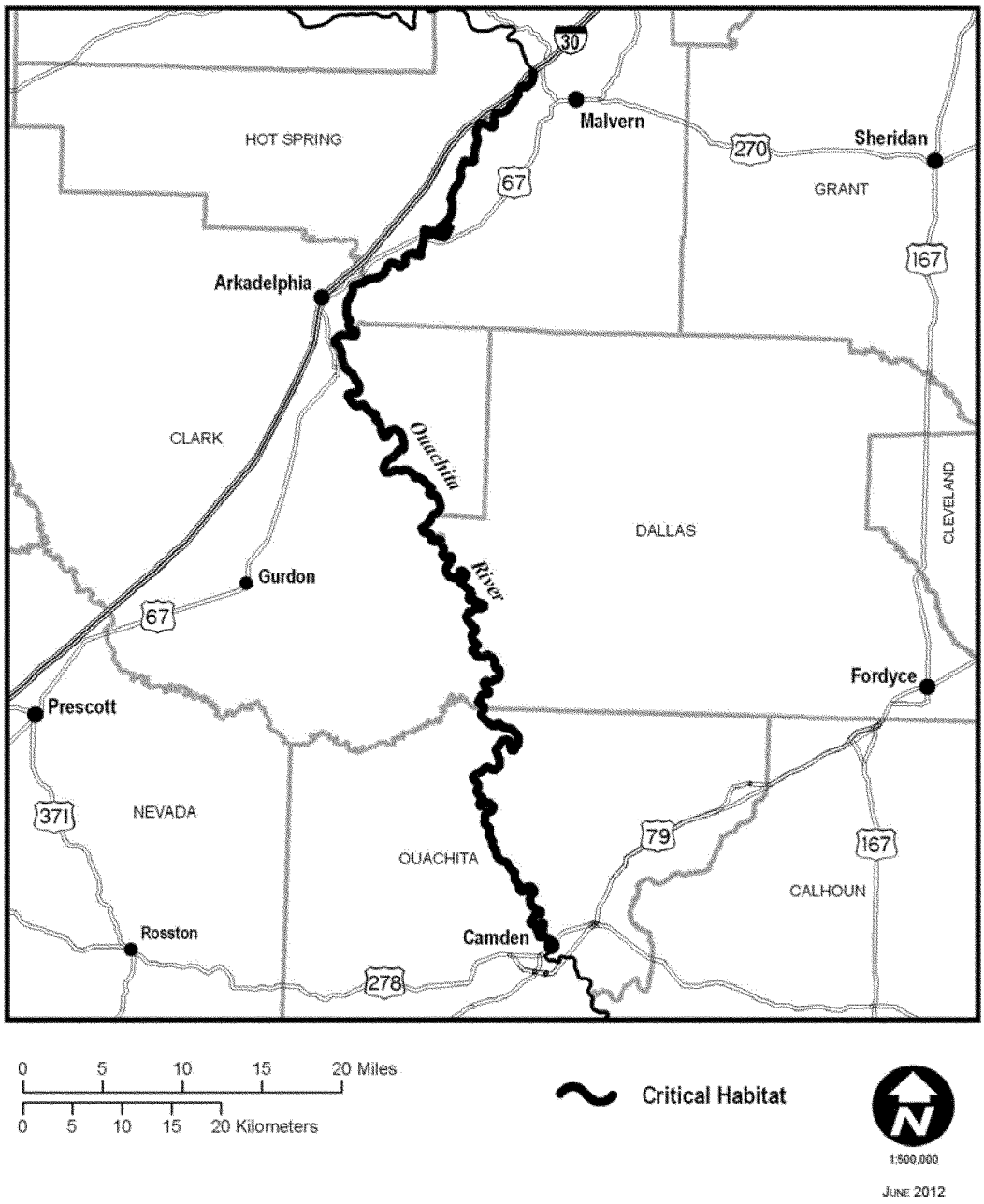


(10) Unit RF4b: Ouachita River—Clark, Hot Spring, and Ouachita Counties, Arkansas.

(i) Unit RF4b includes 157.9 rkm (98.1 rmi) of the Ouachita River from Interstate 30 at Malvern, Hot Spring County, Arkansas, downstream to U.S. Highway 79 at Camden, Ouachita County, Arkansas.

(ii) **Note:** Map of Unit RF4b (Ouachita River) of critical habitat for rabbitsfoot follows:

Map of Unit RF4b (Ouachita River) of critical habitat for Rabbitsfoot

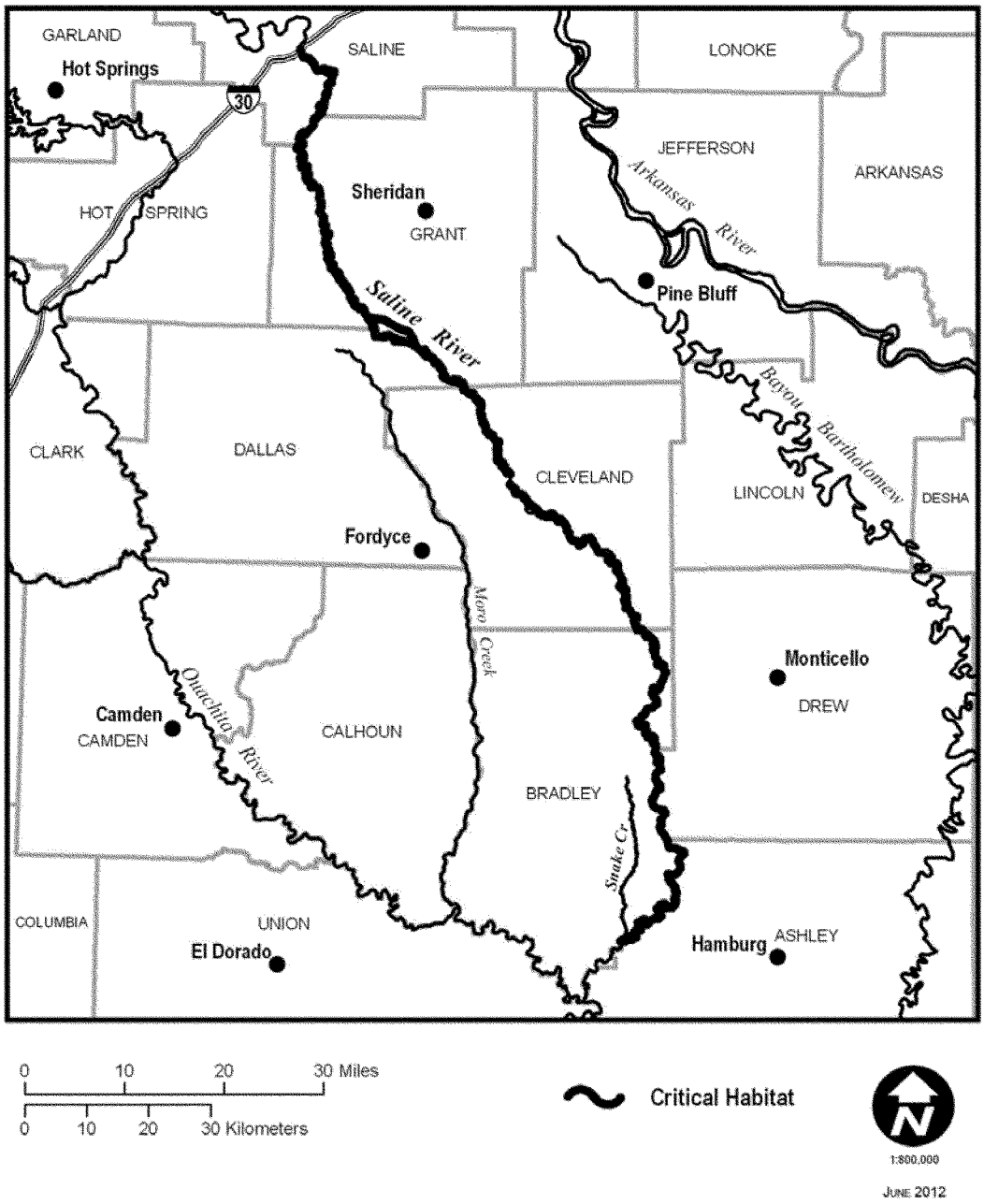


(11) Unit RF5: Saline River—Ashley, Bradley, Cleveland, Dallas, Drew, Grant, and Saline Counties, Arkansas.

(i) Unit RF5 includes 288.4 rkm (179.2 rmi) of the Saline River from Interstate 30 near Benton, Saline County, Arkansas, downstream to Snake Creek confluence north of Felsenthal National Wildlife Refuge's northern border located northwest of Crossett, Ashley and Bradley Counties, Arkansas.

(ii) **Note:** Map of Unit RF5 (Saline River) of critical habitat for rabbitsfoot follows:

Map of Unit RF5 (Saline River) of critical habitat for Rabbitsfoot

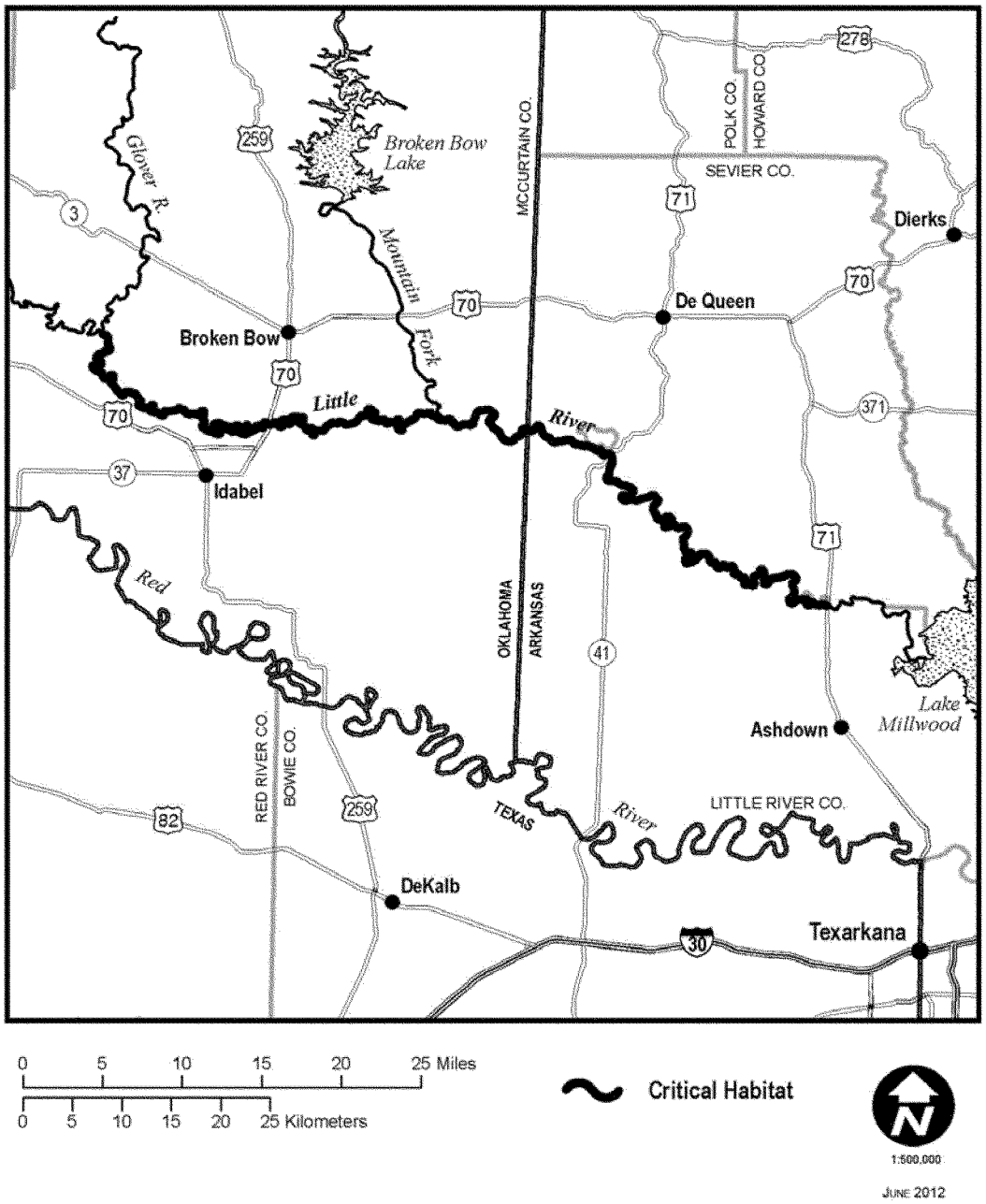


(12) Unit RF6: Little River—McCurtain County, Oklahoma; and Little River and Sevier Counties, Arkansas.

(i) Unit RF6 includes 139.7 rkm (86.8 rmi) of the Little River from the Glover River confluence northwest of Idabel, McCurtain County, Oklahoma, downstream to U.S. Highway 71 north of Wilton, Little River and Sevier Counties, Arkansas.

(ii) **Note:** Map of Unit RF6 (Little River) of critical habitat for rabbitsfoot follows:

Map of Unit RF6 (Little River) of critical habitat for Rabbitsfoot

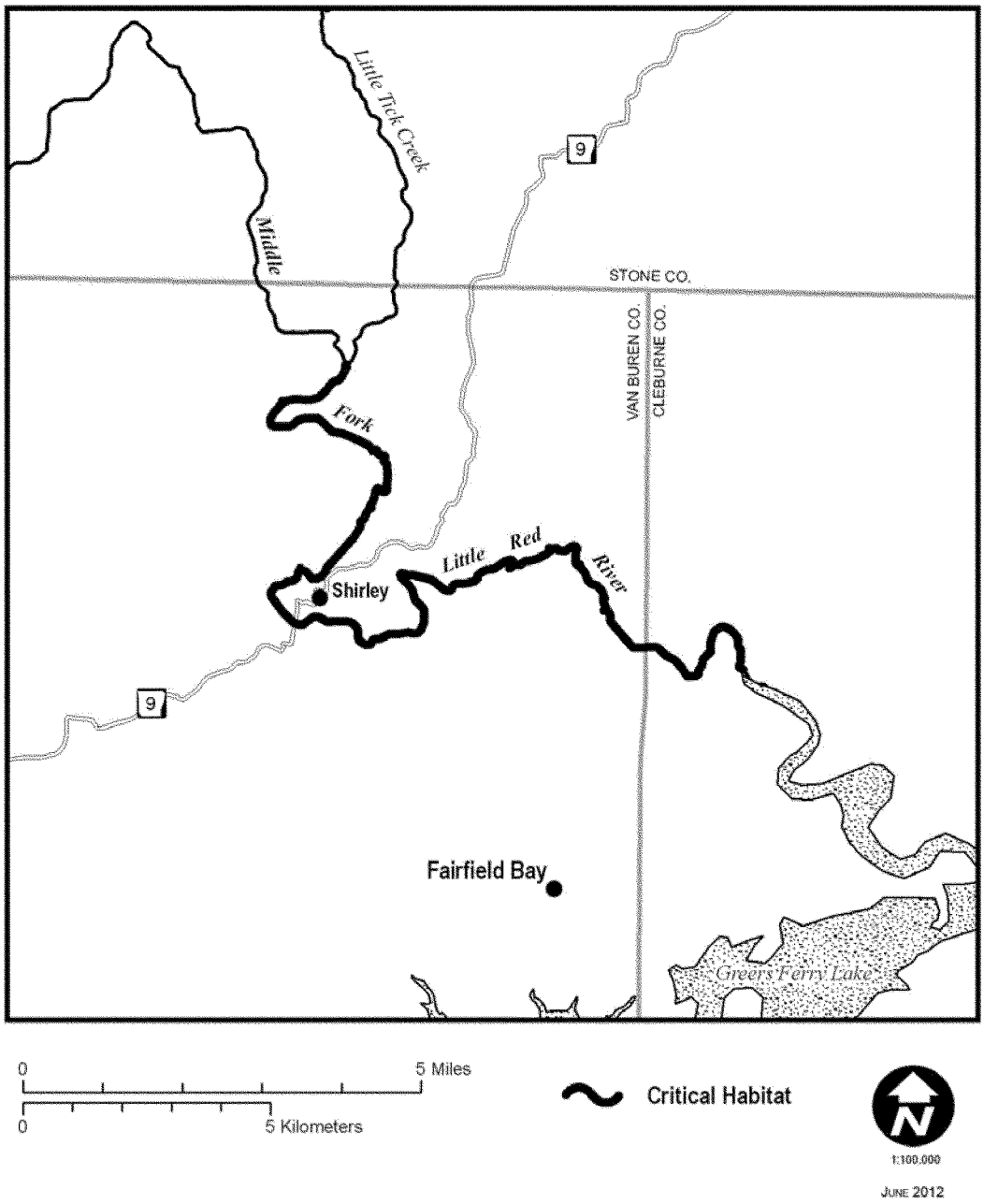


(13) Unit RF7: Middle Fork Little River—Van Buren County, Arkansas.

(i) Unit RF7 includes 23.3 rkm (14.5 rmi) of the Middle Fork Little Red River from the confluence of Little Tick Creek north of Shirley, Arkansas, downstream to the upstream point of inundation by Greers Ferry Reservoir, Van Buren County, Arkansas.

(ii) **Note:** Map of Unit RF7 (Middle Fork Little Red River) of critical habitat for rabbitsfoot follows:

Map of Unit RF7 (Middle Fork Little Red River) of critical habitat for Rabbitsfoot

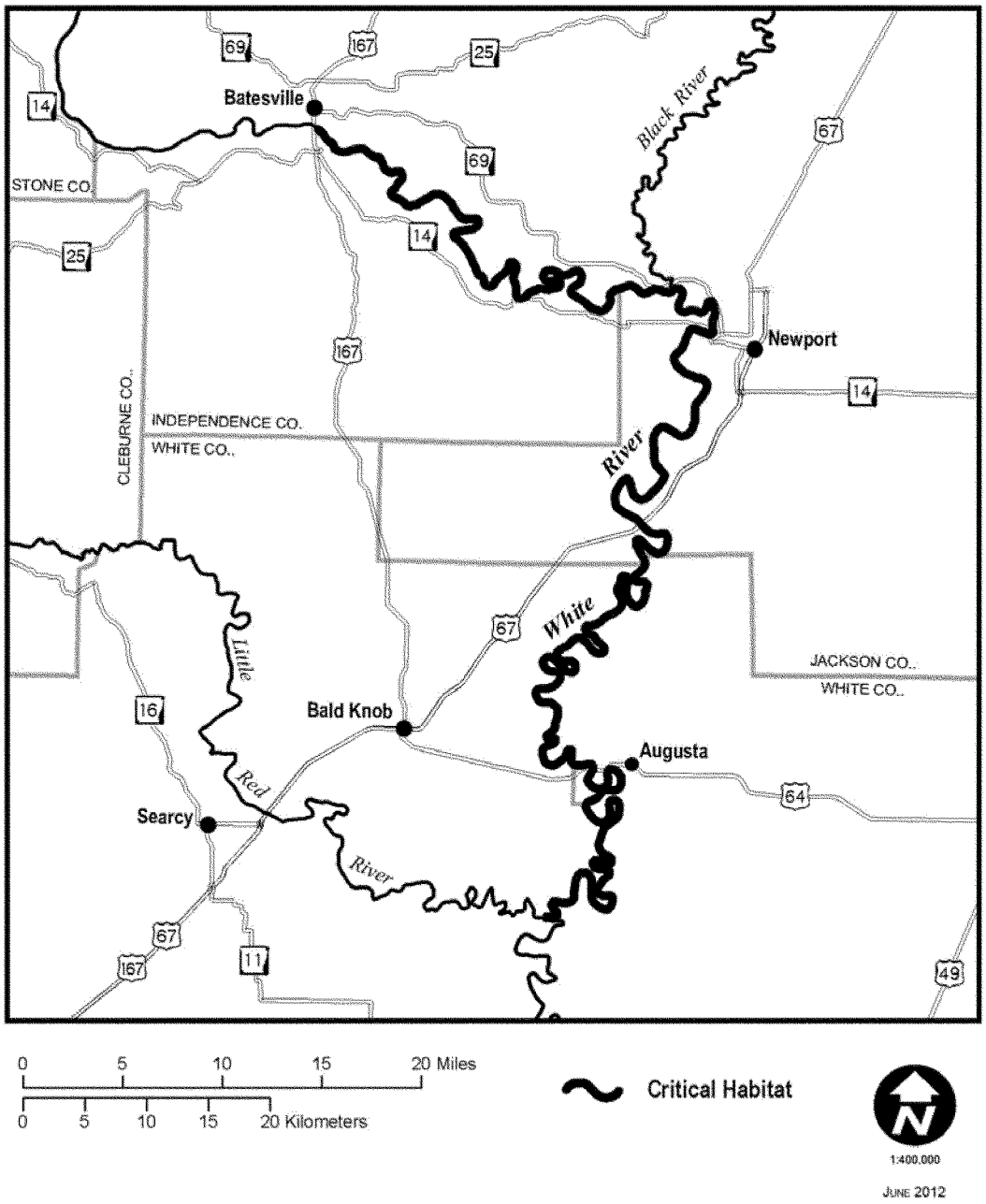


(14) Unit RF8a: White River—Independence, Jackson, White, and Woodruff Counties, Arkansas.

(i) Unit RF8a includes 188.3 rkm (117.0 rmi) of the White River from the Batesville Dam at Batesville, Independence County, Arkansas, downstream to the Little Red River confluence north of Georgetown, White, and Woodruff Counties, Arkansas.

(ii) **Note:** Map of Unit RF8a (White River) of critical habitat for the rabbitsfoot follows:

Map of Unit RF8a (White River) of critical habitat for Rabbitsfoot

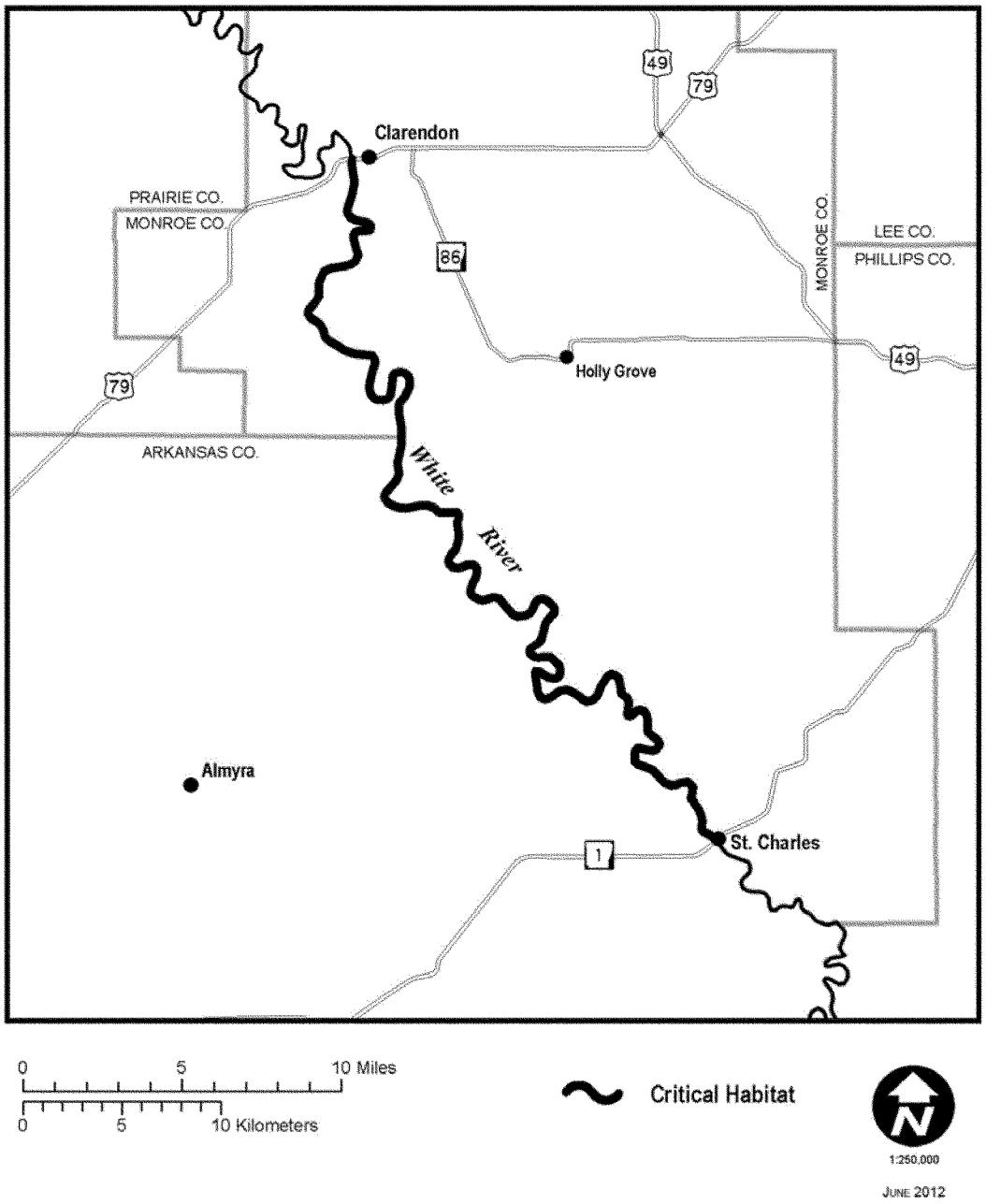


(15) Unit RF8b: White River—Arkansas and Monroe Counties, Arkansas.

(i) Unit RF8b includes 68.9 rkm (42.8 rmi) of the White River from U.S. Highway 79 at Clarendon, Monroe County, Arkansas, downstream to Arkansas Highway 1 near St. Charles, Arkansas County, Arkansas.

(ii) **Note:** Map of Unit RF8b (White River) of critical habitat for rabbitsfoot follows:

Map of Unit RF8b (White River) of critical habitat for Rabbitsfoot

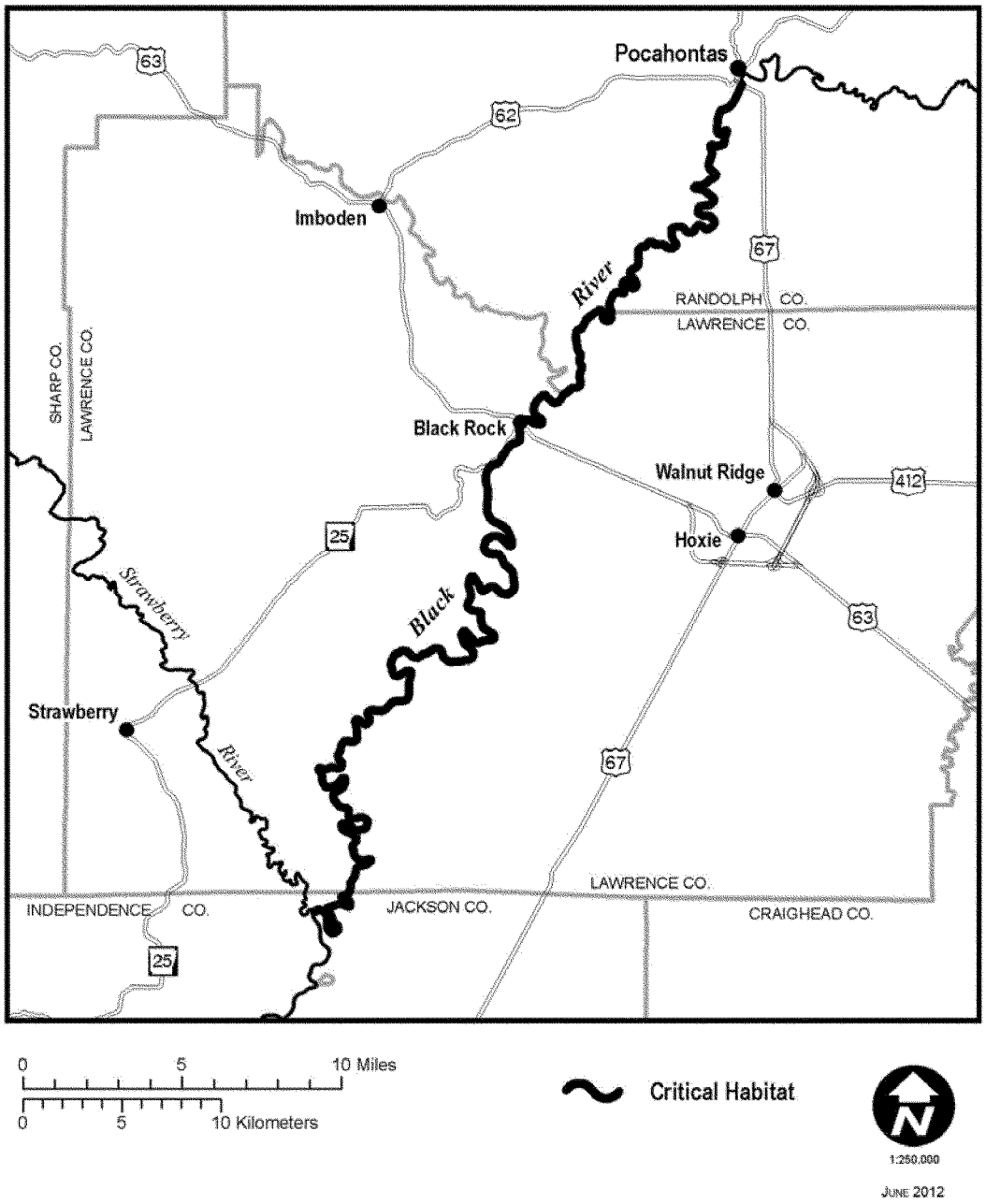


(16) Unit RF9: Black River—Lawrence and Randolph Counties, Arkansas.

(i) Unit RF9 includes 92.2 rkm (57.3 rmi) of the Black River from U.S. Highway 67 at Pocahontas, Randolph County, Arkansas, downstream to the Strawberry River confluence southeast of Strawberry, Lawrence County, Arkansas.

(ii) **Note:** Map of Unit RF9 (Black River) of critical habitat for rabbitsfoot follows:

Map of Unit RF9 (Black River) of critical habitat for Rabbitsfoot

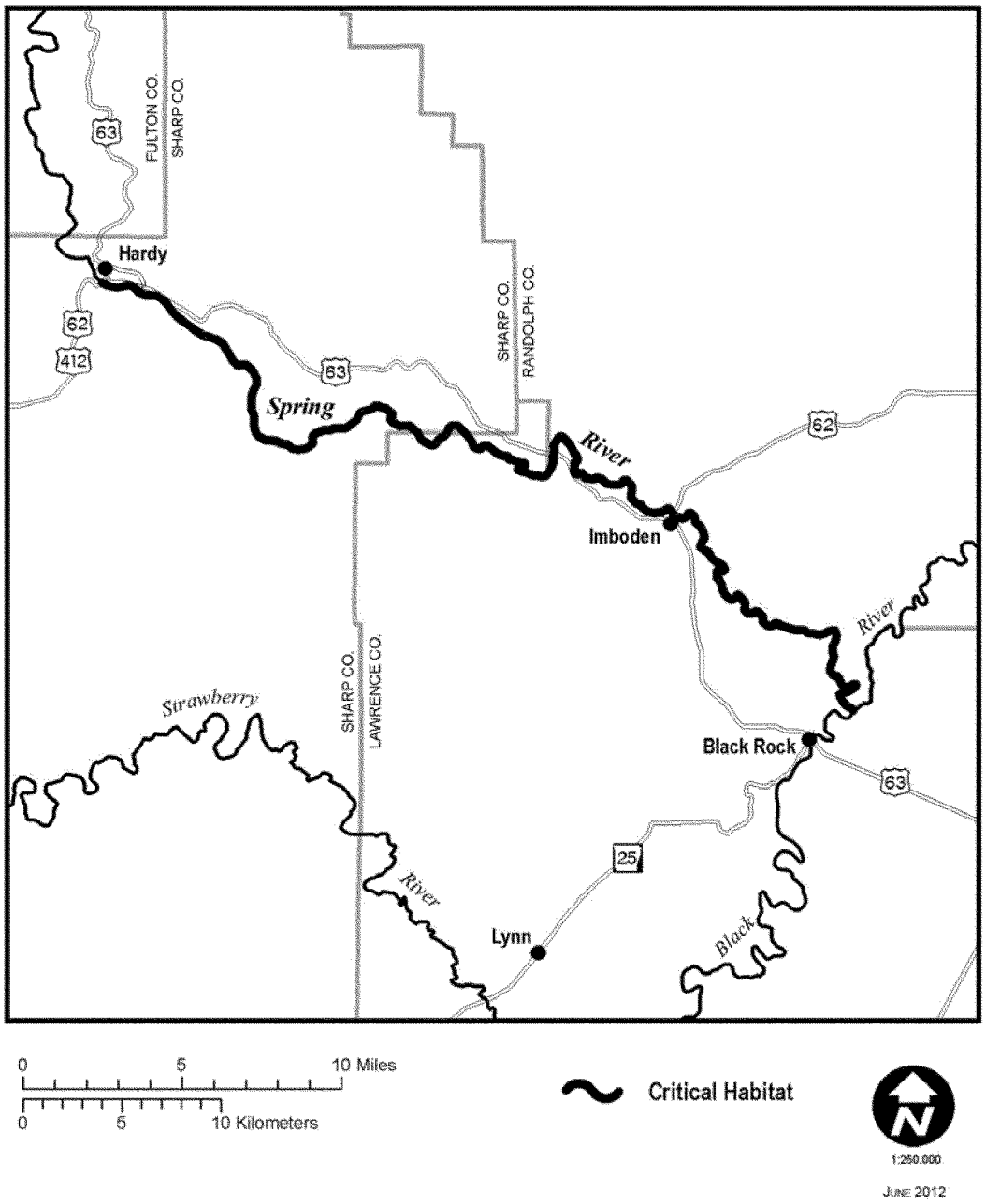


(17) Unit RF10: Spring River—Lawrence, Randolph, and Sharp Counties, Arkansas.

(i) Unit RF10 includes 62.8 rkm (39.0 rmi) of the Spring River from U.S. Highway 412 and 62 at Hardy in Sharp County, Arkansas, downstream to its confluence with the Black River east of Black Rock, Lawrence, and Randolph Counties, Arkansas.

(ii) **Note:** Map of Unit RF10 (Spring River) of critical habitat for rabbitsfoot follows:

Map of Unit RF10 (Spring River) of critical habitat for Rabbitsfoot

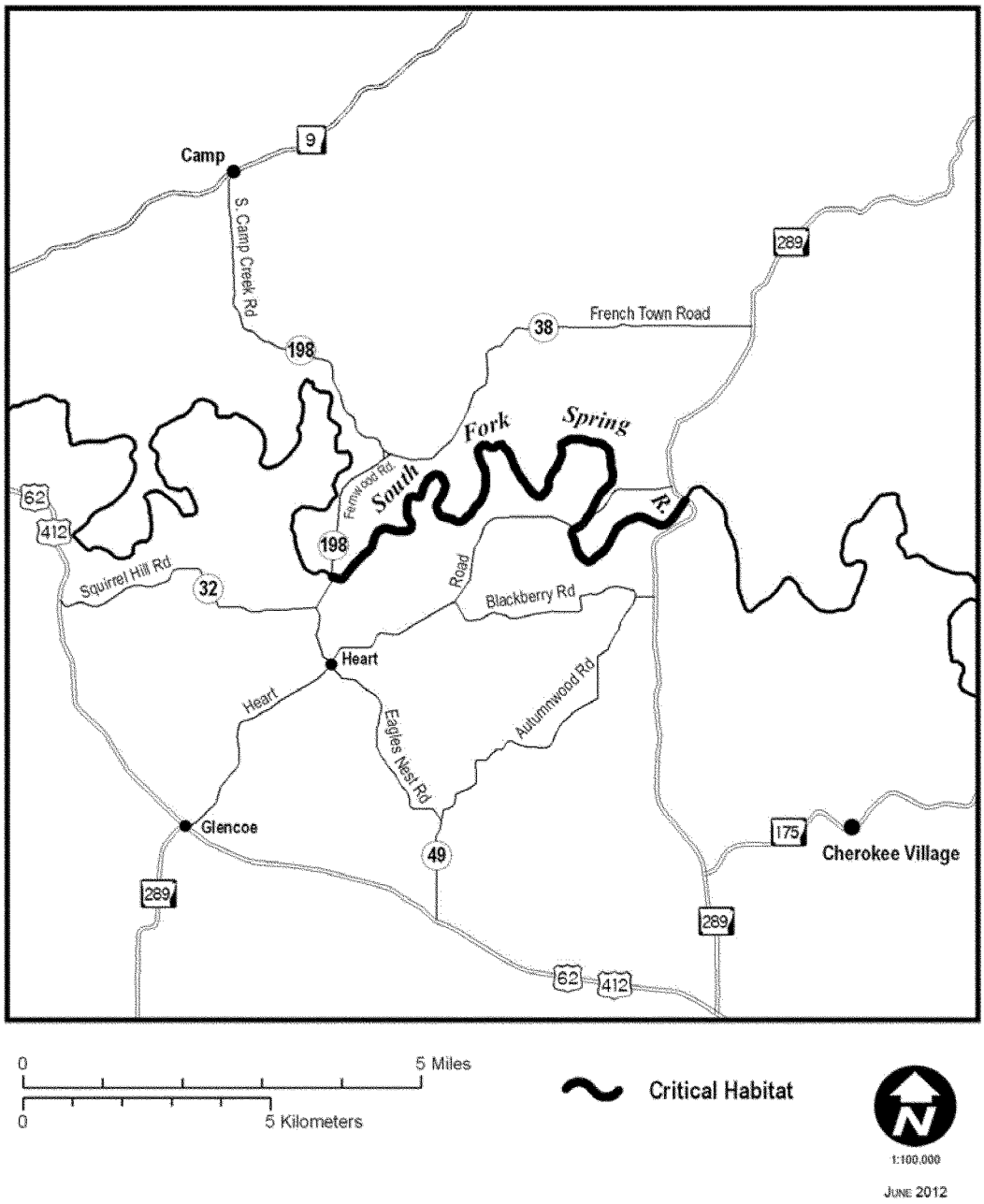


(18) Unit RF11: South Fork Spring River—Fulton County, Arkansas.

(i) Unit RF11 includes 16.4 rkm (10.2 rmi) of the South Fork Spring River from Fulton County Road 198 north of Heart, Arkansas, downstream to Arkansas Highway 289 at Saddle, Fulton County, Arkansas.

(ii) **Note:** Map of Unit RF11 (South Fork Spring River) of critical habitat for rabbitsfoot follows:

Map of Unit RF11 (South Fork Spring River) of critical habitat for Rabbitsfoot

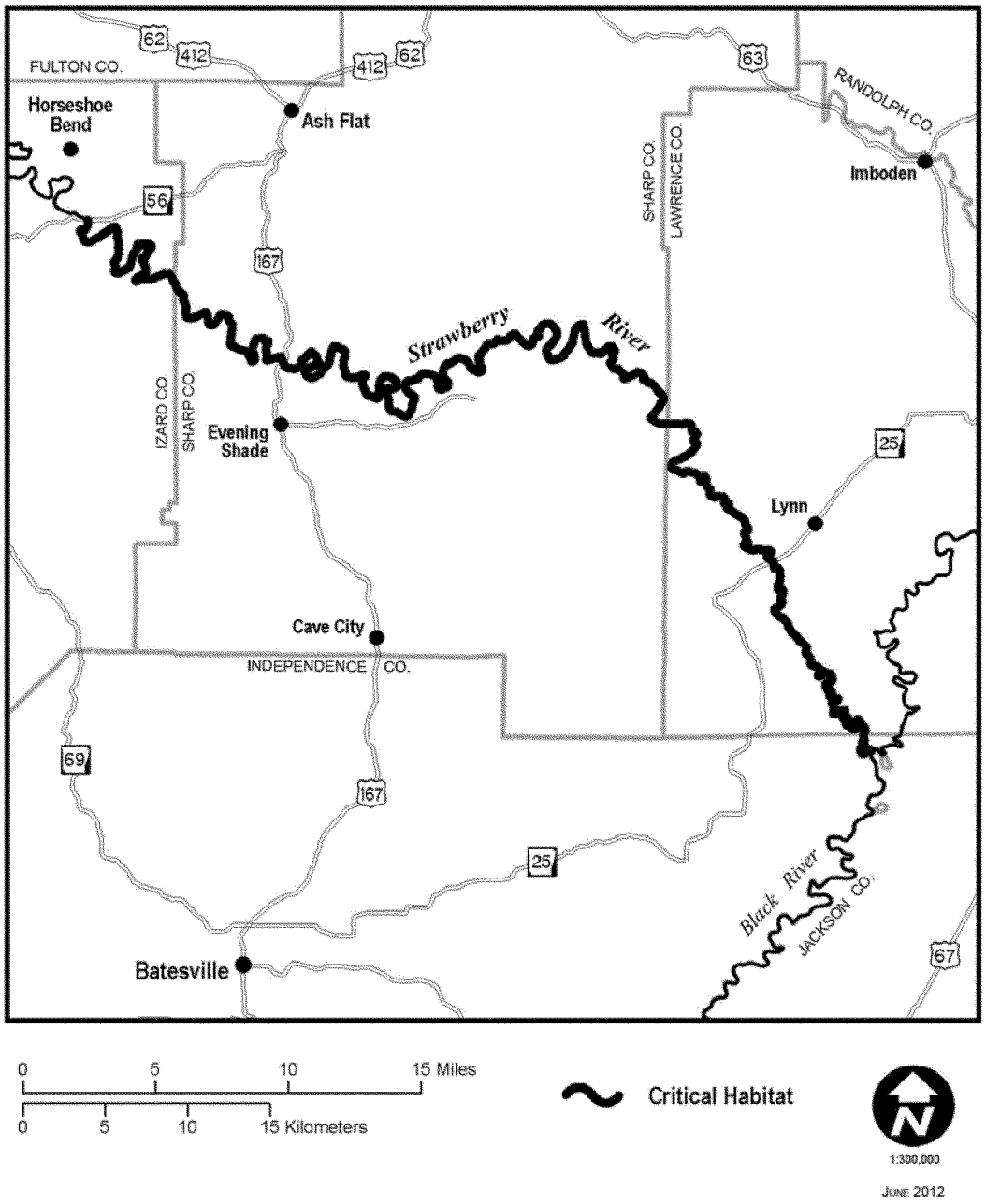


(19) Unit RF12: Strawberry River—Izard, Lawrence, and Sharp Counties, Arkansas.

(i) Unit RF12 includes 123.8 rkm (76.9 rmi) of the Strawberry River from Arkansas Highway 56 south of Horseshoe Bend, Izard County, Arkansas, downstream to its confluence with the Black River southeast of Strawberry, Lawrence County, Arkansas.

(ii) **Note:** Map of Unit RF12 (Strawberry River) of critical habitat for rabbitsfoot follows:

Map of Unit RF12 (Strawberry River) of critical habitat for Rabbitsfoot

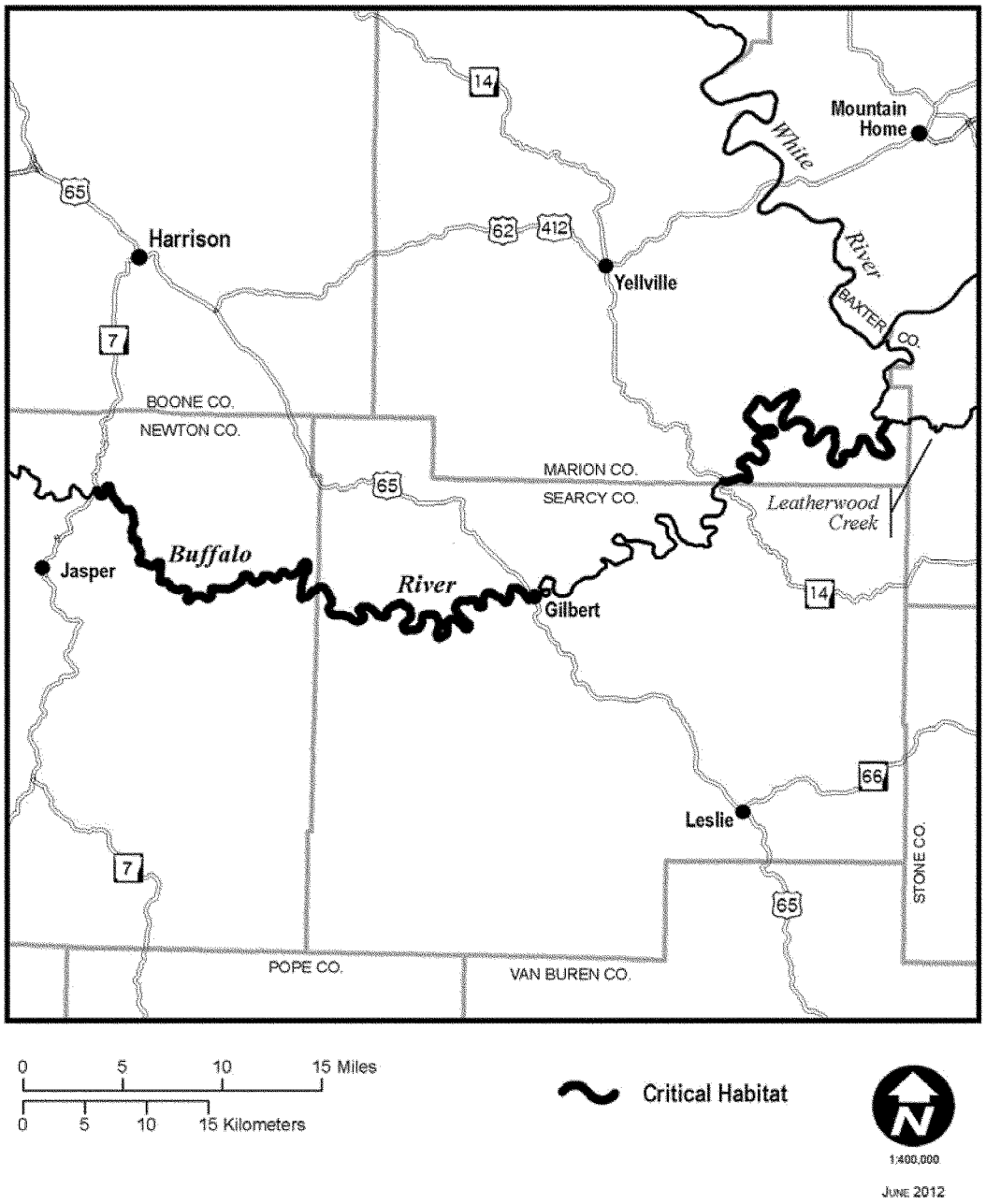


(20) Unit RF13: Buffalo River—Newton and Searcy Counties, Arkansas.

(i) Unit RF13 includes 113.6 rkm (70.6 rmi) of the Buffalo River from the Cove Creek confluence southeast of Erbie, Newton County, Arkansas, downstream to U.S. Highway 65 west of Gilbert, Searcy County, Arkansas (western segment), and Arkansas Highway 14 downstream to the confluence of Leatherwood Creek in the Lower Buffalo Wilderness Area (eastern segment).

(ii) **Note:** Map of Unit RF13 (Buffalo River) of critical habitat for rabbitsfoot follows:

Map of Unit RF13 (Buffalo River) of critical habitat for Rabbitsfoot

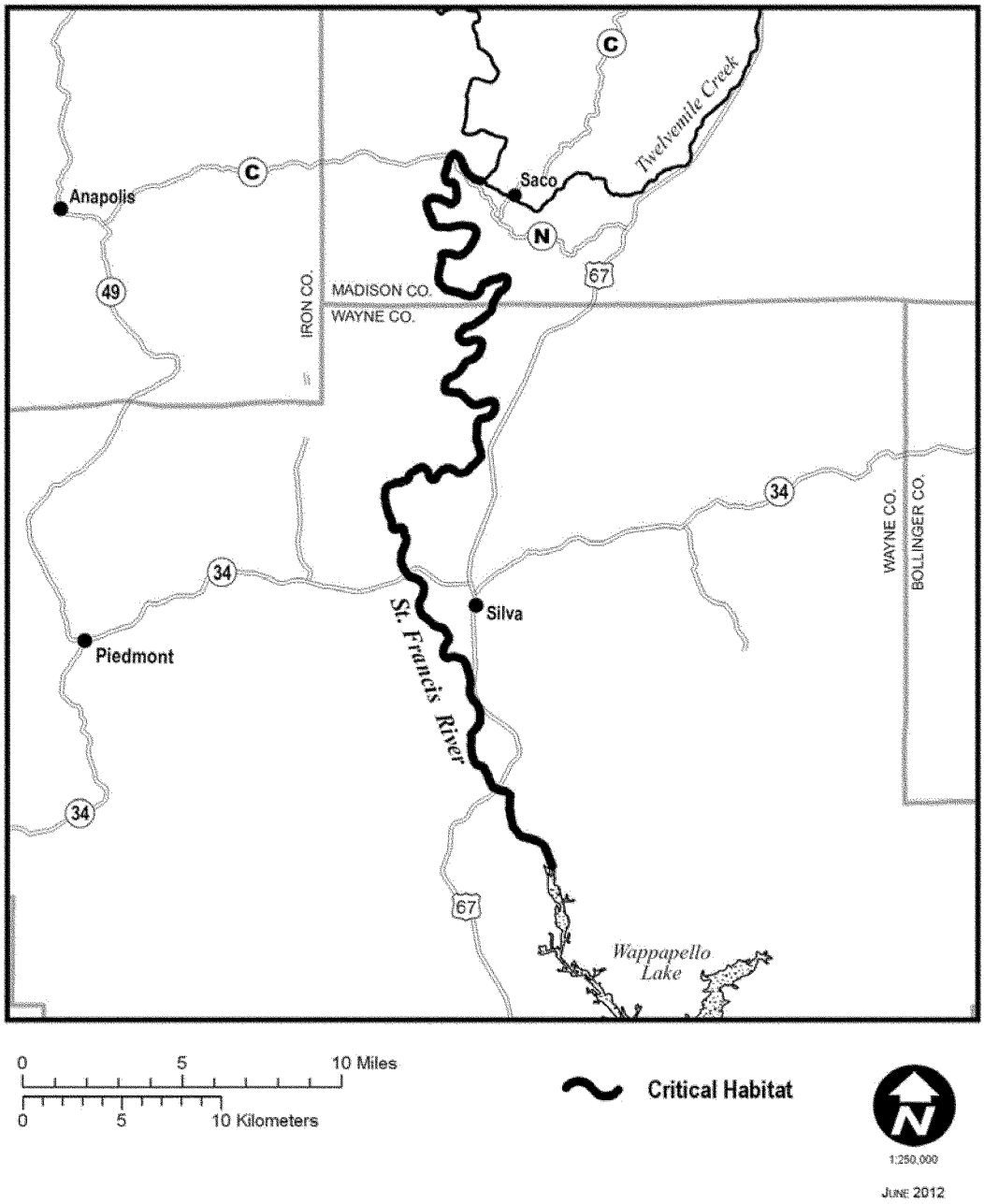


(21) Unit RF14: St. Francis River—Madison and Wayne Counties, Missouri.

(i) Unit RF14 includes 64.3 rkm (40.0 rmi) of the St. Francis River from the Twelvemile Creek confluence west of Saco, Madison County, Missouri, downstream to the upstream point of inundation by Lake Wappepello, Wayne County, Missouri.

(ii) **Note:** Map of Unit RF14 (St. Francis River) of critical habitat for rabbitsfoot follows:

Map of Unit RF14 (St. Francis River) of critical habitat for Rabbitsfoot

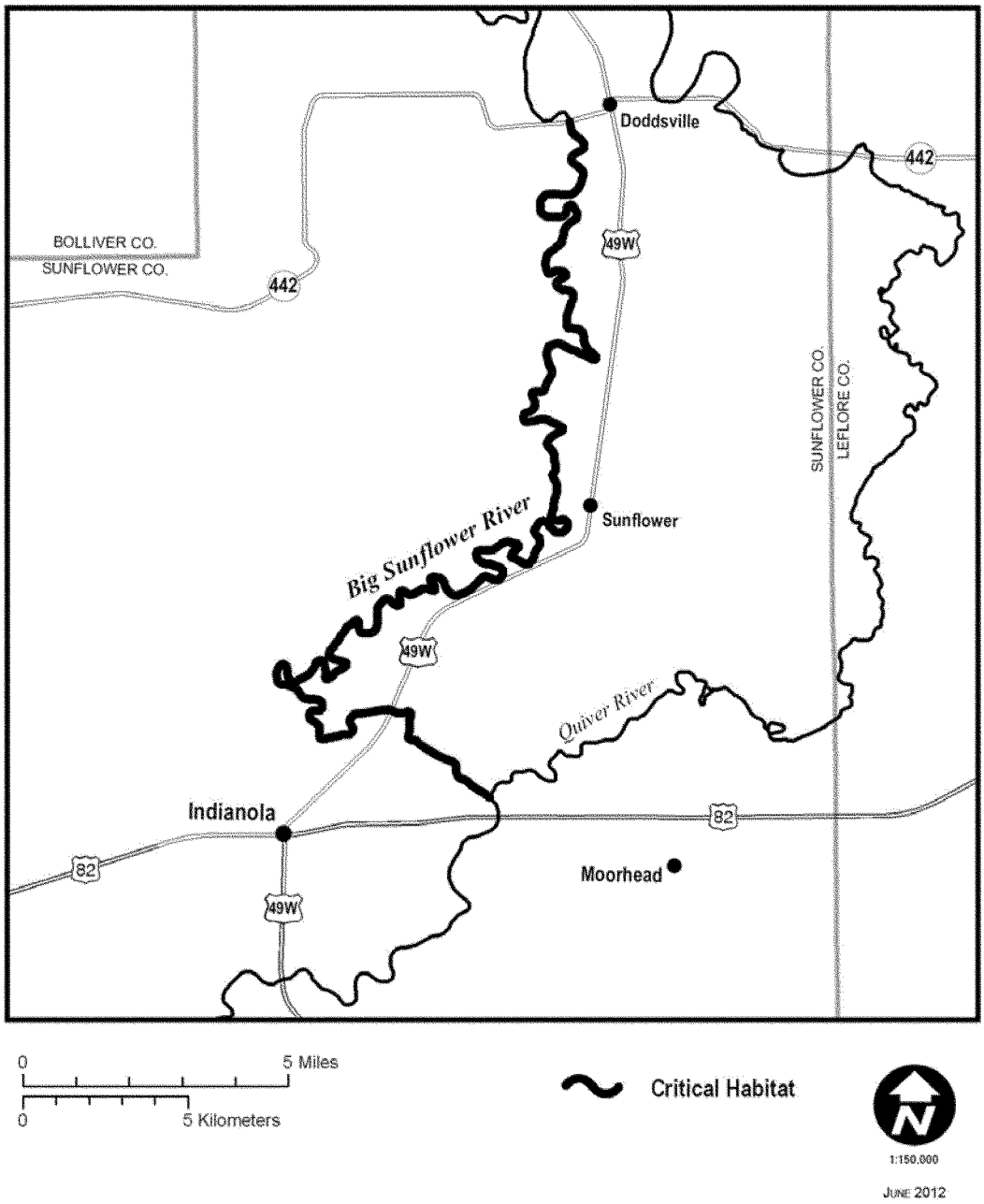


(22) Unit RF15: Big Sunflower River—Sunflower County, Mississippi.

(i) Unit RF15 includes 51.5 rkm (32.0 rmi) of the Big Sunflower River from Mississippi Highway 442 west of Doddsville, Mississippi, downstream to the Quiver River confluence east of Indianola, Sunflower County, Mississippi.

(ii) **Note:** Map of Unit RF15 (Big Sunflower River) of critical habitat for rabbitsfoot follows:

Map of Unit RF15 (Big Sunflower River) of critical habitat for Rabbitsfoot

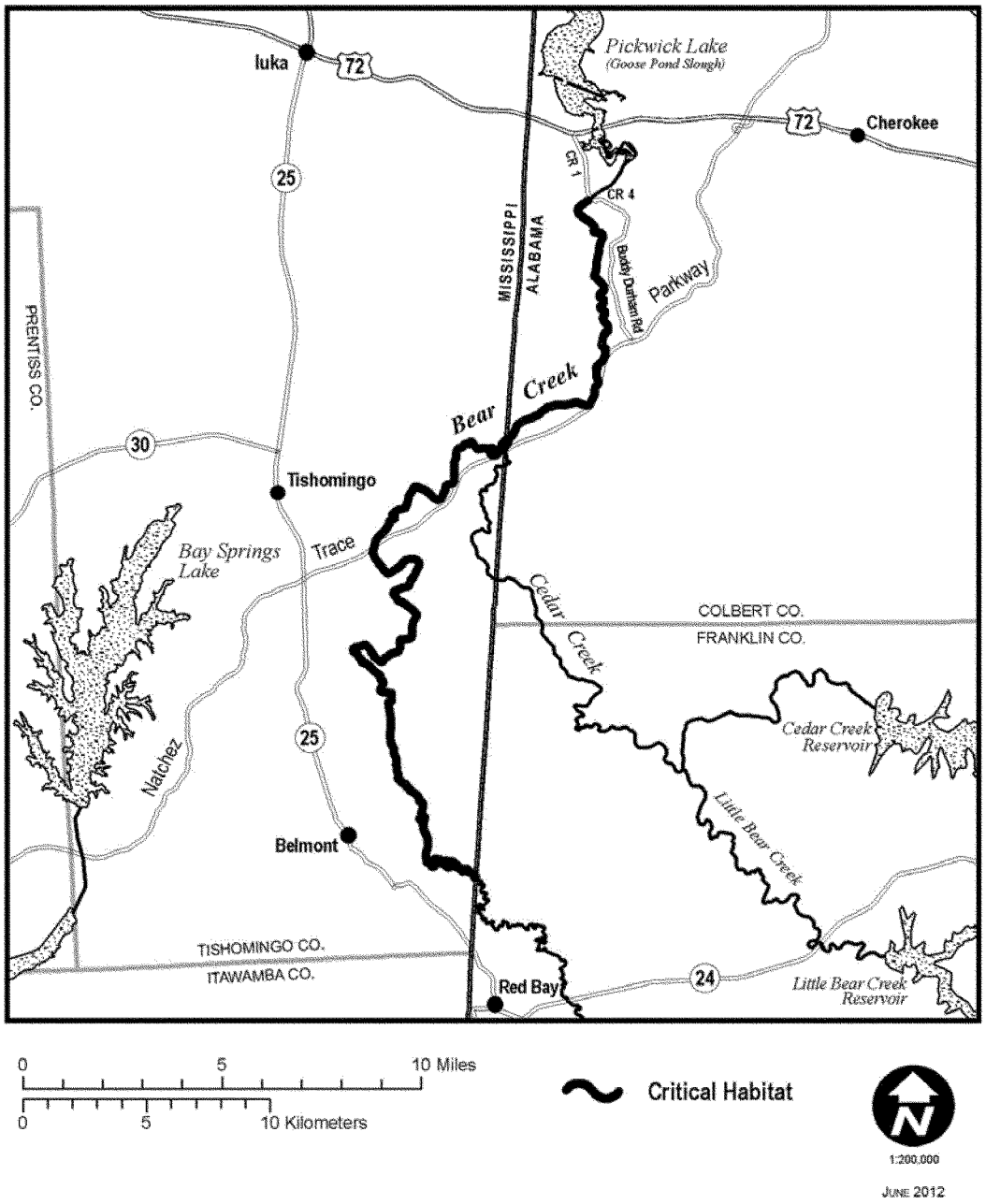


(23) Unit RF16: Bear Creek—Tishomingo County, Mississippi; and Colbert County, Alabama.

(i) Unit RF16 includes 49.7 rkm (30.9 rmi) of Bear Creek from the Alabama and Mississippi State line east of Golden, Tishomingo County, Mississippi, downstream to Alabama County Road 4 southwest of Sutton Hill, Colbert County, Alabama (just upstream of Pickwick Lake).

(ii) **Note:** Map of Unit RF16 (Bear Creek) of critical habitat for rabbitsfoot follows:

Map of Unit RF16 (Bear Creek) of critical habitat for Rabbitsfoot

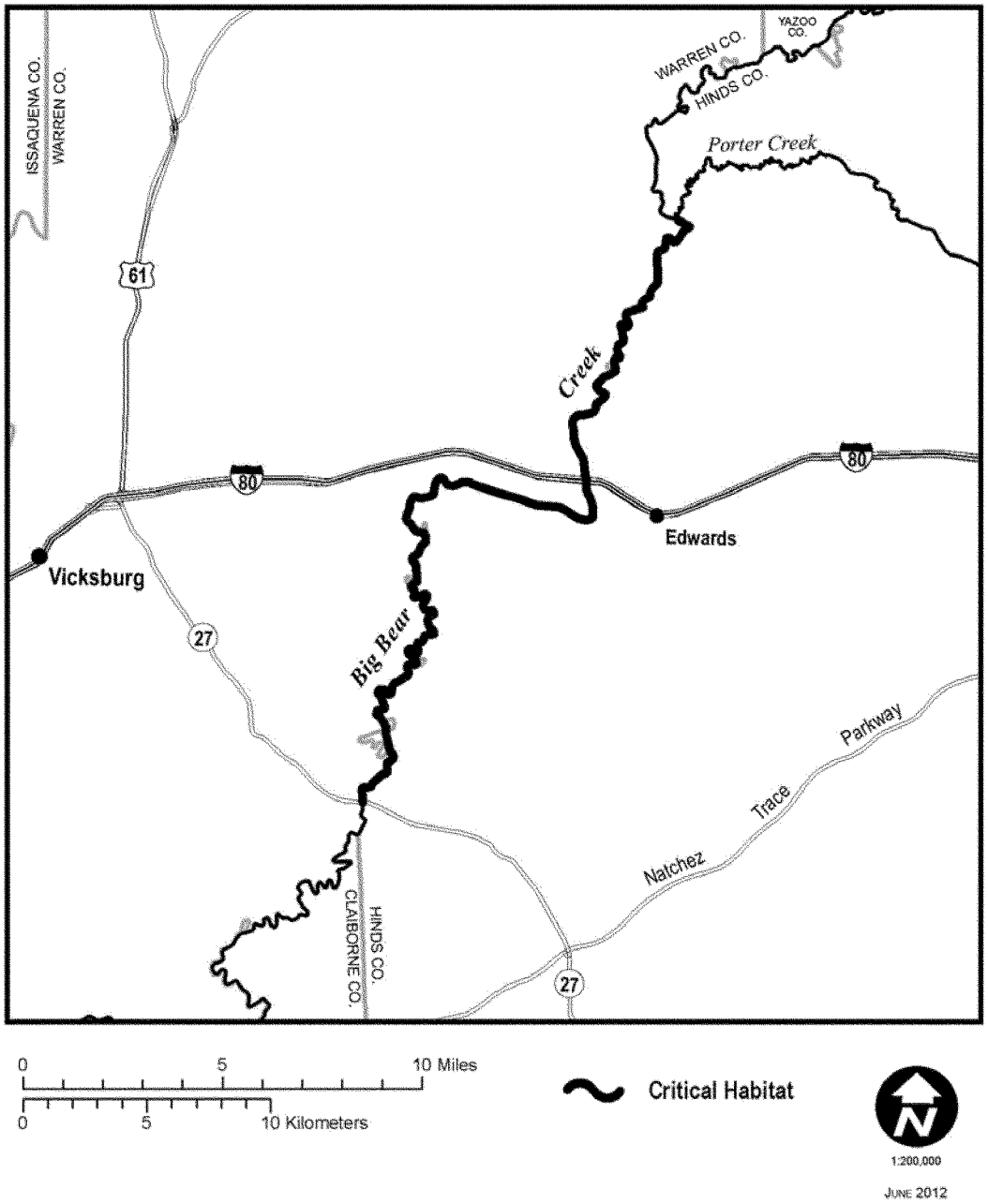


(24) Unit RF17: Big Black River—Hinds and Warren Counties, Mississippi.

(i) Unit RF17 includes 43.3 rkm (26.9 rmi) of the Big Black River from Porter Creek confluence west of Lynchburg, Hinds County, Mississippi, downstream to Mississippi Highway 27 west of Newman, Warren County, Mississippi.

(ii) **Note:** Map of Unit RF17 (Big Black River) of critical habitat for rabbitsfoot follows:

Map of Unit RF17 (Big Black River) of critical habitat for Rabbitsfoot

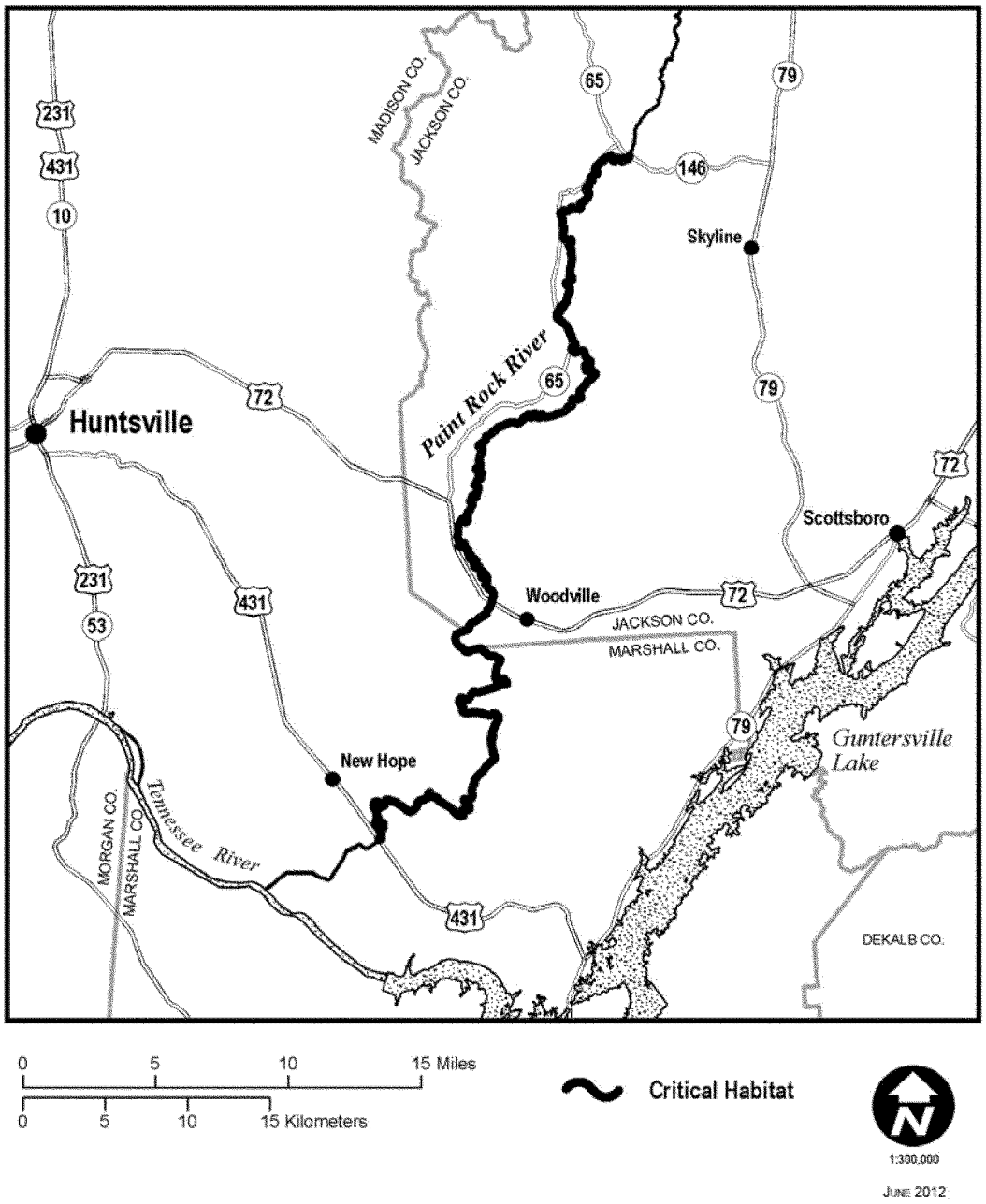


(25) Unit RF18: Paint Rock River—Jackson, Madison, and Marshall Counties, Alabama.

(i) Unit RF18 includes 81.0 rkm (50.3 rmi) of the Paint Rock River from the convergence of Estill Fork and Hurricane Creek north of Skyline, Jackson County, Alabama, downstream to U.S. Highway 431 south of New Hope, Madison and Marshall Counties, Alabama.

(ii) **Note:** Map of Unit RF18 (Paint Rock River) of critical habitat for rabbitsfoot follows:

Map of Unit RF18 (Paint Rock River) of critical habitat for Rabbitsfoot

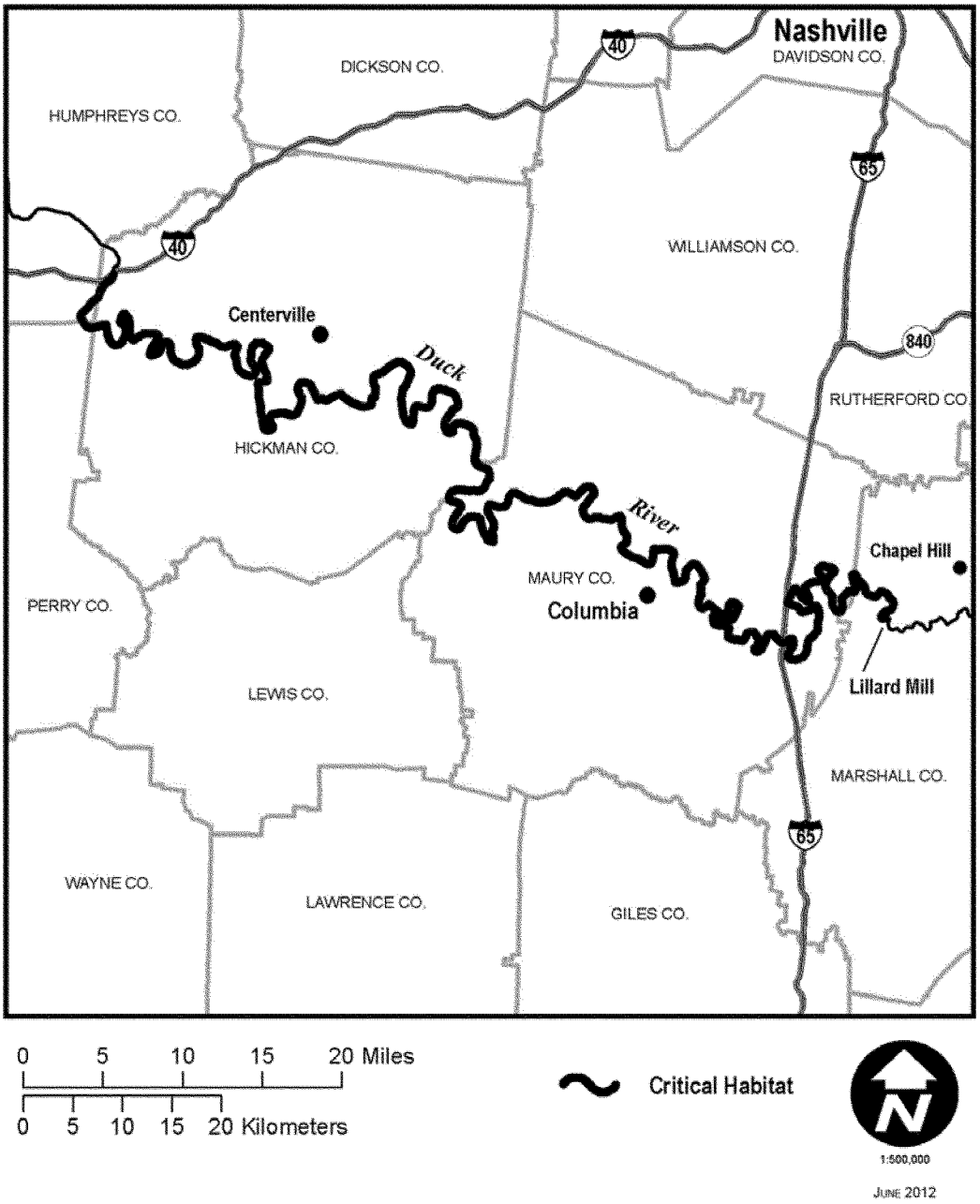


(26) Unit RF19: Duck River—Hickman, Marshall, and Maury Counties, Tennessee.

(i) Unit RF19 includes 235.3 rkm (146.2 rmi) of the Duck River from Lillard Mill (RKM 288.1; RMI 179) west of Tennessee Highway 272, Marshall County, Tennessee, downstream to Interstate 40 near Bucksnort, Hickman County, Tennessee.

(ii) **Note:** Map of Unit RF19 (Duck River) of critical habitat for rabbitsfoot follows:

Map for Unit RF19 (Duck River) of critical habitat for Rabbitsfoot

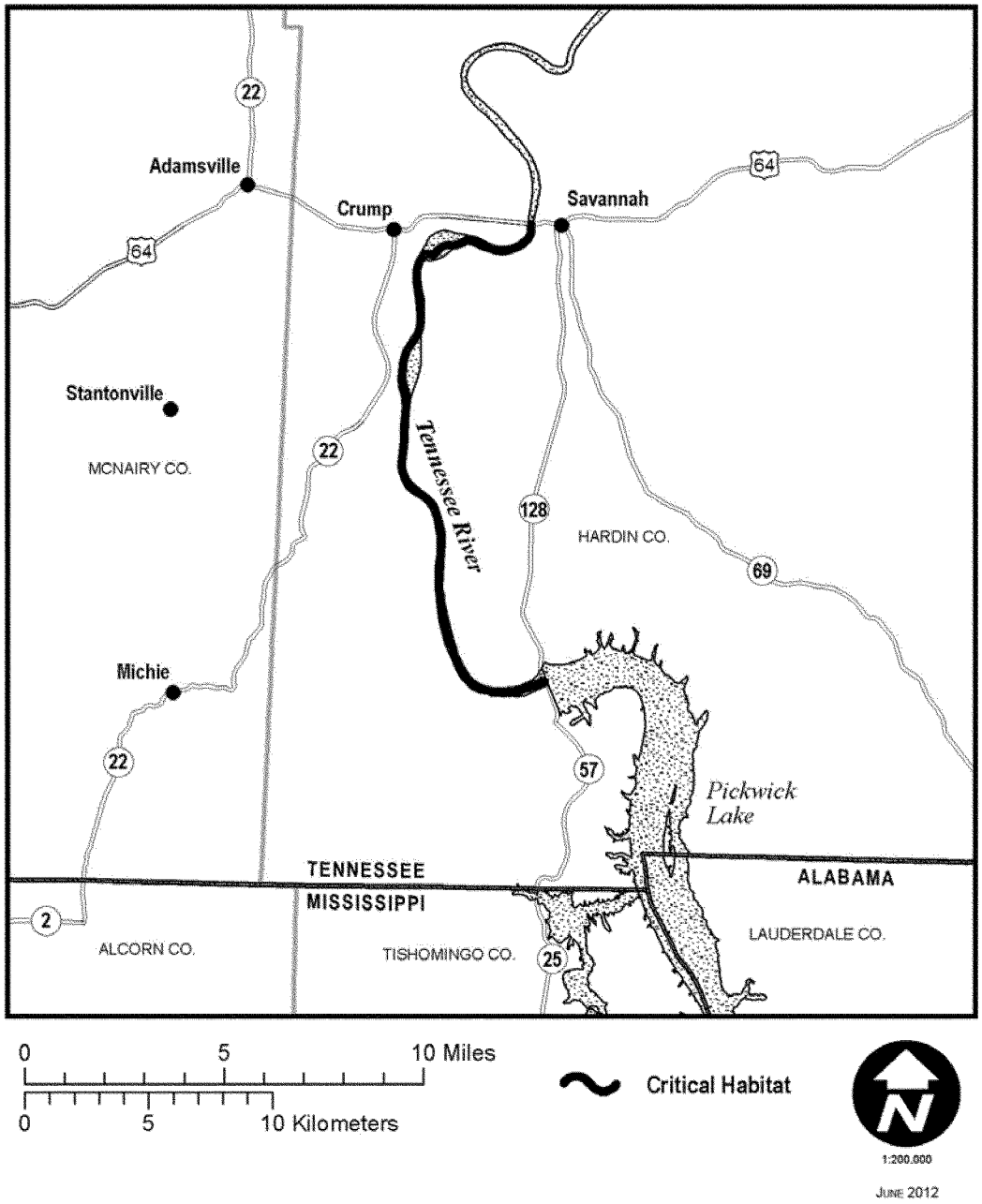


(27) Unit RF20a: Tennessee River—Hardin County, Tennessee.

(i) Unit RF20a includes 26.7 rkm (16.6 rmi) of the Tennessee River from Pickwick Lake Dam downstream to U.S. Highway 64 near Adamsville, Hardin County, Tennessee.

(ii) **Note:** Map of Unit RF20a (Tennessee River) of critical habitat for rabbitsfoot follows:

Map for Unit RF20a (Tennessee River) of critical habitat for Rabbitsfoot

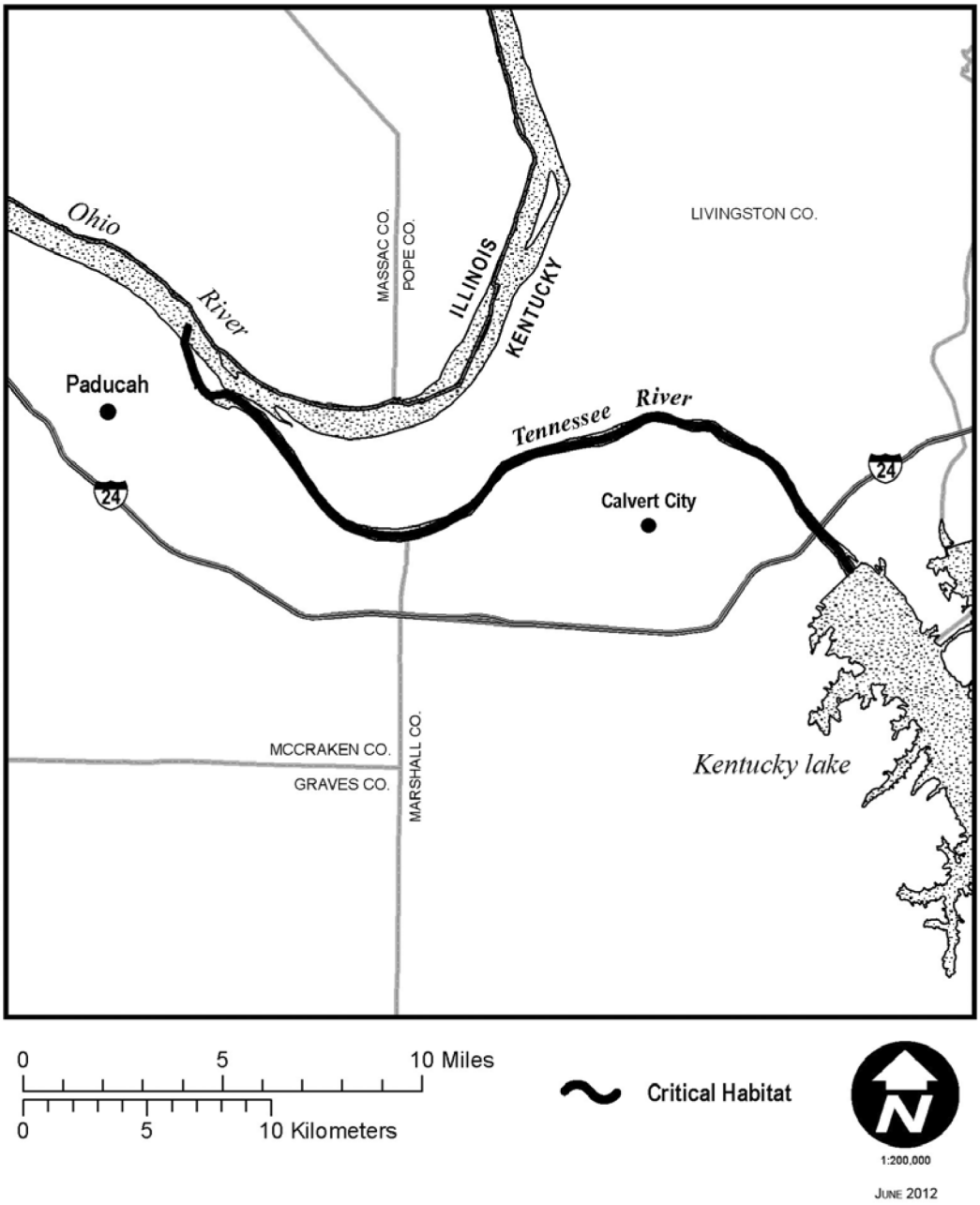


(28) Unit RF20b: Tennessee River—Livingston, Marshall, and McCracken Counties, Kentucky.

(i) Unit RF20b includes 35.6 rkm (22.1 rmi) of the Tennessee River from Kentucky Lake Dam, Marshall and Livingston Counties, Kentucky, downstream to its confluence with the Ohio River, Livingston and McCracken Counties, Kentucky.

(ii) **Note:** Map of Unit RF20b (Tennessee River) of critical habitat for rabbitsfoot follows:

Map for Unit RF20b (Tennessee River) of critical habitat for Rabbitsfoot

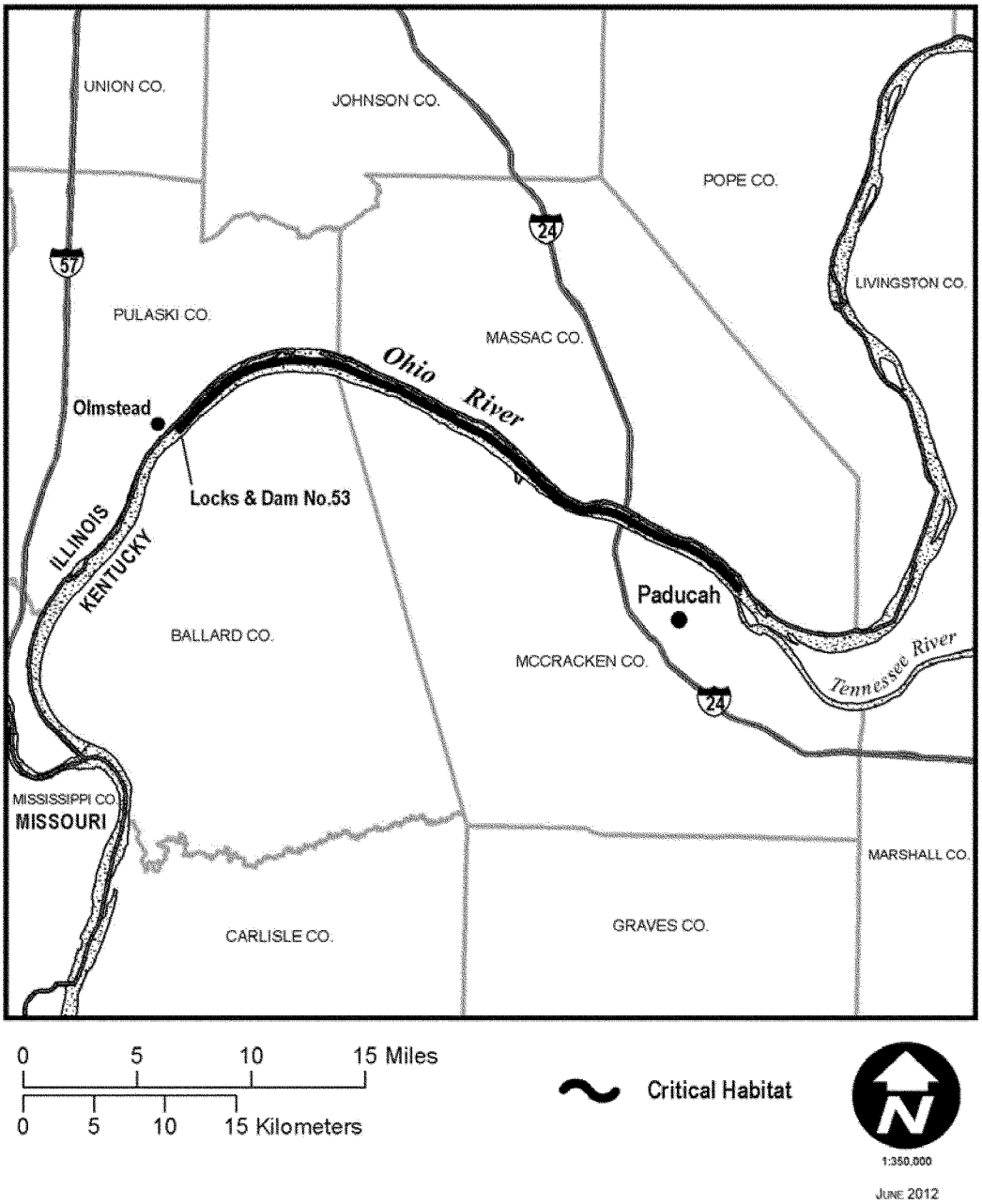


(29) Unit RF21: Ohio River—Ballard, Livingston, and McCracken Counties, Kentucky; Massac and Pulaski Counties, Illinois.

(i) Unit RF21 includes 45.9 rkm (28.5 rmi) of the Ohio River from the Tennessee River confluence, Livingston and McCracken Counties, Kentucky, downstream to Lock and Dam 53 near Olmstead, Pulaski County, Illinois.

(ii) **Note:** Map of Unit RF21 (Ohio River) of critical habitat for rabbitsfoot follows:

Map for Unit RF21 (Ohio River) of critical habitat for Rabbitsfoot

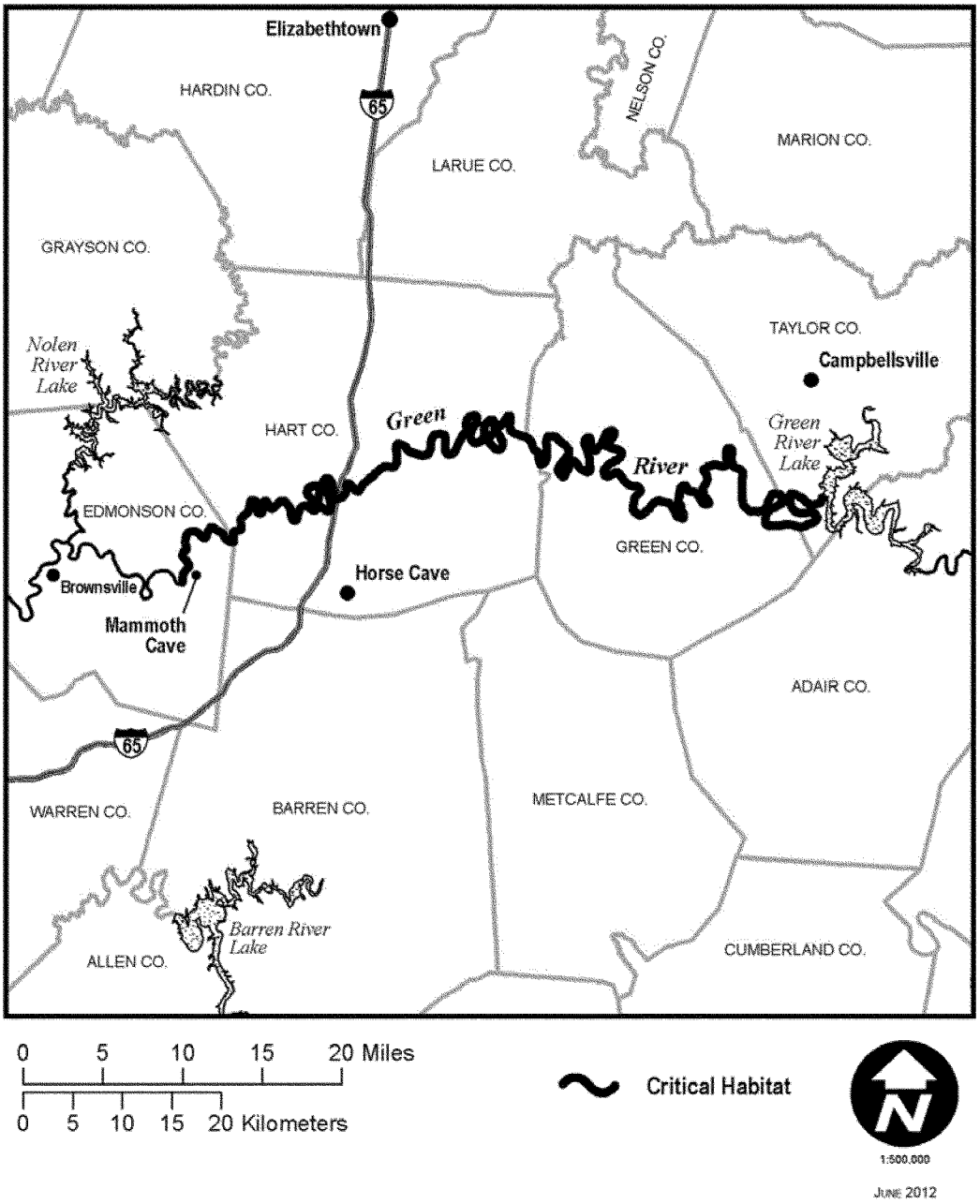


(30) Unit RF22: Green River—Green, Hart, and Taylor Counties, Kentucky.

(i) Unit RF22 includes 175.6 rkm (109.1 rmi) of the Green River from Green River Lake Dam south of Campbellsville, Taylor County, Kentucky, downstream to Maple Springs Ranger Station Road in Mammoth Cave National Park, Kentucky.

(ii) **Note:** Map of Unit RF22 (Green River) of critical habitat for rabbitsfoot follows:

Map for Unit RF22 (Green River) of critical habitat for Rabbitsfoot

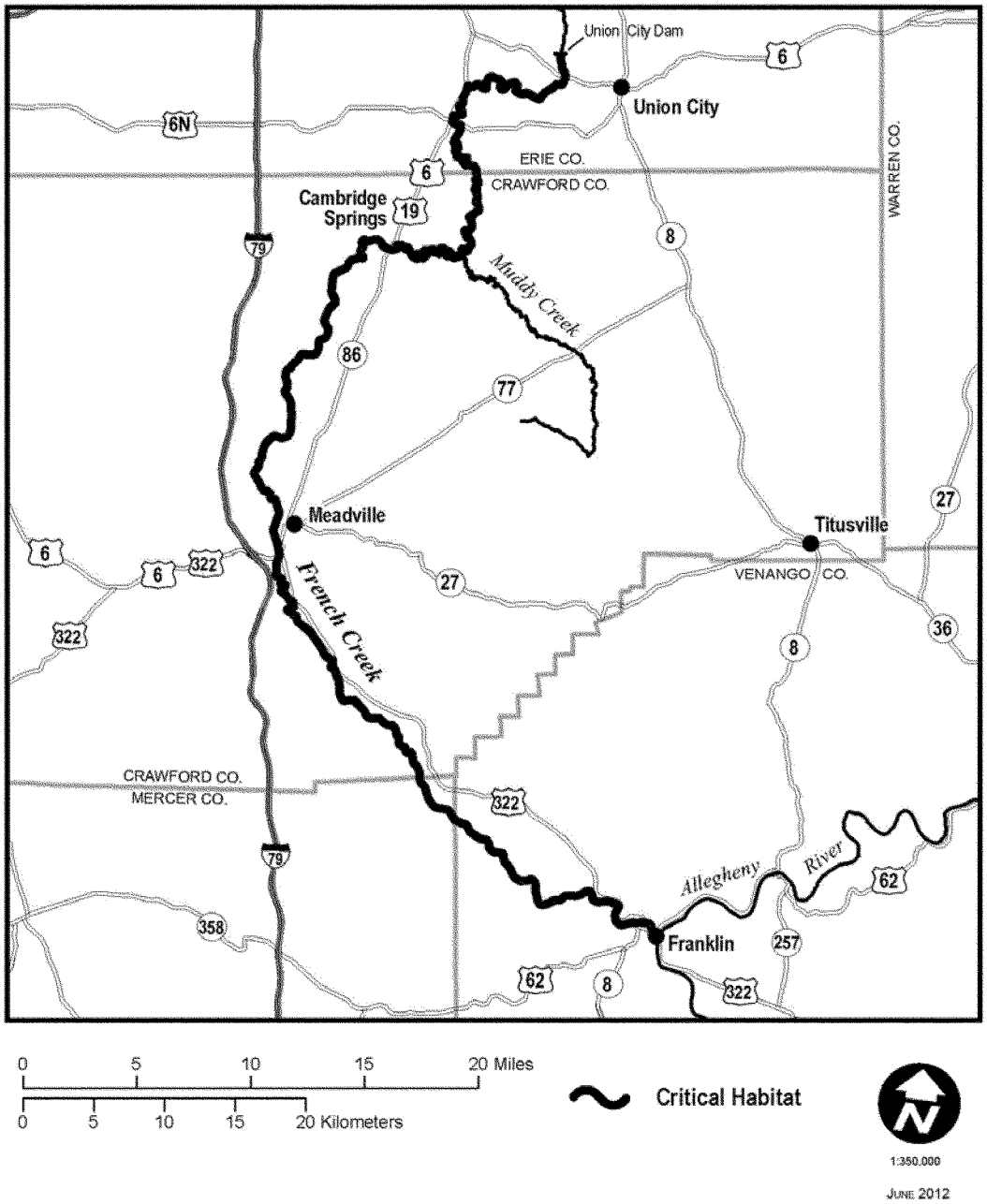


(31) Unit RF23: French Creek—Crawford, Erie, Mercer, and Venango Counties, Pennsylvania.

(i) Unit RF23 includes 120.4 rkm (74.8 rmi) of French Creek from Union City Reservoir Dam northeast of Union City, Erie County, Pennsylvania, downstream to its confluence with the Allegheny River near Franklin, Venango County, Pennsylvania.

(ii) **Note:** Map of Unit RF23 (French Creek) of critical habitat for rabbitsfoot follows:

Map for Unit RF23 (French Creek) of critical habitat for Rabbitsfoot

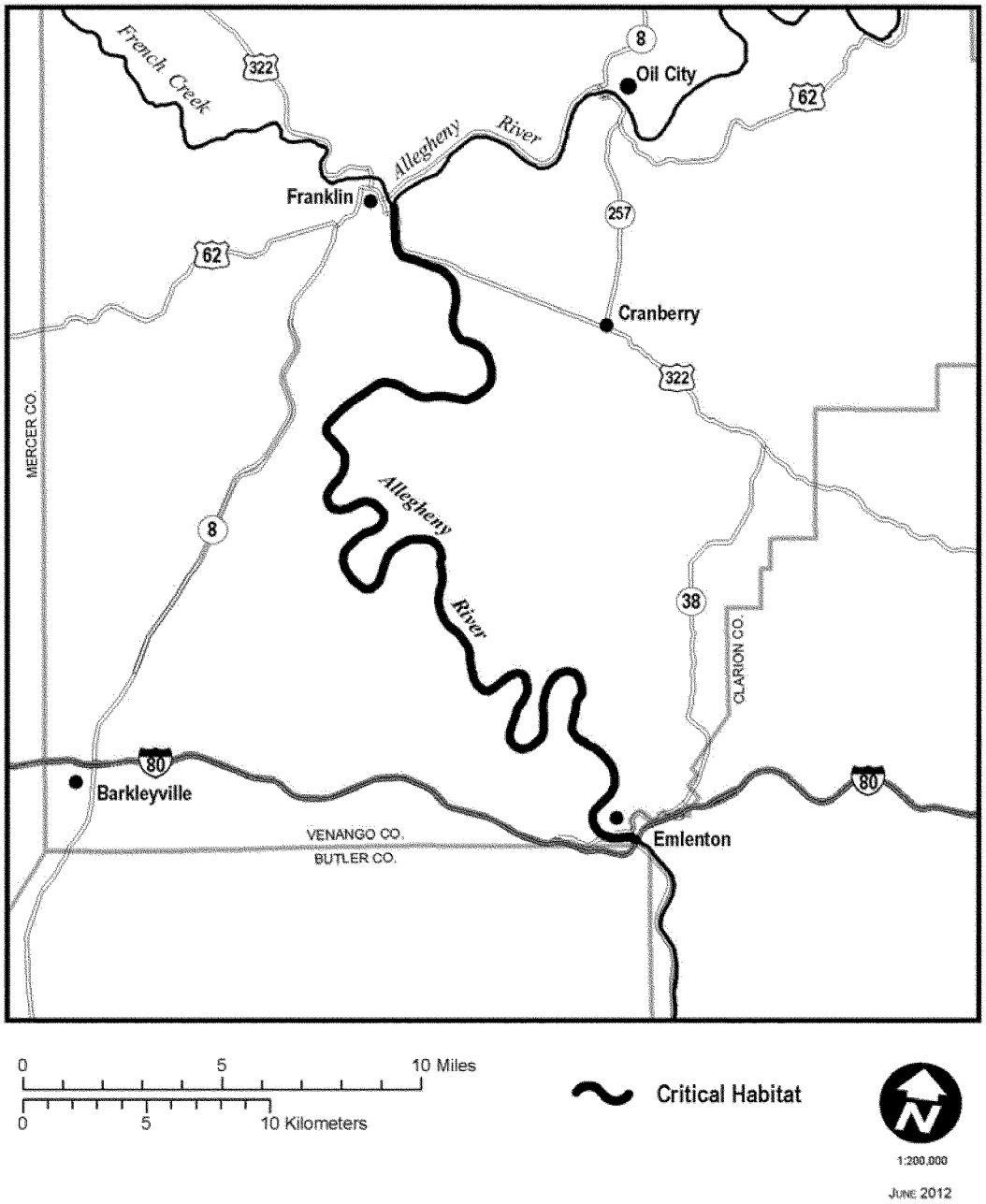


(32) Unit RF24: Allegheny River—Venango County, Pennsylvania.

(i) Unit RF24 includes 57.3 rkm (35.6 rmi) of the Allegheny River from the French Creek confluence near Franklin, Venango County, Pennsylvania, downstream to Interstate 80 near Emlenton, Venango County, Pennsylvania.

(ii) **Note:** Map of Unit RF24 (Allegheny River) of critical habitat for rabbitsfoot follows:

Map of Unit RF24 (Allegheny River) of critical habitat for Rabbitsfoot

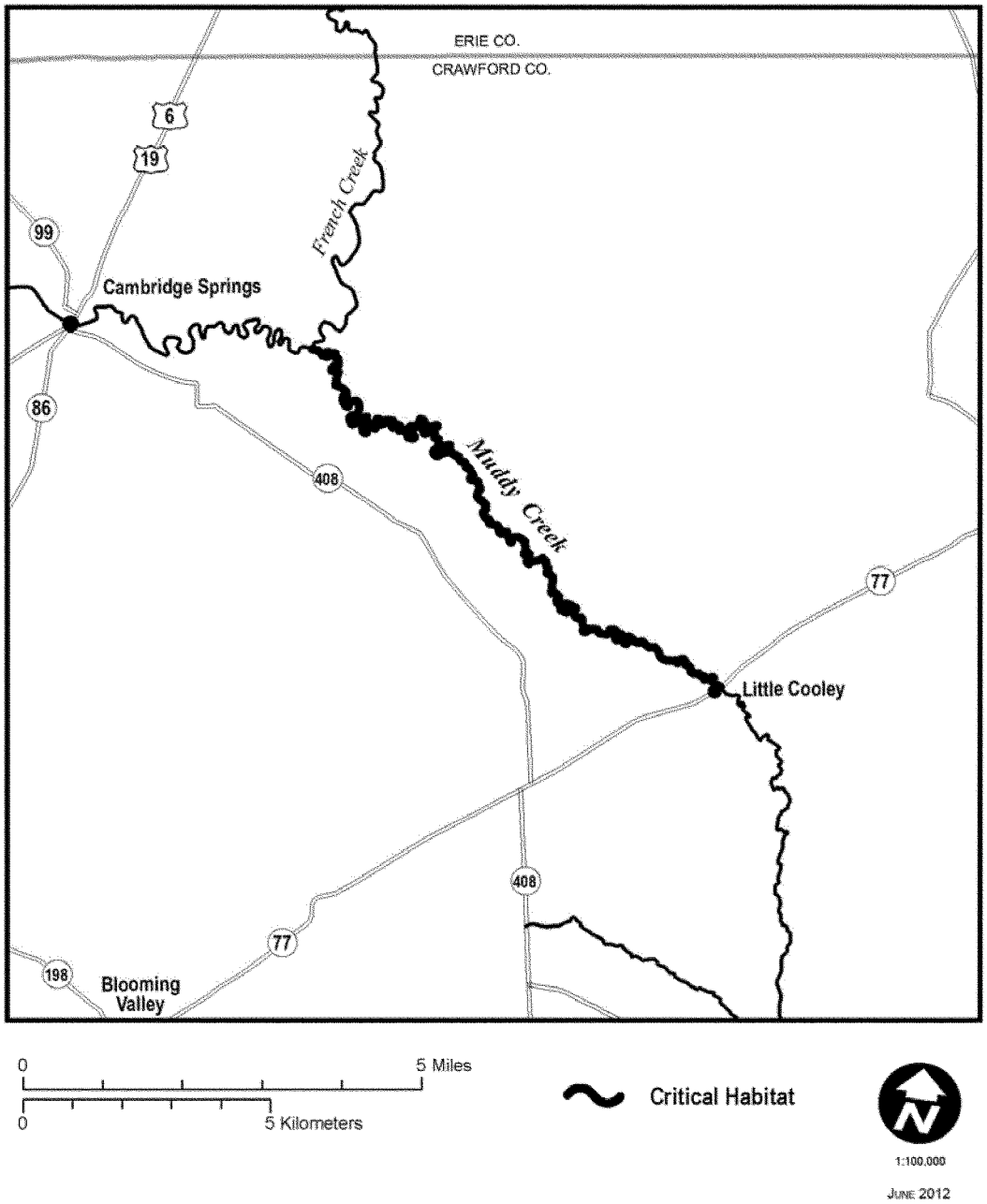


(33) Unit RF25: Muddy Creek—Crawford County, Pennsylvania.

(i) Unit RF25 includes 20.1 rkm (12.5 rmi) of Muddy Creek from Pennsylvania Highway 77 near Little Cooley, Crawford County, Pennsylvania, downstream to its confluence with French Creek east of Cambridge Springs, Crawford County, Pennsylvania.

(ii) **Note:** Map of Unit RF25 (Muddy Creek) of critical habitat for rabbitsfoot follows:

Map of Unit RF25 (Muddy Creek) of critical habitat for Rabbitsfoot

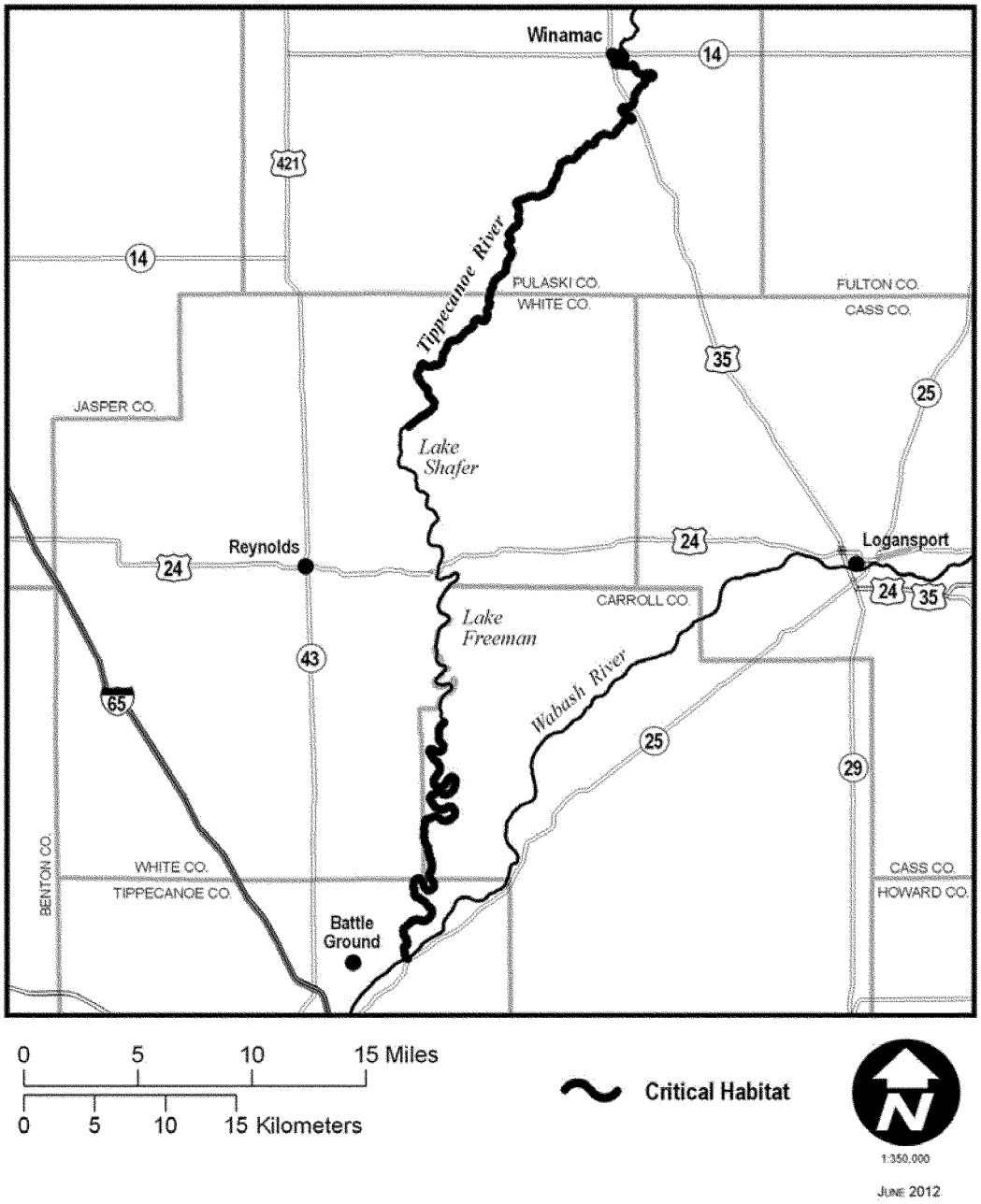


(34) Unit RF26: Tippecanoe River—Carroll, Pulaski, Tippecanoe, and White Counties, Indiana.

(i) Unit RF26 includes 75.6 rkm (47.0 rmi) of the Tippecanoe River from Indiana Highway 14 near Winamac, Pulaski County, Indiana, downstream to its confluence with the Wabash River northeast of Battle Ground, Tippecanoe County, Indiana, excluding Lakes Schafer and Freeman and the stream reach between the two lakes.

(ii) **Note:** Map of Unit RF26 (Tippecanoe River) of critical habitat for rabbitsfoot follows:

Map of Unit RF26 (Tippecanoe River) of critical habitat for Rabbitsfoot

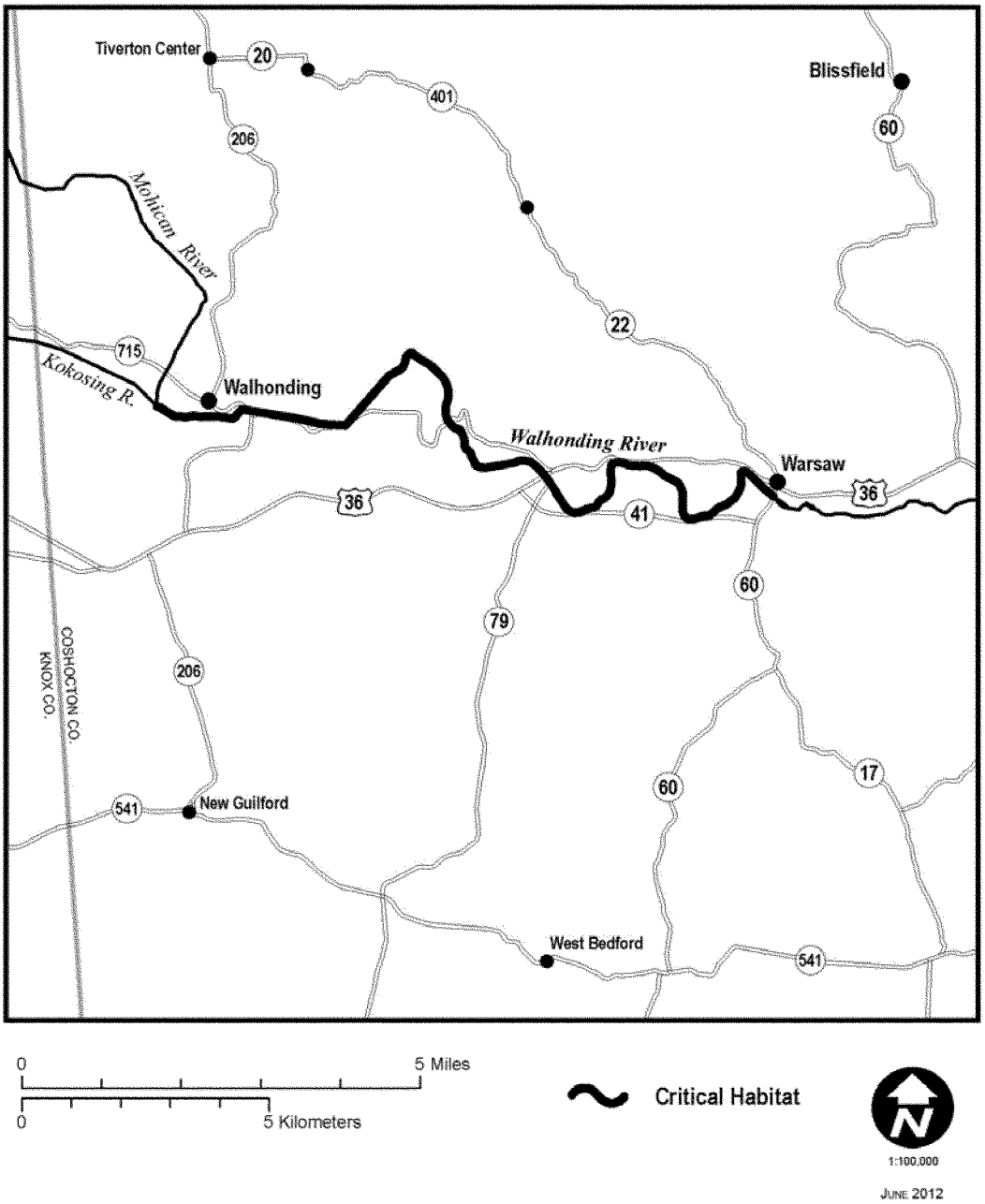


(35) Unit RF27: Walhonding River—Coshocton County, Ohio.

(i) Unit RF27 includes 17.5 rkm (10.9 rmi) of the Walhonding River from the convergence of the Kokosing and Mohican Rivers downstream to Ohio Highway 60 near Warsaw, Coshocton County, Ohio.

(ii) **Note:** Map of Unit RF27 (Walhonding River) of critical habitat for rabbitsfoot follows:

Map of Unit RF27 (Walhonding River) of critical habitat for Rabbitsfoot

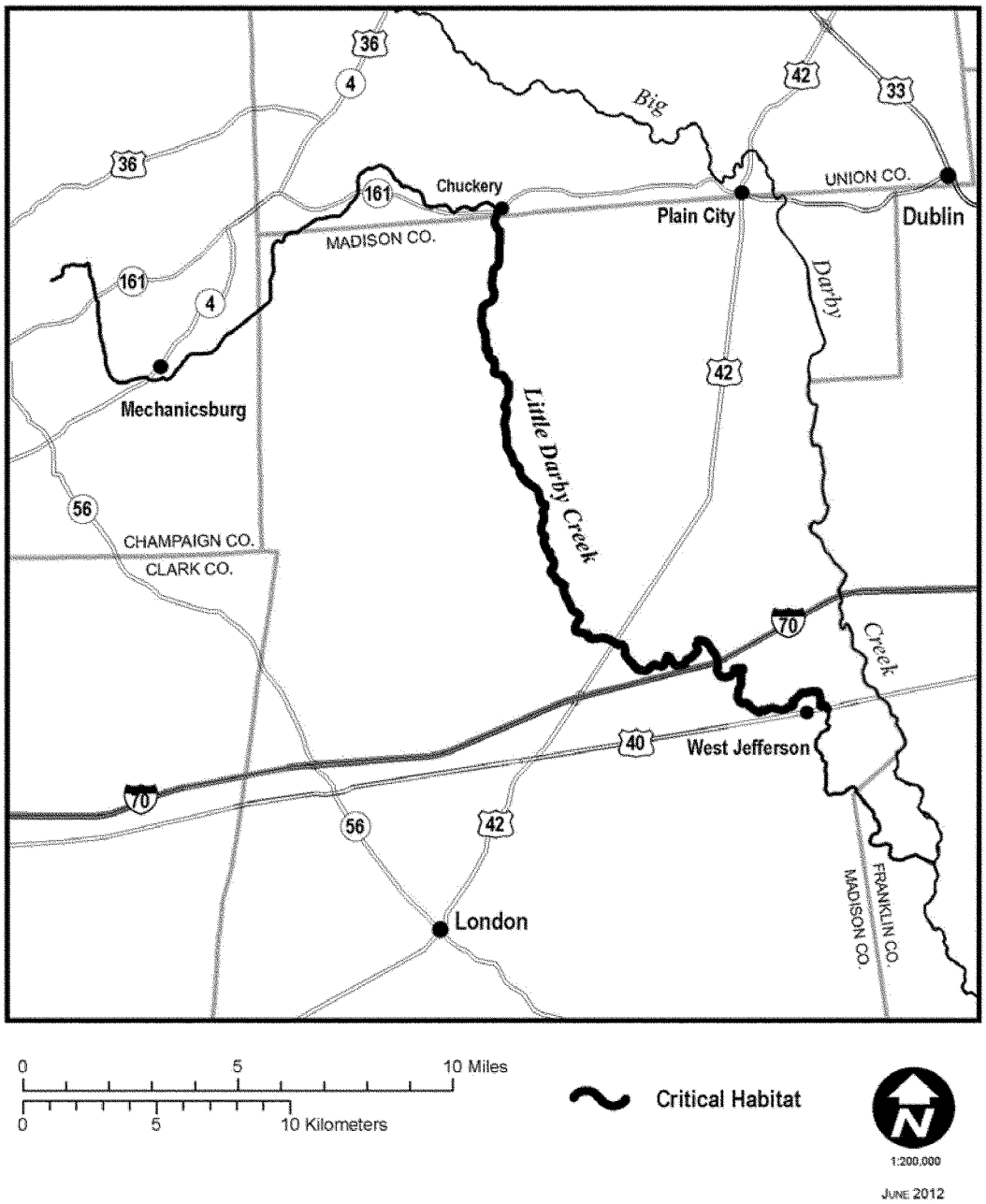


(36) Unit RF28: Little Darby Creek—Madison and Union Counties, Ohio.

(i) Unit RF28 includes 33.3 rkm (20.7 rmi) of Little Darby Creek from Ohio Highway 161 near Chuckery, Madison County, Ohio, downstream to U.S. Highway 40 near West Jefferson, Madison County, Ohio.

(ii) **Note:** Map of Unit RF28 (Little Darby Creek) of critical habitat for rabbitsfoot follows:

Map of Unit RF28 (Little Darby Creek) of critical habitat for Rabbitsfoot

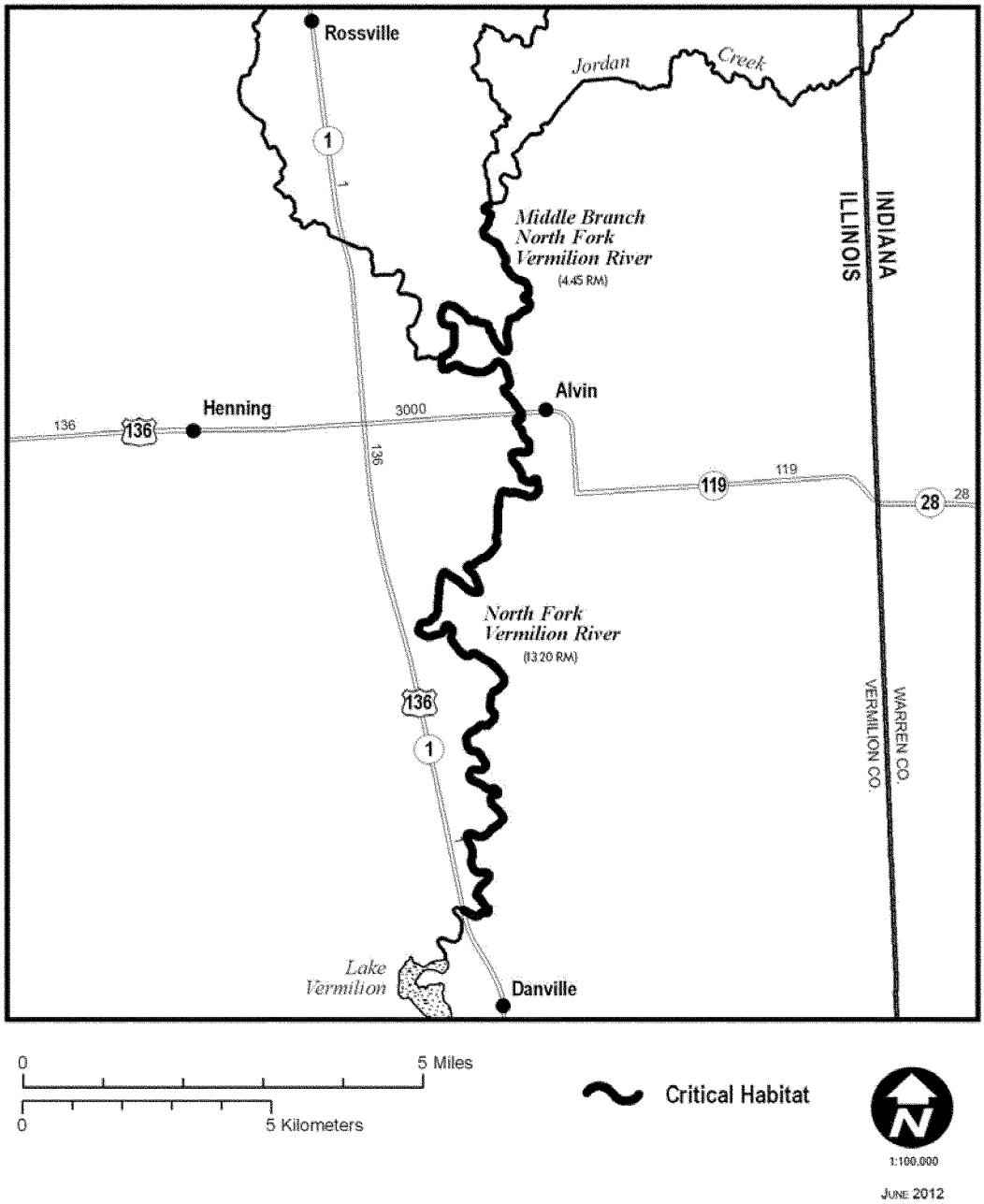


(37) Unit RF29: North Fork Vermilion River and Middle Branch North Fork Vermilion River, respectively, Vermilion County, Illinois.

(i) Unit RF29 includes 28.5 rkm (17.7 rmi) of the North Fork Vermilion River from the confluence of Middle Branch North Fork Vermilion River downstream to Illinois Highway 1 and U.S. Highway 136 upstream of Lake Vermilion, Vermilion County, Illinois. Unit RF29 also includes 7.2 rkm (4.5 rmi) of the Middle Branch North Fork Vermilion River from the Jordan Creek confluence northwest of Alvin, Illinois, downstream to its confluence with North Fork Vermilion River west of Alvin, Vermilion County, Illinois.

(ii) **Note:** Map of Unit RF29 (North Fork Vermilion River and Middle Branch North Fork Vermilion River) of critical habitat for rabbitsfoot follows:

Map for Unit RF29 (North Fork Vermilion River and Middle Branch Vermilion River) of critical habitat for Rabbitsfoot

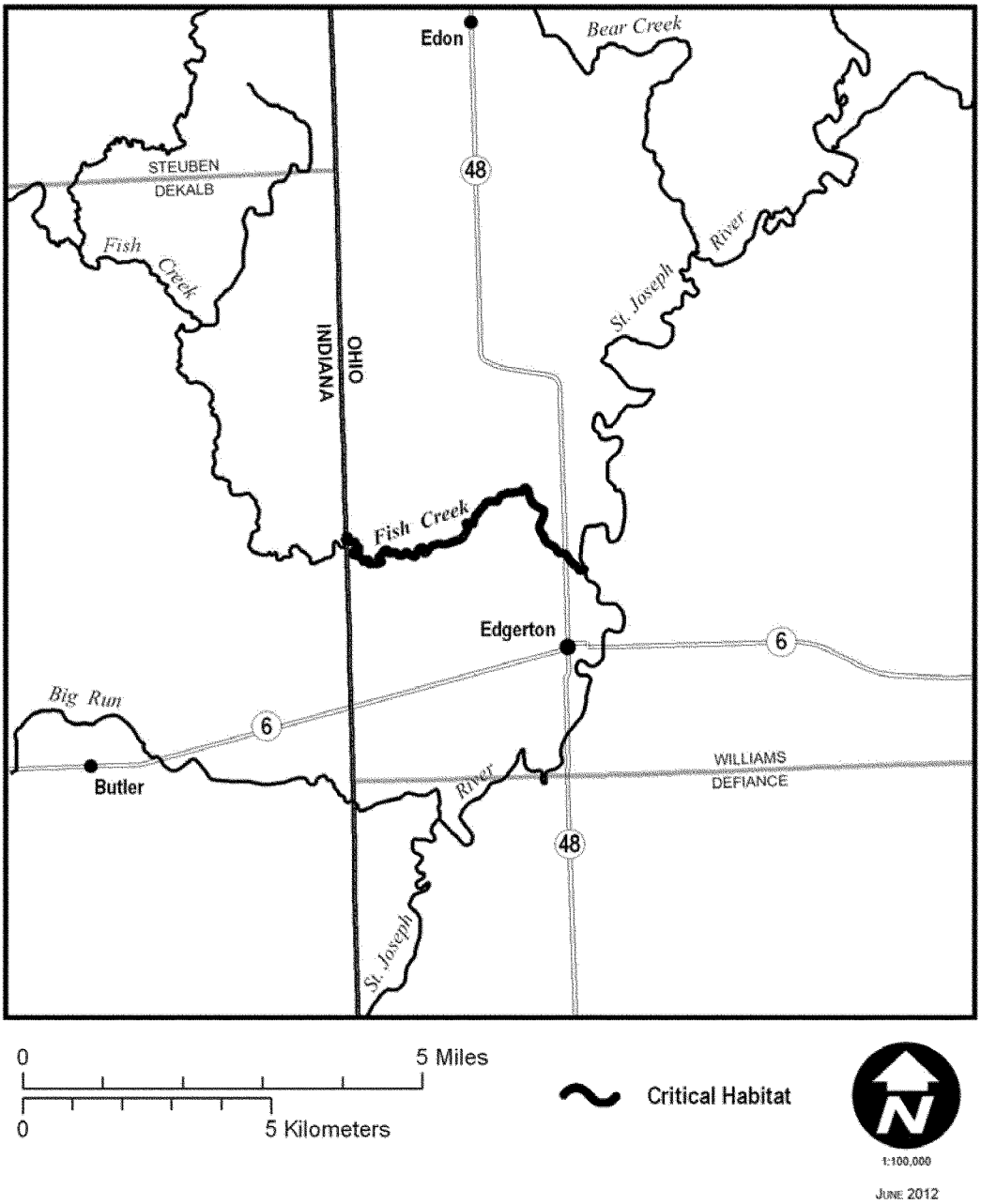


(38) Unit RF30: Fish Creek—Williams County, Ohio.

(i) Unit RF30 includes 7.7 rkm (4.8 rmi) of Fish Creek from the western (upstream) portion of Fish Creek Wildlife Area near the Indiana and Ohio State line northwest of Edgerton, Ohio, downstream to its confluence with the St. Joseph's River north of Edgerton, Williams County, Ohio.

(ii) **Note:** Map of Unit RF30 (Fish Creek) of critical habitat for rabbitsfoot follows:

Map of Unit RF30 (Fish Creek) of critical habitat for Rabbitsfoot

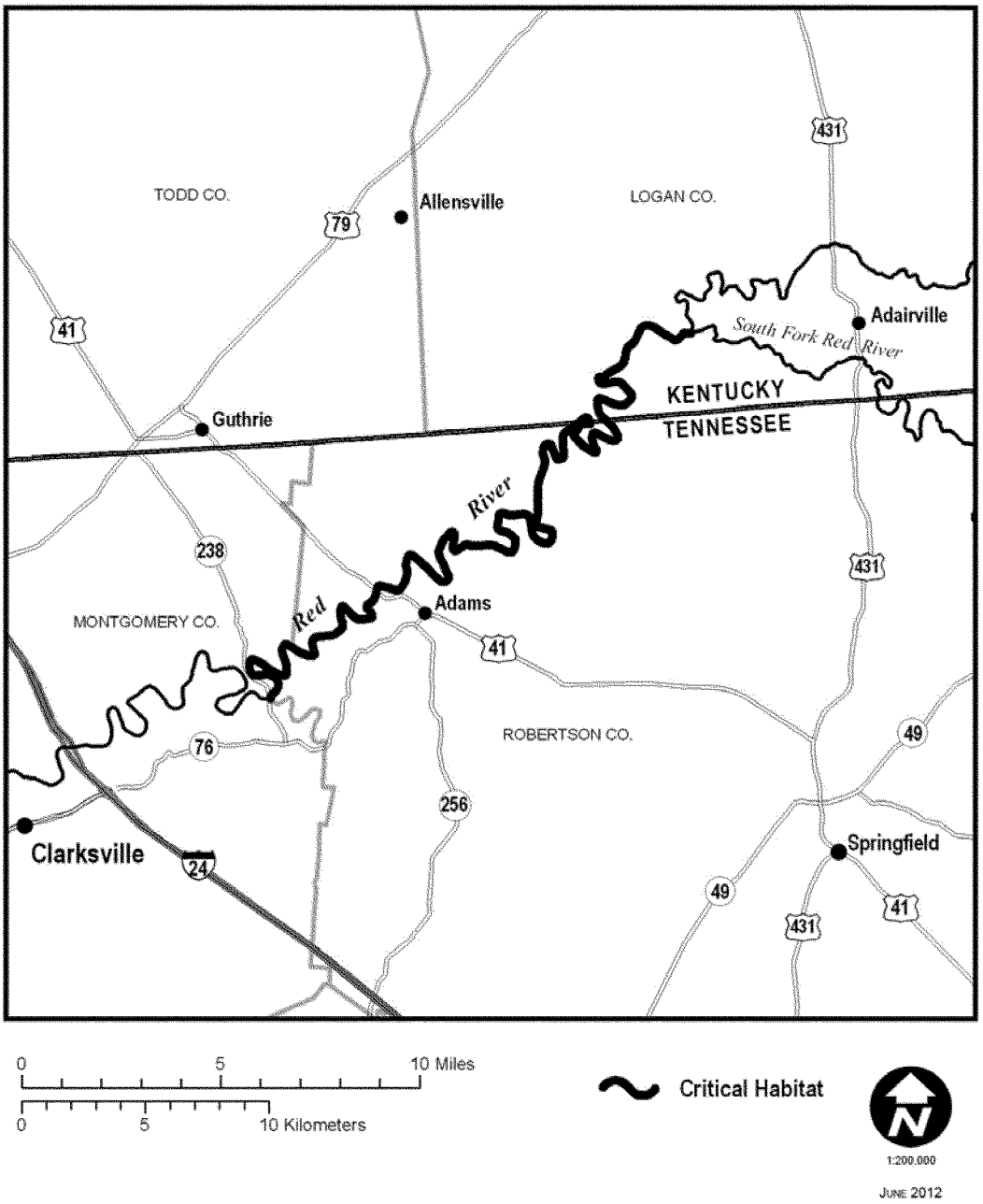


(39) Unit RF31: Red River—Logan County, Kentucky; and Robertson County, Tennessee.

(i) Unit RF31 includes 50.2 rkm (31.2 rmi) of the Red River from the South Fork Red River confluence west of Adairville, Logan County, Kentucky, downstream to the Sulphur Fork confluence southwest of Adams, Robertson County, Tennessee.

(ii) **Note:** Map of Unit RF31 (Red River) of critical habitat for rabbitsfoot follows:

Map of Unit RF31 (Red River) of critical habitat for Rabbitsfoot

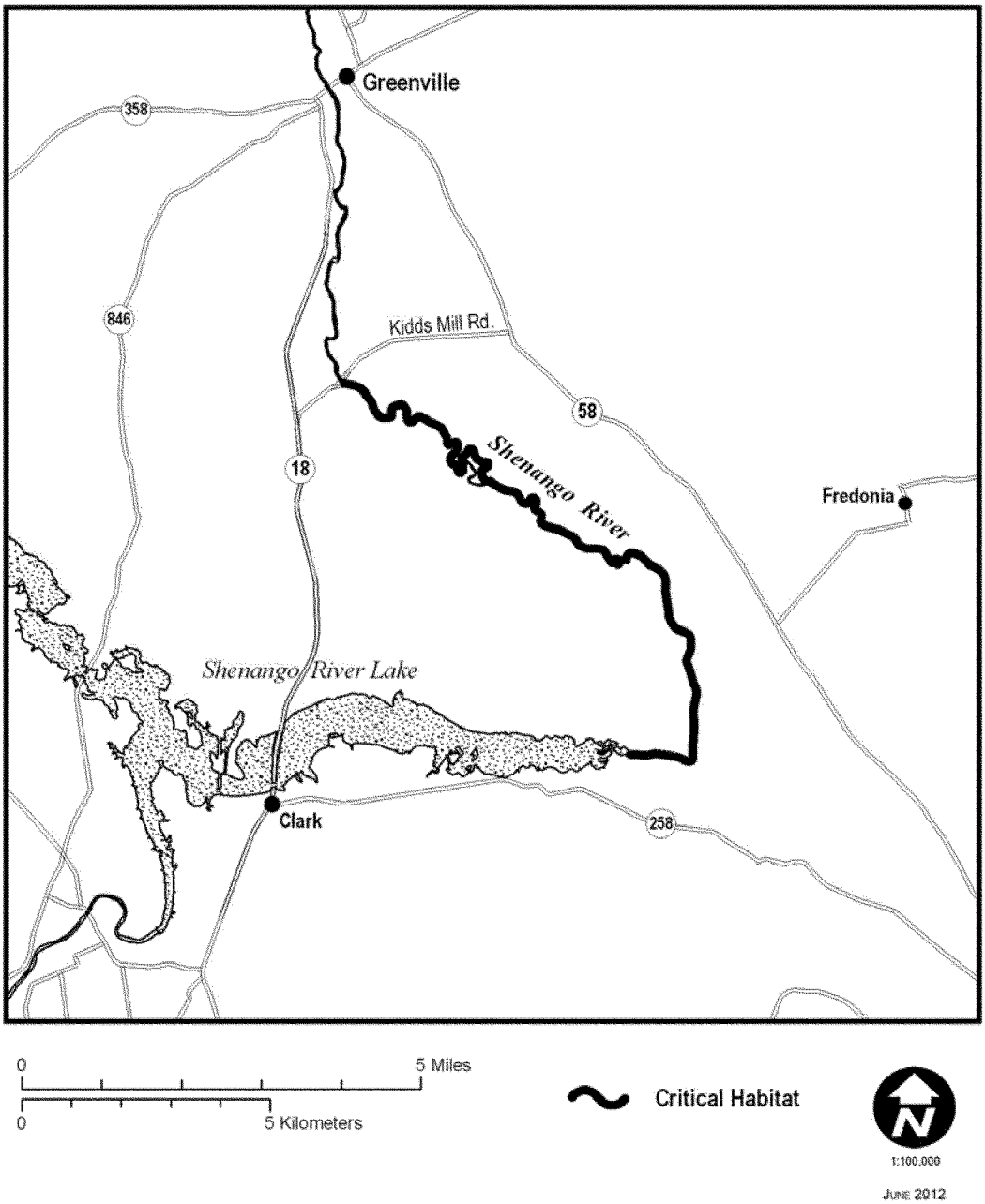


(40) Unit RF32: Shenango River—Mercer County, Pennsylvania.

(i) Unit RF32 includes 16.3 rkm (10.1 rmi) of the Shenango River from Kidds Mill Road near Greenville, Pennsylvania, downstream to the upstream point of inundation by Shenango River Lake near Big Bend, Mercer County, Pennsylvania.

(ii) **Note:** Map of Unit RF32 (Shenango River) of critical habitat for rabbitsfoot follows:

Map of Unit RF32 (Shenango River) of critical habitat for Rabbitsfoot



* * * * *

Dated: August 22, 2012.

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2012–24151 Filed 10–12–12; 8:45 am]

BILLING CODE 4310–55–c

FEDERAL REGISTER

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Part III

Environmental Protection Agency

40 CFR Part 98

Greenhouse Gas Reporting Program: Proposed Amendments and Confidentiality Determinations for Subpart I; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 98

[EPA–HQ–OAR–2011–0028; FRL–9726–7]

RIN 2060–AR61

Greenhouse Gas Reporting Program: Proposed Amendments and Confidentiality Determinations for Subpart I

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; Grant of Reconsideration.

SUMMARY: This action proposes amending the calculation and monitoring methodologies for the Electronics Manufacturing, of the Greenhouse Gas Reporting Rule. Proposed changes include revising certain calculation methods and adding a new method, amending data reporting requirements, and clarifying terms and definitions. This action also proposes confidentiality determinations for the reporting of the new and revised data elements. Many of these proposed actions are in response to a petition to reconsider specific aspects of our regulations. This document also proposes amendments to the General Provisions of the Greenhouse Gas Reporting Rule to reflect proposed changes to the reporting requirements for the Electronics Manufacturing sector.

DATES: *Comments.* Comments must be received on or before December 17, 2012.

Public Hearing. The EPA does not plan to conduct a public hearing unless requested. To request a hearing, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section by October 23, 2012. Upon such request, the EPA will hold the hearing on October 31, 2012 in the Washington, DC area starting at 9 a.m., local time. The EPA will provide further information about the hearing on its Web page if a hearing is requested.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2011–0028, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Email: GHGReportingCBI@epa.gov.*
- *Fax:* (202) 566–1741.
- *Mail:* Environmental Protection Agency, EPA Docket Center (EPA/DC), Mailcode 6102T, Attention Docket ID No. EPA–HQ–OAR–2011–0028, 1200 Pennsylvania Avenue NW., Washington, DC 20460.
- *Hand Delivery:* EPA Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue NW., Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2011–0028. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute.

Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. Send or deliver information identified as CBI to only the mail or hand/courier delivery address listed above, attention: Docket ID No. EPA–HQ–OAR–2011–0028. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *http://www.regulations.gov,* your email 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, the 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 the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave. NW., Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER GENERAL INFORMATION CONTACT: Carole Cook, Climate Change Division, Office of Atmospheric Programs (MC–6207J), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 343–9263; fax number: (202) 343–2342; email address: *GHGReportingRule@epa.gov.* For technical information, contact the Greenhouse Gas Reporting Rule Hotline at: *http://www.epa.gov/climatechange/emissions/ghgrule_contactus.htm* Alternatively, contact Carole Cook at (202) 343–9263.

SUPPLEMENTARY INFORMATION: *Additional information on submitting comments:* To expedite review of your comments by agency staff, you are encouraged to send a separate copy of your comments, in addition to the copy you submit to the official docket, to Carole Cook, U.S. EPA, Office of Atmospheric Programs, Climate Change Division, Mail Code 6207–J, Washington, DC 20460, telephone (202) 343–9263, email address: *GHGReportingRule@epa.gov.*

Worldwide Web (WWW). In addition to being available in the docket, an electronic copy of this proposal, memoranda to the docket, and all other related information will also be available through the WWW on the EPA's Greenhouse Gas Reporting Rule Web site at *http://www.epa.gov/climatechange/.*

Acronyms and Abbreviations. The following acronyms and abbreviations are used in this document.

BAMM best available monitoring methods
CAA Clean Air Act
CO_2e carbon dioxide equivalent
CBI confidential business information
CFR Code of Federal Regulations
CVD chemical vapor deposition
DRE destruction or removal efficiency
EIA Economic Impact Analysis
EPA U.S. Environmental Protection Agency
F–GHG fluorinated greenhouse gas
FDL field detection limit
FTIR Fourier transform infrared
GHG greenhouse gas
GWP global warming potential
HTF heat transfer fluid
ICR Information Collection Request
IPCC Intergovernmental Panel on Climate Change
ISBN International Standard Book Number
ISMI International SEMATECH Manufacturing Initiative

LCD liquid crystal display
MEMS micro-electro-mechanical systems
$mtCO_2e$ metric ton carbon dioxide equivalent
NAICS North American Industrial Classification System
N_2O nitrous oxide
NTTAA National Technology Transfer and Advancement Act of 1995
OMB Office of Management & Budget
PFC perfluorocarbon
POU point of use
ppbv parts per billion by volume
QMS quadrupole mass spectroscopy
RFA Regulatory Flexibility Act
RSASTP random sampling abatement system testing program
RSD relative standard deviation
SEMATECH SEmiconductor MAnufacturing TECHnology
SIA Semiconductor Industry Association
UMRA Unfunded Mandates Reform Act of 1995
U.S. United States
VCS voluntary consensus standard
WWW Worldwide Web

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I. General Information

A. What is the purpose of this action?

The EPA is proposing amendments to the calculation and monitoring methodologies for Subpart I, Electronics Manufacturing, of the Greenhouse Gas Reporting Rule (''subpart I''). In addition, the EPA is proposing conforming changes to the reporting and recordkeeping requirements of subpart I. Changes include revising certain calculation methods and adding a new method, amending data reporting requirements, and clarifying terms and definitions. The EPA is proposing these amendments to (1) Modify calculation methods and data requirements to better reflect new industry data and current practice; (2) provide additional calculation methods to allow individual facilities to choose the method best suited for their operations; (3) reduce the burden associated with existing requirements; and (4) address sensitive business information concerns raised by members of the Semiconductor Industry Association (SIA). Amendments being proposed today affect all facilities that manufacture electronics including those that manufacture semiconductors (including light emitting diodes), micro-electro-mechanical systems (MEMS), liquid crystal displays (LCDs), or photovoltaic (PV) cells. Because we are planning an effective date of January 1, 2014 for the final amendments, we are also proposing to remove the rule language for certain provisions that will not apply after 2013. Sections II and III of this preamble contain more detailed information on the background and rationale for these proposed amendments. Many of the proposed changes are in response to a petition to reconsider specific aspects of subpart I.

The EPA is also proposing confidentiality determinations for the new and revised data elements under the proposed amendments to subpart I. Section IV of this preamble provides the background and rationale for these proposed confidentiality determinations. Finally, Section V of this preamble describes the statutory and executive order requirements applicable to this action.

B. Does this action apply to me?

This proposal affects entities that are required to submit annual greenhouse gas (GHG) reports under subpart I of 40 CFR part 98 (''Part 98''). The Administrator determined that this action is subject to the provisions of Clean Air Act (CAA) section 307(d). See CAA section 307(d)(1)(V) (the provisions of CAA section 307(d) apply to ''such other actions as the Administrator may determine''). Part 98 and this action affect owners and operators of electronics manufacturing facilities. Affected categories and entities include those listed in Table 1 of this preamble.

TABLE 1—EXAMPLES OF AFFECTED ENTITIES BY CATEGORY

Category	NAICS	Examples of affected facilities
Electronics Manufacturing	334111	Microcomputers manufacturing facilities.
	334413	Semiconductor, photovoltaic (solid-state) device manufacturing facilities.
	334419	Liquid crystal display unit screens manufacturing facilities.
	334419	Micro-electro-mechanical systems manufacturing facilities.

Table 1 of this preamble lists the types of entities that potentially could be affected by the reporting requirements under the subpart covered by this proposal. However, this list is not intended to be exhaustive, but rather provides a guide for readers regarding facilities likely to be affected by this action. Other types of facilities not listed in the table could also be subject to reporting requirements. To determine whether you are affected by this action,

you should carefully examine the applicability criteria found in 40 CFR part 98, subpart A as well as 40 CFR part 98, subpart I. If you have questions regarding the applicability of this action to a particular facility, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

C. Legal Authority

The EPA is proposing rule amendments to Part 98 under its existing CAA authority, specifically authorities provided in CAA section 114. As stated in the preamble to the 2009 final rule (74 FR 56260, October 30, 2009) and the Response to Comments on the Proposed Rule, Volume 9, Legal Issues, CAA section 114 provides the EPA broad authority to obtain the information in Part 98, including subpart I, because such data would inform and are relevant to the EPA's carrying out a wide variety of CAA provisions. As discussed in the preamble to the initial Part 98 proposal (74 FR 16448, April 10, 2009), CAA section 114(a)(1) authorizes the Administrator to require emissions sources, persons subject to the CAA, manufacturers of control or process equipment, or persons whom the Administrator believes may have necessary information to monitor and report emissions and provide such other information the Administrator requests for the purposes of carrying out any provision of the CAA.

In addition, the EPA is proposing confidentiality determinations for proposed data elements in subpart I, under its authorities provided in sections 114, 301, and 307 of the CAA. As mentioned, CAA section 114 provides the EPA authority to obtain the information in Part 98, including those in subpart I. Section 114(c) requires that the EPA make publicly available information obtained under section 114 except for information (excluding emission data) that qualify for confidential treatment.

The Administrator has determined that this action (proposed amendments and confidentiality determinations) is subject to the provisions of section 307(d) of the CAA.

D. What should I consider as I prepare my comments to the EPA?

1. Submitting Comments That Contain CBI

Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to the EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. Send or deliver information identified as CBI to only the mail or hand/courier delivery address listed above, attention: Docket ID No. EPA–HQ–OAR–2011–0028.

If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

2. Tips for Preparing Your Comments

When submitting comments, remember to:

Identify the rulemaking by docket number and other identifying information (e.g., subject heading, **Federal Register** date and page number).

Follow directions. The EPA may ask you to respond to specific questions or organize comments by referencing a CFR part or section number.

Explain why you agree or disagree, and suggest alternatives and substitute language for your requested changes.

Describe any assumptions and provide any technical information and/or data that you used.

If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow us to reproduce your estimate.

Provide specific examples to illustrate your concerns and suggest alternatives.

Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

Make sure to submit your information and comments by the comment period deadline identified in the preceding section titled **DATES**. To ensure proper receipt by the EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

To expedite review of your comments by agency staff, you are encouraged to send a separate copy of your comments, in addition to the copy you submit to the official docket, to Carole Cook, U.S. EPA, Office of Atmospheric Programs, Climate Change Division, Mail Code 6207–J, Washington, DC, 20460, telephone (202) 343–9263, email *GHGReportingCBI@epa.gov*. You are also encouraged to send a separate copy of your CBI information to Carole Cook at the provided mailing address in the **FOR FURTHER INFORMATION CONTACT** section. Please do not send CBI to the electronic docket or by email.

II. Background for Proposed Amendments to GHG Monitoring and Calculation Methodologies and Other Technical Revisions

A. Background for Proposed Amendments

The GHG reporting requirements for subpart I were finalized on December 1, 2010 (75 FR 74774, hereafter referred to as ''final subpart I rule''). Following the publication of the final subpart I rule in the **Federal Register**, the SIA (hereafter referred to as ''the Petitioner'') submitted on January 31, 2011 an administrative petition titled ''Petition for Reconsideration and Request for Stay Pending Reconsideration of Subpart I of the Final Rule for Mandatory Reporting of Greenhouse Gases'' (hereafter referred to as the ''Petition for Reconsideration'', available in docket EPA–HQ–OAR–2009–0927), requesting reconsideration of numerous provisions in the final subpart I rule. Since that petition was filed, the EPA has published five actions related to subpart I.

- Additional Sources of Fluorinated GHGs: Extension of Best Available Monitoring Provisions for Electronics Manufacturing (76 FR 36339, published June 22, 2011). Granted the Petition for Reconsideration with respect to the provisions for the use of Best Available Monitoring Methods (BAMM). Extended three of the deadlines in subpart I related to using the BAMM provisions from June 30, 2011 to September 30, 2011.
- Changes to Provisions for Electronics Manufacturing to Provide Flexibility (76 FR 59542, published September 27, 2011). Amended the calculation and monitoring provisions for the largest semiconductor manufacturing facilities to provide flexibility through the end of 2013 and extended two deadlines in the BAMM provisions.
- Proposed Confidentiality Determinations for Subpart I and Proposed Amendments to Subpart I Best Available Monitoring Methods Provisions (77 FR 10434, published February 22, 2012). Re-proposed confidentiality determinations for data elements in subpart I and proposed amendments to the provisions regarding

the calculation and reporting of emissions from facilities that use BAMM.

- Revisions to Heat Transfer Fluid Provisions (77 FR 10373, published February 22, 2012). Amended the definition of fluorinated heat transfer fluids (fluorinated HTFs) and the provisions to estimate and report emissions from fluorinated HTFs.
- Final Confidentiality Determinations for Nine Subparts and Amendments to Subpart A and I under the Mandatory Reporting of Greenhouse Gases Rule; Final Rule (77 FR 48072, published August 13, 2012). Final confidentiality determinations for data elements in subpart I and final amendments to the provisions regarding the calculation and reporting of emissions from facilities that use BAMM.

B. How would these amendments apply to 2012 and 2013 reports?

The EPA intends to address the comments on these proposed amendments and publish any final amendments in 2013. Facilities would be required to follow one of the new or revised methods to estimate emissions beginning in 2014. The first reports of emissions estimated using the new methods would be submitted in 2015. For the reports for reporting years 2012 and 2013, reporters would be expected to calculate emissions and other relevant data using the existing requirements under Part 98. These existing requirements include the flexibility for the largest semiconductor manufacturing facilities added in the September 27, 2011 rule titled ''Changes to Provisions for Electronics Manufacturing to Provide Flexibility.''

Given the timing and extent of the proposed changes, and the likelihood that the final rule will not be published until the second half of 2013, we have determined that it is not feasible for sources to implement these changes for reporting year 2013. The proposed revisions would change and replace existing calculation methods and regulatory requirements, and would greatly affect how emissions are calculated and the data that would be reported. For example, we are proposing to add a new stack testing option to measure and calculate fab-level fluorinated greenhouse gas (F–GHG) emissions, revise process categories and associated gas utilization rates and by-product formation rates, and eliminate existing methods that require using recipe-specific gas utilization rates and by-product formation rates to calculate emissions. Because of the different data collection requirements compared to the current subpart I requirements, we do not anticipate that facilities would have enough time after the final rule is published to schedule stack tests, revise their current tracking and monitoring methods, or revise the data collection methods for reporting year 2013.

Thus, reporters using the current methods in subpart I would continue to use these methods for collecting data and calculating emissions for 2013 that are reported in 2014. Reporters would be required to select calculation methods based on any final revisions to the rule to calculate the emissions for 2014 that are reported in 2015.

III. Summary and Rationale for Proposed Amendments to GHG Monitoring and Calculation Methodologies and Other Revisions

A. Summary of Proposed Rule Amendments in Response to Petition for Reconsideration

In this action, we are granting reconsideration on all issues in the Petition for Reconsideration not already addressed in the final rules published June 22, 2011 (Additional Sources of Fluorinated GHGs: Extension of Best Available Monitoring Provisions for Electronics Manufacturing); September 27, 2011 (Changes to Provisions for Electronics Manufacturing to Provide Flexibility); and August 13, 2012 (Confidentiality Determinations for Subpart I and Amendments to Subpart I Best Available Monitoring Methods Provisions). Those final rules are described in Section II.A of this preamble. Section III.B of this preamble discusses the specific issues raised in the Petition for Reconsideration that are addressed in this action and the changes the EPA is proposing in response to the petition. The EPA intends to complete its response to the Petition for Reconsideration through this rulemaking.

Following consideration of the issues raised in the Petition for Reconsideration and data presented by the Petitioner, the EPA is proposing certain amendments to subpart I. Table 2 of this preamble presents a summary of the outstanding issues raised by the Petitioner and the corresponding proposed changes to the rule. Section III.B of this preamble provides further detail including the EPA's rationale for each proposed change.

TABLE 2—PROPOSED CHANGES TO THE RULE BASED ON PETITION FOR RECONSIDERATION AND THE PETITIONER'S MAY 26, 2011 LETTER SUPPORTING THE DEVELOPMENT OF THE RULE CHANGES TO PROVIDE FLEXIBILITY THAT WERE FINALIZED SEPTEMBER 27, 2011

Technical issue	Proposed changes to rule
Rows 2 and 12 apply to semiconductor facilities only. All other rows apply to all electronics manufacturing facilities.	
1. Addition of an emission estimation method as an alternative to recipe-specific emission factors. (See Section III.B.1).	Revising 40 CFR 98.93 to provide an option for using stack testing as an alternative method for determining fab-level emission factors for determining fab-level F–GHG emissions for all electronics manufacturing facilities. Revising 40 CFR 98.94 to 98.98 to include the monitoring methods, QA/QC, missing data, reporting, recordkeeping, and definition requirements for the stack testing alternative.
2. Revision of default gas utilization rates and by-product formation rates for the plasma etch process type for semiconductor manufacturing. (See Section III.B.2).	Revise 40 CFR 98.92(a) and 40 CFR 98.93(a)(2) and (a)(4) to combine wafer cleaning and plasma etch emission processes and associated gas utilization rates and by-product formation rates. Revise Tables I–3 and I–4 for semiconductor manufacturing with new gas utilization rates and by-product formation rates based on gas type and process type or sub-type using additional data submitted by the Petitioner.

TABLE 2—PROPOSED CHANGES TO THE RULE BASED ON PETITION FOR RECONSIDERATION AND THE PETITIONER'S MAY 26, 2011 LETTER SUPPORTING THE DEVELOPMENT OF THE RULE CHANGES TO PROVIDE FLEXIBILITY THAT WERE FINALIZED SEPTEMBER 27, 2011—Continued

Technical issue	Proposed changes to rule
3. Removing recipe-specific emission factors: Requirements for (1) Largest semiconductor manufacturing facilities (defined as those facilities with annual manufacturing capacity of greater than 10,500 m^2 of substrate) to use recipe-specific gas utilization rates and by-product formation rates to estimate emissions from plasma etch processes; and (2) semiconductor facilities using wafers greater than 300 mm diameter to estimate all of their emissions from processes that use fluorinated GHGs using recipe-specific gas utilization rates and by-product formation rates. (See Section III.B.3).	Revising 40 CFR 98.93, 98.94, 98.96, and 98.97 to remove provisions to use recipe-specific gas utilization rates and by-product formation rates and to combine the wafer cleaning process type with the plasma etch process type. Under this proposal, all semiconductor manufacturing facilities, regardless of manufacturing capacity, would have the option to use default gas utilization rates and by-product formation rates to estimate emissions from the plasma etching/wafer cleaning process type and from the following three subtypes of the chamber cleaning process type: in-situ plasma chamber cleaning, remote plasma chamber cleaning, and in-situ thermal chamber cleaning.
4. Calculation for determining manufacturing capacity. (See Section III.B.4).	Revising the terminology and definition of *maximum designed substrate starts* in 40 CFR 98.98 to be *maximum substrate starts,* meaning for the purposes of Equation I–5 in subpart I, the maximum quantity of substrates, expressed as surface area, that could be started each month in a reporting year based on the equipment installed in that facility and assuming that the equipment were fully utilized. Manufacturing equipment would be considered installed when it is on the manufacturing floor and connected to the required utilities.
5. Reporting provisions for facilities that have integrated production and research and development (R&D) activities. (See Section III.B.5).	Facilities would be allowed to report integrated production and R&D emissions and, if doing so, would be required to provide an estimate of the fraction of total emissions from their R&D activities under 40 CFR 98.96.
6. Requirements for the accuracy and precision of the equipment measuring gas consumption. (See Section III.B.6).	Removing the requirement for one percent of full-scale accuracy for ''all flow meters, weigh scales, pressure gauges and thermometers* * *'' in 40 CFR 98.93(i) and referencing the calibration accuracy requirements in 40 CFR 98.3(i) for all measurement devices used to measure quantities that are monitored in subpart I.
7. Provisions for re-calculating the facility-wide gas specific heel factor and handling exceptional circumstances. (See Section III.B.7).	Revising the criteria for an ''exceptional circumstance'' in 40 CFR 98.94(b)(4) from 20 percent of the original trigger point for change out to 50 percent for small cylinders (containing less than 9.08 kilograms (20 pounds) of gas). For large containers, the ''exceptional circumstance'' would remain as a change out point that differs by 20 percent of the trigger point used to calculate the gas specific heel factor. Clarifying the requirements for recalculating the facility-wide heel factor.
8. Requirements for verifying the model used to apportion gas consumption. (See Section III.B.8).	Revising 40 CFR 98.94(c) to allow for development of apportioning factors by using direct measurements using gas flow meters or weigh scales, to measure process sub-type, process type, stack system, or fab-specific input gas consumption. Revising 40 CFR 98.94(c)(2)(i) to allow reporters to select a period of the reporting year and its duration that is representative of normal operations for the model verification. The representative period would be at least 30 days in duration, and may be as long as one year. The model would be verified using the F–GHG used in the greatest quantity, and would be corrected if it does not meet the verification requirements. A facility would be able to use two F–GHG for model verification if they both meet the criteria and if at least one of them is used in the greatest quantity. Increasing the maximum allowed difference between the modeled and actual gas consumption in the verification process from 5 percent to 20 percent.
9. Provisions for calculating N_2O emissions. (See Section III.B.9)	Revising 40 CFR 98.93(b), 40 CFR 98.96(c)(3) and 40 CFR 98.96(k) to clarify that facilities must calculate annual fab-level N_2O emissions from the chemical vapor deposition (CVD) process type and from the aggregate of other electronics manufacturing production processes using default emission factors (facilities are not required to report emissions from each CVD process and from each other N_2O using process).
10. Provisions for reporting controlled emissions from abatement systems. (See Section III.B.10).	Revising 40 CFR 98.94(f) to allow facilities to use either revised default destruction or removal efficiency (DRE) values or to establish a site-specific DRE value for each combination of input gas or by-product gas and process type or sub-type using directly measured DREs. Providing alternative methods for a facility to directly measure DRE.

TABLE 2—PROPOSED CHANGES TO THE RULE BASED ON PETITION FOR RECONSIDERATION AND THE PETITIONER'S MAY 26, 2011 LETTER SUPPORTING THE DEVELOPMENT OF THE RULE CHANGES TO PROVIDE FLEXIBILITY THAT WERE FINALIZED SEPTEMBER 27, 2011—Continued

Technical issue	Proposed changes to rule
11. Provisions for determining and calculating abatement system uptime. (See Section III.B.11).	Revising Equation I–15 to allow reporters to calculate the average uptime for the group of systems for each combination of input gas or by-product gas and process type or sub-type, using the same process categories in which F–GHG use and emissions are calculated. Abatement system uptime monitoring and calculation would be simplified by assuming that connected process tools operate with F–GHGs or N_2O flowing continuously once they are installed; this would apply for all methods (both default emission factors and stack testing).
12. Absence of a method for updating gas utilization rates and by-product formation rates and DRE values for semiconductor manufacturing. (See Section III.B.12).	Revising the data reporting requirements in 40 CFR 98.96 to require certain semiconductor manufacturing facilities to provide a report to the EPA every 3 years covering technology changes at the facility that may affect gas utilization rates and by-product formation rates or DRE values.

The EPA is not staying subpart I pending reconsideration as requested in the Petition for Reconsideration because the EPA believes that the concerns prompting the stay request have been addressed through the BAMM process and through the September 27, 2011 final rule (Changes to Provisions for Electronics Manufacturing to Provide Flexibility), which amended the calculation and monitoring provisions for the largest semiconductor manufacturing facilities to provide flexibility through the end of 2013. As stated in the preamble to the September 27, 2011 final rule, the EPA intends to finalize revisions to subpart I in 2013 so that semiconductor manufacturing facilities can implement the revised subpart I beginning in 2014. The EPA is not reopening the entirety of subpart I for comment but is taking comment only on the remaining issues raised by the Petitioner, as listed in Table 2 of this preamble, and the proposed amendments described in Section III.B of this preamble, with the exception that we request comment on whether new data are available to update the default gas utilization rates and by-product formation rates for the facilities that manufacture MEMS, LCDs, or PV cells (see Section III.B.2 of this preamble), and whether new data are available on measured DRE values for abatement systems used at MEMS, LCD, or PV cell manufacturing facilities (see Section III.B.10 of this preamble).

In summary, the major changes we are proposing are to revise the calculation methods to provide all electronics manufacturing facilities the choice of two methods to calculate annual emissions and to remove the option for electronics manufacturing facilities to determine and use recipe-specific gas utilization rates and by-product formation rates. The proposed rule would provide the option for reporters to use either default gas utilization rates and by-product formation rates, which the EPA is proposing to revise for semiconductor manufacturing facilities to reflect new industry data provided to the EPA, or to conduct stack testing to establish site-specific emission factors for F–GHGs that would be used to calculate F–GHG emissions. The proposed amendments would ensure that the EPA receives accurate and current facility-specific data. The proposed amendments also include provisions for the periodic review of industry advances and changes that may impact the default gas utilization rates and by-product formation rates and default DRE values used to estimate emissions, to encourage the continued collection of data that represent current industry practices. Additionally, the proposed stack testing approach allows for estimation of emissions based on periodic direct measurements of stack emissions from facilities. These proposed amendments would allow the EPA to accurately characterize and analyze GHG emissions from facilities in the electronics manufacturing industry while reducing burden to the industry.

B. Rationale for Proposed Amendments

1. Stack Testing as an Alternative Emission Monitoring Method for Facilities that Manufacture Electronics

After subpart I was promulgated, the Petitioner expressed interest in developing a method to use stack testing to quantify F–GHG emissions from electronics manufacturing facilities as an alternative to the recipe-specific method in the final subpart I rule. Specifically, the Petitioner proposed an approach in which they would (1) develop emission factors by measuring emissions from their stacks over a certain period and dividing them by an activity metric (e.g., gas consumption) measured over the same period; and (2) estimate annual emissions by multiplying the emission factors by the appropriate annual activity. They noted that stack testing is already widely accepted in the industry and commonly used to quantify non-F–GHG emissions for compliance with other state and federal air programs. They also noted that in most facilities, a large number of tools using F–GHGs are exhausted through a relatively small number of stacks, and stack testing in such a situation could be at least as accurate as the other methods in the final subpart I rule, and could be more cost-effective for the facility depending on how often testing is conducted (see ''Technical Support for the Stack Test Option for Estimating Fluorinated Greenhouse Gas Emissions from Electronics Manufacturing Facilities under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028).

The EPA recognizes that stack testing is an important tool that has historically been required for specified non-F–GHG pollutants to determine a facility's compliance with emission limits, capture or control efficiencies, or monitoring parameters established pursuant to certain provisions of the CAA. Stack testing performed and verified according to the procedures in validated EPA methods is considered a reliable method to quantify facility emissions as long as a robust and predictable relationship is found between emissions and the selected activity metric. Because stack testing is a direct measurement of facility emissions, it has the potential to provide a high-quality characterization

of the emissions from the electronics manufacturing industry. Electronics manufacturers are already using stack testing to comply with other air rules and operating permit requirements. For example, semiconductor manufacturers subject to 40 CFR part 63, subpart BBBBB, National Emission Standards for Hazardous Air Pollutants for Semiconductor Manufacturing, are already required to perform stack testing using EPA Method 320 at 40 CFR part 63, appendix A (hereafter ''EPA Method 320''), among others, to comply with subpart BBBBB, although they are not required to use EPA Method 320 to quantify F–GHG emissions.

To determine whether stack testing might be appropriate to quantify F–GHG emissions from electronics manufacturing, EPA evaluated whether it demonstrates (1) The ability of a method and technology to accurately measure F–GHG emissions from electronics manufacturing facilities during the test; (2) the ability to accurately measure a corresponding activity metric during the test; and (3) the existence of a reasonably constant and predictable relationship between F–GHG emissions and the chosen activity metric. The first and third factors were particularly important given the relatively low concentrations of F–GHGs in exhaust streams at electronics facilities and the potential variability of emission factors over time at those facilities as the mix of products and processes changed over time.

The Petitioner provided data from stack testing and supporting data on F–GHG consumption and production to demonstrate that that stack testing can be used to estimate annual emissions. These data were provided to the EPA in support of the Petitioner's request in the petition for reconsideration to add a stack testing option to subpart I for semiconductor manufacturing. The data were collected using EPA Method 320, ''Measurement Of Vapor Phase Organic And Inorganic Emissions By Extractive Fourier Transform Infrared (FTIR) Spectroscopy'' (40 CFR part 63, appendix A), at three companies manufacturing a variety of semiconductor products on different sized wafers. The data provided to the EPA demonstrated that F–GHG emissions are a direct and reasonably constant function of F–GHG consumption over the test period. Moreover, data from multiple tests at two facilities showed that emission factors (kg gas emitted/kg gas consumed) did not vary widely in the absence of significant technology and abatement level changes, even though the mix of products at one of the facilities appeared likely to have changed during the months since the previous test. This indicates that emissions from one period at a facility, when converted to emission factors based on F–GHG consumption, can be used to determine emissions at the same facility over an extended period of time (i.e., one year, and longer under certain circumstances), and can be scaled to estimate annual F–GHG emissions.

The data provided by the Petitioner (see ''Technical Support for the Stack Test Option for Estimating Fluorinated Greenhouse Gas Emissions from Electronics Manufacturing Facilities under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028) demonstrated that current FTIR methods, such as EPA Method 320, have sufficient sensitivity, when used in conjunction with detectors optimized to detect F–GHGs, to provide accurate measurements of F–GHG emissions. EPA Method 320 can be used to measure concentrations of the commonly emitted F–GHGs down to a few parts per billion by volume (ppbv), and the field detection limits for the same F–GHGs can be as low as 1 or 2 ppbv.

The same data provided by the Petitioner provided evidence that F–GHG consumption can be accurately measured or estimated over the proposed test period of 8 hours as long as varying temperatures, non-ideal gas behavior, and low drawdown rates are appropriately accounted for. (Methods for accounting for these are discussed in ''*Stack testing requirements*'' in Section III.B.1 of this preamble.) This ensures that gas consumption can be accurately determined, either directly for the test period or by interpolating from longer-term consumption data. Accurate gas consumption measurements ensure that gas consumption can be used with the stack emission measurements as the basis for emission factors to calculate annual emissions.

Finally, the data provided by the Petitioner demonstrated that emissions estimated from stack testing were in agreement with emissions for the same facilities estimated using other methods, such as the default gas utilization rates and by-product formation rate method in subpart I (see ''Technical Support for the Stack Test Option for Estimating Fluorinated Greenhouse Gas Emissions from Electronics Manufacturing Facilities under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028).

The EPA is proposing to revise subpart I to include a stack testing option for estimating annual F–GHG emissions at 40 CFR 98.93(i). This option would apply to all electronic manufacturing facilities, including those making semiconductors, MEMS, LCDs, and PV cells. We are not proposing this option for estimating N_2O emissions; a review of the stack test data provided to the EPA revealed inconsistent results for stack measurements of N_2O emissions for which the cause could not be determined (see ''Technical Support for the Stack Test Option for Estimating Fluorinated Greenhouse Gas Emissions from Electronics Manufacturing Facilities under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028). Therefore, we do not have sufficient data to show that stack testing is appropriate for development of N_2O emission estimates. However, the rule already includes an option based on default emission factors for estimating N_2O emissions (see 40 CFR 98.93(b)). (Proposed amendments to the provisions and emission factors for estimating N_2O emissions are discussed in Section III.B.9 of this preamble.)

In this action, we are also proposing to allow all electronics manufacturing facilities to use separate methods (i.e., stack testing or default utilization and by-product formation rates) to estimate emissions from each fab within a single facility. Facilities would report GHG emissions on a fab basis. Many electronics manufacturing facilities are divided into separate fabs, which generally consist of separate buildings constructed at different times in which the processing tools are located. Most facilities have only one fab, but some facilities have two or more fabs. Each fab may be dedicated to a different product type, or may represent different generations of manufacturing technology because they were built at different times. In the semiconductor manufacturing industry, separate fabs may use different size wafers.

Because of differences among fabs (e.g., differences in the number of stacks), a reporter may wish to use different methods to estimate emissions from each fab. We are proposing to allow reporters to use different methods for separate fabs, but would also require that emissions be reported at the fab level. We are proposing to define a ''fab'' in 40 CFR 98.98 as ''the portion of an electronics manufacturing facility located in a separate physical structure that began manufacturing on a certain date.''

Selection of Stack Systems for Testing. The EPA recognizes that given the diversity of facility designs among electronics manufacturers, some facilities may have some stacks that account for only a small percent of total facility emissions. In order to avoid the burden of testing a large number of stacks, the proposed amendments

would not require that all stacks be tested. Instead, the reporter would develop a preliminary estimate of the annual emissions from each ''stack system'' in a fab and would not be required to test those stack systems that account for relatively small emissions. A stack system would be considered to be one or more stacks that are connected by a common header or manifold, through which a fluorinated GHG-containing gas stream originating from one or more fab processes is, or has the potential to be, released to the atmosphere. For purposes of subpart I, stack systems would not include emergency vents or bypass stacks through which emissions are not usually vented under typical operating conditions.

Under the proposed rule, the reporter would develop a preliminary estimate of F–GHG emissions from each stack system on a metric ton carbon dioxide equivalent ($mtCO_2e$) basis using the gas consumption in the tools associated with the stack system and gas utilization rates and by-product formation rates in proposed Tables I–11 through I–15, and accounting for the DRE of the ''point of use'' (POU) abatement systems and the uptime (the fraction of time the system is operating within manufacturer's specifications) of the POU systems. The gas utilization rates and by-product formation rates in proposed Tables I–11 through I–15 are based on the 2006 Intergovernmental Panel on Climate Change (IPCC) Tier 2a factors.[1] The factors in proposed Tables I–11 and I–12 for semiconductor manufacturing facilities were updated from the 2006 IPCC factors based on additional data collected by the Petitioner (see ''Technical Support for Modifications to the Fluorinated Greenhouse Gas Emission Estimation Method Option for Semiconductor Facilities under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028).

In the preliminary estimate, reporters would be required to use data from the previous reporting year for the DRE of abatement and the total uptime of all abatement systems in each stack system. The consumption of each F–GHG in each stack system would be estimated as the total gas consumption of that F–GHG times the ratio of the number of tools using that F–GHG that are feeding to that stack system to the total number of tools in the fab using that F–GHG. The reporter would convert the F–GHG emissions to CO_2e using the global warming potential (GWP) values for F–GHG in Table A–1 of subpart A of Part 98. For F–GHG in Tables I–11 through I–15 for which Table A–1 of subpart A of Part 98 does not list a GWP value, reporters would use a default value of 2,000 for the GWP. Based on this preliminary estimate, the reporter would rank the F–GHG emitting stack systems at the facility from the lowest to highest emitting. The reporter would not have to test emissions from low-emitting stack systems, defined as those F–GHG emitting stack systems meeting all of the following three criteria:

(1) The sum of the F–GHG emissions from all combined stack systems in the fab that are not tested is less than 10,000 $mtCO_2e$ per year;

(2) Each of the stack systems that are not tested are within the fab's lowest F–GHG emitting stack systems that together emit 15 percent or less of total CO_2e F–GHG emissions from the fab; and

(3) The F–GHG emissions from each of the stack systems that are not tested can be attributed to only one particular collection of process tools during the test (i.e., the stack cannot be used as a bypass from other tools that are normally vented through a stack system that does not meet these criteria).

For those low-emitting stack systems that are not tested, the reported F–GHG emissions would be the preliminary estimate made using the gas consumption and the gas utilization rates and by-product formation rates in proposed Tables I–11 through I–15 in subpart I, accounting for the DRE and uptime of the POU abatement systems. The default emission factors in proposed Tables I–11 through I–15 are simplified default emission factors based on just F–GHG species, and do not account for different rates by process type or sub-type. This approach minimizes reporting burden to industry because it does not require allocation of gas consumption between process types or sub-types (e.g., etch and chamber clean), as is required for the default emission factor based method. However, we recognize that there may be a need for facilities to reconfigure low-emitting stack systems following testing for production reasons. As a result, we are specifically requesting comment on how often such stack flow configuration changes occur. In addition, we are specifically requesting comment on whether reporters should be allowed to calculate emissions for low-emitting stack systems that are not tested using average fab-specific emission factors developed for the stack systems that are tested. We are specifically requesting comment on how such a provision would affect emission calculations from differences in gas and process types, and in DRE abatement system uptime between stack systems that are tested and stack systems that are not tested.

Stack testing requirements. For those higher-emitting stack systems in each fab that are not exempt from measurement, the reporter would measure each F–GHG concentration (parts per million by volume, ppmv) and the total stack flow to determine the hourly mass flow rate (kg/hr) of each F–GHG emitted from each applicable stack system. If a stack system has more than one stack from a common header, the reporter would be required to measure F–GHG concentration and flow in each stack from that header because it is known from prior testing that F–GHG concentrations and flow rates are not consistent in such systems because of incomplete mixing. The reporter would use EPA Method 320 or another validated method to measure F–GHG concentration, and EPA Methods 1 through 4 at 40 CFR part 60, appendices A–1, A–2, and A–3 to measure other stack gas parameters needed to convert F–GHG concentration to mass emissions for the test period. Reporters would also be required to measure the fab-specific consumption of each F–GHG for the test period.

Reporters would be required to determine the F–GHGs expected to be emitted from the stack system, including by-product F–GHG, based on a facility analysis of all F–GHGs consumed or emitted in the previous reporting year, and all F–GHGs expected to be consumed or emitted in the current reporting year by process tools vented to the stack system. Documented results of the analysis would be kept as a record by the facility. The facility would not be required to test for all F–GHG consumed in the previous year if they are no longer being used, but only to consider the use of those F–GHG in the analysis of the F–GHG previously consumed or emitted and expected to be consumed or emitted. The reporter would also need to consider in the analysis the by-product gases that are included in Tables I–3 to I–7 that are applicable to the reporter's industry segment (semiconductors, PV, MEMS, or LCD). Based on this analysis, reporters would be required to measure emissions for all F–GHG used as input gases and any expected by-product F–GHG, except for any intermittent low-use F–GHG. Intermittent low-use F–GHGs would be defined as F–GHG that meet all of the following:

(1) The F–GHG is used by the fab but was not used on the day of the actual stack testing;

[1] 2006 IPCC Guidelines for National Greenhouse Gas Inventories, Prepared by the National Greenhouse Gas Inventories Programme, Eggleston H.S., Buendia L., Miwa K., Ngara T. and Tanabe K. (eds). Hayama, Kanagawa, Japan.

(2) The emissions of that F–GHG do not constitute more than 5 percent of the total annual F–GHG emissions from the fab on a CO_2e basis; and

(3) The sum of all F–GHG that are considered intermittent low-use F–GHGs does not exceed 10,000 $mtCO_2e$ for that year.

We are proposing that reporters would specifically test for CF_4 and C_2F_6 as by-product F–GHG from all stack systems that are subject to testing. These two F–GHG are commonly formed by-product gases in the electronics manufacturing industry from the plasma etch and chamber cleaning process types, and some may also be formed in the abatement systems.

We are also considering an option that would require testing for all F–GHGs that have been identified as by-products of any input gas in previous testing throughout the electronics industry. This set would include C_3F_8, C_4F_6, C_4F_8, and CHF_3 in addition to CF_4 and C_2F_6. We are considering this option because the identities and quantities of by-products generated at a particular facility at a particular time can be difficult to predict, and the costs of testing for additional by-products are expected to be modest. In the one set of semiconductor facility stack tests that tested for the full range of potential by-products listed above, a perfluorocarbon (PFC) by-product was found, C_3F_8, which accounted for up to 40 percent of the GWP-weighted by-product emissions of the fab (and up to two percent of the total GWP-weighted emissions). If unexpected by-products occur in similar proportions at other facilities, failing to measure for them could lead to routine underestimates of emissions at those facilities. This option is discussed further in the memorandum ''Technical Support for the Stack Test Option for Estimating Fluorinated Greenhouse Gas Emissions from Electronics Manufacturing Facilities under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028. We are specifically requesting comment on the option of requiring facilities to test for the six by-products listed above.

Reporters would calculate annual emissions of intermittent low-use F–GHGs using the gas consumption and the gas utilization rates and by-product formation rates in proposed Tables I–11 through I–15 in the rule, accounting for the DRE and uptime of the POU systems during the year for which emissions are being estimated.

The testing period would be 8 hours for each stack, with the option for a longer duration. The EPA understands that a 24-hour testing duration may be burdensome and may increase testing costs; however, reporters could elect to conduct longer testing to improve the accuracy of gas consumption and F–GHG concentration measurements for gases used in smaller quantities.

Reporters would not be required to measure all stacks simultaneously, but reporters would be required to certify there are no changes between tests in the stack flow configuration (i.e., the relationship between sets of process tools and any connected POU systems and their corresponding waste streams that are ultimately vented through the stack). Reporters would also be required to certify there are no changes in the centralized abatement systems; if any are present. The tests would have to be conducted during a period in which the fab is operating at a representative operating level and with the POU abatement systems connected to the stack being tested operating with at least 90 percent uptime during the 8-hour (or longer) period, or at no less than 90 percent of the average uptime measured during the previous reporting year. The representative operating level would be considered to be operating the fab, in terms of substrate starts for the period of testing, at no less than 50 percent of installed production capacity or no less than 70 percent of the average production rate for the reporting year, where production rate for the reporting year is represented in average monthly substrate starts. For the purposes of stack testing, the period for determining the representative operating level must be the 30-day period ending on the same date on which testing is concluded.

To convert the measured F–GHG emission rates into fab-specific emission factors, the reporter would measure the consumption of each F–GHG used in the tools associated with the stack systems being tested, excluding gas consumption allocated to tools venting to low-emitting stack systems that are not tested. Consumption could be measured using gas flow meters, weigh scales, or pressure measurements (corrected for temperature and non-ideal gas behavior). For gases with low volume consumption for which it is infeasible to measure consumption accurately over the 8-hour testing duration, short-term consumption could be estimated by using one or more of the following:

(1) Drawing from single gas containers in cases where gas is normally drawn from a series of containers supplying a manifold;

(2) Increasing the length of the test period to greater than 8 hours; or

(3) Calculating consumption from long-term consumption (e.g., monthly) that is pro-rated to the test duration.

F–GHGs not detected by Method 320. The EPA is proposing that the concentrations of F–GHG in stacks systems be measured using EPA Method 320. This has been shown to be a valid method for measuring these target compounds, but it is expected that some F–GHG may occur in concentrations that are below the field detection limit (FDL), as defined in EPA Method 320. Therefore, we are proposing that the following procedures be followed to account for different scenarios in which a F–GHG is used, but not detected by Method 320 measurements:

- If a F–GHG is consumed during testing, but emissions are not detected, the reporter would use one-half of the FDL for the concentration of that F–GHG in calculations.
- If a F–GHG is consumed during testing and detected intermittently during the test run, the reporter would use the detected concentration for the value of that F–GHG when available and use one-half of the FDL for the value when the F–GHG is not detected.
- If a F–GHG is not consumed during testing but is detected intermittently as a by-product gas, the reporter would use the measured concentration when available and use one-half of the FDL for the value when the F–GHG is not detected.
- If a F–GHG is an expected by-product gas (e.g., CF_4, C_2F_6, and other gases listed as by-products in Tables I–3, I–4, I–5, I–6, I–7, and proposed Tables I–11 to I–15) of the stack system tested and is not detected during the test run, use one-half of the FDL for the value of that F–GHG.
- If a F–GHG is not used, and is not an expected by-product of the stack system and is not detected, then assume zero emissions for that F–GHG for the tested stack system.

We are specifically requesting comment on the option of listing specific by-product gases as ''expected'' to be emitted even when they are not detected. Based on a review of the default emission factor tables listed above, CF_4 and C_2F_6 are almost always generated as by-products (that is, they are generated by a wide range of process types and input gases), and CHF_3 is frequently generated. Other by-products appear to be generated less frequently. Thus, it may be appropriate to specify CF_4 and C_2F_6, and possibly also CHF_3, as the set of by-products for which a value of one half of the FDL should be assumed in calculating emissions during the test. This approach would simplify the rule, provide certainty for purposes of implementation, and relieve facilities of the burden of determining

which by-products are ''expected'' to be emitted.

EPA Method 320 requires the specification of maximum FDLs because the FDLs achieved by a method and detector can have a significant impact on the quality of the measurements. For example, if the FDL for a F–GHG were so high that large emissions of that GHG were never detected, the uncertainty of the resulting emissions estimate (i.e., one-half the FDL), would be correspondingly high. The EPA is proposing maximum FDLs based on (1) review of the FDLs that have been achieved at three different semiconductor facilities, and (2) analysis of the magnitude of the emissions that would occur (in CO_2e) at various possible maximum FDLs. The latter provides an indication of the uncertainty of emissions measurements using methods and detectors with those FDLs. The proposed maximum FDLs can be found in proposed Table I–10 of the regulatory text.

The EPA expects that the proposed treatment of these non-detect values using one-half of the FDL will avoid any potential under-counting of any F–GHGs that are expected to be in the emissions from a given process and F–GHG input gas combination. At the same time, the proposed treatment will provide a reasonable estimate of emissions of F–GHGs that occur in concentrations that are below the FDL. The EPA's analysis of testing data provided by the Petitioner has shown that emission measurements of gases known to be used and for which the concentration was below the FDL accounted for about 0.1 percent of F–GHG consumption and would account for about 0.1 percent of emissions on a CO_2e basis if the concentration was assumed to be one-half of the FDL as outlined in this section (see ''Technical Support for the Stack Test Option for Estimating Fluorinated Greenhouse Gas Emissions from Electronics Manufacturing Facilities under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028).

Alternative stack test methods. To provide flexibility for facilities utilizing the stack test option, we are proposing that reporters may use an alternative stack test method to measure the concentration of F–GHG in each stack provided that the method is validated using EPA Method 301 of 40 CFR part 63, appendix A (hereafter ''EPA Method 301''), and the EPA approves its use.

Under the proposed approval process in 40 CFR 98.94(k), the reporter would be required to notify the Administrator of the intent to use an alternative test method. The notification would need to include a test plan describing the alternative method and procedures, the range of test conditions over which the validation is intended to be applicable, and also an alternative means of calculating the fab-level F–GHG emissions if the Administrator denies the use of the results of the alternative method. The reporter would be required to validate the alternative method using EPA Method 301 and submit the results of the Method 301 validation process along with the notification of intention and a rationale for not using the specified method.

The Administrator would review and determine whether the validation of the proposed alternative method is adequate and issue an approval or disapproval of the alternative test plan within 120 days of the reporter submitting the notification and test plan. The reporter would be required to respond to any of the Administrator's questions on the test plan before obtaining approval and take into account the Administrator's comments on the test plan in conducting the test using the alternative method. The reporter would be required to respond to the Administrator's questions or request for additional information on the plan during the 120-day review period and the Administrator's questions or request for additional information would not extend that review period. Therefore, it would be the reporter's obligation to respond in a timely manner. If an alternative test plan were not approved, a reporter would need to begin the process to have an alternative test method approved starting with the notification of intent to use an alternative test method.

The reporter would report the results of stack testing using the alternative method and procedure specified in the approved test plan. The report would include all methods, calculations and data used to determine F–GHG emissions. The Administrator would review the results of the test using the alternative methods and procedure and then approve or deny the use of the results of the alternative test method and procedure no later than 120 days after they are submitted to the EPA. During this 120-day period, the reporter would be required to respond to any of the Administrator's questions on the test report before obtaining approval of the final test results using the alternative method. If the Administrator were to find reasonable grounds to dispute the results obtained by the alternative method, the Administrator could require the use of the method specified in subpart I instead of the alternative method.

Once the Administrator approved the use of the alternative method, that method could be used by any other facility for the same F–GHGs and types of stack systems, if the approved conditions apply to that facility. In granting approval, the Administrator would limit the range of test conditions and emission characteristics for which that approval is granted and under which the alternative method could be used without seeking further approval. The Administrator would specify those limitations, if any, in the approval of the alternative method.

Accounting for Abatement System Downtime. To account for the effect of POU abatement system downtime in estimating emissions using the stack testing method, reporters would record the abatement system downtime in each fab during testing and for the entire reporting year. Using the downtime measured during testing, the reporters would correct the measured emission factors to assume no abatement system downtime (i.e., 100 percent abatement system uptime). The downtime measured over the entire reporting year would be used to calculate the excess F–GHG emissions that occur as a result of abatement system downtime events.

The reporter would measure the amount of POU abatement system downtime (in minutes) during the emission tests for any tools that are vented to the stacks being tested. For example, if five POU abatement systems are down for times of 10, 15, 25, 30, and 40 minutes during an 8-hour test, the total POU system downtime would be 120 minutes, or 5.0 percent of the total possible abatement system and tool operating time for the five tools (2,400 minutes). Using these data and the average DRE for the POU abatement systems, the emission factor measured during the testing would be adjusted to an emission factor representing POU abatement systems with 100 percent uptime (zero percent downtime).

The downtime measured over the year would be used to determine an uptime factor that would be an aggregate for all abatement systems in the fab, and calculated using proposed Equation I–23 in subpart I. Abatement system downtime would be considered any time during which the abatement system was not operating according to the manufacturer's specifications. The reporter would determine the sum of the downtime for all abatement systems during the year, and divide this sum by the sum of the possible annual operating time for each of the tools connected to those abatement systems in the fab to determine the downtime fraction. The downtime fraction would be the

decimal fraction of operating time that the abatement systems were not operating according to the manufacturer's specifications. The uptime fraction used in the emissions calculations would be equal to 1 minus the downtime fraction.

The total possible annual tool operating time would be calculated by assuming that tools that were installed for the whole of the year were operated for the entire year. The total possible tool operating time would be prorated to account for the days in which a tool was not installed; any partial day that a tool was installed would be treated as a full day of tool operation. For an abatement system with more than one connected tool, the tool operating time would be equivalent to a full year if at least one tool was installed at all times throughout the year. The reporter would also be able to account for time that tools are idle and no gas is flowing through the tools to the abatement system.

It is important to note that the proposed calculation of the uptime factor is different when a reporter would be using the proposed stack testing method than when the reporter would be using the default gas utilization rate and by-product formation rate method. In the proposed stack testing method, the uptime would not be determined for each gas and process type combination, as it would be under the proposed revisions to the default emission factor method. Instead, the uptime factor would be based on an aggregate for all tools in the fab for which the stack testing method is being used. This aggregate method is possible because the emissions measured at the stack already account for the fact that the emissions have been abated, and the uptime factor is only needed to account for the relatively small percent of time that the abatement systems are not operating and excess emissions need to be calculated. In contrast, the default gas utilization rates and by-product formation rates in the current rule and in the proposed amendments are for ''unabated emissions'' and the uptime factor needs to be determined for each gas and process type combination to determine the relatively large percent of emissions that have been abated.

To calculate an unabated emission factor during periods of downtime in the stack testing method, the reporter would divide the abated emission factor by $(1–d_{if})$, where d_{if} is the average weighted fraction of F–GHG *i* destroyed or removed in the POU abatement system(s) in the fab. The factor d_{if} would be calculated using proposed Equation I–24 in subpart I, based on the gas consumption and destruction and removal efficiency (DRE) for the abatement system(s) for each gas and process type combination.

When calculating annual emissions, the reporter would continue to collect abatement system downtime data and calculate the fraction of abatement system uptime for the fab. Excess emissions from abatement system downtime events would be determined based on the actual amount of downtime as a percent of the total annual abatement system operating time for the reporting year. If a fab had 2.0 percent downtime for the year, then the unabated emission factor would be applied to 2.0 percent of the gas consumption for the year to calculate the excess emissions. The abated emission factor would be applied to the other 98 percent of gas consumption for the fab. The excess emissions and the abated emissions would be added together to determine the total annual emission from the fab.

Calculating an average fab-specific emission factor. The reporter would calculate an average fab-specific emission factor using proposed Equation I–19 in subpart I for each input F–GHG and proposed Equation I–20 for each by-product F–GHG, based on the testing results (average kg/hr) and the F–GHG gas consumption (average kg/hr). The fab-specific emission factor for each input F–GHG and each F–GHG formed as a by-product would take into account the mass emission rate, the gas consumption, the abatement system uptime, and the F–GHG destroyed or removed from the abatement systems. The fab-specific emission factor for input gases would be in units of kg gas emitted per kg of the same gas consumed (kg/kg).

For gases generated as by-products, we are proposing that the fab-specific emission factor would be the mass of the by-product emitted divided by the summed masses of all the F–GHGs consumed, as presented in proposed Equation I–20. This equation would apply to those F–GHGs that are emitted only as by-products and not consumed as input gases.

The reporter would calculate annual emissions for each F–GHG by-product gas as the product of the fab-specific emission factor and the total annual amount of F–GHG consumed, corrected for any POU abatement system downtime as described in this section of the preamble.

In some cases, emissions of a particular F–GHG input gas may exceed consumption of that gas because the F–GHG is generated as a by-product of the other input gases. This is often the case for CF_4. In these cases, we are proposing that the reporter use 1.0 as the input F–GHG emission factor and treat the remainder of that F–GHG's emissions as a by-product of the other input gases. The reporter would use Equation I–20 to calculate the emission factor for the by-product emissions. For example, if during the testing, the fab consumed 100 kg of an F–GHG, but the stack testing measured 300 kg of that gas, the reporter would assign 100 kg of that F–GHG as an input gas used in proposed Equation I–19, and 200 kg of that gas as a by-product gas used in proposed Equation I–20. In this instance, we are also proposing that the denominator in Equation I–20 would include the consumption of all other F–GHGs, with the exception of the F–GHG being included in the numerator. This treatment of the denominator reflects the fact that we are assuming that the F–GHG in the numerator is formed as a by-product from all other F–GHGs, while the emissions from the actual consumption of that F–GHG as an input are being accounted by proposed Equation I–19. For calculating emissions from an F–GHG with an input emission factor equal to 1.0 and with a by-product emission factor, the input F–GHG emissions would be assumed to equal consumption of that F–GHG, and the by-product emissions would be determined by multiplying the by-product emission factor by the sum of the consumption of all F–GHGs excluding the by-product F–GHG.

The advantage of this approach is that it reflects the physical mechanism through which emissions of an input gas exceed consumption of that gas. Because mass is conserved, the emissions of an input gas that are in excess of consumption of that gas must be attributable to the other input gases. These ''excess'' emissions are expected to vary with the facility's consumption of the other input gases rather than with the facility's consumption of the ''excessively'' emitted gas. Reflecting this in the by-product emission factor will lead to more accurate emission estimates and will help to prevent large swings in emission factors that could result when consumption of the ''excessively'' emitted gas varies from test to test. For example, this could help a facility to avoid a 20 percent or greater relative standard deviation in its CF_4 emission factor, which would otherwise prevent the facility from qualifying to skip testing for five years (see ''*Testing frequency*'' in Section III.B.1 of this preamble).

Note that the proposed approach includes a simplification that would in some cases affect the ''extra'' emissions

that are reassigned as by-products of other input gases. This simplification, and its potential impacts are discussed in more detail in the document entitled ''Technical Support for the Stack Test Option for Estimating Fluorinated Greenhouse Gas Emissions from Electronics Manufacturing Facilities under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028. Although we expect that the effect of this simplification will generally be small, we are specifically requesting comment on the simplification.

We are also specifically seeking comment on the proposed treatment of F–GHGs whose emissions exceed consumption, and comment on which F–GHG should be included in the denominator of proposed Equation I–20 for calculating the emission factor for by-product F–GHG. The currently proposed equation includes all F–GHG used in the fab in the denominator for the calculation of all by-product F–GHGs, except when the emission factor for an input F–GHG exceeds 1.0. If the emission factor for a F–GHG exceeds 1.0, the emissions greater than 1.0 would be assumed to be by-product F–GHG instead of un-utilized input F–GHG. This proposed approach is based on the assumption that all F–GHG used as inputs could be contributors of fluoride (F) atoms that could be involved in the formation of F–GHG by-product gases, which are primarily carbon containing F–GHG, even if those input F–GHG do not contain carbon, such as SF_6 or NF_3. An alternative approach on which the EPA is seeking comment is not to include in the denominator SF_6, NF_3, and other F–GHG that do not contain carbon (C) atoms, assuming that they are less involved in the formation of carbon containing by-product F–GHG than the F–GHG used as inputs that contain carbon.

Testing frequency. Based on the potential for multiple process changes and numerous R&D activities that may affect emissions at an individual facility, as discussed in the Petition for Reconsideration, the EPA is proposing in 40 CFR 98.94(j)(5)(i) to require annual testing of each stack system and annual calculation of emission factors, excluding those low-emitting stack systems that are exempt from testing. However, to offer flexibility, the EPA is also proposing in 40 CFR 98.94(j)(5)(ii) to allow reduced testing frequency based on variability in measured emission factors. If the reporter meets criteria for low measured variability in emission factors calculated from the test results, then testing frequency could be reduced to every 5 years instead of annually. Under this option, a reporter would conduct a minimum of three emission tests for each non-exempt stack, with at least 2 months between the tests on a single stack system. All tests could be done in one year, or the reporter could use three annual tests for this analysis. If the relative standard deviation (RSD) of the emission factors calculated from each of the three tests, expressed as CO_2e for all F–GHG combined, was less than or equal to 15 percent, and the RSD of the emission factors for each single F–GHG that individually accounts for 5 percent or more of CO_2e emissions was less than 20 percent, the facility could use the averages of the three emission factors for each F–GHG for annual reporting for that year and the next 4 years without testing, unless conditions change that affect the emission factors and trigger retesting, as specified in proposed 40 CFR 98.94(j)(8) and described in this section of the preamble. If the variability between the three tests did not meet these criteria, then the facility would use the emission factors from the most recent testing for reporting for that year and continue the annual testing. Facilities could repeat the RSD analysis each year using the previous three sets of data. We anticipate that this provision will provide additional incentive for careful measurements of emissions and gas consumption during each stack test to maximize the repeatability of the results in subsequent tests.

In addition, previously completed tests that were performed and verified according to EPA Method 320 or an alternative method validated using EPA Method 301 could be applied towards the three tests required under this option, as long as all three tests were completed no earlier than the date 3 years before the date of publication of the final rule amendments and they meet the final rule requirements for stack testing, which are being proposed under 40 CFR 98.94(j). Allowing facilities to use prior completed tests would allow them to use data that were collected in support of developing this proposed stack testing option, and in support of developing the revised default gas utilization rates and by-product formation rates that are also being proposed in this action. The reporter would be required to conduct testing of each stack system, regardless of the results of the most recent stack tests, if certain changes take place in the reporter's annual consumption of F–GHGs or in the equipment and processes at the fab. Testing would need to be repeated to develop a new fab-specific emission factor if consumption of a specific input gas used during the emissions test changes by more than 10 percent of total annual gas consumption in CO_2e, relative to gas consumption in CO_2e for that gas during the year in which the most recent emissions test was conducted. For example, if use of a single gas goes from 25 percent of CO_2e to more than 35 percent of CO_2e, that would trigger the need for a new test. If there is a change in the reporter's use of an intermittent low-use F–GHG that was not used during the emissions test and not reflected in the fab-specific emission factor, such that it no longer meets the proposed definition of intermittent low-use F–GHG (see ''*Stack testing requirements*'' in Section III.B.1 of this preamble), the reporter would also be required to re-test using that gas. Additionally, if there is: (1) A decrease by more than 10 percent in the fraction of tools with abatement systems, compared to the fraction of tools with abatement systems during the most recent emissions test; (2) a change in the wafer or substrate size used by the fab since the most recent emissions test; or (3) a change in a stack system that formerly met the criteria for not being subject to testing such that it no longer meets those criteria, then the reporter would also be required to re-test.

Finally, if a reporter is using a F–GHG that was not used during the emissions test, the reporter would be required to conduct additional stack tests in that year during a period when that gas is being used to determine an emission factor for that gas. If a F–GHG is no longer used or is an intermittent low-use gas, re-testing would not be required, and F–GHG emissions would be calculated according to the process for intermittent low-use gases.

The EPA is specifically soliciting comment on other changes that may occur at a fab, including the adoption of specific new process technologies that should be included in the list of activities that would be expected to affect emissions to the point that those changes should require a fab to retest the stacks to develop new emission factors.

As stacks are re-tested, reporters would update the fab-specific emission factors with the new data from those stacks, replacing the data from the earlier testing of the same stack. The reporters would also be required to annually review the current data for determining which stacks were exempt from testing to ensure that the low-emitting stacks still qualify for exemption. If a stack no longer meets the criteria for exemption from testing as a low-emitting stack, it would need

to be tested and the fab-specific emission factor would need to be recalculated including those data. This provision would ensure that the fab-specific emission factors determined through testing are based on approximately 85 percent of the F–GHG consumed in the fab on a CO_2e basis. Finally, if a requirement to re-test stacks were triggered, facilities would also be required to re-evaluate the RSD of the emission factors including the most recent test results and the previous two test results to see if they still complied with the provisions that allow them to skip testing. If they did not meet those provisions, they would have to resume annual testing for at least the next 3 years to complete a new RSD analysis. Even if they met those requirements, they still would be required to resume annual testing no later than the fifth year after the original RSD analysis that was performed before the retesting requirement was triggered.

We specifically request comment on the proposed option to allow less frequent emission testing (i.e., the 5-year testing exemption). Commenters are encouraged to supply rationale and any available data in support of submitted comments.

2. Revise the Default Gas Utilization Rates and By-Product Formation Rates for the Plasma Etch Process Category for Facilities That Manufacture Semiconductors

The EPA is proposing to amend the default plasma etch and chamber cleaning gas utilization rates and by-product formation rates and the requirements in 40 CFR 98.93(a)(2) for estimating F–GHG emissions from plasma etch processes at semiconductor manufacturing facilities. The EPA is not proposing to amend the default emission factors for other types of electronics manufacturing facilities. As discussed in this section of this preamble, the current provisions allow certain facilities the option to use default plasma etch and chamber cleaning rates based on wafer size, gas input, and process type/sub-type. The default emission factors are based on two different wafer size classes (one set of default emission factors for both 150 mm and 200 mm wafers combined, and a second set of default emission factors for 300 mm wafers) and five process types/sub-types (plasma etching; chamber cleaning including in situ plasma cleaning, remote plasma cleaning, in situ thermal cleaning; and wafer cleaning).

As discussed in this section of this preamble, following the promulgation of the final subpart I rule, the Petitioner submitted additional utilization and by-product formation data for various size wafers (200 mm and 300 mm) from semiconductor manufacturing facilities. The Petitioner requested that the EPA consider revising the default gas utilization rates and by-product formation rates based on gas input, process type, and wafer size. They also requested that the rule be revised to allow all semiconductor manufacturing facilities to use the revised default emission factors in lieu of requiring certain manufacturers to develop recipe-specific utilization rates and by-product formation rates (see ''Technical Support for Modifications to the Fluorinated Greenhouse Gas Emission Estimation Method Option for Semiconductor Facilities under Subpart I,'' Docket ID. No EPA–HQ–OAR–2011–0028).

The Petitioner, in documents submitted to the EPA after the Petition for Reconsideration, also questioned the EPA's establishment of separate default gas utilization rates and by-product formation rates for the wafer cleaning process type in the final subpart I rule. The Petitioner stated that the wafer cleaning process represents a very small fraction of overall semiconductor manufacturing GHG consumption and emissions. At 12 facilities analyzed by the Petitioner, wafer cleaning represented 1 percent or less of the gas used at each facility. The Petitioner also noted that wafer cleaning is basically the same process as the wafer plasma etch process (see ''Technical Support for Modifications to the Fluorinated Greenhouse Gas Emission Estimation Method Option for Semiconductor Facilities under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028). Plasma etching is defined in 40 CFR 98.98 as ''a process type that consists of any production process using fluorinated GHG reagents to selectively remove materials from a substrate during electronics manufacturing.'' Wafer cleaning is defined in 40 CFR 98.98 as ''a process type that consists of any production process using fluorinated GHG reagents to clean wafers at any step during production.'' The Petitioner stated in documents submitted to the EPA that the tools specifically designated for wafer cleaning are using the same gases in plasma to remove materials as used in the tools designated for plasma etching. The Petitioner also noted that the gas utilization rates for wafer cleaning and plasma etching in subpart I are similar for the four gases most commonly used in both plasma etch and wafer cleaning (CF_4, CH_2F_2, NF_3, and SF_6), especially for SF_6 and CF_4. The Petitioner also provided additional data to support their recommendation to combine the wafer cleaning process type with the plasma etch process type (see ''Technical Support for Modifications to the Fluorinated Greenhouse Gas Emission Estimation Method Option for Semiconductor Facilities under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028).

In response to the concerns raised in the Petition for Reconsideration about the recipe-specific measurements, the EPA is proposing to amend the default utilization and by-product formation rates for the semiconductor manufacturing industry. Based on the amendments in the September 27, 2011 final rule titled ''Changes to Provisions for Electronics Manufacturing to Provide Flexibility,'' the larger semiconductor facilities that manufacture wafers measuring 300 mm or less may use the default utilization and by-product formation rates currently in subpart I to estimate emissions, instead of the recipe-specific method that would have otherwise been required, only through December 31, 2013.

First, the EPA is proposing that all semiconductor manufacturing facilities, regardless of manufacturing capacity, would have the option to calculate F–GHG emissions from the plasma etching process type using the appropriate default gas utilization rates and by-product formation rates provided in Tables I–3 and I–4 of subpart I. We would no longer distinguish between ''large'' and ''other'' semiconductor manufacturing facilities based on the calculated annual manufacturing capacity. That distinction exists in the current subpart I because the EPA chose not to require the recipe-specific method for the ''other'' semiconductor manufacturing facilities. However, the calculation methods we are proposing in today's action would apply to all semiconductor manufacturing facilities. Under this proposal, no electronics manufacturing facility would have the option to determine and use recipe-specific gas utilization rates and by-product formation rates for the plasma etch process type, as described in Section III.B.3 of this preamble. The EPA is proposing to remove the distinction between large and other semiconductor facilities, such that all semiconductor manufacturing facilities could use the default gas utilization rates and by-product formation rates, independent of facility size. The EPA had required only the largest semiconductor manufacturing facilities to use the recipe-specific plasma etch method to ensure that smaller facilities

had a lower burden consistent with their lower expected F–GHG emissions. However, in proposing to remove the recipe-specific plasma etch method, the burden on the largest facilities would be reduced significantly and would eliminate the need to distinguish between ''large'' and ''other'' semiconductor manufacturing facilities.

Second, we are proposing to revise the default emission factors for the plasma etch process type in Tables I–3 and I–4 of subpart I. The proposed revised default emission factors are based on an expanded data set provided to the EPA by semiconductor manufacturing facilities after subpart I was originally promulgated in December 2010. The data were provided to the EPA in support of the Petitioner's request to develop alternatives to the recipe-specific method. The proposed revised plasma etch default emission factors are based on 976 data records (representing additional data submitted after December 1, 2010; see the EPA's analysis in ''Technical Support for Modifications to the Fluorinated Greenhouse Gas Emission Estimation Method Option for Semiconductor Facilities under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028), whereas the plasma etch default emission factors in the final subpart I are based on 93 records. As in the final rule, the proposed plasma etch default emission factors were developed using data characterizing un-abated emissions for specific process equipment that follows a version of the International SEMATECH Manufacturing Initiative (ISMI) measurement guidelines. Because the set of tool manufacturers and processes included in the 976 data records is larger than that included in the 93 records, the proposed revised plasma etch default emission factors are expected to be more representative of the F–GHG emitting processes and tools than the default emission factors in the final subpart I rule promulgated in December 2010. However, please see the ''Technical Support for Modifications to the Fluorinated Greenhouse Gas Emission Estimation Method Option for Semiconductor Facilities under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028, for more discussion of this issue and of the estimated uncertainty associated with the use of the default emission factor approach.

In developing the proposed revised default emission factors for the plasma etch process type in semiconductor manufacturing, the EPA considered alternatives that would reduce the burden compared to the recipe-specific approach in the current rule, while still providing F–GHG emission estimates with generally acceptable uncertainty.[2] The EPA considered including film type as a variable in the tables of default emission factors for the plasma etch process type, in addition to the input gas type and wafer size. However, based on the EPA and the Petitioner's analysis of the available data, the EPA determined that including film type would provide only a marginal improvement (about 4 percent) in the uncertainty of the emission estimates, but it would also introduce a potential for error because F–GHG consumption would need to be apportioned to plasma etch processes based on the film type being etched. The potential error introduced by apportioning F–GHG consumption by film type would offset the reduction in uncertainty by including the film type. In addition, including film type would also increase the burden associated with this approach because facilities would need to apportion gas consumption by film type. The EPA also considered establishing default emission factors for different sub-types of the plasma etch process type. However, based on an analysis of the available data, no difference in default emission factors could be accurately determined for any identifiable sub-type of the plasma etch process type. Based on these findings, the EPA concluded that including only input F–GHG type and wafer size in the default emission factors for the plasma etch process type would achieve the best balance between the burden and uncertainty in estimating F–GHG emissions from the plasma etch process type. (See ''Technical Support for Modifications to the Fluorinated Greenhouse Gas Emission Estimation Method Option for Semiconductor Facilities under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028.)

The EPA also considered two averaging conventions in developing the proposed revised default by-product emission factors for etch process input F–GHG for multi-gas processes. The first convention used the simple arithmetic mean of all available by-product emission factor data where a non-zero measurement was recorded. This method averaged all available non-zero by-product emission factor data (by by-product) for each gas, wafer size, process type or sub-type combination. This approach is appropriate if zeros indicate that a by-product was not looked for during the test.

The second convention used the simple arithmetic mean of all available by-product emission factor data, but included the use of zeros when by-product emissions were not recorded. This method averaged all available by-product emissions factor data (by by-product) including records that did not indicate by-product emissions (zeros) for each gas, wafer size, process type or sub-type combination. This approach is appropriate if zeros indicate that a by-product was looked for during the test, but was not detected.

The EPA compared the resulting by-product emission factors from using both averaging conventions. The comparison showed that including versus not including the zeros for cases where no detected by-product was reported resulted, on average, in a 38 to 45 percent difference in the by-product emission factors (see ''Technical Support for Modifications to the Fluorinated Greenhouse Gas Emission Estimation Method Option for Semiconductor Facilities Under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028).

Because the EPA was not certain whether zeros indicate that particular by-products were not looked for or whether they were looked for but not detected, we are conservatively proposing by-product emission factors that do not include zeros. We specifically request comment on whether and to what extent zeros in the emission factor data indicate that a by-product was looked for, but not detected. We also specifically request comment on what the detection limits were for such by-products. To the extent that zeros represent instances where a by-product was looked for, but not detected, we recognize that not including zeros in the by-product emission factor development may result in overstating by-product emissions. Therefore, we are specifically requesting comment on the method for averaging the available by-product emission factor data to determine the default by-product emission factors.

Third, the EPA is proposing to revise the default by-product formation rates for the chamber cleaning process type/sub-types in Tables I–3 and I–4 of subpart I. In developing the proposed default utilization and by-product emission factors for etch processes, the EPA also reviewed emissions from chamber cleaning processes for completeness. The EPA did not receive new data to support revised default

[2] The EPA performed an uncertainty analysis that found that, depending on the wafer size and gas usage patterns of the fab, the default emission factor approach would result in estimates with uncertainties between approximately 10 and 40 percent; see ''Technical Support for Modifications to the Fluorinated Greenhouse Gas Emission Estimation Method Option for Semiconductor Facilities under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028.

utilization rates for the chamber cleaning process type/sub-types established in the final subpart I rule. However, the EPA evaluated the averaging conventions used to develop the proposed revised default by-product emission factors for etch processes for use in developing default by-product emission factors for the chamber cleaning process type/sub-types. Using data from the final subpart I rule, the EPA analyzed the emission estimates from chamber cleaning process type/sub-types using the two averaging conventions described in this section of this preamble. Again, for simplicity, we are proposing to not include zeros for the development of by-product emission factors. As with the proposed revised default etch emission factors, the averaging comparison showed that including versus not including the zeros for cases where no detected by-product was reported could result in overstating by-product emissions. Therefore, we are proposing to follow the same averaging convention for chamber cleaning process type/sub-types. The revised default by-product formation rates for the chamber cleaning process type/sub-types in Tables I–3 and I–4 of subpart I reflect the simple arithmetic mean of the available by-product emission factor data, without the use of zeros. As for the revised default etch emission factors, we are specifically seeking comment on the method for averaging the available by-product emission factor data to determine the default by-product emission factors for chamber cleaning process type/sub-types.

Finally, the EPA is proposing to combine the semiconductor wafer cleaning process type with the plasma etch process type; the amended rule would not have separate default emission factors for semiconductor wafer cleaning in the revised Table I–3 and I–4 of subpart I. The EPA has reviewed the available data (see ''Technical Support for Modifications to the Fluorinated Greenhouse Gas Emission Estimation Method Option for Semiconductor Facilities under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028), and believes that it is appropriate to combine these process types. The same gases are used for plasma etch and wafer clean, with similar gas utilization rates and by-product formation rates, and the wafer clean process represents 1 percent or less of gas consumption at a typical facility. Furthermore, the burden associated with apportioning gas consumption to the various process types is expected to be reduced by combining the wafer cleaning and the plasma etch process types because some gases used for wafer cleaning are also used in etching processes.

For the chamber clean process type, we are not proposing any changes to the three chamber clean sub-types. Under the revised default emission factors, semiconductor manufacturing facilities would estimate emissions from chamber clean and plasma etch processes using the following four process types/sub-types: (1) Plasma etch/wafer cleaning process type; and (2) chamber cleaning process type, including (2a) in situ plasma chamber cleaning; (2b) remote plasma chamber cleaning; and (2c) in situ thermal chamber cleaning.

If gas utilization rates and by-product formation rates are not available for a gas/process combination in Tables I–3 or I–4 of subpart I, we are proposing that reporters would assume that the utilization and by-product formation rates are zero (i.e., assume that emissions of a gas equal consumption of that gas). This approach is consistent with the methodology in the current subpart I rule, except that we are proposing to remove the option for facilities to develop recipe-specific factors.

All other provisions related to the method using default gas utilization rates and by-product formation rates, such as the wafer size classes used for the default emission factors in Tables I–3 and I–4, would remain the same. The only exception would be that the default emission factors in Table I–4 that apply to 300 mm wafers would also apply to wafers greater than 300 mm (e.g., 450 mm wafers). As more data (i.e., utilization and by-product formation rates) become available for the semiconductor manufacturing industry in the future, the EPA would consider adding new default emission factors to Tables I–3 and I–4 for new gas and process type/sub-type combinations, including adding any new default emission factors specifically for semiconductor manufacturing facilities using wafers greater than 300 mm diameter (e.g., 450 mm wafers). However, for this proposal, facilities using wafers greater than 300 mm diameter would use the same default emission factors as those using 300 mm wafers. Section III.B.12 of this preamble describes the proposed process for updating default emission factors as more information is collected from the electronics manufacturing industry.

We request comment on whether new data are available for gas utilization and by-product formation rates for any of the process types or sub-types in the semiconductor manufacturing industry that could be used to further update the default emission factors for semiconductor manufacturing. Commenters are encouraged to submit available data with their comments using the ''Electronics Manufacturing Data Request Sheet'' (see Docket ID No. EPA–HQ–OAR–2011–0028). Commenters can fill out the ''Electronics Manufacturing Data Request Sheet'' and submit the data to Docket ID No. EPA–HQ–OAR–2011–0028 for consideration by the EPA on whether to update the proposed default emission factors for semiconductor manufacturing. If the EPA does update the proposed default emission factors using such new data, if approved by the EPA, for the final rule, it will do so using the same methodologies as described in the ''Technical Support for Modifications to the Fluorinated Greenhouse Gas Emission Estimation Method Option for Semiconductor Facilities under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028). The EPA will use the same criteria for accepting new data that were used in accepting data as specified in that document.

The EPA has not developed any specific changes to the default gas utilization rates and by-product formation rates for MEMS, LCD, and PV in Tables I–5 (MEMS), I–6 (LCD), and I–7 (PV) of subpart I because we have not received any new utilization and by-product formation rate data. However, we request comment on whether new data are available to update the default emission factors for the facilities that manufacture MEMS, LCD, or PV cells; commenters are encouraged to submit available data and supporting information with their comments using the ''Electronics Manufacturing Data Request Sheet'' (see Docket ID No. EPA–HQ–OAR–2011–0028). Commenters can fill out the ''Electronics Manufacturing Data Request Sheet'' and submit the data to Docket ID No. EPA–HQ–OAR–2011–0028 for consideration by the EPA on whether to update the default emission factors for MEMS, LCD, or PV manufacturing. If the EPA does update the default emission factors using such new data, if approved by the EPA, it will do so using the same methodologies as described in the ''Technical Support for Modifications to the Fluorinated Greenhouse Gas Emission Estimation Method Option for Semiconductor Facilities under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028). The EPA will use the same criteria for accepting new data that were used in accepting data as specified in that document.

3. Removing the Provisions for Using Recipe-Specific Gas Utilization Rates and By-Product Formation Rates for Facilities That Manufacture Electronics

The EPA is proposing to remove the provisions to use recipe-specific gas utilization rates and by-product formation rates in 40 CFR 98.93(a)(2)(ii)(A), (a)(3), and (a)(4). Under 40 CFR 98.93(a)(2)(ii)(A) of the final subpart I rule, semiconductor manufacturing facilities with an annual manufacturing capacity greater than 10,500 square meters of substrate per year manufacturing wafers with a diameter of 300 mm or less were required to use recipe-specific gas utilization rates and by-product formation rates to estimate emissions for the plasma etch process. However, the September 27, 2011 final rule titled ''Changes to Provisions for Electronics Manufacturing to Provide Flexibility'' provided these facilities the option to use the default emission factors in lieu of recipe-specific rates for emissions estimated for the 2011, 2012, and 2013 reporting years. Under the current provisions (40 CFR 98.93(a)(3)), all electronics manufacturing facilities (including PV, MEMS, LCD, and semiconductor manufacturers) are given the option to estimate their F–GHG emissions using recipe-specific rates. Under 40 CFR 98.93(a)(4), semiconductor manufacturers are required to use recipe-specific rates for all F–GHG processes if manufacturing on wafers that are greater than 300 mm in diameter.

After subpart I was promulgated on December 1, 2010 (75 FR 75774), the Petitioner requested the EPA to reconsider and remove the requirement to develop and use recipe-specific gas utilization rates and by-product formation rates for certain semiconductor manufacturing processes and facilities. The Petitioner cited three primary concerns with using recipe-specific rates in place of other methods:

- The technical burden of determining rates for numerous recipes used at a facility, which could number in the hundreds.
- The technical and logistical burden of tracking gas consumption and other facility parameters on a recipe-specific basis to accurately implement recipe-specific rates.
- Recipe-specific information could be used to reverse engineer individual recipes and otherwise compromise trade secrets.

The Petitioner noted that the recipes used at a facility could number in the hundreds. In the Petition for Reconsideration, the Petitioner provided industry survey results for 19 facilities each having over 200 recipes, in which three facilities had over 500 recipes, and two facilities had greater than 800 recipes. For facilities with R&D activities, the Petitioner noted that the number of unique recipes could run ''into the thousands.'' The Petitioner explained in the petition that the EPA defined individual recipes in a way that presumed that each recipe has a ''specific combination of gases'' ''used repeatedly'' and ''under specific conditions of reactor temperature, pressures, flow, radio frequency (RF) power and duration.'' The Petitioner stated that a manufacturer may have many complex recipes that are comprised of upwards of 20 or more individual steps that could each meet the rule definition of ''individual recipe,'' and that manufacturing facilities may run hundreds to thousands of such recipes per year. Because of the nature of the fabrication process, for each step, a recipe could specify a varying ''combination of gases'' or a variety of distinct ''specific conditions.'' The petition stated that the EPA's definition of individual recipes could be interpreted to render each step in a complex recipe as a separate ''individual recipe'' that would need to be tracked and measured to determine recipe-specific utilization and by-product formation rates.

The Petitioner also stated that the EPA's definition of ''similar recipes'' could result in each step of a complex recipe to be considered an ''individual recipe'' under subpart I, due to changes in the chemicals used and the specific conditions for each step. Furthermore, as discussed in Section III.B.5 of this preamble, the Petitioner asserted that many facilities integrate research and development activities into their production lines, and research requires an iterative process and introduces hundreds of recipe variations that would need to be accounted for. The Petitioner stated in the Petition for Reconsideration that the equipment and personnel do not currently exist in most facilities to perform the measurements, testing, and data collection that would be required under subpart I to develop gas utilization rates and by-product formation rates for every recipe or each recipe step. Specifically, the Petitioner provided an industry analysis with the Petition for Reconsideration that stated that only 5 of 24 surveyed facilities had the available equipment, and only one facility had personnel with the expertise to perform the testing to quantify emissions from individual recipes.

The Petitioner further stated in the Petition for Reconsideration that tracking gas consumption and other facility parameters on a recipe-specific basis would present technical and logistical challenges to manufacturers. The Petitioner said that the infrastructure does not currently exist to perform the data collection and testing that would be required on a recipe-specific basis. The Petitioner stated in the petition that many facilities would need to make significant equipment expenditures in order to have the capability to measure and collect the gas consumption data at the recipe-specific level.

In the Petition for Reconsideration, the Petitioner also stated that it is difficult to estimate the quantities of gas used in individual production processes and steps, and it is currently not possible to measure actual consumption because the points at which gases are used (the individual tools) are widely distributed throughout a facility. Although each individual process chamber has a mass flow controller to control the actual flow of each gas introduced in the chamber, collecting this information would require software modifications and the implementation of data gathering capability on the level of each tool at the facility, and then managing the data collected for all tools across the facility. In subsequent information provided to the EPA, the Petitioner stated that apportioning gas consumption to these points on a recipe-specific basis would introduce significant degrees of error that could affect the uncertainty of estimated emissions.

In discussions with the EPA, the Petitioner also suggested that as an alternative to the recipe-specific approach, facilities may be able to estimate emissions using the allocation of F–GHG to specific process types, and an estimate of the overall DRE for those process types. However, because the Petitioner and EPA developed the other F–GHG estimation approaches being proposed today, this alternative method was not developed beyond an initial concept.

In 2010, the EPA's goal was to publish default utilization rates and by-product formation rates for the electronics manufacturing industry that would provide accurate facility-level F–GHG emissions data. This would avoid the need for facilities to determine these rates on a recipe-specific basis. At that time, however, the emission data available to the agency was very limited, particularly with regard to F–GHG emissions from the plasma etch process for the semiconductor industry. At the final rule stage, we decided that we still had insufficient data for estimating

plasma etch process emissions using default emission factors for the largest facilities. For that reason, we required the largest facilities to report their facility-specific plasma etch data using a recipe-specific approach. We intended to use these data to develop emission factors for incorporation into the rule at a later date. Subsequent to the publication of the final rule, the Petitioner provided a substantial amount of plasma etch data as described in this section of the preamble. We have used these data to develop improved emission factors for plasma etch processes. Thus, the recipe-specific approach is no longer a critical part of the rule. As described in Section III.B.12 of this preamble, we are also proposing a mechanism for gathering data from facilities on changes to their processes that may necessitate updates to the default emission factors. We anticipate this addition will ensure that the default emission factors continue to reflect facility emissions going forward.

It is the EPA's position that the recipe-specific requirements in 40 CFR 98.93(a)(2)(ii)(A), (a)(3), and (a)(4) are no longer necessary given the substantial amount of data submitted by the Petitioner following promulgation of subpart I, together with today's proposal to revise the default utilization and by-product formation rate method and introduce a stack testing method. Furthermore, the EPA believes the revised and alternative methods proposed today would provide reliable facility-specific data while avoiding in large part the potential concerns raised regarding the recipe-specific requirements with respect to technical difficulty, burden, and the protection of trade secret information. The EPA is proposing to remove the recipe-specific requirements and revise corresponding requirements in 40 CFR 98.94, 98.96, and 98.97 to remove recipe-specific provisions.

As described in Section III.B.2 of this preamble, after subpart I was promulgated, the EPA received additional data characterizing emissions from the semiconductor manufacturing industry and supporting revised default gas utilization and by-product formation rates for the plasma etch process. As discussed in Section III.B.2 of this preamble, we are proposing revised default utilization rate and by-product formation rates for the plasma etch and chamber cleaning process types. The EPA believes that the revised default emission factors (based on process type, gas, and wafer size) would provide reliable facility-specific GHG data. Like other semiconductor manufacturing facilities, new facilities manufacturing semiconductors on wafers greater than 300 mm diameter would not be required to develop recipe-specific gas utilization rates and by-product formation rates and would use either the default factors for 300 mm wafers or stack testing. In the future, the EPA will likely develop default gas utilization rates and by-product formation rates specifically for facilities using wafers greater than 300 mm as that technology is implemented and emissions data are available and collected by the EPA (see Section III.B.12 of this preamble).

As described in Section III.B.1 of this preamble, the EPA is also proposing to include a method using stack testing to develop fab-specific F–GHG emission factors for all electronics manufacturing facilities. The EPA believes that the addition of the stack testing method would also provide representative facility-specific GHG data for all types of electronics manufacturing facilities, including new facilities manufacturing semiconductors on wafers greater than 300 mm diameter. Allowing a stack test approach in addition to the revised default emission factor approach would give reporters flexibility to choose from alternative methods if the recipe-specific approach is removed as the EPA is proposing. For example, facilities with a large number of stacks may prefer the default emission factor approach, whereas a facility with a small number of stacks may desire the stack test method. Compared to the recipe-specific approach, the default emission factor and stack test options would reduce or eliminate the burden, technical, and logistical feasibility concerns raised by the Petitioner.

Finally, the proposed default gas utilization rates and by-product formation rate and stack test alternatives are more compatible with the existing infrastructure, equipment, data management, and recordkeeping systems currently used by the industry than the recipe-specific approach. The proposed approaches would ensure that the EPA would continue to receive representative data for characterizing the F–GHG emissions from the industry while reducing burden on reporting facilities.

Although the EPA has deferred the mandatory use of recipe-specific gas utilization rates and by-product formation rates through the end of 2013 (76 FR 59542, September 27, 2011), we are proposing that the requirements to use recipe-specific rates in 40 CFR 98.93(a)(2)(ii)(A), (a)(3), and (a)(4) would be removed and therefore no longer be effective beginning January 1, 2014. Under the proposed amendments, no semiconductor manufacturing facility would have the option to use the recipe-specific method or report those data elements after the end of 2013. In addition, the recipe-specific method would be removed as an option for other electronics manufacturing facilities for the same reasons related to burden and technical feasibility that it would be removed for semiconductor manufacturing facilities.

As described in Section II.B of this preamble, the proposed rule may not be finalized until the second half of 2013. Therefore, reporters currently using the recipe-specific methods of 40 CFR 98.93(a)(2)(ii)(A), (a)(3), and (a)(4), if any, would be allowed to continue to use these methods for estimating 2013 emissions reported in 2014. Following the January 1, 2014 effective date, reporters would be required to select new calculation methods to estimate emissions for 2014 reported in 2015, and thereafter, based on the options in the final amendments to subpart I.

Finally, we are also proposing to revise 40 CFR 98.93(a)(6) to remove the option to develop recipe-specific gas utilization rates and by-product formation rates for F–GHG and process combinations for which no default emission factors are available, and to revise 40 CFR 98.93(b)(1)(i) and (b)(2)(i) to remove the option to develop facility-specific N_2O emission factors. These options would present essentially the same technical problems as the provisions for developing recipe-specific F–GHG rates elsewhere in the rule, including for the facility-specific N_2O factors.

Under 40 CFR 98.93(a)(6), facilities would assume that F–GHG emissions equal F–GHG consumption, which is equivalent to treating the utilization and by-product formation rates for gas and process combinations without default factors as both zero. However, the number of default gas utilization rates and by-product formation rates for different gas and process combination is sufficiently broad that the fraction of total emissions represented by emissions estimated under 40 CFR 98.93(a)(6) would be minimal. Under the proposed revisions to 40 CFR 98.93(b), facilities would use default N_2O emission factors for both CVD processes and for the aggregate of all other manufacturing production processes, and would not have the option to develop facility-specific N_2O emission factors.

We specifically request comment on whether facilities are currently using or plan to use the recipe-specific approach from the final subpart I rule in 40 CFR 98.93(a)(6), or the facility-specific approach for N_2O emissions in 40 CFR

98.93(b), for the 2013 reporting year or beyond and whether removal of these methods would significantly impact facilities.

4. Applicability and Calculating Annual Manufacturing Capacity for Facilities That Manufacture Electronics

The EPA is proposing to revise the calculation to determine annual capacity for electronics manufacturing facilities, which is used in the calculation to determine whether a facility meets the reporting threshold. The current subpart I applicability threshold for semiconductor, MEMS, and LCD manufacturing relies on 2006 IPCC Tier 1 emission factors [3] and the annual manufacturing capacity of the facility. (For PV manufacturing, emissions for applicability determinations are determined by multiplying annual F–GHG purchases or consumption by the gas-appropriate GWPs.) Electronics manufacturing facilities with total facility emissions equal to or greater than 25,000 $mtCO_2e$ must report under subpart I. For the applicability determination, emissions from the electronics manufacturing operations at the facility are calculated using the methods in 40 CFR 98.91 instead of the methods in 40 CFR 98.93. The current methods under 40 CFR 98.91 calculate emissions based on the maximum designed capacity of the facility (measured in surface area of substrate produced) and do not account for the effect of GHG abatement systems. Facilities whose total reported emissions, including the emissions from electronics manufacturing calculated according to 40 CFR 98.93, are below the 25,000 $mtCO_2e$ threshold can stop reporting if they meet the criteria in 40 CFR 98.2(i).

The current subpart I also requires different methods for semiconductor facilities to calculate and report their F–GHG emissions based on the annual manufacturing capacity of the semiconductor facility and the size of wafers the semiconductor facility is manufacturing.[4] The facility's manufacturing capacity is calculated using Equation I–5, which specifies the manufacturing capacity as 100 percent of the annual manufacturing capacity of a facility, as determined by summing the area of maximum designed substrate starts of a facility per month over the reporting period. ''Maximum designed substrate starts'' is currently defined in 40 CFR 98.98 as ''the maximum quantity of substrates, expressed as surface area, that could be started each month during a reporting year if the facility were fully equipped as defined in the facility design specifications and if the equipment were fully utilized. It denotes 100 percent of annual manufacturing capacity of a facility.''

Following the publication of the final subpart I rule, the Petitioner stated in the Petition for Reconsideration that the maximum capacity calculation methods assume that a facility has both a full complement of equipment that corresponds to its design, and that the full complement of equipment is utilized to a maximum degree. The Petitioner stated that the reliance on a ''fully equipped'' facility and ''fully utilized'' equipment does not reflect the majority of semiconductor facilities, which may increase or reduce production to meet market demands or update their process to create new products. In the Petition for Reconsideration, the Petitioner noted that many facilities are built to reach a certain maximum capacity but are only equipped in stages (for example, one production line at a time), and that older facilities may have been built for a certain capacity but may only be used partially as part of the original equipment is sold or moved to a newer facility. The Petitioner requested that the method for calculating manufacturing capacity, including the definition of ''maximum designed substrate starts,'' correlate to a facility's actual current equipped capacity.

The EPA agrees that a facility's annual capacity may not be reflected by the designed capacity of a ''fully equipped'' and ''fully utilized'' facility, because some equipment that is part of the original design configuration may not yet be installed, or some equipment may be removed and not replaced. Therefore, the EPA is proposing to replace the phrase ''maximum designed substrate starts'' in Equation I–5 with the phrase ''maximum substrate starts.'' Likewise, we are proposing to replace the definition in 40 CFR 98.98 of ''maximum designed substrate starts'' with that for ''maximum substrate starts,'' which would mean ''the maximum quantity of substrates, expressed as surface area, that could be started each month during a reporting year based on the equipment installed in that facility and assuming that the installed equipment were fully utilized. Manufacturing equipment is considered installed when it is on the manufacturing floor and connected to required utilities.''

A facility would continue to use Equation I–5, with this revision, to determine the annual manufacturing capacity of the facility to determine if they meet the threshold for reporting under subpart I.

The proposed changes retain the requirement to calculate and report the maximum annual capacity of the facility (see 40 CFR 98.96(a)), but clarify that the maximum capacity is based on the equipment on-site in the reporting year, assuming it is fully utilized, rather than the design capacity.

The proposed changes would not affect the applicability of subpart I to any facility that is already reporting GHG emissions under subpart I. If the proposed changes become final, facilities that are already reporting would not be able to re-calculate emissions using the procedures under 40 CFR 98.91 and cease reporting if they do not meet the revised applicability criteria. Facilities may cease reporting only if they meet the criteria in 40 CFR 98.2(i).

We are also proposing to remove the requirement that semiconductor manufacturing facilities calculate and report their F–GHG emissions based on the annual manufacturing capacity of the facility and the size of wafers that the facility is manufacturing. Subpart I currently distinguishes between ''large'' and ''other'' semiconductor facilities based on the calculated annual manufacturing capacity. Except as provided in the September 27, 2011 final rule titled ''Changes to Provisions for Electronics Manufacturing to Provide Flexibility in 2011 to 2013,'' subpart I requires ''large'' semiconductor facilities (facilities with an annual manufacturing capacity of greater than 10,500 m^2 of substrate) and those facilities that manufacture wafers greater than 300 mm in diameter to calculate emissions using recipe-specific utilization and by-product formation rates. As discussed in Sections III.B.1 through III.B.3 of this preamble, we are proposing to revise the calculation methodologies for semiconductor manufacturers. The proposed calculation methods would apply to all semiconductor manufacturers and there is no longer a need to distinguish ''large'' facilities based on manufacturing capacity.

[3] 2006 IPCC Guidelines for National Greenhouse Gas Inventories, Prepared by the National Greenhouse Gas Inventories Programme, Eggleston H.S., Buendia L., Miwa K., Ngara T. and Tanabe K. (eds). Hayama, Kanagawa, Japan. Available at: *http://www.ipcc-nggip.iges.or.jp/public/2006gl/index.html*

[4] Facilities manufacturing MEMS, PVs, and LCDs use the same method regardless of facility manufacturing capacity. Facility manufacturing capacity is still used to determine applicability according to 40 CFR 98.91.

5. Integrated Production and R&D Activities for Facilities That Manufacture Electronics

The October 30, 2009 final GHG reporting rule (74 FR 56260) defined research and development (R&D) activities as ''those activities conducted in process units or at laboratory bench-scale settings whose purpose is to conduct research and development for new processes, technologies, or products and whose purpose is not for the manufacture of products for commercial sale, except in a *de minimis* manner.'' (See 40 CFR 98.6.) At that time, emissions from R&D were expected to be small, and these activities were not expected to significantly contribute to the total emissions from a reporting facility. The final subpart I rule (75 FR 74774, December 1, 2010) did not change the provisions for R&D activities, but deferred to the requirements found in 40 CFR part 98, subpart A.

Following the publication of the final subpart I rule, the Petitioner stated in the Petition for Reconsideration that the final subpart I rule does not account for semiconductor manufacturing facilities that are unable to segregate their R&D activities from production manufacturing. The Petitioner stated in the petition that in order to remain globally competitive, semiconductor companies must engage in robust R&D efforts aimed at innovating new manufacturing processes and new recipes. The petition further stated that many semiconductor facilities integrate their R&D processes into their manufacturing facilities to better consider process manufacturability. The Petitioner stated that many facilities that have integrated R&D cannot segregate gas consumption and emissions from regular production activities.

To date, no facilities covered by other source categories have requested a change to the R&D exemption. However, based on the additional information provided by facilities subject to subpart I, the EPA believes that certain facilities in the electronics manufacturing industry may have unique R&D activities that are integrated into production. In some cases, facilities with integrated R&D may use the same gases from the same containers for both R&D activities and normal production. The EPA agrees that for these electronics manufacturing facilities, it is not feasible to accurately segregate gas consumption for R&D activities from production activities without measuring consumption at the level of the individual tool, or by the individual wafer. (See ''Technical Support for Other Technical Issues Addressed in Revisions to Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028.) Because gas consumption is the basis for estimating emissions from the electronics industry, segregating gas consumption for R&D and production would be essential to segregating the emissions from the respective processes, and this is not currently feasible at many facilities. Therefore, the EPA is proposing to allow all electronics manufacturing facilities covered by subpart I who cannot segregate R&D emissions to report R&D emissions with their total facility emissions and to identify that emissions associated with R&D activities are included in their overall emissions estimates. We are also proposing that facilities reporting integrated R&D emissions must report an estimate of the range of the percentage of total emissions from their R&D activities as part of their annual report (see proposed 40 CFR 98.96(x) and 40 CFR 98.97(j)).

6. Accuracy and Precision of Monitoring Instrumentation for Facilities That Manufacture Electronics

Subpart I currently requires all flow meters, weigh scales, pressure gauges, and thermometers used for measurements to have an accuracy and precision of one percent of full scale or better (40 CR 98.94(i)). In comments to the April 12, 2010 proposed subpart I rule (75 FR 18652), the Petitioner stated that many older facilities in the electronics manufacturing industry do not have the ability or the available instrumentation to measure all quantities, primarily F–GHG and N_2O gas consumption, used to calculate GHG emissions to an accuracy and precision of 1 percent of full scale or better (see ''Response to Public Comments, Subpart I—Electronics Manufacturing,'' Docket ID. No EPA–HQ–OAR–2009–0927–0228). Therefore, these facilities would have difficulty achieving compliance with the accuracy and precision requirements of the subpart without purchasing and installing new measurement equipment. The Petitioner provided additional data in these comments and in the Petition for Reconsideration that these older facilities typically have accuracies of 2 to 4 percent, and requested that the accuracy requirements for subpart I account for the technical capabilities of older facilities, who may find installing new measurement equipment problematic based on existing equipment configurations.

The EPA recognizes that some of the older facilities required to report under subpart I may have difficulty achieving compliance with the current accuracy and precision requirements. Additionally, the EPA evaluated the existing accuracy and precision requirements in 40 CFR part 98, subpart A, which require flow meters to have a calibration error of not more than 5 percent of the reference value (not full scale) (see 40 CFR 98.3(i)). The 5 percent calibration error requirements of 40 CFR 98.3(i) apply only to gas and liquid flow meters used to measure fuel, process streams, or feedstocks; they do not apply to weigh scales, pressure gauges, and thermometers. Under 40 CFR 98.3(i), these latter measurement devices must be calibrated to meet the accuracy requirement specified for the device in the applicable source category subpart, or, in the absence of an accuracy requirement, the device must be calibrated based on other available standards, such as manufacturer's specifications and industry standards.

The EPA is proposing to remove the 1 percent accuracy and precision requirements in subpart I (40 CFR 98.94(i)). Instead, we are proposing that electronics manufacturing facilities subject to subpart I would be required to meet the existing General Provision calibration accuracy requirements in subpart A (40 CFR 98.3(i)). This would provide a balance between the technical issues raised by the Petitioner and the need to gather data for F–GHGs and N_2O with a reasonable degree of accuracy. The EPA believes that the subpart A requirements would be appropriate for electronics manufacturing facilities and would address the concerns of the older facilities. Under this proposal, the calibration accuracy requirements for gas flow measurement devices would be 5 percent, as specified in 40 CFR 98.3(i). Further, other measuring devices (e.g., weigh scales and thermometers) would be required to be calibrated to an accuracy based on an applicable operating standard, including, but not limited to, device manufacturer's specifications and industry standards (see 40 CFR 98.3(i)(1)(i)).

The EPA does not expect that this change will impact the accuracy of facility F–GHG and N_2O emission estimates at facilities that are using measurement equipment that meets the one percent of full scale standard. It may affect the accuracy of F–GHG and N_2O emission estimates at older facilities that have less accurate measurement equipment. However, the subpart A requirements, which appear in 40 CFR 98.3(i), still require an appropriate amount of accuracy in measurement equipment used for compliance. The accuracy requirements in subpart A that we propose to apply

to subpart I are a minimum requirement. Facilities that are currently meeting the higher accuracy standard in subpart I would be expected to continue to use the same monitoring equipment and achieve the same level of accuracy, and would not be expected to ''fall back'' to the minimum accuracy requirement in subpart A by, for example, replacing current equipment with less accurate monitoring equipment.

7. Facility-Wide Gas Specific Heel Factor for Facilities That Manufacture Electronics

The 2010 final subpart I rule requires electronics manufacturing facilities to calculate emissions from gas consumption and account for the residual amount of gas left in containers that are returned to the gas supplier. This residual amount of gas is referred to as a ''heel.'' Facilities establish a trigger point based on cylinder weight or gas pressure for each gas and type or size of container used by the facility to indicate that the cylinder should be changed for a full one.

Specifically, the final subpart I rule requires electronics manufacturing facilities to calculate a facility-wide heel factor for each gas to account for the amount of gas represented by the heel in the emissions calculations. Subpart I also requires facilities to ''re-calculate a facility-wide gas-specific heel factor if you use a trigger point for change out for a gas and container type that differs by more than 5 percent from the previously used trigger point for change out for that gas and container type.'' Additionally, the final subpart I rule requires measuring the pressure or weight of the container when an exceptional circumstance occurs; an ''exceptional circumstance'' is a change out point that differs by more than 20 percent from the trigger point for change out used to calculate the facility-wide gas-specific heel factor for that gas and container type. See 40 CFR 98.94(b).

The requirement to re-calculate the facility-wide gas-specific heel factor if the trigger point for change out differs by more than 5 percent is one of the issues identified in the Petition for Reconsideration. In the Petition for Reconsideration, the Petitioner stated that the requirement is technically infeasible for certain facilities using small containers, because the level of accuracy associated with these measurements may not be achievable. Specifically, the Petitioner provided the example of a facility using a 20-pound cylinder with a trigger point of 2 pounds. The Petitioner stated that any change in this trigger point of more than 0.1 pounds would require a facility to ''recalculate a facility-wide gas specific heel factor,'' and any deviation in the actual change out point of more than 0.4 pounds would require handling as an ''exceptional circumstance.'' The Petitioner stated that, in the context of using hundreds of cylinders, the re-calculation requirement presents a significant amount of management in terms of tracking and administrative tasks, for a minimal difference in the accuracy of the emission estimates reported.

The EPA did not intend to require facilities to recalculate the facility-wide heel factor whenever the actual heel in a container deviated from trigger point by more than 5 percent. The EPA is proposing to amend the requirements to clarify that recalculating the heel factor is only needed when the trigger point for a specific gas and cylinder type is changed, and not as a result of variation in the actual heel remaining in a cylinder. The trigger point is changed by the facility operators to account for changes in the type or size of containers, or to reflect changes in the process operating requirements that would allow for a lower heel factor to be used to utilize a greater fraction of the gas in a container, or that may require a larger heel factor as a more conservative margin before a container is empty. Subpart I has separate provisions at 40 CFR 98.94(b)(4) to address exceptional circumstances in which the amount of heel in a cylinder deviates substantially from the usual trigger point. We are proposing to amend 40 CFR 98.94(b)(5) to clarify that a gas-specific heel factor must be recalculated when the facility executes a process change to modify the trigger point for a gas and container type that differs by more than 5 percent from the previously used trigger point for that gas and container type. The proposed amendments would clarify the EPA's intent that facilities recalculate the heel factor when there are process changes that would substantially alter the trigger point, and that facilities do not need to recalculate the heel factor to reflect variation in the actual heel quantities in cylinders.

The EPA is also proposing to revise the ''exceptional circumstance'' criteria at 40 CFR 98.94(b)(4) with respect to small containers because while the current criteria are appropriate for large cylinders, treating small containers in the same manner may be burdensome. Specifically, we are proposing to revise the criteria for an ''exceptional circumstance'' in 40 CFR 98.94(b)(4) from 20 percent of the original trigger point for change out to 50 percent for small cylinders. We are proposing to define a small cylinder as a container that contains less than 9.08 kg (20 pounds) of gas. For large containers, the ''exceptional circumstance'' would remain as a change out point that differs by 20 percent of the trigger point used to calculate the gas-specific heel factor. We are proposing to revise the criteria for small containers to 50 percent to reduce the burden for facilities using small containers and still maintain the accuracy needed for accounting for the heel in both small and large containers. These proposed changes take into account the fact that a small amount of F–GHGs can account for a large fraction of the heel factor in a small container, and that normal variation in day-to-day container management could be more likely to trigger an ''exceptional circumstance.'' At the same time, the proposed revisions would still require facilities to directly measure the heel in cases where the cylinder change out deviated from the established trigger point. For example, a small 15-pound cylinder with a 2-pound trigger point would still need to be measured, in lieu of using the established heel factor, if the difference in the change out point was greater than 1 pound. In this example, this 1-pound difference (based on the proposed 50-percent criteria for an exceptional circumstance) represents less than 8 percent of the usable gas in the cylinder. Under the current 20-percent criteria, a difference from the actual trigger point of 0.4 pounds (20 percent of the 2-pound trigger point), would represent about 3 percent of the usable gas in the cylinder. These small cylinders for which we are proposing to change the exceptional circumstance criteria generally represent a small percentage of overall gas consumption. The EPA understands that cylinder size is generally chosen to reflect overall consumption, with larger cylinder sizes chosen by the facility for those gases used in larger quantities.

8. Apportioning Model Verification for Facilities That Manufacture Electronics

Subpart I requires electronics manufacturing facilities to estimate emissions from gas consumption and report the input gas consumed for each individual process sub-type or process type using Equation I–13. Equation I–13 requires the use of an apportioning factor, which is developed for F–GHG and N_2O input gases using a facility-specific engineering model, and is expressed as a fraction of the input gas used for each process sub-type or process type. Reporters have the flexibility to develop the model based on any quantifiable metric selected by the facility (such as wafer passes or wafer starts), but must verify the model

by comparing the modeled and actual gas use for the largest gas used for plasma etch and the largest gas used for chamber cleaning. Additionally, the difference between actual and modeled plasma etch gas consumption must not exceed 5 percent. The provisions of 40 CFR 98.94(c)(2)(i) also require that for verifying the model, facilities analyze a 30-day period of operation during which the utilized capacity of the facility equals or exceeds 60 percent of its design capacity, or if the utilized capacity is less than 60 percent during the reporting year, a period during which the facility experiences its highest 30-day average utilization. This approach allows reporters to select the most appropriate quantifiable metric for their facility while providing consistent verification methods.

The Petition for Reconsideration raised concerns that the verification requirements for the apportioning engineering model were overly burdensome. The Petitioner stated that the hardware and infrastructure for apportioning gas consumption by process type or sub-type to meet this requirement are not in place at most facilities, and would require installation of additional equipment to measure and record gas consumption at the individual tool level for developing and confirming the model at the 5 percent accuracy level.

However, the Petitioner also noted that some facilities may be configured such that they are able to apportion gas consumption to one or more process types or process sub-types based on gas connections and measured flow rates (see ''Technical Support for Other Technical Issues Addressed in Revisions to Subpart I,'' Docket ID no. EPA–HQ–OAR–2011–0028). They requested that the rule accommodate both a modeling and a measurement approach.

The Petitioner also stated that the verification period criteria in 40 CFR 98.94(c)(2)(i) are not practicable. Specifically, the Petitioner pointed out that the data needed to assess the period with the highest 30-day average utilization may not be available until the end of the reporting year. As a result, facilities may not have enough time to identify and select the assessment period, complete and compare the modeling and measurement analysis, or make corrections prior to the applicable reporting deadline in the following year (see ''SIA Revised Proposal to Amend the Apportionment Model Validation Criteria in 40 CFR 98.94(c),'' Docket ID no. EPA–HQ–OAR–2011–0028). Based on these concerns, the Petitioner requested that the rule be revised to allow facilities to select a period of operation for model verification that is representative of normal operation, up to and including the full calendar year of operation.

Additionally, in the Petition for Reconsideration the Petitioner questioned the requirement to demonstrate that the model provides a measurement of gas consumption that is accurate to within 5 percent of the actual measurement. The petition stated that data provided from one manufacturer showed that, for a single tool running two recipes, the difference between modeled gas consumption and actual gas consumption was greater than 5 percent (see ''Verification Tests to Demonstrate Difficulty of Achieving 5 percent Limit,'' Docket ID. No EPA–HQ–OAR–2011–0028). The Petitioner explained that facilities running a number of tools with a larger number of recipes would have greater uncertainties and would be unable to meet the verification requirements of the final rule. Furthermore, they stated that some facilities would require monitoring, collecting, and analyzing data from the mass flow meters for all tools to accurately model, verify, and achieve the 5 percent verification requirement.

The EPA received comments with similar concerns in response to the June 22, 2011 proposed rule titled ''Changes to Provisions for Electronics Manufacturing (Subpart I) To Provide Flexibility'' (76 FR 36472). In the preamble to the corresponding final rule (76 FR 59542, September 27, 2011), the EPA responded that apportioning is a particularly important component in estimating emissions of F–GHGs from electronics manufacturing because the consumption of gas by process type or sub-type is one of the major sources of error in estimating GHG emissions. The EPA also noted in that response that facilities that could not meet the apportioning model verification requirements in subpart I had the option to apply for, and if approved by the Administrator, use BAMM in 2011, 2012, and 2013. The EPA reported in that preamble that we had received only a small number of requests to use BAMM, relative to the number of facilities expected to report under subpart I. The EPA concluded that while some facilities were unable to meet the model verification requirements, the problem was limited.

Despite the problem being limited to particular facilities, the EPA wants to ensure that all facilities can comply with subpart I. The EPA recognizes that some facilities may still not be able to meet the present apportioning model verification requirements in 40 CFR 98.94(c)(2), even though other changes being proposed today would reduce the need to apportion gas consumption. For example, the proposed stack test alternative and the revised default utilization and by-product formation rates would reduce the need to apportion gas among tools or process types. According to the Petitioner, the situation would be most complicated for semiconductor facilities using 150 or 200 mm wafers because they would typically need to apportion three to five different gases between plasma etch and chamber cleaning process types. At 300 mm fabs, NF_3 appears to be the only gas that needs to be apportioned between plasma etch and chamber cleaning process types, based on information provided by the Petitioner.

Even though facilities would have a reduced need to apportion gas consumption between the plasma etch and chamber clean process types, the EPA recognizes that many would still need to apportion gas consumption between abated and unabated tools and, if they were to use the proposed stack testing option, they may also need to apportion gas consumption between stack systems that are tested and those that are not. As a result, certain facilities would still face issues of technical feasibility in meeting the apportioning model verification requirement requiring a 5 percent maximum difference between modeled and actual F–GHG consumption.

In light of these concerns, the EPA is proposing to amend the verification requirements. First, the proposed amendments would allow reporters the option to use direct measurements of gas consumption to avoid the need to develop an apportioning model, and to develop an apportioning factor for each process type, sub-type, stack system, or fab using gas flow meters or weigh scales because direct measurements would provide the most accurate data for analysis. However, the proposed rule would retain the option to use an apportioning model to allow for greater flexibility for electronics manufacturers and reduce the burden for facilities with a larger number of tools, gases, or process types and sub-types. The model verification requirements would be retained to ensure that reporters across the industry are providing data of consistent quality. Reporters opting to use the apportioning model would be required to verify the model by comparing actual gas consumption to modeled gas consumption. The reporter would select for comparison the F–GHG that corresponds to the largest quantity, on a mass basis, of F–GHG used at the

fab that has to be apportioned. Reporters would have the flexibility to verify the model for two F–GHGs on an aggregate use basis if one of the gases selected is used in the largest quantity at each fab. In this option, the predicted total volume consumed of the two gases combined would be required to match the actual total volume consumed within the verification percent difference requirements for the apportioning model. Reporters would use this latter option to account for the fact that they may not be able to predict which gas will be used in the largest quantity as of the end of the year, but they want to verify the model at some point early in the year. For example, a facility may predict that one of two gases, CF_4 and C_2F_6, would be used in the largest quantity as of the end of the year, but they do not know which one. However, they believe that the two-month period from March to April is the most representative period of operations, and they may select that period because that is when they will be performing stack testing. The facility could verify the model for both gases based on data from March and April. At the end of the year, the facility would confirm that at least one of those two gases was used in the highest quantity and both gases met the verification criteria on an aggregate basis. Reporters would be required to correct the model if it did not meet the verification requirements.

Second, where a facility opts to develop and use an apportioning model, we are also proposing to revise the verification standard to increase the allowable difference between the actual and modeled gas consumption from a maximum 5 percent difference to a maximum of 20 percent difference. The data provided in an industry analysis submitted with the Petition for Reconsideration have shown that the 5 percent difference criterion would be difficult to achieve under most operating scenarios and would require installation of additional equipment. Increasing the allowable difference between the actual and modeled gas consumption from a maximum 5 percent difference to a maximum 20 percent difference would also reduce the burden on facilities by providing greater flexibility in the methods they use for modeling gas consumption. This will reduce the potential that they will need to purchase and install new equipment to measure, record, and analyze data for gas consumption at the level of the individual tool, process type, or process sub-type.

As a result of other rule changes being proposed today, including the combining of the wafer clean and plasma etch process categories for semiconductor manufacturing and the elimination of the use of recipe-specific gas utilization rates and by-product formation rates for semiconductor manufacturing, the number of gases that would need to be apportioned among process types and sub-types would be reduced for semiconductor manufacturing facilities, especially for semiconductor manufacturing facilities using 300 mm wafers. For facilities that are using 300 mm, only NF_3 is commonly used in both the plasma etch and chamber clean process types. For facilities that are using 150 mm or 200 mm wafers, several F–GHG are used in both the plasma etch and chamber clean process types. Therefore, the potential effect of the proposed increase in the allowable difference between modeled and actual gas consumption on overall uncertainty of the GHG emission estimates has been minimized for semiconductor manufacturing facilities using 300 mm wafers that need to apportion gas usage among process types or sub-types compared to the standards promulgated in December 2010. However, it is not clear what effect this change will have on facilities using 150 mm and 200 mm wafers because of the number of gases that are used in both plasma etching and chamber cleaning process types.

The proposed change in the apportioning model criteria would also apply to LCD, MEMS, and PV manufacturing facilities. For LCD manufacturing, only SF_6 is commonly used in both the plasma etching and chamber cleaning process types and would need to be apportioned between those process types. For both MEMS and for PV, several F–GHGs are typically used in both the plasma etching and chamber cleaning process types and would need to be apportioned between the two process types.

It is also important to note that facilities would be required to apportion gas consumption between tools and processes for which they are claiming emission reductions as a result of abatement systems, and some facilities do not have abatement systems on all of their tools. For these reasons, we are specifically seeking comment on the need to change the verification model criterion from 5 percent maximum allowed difference to 20 percent, and the effect that this proposed change may have on the error or uncertainty associated with the F–GHG emission estimates at facilities that need to apportion several gases between process types, or between tools that do or do not have abatement systems.

We also agree with the Petitioner that facilities should be able to select a longer period of operation as the basis for verifying their apportioning models. We agree that they should be able to compare modeled to actual gas consumption for the whole year to verify the model, because it may be difficult to identify in advance a shorter period that meets the production criteria in 40 CFR 98.94(c)(2)(i). The current rule specifies that facilities analyze a period of at least 30-days operation to verify the model, but does not specify a maximum allowed period; it specifies a minimum of 30 days to ensure that data are representative of normal operation.

We are also proposing to allow the facility to select a period of the reporting year when the fab is at a ''representative operating level'' for the model verification, instead of at a minimum percent of design capacity, or instead of at the highest 30-day average utilization. The concept of a representative operating level would replace the current requirement in 40 CFR 98.94(c)(2)(i) that the facility be operating at 60 percent or more of its design capacity during the model verification, or that the verification occur during the period with the highest 30-day average for facility utilization if the facility operates below 60 percent of design capacity. The Petitioner pointed out that, under the current rule, it is difficult for a facility operating below 60 percent capacity to determine which 30-day period would have the highest average facility utilization. Furthermore, a facility that performs a validation early in the year while operating at less than 60 percent capacity may need to repeat the verification if production dramatically increased later in the year such that the facility was operating above 60 percent of design capacity. (The proposed amendment to adopt the definition of a ''representative operating level'' is described in detail in Section III.B.1 of this preamble.)

Under this proposal, the representative period would still be at least 30 days, but we are proposing to clarify that it can be up to the whole calendar reporting year in duration. Because the proposed requirements would allow the use of a representative operating level, facilities would be able to determine the assessment period with less chance of having to repeat the verification, complete and compare the modeling and measurement analysis, and make corrections to the model, if needed, prior to the March report submittal deadline for a given reporting year.

9. Calculating N_2O Emissions for Facilities That Manufacture Electronics

The EPA is proposing to revise the language for calculating N_2O emissions in 40 CFR 98.93(b) to clarify that reporting is at the fab level. In the Petition for Reconsideration, the Petitioner requested clarification of the requirements to calculate annual facility-level N_2O emissions for CVD processes for electronics manufacturing facilities. The current subpart I states in 40 CFR 98.93(b) that facilities ''must calculate annual facility-level N_2O emissions from each chemical vapor deposition process and other electronics manufacturing production processes.'' However, 40 CFR 98.96(c)(3) specifies reporting ''N_2O emitted from each chemical vapor deposition process and from other N_2O-using manufacturing processes as calculated in Equation I–10 of this subpart.'' The Petitioner indicated that this difference in language led to confusion as to whether the EPA intended to require facility-level calculation and reporting of N_2O emissions for CVD processes, or whether facilities must apportion gas consumption to individual CVD processes and other individual N_2O-using processes.

The EPA intended to require facilities to report the N_2O emissions from all CVD processes combined and from all other manufacturing processes combined, including wafer plasma etch and chamber cleaning, using the amount of N_2O consumed, the process utilization factor for the process, and the fraction of N_2O destroyed by abatement systems. The proposed amendments would clarify that facilities calculate and report emissions at the fab level for the aggregate of all CVD processes and for the aggregate of all other N_2O-using processes. We are proposing that facilities will use only the default N_2O utilization factors in proposed Table I–8 of subpart I, one for CVD processes and one for all other N_2O-using processes. This approach is consistent with the requirements to calculate emissions of F–GHGs from each process type or sub-type.

The EPA is proposing to revise 40 CFR 98.93(b) to read as follows: ''You must calculate and report annual fab-level N_2O emissions from all chemical vapor deposition processes and from the aggregate of other electronics manufacturing production processes.'' The ''aggregate of other electronics manufacturing production processes'' would represent the combination of wafer plasma etch and wafer cleaning categories using N_2O, and any other electronics manufacturing production processes using N_2O. Therefore, facilities would report two N_2O emission values for each fab at a facility: One for the aggregate of the chemical vapor deposition processes and one for the aggregate of other electronics manufacturing production processes. We are proposing to make similar changes to the reporting requirements in 40 CFR 98.96(c) for consistency and clarification.

We are also proposing to revise the default N_2O emission factor in Table I–8 of subpart I for the aggregate of the other N_2O-using manufacturing processes. The current default emission factor is 1.0 kg of N_2O emitted per kg of N_2O consumed. The proposed emission factor would be 1.14 kg of N_2O emitted per kg of N_2O consumed. This factor represents an average of the stack emission factors for N_2O (total N_2O emissions/total N_2O consumption) measured at several fabs (see ''Technical Support for Other Technical Issues Addressed in Revisions to Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028). At this time, the EPA does not have sufficient information to draw conclusions about the mechanism that results in the apparent creation of N_2O such that the N_2O emission rate is greater than the consumption rate. The EPA specifically seeks comment on the existing data and analysis supporting the revised emission factor, and requests additional data and analysis. Note that the emission factor is based on total N_2O consumption rather than just the consumption associated with non-CVD applications (which was not available to the EPA); thus, when applied only to non-CVD N_2O consumption, it may not fully compensate for the unknown N_2O source. The EPA will consider new information submitted by commenters in developing the final default emission factor. Commenters are encouraged to submit available data with their comments using the ''Electronics Manufacturing Data Request Sheet'' (see Docket ID No. EPA–HQ–OAR–2011–0028). Commenters can fill out the ''Electronics Manufacturing Data Request Sheet'' and submit the data to Docket ID No. EPA–HQ–OAR–2011–0028 for consideration by the EPA in developing the final revised default N_2O emission factors. If the EPA does update the proposed revised emission factor using such new data, if approved by the EPA, for the final rule, it will do so using the same methodologies as described in the ''Technical Support for Other Technical Issues Addressed in Revisions to Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028. The EPA will use the same criteria for accepting new data that were used in accepting data as specified in that document.

10. Abatement System Destruction and Removal Efficiency (DRE) for Facilities That Manufacture Electronics

Subpart I currently allows electronics manufacturers using abatement systems to reflect the emission reductions from abatement systems using either a measured or default DRE. The DRE is the efficiency of an abatement system to destroy or remove F–GHGs, N_2O, or both, and is expressed as the complement of the ratio of the volume of F–GHGs or N_2O exiting the abatement system divided by the volume of F–GHG or N_2O entering the abatement system.

Subpart I currently provides the option to use a default DRE value of 60 percent for all gases and process types and sub-types, or to directly measure the DRE for a system, or use the average of the measured DREs for a class of systems, as specified in the 40 CFR 98.94(f). For facilities opting to directly measure DREs, subpart I currently requires that measurements be in accordance with the EPA's Protocol for Measuring Destruction or Removal Efficiency of Fluorinated Greenhouse Gas Abatement Equipment in Electronics Manufacturing (''EPA's DRE Protocol''), Version 1, EPA 430–R–10–003.[5] Facilities are also required to measure the DREs at a frequency specified by EPA's random sampling abatement system testing program (RSASTP). As in the current rule, where a facility wishes to reflect emission reductions from the use of abatement systems, they must also certify that their abatement systems are installed, operated, and maintained according to manufacturers' specifications, as well as account for the uptime of the abatement system.

Following the publication of the final subpart I rule in December 2010, the Petitioner stated that the default DRE value is too low and also expressed concerns about the direct DRE measurement provisions. They provided data from DRE testing showing that the measured DRE values for ''point-of-use'' abatement systems at semiconductor manufacturing facilities may exceed 90 percent for certain gas and process type combinations (see ''Technical Support for Accounting for Destruction or Removal Efficiency for Electronics Manufacturing Facilities under Subpart I'', Docket ID No. EPA–HQ–OAR–2011–0028). Therefore, relying on the default DRE value of 60 percent would result in

[5] Available at: *http://www.epa.gov/semiconductor-pfc/documents/dre_protocol.pdf* (March 2010).

overestimating emissions from controlled tools by a factor of four times if the actual DRE is 90 percent, or by a factor of 20 if the actual DRE is 98 percent.

Furthermore, the Petitioner explained that in order to avoid overestimating emissions and take credit for the abatement systems already installed, facilities would need to use directly measured DRE values in lieu of the default DRE. The Petitioner explained in the Petition for Reconsideration that in the semiconductor manufacturing industry, a facility may have a hundred or more process tools, and each tool is fitted with its own F–GHG or N_2O abatement system, if one is used. As a result, measuring DRE can be expensive given the potential number of abatement systems involved. The petition stated that most large semiconductor manufacturing facilities have more than twice the number of POU abatement systems as estimated in the final subpart I rule. The Petitioner provided facility data from a semiconductor industry analysis submitted with the petition to show that most large facilities have an average of 104 abatement systems.

The Petitioner also noted that semiconductor manufacturing facilities would need to test a higher number of representative systems than estimated by the EPA if using the average of the measured DREs for a class of systems. The final subpart I rule defined classes of abatement systems by the manufacturer's model number and the gas that system abates. The commenters noted that with the narrow definition of class, facilities would have a potentially large number of ''classes'' with a small number of systems in each class. Therefore, a facility would need to test many systems to determine the average DRE for each class.

The EPA has considered the Petitioner's concerns and believes the DRE provisions can be simplified to relieve burden associated with measuring DRE and provide flexibility without adversely affecting the error or uncertainty of the DRE values used in emission calculations. Therefore, the EPA is proposing to revise the current subpart I provisions for directly measuring abatement system DRE, and to revise the basis for determining average DRE values for groups of similar abatement systems. These proposed changes would apply to all electronics manufacturers. All reporters covered under subpart I would still have the option of using either default DRE values or a measured DRE value to calculate abated emissions.

The EPA considers that the two essential parameters that affect the DRE performance of a system are the process category and the gas being abated. Therefore, we are proposing to allow reporters the option to establish a measured DRE value for each gas used in each process type, rather than each abatement system or ''class'' of abatement systems as currently defined in 40 CFR 98.98. Reporters would measure the DRE for each gas and process type combination in which F–GHG and N_2O are used in tools with abatement systems and for which abated emissions are calculated. The gas and process type combination would replace the concept of an abatement system ''class'' used in the current rule and would result in fewer DRE measurements being needed to determine the average DRE to be used in the emission equations.

In reviewing the available data (see ''Technical Support for Accounting for Destruction or Removal Efficiency for Electronics Manufacturing Facilities under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028), we believe that this approach would simplify the gas apportionment and uptime calculations for industry by reducing the number of ''classes'' of abatement systems, and would also reduce the burden of measuring DRE for a specific ''class'' of abatement systems. It is unlikely that the proposed approach would have any adverse effect on the error or uncertainty of the DRE values used in the emission equations. Rather, by simplifying the definition of abatement system class to the gas and process type combination, the proposed approach would likely encourage more testing of actual abatement systems and reduce the number of facilities that are using default DRE values. Consistent with the current subpart I, if a facility develops a measured DRE value for abatement systems for a gas and process type combination, the resulting DRE must be used for that gas and process type combination and a default DRE value cannot be used.

The current subpart I provisions require facilities to measure abatement system DREs in accordance with the EPA's DRE Protocol. We are proposing to revise the current subpart I provisions to allow reporters to use methods adapted from the 2009 ISMI Guideline tracer release/FTIR monitoring approach for determining abatement system DRE (hereafter, the ''2009 ISMI Guideline'')[6] and also an alternative method to locate sampling sites. These alternatives would be included in the proposed Appendix A to subpart I.

After reviewing the available data (see ''Comparison of Fourier Transform Infrared (FTIR) and Quadrupole Mass Spectroscopy (QMS) Methods for Determining POU Abatement System Effluent Flow,'' Technology Transfer #10095115A–ENG International SEMATECH Manufacturing Initiative, October 30, 2010, Docket ID No. EPA–HQ–OAR–2011–0028), we believe that allowing for the use of the adaptation of the 2009 ISMI Guideline would add flexibility to industry while reflecting potential improvements to the methods in the 2006 ISMI Guideline[7] that are referenced in the EPA's DRE Protocol. However, because we have limited test data and results from the use of this method we are specifically seeking comment and additional data from the use of the 2009 ISMI Guideline and any adaptations that facilities have implemented in the actual measurement of DRE from abatement systems at electronics manufacturing facilities.

The 2009 ISMI Guideline includes a method to measure abatement system flow and to account for dilution that may occur between the inlet and outlet of the abatement system by measuring the concentration of a non-reactive tracer gas into the abatement system flow in a known concentration. The change in concentration is used to measure dilution across the abatement system. To ensure thorough mixing of the tracer and accurate measures of flow and dilution, the 2009 ISMI Guideline requires sources to measure the concentration at least eight duct diameters downstream of the injection site. Because of the presence of short ducts in POU abatement systems, it can be difficult to meet those criteria. Therefore, we are also proposing that facilities could use an adaptation of Section 8.1 of EPA Method 7E at 40 CFR part 60, appendix A–4 as an alternative to determine whether the injected tracer is well mixed in the duct system or is stratified (i.e., poorly mixed), and to adjust the sampling if it is stratified. The concentration of the tracer would be measured at three traverse points at 16.7, 50.0, and 83.3 percent of the diameter of the duct and would have to

[6] Benaway, B., Hall, S., Laush, C., Ridgeway, R., Sherer, M., & Trammell, S. (2009). ''Guideline for Environmental Characterization of Semiconductor Process Equipment—Revision 2'', TT#06124825B–ENG, International SEMATECH Manufacturing Initiative (ISMI), December 2009. Available at: *http://www.sematech.org/docubase/document/4825beng.pdf.*

[7] Laush, C., Sherer, M., & Worth, W. (2006). ''Guideline for Environmental Characterization of Semiconductor Process Equipment'', TT#06124825A–ENG, International SEMATECH Manufacturing Initiative (ISMI), December 2006. Available at: *https://supplier.intel.com/static/EHS/4825aeng.pdf.*

be sampled for a minimum of twice the system response time. If the tracer gas concentration at each traverse point differs from the mean concentration for all traverse points by no more than ±5.0 percent of the mean concentration, the gas stream would be considered un-stratified and the facility would be allowed collect samples from a single point that most closely matches the mean. If the 5.0 percent criterion were not met, but the concentration at each traverse point differed from the mean concentration for all traverse points by no more than ±10.0 percent of the mean, a facility would be able to take samples from two points and use the average of the two measurements. The two points would be spaced at 16.7, 50.0, or 83.3 percent of the line. If the concentration at each traverse point differed from the mean concentration for all traverse points by more than ±10.0 percent of the mean but less than ±20.0 percent, the facility would take samples from three points at 16.7, 50.0, and 83.3 percent of the measurement line and use the average of the three measurements. If the gas stream were found to be stratified because the ±20.0 percent criterion for a three-point test were not met, the facility would be required to locate and take samples from traverse points for the test in accordance with Sections 11.2 and 11.3 of EPA Method 1 at 40 CFR part 60, appendix A–1. This proposed protocol is an adaptation of the protocol in Section 8.1.2 of EPA Method 7E, Determination of Nitrogen Oxides Emissions from Stationary Sources (Instrumental Analyzer Procedure), in 40 CFR part 60, appendix A–4. However, no data results from this were available to the EPA at the time of this proposal. As a result, we are specifically requesting that commenters submit test results, if available, using the proposed protocol during the comment period so that we can better assess the appropriateness and validity of the proposed protocol.

In addition, to provide additional flexibility for facilities, we are proposing that reporters may request approval to use an alternative sampling and analysis method to measure abatement system DRE that is not included in subpart I, provided the reporter follows the proposed process to obtain the Administrator's approval. The approval process would be the same process used to obtain the Administrator's approval to use an alternative stack testing method (see ''Alternative stack test methods'' in Section III.B.1 of this preamble).

We are also proposing to revise the RSASTP in the current subpart I. The rule currently requires that for each system class, the reporter must test the greater of three units per year or 20 percent of units per year. We are proposing to amend the RSASTP to reduce the amount of testing that must be performed by an individual facility. The proposed amendments would require that facilities test 10 percent of systems annually over a 2-year period (20 percent total) to set a baseline DRE for the given gas and process type combination. The systems would have to be randomly selected. A facility would have the option to test 20 percent of abatement systems in the first year. Until the facility measured 20 percent of abatement systems for a gas and process type combination (e.g., for calculating emissions in the first year if they test only 10 percent of systems per year), they would use the default DRE values to calculate emissions. For every 3-year period after, facilities would be required to randomly select and test 15 percent of the systems to validate the site-specific DRE. The reporter could opt to test 15 percent of the systems in the first year of the 3-year period, but must test at least 5 percent of the systems each year until 15 percent are tested.

If testing of a particular randomly selected abatement system would be disruptive to production, the reporter could replace that system with another randomly selected system and return the other to the sampling pool for subsequent testing. To ensure that a representative sample of abatement systems are tested, we are proposing that a system cannot be returned to the subsequent testing pool for more than three consecutive selections and must be tested on the third selection. We are also allowing a reporter to specifically include in one of the next two sampling years a system that could not be tested when it was first selected so that the reporter can plan for the testing of that system when it will be less disruptive.

We are proposing that the average DRE for each gas and process type combination would be calculated first as the arithmetic mean of the first 2 years of measurements. Beginning in the third year of testing, the average DRE would be the arithmetic mean of all test results for that gas and process type combination, until the facility tested at least 30 percent of all systems for each gas and process combination. After testing at least 30 percent of all systems for a gas and process combination, the facility would use the arithmetic mean of the most recent 30 percent of systems tested as the average DRE in the emissions calculations.

To account for measurements that may be affected by improper maintenance or operation of the abatement systems during a DRE measurement, the measured DRE value would be used as follows: (1) Where the DRE of some abatement units is below the design and default DRE, and proper maintenance and operation procedures have been followed, the data from the low DRE test must be included in the fab-specific DREs; (2) if proper maintenance and operation procedures have not been not followed, then the facility would implement the appropriate operational change or system maintenance (per the manufacturer instructions or the site maintenance plan), and a retest of that device would be required within the same reporting year. In this case, a reporter would not be required to include in the average DRE calculation the DRE result from the device for which proper maintenance and operation procedures were not followed. As an alternative, we are also proposing that instead of retesting that device within the reporting year, the reporter could use the measured DRE value in calculating the average DRE for the reporting year, and then include the same device in the next year's abatement system testing in addition to the testing of randomly selected devices for that next reporting year. The reporter would still need to count the period during which the abatement system manufacturer's proper maintenance and operation procedures were not being followed towards that abatement system's downtime for the year for the purposes of calculating emissions.

The proposed revisions to the RSASTP testing schedule would minimize the burden imposed on industry associated with annual testing of abatement systems. The Petitioner estimated that the current subpart I provisions that require facilities to test the greater of 3 or 20 percent of abatement systems in each class of abatement systems (as currently defined in 40 CFR 98.98) actually results in facilities testing, on average, 45 percent of their installed abatement systems in a fab each year (see ''Technical Support for Accounting for Destruction or Removal Efficiency for Electronics Manufacturing Facilities under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028). By revising the RSASTP so that facilities are required to test 20 percent of all abatement systems in a fab for a given gas and process type combination in the first two years, and 15 percent in each 3-year period thereafter, the Petitioner estimated a 16 to 50 percent reduction in the required abatement system testing. The Petitioner estimated the annual cost savings per facility to be

between $60,000 and $750,000 per year, depending on the number of installed systems, and would also reduce the number of personnel hours and production disruption associated with conducting abatement system testing. The EPA has reviewed the Petitioner's estimates and agrees with their findings regarding the burden of the current rule requirements and the potential savings associated with the proposed revisions to the RSASTP requirements.

For reporters who do not measure facility-specific DRE values, we are also allowing electronics manufacturing facilities to use a default DRE. For semiconductor manufacturing facilities, we are proposing to revise and expand the available DRE default values that they may use to calculate emissions. The revised default DREs for semiconductor manufacturing facilities would be included in proposed Table I–16.

The EPA does not have specific default DRE values to propose for other electronics manufacturers (MEMS, LCDs, and PV cells). Unless the EPA includes revised default DREs in the final rule amendments, facilities manufacturing MEMS, LCDs, and PV cells would still be required to use the 60 percent default DRE if they were not using measured DREs and wanted to account for abatement system DRE in their reported emissions. The EPA does not have any data at this time to support revising the default DRE value of 60 percent for these other electronics manufacturers. However, the EPA is specifically soliciting comment and supporting data on whether alternative default DRE values should be developed for other types of electronics manufacturing facilities, including data from actual DRE measurements and information on the methods used to measure DRE.

The current rule offers only a single default DRE value of 60 percent for all gas and process type combinations because, at the time it was proposed and promulgated, the EPA did not have sufficient DRE data for specific F–GHGs or process types that were measured using the EPA's DRE Protocol. Since that time, the Petitioner has provided data for semiconductor manufacturing facilities to the EPA on abatement system uptime, abatement system inventories, and DRE measurement, following the publication of the final subpart I rule (see ''Technical Support for Accounting for Destruction or Removal Efficiency for Electronics Manufacturing Facilities under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028). We are proposing to add default DRE values which reflect the results of the EPA's analysis of the DRE test data for specific gas and process type combinations. The majority of the DRE testing data analyzed were collected following the EPA's DRE Protocol that is incorporated by reference into the current rule. The EPA also considered the design and model of the abatement system used for each gas and process combination. The available test data, which includes tests performed on 96 POU systems connected to plasma etch processes and tests on 49 POU systems connected to chamber cleaning processes, showed that the manufacturer's design DRE is relatively consistent across different designs/models. However, it should be noted that the vast majority (about 97 percent) of the DRE data came from tests of one vendor's equipment. The data also supports the concept that achievable DREs vary by gas and process type (see ''Technical Support for Accounting for Destruction or Removal Efficiency for Electronics Manufacturing Facilities under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028). Therefore, where sufficient test data are available, the EPA is proposing to establish revised default DRE values for the gas and process type combinations for semiconductor manufacturing shown in Table 3 of this preamble:

TABLE 3—PROPOSED DEFAULT DRE VALUES FOR SEMICONDUCTOR MANUFACTURING

Process type/gas	Proposed default DREs (percent)
Plasma etch/Wafer Cleaning	
CHF_3, CH_2F_2, C_4F_8, NF_3, SF_6, C_4F_6	98
All other plasma etch/wafer clean fluorinated GHG	60
Chamber Clean	
NF_3	75
All other gases	60
N_2O	
CVD and all other N_2O-using processes	60

Overall, the EPA found sufficient data to propose revised default DRE values for systems abating CHF_3, CH_2F_2, C_4F_8, NF_3, SF_6, and C_4F_6 from plasma etching/wafer cleaning processes in semiconductor manufacturing. The abatement DRE test results for systems abating CF_4 from plasma etch processes were lower than expected and below the manufacturer's DRE, which suggests improper abatement system operation; based on these results and the difficulty of abating CF_4, we are proposing to retain the current subpart I default DRE value of 60 percent for these systems. Additionally, in some cases there were few or no test data available for a gas and process type combination, including systems abating C_2F_6, C_3F_8, CH_3F, and C_5F_8 for plasma etch. For C_2F_6, only one data point was provided. Since this gas is difficult to abate, the EPA proposes to retain the current subpart I default DRE value of 60 percent until additional data or technical information is available. We have followed the same approach for C_3F_8, CH_3F, C_5F_8, and chamber cleaning processes using gases other than NF_3, because no data were available that could support altering the current default value of 60 percent for these gas and process type combinations. Further discussion of the EPA's analysis of the submitted DRE data is in the memorandum ''Technical Support for Accounting for Destruction or Removal Efficiency for Electronics Manufacturing Facilities under Subpart I'' (see Docket

ID No. EPA–HQ–OAR–2011–0028). The EPA is specifically requesting comment and supporting DRE data on the proposed default DRE values, and whether any default DRE values should be developed for other gas and process type combinations.

Commenters are encouraged to submit available DRE data for all of the electronics manufacturing industry segments (semiconductors, MEMS, PV cells, and LCDs) with their comments using the ''Electronics Manufacturing Data Request Sheet'' (see Docket ID No. EPA–HQ–OAR–2011–0028). Commenters can fill out the ''Electronics Manufacturing Data Request Sheet'' and submit the data to Docket ID No. EPA–HQ–OAR–2011–0028 for consideration by the EPA in developing the final revised default DRE values. If EPA does update the proposed default DRE values using such new data, if approved by the EPA, for the final rule, it will do so using the same methodologies as described in the ''Technical Support for Accounting for Destruction or Removal Efficiency for Electronics Manufacturing Facilities under Subpart I,'' Docket ID No. EPA–HQ–OAR–2011–0028. The EPA will use the same criteria for accepting new data that were used in accepting data as specified in that document.

The EPA would also add new or revised DRE values as part of the proposed process for updating the table of default gas utilization rates and by-product formation rates, when the data become available in the future. See Section III.B.12 of this preamble for the proposed process for updating default emission factors and default DRE values as more data are collected for the semiconductor manufacturing industry.

In order to ensure that the abatement systems used are performing to the default DRE or the initial measured DRE, the rule currently requires that facilities certify that abatement systems are properly installed, operated, and maintained according to the manufacturer's recommended requirements (40 CFR 98.94(f)(1)). Abatement equipment suppliers have established set-up, operation, and maintenance procedures to maintain system performance at the expected DREs. In addition to those existing requirements, we are proposing to require that where a facility wishes to account for abatement system DRE in calculating emissions, reporters would establish and maintain an abatement system preventative maintenance plan. The abatement system maintenance plan would define the required maintenance procedures for each type of abatement system used at the facility, and would include corrective action procedures for when an abatement unit is not operating properly. The abatement unit maintenance plan would be kept as part of the GHG monitoring plan required by 40 CFR 98.3(g)(5).

11. Abatement System Uptime for Facilities That Manufacture Electronics

The current subpart I requires facilities opting to report controlled emissions from abatement systems to calculate the ''uptime'' of each abatement system using Equation I–15 of subpart I. In the current rule, uptime is calculated as the ratio of time the abatement system is operating while F–GHG or N_2O are flowing through the process tool(s) connected to the system, to the total time during which F–GHG or N_2O are flowing through the process tool(s) connected to the abatement system.

In the Petition for Reconsideration, the Petitioner questioned the uptime requirements, stating that the EPA's definition of uptime differs substantially from how uptime is actually measured in semiconductor facilities. They maintained the industry is better able to estimate the uptime of an abatement system by measuring and tracking ''unplanned downtime.'' Further, the industry petition reports that most facilities do not currently have the data collection and management capability to track the time that F–GHG or N_2O are flowing through a tool and match it to the time when the abatement system for each tool is not operating, because the data loggers for the tools and the abatement systems do not interface.

Based on a review of the Petitioner's concerns, the EPA is proposing to revise the methods used to calculate abatement system uptime. The EPA agrees that most electronics manufacturing facilities do not have the equipment, data collection, and management capability to track the time that F–GHG or N_2O are flowing through a tool and match it to the time when the abatement system is not operating. Therefore, requiring facilities to calculate the ratio of time that each abatement system is operating to the total time during which gases flow through the process tool would present challenges for compliance. In addition, the EPA understands that many tools do not have an interlock between the gas supply and the abatement system to stop F–GHG or N_2O flow to the tool if the abatement unit stops operating.

For facilities that are using the default gas utilization rates and by-product formation rates, we are proposing to amend 40 CFR 98.93(g) to allow reporters to calculate the uptime of all the abatement systems for each combination of input gas or by-product gas and each process type or sub-type combination, using the same process categories in which F–GHG use and emissions are calculated. Since reporters would calculate uptime for groups of abatement systems instead of each individual abatement system, we are proposing to revise Equation I–15 into two separate equations to specify how reporters must calculate uptime for each group of abatement systems: Those emitting input gases and those emitting by-product gases.

Reporters would use proposed Equation I–15a to calculate the uptime of all the abatement systems for each combination of input gas and process type or sub-type combination. Reporters would use proposed Equation I–15b to calculate the uptime of all the abatement systems for each combination of by-product gas and process type or sub-type combination.

Reporters would be required to determine the average abatement system uptime factor for a given gas/process type or sub-type combination by: (1) Calculating the total time that the abatement system connected to process tools in the fab is not operating within manufacturer's specifications as a fraction of the total time in which the abatement system has at least one associated tool in operation during the reporting year for each gas/process type combination; and (2) by subtracting this fraction from 1.0 to calculate the uptime fraction. For determining the amount of tool operating time, reporters would be able to assume that tools that were installed for the entire reporting year were operated for 525,600 minutes per year. For tools that were installed or uninstalled during the year, reporters would be required to prorate the operating time to account for the days in which the tool was not installed; any partial day that a tool was installed would be treated as a full day (1,440 minutes) of tool operation. If a tool is ''idle'' with no gas flowing through it to the abatement system, the reporter would have the option to count only the time that the tool has gas flowing through it for purposes of determining the tool operating time. For an abatement system that has more than one connected tool, the tool operating time would be considered to be equivalent to a full year if at least one tool was installed and operating at all times throughout the year. Because the uptimes for the tools in electronics manufacturing facilities are typically very high, the proposed approach would reduce the technical burden associated with measuring uptime for individual

tools while still maintaining the accuracy of the uptime calculation used in the emissions calculations.

Reporters would then calculate the excess emissions during periods of downtime by using the gas consumption for each gas, the default gas utilization rates and by-product formation rates, and the fraction of operating time that is represented by POU abatement system downtime. Emissions during periods of POU abatement system uptime would be calculated using the gas consumption for each gas, the default emission factors, the fraction of gas removed or destroyed through abatement, and the fraction of operating time that is represented by POU abatement system uptime. The proposed amendments would reduce the burden on industry because they would allow facilities to use uptime calculated through existing maintenance management systems as a representative uptime, while still ensuring that unabated (excess) emissions are accounted for in annual emissions as a result of downtime events.

In proposing these amendments, the EPA acknowledges that significant investment would be required by facilities to install hardware and/or software to track when gas is flowing to a tool and to identify if the abatement system is or is not operating while gas flow is occurring as required by the current subpart I. By assuming that tools that were installed for the whole reporting year were operated for 525,600 minutes per year, and using this in the denominator of the abatement system uptime calculation, the proposed abatement system uptime calculations would conservatively estimate the uptime fraction that is used in accounting for abatement system effects on emissions. This conservative approach avoids the added expense of additional data collection and analysis to match abatement system uptime periods to the same periods during which gas is flowing through the associated tool. Further discussion of accounting for abatement system uptime is in the memorandum ''Technical Support for Modifications to the Fluorinated Greenhouse Gas Emission Estimation Method Option for Semiconductor Facilities under Subpart I'' (see Docket ID No. EPA–HQ–OAR–2011–0028).

12. Updating Default Gas Utilization Rates and By-Product Formation Rates and DRE Values for Semiconductor Manufacturing

The semiconductor manufacturing industry has historically been fast-evolving, achieving exponentially increasing processor speeds and improving manufacturing efficiencies through the rapid adoption of new manufacturing processes. These innovations have resulted in changes in F–GHG emissions and emission factors, which have been recognized in the IPCC Guidelines and in subpart I by, for example, the establishment of different emission factors for fabs manufacturing 200 mm vs. 300 mm wafer sizes. This evolution is continuing at the present time with the introduction of 450 mm wafer technology, as well as other new process technologies that could affect emissions. As a result, EPA considers appropriate that subpart I should include a mechanism for collecting information on changes in the semiconductor industry that would potentially affect emissions and new data and that could be used for the updating of default gas utilization rates and by-product formation rates and abatement system DRE values so that they are representative of current emissions and abatement system performance.

In order to provide for consistent review of technology changes in the semiconductor manufacturing industry and helping to ensure that the proposed default gas utilization rates and by-product formation rates and DRE values accurately reflect the industry's practices in future years, we are proposing to add a new paragraph (y) to the data reporting requirements in 40 CFR 98.96. We are proposing to require certain semiconductor manufacturing facilities to provide a report to the EPA every 3 years, beginning in 2017, that addresses technology changes at the facility that could affect GHG emissions. The report would address how technology in the industry has changed over the previous 3 years and the extent to which any of the identified changes are likely to have affected the emissions characteristics of semiconductor manufacturing processes in such a way that the default gas utilization rates and by-product formation rates and/or default DRE values in subpart I may need to be updated or augmented.

We are proposing that the first 3-year report would be due with the annual GHG emissions report submitted in 2017. Only semiconductor manufacturing facilities subject to subpart I and with emissions from subpart I processes greater than 40,000 $mtCO_2e$ per year would be required to submit the report. The requirement to submit the first report in 2017 would be based on the facility's emissions in 2015 (which would be reported in 2016), and the requirement to submit subsequent reports would be based on emissions in the most recently submitted annual GHG report. For example, any facility that reported GHG emissions from the subpart I source category of greater than 40,000 $mtCO_2e$ for reporting year 2015 would submit the 3-year report due in 2017. Facilities with reported emissions at or below 40,000 $mtCO_2e$ per year could voluntarily prepare and submit a report. Facilities that are not subject to reporting under subpart I based on actual emissions would not be required to submit a 3-year report.

We are proposing that the 3-year report must include the following: (1) Whether and how the plasma etch gases and plasma technologies used in 200 mm and 300 mm wafer manufacturing in the United States have changed and whether any of the identified changes are likely to have affected the emissions characteristics of semiconductor manufacturing processes in such a way that the default gas utilization rates and by-product formation rates or default DRE values may need to be updated; (2) the effect of the implementation of new products, process technologies, and/or finer line width processes in 200 mm and 300 mm technologies, the introduction of new tool platforms and process chambers, and the introduction of new processes on previously tested platforms or process chambers; (3) the status of implementing 450 mm wafer technology and the potential need to create or update gas utilization rates and by-product formation rates compared to 300 mm technology; and (4) the submission of any gas utilization rates and by-product formation rate or DRE data that have been collected in the previous 3 years that support the changes or continuities in semiconductor manufacturing processes described in the report. If the report indicates that the emissions characteristics of semiconductor manufacturing processes may have changed, the report would be required to include a data gathering and analysis plan describing the testing of tools to determine the potential effect on current gas utilization rates and by-product formation rates and DRE values under the new conditions, and a planned analysis of the effect on overall facility emissions using a representative gas-use profile for a 200 mm, 300 mm, or 450 mm fab (depending on which technology is under consideration).

The EPA would review the reports received and determine whether it is necessary to update the default gas utilization rates and by-product formation rates and default DREs in Tables I–3, I–4, I–11, I–12, and I–16 based on the following: (1) Whether the revised default gas utilization rates and

by-product formation rates and DREs would result in a projected shift in emissions of 10 percent of greater; (2) whether new platforms, process chambers, processes, or facilities that are not captured in current default gas utilization rates and by-product formation rates and DRE values should be included in revised values; and (3) whether new data are available that would expand the existing data set to include new gases, tools, or processes not included in the existing data set (i.e. gases, tools, or processes for which no data are currently available).

The EPA would review the report(s) within 120 days and notify the facilities that submitted the report(s) whether the Agency determined it was appropriate to update the default emission factors and/or DRE values. If the EPA determines it is necessary to update the default emission factors and/or DRE values, those facilities would then have 180 days following the date they receive notice of the determination to execute the data collection and analysis plan described in the report and submit those data to the EPA. The EPA would then determine whether to issue a proposal to amend the rule to update the default emission factors and/or DRE values using the newly submitted data.

These proposed requirements would establish consistent procedures for the update and renewal of default gas utilization rates and by-product formation rates and DRE values of the rule, helping to ensure that the subpart I rule accurately reflects advances in technology and characterizes industry emissions for semiconductor manufacturing. The EPA is specifically seeking comment on whether any other topics, besides the four proposed topics listed, should be included in the proposed triennial report. For example, some new manufacturing technologies, substrates, or films, such as the use of elemental fluorine gas for chamber cleaning or the use of organosilicate films, may affect F–GHG emissions without changes in the actual consumption of F–GHG as input gases. The EPA is soliciting comment on whether those types of changes would already be addressed by the four topics listed or whether more specific topics for those types of changes should be specified for the triennial report.

The EPA is also specifically seeking comment on whether triennial reports should include additional information. For example, the triennial report could include a specific set of measurements of gas utilization rates, by-product formation rates, and/or DRE values. This could include the gas utilization rates and by-product formation rates measured for all new tools acquired by the facility over the previous 3 years as well as gas utilization rates and by-product formation rates measured for new processes run on existing tools at the facility. Measurement of emission rates from the introduction of new processes on existing tools could result in increased burden; however, the EPA could limit this burden by requesting a set number of measurements (e.g., 5) for new processes that were significantly different [8] from existing processes and/or that accounted for the largest fractions of the facility's GWP-weighted fluorinated GHG consumption. Specifying the data to submit in the final rule would ensure that consistent, comparable, and objective data sets were submitted by all affected facilities, and would permit the EPA to examine the data directly to ascertain whether a change in default emission factors or default DRE values was warranted.

C. Proposed Rule Changes to Reporting and Recordkeeping Requirements

In this action, the EPA is proposing several changes (additions as well as revisions) to the data reporting and recordkeeping requirements in subpart I. Table 4 of this preamble summarizes the proposed changes to the reporting elements.

TABLE 4—PROPOSED CHANGES TO REPORTING REQUIREMENTS

Data element	Change/Revision	Original citation	Proposed new or revised citation
Annual emissions of each F–GHG emitted from each process type for which your facility is required to calculate emissions as calculated in Equations I–6 and I–7.	Revise to apply only when default gas utilization rate and by-product formation rate procedures in 40 CFR 98.93(a) are used to calculate emissions. Revise so that requirement applies to "fab" instead of facility.	98.96(c)(1)	NA.
Annual emissions of each F–GHG emitted from each individual recipe (including those in a set of similar recipes) or process subtype.	Remove requirement to report emissions by individual recipe (including those in a set of similar recipes). Revise so that requirement applies to "fab" instead of facility.	98.96(c)(2)	NA.
Emissions of N_2O emitted from each chemical vapor deposition process and from other N_2O using manufacturing processes as calculated in Equation I–10.	Revise to clarify that facilities report N_2O emitted from the chemical vapor deposition process and from the aggregate of other N_2O-using manufacturing processes. Revise so that requirement applies to "fab" instead of facility.	98.96(c)(3)	NA.
Annual emissions of each F–GHG emitted from each fab when you use the procedures specified in 40 CFR 98.93(i).	Add reporting requirement in conjunction with the stack testing option.	NA	98.96(c)(5).
Data elements reported when you use factors for F–GHG process utilization and by-product formation rates other than the defaults provided in Tables I–3, I–4, I–5, I–6, and I–7 to this subpart and/or N_2O utilization factors other than the defaults provided in Table I–8 to subpart I.	Remove and reserve all of 98.96(f) because of proposed changes to remove the use of recipe-specific gas utilization rates and by-product formation rates.	98.96(f)	NA.

[8] "Significantly different" could be defined as using a markedly different gas mixture than the mixture used by previous processes applied to achieve the same end (i.e., etch the same film or feature), similar to the criteria used to determine when new stack testing is warranted. Other possible criteria include radio frequency (RF) power and flow rate.

TABLE 4—PROPOSED CHANGES TO REPORTING REQUIREMENTS—Continued

Data element	Change/Revision	Original citation	Proposed new or revised citation
Annual gas consumption for each F–GHG and N_2O as calculated in Equation I–11 of this subpart, including where your facility used less than 50 kg of a particular F–GHG or N_2O during the reporting year. For all F–GHGs and N_2O used at your facility for which you have not calculated emissions using Equations I–6, I–7, I–8, I–9, and I–10, the chemical name of the GHG used, the annual consumption of the gas, and a brief description of its use.	Change to recordkeeping requirement. Revise so that requirement applies to ''fab'' instead of facility. Add applicable equation references for the stack testing option.	98.96(g)	98.97(k).
All inputs used to calculate gas consumption in Equation I–11 for each F–GHG and N_2O used.	Change to recordkeeping requirement	98.96(h)	98.97(k)(1).
Disbursements for each F–GHG and N_2O during the reporting year, as calculated using Equation I–12.	Change to recordkeeping requirement	98.96(i)	98.97(n).
All inputs used to calculate disbursements for each F–GHG and N_2O used in Equation I–12 including all facility-wide gas-specific heel factors used for each F–GHG and N_2O.	Change to recordkeeping requirement	98.96(j)	98.97(n).
Annual amount of each F–GHG consumed for each recipe, process sub-type, or process type, as appropriate, and the annual amount of N_2O consumed for each chemical vapor deposition and other electronics manufacturing production processes, as calculated using Equation I–13.	Change to recordkeeping requirement. Remove ''recipe-specific'' requirements. Revise to read ''* * * annual amount of N_2O consumed for the chemical vapor deposition processes and from the aggregate of other electronics manufacturing production processes* * *''.	98.96(k)	98.97(m).
All apportioning factors used to apportion F–GHG and N_2O consumption.	Change to recordkeeping requirement	98.96(l)	98.97(c)(1).
Identification of the quantifiable metric used in your facility-specific engineering model to apportion gas consumption.	Correct citation	98.96(m)(i)	98.96(m)(1).
Start and end dates selected under 40 CFR 98.94(c)(2)(i).	Correct citation	98.96(m)(ii)	98.96(m)(2).
Certification that the gases you selected under 40 CFR 98.94(c)(2)(ii) correspond to the largest quantities consumed on a mass basis, at your facility in the reporting year for the plasma etching process type and the chamber cleaning process type.	Correct citation	98.96(m)(iii)	98.96(m)(3).
The result of the calculation comparing the actual and modeled gas consumption under 40 CFR 98.94(c)(2)(iii).	Correct citation and revise to read ''* * * modeled gas consumption under 40 CFR 98.94(c)(2)(iii) and (iv), as applicable.''.	98.96(m)(iv)	98.96(m)(4).
If you are required to apportion F–GHG consumption between fabs, certification that the gases you selected under 40 CFR 98.94(c)(2)(ii) correspond to the largest quantities consumed on a mass basis, of F–GHG used at your facility during the reporting year for which you are required to apportion.	Add requirement	NA	98.96(m)(5).
Fraction of each F–GHG or N_2O fed into recipe, process sub-type, or process type that is fed into tools connected to abatement systems.	Move to recordkeeping, and remove recipe-specific references.	98.96(n)	98.97(o).
Fraction of each F–GHG or N_2O destroyed or removed in abatement systems connected to process tools where recipe, process sub-type, or process type j is used, as well as all inputs and calculations used to determine the inputs for Equation I–14.	Move to recordkeeping, remove recipe-specific references, and revise to apply to the stack testing option.	98.96(o)	98.97(p).

TABLE 4—PROPOSED CHANGES TO REPORTING REQUIREMENTS—Continued

Data element	Change/Revision	Original citation	Proposed new or revised citation
Inventory and description of all abatement systems through which F–GHGs or N_2O flow at your facility, including the number of systems of each manufacturer, model numbers, manufacturer claimed F–GHG and N_2O destruction or removal efficiencies, if any, and records of destruction or removal efficiency measurements over their in-use lives. The inventory of abatement systems must describe the tools with model numbers and the recipe(s), process sub-type, or process type for which these systems treat exhaust.	Revise the inventory to include only those systems for which the facility is claiming F–GHG or N_2O destruction or removal. Revise to report only (1) the number of devices controlling emissions for each process type, for each gas used in that process for which control credit is being taken; and (2) the basis of the DRE being used (default or site specific testing) for each process type and for each gas. Revise to not require reporting the model number of the tools associated with each abatement system, and to remove the recipe-specific references.	98.96(p)	NA.
Certification that each abatement system is installed, maintained, and operated according to manufacturer specifications. All inputs to abatement system uptime calculations, the default or measured DRE used for each abatement system, and the description of the calculations and inputs used to calculate class averages for measured DRE values.	The certification would be revised to include that all systems are installed, maintained, and operated also according to the site maintenance plan for abatement systems. All inputs to abatement system uptime calculations, the default or measured DRE used for each abatement system, and the description of the calculations and inputs used to calculate class averages for measured DRE values would be moved to recordkeeping in 98.97(d). In place of reporting the information and data on uptime and DRE calculations for abatement systems, the reporter would calculate and report an effective facility-wide DRE, proposed in 98.96(r).	98.96(q)	98.97(d).
Inputs to the F–HTF mass balance equation, Equation I–16, for each F–HTF.	Change to recordkeeping	98.96(r)	98.97(r).
An effective facility-wide DRE calculated using Equation I–26, I–27, and I–28, as appropriate.	Add requirement	NA	98.96(r).
Estimates of missing data where missing data procedures were used to estimate inputs into the F–HTF mass balance equation under 40 CFR 98.95(b).	Change to recordkeeping	98.96(s)	98.97(s).
A brief description of each ''best available monitoring method'' used according to 40 CFR 98.94(a), the parameter measured or estimated using the method, and the time period during which the ''best available monitoring method'' was used.	Remove the reporting requirement because the BAMM provisions in 98.94(a) will be obsolete by the time these proposed amendments are final and are being proposed to be deleted.	98.96(t)	NA.
For reporting year 2012 only, the date on which you began monitoring emissions of F–HTF whose vapor pressure falls below 1 mm of Hg absolute at 25 degrees C.	Remove requirement because these provisions will be obsolete by the time these proposed amendments are final.	98.96(v)	NA.
The date of any stack testing conducted during the reporting year, and the identity of the stack tested.	Add requirement in conjunction with stack testing option.	NA	98.96(w)(1).
An inventory of all stacks from which process F–GHG are emitted. For each stack system, indicated whether the stack is among those for which stack testing was performed as per 40 CFR 98.3(i)(3) or not performed per 40 CFR 98.93(i)(2).	Add requirement in conjunction with stack testing option.	NA	98.96(w)(2).
If emission reported under 40 CFR 98.96(c) include emission from research and development activities, the approximate percentage of total GHG emissions that are attributable to research and development activities.	Add requirement	NA	98.96(x).

TABLE 4—PROPOSED CHANGES TO REPORTING REQUIREMENTS—Continued

Data element	Change/Revision	Original citation	Proposed new or revised citation
If your semiconductor manufacturing facility emits more than 40,000 $mtCO_2e$, a triennial technology assessment report that includes information such as how gases and technologies have changed, the effect on emissions of the implementation of new process technologies, and default utilization and by-product formation rates collected in the previous 3 years.	Add requirement	NA	98.96(y).

NA—Not applicable.

The EPA is proposing to amend subpart I such that, with the addition of certain new data elements, several current data reporting elements would not be reported to the EPA and would, instead, be kept as records.[9] These records would be made available to the EPA for review upon request. The EPA has determined that under the proposed amendments, as described in Sections III.A and III.B of this preamble, it is no longer necessary to require reporting of these data elements. Specifically, the EPA is proposing to amend subpart I to add a stack testing option and to revise the method that uses default gas utilization rates and by-product formation rates. The EPA has determined that the new stack testing option and the revised default emission factor method represent simplified methods compared to the current default emission factor method in subpart I and provide accurate fab-level GHG data that can be verified using other data elements that are also reported. Other data that would be reported, such as the annual manufacturing capacity of the facility reported under 40 CFR 98.96(a) and the proposed effective facility-wide DRE factor that would be calculated and reported under proposed 40 CFR 98.96(r), would be used to verify the reported GHG emissions by comparing them to other data reported by the facility as well as statistically analyzing the reported information for the population of facilities reporting under subpart I.

Given the proposed amendments to the methods in 40 CFR 98.93, the EPA has determined that fewer data elements would be needed to verify the GHG emissions data and, therefore, would not require the reporting of the data elements that the EPA is proposing to move to recordkeeping. Requiring reporting of these data elements would create an unnecessary burden for all facilities, because a requirement to maintain the same data as records would provide sufficient information to confirm reported GHG emissions through an on-site review of those records in individual circumstances, if necessary.

The proposed stack testing option would take advantage of the fact that facilities with dozens of individual tools often have only a few emission stacks because emissions from many tools are consolidated into a shared stack system instead of having individual stacks. Therefore, at many facilities, testing a few stacks is less of a burden than tracking gas consumption and other parameters for multiple tools. The stack testing approach would involve the development of fab-specific emission factors in terms of kg of F–GHG emitted per kg of F–GHG consumed based on measured stack emissions. Using this approach, facilities would be required to monitor and keep records of the amount of each F–GHG consumed and data on the operating time and performance of abatement systems, but they would not be required to report these data for the reasons specified above. Other data needed to determine the amount of F–GHG used in a process type or sub-type would not be reported, but would be kept as records. The EPA has determined that these detailed data are not needed for verification of the GHG data under the proposed stack testing option because the EPA could use other reported data to verify the GHG data.

The proposed amendments to the default gas utilization rate and by-product formation rate approach would require facilities to monitor and keep records of the amount of each F–GHG consumed in each process type and sub-type, and data on the operating time and performance of abatement systems, but they would not need to report these data. The EPA has determined that GHG emissions estimated using the revised default emission factor method can be verified using statistical and other types of analysis of the reported data elements. Reported GHG emissions can be confirmed through an on-site review of those records in individual circumstances, if necessary.

The proposed amendments to the reporting requirements would move the information on the number and DRE of abatement systems at each facility from the reporting requirements to the recordkeeping requirements. In order to determine the extent to which GHG emissions from this category are being abated, we are proposing to include in 40 CFR 98.96(r) a requirement for each facility to calculate and report an effective facility-wide DRE factor for the emissions from the electronics manufacturing processes at the facility. This factor would be calculated as 1 minus the ratio of actual reported emissions to the emissions that would occur if there were no abatement. The actual emissions are already reported under subpart A and subpart I.

For calculating the effective facility-wide DRE, facilities would have two methods for calculating emissions that would occur if there were no abatement. The first method would be used to calculate the emissions without abatement in cases where the facility calculated reported emissions using default utilization and by-product formation rates. This includes cases in which the facility would calculate emissions under 40 CFR 98.93(a) and also those emissions that were calculated for stack systems that are

[9] These reporting elements include data elements that have been designated as ''inputs to emissions equations'' in the August 25, 2011 final rule titled, ''Change to the Reporting Date for Certain Data Elements Required Under the Mandatory Reporting of Greenhouse Gases Rule'' (76 FR 53057), and listed in Table A–7 of subpart A. Consistent with the proposed amendments to subpart I, we are proposing to remove these subpart I inputs to emissions equations data elements from table A–7 so that they would not be required to be reported by March 31, 2015. More information on this proposed change can be found at the end of Section III.C of this preamble.

exempt from testing, under 40 CFR 98.93(i)(3). In this method emissions without abatement would be calculated using the consumption of each F–GHG and N_2O in each process type or sub-type, and the default gas utilization rates and by-product formation rates in Tables I–3 to I–8, and I–11 to I–15 of subpart I. This calculation would not require facilities to collect any additional information because the information on F–GHG and N_2O consumption is already required to perform the calculations needed to estimate emissions using either the proposed revised default emission factor approach or the proposed stack testing option. This proposed reporting requirement, 40 CFR 98.96(r), would require a new calculation with these existing data, including the current reported actual emissions and the emissions that would occur if there were no abatement. The latter would be calculated using the consumption of each F–GHG and N_2O in each process type or sub-type and the appropriate default gas utilization rates and by-product formation rates in Tables I–3 to I–8 and I–11 to I–15 of subpart I.

The second method would be used to calculate the emissions without abatement from stack systems in cases where the facility calculated emissions based on stack testing conducted according to 40 CFR 98.93(i)(4). In this method, facilities would calculate emissions without abatement from the reported GHG emissions using the inverse of the DRE and the fraction of each gas in each process type that is abated. This method would use default values or values that would already be measured and used in the equations that a facility would use to calculate GHG emissions in the proposed stack testing option.

In this notice we are also proposing changes to Table A–7 of subpart A, General Provisions. Table A–7 lists those data elements for which the reporting date has been deferred to March 31, 2015 for the 2011 to 2013 reporting years. We are proposing to revise Table A–7 for the rows specific to subpart I to remove the references to those data elements described in Table 4 of this preamble that would be moved from reporting in 40 CFR 98.96 to recordkeeping under 40 CFR 98.97, or that would be removed entirely from subpart I because of the proposed removal of the relevant emission calculation requirement. If the EPA finalizes the proposed changes to the reporting requirements, reporters would no longer be required to report these elements in 2014 and beyond, and thus there would be no reporting requirement to defer.

D. Proposed Changes To Remove BAMM Provisions and Language Specific to Reporting Years 2011, 2012, and 2013

We are proposing to remove the provisions in 40 CFR 98.94(a) for best available monitoring methods (BAMM). The requirements of 40 CFR 98.94(a)(1) through (a)(3) provide an option for reporters to request and use BAMM for calendar year 2011 reporting for monitoring parameters that cannot be reasonably measured according to the monitoring and QA/QC methods provided in subpart I. The provisions require that, starting no later than January 1, 2012, the reporter must discontinue using BAMM and begin following all applicable monitoring and QA/QC requirements of this part, unless the EPA has approved the use of BAMM beyond 2011 under 40 CFR 98.98(a)(4).

As discussed in Section II.B of this preamble, the EPA intends to finalize the proposed revisions to subpart I in 2013 so that semiconductor manufacturing facilities can implement the revised subpart I beginning in 2014. The proposed amendments would become effective on January 1, 2014. Facilities would be required to follow one of the new methods to estimate emissions beginning in 2014, submitting the first reports of emissions estimated using the new methods in 2015. The BAMM provisions of 40 CFR 98.94(a) would be outdated on the effective date. The provisions of 40 CFR 98.94(a)(1) to (a)(3) are limited to 2011, and the deadline for requesting an extension under 40 CFR 98.94(a)(4) also occurred in 2011. Therefore, we are proposing to remove all the BAMM provisions in the current subpart I, because they would no longer be applicable in 2014. We are not proposing any new BAMM provisions because we expect that all facilities would be in compliance with the monitoring and QA/QC methods required under subpart I by the time the 2014 calendar year reports are submitted in 2015.

We are also proposing to remove 40 CFR 98.93(h)(2), which provides an option for reporters to calculate and report emissions of fluorinated heat transfer fluids using select time periods in 2012, and the corresponding reporting requirement at 40 CFR 98.96(v). In addition, we are proposing to remove language in 40 CFR 98.94(h)(3) that is specific to the monitoring of fluorinated heat transfer fluids in 2012. These provisions would no longer be applicable on the effective date of the proposed amendments.

IV. Background for Confidentiality Determinations for Subpart I of Part 98

A. Overview and Background

In this notice we are also proposing confidentiality determinations for the new and revised reporting data elements in the proposed subpart I rule amendments. For information on the history of confidentiality determinations for subpart I data elements, see the following notices:

- Proposed Confidentially Determinations for Data Required Under the Mandatory Greenhouse Gas Reporting Rule and Proposed Amendment to Special Rules Governing Certain Information Under the Clean Air Act; Proposed Rule (75 FR 39094, July 7, 2010); hereafter referred to as the ''July 7, 2010 CBI proposal.'' Proposed confidentiality determinations for Part 98 data elements, including data elements contained in subpart I.
- Confidentiality Determinations for Data Required Under the Mandatory Greenhouse Gas Reporting Rule and Proposed Amendment to Special Rules Governing Certain Information Under the Clean Air Act; Final Rule (76 FR 30782, May 26, 2011) hereafter referred to as the ''2011 Final CBI Rule.'' Assigned data elements to data categories and published the final CBI determinations for the data elements in 34 Part 98 subparts, except for those data elements that were assigned to the ''Inputs to Emission Equations'' data category. Final CBI determinations for subpart I were not included because of substantial changes to data elements and the addition of new data elements in the final subpart I.
- Mandatory Reporting of Greenhouse Gases Rule: Proposed Confidentiality Determinations for Subpart I and Proposed Amendments to Subpart I Best Available Monitoring Methods Provisions; Proposed Rule (77 FR 10434, February 22, 2012), hereafter referred to as ''Subpart I CBI re-proposal.'' The EPA re-proposed for public comment the confidentiality determinations for the data elements in subpart I to reflect the reporting data elements in the 2010 final subpart I and all subsequent proposed and final amendments to subpart I up to the date of the CBI re-proposal.
- Mandatory Reporting of Greenhouse Gases Rule: Final Confidentiality Determinations for Nine Subparts and Amendments to Subpart A and I under the Mandatory Reporting of Greenhouse Gases Rule; Final Rule (77 FR 48072, August 13, 2012), hereafter referred to as ''Final Subpart I CBI Determinations Rule.'' The EPA published the final confidentiality determinations for the data elements in subpart I to reflect the

reporting data elements in the 2010 final subpart I and all subsequent final amendments to subpart I up to the date of the Subpart I CBI re-proposal.

In this action, the EPA is proposing confidentiality determinations for the new and revised data elements under the proposed subpart I amendments that are described in Section III of this preamble. These proposed confidentiality determinations would be finalized based on public comment. The EPA currently plans to finalize these determinations at the same time rule amendments to subpart I described in Section III of this preamble are finalized.

B. Approach to Proposed CBI Determinations for New or Revised Subpart I Data Elements

In this action, we are proposing to add or revise 25 new data reporting requirements in subpart I. We propose to assign each of the newly proposed or revised data elements in subpart I, a direct emitter subpart, to one of the direct emitter data categories created in the 2011 Final CBI Rule.[10] The 25 new or revised data elements were assigned to one of the 10 data categories listed in Table 5 of this preamble. Please see the memorandum titled ''Proposed Data Category Assignments for Subpart I 2012 Amendments'' in Docket EPA–HQ–OAR–2011–0028 for a list of the 25 newly proposed or revised data elements in this subpart and their proposed category assignments.

TABLE 5—SUMMARY OF FINAL CONFIDENTIALITY DETERMINATIONS FOR DIRECT EMITTER DATA CATEGORIES

[Based on May 26, 2011 final CBI rule]

Data category	Confidentiality determination for data elements in each category		
	Emission data [a]	Data that are not emission data and not CBI	Data that are not emission data but are CBI [b]
Facility and Unit Identifier Information	X		
Emissions	X		
Calculation Methodology and Methodological Tier	X		
Data Elements Reported for Periods of Missing Data that are Not Inputs to Emission Equations	X		
Unit/Process ''Static'' Characteristics that are Not Inputs to Emission Equations		X[c]	X[c]
Unit/Process Operating Characteristics that are Not Inputs to Emission Equations		X[c]	X[c]
Test and Calibration Methods		X	
Production/Throughput Data that are Not Inputs to Emission Equations			X
Raw Materials Consumed that are Not Inputs to Emission Equations			X
Process-Specific and Vendor Data Submitted in BAMM Extension Requests			X

[a] Under CAA section 114(c), ''emission data'' are not entitled to confidential treatment. The term ''emission data'' is defined at 40 CFR 2.301(a)(2)(i).

[b] Section 114(c) of the CAA affords confidential treatment to data (except emission data) that are considered CBI.

[c] In the 2011 Final CBI Rule, this data category contains both data elements determined to be CBI and those determined not to be CBI. See discussion in Section IV.B of this preamble for more details.

As shown in Table 5 of this preamble, the EPA made categorical confidentiality determinations for data elements assigned to eight direct emitter data categories. For two data categories, ''Unit/Process 'Static' Characteristics That are Not Inputs to Emission Equations'' and ''Unit/Process Operating Characteristics That are Not Inputs to Emission Equations,'' the EPA determined in the 2011 Final CBI Rule that the data elements assigned to those categories are not emission data but did not make categorical CBI determinations. Rather, the EPA made CBI determinations for individual data elements assigned to these two data categories.

We are following the same approach in this proposed rule. Specifically, we are proposing to assign each of the 25 new or revised data elements in the proposed subpart I amendment to the appropriate direct emitter data category. For the 13 data elements being assigned to categories with categorical confidentiality determinations, we propose to apply the categorical determinations made in the 2011 Final CBI Rule to the assigned data elements. For the 12 new or revised subpart I reporting elements assigned to the ''Unit/Process 'Static' Characteristics That are Not Inputs to Emission Equations'' and the ''Unit/Process Operating Characteristics That are Not Inputs to Emission Equations'' data categories, consistent with our approach towards data elements previously assigned to these data categories, we propose that these data elements are not emission data. Section IV.C of this preamble discusses the proposed CBI determinations and supporting rationale for these data elements. All 25 new and revised subpart I data elements in the proposed subpart I amendment are listed in the memorandum titled ''Proposed Data Category Assignments for Subpart I 2012 Amendments'' in Docket EPA–HQ–OAR–2011–0028.

C. Proposed Confidentiality Determinations for Individual Data Elements in Two Direct Emitter Data Categories

As described in Section IV.B of this preamble, the EPA is proposing individual CBI determinations for the 12 data elements assigned to the ''Unit/Process 'Static' Characteristics That are Not Inputs to Emission Equations'' and ''Unit/Process Operating Characteristics That are Not Inputs to Emission Equations'' data categories.

One new subpart I reporting element is being proposed that would be assigned to the ''Unit/Process 'Operating' Characteristics That are Not Inputs to Emission Equations'' data category. This proposed new data element would be the effective facility-

[10] The 2011 Final CBI Rule created 11 direct emitter data categories, including the 10 data categories listed in Table 5 of this preamble and an inputs to emissions equations data category. However, EPA has not made final confidentiality determinations for any data element assigned to the inputs to emissions equations data category either in the 2011 Final CBI Rule or any other rulemaking.

wide DRE factor that is calculated and reported according to 40 CFR 98.96(r). We are proposing that this data element not be considered CBI because it does not reveal any information that is likely to cause competitive harm if publicly released. Facilities would be required to report the calculated facility-wide DRE factor, but would not be required to report any additional data used to calculate the facility-wide DRE factor, except the actual emissions values that are already reported under subpart A and subpart I. The effective facility-wide DRE would indicate the approximate fraction of a facility's emissions that are abated. However, it would not provide any insight into the design or operating conditions of any individual process because the effective facility-wide DRE would be an aggregate value indirectly calculated from, among other things, actual emissions, abatement system DRE, abatement system uptime, apportioning factors, gas consumption, and default gas utilization rates and by-product formation rates. Because of the large number of variables that would go into calculating the effective facility-wide DRE that would not be reported under the proposed changes to 40 CFR 98.96, competitors would not be able to use the reported effective facility-wide DRE factor together with other reported data elements (such as emissions) to calculate any data element that would otherwise not be reported and considered sensitive, such as the amount of F–GHG used in an individual process type or sub-type. Therefore, public disclosure of this data element through the required reporting proposed here is not likely to cause substantial competitive harm to the reporting company; the EPA is proposing that this data element not be protected as CBI.

One new data element under the proposed 40 CFR 98.96(p)(2) would be assigned to the ''Unit/Process 'Static' Characteristics That Are Not Inputs to Emission Equations'' data category. Proposed 40 CFR 98.96(p)(2) would require the basis of the DRE value used (either default or site specific measurement according to proposed 40 CFR 98.94(f)(4)(i) through (vi)) for each process sub-type or process type and for each gas. We are proposing that this data element not be considered CBI, because it does not reveal any information that is likely to cause competitive harm if publicly released. Specifying whether default or site-specific DRE values were used would reveal that a fab did or did not use a default DRE value. However, it would not provide any insight into the design or operating conditions of any individual process since the default DRE is used in combination with fab-specific apportioning factors and consumption information to calculate annual emissions. Because fab-specific consumption and apportioning data used as inputs to emissions equations are not required to be reported under the proposed subpart I, competitors would be unable to derive any sensitive information based on the knowledge that a particular fab used a default DRE value for a gas and process type or sub-type combination. Therefore, public disclosure of this data element through the required reporting proposed here is not likely to cause substantial competitive harm to the reporting company; the EPA is proposing that this data element not be protected as CBI.

Five new data elements to be reported under the proposed 40 CFR 98.96(y)(2) and (y)(3) are part of the triennial (every 3 years) technology assessment report and would be assigned to the ''Unit/Process 'Static' Characteristics That Are Not Inputs to Emission Equations'' data category. These data elements would be required for facilities that emit more than 40,000 $mtCO_2e$ of GHG emissions in 2015 from the electronics manufacturing processes subject to reporting. Proposed 40 CFR 98.96(y)(2)(i) would require, as part of the triennial technology assessment report, a description of how the gases and technologies used in semiconductor manufacturing using 200 mm and 300 mm wafers in the United States have changed in the past 3 years and whether any of the identified changes are likely to have affected the emissions characteristics of semiconductor manufacturing processes in such a way that the default emission factors or default DRE values may be required to be updated. Proposed 40 CFR 98.96(y)(2)(ii) would require a description of the effect of the implementation of new process technologies and/or finer line width processes in 200 mm and 300 mm technologies, the introduction of new tool platforms, and the introduction of new processes on previously tested platforms. Proposed 40 CFR 98.96(y)(2)(iii) would require a description of the status of implementing 450 mm wafer technology and the potential need to create or update emission factors compared to 300 mm technology. Proposed 40 CFR 98.96(y)(2)(v) would require a description of the use of a new gas, the use of an existing gas in a new process type or sub-type, or a fundamental change in process technology. Proposed 40 CFR 98.96(y)(3) would require a data gathering and analysis plan that includes the testing of tools to determine the potential effect on current emission factors and DRE values under new conditions, and a planned analysis of the effect on overall facility emissions using a representative gas-use profile for a 200 mm, 300 mm, or 450 mm fab (depending on which technology is under consideration). We are proposing that each of these five new data elements be protected as CBI because the proposed data elements are likely to reveal information regarding recipe-specific data, new technologies, or advances in production processes that could be used by a competitor. The EPA intends to use the information collected in the triennial report for consideration of updating default emission factors or DRE values in future rulemakings. This information is not emission data and is likely to reveal potentially sensitive information about individual facilities because it is likely to include information about recent process technology developed and adopted by the facilities, including proprietary process technology that would not be revealed otherwise. Therefore, public disclosure of these five data elements through the required reporting proposed here is likely to cause substantial competitive harm to the reporting company; the EPA is proposing that these data elements be protected as CBI.

We are proposing to revise an additional five data elements in subpart I that would be assigned to the ''Unit/Process 'Operating' Characteristics That Are Not Inputs to Emission Equations'' and ''Unit/Process 'Static' Characteristics That Are Not Inputs to Emission Equations'' data category. These five data elements are being revised to clarify the basis for the data element (e.g., fab-specific instead of facility-specific), to clarify applicability, or to conform to amendments in other rule sections. EPA made categorical assignments and confidentiality determinations for these five data elements in Final Subpart I CBI Determinations Rule. The proposed amendment does not change the nature or type of the data to be collected. Therefore, we are not proposing to change the data categorical assignments or CBI categorical determinations for these five data elements. Additional information on these five revised subpart I data elements in the proposed subpart I amendment can be found in the memorandum titled ''Proposed Data Category Assignments for Subpart I 2012 Amendments'' in Docket EPA–HQ–OAR–2011–0028.

D. Request for Comments on Proposed Confidentiality Determinations

Today's action provides affected businesses subject to Part 98, other stakeholders, and the general public an opportunity to provide comment on several aspects of this proposal. For the CBI component of this rulemaking, we are soliciting comment on the following specific issues.

First, we specifically seek comment on the proposed data category assignment for each of the 25 new or revised data elements in the proposed amendments to subpart I. If you believe that the EPA has improperly assigned certain new data elements in this subpart to any of the existing data categories, please provide specific comments identifying which of the new data elements may be mis-assigned along with a detailed explanation of why you believe them to be incorrectly assigned and in which data category you believe they belong.

Second, we specifically seek comment on our proposal to apply the same categorical confidentiality determinations made in the 2011 Final CBI Rule for eight direct emitter data categories to the new or revised data elements in the proposed amendments to subpart I that are assigned to those categories.

We seek comment on the proposed confidentiality status of the 12 newly proposed or revised data elements in the direct emitter data categories for ''Unit/Process 'Static' Characteristics That Are Not Inputs to Emission Equations'' and ''Unit/Process Operating Characteristics That Are Not Inputs to Emission Equations.''

By proposing confidentiality determinations prior to data reporting through this proposal and rulemaking process, we provide potential reporters an opportunity to submit comments identifying data they consider sensitive and their rationales and supporting documentation; this opportunity is the same as that which is afforded submitters of information in case-by-case confidentiality determinations. We will evaluate claims of confidentiality before finalizing the confidentiality determinations. Please note that this will be reporters' only opportunity to substantiate your confidentiality claim. Upon finalizing the confidentiality determinations of the subpart I data elements in this rule, the EPA will release or withhold these subpart I data in accordance with 40 CFR 2.301, which contains special provisions governing the treatment of 40 CFR part 98 data for which confidentiality determinations have been made through rulemaking.

Please consider the following instructions in submitting comments on the newly proposed data elements in subpart I.

Please identify each individual proposed new or revised data element you do or do not consider to be CBI or emission data in your comments. Please explain specifically how the public release of that particular data element would or would not cause a competitive disadvantage to a facility. Discuss how this data element may be different from or similar to data that are already publicly available. Please submit information identifying any publicly available sources of information containing the specific data elements in question. Data that are already available through other sources would not be considered to be CBI. In your comments, please identify the manner and location in which each specific data element you identify is publicly available, including a citation. If the data are physically published, such as in a book, industry trade publication, or federal agency publication, provide the title, volume number (if applicable), author(s), publisher, publication date, and International Standard Book Number (ISBN) or other identifier. For data published on a Web site, provide the address of the Web site and the date you last visited the Web site and identify the Web site publisher and content author.

If your concern is that competitors could use a particular data element to discern sensitive information, specifically describe the pathway by which this could occur and explain how the discerned information would negatively affect your competitive position. Describe any unique process or aspect of your facility that would be revealed if the particular proposed new or revised data element you consider sensitive were made publicly available. If the data element you identify would cause harm only when used in combination with other publicly available data, then describe the other data, identify the public source(s) of these data, and explain how the combination of data could be used to cause competitive harm. Describe the measures currently taken to keep the data confidential. Avoid conclusory and unsubstantiated statements, or general assertions regarding potential harm. Please be as specific as possible in your comments and include all information necessary for the EPA to evaluate your comments.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under section 3(f)(4) of Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

The EPA prepared an analysis of the potential costs associated with this proposal. This analysis is contained in the Economics Impact Analysis (EIA), ''Proposed Amendments and Confidentiality Determinations for Subpart I EIA.'' A copy of the analysis is available in the docket for this action and the analysis is briefly summarized here. Overall, the EPA has concluded that the costs of the proposed changes would significantly reduce subpart I compliance costs. Specifically, the proposed changes would reduce nationwide compliance costs in the first year by 37 percent ($2.7 million to $1.7 million) and by 73 percent in the second year ($6.4 million to $1.7 million).

B. Paperwork Reduction Act

This action does not increase information collection burden. As previously mentioned, this action proposes amended reporting methodologies in subpart I, confidentiality determinations for reported data elements, and amendments to subpart A to reflect proposed changes to the reporting requirements in subpart I. The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in subpart I, under 40 CFR part 98, under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.,* and has assigned OMB control number 2060–0650 for subpart I. The OMB control numbers for the EPA's regulations in 40 CFR are listed at 40 CFR part 9. Additional information can be found in the docket (see file ''Proposed Amendments and Confidentiality Determinations for Subpart I Information Collection Burden''). We continue to be interested in the potential impacts of this action on the burden associated with the proposed amendments and welcome comments on issues related to such impacts.

C. Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act 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 this re-proposal on small entities, ''small entity'' is defined as: (1) A small business as defined by the Small Business Administration's 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; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

This action proposes to (1) Amend monitoring and calculation methodologies in subpart I; (2) assign subpart I data reporting elements into CBI data categories; and (3) amend subpart A to reflect proposed changes to the reporting requirements in subpart I. After considering the economic impacts of today's proposed rule on small entities, I certify that this action would not have a significant economic impact on a substantial number of small entities. The small entities that would be directly regulated by this proposed rule are facilities included in NAICS codes for Semiconductor and Related Device Manufacturing (334413) and Other Computer Peripheral Equipment Manufacturing (334119). In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on small entities subject to the rule.

The EPA is proposing to take several steps to reduce the impact of Part 98 on small entities. For example, the EPA is proposing to remove the recipe-specific reporting requirements for subpart I, which were identified by the Petitioner as economically and technically burdensome. In addition, the EPA has provided a number of flexibilities in this proposed rule, which would allow reporters to choose the methodologies that are least burdensome for their facility. Finally, the EPA continues to conduct significant outreach on the mandatory GHG reporting rule, and subpart I specifically, and maintains an ''open door'' policy for stakeholders to help inform the EPA's understanding of key issues for the industries. Additional information can be found in the docket (see file ''Proposed Amendments and Confidentiality Determinations for Subpart I EIA''). We continue to be interested in the potential impacts of this action on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act (UMRA)

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, requires federal agencies, unless otherwise prohibited by law, to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Federal agencies must also develop a plan to provide notice to small governments that might be significantly or uniquely affected by any regulatory requirements. The plan must enable officials of affected small governments to have meaningful and timely input in the development of the EPA regulatory proposals with significant federal intergovernmental mandates and must inform, educate, and advise small governments on compliance with the regulatory requirements.

This action proposes to: (1) Amend monitoring and calculation methodologies in subpart I; (2) assign subpart I data reporting elements into CBI data categories; and (3) amend subpart A to reflect proposed changes to the reporting requirements in subpart I. This action does not contain a federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. In some cases, the EPA has increased flexibility in the selection of methods used for calculating and reporting GHGs. Also in this action, the EPA is revising specific provisions to provide clarity on what is to be reported. These revisions do not add additional burden on reporters but offer flexibility. As part of the process of finalization of the subpart I rule, the EPA undertook specific steps to evaluate the effect of those final rules on small entities. Based on the proposed amendments to subpart I provisions, burden will stay the same or decrease, therefore the EPA's determination finding of no significant economic impact on a substantial number of small entities has not changed. Thus, this action is not subject to the requirements of sections 202 or 205 of the UMRA. This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

However, in developing Part 98, the EPA consulted with small governments pursuant to a plan established under section 203 of the UMRA to address impacts of regulatory requirements in the rule that might significantly or uniquely affect small governments. For a summary of the EPA's consultations with state and/or local officials or other representatives of state and/or local governments in developing Part 98, see Section VIII.D of the preamble to the final rule (74 FR 56370, October 30, 2009).

E. Executive Order 13132: Federalism

This action does not have federalism implications. It 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. However, for a more detailed discussion about how Part 98 relates to existing state programs, please see Section II of the preamble to the final rule (74 FR 56266, October 30, 2009).

This action, which is proposing amended calculation and reporting methodologies in subpart I, proposing new confidentiality determinations for data elements required under subpart I, and proposing amendments to subpart A to reflect proposed changes to the reporting requirements in subpart I, would only apply to certain electronics manufacturers. No state or local government facilities are known to be engaged in the activities that would be affected by the provisions in this proposed rule. This action also does not limit the power of states or localities to collect GHG data and/or regulate GHG emissions. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with the EPA policy to promote communications between the EPA and state and local governments, the EPA specifically solicits comment on this proposed action from state and local officials. For a summary of the EPA's consultation with state and local organizations and representatives in developing Part 98, see Section VIII.E of

the preamble to the final rule (74 FR 56371, October 30, 2009).

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This action proposes to: (1) Amend monitoring and calculation methodologies in subpart I; (2) assign subpart I data reporting elements into CBI data categories; and (3) amend subpart A to reflect proposed changes to the reporting requirements in subpart I. This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). No tribal facilities are known to be engaged in the activities affected by this action. Thus, Executive Order 13175 does not apply to this action. For a summary of the EPA's consultations with tribal governments and representatives, see Section VIII.F of the preamble to the final rule (74 FR 56371, October 30, 2009). The EPA specifically solicits additional comment on this proposed action from tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action proposes to: (1) Amend monitoring and calculation methodologies in subpart I; (2) assign subpart I data reporting elements into CBI data categories; and (3) amend subpart A to reflect proposed changes to the reporting requirements in subpart I. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action, which proposes to: (1) Amend monitoring and calculation methodologies in subpart I, (2) assign subpart I data reporting elements into CBI data categories, and (3) amend subpart A to reflect proposed changes to the reporting requirements in subpart I, 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(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113 (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. The NTTAA directs the EPA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable VCS.

This action, which is proposing to amend monitoring and calculation methodologies in subpart I, involves technical standards. The EPA is proposing to include a stack testing option that would involve using the following EPA reference methods:

- Method 1 or 1A at 40 CFR part 60, appendix A–1, to select sampling port locations and the number of traverse points in the exhaust stacks.
- Method 2, 2A, 2C, 2D, 2F, or 2G at 40 CFR part 60, appendix A–1 and A–2, to determine gas velocity and volumetric flow rate in the exhaust stacks.
- Method 3, 3A, or 3B at 40 CFR part 60, appendix A–2, to determine the gas molecular weight of the exhaust using the same sampling site and at the same time as the F–GHG sampling is performed.
- Method 4 at 40 CFR part 60, appendix A–3, to measure gas moisture content in the exhaust stacks.
- Method 301 at 40 CFR part 63, appendix A, to perform field validations of alternative methods of measuring F–GHG emissions and abatement system DRE.
- Method 320 at 40 CFR part 63, appendix A, to measure the concentration of F–GHG in the stack exhaust.

Consistent with the NTTAA, the EPA conducted searches to identify VCS in addition to these EPA methods. The EPA conducted searches for VCS from at least three different voluntary consensus standards bodies, including the following: ASTM, ASME, and International SEMATECH Manufacturing Initiative (ISMI). No applicable VCS were identified for EPA Methods 1A, 2A, 2D, 2F, or 2G. The method, ASME PTC 19.10–1981, Flue and Exhaust Gas Analyses, is not cited in this proposed rule for its manual method for measuring the oxygen, carbon dioxide and carbon monoxide content of the exhaust gas. ASME PTC 19.10–1981 is an acceptable alternative to EPA Methods 3A and 3B for the manual procedures only, and not the instrumental procedures. The VCS ASTM D6348–03 (2010), Determination of Gaseous Compounds by Extractive Direct Interface Fourier Transform (FTIR) Spectroscopy, has been reviewed by the EPA as a potential alternative to EPA Method 320. All data and information EPA has received in support of the stack testing method used EPA Method 320. Since this industry contains specialized gases in low concentrations, EPA would prefer to have supporting data prior to approving another test method. Because of this, we are not proposing this standard as an acceptable alternative for EPA Method 320 in this proposed rule. We note that reporters have the option to obtain approval for this method under the procedures outlines in 98.94(k). We specifically seek comment on whether or not ASTM D6348–03 should be included in as an option for the stack testing method.

The EPA is proposing to revise the current subpart I provisions for determining abatement system DRE to incorporate language based on methods adapted from the ISMI 2009 Guideline for Environmental Characterization of Semiconductor Process Equipment—Revision 2. We are proposing to incorporate applicable portions of the ISMI 2009 Guideline into the rule in proposed Appendix A to Subpart I. The EPA is not proposing to incorporate by reference the entire ISMI 2009 Guideline because the ISMI 2009 Guidelines have not been subject to the same level of peer review and validation as other alternative standards (e.g., ASTM or ASME standards). Therefore, we are proposing to incorporate only those portions of the 2009 ISMI Guideline that the EPA has determined are needed to provide flexibility and reduce burden in subpart I.

The EPA identified no other VCS that were potentially applicable for subpart I in lieu of EPA reference methods. Therefore, the EPA does not intend to adopt other standards for this purpose. For the methods required or referenced by the proposed rules, a source may apply to the EPA for permission to use alternative test methods or alternative monitoring requirements in place of any required testing methods, performance specifications or procedures, as specified in proposed 40 CFR part 98, subpart I.

The EPA welcomes comments on this aspect of the proposed rulemaking and, specifically, invites the public to

identify potentially applicable VCS and to explain why such standards should be used in this regulation. Commenters should also explain why this proposed rule should adopt these VCS in lieu of, or in addition to, EPA standards. Emission test methods submitted for evaluation should be accompanied with a basis for the recommendation, including method validation data and the procedure used to validate the candidate method (if a method other than Method 301 was used).

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.

This action is proposing to: (1) Amend monitoring and calculation methodologies in subpart I; (2) assign subpart I data reporting elements into CBI data categories; and (3) amend subpart A to reflect proposed changes to the reporting requirements in subpart I. The EPA has determined that this action will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This action addresses only reporting and recordkeeping procedures.

List of Subjects in 40 CFR Part 98

Environmental protection, Administrative practice and procedure, Greenhouse gases, Reporting and recordkeeping requirements.

Dated: August 31, 2012.

Lisa P. Jackson,

Administrator.

For the reasons set out in the preamble, title 40, chapter I, of the Code of Federal Regulations is proposed to be amended as follows:

PART 98—[AMENDED]

1. The authority citation for part 98 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart A—[Amended]

2. Section 98.7 is amended by revising paragraph (m)(3) and removing and reserving paragraph (n).

The revision reads as follows:

§ 98.7 What standardized methods are incorporated by reference into this part?

* * * * *

(m) * * *

(3) Protocol for Measuring Destruction or Removal Efficiency (DRE) of Fluorinated Greenhouse Gas Abatement Equipment in Electronics Manufacturing, Version 1, EPA–430–R–10–003, March 2010 (EPA 430–R–10–003), *http://www.epa.gov/semiconductor-pfc/documents/dre_protocol.pdf*, IBR approved for § 98.94(f)(4)(i), § 98.94(g)(3), § 98.97(d)(4), § 98.98, Appendix A to subpart I of this part, § 98.124(e)(2), and § 98.414(n)(1).

* * * * *

Table A–7 to Subpart A of Part 98 [Amended]

3. Table A–7 to subpart A of part 98 is amended by removing the entries for ''98.96(f)(1),'' ''98.96(g),'' ''98.96(h),'' ''98.96(i),'' ''98.96(j),'' ''98.96(k),'' ''98.96(l),'' ''98.96(n),'' ''98.96(o),'' ''98.96(q)(2),'' ''98.96(q)(3),'' ''98.96(q)(5)(iv),'' and ''98.96(r).''

Subpart I—[Amended]

4. Section 98.91 is amended by revising the definitions of ''C_i'' in Equation I–3 of paragraph (a)(3) and ''W_x'' in Equation I–5 of paragraph (b) to read as follows:

§ 98.91 Reporting threshold.

(a) * * *

(3) * * *

* * * * *

C_i = Annual fluorinated GHG (input gas i) purchases or consumption (kg). Only gases that are used in PV manufacturing processes listed at § 98.90(a)(1) through (a)(4) that have listed GWP values in Table A–1 to subpart A of this part must be considered for threshold applicability purposes.

* * * * *

(b) * * *

* * * * *

W_X = Maximum substrate starts of a facility in month x (m^2 per month).

* * * * *

5. Section 98.92 is amended by:

a. Revising paragraph (a)(1).

b. Removing and reserving paragraphs (a)(2) and (3).

c. Revising paragraph (a)(6).

The revisions read as follows:

§ 98.92 GHGs to report.

(a) * * *

(1) Fluorinated GHGs emitted.

* * * * *

(6) All fluorinated GHGs and N_2O consumed.

* * * * *

6. Section 98.93 is amended by:

a. Revising paragraphs (a) and (b).

b. Revising paragraph (c) introductory text and the definitions of ''C_i'', ''I_{Bi}'', ''I_{Ei}'', ''A_i'', and ''D_i'' in Equation I–11 of paragraph (c).

c. Revising paragraph (d) introductory text and the definitions of ''D_i'', ''h_{il}'', ''N_{il}'', ''F_{il}'', ''X_i'', and ''M'' in Equation I–12 of paragraph (d).

d. Revising paragraph (e) introductory text and the definitions of ''$C_{i,j}$'', ''$f_{i,j}$'', ''C_i'', and ''j'' in Equation I–13 of paragraph (e).

e. Removing and reserving paragraph (f).

f. Revising paragraph (g).

g. Revising paragraph (h) introductory text and the definitions of ''EH_i'', ''I_{iB}'', ''P_i'', ''N_i'', ''R_i'', ''I_{iE}'', and ''D_i'' in Equation I–16 of paragraph (h).

h. Removing and reserving paragraph (h)(2).

i. Adding paragraph (i).

The revisions read as follows:

§ 98.93 Calculating GHG emissions.

(a) You must calculate total annual emissions of each fluorinated GHG emitted by electronics manufacturing production processes from each fab (as defined in § 98.98) at your facility, including each input gas and each by-product gas, for each process type or process sub-type. You must use either default gas utilization rates and by-product formations rates according to the procedures in paragraphs (a)(1), (a)(2), (a)(4), or (a)(6) of this section, as appropriate, or the stack test method according to paragraph (i) of this section, to calculate emissions of each input gas and each by-product gas. If your fab uses less than 50 kg of a fluorinated GHG in one reporting year, you may calculate emissions as equal to your fab's annual consumption for that specific gas as calculated in Equation I–11 of this subpart. If your fab is required to perform calculations using default emission factors for gas utilization and by-product formation rates according to the procedures in paragraphs (a)(1), (a)(2), or (a)(4) of this section, and default values are not available for a particular input gas and process type or sub-type combination in Tables I–3, I–4, I–5, I–6, or I–7, you must follow the procedures in paragraph (a)(6) of this section. If you calculate emissions of fluorinated GHG input gases and by-product gases by process type or sub-type using the methods in paragraphs

(a)(1), (a)(2), or (a)(4) of this section, you must calculate annual emissions of each input fluorinated GHG and of each by-product fluorinated GHG using Equations I–6 and I–7, respectively.

$$ProcesstypeE_i = \sum_{j=1}^{N} E_{ij} \qquad \text{(Eq. I-6)}$$

Where:

ProcesstypeEi = Annual emissions of input gas i from the processes type on a fab basis (metric tons).

E_{ij} = Annual emissions of input gas i from process sub-type or process type j as calculated in Equation I–8 of this subpart (metric tons).

N = The total number of process sub-types j that depends on the electronics manufacturing fab and emission calculation methodology. If E_{ij} is calculated for a process type j in Equation I–8 of this subpart, N = 1.

i = Input gas.

j = Process sub-type or process type.

$$ProcesstypeBE_k = \sum_{j=1}^{N} \sum_{i} BE_{ijk} \qquad \text{(Eq. I-7)}$$

Where:

$ProcesstypeBE_k$ = Annual emissions of by-product gas k from the processes type on a fab basis (metric tons).

BE_{ijk} = Annual emissions of by-product gas k formed from input gas i used for process sub-type or process type j as calculated in Equation I–9 of this subpart (metric tons).

N = The total number of process sub-types j that depends on the electronics manufacturing fab and emission calculation methodology. If BE_{ijk} is calculated for a process type j in Equation I–9 of this subpart, N = 1.

i = Input gas.

j = Process sub-type, or process type.

k = By-product gas.

(1) If you manufacture MEMS, LCDs, or PVs, you must calculate annual fab-level emissions of each fluorinated GHG used for the plasma etching and chamber cleaning process types using default utilization and by-product formation rates as shown in Table I–5, I–6, or I–7 of this subpart, as appropriate, and by using Equations I–8 and I–9 of this subpart.

(2) If you manufacture semiconductors on wafers measuring 300 mm or less in diameter, you must adhere to the procedures in paragraphs (a)(2)(i) and (ii) of this section.

(i) You must calculate annual fab-level emissions of each fluorinated GHG used for the plasma etching/wafer cleaning process type using default utilization and by-product formation rates as shown in Table I–3 or I–4 of this subpart, and by using Equations I–8 and I–9 of this subpart.

(ii) You must calculate annual fab-level emissions of each fluorinated GHG used for each of the process sub-types associated with the chamber cleaning process type, including in-situ plasma chamber clean, remote plasma chamber clean, and in-situ thermal chamber clean, using default utilization and by-product formation rates as shown in Table I–3 or I–4 of this subpart, and by using Equations I–8 and I–9 of this subpart.

(3) [Reserved.]

(4) If you manufacture semiconductors on wafers measuring greater than 300 mm in diameter, you must adhere to the procedures in paragraphs (a)(4)(i) and (ii) of this section.

(i) You must calculate annual fab-level emissions of each fluorinated GHG used for the plasma etching/wafer cleaning process type using default utilization and by-product formation rates as shown in Table I–4 of this subpart, and by using Equations I–8 and I–9 of this subpart.

(ii) You must calculate annual fab-level emissions of each fluorinated GHG used for each of the process sub-types associated with the chamber cleaning process type, including in-situ plasma chamber clean, remote plasma chamber clean, and in-situ thermal chamber clean, using default utilization and by-product formation rates as shown in Table I–4 of this subpart, and by using Equations I–8 and I–9 of this subpart.

(5) [Reserved.]

(6) If your facility is required to perform calculations using default emission factors for gas utilization and by-product formation rates according to the procedures in paragraphs (a)(1), (a)(2), or (a)(4) of this section, and default values are not available for a particular input gas and process type or sub-type combination in Tables I–3, I–4, I–5, I–6, or I–7, you must use the utilization and by-product formation rates of zero and use Equations I–8 and I–9 of this subpart.

$$E_{ij} = C_{ij} * (1 - U_{ij}) * (1 - a_{ij} * d_{ij} * UT_{ij}) * 0.001 \qquad \text{(Eq. I-8)}$$

Where:

E_{ij} = Annual emissions of input gas i from process sub-type or process type j, on a fab basis (metric tons).

C_{ij} = Amount of input gas i consumed for process sub-type or process type j, as calculated in Equation I–13 of this subpart, on a fab basis (kg).

U_{ij} = Process utilization rate for input gas i for process sub-type or process type j (expressed as a decimal fraction).

a_{ij} = Fraction of input gas i used in process sub-type or process type j with abatement systems, on a fab basis (expressed as a decimal fraction).

d_{ij} = Fraction of input gas i destroyed or removed in abatement systems connected to process tools where process sub-type, or process type j is used, on a fab basis(expressed as a decimal fraction). This is zero unless the facility adheres to the requirements in § 98.94(f).

UT_{ij} = The average uptime factor of all abatement systems connected to process tools in the fab using input gas i in process sub-type or process type j, as calculated in Equation I–15a of this

subpart, on a fab basis (expressed as a decimal fraction).

0.001 = Conversion factor from kg to metric tons.

i = Input gas.

j = Process sub-type or process type.

$$BE_{ijk} = B_{ijk} * C_{ij} * (1 - a_{ij} * d_{jk} * UT_{jk}) * 0.001 \qquad \text{(Eq. I-9)}$$

Where:

BE_{ijk} = Annual emissions of by-product gas k formed from input gas i from process sub-type or process type j, on a fab basis (metric tons).

B_{ijk} = By-product formation rate of gas k created as a by-product per amount of input gas i (kg) consumed by process sub-type or process type j (kg).

C_{ij} = Amount of input gas i consumed for process sub-type, or process type j, as calculated in Equation I–13 of this subpart, on a fab basis (kg).

a_{ij} = Fraction of input gas i used for process sub-type, or process type j with abatement systems, on a fab basis (expressed as a decimal fraction).

d_{jk} = Fraction of by-product gas k destroyed or removed in abatement systems connected to process tools where process sub-type, or process type j is used, on a fab basis (expressed as a decimal fraction). This is zero unless the facility adheres to the requirements in § 98.94(f).

UT_{jk} = The average uptime factor of all abatement systems connected to process tools in the fab emitting by-product gas k in process sub-type or process type j, as calculated in Equation I–15b of this subpart, on a fab basis (expressed as a decimal fraction).

0.001 = Conversion factor from kg to metric tons.

i = Input gas.

j = Process sub-type or process type.

k = By-product gas.

(b) You must calculate annual fab-level N_2O emissions from all chemical vapor deposition processes and from the aggregate of other electronics manufacturing production processes using Equation I–10 of this subpart and the methods in paragraphs (b)(1) and (b)(2) of this section. If your fab uses less than 50 kg of N_2O in one reporting year, you may calculate fab emissions as equal to your fab's annual consumption for N_2O as calculated in Equation I–11 of this subpart.

$$E(N_2O)_j = C_{N_2O,j} * (1 - U_{N_2O,j}) * (1 - a_{N_2O,j} * d_{N_2O,j} * UT_{N2O}) * 0.001 \qquad \text{(Eq. I-10)}$$

Where:

$E(N_2O)_j$ = Annual emissions of N_2O for N_2O-using process j, on a fab basis (metric tons).

$C_{N2O,j}$ = Amount of N_2O consumed for N_2O-using process j, as calculated in Equation I–13 of this subpart and apportioned to N_2O process j, on a fab basis (kg).

$U_{N2O,j}$ = Process utilization factor for N_2O-using process j (expressed as a decimal fraction) from Table I–8 of this subpart.

$a_{N2O,j}$ = Fraction of N_2O used in N_2O-using process j with abatement systems, on a fab basis (expressed as a decimal fraction).

$d_{N2O,j}$ = Fraction of N_2O for N_2O-using process j destroyed or removed in abatement systems connected to process tools where process j is used, on a fab basis (expressed as a decimal fraction). This is zero unless the facility adheres to the requirements in § 98.94(f).

UT_{N2O} = The average uptime factor of all the abatement systems connected to process tools in the fab that use N_2O, as calculated in Equation I–15a of this subpart, on a fab basis (expressed as a decimal fraction). For purposes of calculating the abatement system uptime for N_2O using process tools, in Equation I–15a of this subpart, the only input gas i is N_2O, j is the N_2O using process, and p is the N_2O abatement system connected to the N_2O using tool.

0.001 = Conversion factor from kg to metric tons.

j = Type of N_2O-using process, either chemical vapor deposition or all other N_2O-using manufacturing processes.

(1) You must use the factor for N_2O utilization for chemical vapor deposition processes as shown in Table I–8 to this subpart.

(2) You must use the factor for N_2O utilization for all other manufacturing production processes other than chemical vapor deposition as shown in Table I–8 to this subpart.

(c) You must calculate total annual input gas i consumption on a fab basis for each fluorinated GHG and N_2O using Equation I–11 of this subpart.

* * * * *

C_i = Annual consumption of input gas i, on a fab basis (kg per year).

I_{Bi} = Inventory of input gas i stored in containers at the beginning of the reporting year, including heels, on a fab basis (kg). For containers in service at the beginning of a reporting year, account for the quantity in these containers as if they were full.

I_{Ei} = Inventory of input gas i stored in containers at the end of the reporting year, including heels, on a fab basis (kg). For containers in service at the end of a reporting year, account for the quantity in these containers as if they were full.

A_i = Acquisitions of input gas i during the year through purchases or other transactions, including heels in containers returned to the electronics manufacturing facility, on a fab basis (kg).

D_i = Disbursements of input gas i through sales or other transactions during the year, including heels in containers returned by the electronics manufacturing facility to the chemical supplier, as calculated using Equation I–12 of this subpart, on a fab basis (kg).

* * * * *

(d) You must calculate disbursements of input gas i using fab-wide gas-specific heel factors, as determined in § 98.94(b), and by using Equation I–12 of this subpart.

* * * * *

D_i = Disbursements of input gas i through sales or other transactions during the reporting year on a fab basis, including heels in containers returned by the electronics manufacturing fab to the gas distributor (kg).

h_{il} = Fab-wide gas-specific heel factor for input gas i and container size and type l (expressed as a decimal fraction), as determined in § 98.94(b). If your fab uses less than 50 kg of a fluorinated GHG or N_2O in one reporting year, you may assume that any h_{il} for that fluorinated GHG or N_2O is equal to zero.

N_{il} = Number of containers of size and type l returned to the gas distributor containing the standard heel of input gas i.

F_{il} = Full capacity of containers of size and type l containing input gas i, on a fab basis (kg).

X_i = Disbursements under exceptional circumstances of input gas i through sales or other transactions during the year, on a fab basis (kg). These include returns of containers whose contents have been weighed due to an exceptional circumstance as specified in § 98.94(b)(4).

* * * * *

M = The total number of different sized container types on a fab basis. If only one size and container type is used for an input gas i, M=1.

(e) You must calculate the amount of input gas i consumed, on a fab basis, for each process sub-type or process type j, using Equation I–13 of this subpart.

* * * * *

$C_{i,j}$ = The annual amount of input gas i consumed, on a fab basis, for process sub-type, or process type j (kg).

$f_{i,j}$ = Process sub-type-specific, or process type-specific j, input gas i apportioning factor (expressed as a decimal fraction),

as determined in accordance with § 98.94(c).

C_i = Annual consumption of input gas i, on a fab basis, as calculated using Equation I–11 of this subpart (kg).

* * * * *

j = Process sub-type, or process type.

(f) [Reserved.]

(g) If you report controlled emissions pursuant to § 98.94(f), you must calculate the uptime of all the abatement systems for each combination of input gas or by-product gas, and process sub-type or process type, by using Equation I–15a or I–15b of this subpart. Use Equation I–15a for the calculation of uptime for tools using each input gas, and Equation I–15b for the calculation of uptime for tools emitting each by-product gas.

$$UT_{ij} = 1 - \sum_{p} \frac{Td_{ijp}}{\sum_p UT_{ijp}} \qquad \text{(Eq. I-15a)}$$

Where:

UT_{ij} = The average uptime factor of all abatement systems connected to process tools in the fab using input gas i in process sub-type or process type j (expressed as a decimal fraction).

Td_{ijp} = The total time, in minutes, that abatement system p, connected to process tool(s) in the fab using input gas i in process sub-type or process type j, is not in operational mode, as defined in § 98.98, when at least one of the tools connected to abatement system p is in operation.

UT_{ijp} = Total time, in minutes per year, in which abatement system p has at least one associated tool in operation. For determining the amount of tool operating time, you may assume that tools that were installed for the whole of the year were operated for 525,600 minutes per year. For tools that were installed or uninstalled during the year, you must prorate the operating time to account for the days in which the tool was not installed; treat any partial day that a tool was installed as a full day (1,440 minutes) of tool operation. For an abatement system that has more than one connected tool, the tool operating time is 525,600 minutes per year if at least one tool was installed at all times throughout the year. If you have tools that are idle with no gas flow through the tool, you may calculate total tool time using the actual time that gas is flowing through the tool.

i = Input gas.

j = Process sub-type or process type.

p = Abatement system.

$$UT_{jk} = 1 - \sum_{p} \frac{Td_{jkp}}{\sum_p UT_{jkp}} \qquad \text{(Eq. I-15b)}$$

Where:

UT_{jk} = The average uptime factor of all abatement systems connected to process tools in the fab which emit by-product gas k, in process sub-type or process type j (expressed as a decimal fraction).

Td_{jkp} = The total time, in minutes, that abatement system p, connected to process tool(s) in the fab which emit by-product gas k, in process sub-type or process type j, is not in operational mode, as defined in § 98.98, when at least one of the tools connected to abatement system p is in operation.

UT_{kp} = Total time, in minutes per year, in which abatement system p has at least one associated tool in operation. For determining the amount of tool operating time, you may assume that tools that were installed for the whole of the year were operated for 525,600 minutes per year. For tools that were installed or uninstalled during the year, you must prorate the operating time to account for the days in which the tool was not installed; treat any partial day that a tool was installed as a full day (1,440 minutes) of tool operation. For an abatement system that has more than one connected tool, the tool operating time is 525,600 minutes per year if at least one tool was installed at all times throughout the year. If you have tools that are idle with no gas flow through the tool, you may calculate total tool time using the actual time that gas is flowing through the tool.

j = Process sub-type or process type.

k = By-product gas.

p = Abatement system.

(h) If you use fluorinated heat transfer fluids, you must calculate the annual emissions of fluorinated heat transfer fluids on a fab basis using the mass balance approach described in Equation I–16 of this subpart.

* * * * *

EH_i = Emissions of fluorinated heat transfer fluid i, on a fab basis (metric tons/year).

* * * * *

I_{iB} = Inventory of fluorinated heat transfer fluid i, on a fab basis, in containers other than equipment at the beginning of the reporting year (in stock or storage) (l). The inventory at the beginning of the reporting year must be the same as the inventory at the end of the previous reporting year.

P_i = Acquisitions of fluorinated heat transfer fluid i, on a fab basis, during the reporting year (l), including amounts purchased from chemical suppliers, amounts purchased from equipment suppliers with or inside of equipment, and amounts returned to the facility after off-site recycling.

N_i = Total nameplate capacity (full and proper charge) of equipment that uses fluorinated heat transfer fluid i and that is newly installed in the fab during the reporting year (l).

R_i = Total nameplate capacity (full and proper charge) of equipment that uses fluorinated heat transfer fluid i and that is removed from service in the fab during the reporting year (l).

I_{iE} = Inventory of fluorinated heat transfer fluid i, on a fab basis in containers other than equipment at the end of the reporting year (in stock or storage)(l).

D_i = Disbursements of fluorinated heat transfer fluid i, on a fab basis, during the reporting year, including amounts returned to chemical suppliers, sold with or inside of equipment, and sent off-site for verifiable recycling or destruction (l). Disbursements should include only amounts that are properly stored and transported so as to prevent emissions in transit.

* * * * *

(i) *Stack test method.* As an alternative to the default emission factor method in paragraph (a) of this section, you may calculate fab-level fluorinated GHG emissions using fab-specific emission factors developed from stack testing. To use the method in this paragraph, you must first make a preliminary estimate of the fluorinated GHG emissions from each stack system in the fab under paragraph (i)(1) of this section. You must then compare the

preliminary estimate for each stack system to the criteria in paragraph (i)(2) of this section to determine whether the stack system meets the criteria for using the stack test method described in paragraph (i)(3) of this section or whether the stack system meets the criteria for using the method described in paragraph (i)(4) of this section to estimate emissions from the stack systems that are not tested.

(1) *Preliminary estimate of emissions by stack system in the fab.* You must calculate a preliminary estimate of the annual emissions of each fluorinated GHG from each stack system in the fab using default utilization and by-product formation rates as shown in Table I–11, I–12, I–13, I–14, or I–15 of this subpart, as applicable, and by using Equations I–8 and I–9 of this subpart. When using Equations I–8 and I–9 of this subpart for the purposes of this paragraph (i)(1), you must also adhere to the procedures in paragraphs (i)(1)(i) to (iii) of this section to calculate preliminary estimates.

(i) When you are calculating preliminary estimates for the purpose of this paragraph (i)(1), you must consider the subscript ''j'' in Equations I–8 and I–9, and I–13 of this subpart to mean ''stack system'' instead of ''process sub-type or process type.'' For the value of a_{ij}, the fraction of input gas i that is used in tools with abatement systems, for use in Equations I–8 and I–9, you may use the ratio of the number of tools using input gas i that have abatement systems that are vented to the stack system for which you are calculating the preliminary estimate to the total number of tools using input gas i that are vented to that stack system, expressed as a decimal fraction. You may use this approach to determining a_{ij} only for this preliminary estimate.

(ii) You must use data from the previous reporting year to estimate the consumption of input gas i as calculated in Equation I–13 of this subpart and the fraction of input gas i destroyed in abatement systems for each stack system as calculated by Equation I–24 of this subpart. When calculating the consumption of input gas i as calculated in Equation I–13 of this subpart, the term ''f_{ij}'' is replaced with the ratio of the number of tools using input gas i that are vented to the stack system for which you are calculating the preliminary estimate to the total number of tools in the fab using input gas i, expressed as a decimal fraction. You may use this approach to determining f_{ij} only for this preliminary estimate.

(iii) You must use data from the previous reporting year to estimate the total uptime of all abatement systems for the stack system as calculated by Equation I–23 of this subpart, instead of using Equation I–15a or Equation I–15b of this subpart to calculate the average uptime factor.

(2) *Method selection for stack systems in the fab.* If the calculations under paragraph (i)(1) of this section, as well as any subsequent annual measurements and calculations under this subpart, indicate that the stack system meets the criteria in paragraph (i)(2)(i) through (iii) of this section, then you may comply with either paragraph (i)(3) of this section (stack test method) or paragraph (i)(4) of this section (method to estimate emissions from the stack systems that are not tested). If the stack system does not meet all three criteria in paragraph (i)(2)(i) through (iii) of this section, then you must comply with the stack test method specified in paragraph (i)(3) of this section.

(i) The sum of annual emissions of fluorinated GHGs from all of the combined stack systems that are not tested in the fab is less than 10,000 metric ton CO_2e per year. For those fluorinated GHG in Tables I–11, I–12, I–13, I–14, and I–15 of this subpart for which Table A–1 to subpart A of this part does not define a GWP value, you must use a value of 2,000 for the GWP in calculating metric ton CO_2e for that fluorinated GHG.

(ii) When all stack systems in the fab are ordered from lowest to highest emitting in metric ton CO_2e of fluorinated GHG per year, each of the stack systems that is not tested is within the set of the fab's lowest emitting fluorinated GHG stack systems that together emit 15 percent or less of total CO_2e fluorinated GHG emissions from the fab. For those fluorinated GHG that do not have GWP values listed in Table A–1 to subpart A of this part, you must use a GWP value of 2,000 in calculating CO_2e.

(iii) Fluorinated GHG emissions from each of the stack systems that is not tested can only be attributed to particular process tools during the test (that is, the stack system that is not tested cannot be used as an alternative emission point or bypass stack system from other process tools not attributed to the untested stack system).

(3) *Stack system stack test method.* For each stack system in the fab for which testing is required, measure the emissions of each fluorinated GHG from the stack system by conducting an emission test. In addition, measure the fab-specific consumption of each fluorinated GHG by the tools that are vented to the stack systems tested. Measure emissions and consumption of each fluorinated GHG as specified in § 98.94(j). Develop fab-specific emission factors and calculate fab-level fluorinated GHG emissions using the procedures specified in paragraph (i)(3)(i) through (viii) of this section. All emissions test data and procedures used in developing emission factors must be documented according to § 98.97.

(i) You must measure, and, if applicable, apportion the fab-specific fluorinated GHG consumption of the tools that are vented to the stack systems that are tested during the emission test as specified in § 98.94(j)(3). Calculate the consumption for each fluorinated GHG for the test period.

(ii) You must calculate the emission of each fluorinated GHG consumed as an input gas using Equation I–17 of this subpart and each fluorinated GHG formed as a by-product gas using Equation I–18 of this subpart and the procedures specified in paragraphs (i)(3)(ii)(A) through (E) of this section. If a stack system has more than one stack emitting to the atmosphere from a common header, you must measure the fluorinated GHG concentration and flow in each stack from that header to the atmosphere, and sum the emissions from each stack in the stack system when using Equation I–17 or Equation I–18 of this subpart.

$$E_{is} = MW_i * Q_s * \frac{1}{SV} * \frac{1}{10^3} * \sum_{m=1}^{N} \frac{X_{ism}}{10^6} * \Delta t_m \qquad \text{(Eq. I-17)}$$

Where:

E_{is} = Total fluorinated GHG input gas i, emitted from stack system s, during the sampling period (kg).

X_{ism} = Average concentration of fluorinated GHG input gas i in stack system s, during the time interval m (ppmv).

MW_i = Molecular weight of fluorinated GHG input gas i (g/g-mole).

Q_s = Flow rate of the stack system s, during the sampling period (m^3/min).

SV = Standard molar volume of gas (0.02240 m^3/g-mole at 68 °F and 1 atm).
Δt_m = Length of time interval m (minutes). Each time interval in the sampling period must be less than or equal to 60 minutes (for example an 8 hour sampling period would consist of at least 8 time intervals).
$1/10^3$ = Conversion factor (1 kilogram/1,000 grams).
i = Fluorinated GHG input gas.
s = Stack system.
N = Total number of time intervals m in sampling period.
m = Time interval.

$$E_{ks} = MW_k * Q_s * \frac{1}{SV} * \frac{1}{10^3} * \sum_{m=1}^{N} \frac{X_{ksm}}{10^6} * \Delta t_m \qquad \text{(Eq. I-18)}$$

Where:
E_{ks} = Total fluorinated GHG by-product gas k, emitted from stack system s, during the sampling period (kg).
X_{ks} = Average concentration of fluorinated GHG by-product gas k in stack system s, during the time interval m (ppmv).
MW_k = Molecular weight of the fluorinated GHG by-product gas k (g/g-mole).
Q_s = Flow rate of the stack system s, during the sampling period (m^3/min).
SV = Standard molar volume of gas (0.02240 m^3/g-mole at 68 °F and 1 atm).
Δt_m = Length of time interval m (minutes). Each time interval in the sampling period must be less than or equal to 60 minutes (for example an 8 hour sampling period would consist of at least 8 time intervals).
$1/10^3$ = Conversion factor (1 kilogram/1,000 grams).
k = Fluorinated GHG by-product gas.
s = Stack system.
N = Total number of time intervals m in sampling period.
m = Time interval.

(A) If a fluorinated GHG is consumed during the sampling period, but emissions are not detected, use one-half of the field detection limit you determined for that fluorinated GHG according to § 98.94(j)(2) for the value of ''X_{ism}'' in Equation I–17.

(B) If a fluorinated GHG is consumed during the sampling period and detected intermittently during the sampling period, use the detected concentration for the value of ''X_{ism}'' in Equation I–17 when available and use one-half of the field detection limit you determined for that fluorinated GHG according to § 98.94(j)(2) for the value of ''X_{ism}'' when the fluorinated GHG is not detected.

(C) If a fluorinated GHG is not consumed during the sampling period but is detected intermittently as a by-product gas, use the measured concentration for ''X_{ksm}'' in Equation I–18 when available and use one-half of the field detection limit you determined for that fluorinated GHG according to § 98.94(j)(2) for the value of ''X_{ksm}'' when the fluorinated GHG is not detected.

(D) If a fluorinated GHG is an expected by-product gas of the stack system tested and is not detected during the sampling period, use one-half of the field detection limit you determined for that fluorinated GHG according to § 98.94(j)(2) for the value of ''X_{ksm}'' in Equation I–18.

(E) If a fluorinated GHG is not an expected by-product of the stack system and is not detected during the sampling period, then assume zero emissions for that fluorinated GHG for the tested stack system.

(iii) You must calculate a fab-specific emission factor for each fluorinated GHG input gas consumed (in kg of fluorinated GHG emitted per kg of input gas i consumed) in the tools that vent to stack systems that are tested, as applicable, using Equation I–19 of this subpart. If the emissions of input gas i exceed the consumption of input gas i during the sampling period, then equate ''E_{ij}'' to the consumption of input gas i and treat the difference between the emissions and consumption of input gas i as a by-product of the other input gases, using Equation I–20 of this subpart.

$$EF_{if} = \frac{\sum_s (E_{is})}{Activity_{if} * \left(UT_f + \left(\frac{1 - UT_f}{1 - (a_{if} * d_{if})} \right) \right)} \qquad \text{(Eq. I-19)}$$

Where:
EF_{if} = Emission factor for fluorinated GHG input gas i, from fab f, representing 100 percent abatement system uptime (kg emitted/kg input gas consumed).
E_{is} = Mass emission of fluorinated GHG input gas i from stack system s, during the sampling period (kg emitted).
$Activity_{if}$ = Consumption of fluorinated GHG input gas i, for fab f, in the tools vented to the stack systems being tested, during the sampling period, as determined following the procedures specified in § 98.94(j)(3) (kg consumed).
UT_f = The total uptime of all abatement systems for fab f, during the sampling period, as calculated in Equation I–23 of this subpart (expressed as decimal fraction). If the stack system does not have abatement systems on the tools vented to the stack system, the value of this parameter is zero.
a_{if} = Fraction of fluorinated GHG input gas i used in fab f in tools with abatement systems (expressed as a decimal fraction).
d_{if} = Fraction of fluorinated GHG input gas i destroyed or removed in abatement systems connected to process tools in fab f, as calculated in Equation I–24 of this subpart (expressed as decimal fraction). If the stack system does not have abatement systems on the tools vented to the stack system, the value of this parameter is zero.
f = Fab.
i = Fluorinated GHG input gas.
s = Stack system.

(iv) You must calculate a fab-specific emission factor for each fluorinated GHG formed as a by-product (in kg of fluorinated GHG per kg of total fluorinated GHG consumed) in the tools vented to stack systems that are tested, as applicable, using Equation I–20 of this subpart. When calculating the by-product emission factor for an input gas for which emissions exceeded its consumption, exclude the consumption of that input gas from the term ''$\Sigma(Activity_{if})$.''

$$EF_{kf} = \frac{\sum_{s}(E_{ks})}{\sum_{i}(Activity_{if}) * \left(UT_f + \left(\frac{1-UT_f}{1-(a_f * d_{kf})}\right)\right)} \qquad \text{(Eq. I-20)}$$

Where:

EF_{kf} = Emission factor for fluorinated GHG by-product gas k, from fab f, (kg emitted/kg of all input gases consumed in tools vented to stack systems that are tested).

E_{ks} = Mass emission of fluorinated GHG by-product gas k, emitted from stack system s, during the sampling period (kg emitted).

$Activity_{if}$ = Consumption of fluorinated GHG input gas i for fab f in tools vented to stack systems that are tested, during the sampling period as determined following the procedures specified in § 98.94(j)(3) (kg consumed).

UT_f = The total uptime of all abatement systems for fab f, during the sampling period, as calculated in Equation I–23 of this subpart (expressed as decimal fraction).

a_f = Fraction of all input gases used in fab f in tools with abatement systems (expressed as a decimal fraction).

d_{kf} = Fraction of fluorinated GHG by-product gas k destroyed or removed in abatement systems connected to process tools in fab f, as calculated in Equation I–24 of this subpart (expressed as decimal fraction).

f = Fab.

i = Fluorinated GHG input gas.

k = Fluorinated GHG by-product gas.

s = Stack system.

(v) You must calculate annual fab-level emissions of each fluorinated GHG consumed using Equation I–21 of this section.

$$E_{if} = EF_{if} * C_{if} * UT_f + \frac{EF_{if}}{\left(1-(a_{if} * d_{if})\right)} * C_{if} * \left(1-UT_f\right) \qquad \text{(Eq. I-21)}$$

Where:

E_{if} = Annual emissions of fluorinated GHG input gas i (kg/year) from the stack systems that are tested for fab f.

EF_{if} = Emission factor for fluorinated GHG input gas i emitted from fab f, as calculated in Equation I–19 of this subpart (kg emitted/kg input gas consumed).

C_{if} = Total consumption of fluorinated GHG input gas i in tools that are vented to stack systems that are tested, for fab f, for the reporting year, as calculated using Equation I–13 of this subpart (kg/year).

UT_f = The total uptime of all abatement systems for fab f, during the reporting year, as calculated using Equation I–23 of this subpart (expressed as a decimal fraction).

a_{if} = Fraction of fluorinated GHG input gas i used in fab f in tools with abatement systems (expressed as a decimal fraction).

d_{if} = Fraction of fluorinated GHG input gas i destroyed or removed in abatement systems connected to process tools in fab f that are included in the stack testing option, as calculated in Equation I–24 of this subpart (expressed as decimal fraction).

f = Fab.

i = Fluorinated GHG input gas.

(vi) You must calculate annual fab-level emissions of each fluorinated GHG by-product formed using Equation I–22 of this section.

$$E_{kf} = EF_{kf} * \sum_{i} C_{if} * UT_f + \frac{EF_{kf}}{\left(1-(a_f * d_{kf})\right)} * \sum_{i} C_{if} * \left(1-UT_f\right) \qquad \text{(Eq. I-22)}$$

Where:

E_{kf} = Annual emissions of fluorinated GHG by-product k (kg/year) from the stack systems that are tested for fab f.

EF_{kf} = Emission factor for fluorinated GHG by-product k, emitted from fab f, as calculated in Equation I–20 of this subpart (kg emitted/kg of all input gases consumed).

C_{if} = Total consumption of fluorinated GHG input gas i in tools that are vented to stack systems that are tested, for fab f, for the reporting year, as calculated using Equation I–13 of this subpart.

UT_f = The total uptime of all abatement systems for fab f, during the reporting year as calculated using Equation I–23 of this subpart (expressed as a decimal fraction).

a_f = Fraction of input gases used in fab f in tools with abatement systems (expressed as a decimal fraction).

d_{kf} = Fraction of fluorinated GHG by-product k destroyed or removed in abatement systems connected to process tools in fab f that are included in the stack testing option, as calculated in Equation I–24 of this subpart (expressed as decimal fraction).

f = Fab.

i = Fluorinated GHG input gas.

k = Fluorinated GHG by-product.

(vii) When using the stack testing method described in this paragraph (i), you must calculate abatement system uptime on a fab basis using Equation I–23 of this subpart. When calculating abatement system uptime for use in Equation I–19 and I–20 of this subpart, you must evaluate the variables ''Td_{pj}'' and ''UT_{pf}'' for the sampling period instead of the reporting year.

$$UT_f = 1 - \sum_{p} \frac{Td_{pf}}{\sum_p UT_{pf}} \qquad \text{(Eq. I-23)}$$

Where:

UT_f = The total uptime of all abatement systems, for fab f (expressed as a decimal fraction).

Td_{pf} = The total time, in minutes, that abatement system p, connected to process tool(s) in fab f, is not in operational mode as defined in § 98.98.

UT_{pf} = Total time, in minutes per year, in which the tool(s) connected at any point during the year to abatement system p, in fab f could be in operation. For determining the amount of tool operating time, you may assume that tools that were installed for the whole of the year were operated for 525,600 minutes per

year. For tools that were installed or uninstalled during the year, you must prorate the operating time to account for the days in which the tool was not installed; treat any partial day that a tool was installed as a full day (1,440 minutes) of tool operation. For an abatement system that has more than one connected tool, the tool operating time is 525,600 minutes per year if there was at least one tool installed at all times throughout the year. If you have tools that are idle with no gas flow through the tool, you may calculate total tool time using the actual time that gas is flowing through the tool.

f = Fab.

p = Abatement system.

(viii) When using the stack testing option described in this paragraph (i), you must calculate the weighted average fraction of input gas i destroyed or removed in abatement systems for each fab f, as applicable, by using Equation I–24 of this subpart.

$$d_{if} = \frac{\Sigma_j C_{ijf} * DRE_{ij}}{\Sigma_j C_{ijf}} \qquad \text{(Eq. I-24)}$$

Where:

d_{if} = The average weighted fraction of fluorinated GHG input gas i destroyed or removed in abatement systems in fab f (expressed as a decimal fraction).

C_{ijf} = The amount of fluorinated GHG input gas i consumed for process type j fed into abatement systems in fab f (kg).

DRE_{ij} = Destruction or removal efficiency for fluorinated GHG input gas i in abatement systems connected to process tools where process type j is used (expressed as a decimal fraction) determined according to § 98.94(f).

f = fab.

i = Fluorinated GHG input gas.

j = Process type.

(4) *Method to calculate emissions from stack systems that are not tested.* You must calculate annual fab-level emissions of each input and by-product fluorinated GHG for those fluorinated GHG listed in paragraphs (i)(4)(i) and (ii) of this section using default utilization and by-product formation rates as shown in Tables I–11, I–12, I–13, I–14, or I–15 of this subpart, as applicable, and by using Equations I–8, I–9, and I–13 of this subpart. When using Equations I–8, I–9, and I–13 of this subpart to fulfill the requirements of this paragraph, you must use, in place of the term C_{ij} in each equation, the total consumption of each fluorinated GHG meeting the criteria in paragraph (i)(4)(i) of this section or that is used in tools vented to the stack systems that meet the criteria in paragraph (i)(4)(ii) of this section. You also must use the results of Equation I–24 of this subpart in place of the terms d_{ij} in Equation I–8 of this subpart and d_{jk} in Equation I–9 of this subpart, and use the results of Equation I–23 of this subpart in place of the results of Equation I–15a or Equation I–15b of this subpart for the terms UT_{ij} and UT_{jk}.

(i) Calculate emissions from consumption of each intermittent low-use fluorinated GHG as defined in § 98.98 of this subpart using the default utilization and by-product formation rates and equations specified in paragraph (i)(4) of this section. If a fluorinated GHG was not being used during the stack testing and does not meet the definition of intermittent low-use fluorinated GHG in § 98.98, then you must test the stack systems associated with the use of that fluorinated GHG at a time when that gas is in use at a magnitude that would allow you to determine an emission factor for that gas according to the procedures specified in paragraph (i)(3) of this section.

(ii) Calculate emissions from consumption of each fluorinated GHG used in tools vented to stack systems that meet the criteria specified in paragraphs (i)(2)(i) through (i)(2)(iii) of this section, and were not tested according to the procedures in paragraph (i)(3) of this section. Calculate emissions using the default utilization and by-product formation rates and equations specified in paragraph (i)(4) of this section.

(5) To determine the total emissions of each fluorinated GHG from each fab under this stack testing option, you must sum the emissions of each fluorinated GHG determined from the procedures in paragraph (i)(3) of this section with the emissions of the same fluorinated GHG determined from the procedures in paragraph (i)(4) of this section.

7. Section 98.94 is amended by:

a. Removing and reserving paragraph (a).

b. Revising paragraph (b), paragraph (c) introductory text, and paragraph (c)(2).

c. Adding paragraph (c)(3).

d. Removing and reserving paragraphs (d) and (e).

e. Revising paragraph (f) introductory text and paragraph (f)(1) introductory text, (f)(1)(ii), (f)(2), (f)(3) and (f)(4).

f. Removing and reserving paragraphs (g)(1) and (g)(2).

g. Revising paragraphs (g)(3) and (g)(4).

h. Revising paragraph (h) introductory text and paragraphs (h)(3) and (i).

i. Adding paragraphs (j) and (k).

The additions and revisions read as follows:

§ 98.94 Monitoring and QA/QC requirements.

(a) [Reserved.]

(b) For purposes of Equation I–12 of this subpart, you must estimate fab-wide gas-specific heel factors for each container type for each gas used, except for fluorinated GHGs or N_2O which your fab uses in quantities less than 50 kg in one reporting year, according to the procedures in paragraphs (b)(1) through (b)(5) of this section.

(1) Base your fab-wide gas-specific heel factors on the trigger point for change out of a container for each container size and type for each gas used. Fab-wide gas-specific heel factors must be expressed as the ratio of the trigger point for change out, in terms of mass, to the initial mass in the container, as determined by paragraphs (b)(2) and (3) of this section.

(2) The trigger points for change out you use to calculate fab-wide gas-specific heel factors in paragraph (b)(1) of this section must be determined by monitoring the mass or the pressure of your containers. If you monitor the pressure, convert the pressure to mass using the ideal gas law, as displayed in Equation I–25 of this subpart, with the appropriate Z value selected based upon the properties of the gas.

$$pV = ZnRT \qquad \text{(Eq. I-25)}$$

Where:

p = Absolute pressure of the gas (Pa).

V = Volume of the gas container (m^3).

Z = Compressibility factor.

n = Amount of substance of the gas (moles).

R = Gas constant (8.314 Joule/Kelvin mole).

T = Absolute temperature (K).

(3) The initial mass you use to calculate a fab-wide gas-specific heel factor in paragraph (b)(1) of this section may be based on the weight of the gas provided to you in gas supplier documents; however, you remain responsible for the accuracy of these masses and weights under this subpart.

(4) If a container is changed in an exceptional circumstance, as specified in paragraphs (b)(4)(i) and (ii) of this section, you must weigh that container or measure the pressure of that container with a pressure gauge, in place of using a heel factor to determine the residual weight of gas. When using mass-based trigger points for change out, you must determine if an exceptional circumstance has occurred based on the net weight of gas in the container, excluding the tare weight of the container.

(i) For containers with a maximum storage capacity of less than 9.08 kg (20 lbs) of gas, an exceptional circumstance is a change out point that differs by more than 50 percent from the trigger point for change out used to calculate your fab-wide gas-specific heel factor for that gas and container type.

(ii) For all other containers, an exceptional circumstance is a change out point that differs by more than 20 percent from the trigger point for change out used to calculate your fab-wide gas-specific heel factor for that gas and container type.

(5) You must re-calculate a fab-wide gas-specific heel factor if you execute a process change to modify the trigger point for change out for a gas and container type that differs by more than 5 percent from the previously used trigger point for change out for that gas and container type.

(c) You must develop apportioning factors for fluorinated GHG and N_2O consumption (including the fraction of gas consumed by process tools connected to abatement systems as in Equations I–8, I–9, I–10, and I–24 of this subpart), to use in the equations of this subpart for each input gas i, process sub-type, process type, stack system, and fab as appropriate, using a fab-specific engineering model that is documented in your site GHG Monitoring Plan as required under § 98.3(g)(5). This model must be based on a quantifiable metric, such as wafer passes or wafer starts, or direct measurement of input gas consumption as specified in paragraph (c)(3) of this section. To verify your model, you must demonstrate its precision and accuracy by adhering to the requirements in paragraphs (c)(1) and (2) of this section.

* * * * *

(2) You must demonstrate the accuracy of your fab-specific model by comparing the actual amount of input gas i consumed and the modeled amount of input gas i consumed in the fab, as follows:

(i) You must analyze actual and modeled gas consumption for a period when the fab is at a representative operating level (as defined in § 98.98) lasting at least 30 days but no more than the reporting year.

(ii) You must compare the actual gas consumed to the modeled gas consumed for one fluorinated GHG reported under this subpart for the fab. You must certify that the fluorinated GHG selected for comparison corresponds to the largest quantity, on a mass basis, of fluorinated GHG consumed at the fab during the reporting year for which you are required to apportion following the procedures specified in § 98.93(a), (b), or (i). You may compare the actual gas consumed to the modeled gas consumed for two fluorinated GHGs and demonstrate conformance according to paragraph (c)(2)(iii) of this section on an aggregate use basis for both fluorinated GHGs if one of the fluorinated GHGs selected for comparison corresponds to the largest quantities, on a mass basis, of fluorinated GHGs used at each fab during the reporting year.

(iii) You must demonstrate that the comparison performed for the largest quantity of gas(es), on a mass basis, consumed in the fab in paragraph (c)(2)(ii) of this section, does not result in a difference between the actual and modeled gas consumption that exceeds 20 percent relative to actual gas consumption, reported to two significant figures using standard rounding conventions.

(iv) If you are required to apportion gas consumption and use the procedures in § 98.93(i) to calculate annual emissions from a fab, you must verify your apportioning factors using the procedures in paragraphs (c)(2)(ii) and (iii) of this section such that the time period specified in paragraph (c)(2)(i) of this section ends on the last day you perform the sampling events specified under § 98.93(i)(3).

(v) If your facility has multiple fabs with a single centralized fluorinated-GHG supply system and two or more fabs that use different methods to calculate annual emissions of fluorinated GHGs, you must verify that your apportioning model can apportion fluorinated GHG consumption among the fabs by adhering to the procedures in paragraphs (c)(2)(ii) through (c)(2)(iv) of this section.

(3) As an alternative to developing apportioning factors for fluorinated GHG and N_2O consumption using a fab-specific engineering model, you may develop apportioning factors through the use of direct measurement using gas flow meters and weigh scales to measure process sub-type, process type, stack system, or fab-specific input gas consumption. You may use a combination of apportioning factors developed using a fab-specific engineering model and apportioning factors developed through the use of direct measurement, provided this is documented in your site GHG Monitoring Plan as required under 98.3(g)(5).

* * * * *

(f) You must adhere to the procedures in paragraphs (f)(1) and (f)(2) of this section if your facility employs abatement systems and you use § 98.93(a) and/or § 98.93(b) to calculate emissions and wish to reflect emission reductions due to these systems. You must also adhere to the procedures in paragraphs (f)(1) and (f)(2) of this section if you use § 98.93(i) to calculate emissions. If you use the default destruction or removal efficiencies in Table I–16 of this subpart, you must adhere to procedures in paragraph (f)(3) of this section. If you use an average of properly measured destruction or removal efficiencies for a gas and process sub-type or process type combination, as applicable, during a reporting year, you must adhere to procedures in paragraph (f)(4) of this section.

(1) You must certify and document that the abatement systems are properly installed, operated, and maintained according to manufacturers' specifications by adhering to the procedures in paragraphs (f)(1)(i) and (ii) of this section.

* * * * *

(ii) You must certify and document your abatement systems are operated and maintained in accordance with the manufacturers' specifications and according to the site maintenance plan for abatement systems that is developed and maintained in your records as specified in § 98.97(d).

(2) You must calculate and document the uptime of abatement systems using Equations I–15a, I–15b, or I–23 of this subpart, as applicable.

(3) To report emissions using the default destruction or removal efficiencies in Table I–16 of this subpart, you must certify and document that the abatement systems at your facility are specifically designed for fluorinated GHG and N_2O abatement.

(4) If you do not use the default destruction or removal efficiency values to calculate and report controlled emissions, you must use an average of properly measured destruction or removal efficiencies for each gas and process sub-type or process type combination, as applicable, determined in accordance with procedures in paragraphs (f)(4)(i) through (vi) of this

section. You must not use a default value from Table I–16 of this subpart for any gas and process type combination for which you have measured the destruction or removal efficiency according to the requirements of paragraphs (f)(4)(i) through (vi) of this section.

(i) A properly measured destruction or removal efficiency value must be determined in accordance with EPA 430–R–10–003 (incorporated by reference, see § 98.7), or according to an alternative method approved by the Administrator as specified in paragraph (k) of this section. If you are measuring destruction or removal efficiency according to EPA 430–R–10–003, you may follow the alternative procedures specified in Appendix A to this subpart.

(ii) You must select and properly measure the destruction or removal efficiency for a random sample of abatement systems to include in a random sampling abatement system testing program in accordance with procedures in paragraphs (f)(4)(ii)(A) and (B) of this section.

(A) For the first 2 years for which your fab is required to report emissions of fluorinated GHG and N_2O, for each abatement system gas and process sub-type or process type combination, as applicable, a random sample of 10 percent of installed abatement systems must be tested annually for a total of 20 percent, or 20 percent may be tested in the first year. For every 3-year period following the initial 2-year period, a random sample of 15 percent of installed abatement systems must be tested for each gas and process sub-type or process type combination; you may test 15-percent in the first year of the 3-year period, but you must test at least 5 percent each year until 15 percent are tested. If the required percent of the total number of abatement systems to be tested for each gas and process sub-type or process type combination does not equate to a whole number, the number of systems to be tested must be determined by rounding up to the nearest integer.

(B) If testing of a randomly selected abatement system would be disruptive to production, you may replace that system with another randomly selected system for testing and return the system to the sampling pool for subsequent testing. Any one abatement system must not be replaced by another randomly selected system for more than three consecutive selections. When you have to replace a system in one year, you may select that specific system to be tested in one of the next two sampling years so that you may plan testing of that abatement system to avoid disrupting production.

(iii) You must use default destruction or removal efficiencies for a gas and process type combination, until you complete testing on 20 percent of the abatement systems for that gas and process sub-type or process type combination, as applicable. Following testing on 20 percent of abatement systems for that gas and process sub-type or process type combination, you must calculate the average destruction or removal efficiency as the arithmetic mean of all test results for that gas and process sub-type or process type combination, until you have tested at least 30 percent of all abatement systems for each gas and process sub-type or process type combination. After testing at least 30 percent of all systems for a gas and process sub-type or process type combination, you must use the arithmetic mean of the most recent 30 percent of systems tested as the average destruction or removal efficiency.

(iv) If a measured destruction or removal efficiency is below the manufacturer-claimed fluorinated GHG or N_2O destruction or removal efficiency and the abatement system is installed, operated, and maintained in accordance with the manufacturers' specifications, the measured destruction or removal efficiency must be included in the calculation of the destruction or removal efficiency value for that gas and process sub-type or process type, as applicable.

(v) If a measured destruction or removal efficiency is below the manufacturer-claimed fluorinated GHG or N_2O destruction or removal efficiency and the abatement system is not installed, operated, or maintained in accordance with the manufacturers' specifications, you must implement corrective action and perform a retest to replace the measured value within the reporting year. In lieu of retesting within the reporting year, you may use the measured value in calculating the average destruction or removal efficiency for the reporting year, and then include the same system in the next year's abatement system testing in addition to the testing of randomly selected systems for that next reporting year.

(vi) If your fab uses redundant abatement systems, you may account for the total abatement system uptime calculated for a specific exhaust stream during the reporting year.

(g) * * *

(3) Follow the QA/QC procedures in accordance with those in EPA 430–R–10–003 (incorporated by reference, see § 98.7), or the applicable QA/QC procedures specified in an alternative method approved by the Administrator according to paragraph (k) of this section, when calculating abatement systems destruction or removal efficiencies. If you are measuring destruction or removal efficiency according to EPA 430–R–10–003, and you elect to follow the alternative procedures specified in Appendix A to this subpart according to paragraph (f)(4)(i) of this section, you must follow any additional QA/QC procedures specified in Appendix A to this subpart.

(4) Demonstrate that, as part of normal operations for each fab, the inventory of gas stored in containers at the beginning of the reporting year is the same as the inventory of gas stored in containers at the end of the previous reporting year.

(h) You must adhere to the QA/QC procedures of this paragraph (h) when calculating annual gas consumption for each fluorinated GHG and N_2O used at each fab and emissions from the use of each fluorinated heat transfer fluid on a fab basis.

* * * * *

(3) Ensure that the inventory at the beginning of one reporting year is identical to the inventory reported at the end of the previous reporting year.

* * * * *

(i) All flowmeters, weigh scales, pressure gauges, and thermometers used to measure quantities that are monitored under this section or used in calculations under § 98.93 must meet the calibration and accuracy requirements specified in § 98.3(i).

(j) *Stack test methodology.* For each fab for which you calculate annual emissions for any fluorinated GHG emitted from your facility using the stack test method according to the procedure specified in § 98.93(i)(3), you must adhere to the requirements in paragraphs (j)(1) through (8) of this section. You may request approval to use an alternative stack test method and procedure according to paragraph (k) of this section.

(1) *Stack system testing.* Conduct an emissions test for each applicable stack system according to the procedures in paragraphs (j)(1)(i) through (iv) of this section.

(i) You must conduct an emission test during which the fab is operating at a representative operating level, as defined in § 98.98, and with the abatement systems connected to the stack system being tested operating with at least 90 percent uptime during the 8-hour (or longer) period for each stack system, or at no less than 90 percent of the abatement system uptime rate

measured over the previous reporting year.

(ii) You must measure for tetrafluoromethane (CF_4), hexafluoroethane (C_2F_6) and any other fluorinated GHG expected to be emitted from the stack system and those fluorinated GHGs used as input fluorinated GHG in process tools vented to the stack system, except for any intermittent low-use fluorinated GHG as defined in § 98.98. You must calculate annual emissions of intermittent low-use fluorinated GHGs by adhering to the procedures in § 98.93(i)(4).

(iii) You must determine the fluorinated GHGs expected to be emitted from the stack system based on a documented facility analysis of all fluorinated GHGs consumed and emitted in the previous reporting year, and all fluorinated GHGs expected to be consumed and emitted in the current reporting year by process tools vented to the stack system. You must also include in that analysis any possible fluorinated GHG by-products formed from fluorinated GHGs consumed in the previous reporting year and expected to be consumed in the current reporting year by process tools connected to the stack system. In developing your facility analysis, you must also consider all fluorinated GHG by-products listed in Tables I–3 through I–7 of this subpart, as applicable, to the products manufactured at your facility. If a fluorinated GHG being consumed in the reporting year was not being consumed during the stack testing and does not meet the definition of intermittent low-use fluorinated GHG in § 98.98, then you must test the stack systems associated with the use of that fluorinated GHG at a time when that gas is in use at a magnitude that would allow you to determine an emission factor for that gas. If a fluorinated GHG consumed in the reporting year was not being consumed during the stack testing and is no longer in use by your fab (e.g., use of the gas has become obsolete or has been discontinued), then you must calculate annual emissions for that fluorinated GHG according to the procedure specified in § 98.93(i)(4).

(iv) Although all applicable stack systems are not required to be tested simultaneously, you must certify that no changes in stack flow configuration (including, for example, the number and type of tools vented to each stack system) occur between tests conducted for any particular fab in a reporting year.

(2) *Test methods and procedures.* You must adhere to the applicable test methods and procedures specified in Table I–9 to this subpart, or adhere to an alternative method approved by the Administrator according to paragraph (k) of this section. The field detection limits achieved under your test methods and procedures must fall at or below the maximum field detection limits specified in Table I–10 to this subpart.

(3) *Fab-specific fluorinated GHG consumption measurements.* You must determine the amount of each fluorinated GHG consumed by each fab during the sampling period for all process tools connected to the stack systems tested under § 98.93(i)(3), according to the procedures in paragraphs (j)(3)(i) and (ii) of this section. This determination must include apportioning gas consumption between stack systems that are being tested and those that not tested under § 98.93(i)(2).

(i) Measure fluorinated GHG consumption using gas flow meters, scales, or pressure measurements. Measure the mass or pressure, as applicable, at the beginning and end of the sampling period and when containers are changed out. If you elect to measure gas consumption using pressure (i.e., because the gas is stored in a location above its critical temperature) you must estimate consumption as specified in paragraphs (j)(i)(A) and (B) of this section.

(A) For each fluorinated GHG, you must either measure the temperature of the fluorinated GHG container(s) when the sampling periods begin and end and when containers are changed out, or measure the temperature of the fluorinated GHG container(s) every hour for the duration of the sampling period. Temperature measurements of the immediate vicinity of the containers (e.g., in the same room, near the containers) shall be considered temperature measurements of the containers.

(B) Convert the sampling period-beginning, sampling period-ending, and container change-out pressures to masses using Equation I–25 of this subpart, with the appropriate Z value selected based upon the properties of the gas (e.g., the Z value yielded by the Redlich, Kwong, Soave equation of state with appropriate values for that gas). Apply the temperatures measured at or nearest to the beginning and end of the sampling period and to the time(s) when containers are changed out, as applicable. For each gas, the consumption during the sampling period is the difference between the masses of the containers of that gas at the beginning and at the end of the sampling period, summed across containers, including containers that are changed out.

(ii) For each fluorinated GHG gas for which consumption is too low to be accurately measured during the sampling period using gas flow meters, scales, or pressure measurements as specified in paragraph (j)(3)(i) of this section, you must follow at least one of the procedures listed in paragraph (j)(3)(ii)(A) through (C) of this section to obtain a consumption measurement.

(A) Draw the gas from a single gas container if it is normally supplied from multiple containers connected by a shared manifold.

(B) Calculate consumption from pro-rated long-term consumption data (for example, calculate and use hourly consumption rates from monthly consumption data).

(C) Increase the duration of the sampling period for consumption measurement beyond the minimum duration specified in Table I–9 of this subpart.

(4) *Emission test results.* The results of an emission test must include the analysis of samples, number of test runs, the average emission factor for each fluorinated GHG measured, the analytical method used, calculation of emissions, the fluorinated GHGs consumed during the sampling period, an identification of the stack systems tested, and the fluorinated GHGs that were included in the test. The emissions test report must contain all information and data used to derive the fab-specific emission factor.

(5) *Emissions testing frequency.* You must conduct emissions testing to develop fab-specific emission factors on a frequency according to the procedures in paragraph (j)(5)(i) or (ii) of this section.

(i) *Annual testing.* You must conduct an annual emissions test for each stack system for which emissions testing is required under § 98.93(i)(3), unless you meet the criteria in paragraph (j)(5)(ii) of this section to skip annual testing. Each set of emissions testing for a stack system must be separated by a period of at least 2 months.

(ii) *Criteria to test less frequently.* After the first 3 years of annual testing, you may calculate the relative standard deviation of the emission factors for each fluorinated GHG included in the test and use that analysis to determine the frequency of any future testing. As an alternative, you may conduct all three tests in less than 3 calendar years for purposes of this paragraph (j)(5)(ii), but this does not relieve you of the obligation to conduct subsequent annual testing if you do not meet the criteria to test less frequently. If the criteria specified in paragraphs (j)(5)(ii)(A) and (B) of this section are met, you may use

the arithmetic average of the three emission factors for each fluorinated GHG and fluorinated GHG by-product for the current year and the next 4 years with no further testing unless your fab operations are changed in way that triggers the re-test criteria in paragraph (j)(8) of this section. In the fifth year following the last stack test included in the previous average, you must test each of the stack systems for which testing is required and repeat the relative standard deviation analysis using the results of the most recent three tests. If the criteria specified in paragraphs (j)(5)(ii)(A) and (B) of this section are not met, you must use the emission factors developed from the most recent testing and continue annual testing. You may conduct more than one test in the same year, but each set of emissions testing for a stack system must be separated by a period of at least 2 months. You may repeat the relative standard deviation analysis using the most recent three tests to determine if you are exempt from testing for the next 4 years.

(A) The relative standard deviation of the total CO_2e emission factors calculated from each of the three tests (expressed as the total CO_2e fluorinated GHG emissions of the fab divided by the total CO_2e fluorinated GHG use of the fab) is less than or equal to 15 percent.

(B) The relative standard deviation for all single fluorinated GHGs that individually accounted for 5 percent or more of CO_2e emissions were less than 20 percent.

(C) For those fluorinated GHG that do not have GWP values listed in Table A–1 to subpart A of this part, you must use a GWP value of 2,000 in calculating CO_2e in paragraphs (j)(5)(ii)(A) and (B) of this section.

(6) *Subsequent measurements.* You must make an annual determination of each stack system's exemption status under § 98.93(i)(2) by March 31 each year. If a stack system that was previously not required to be tested per § 98.93(i)(2), no longer meets the criteria in § 98.93(i)(2), you must conduct the emissions testing for the stack system during the current reporting and develop the fab-specific emission factor from the emissions testing.

(7) *Previous measurements.* You may include the results of emissions testing conducted after [*DATE 3 YEARS BEFORE DATE OF PUBLICATION OF FINAL RULE*] for use in the relative standard deviation calculation in paragraph (j)(5)(ii) of this section if the previous results were determined using a method meeting the requirements in paragraph (j)(2) of this section.

(8) *Scenarios that require a stack system to be re-tested.* By March 31 of each reporting year, you must evaluate and determine whether any changes to your fab operations meet the criteria specified in paragraphs (j)(8)(i) through (vi) of this section. If any of the scenarios specified in paragraph (j)(8)(i) through (vi) of this section occur, you must perform a re-test of any applicable stack system, irrespective of whether you have met the criteria for less frequent testing in paragraph (j)(5)(ii) of this section, before the end of the year in which the evaluation was completed. You must adhere to the methods and procedures specified in § 98.93(i)(3) for performing a stack system emissions test and calculating emissions. If you meet the criteria for less frequent testing in paragraph (j)(5)(ii) of this section, and you are required to perform a re-test as specified in paragraph (j)(8)(i) through (vi) of this section, the requirement to perform a re-test does not extend the date of the next scheduled test that was established prior to meeting the requirement to perform a re-test. If the criteria specified in paragraph (j)(5)(ii) of this section are not met using the results from the re-test and the two most recent stack tests, you must use the emission factors developed from the most recent testing to calculate emissions and resume annual testing. You may resume testing less frequently according to your original schedule if the criteria specified in paragraph (j)(5)(ii) of this section are met using the most recent three tests.

(i) Annual consumption of a fluorinated GHG used during the most recent emissions test (expressed in CO_2e) changes by more than 10 percent of the total annual fluorinated GHG consumption, relative to gas consumption in CO_2e for that gas during the year of the most recent emissions test (for example, if the use of a single gas goes from 25 percent of CO_2e to greater than 35 percent of CO_2e, this change would trigger a re-test). For those fluorinated GHG that do not have GWP values listed in Table A–1 to subpart A of this part, you must use a GWP value of 2,000 in calculating CO_2e.

(ii) A change in the consumption of an intermittent low-use fluorinated GHG (as defined in § 98.98) that was not used during the emissions test and not reflected in the fab-specific emission factor, such that it no longer meets the definition of an intermittent low-use fluorinated GHG.

(iii) A decrease by more than 10 percent in the fraction of tools with abatement systems, compared to the number during the most recent emissions test.

(iv) A change in the wafer size manufactured by the fab since the most recent emissions test.

(v) A stack system that formerly met the criteria specified under § 98.93(i)(2) for not being subject to testing no longer meets those criteria.

(vi) A gas is used or emitted that meets the criteria in paragraph (j)(1)(iii) of this section.

(k) You may request approval to use an alternative stack test method and procedure or to use an alternative method to determine abatement system destruction or removal efficiency by adhering to the requirements in paragraphs (k)(1) through (k)(6) of this section. An alternative method is any method of sampling and analyzing for a fluorinated GHG or N_2O, or the determination of parameters other than concentration, for example, flow measurements, that is not a method specified in this subpart and that has been demonstrated to the Administrator's satisfaction, using Method 301 in appendix A of part 63, to produce results adequate for the Administrator's determination that it may be used in place of a method specified elsewhere in this subpart.

(1) You may use an alternative method from that specified in this subpart provided that you:

(i) Notify the Administrator of your intention to use an alternative method. You must include in the notification a site-specific test plan describing the alternative method and procedures (the alternative test plan), the range of test conditions over which the validation is intended to be applicable, and an alternative means of calculating the fab-level fluorinated GHG or N_2O emissions or determining the abatement system destruction or removal efficiency if the Administrator denies the use of the results of the alternative method under paragraph (k)(2) or (3) of this section.

(ii) Use Method 301 in appendix A of part 63 of this chapter to validate the alternative method. This may include the use of only portions of specific procedures of Method 301 if use of such procedures are sufficient to validate the alternative method; and

(iii) Submit the results of the Method 301 validation process along with the notification of intention and the rationale for not using the specified method.

(2) The Administrator will determine whether the validation of the proposed alternative method is adequate and issue an approval or disapproval of the alternative test plan within 120 days of the date on which you submit the notification and alternative test plan specified in paragraph (k)(1) of this

section. If the Administrator approves the alternative test plan, you are authorized to use the alternative method(s) in place of the methods described in paragraph (f)(4)(i) of this section for measuring destruction or removal efficiency or paragraph (j) of this section for conducting the stack test, as applicable, taking into account the Administrator's comments on the alternative test plan. Notwithstanding the requirement in the preceding sentence, you may at any time prior to the Administrator's approval or disapproval proceed to conduct the stack test using the methods specified in paragraph (j) of this section or the destruction or removal efficiency determination specified in (f)(4)(i) of this section if you use a method specified in this subpart instead of the requested alternative.

(3) You must report the results of stack testing or destruction or removal efficiency determination using the alternative method and procedure specified in the approved alternative test plan. You must include in your report for an alternative stack test method and for an alternative abatement system destruction or removal efficiency determination the information specified in paragraph (j)(4) of this section, including all methods, calculations and data used to determine the fluorinated GHG emission factor or the abatement system destruction or removal efficiency. The Administrator will review the results of the test using the alternative methods and procedure and then approve or deny the use of the results of the alternative test method and procedure no later than 120 days after they are submitted to EPA.

(4) If the Administrator finds reasonable grounds to dispute the results obtained by an alternative method for the purposes of determining fluorinated GHG emissions or destruction or removal efficiency of an abatement system, the Administrator may require the use of another method specified in this subpart.

(5) Once the Administrator has approved the use of the alternative method for the purposes of determining fluorinated GHG emissions for specific fluorinated GHGs and types of stack systems or abatement system destruction or removal efficiency, that method may be used at any other facility for the same fluorinated GHGs and types of stack systems, or fluorinated GHGs and abatement systems, if the approved conditions apply to that facility. In granting approval, the Administrator may limit the range of test conditions and emission characteristics for which that approval is granted and under which the alternative method may be used without seeking approval under paragraphs (k)(1) through (4) of this section. The Administrator will specify those limitations, if any, in the approval of the alternative method.

(6) Neither the validation and approval process nor the failure to validate or obtain approval of an alternative method shall abrogate your responsibility to comply with the requirements of this subpart.

8. Section 98.96 is amended by:

a. Revising paragraph (c) introductory text and paragraphs (c)(1), (c)(2), and (c)(3).

b. Adding paragraph (c)(5).

c. Removing and reserving paragraphs (f), (g), (h), (i), (j), (k), and (l).

d. Revising paragraph (m) introductory text, redesignating paragraphs (m)(i) through (m)(iv) as paragraphs (m)(1) through (m)(4), and revising new paragraphs (m)(1), (m)(3) and (m)(4).

e. Adding paragraph (m)(5).

f. Removing and reserving paragraphs (n) and (o).

g. Revising paragraph (p).

h. Revising paragraphs (q), (r), and (s).

i. Removing and reserving paragraphs (t) and (v).

j. Adding paragraphs (w), (x) and (y).

The additions and revisions read as follows:

§ 98.96 Data reporting requirements.

* * * * *

(c) Annual emissions, on a fab basis as described in paragraph (c)(1) through (5) of this section.

(1) When you use the procedures specified in § 98.93(a) of this subpart, each fluorinated GHG emitted from each process type for which your fab is required to calculate emissions as calculated in Equations I–6 and I–7 of this subpart.

(2) Each fluorinated GHG emitted from each process type or process sub-type as calculated in Equations I–8 and I–9 of this subpart, as applicable.

(3) N_2O emitted from all chemical vapor deposition processes and N_2O emitted from the aggregate of other N_2O-using manufacturing processes as calculated in Equation I–10 of this subpart.

* * * * *

(5) When you use the procedures specified in § 98.93(i) of this subpart, annual emissions of each fluorinated GHG, on a fab basis.

* * * * *

(m) For the fab-specific apportioning model used to apportion fluorinated GHG and N_2O consumption under § 98.94(c), the following information to determine it is verified in accordance with procedures in § 98.94(c)(1) and (2):

(1) Identification of the quantifiable metric used in your fab-specific engineering model to apportion gas consumption for each fab.

* * * * *

(3) Certification that the gas(es) you selected under § 98.94(c)(2)(ii) for each fab corresponds to the largest quantity(ies) consumed on a mass basis, of fluorinated GHG used at your fab during the reporting year for which you are required to apportion.

(4) The result of the calculation comparing the actual and modeled gas consumption under § 98.94(c)(2)(iii) and (iv), as applicable.

(5) If you are required to apportion fluorinated GHG consumption between fabs as required by § 98.94(c)(2)(v), certification that the gas(es) you selected under § 98.94(c)(2)(ii) corresponds to the largest quantity(ies) consumed on a mass basis, of fluorinated GHG used at your facility during the reporting year for which you are required to apportion.

* * * * *

(p) Inventory and description of all abatement systems through which fluorinated GHGs or N_2O flow at your facility and for which you are claiming destruction or removal efficiency, including:

(1) The number of abatement systems controlling emissions for each process sub-type, or process type, as applicable, for each gas used in the process sub-type or process type.

(2) The basis of the destruction or removal efficiency being used (default or site specific measurement according to § 98.94(f)(4)(i)) for each process sub-type or process type and for each gas.

(q) For all abatement systems through which fluorinated GHGs or N_2O flow at your facility, for which you are reporting controlled emissions, a certification that all abatement systems at the facility have been installed, maintained, and operated in accordance with the manufacturer's specifications and according to the site maintenance plan for abatement systems that is developed and maintained in your records as specified in § 98.97(d).

(r) You must report an effective facility-wide destruction or removal efficiency value calculated using Equation I–26, I–27, and I–28 of this subpart, as appropriate. For those fluorinated GHG for which Table A–1 to subpart A of this part does not define a GWP value, you must use a value of 2,000 for the GWP in calculating metric ton CO_2e for that fluorinated GHG.

$$DRE_{FAC} = \left[1 - \frac{\sum_i FGHG_i * GWP_i + \sum_j N_2O_j * GWP_{N2O}}{UAFGHG + SFGHG + \sum_j C_{N2O,j} * (1 - U_{N2O,j}) * GWP_{N2O}} \right] \quad \text{(Eq. I-26)}$$

Where:

DRE_{FAC} = Facility-wide effective destruction or removal efficiency value, expressed as a decimal fraction.

$FGHG_i$ = Total emissions of each fluorinated GHG i emitted from electronics manufacturing processes in the facility, calculated according to the procedures in § 98.93.

N_2O_j = Emissions of N_2O from each N_2O-emitting electronics manufacturing process j in the facility, expressed in metric ton CO_2 equivalents, calculated according to the procedures in § 98.93.

UAFGHG = Total unabated emissions of fluorinated GHG emitted from electronics manufacturing processes in the facility, expressed in metric ton CO_2 equivalents as calculated in Equation I–27 of this subpart.

SFGHG = Total unabated emissions of fluorinated GHG emitted from electronics manufacturing processes in the facility, expressed in metric ton CO_2 equivalents, as calculated in Equation I–28 of this subpart.

$C_{N2O,j}$ = Consumption of N_2O in each N_2O emitting process j, expressed in metric ton CO_2 equivalents.

$1-U_{N2O,j}$ = N_2O emission factor for each N_2O emitting process j from Table I–8 of this subpart.

GWP_i = GWP of emitted fluorinated GHG i from Table A–1 of this part. For those fluorinated GHGs for which Table A–1 to subpart A of this part does not define a GWP value, use a GWP value of 2,000.

GWP_{N2O} = GWP of N_2O from Table A–1 of this part.

i = Fluorinated GHG.

j = Process Type.

(1) Use Equation I–27 of this subpart to calculate total unabated emissions, in metric tons CO_2e, of all fluorinated GHG emitted from electronics manufacturing processes whose emissions of fluorinated GHG you calculated according to the default utilization and by-product formation rate procedures in § 98.93(a) or § 98.93(i)(4). For each fluorinated GHG i in process j, use the same consumption (C_{ij}), emission factors ($1-U_{ij}$), and by-product formation rates (B_{ijk}) to calculate unabated emissions as you used to calculate emissions in § 98.93(a) or § 98.93(i)(4). For those fluorinated GHGs for which Table A–1 to subpart A of this part does not define a GWP value, use a GWP value of 2,000.

$$UAFGHG = \sum_i \sum_j C_{ij} * (1 - U_{ij}) * GWP_i + \sum_i \sum_j C_{ij} * B_{ijk} * GWP_k \quad \text{(Eq. I-27)}$$

Where:

UAFGHG = Total unabated emissions of fluorinated GHG i emitted from electronics manufacturing processes in the facility, expressed in metric ton CO_2e for which you calculated total emission according to the procedures in § 98.93(a) or § 98.93(i)(4).

C_{ij} = Total consumption of fluorinated GHG i, apportioned to process j, expressed in metric ton CO_2e for which you used to calculate total emissions according to the procedures in § 98.93(a) or § 98.93(i)(4).

U_{ij} = Process utilization rate for fluorinated GHG i, process type j, for which you used to calculate total emissions according to the procedures in § 98.93(a) or § 98.93(i)(4).

GWP_i = GWP of emitted fluorinated GHG i from Table A–1 of this part. For those fluorinated GHGs for which Table A–1 to subpart A of this part does not define a GWP value, use a GWP value of 2,000.

GWP_k = GWP of emitted fluorinated GHG by-product k, from Table A–1 of this part. For those fluorinated GHGs for which Table A–1 to subpart A of this part does not define a GWP value, use a GWP value of 2,000.

B_{ijk} = By-product formation rate of fluorinated GHG k created as a by-product per amount of fluorinated GHG input gas i (kg) consumed by process type j (kg).

i = Fluorinated GHG.

j = Process Type.

k = Fluorinated GHG by-product.

(2) Use Equation I–28 to calculate total unabated emissions, in metric ton CO_2e, of all fluorinated GHG emitted from electronics manufacturing processes whose emissions of fluorinated GHG you calculated according to the stack testing procedures in § 98.93(i)(3). For each set of processes, use the same input gas consumption (C_{if}), input gas emission factors (EF_{if}), by-product gas emission factors (EF_{kf}), fractions of tools abated (a_{if} and a_f), and destruction efficiencies (d_{kf} and d_{kf}) to calculate unabated emissions as you used to calculate emissions. For those fluorinated GHGs for which Table A–1 to subpart A of this part does not define a GWP value, use a GWP value of 2,000.

$$SFGHG = \sum_i \sum_f \left[\frac{EF_{if}}{\left(1 - \left(a_{if} * d_{if}\right)\right)} * C_{if} * GWP_i \right] + \sum_k \sum_f \left[\frac{EF_{kf}}{\left(1 - \left(a_{kf} * d_{kf}\right)\right)} * \sum_i C_{if} * GWP_k \right] \quad \text{Eq. I-28)}$$

Where:

SFGHG = Total unabated emissions of fluorinated GHG i emitted from electronics manufacturing processes in the facility, expressed in metric ton CO_2e for which you calculated total emission according to the procedures in § 98.93(i)(3).

EF_{if} = Emission factor for fluorinated GHG input gas i, emitted from fab f, as calculated in Equation I–19 of this subpart (kg emitted/kg input gas consumed).

a_{if} = Fraction of fluorinated GHG input gas i used in fab f in tools with abatement systems (expressed as a decimal fraction).

d_{if} = Fraction of fluorinated GHG i destroyed or removed in abatement systems connected to process tools in fab f, for which you used to calculate total emissions according to the procedures in § 98.93(i)(3) (expressed as a decimal fraction).

C_{if} = Total consumption of fluorinated GHG input gas i, of tools vented to stack systems that are tested, for fab f, for the reporting year, expressed in metric ton CO_2e for which you used to calculate total emissions according to the procedures in § 98.93(i)(3) (expressed as a decimal fraction).

EF_{kf} = Emission factor for fluorinated GHG by-product gas k, emitted from fab f, as

calculated in Equation I–20 of this subpart (kg emitted/kg of all input gas consumed in tools vented to stack systems that are tested).

a_f = Fraction of all input gas used in fab f in tools with abatement systems (expressed as a decimal fraction).

d_{kf} = Fraction of fluorinated GHG by-product k destroyed or removed in abatement systems connected to process tools in fab f, for which you used to calculate total emissions according to the procedures in § 98.93(i)(3) (expressed as a decimal fraction).

U_{ij} = Process utilization rate for fluorinated GHG i, process type j, for which you used to calculate total emissions according to the procedures in § 98.93(a) or § 98.93(i)(4).

GWP_i = GWP of emitted fluorinated GHG i from Table A–1 of this part. For those fluorinated GHGs for which Table A–1 of subpart A to this part does not define a GWP value, use a GWP value of 2,000.

GWP_k = GWP of emitted fluorinated GHG by-product k, from Table A–1 of this part. For those fluorinated GHGs for which Table A–1 to subpart A of this part does not define a GWP value, use a GWP value of 2,000.

i = Fluorinated GHG.

j = Process Type.

k = Fluorinated GHG by-product.

(s) Where missing data procedures were used to estimate inputs into the fluorinated heat transfer fluid mass balance equation under § 98.95(b), the number of times missing data procedures were followed in the reporting year and the method used to estimate the missing data.

* * * * *

(w) If you elect to calculate fab-level emissions of fluorinated GHG using the stack test method specified in § 98.93(i), you must report the following in paragraphs (w)(1) and (2) for each stack system, in addition to the relevant data in paragraphs (a) through (v) of this section:

(1) The date of any stack testing conducted during the reporting year, and the identity of the stack system tested.

(2) An inventory of all stack systems from which process fluorinated GHG are emitted. For each stack system, indicate whether the stack system is among those for which stack testing was performed as per § 98.93(i)(3) or not performed as per § 98.93(i)(2).

(x) If the emissions you report under paragraph (c) of this section include emissions from research and development activities, as defined in § 98.6, report the approximate percentage of total GHG emissions, on a metric ton CO_2e basis, that are attributable to research and development activities, using the following ranges: less than 5 percent, 5 percent to less than 10 percent, 10 percent to less than 25 percent, 25 percent to less than 50 percent, 50 percent and higher. For those fluorinated GHG that do not have GWP values listed in Table A–1 of subpart A of this part, you must use a GWP value of 2,000 in calculating CO_2e.

(y) If your semiconductor manufacturing facility emits more than 40,000 metric ton CO_2e of GHG emissions, based on your most recently submitted annual report (beginning with the 2015 reporting year) as required in paragraph (c) of this section, from the electronics manufacturing processes subject to reporting under this subpart, you must prepare and submit a triennial (every 3 years) technology assessment report to the Administrator that meets the requirements specified in paragraphs (y)(1) through (6) of this section. Any other semiconductor manufacturing facility may voluntarily submit this report to the Administrator.

(1) The first report must be submitted with the annual GHG emissions report that is due no later than March 31, 2017, and subsequent reports must be delivered every 3 years no later than March 31 of the year in which it is due.

(2) The report must include the information described in paragraphs (y)(2)(i) through (v) of this section.

(i) It must describe how the gases and technologies used in semiconductor manufacturing using 200 mm and 300 mm wafers in the United States have changed in the past 3 years and whether any of the identified changes are likely to have affected the emissions characteristics of semiconductor manufacturing processes in such a way that the default utilization and by-product formation rates or default destruction or removal efficiency values may need to be updated.

(ii) It must describe the effect on emissions of the implementation of new process technologies and/or finer line width processes in 200 mm and 300 mm technologies, the introduction of new tool platforms, and the introduction of new processes on previously tested platforms.

(iii) It must describe the status of implementing 450 mm wafer technology and the potential need to create or update default emission factors compared to 300 mm technology.

(iv) It must provide any default utilization and by-product formation rates and/or destruction or removal efficiency data that have been collected in the previous 3 years that support the changes in semiconductor manufacturing processes described in the report.

(v) It must describe the use of a new gas, use of an existing gas in a new process type or sub-type, or a fundamental change in process technology.

(3) If, on the basis of the information reported in paragraph (y)(2) of this section, the report indicates that GHG emissions from semiconductor manufacturing may have changed from those represented by the default utilization and by-product formation rates in Tables I–3, I–4, or I–5, or the default destruction or removal efficiency values in Table I–16 of this subpart, the report must lay out a data gathering and analysis plan focused on the areas of potential change. The plan must describe:

(i) The testing of tools to determine the potential effect on current default utilization and by-product formation rates and destruction or removal efficiency values under the new conditions, and

(ii) A planned analysis of the effect on overall facility emissions using a representative gas-use profile for a 200 mm, 300 mm, or 450 mm fab (depending on which technology is under consideration).

(4) Multiple semiconductor manufacturing facilities may submit a single consolidated 3-year report as long as the facility identifying information in § 98.3(c)(1) and the certification statement in § 98.3(c)(9) is provided for each facility for which the consolidated report is submitted.

(5) The Administrator will review the report received and determine whether it is necessary to update the default utilization rates and by-product formation rates in Tables I–3 through I–7 and I–11 through I–15 of this subpart and default destruction or removal efficiency values based on the following:

(i) Whether the revised default utilization and by-product formation rates and destruction or removal efficiency values will result in a projected shift in emissions of 10 percent or greater.

(ii) Whether new platforms, processes, or facilities that are not captured in current default utilization and by-product formation rates and destruction or removal efficiency values should be included in revised values.

(iii) Whether new data are available that could expand the existing data set to include new gases, tools, or processes not included in the existing data set (i.e. gases, tools, or processes for which no data are currently available).

(6) The Administrator will review the reports within 120 days and will notify you of its determination whether it is

necessary to update any default utilization and by-product formation rates and/or destruction or removal efficiency values. If the Administrator determines it is necessary to update default utilization and by-product formation rates and/or destruction or removal efficiency values, you will then have 180 days from the date you receive notice of the determination to execute the data collection and analysis plan described in the report and submit those data to the Administrator.

9. Section 98.97 is amended by:

a. Removing and reserving paragraph (b).

b. Revising paragraph (c).

c. Revising paragraph (d) introductory text and paragraph (d)(1).

d. Adding paragraphs (d)(1)(i) through (d)(1)(iii).

e. Removing and reserving paragraph (d)(3).

f. Revising paragraph (d)(4).

g. Adding paragraphs (d)(5) through (d)(9).

h. Adding paragraphs (i) through (s).

The revisions read as follows:

§ 98.97 Records that must be retained.

* * * * *

(c) Documentation for the fab-specific engineering model used to apportion fluorinated GHG and N_2O consumption. This documentation must be part of your site GHG Monitoring Plan as required under § 98.3(g)(5). At a minimum, you must retain the following:

(1) A clear, detailed description of the fab-specific model, including how it was developed; the quantifiable metric used in the model; all sources of information, equations, and formulas, each with clear definitions of terms and variables; all apportioning factors used to apportion fluorinated GHG and N_2O; and a clear record of any changes made to the model while it was used to apportion fluorinated GHG and N_2O consumption across process sub-types, process types, tools with and without abatement systems, stack systems, and/or fabs.

(2) Sample calculations used for developing the gas apportioning factors (f_{ij}) for the two fluorinated GHGs used at your facility in the largest quantities, on a mass basis, during the reporting year.

(3) If you develop apportioning factors through the use of direct measurement according to § 98.94(c)(3), calculations and data used to develop each gas apportioning factor.

(4) Calculations and data used to determine and document that the fab was operating at representative operating levels, as defined in § 98.98, during the apportioning model verification specified in § 98.94(c).

(d) For all abatement systems through which fluorinated GHGs or N_2O flow at your facility, and for which you are reporting controlled emissions, the following in paragraphs (d)(1) to (9) of this section:

(1) Records of the information in paragraphs (d)(1)(i) though (iii) of this section:

(i) Documentation to certify that each abatement system is installed, maintained, and operated in accordance with manufacturers' specifications.

(ii) Documentation from the abatement system supplier describing the abatement system's designed purpose and emission control capabilities for fluorinated GHG and N_2O.

(iii) Certification that the abatement systems for which emissions are being reported were specifically designed for fluorinated GHG and N_2O abatement.

* * * * *

(4) Where properly measured site-specific destruction or removal efficiencies are used to report emissions, the information in paragraphs (d)(4)(i) though (vi) of this section:

(i) Dated certification by the technician who made the measurement that the destruction or removal efficiency is calculated in accordance with methods in EPA 430–R–10–003 (incorporated by reference, see § 98.7) and, if applicable Appendix A of this subpart, or an alternative method approved by the Administrator as specified in § 98.94(k), complete documentation of the results of any initial and subsequent tests, the final report as specified in EPA 430–R–10–003 (incorporated by reference, see § 98.7) and, if applicable, the records and documentation specified in Appendix A of this subpart including the information required in paragraph (b)(7) of Appendix A of this subpart, or a final report as specified in an alternative method approved by the Administrator as specified in § 98.94(k).

(ii) The average destruction or removal efficiency of the abatement systems operating during the reporting year for each process type and gas combination.

(iii) A description of the calculation used to determine the average destruction or removal efficiency for each process type and gas combination, including all inputs to the calculation.

(iv) The records of destruction or removal efficiency measurements for abatement systems for all tests that have been used to determine the site-specific destruction or removal efficiencies currently being used.

(v) A description of the method used for randomly selecting abatement systems for testing.

(vi) The total number of systems for which destruction or removal efficiency was properly measured for each process type and gas combination for the reporting year.

(5) In addition to the inventory in § 98.96(p), the information in paragraphs (d)(5)(i) though (iii) of this section:

(i) The number of abatement systems of each manufacturer, and model numbers, and the manufacturer's claimed fluorinated GHG and N_2O destruction or removal efficiency, if any.

(ii) Records of destruction or removal efficiency measurements over the in-use life of each abatement system.

(iii) A description of the tool, with the process type or sub-type, for which the abatement system treats exhaust.

(6) Records of all inputs and results of calculations made accounting for the uptime of abatement systems used during the reporting year, in accordance with Equations I–15a, I–15b, or I–23 of this subpart, as applicable. The inputs should include an indication of whether each value for destruction or removal efficiency is a default value or a measured site-specific value.

(7) Records of all inputs and results of calculations made to determine the average weighted fraction of each gas destroyed or removed in the abatement systems for each stack system using Equation I–24 of this subpart, if applicable. The inputs should include an indication of whether each value for destruction or removal efficiency is a default value or a measured site-specific value.

(8) Records of all inputs and the results of the calculation of the facility-wide emission destruction or removal efficiency factor calculated according to Equation I–26 of this subpart.

(9) A maintenance plan for abatement systems, which includes a defined preventative maintenance process and checklist (built on the manufacturer's recommended maintenance program) and a corrective action process that you must follow whenever an abatement system is found to be not operating properly. The maintenance plan must be maintained on-site at the facility as part of the facility's GHG Monitoring Plan as described in § 98.3(g)(5).

* * * * *

(i) Retain the following records for each stack system for which you elect to calculate fab-level emissions of fluorinated GHG using the procedures specified in § 98.93(i)(3) or (4).

(1) Document all stack systems with emissions of fluorinated GHG that are

less than 10,000 metric tons of CO_2e per year and all stack systems with emissions of 10,000 metric tons CO_2e per year or more. Include the data and calculation used to develop the preliminary estimate of emissions for each stack system.

(2) For each stack system, identify the method used to calculate annual emissions; either § 98.93(i)(3) or (4).

(3) The emissions test data and reports (see § 98.94(j)(4)) and the calculations used to determine the fab-specific emission factor, including the actual fab-specific emission factor, the average hourly emission rate of each fluorinated GHG from the stack system during the test and the stack system activity rate during the test.

(4) The fab-specific emission factor and the calculations and data used to determine the fab-specific emission factor for each fluorinated GHG and by-product, as calculated using Equations I–19 and I–20 of § 98.93(i)(3).

(5) Calculations and data used to determine annual emissions of each fluorinated GHG for each fab.

(6) Calculations and data used to determine and document that the fab was operating at representative operating levels, as defined in § 98.98, during the stack testing period.

(7) A copy of the certification that no changes in stack system flow configuration occurred between tests conducted for any particular fab in a reporting year as required by § 98.94(j)(1)(iv) and any calculations and data supporting the certification.

(j) If you report the approximate percentage of total GHG emissions from research and development activities under § 98.96(x), documentation for the determination of the percentage of total emissions of each fluorinated GHG and/or N_2O attributable to research and development, as defined in § 98.6, activities.

(k) Annual gas consumption for each fluorinated GHG and N_2O as calculated in Equation I–11 of this subpart, including where your fab used less than 50 kg of a particular fluorinated GHG or N_2O used at your facility for which you have not calculated emissions using Equations I–6, I–7, I–8, I–9, I–10, I–21, or I–22 of this subpart, the chemical name of the GHG used, the annual consumption of the gas, and a brief description of its use.

(l) All inputs used to calculate gas consumption in Equation I–11 of this subpart, for each fluorinated GHG and N_2O used.

(m) Annual amount of each fluorinated GHG consumed for process sub-type, process type, stack system, or fab, as appropriate, and the annual amount of N_2O consumed for the chemical vapor deposition processes and from the aggregate of other electronics manufacturing production processes, as calculated using Equation I–13 of this subpart.

(n) Disbursements for each fluorinated GHG and N_2O during the reporting year, as calculated using Equation I–12 of this subpart and all inputs used to calculate disbursements for each fluorinated GHG and N_2O used in Equation I–12 of this subpart, including all fab-wide gas-specific heel factors used for each fluorinated GHG and N_2O. If your fab used less than 50 kg of a particular fluorinated GHG during the reporting year, fab-wide gas-specific heel factors do not need to be reported for those gases.

(o) Fraction of each fluorinated GHG or N_2O fed into a process sub-type, process type, stack system, or fab that is fed into tools connected to abatement systems.

(p) Fraction of each fluorinated GHG or N_2O destroyed or removed in abatement systems connected to process tools where process sub-type, process type j is used, or to process tools vented to stack system j or fab f.

(q) All inputs and results of calculations made accounting for the uptime of abatement systems used during the reporting year, or during an emissions sampling period, in accordance with Equations I–15a, I–15b and/or I–23 of this subpart, as applicable.

(r) For fluorinated heat transfer fluid emissions, inputs to the fluorinated heat transfer fluid mass balance equation, Equation I–16 of this subpart, for each fluorinated heat transfer fluid used.

(s) Where missing data procedures were used to estimate inputs into the fluorinated heat transfer fluid mass balance equation under § 98.95(b), the estimates of those data.

10. Section 98.98 is amended by:

a. Removing the definitions of ''Class,'' ''Individual recipe,'' and ''Similar, with respect to recipes.''

b. Adding a definition for ''Fab,'' ''Fully Fluorinated GHGs,'' ''Input gas,'' ''Intermittent low-use fluorinated GHG,'' ''Representative operating levels,'' and ''Stack system.''

c. Revising the definitions of ''By-product formation,'' ''Gas utilization,'' ''Operational mode,'' ''Process types,'' ''Properly measured destruction or removal efficiency,'' ''Trigger point for change out,'' ''Uptime,'' and ''Wafer passes.''

d. Revising the definition of ''Maximum designed substrate starts'' to ''Maximum substrate starts.''

The revisions read as follows:

§ 98.98 Definitions.

* * * * *

By-product formation means the creation of fluorinated GHGs during electronics manufacturing production processes or the creation of fluorinated GHGs by an abatement system. Where the procedures in § 98.93(a) are used to calculate annual emissions, by-product formation is the ratio of the mass of the by-product formed to the mass flow of the input gas. Where the procedures in § 98.93(i) are used to calculate annual emissions, by-product formation is the ratio of the mass of the by-product formed to the total mass flow of all input fluorinated GHGs.

* * * * *

Fab means the portion of an electronics manufacturing facility located in a separate physical structure that began manufacturing on a certain date.

* * * * *

Fully Fluorinated GHGs means fluorinated GHGs that contain only single bonds and in which all available valence locations are filled by fluorine atoms. This includes, but is not limited to, saturated perfluorocarbons, SF_6, NF_3, SF_5CF_3, C_4F_8O, fully fluorinated linear, branched, and cyclic alkanes, fully fluorinated ethers, fully fluorinated tertiary amines, fully fluorinated aminoethers, and perfluoropolyethers.

Gas utilization means the fraction of input N_2O or fluorinated GHG converted to other substances during the etching, deposition, and/or wafer and chamber cleaning processes. Gas utilization is expressed as a rate or factor for specific electronics manufacturing process sub-types or process types.

* * * * *

Input gas means a fluorinated GHG or N_2O used in one of the processes described in § 98.90(a)(1) through (4).

Intermittent low-use fluorinated GHG, for the purposes of determining fluorinated GHG emissions using the stack testing option, means a fluorinated GHG that meets all of the following:

(1) The fluorinated GHG is used by the fab but is not used during the period of stack testing for the fab/stack system.

(2) The emissions of the fluorinated GHG, estimated using the methods in § 98.93(i)(4) do not constitute more than 5 percent of the total fluorinated GHG emissions from the fab on a CO_2e basis.

(3) The sum of the emissions of all fluorinated GHGs that are considered intermittent low-use gases does not exceed 10,000 metric tons CO_2e for the fab for that year, as calculated using the procedures specified in § 98.93(i)(1) of this subpart.

Maximum substrate starts means for the purposes of Equation I–5 of this subpart, the maximum quantity of substrates, expressed as surface area, that could be started each month during a reporting year based on the equipment installed in that facility and assuming that the installed equipment were fully utilized. Manufacturing equipment is considered installed when it is on the manufacturing floor and connected to required utilities.

* * * * *

Operational mode means the time in which an abatement system is properly installed, maintained, and operated according to manufacturers' specifications as required in § 98.93(f)(1). This includes being properly operated within the range of parameters as specified in the operations manual provided by the system manufacturer.

* * * * *

Process types are broad groups of manufacturing steps used at a facility associated with substrate (*e.g.,* wafer) processing during device manufacture for which fluorinated GHG emissions and fluorinated GHG consumption is calculated and reported. The process types are Plasma etching/Wafer Cleaning and Chamber cleaning.

Properly measured destruction or removal efficiency means destruction or removal efficiencies measured in accordance with EPA 430–R–10–003 (incorporated by reference, see § 98.7), and, if applicable, Appendix A to this subpart, or by an alternative method approved by the Administrator as specified in § 98.94(k).

* * * * *

Representative operating levels means (for purposes of verification of the apportionment model or for determining the appropriate conditions for stack testing) operating the fab, in terms of substrate starts for the period of testing or monitoring, at no less than 50 percent of installed production capacity or no less than 70 percent of the average production rate for the reporting year, where production rate for the reporting year is represented in average monthly substrate starts. For the purposes of stack testing, the period for determining the representative operating level must be the period ending on the same date on which testing is concluded.

Stack system means one or more stacks that are connected by a common header or manifold, through which a fluorinated GHG-containing gas stream originating from one or more fab processes is, or has the potential to be, released to the atmosphere. For purposes of this subpart, stack systems do not include emergency vents or bypass stacks through which emissions are not usually vented under typical operating conditions.

Trigger point for change out means the residual weight or pressure of a gas container type that a facility uses as an indicator that operators need to change out that gas container with a full container. The trigger point is not the actual residual weight or pressure of the gas remaining in the cylinder that has been replaced.

Uptime means the ratio of the total time during which the abatement system is in an operational mode, to the total time during which production process tool(s) connected to that abatement system are normally in operation.

* * * * *

Wafer passes is a count of the number of times a wafer substrate is processed in a specific process sub-type, or type. The total number of wafer passes over a reporting year is the number of wafer passes per tool multiplied by the number of operational process tools in use during the reporting year.

* * * * *

11. Table I–1 to subpart I is amended by revising the footnote to read as follows:

Table I–1 to Subpart I of Part 98—Default Emission Factors for Threshold Applicability Determination

* * * * *

Notes: NA denotes not applicable based on currently available information.

12. Table I–3 to subpart I is revised to read as follows:

TABLE I–3 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1–U_{ij}$) FOR GAS UTILIZATION RATES (U_{ij}) AND BY-PRODUCT FORMATION RATES (B_{ijk}) FOR SEMICONDUCTOR MANUFACTURING FOR 150 MM AND 200 MM WAFER SIZES

Process type/ sub-type	Process gas i												
	CF_4	C_2F_6	CHF_3	CH_2F_2	C_2HF_5	CH_3F	C_3F_8	C_4F_8	NF_3	SF_6	C_4F_6	C_5F_8	C_4F_8O
ETCHING/WAFER CLEANING													
$1–U_i$	0.81	0.76	0.50	0.13	0.064	0.66	NA	0.14	0.20	0.55	0.17	NA	NA
BCF_4	NA	0.10	0.085	0.081	0.077	NA	NA	0.12	0.0040	0.15	0.13	NA	NA
BC_2F_6	0.048	NA	0.031	0.025	0.024	NA	NA	0.037	NA	0.17	0.11	NA	NA
BC_4F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_4F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
$BCHF_3$	0.11	NA	NA	0.066	NA	NA	NA	NA	NA	NA	0.066	NA	NA
CHAMBER CLEANING													
In situ plasma cleaning													
$1–U_i$	0.92	0.55	NA	NA	NA	NA	0.40	0.10	0.18	NA	NA	NA	0.14
BCF_4	NA	0.21	NA	NA	NA	NA	0.20	0.11	0.050	NA	NA	NA	0.13
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.045
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Remote plasma cleaning													
$1–U_i$	NA	NA	NA	NA	NA	NA	NA	NA	0.018	NA	NA	NA	NA
BCF_4	NA	NA	NA	NA	NA	NA	NA	NA	0.015	NA	NA	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA

TABLE I–3 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1–U_{ij}$) FOR GAS UTILIZATION RATES (U_{ij}) AND BY-PRODUCT FORMATION RATES (B_{ijk}) FOR SEMICONDUCTOR MANUFACTURING FOR 150 MM AND 200 MM WAFER SIZES—Continued

Process type/ sub-type	Process gas i												
	CF_4	C_2F_6	CHF_3	CH_2F_2	C_2HF_5	CH_3F	C_3F_8	C_4F_8	NF_3	SF_6	C_4F_6	C_5F_8	C_4F_8O
In situ thermal cleaning													
$1–U_i$	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BCF_4	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA

Notes: NA denotes not applicable based on currently available information.

13. Table I–4 to subpart I is revised to read as follows:

TABLE I–4 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1–U_{ij}$) FOR GAS UTILIZATION RATES (U_{ij}) AND BY-PRODUCT FORMATION RATES (B_{ijk}) FOR SEMICONDUCTOR MANUFACTURING FOR 300 MM AND 450 MM WAFER SIZE

Process type/sub-type	Process gas i										
	CF_4	C_2F_6	CHF_3	CH_2F_2	C_3F_8	C_4F_8	NF_3	SF_6	C_4F_6	C_5F_8	C_4F_8O
ETCHING/WAFER CLEANING											
$1–U_i$	0.63	0.80	0.39	0.15	NA	0.17	0.17	0.23	0.18	0.13	NA
BCF_4	NA	0.21	0.10	0.059	NA	0.046	0.052	0.045	0.066	0.15	NA
BC_2F_6	0.092	NA	0.078	0.068	NA	0.030	0.057	0.067	0.090	0.083	NA
BC_4F_6	NA	NA	0.00010	NA	NA	0.018	NA	NA	NA	NA	NA
BC_4F_8	0.00063	NA	0.00080	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
$BCHF_3$	0.011	NA	NA	0.052	NA	0.028	0.035	NA	0.022	0.010	NA
CHAMBER CLEANING											
In situ plasma cleaning											
$1–U_i$	NA	NA	NA	NA	NA	NA	0.23	NA	NA	NA	NA
BCF_4	NA	NA	NA	NA	NA	NA	0.037	NA	NA	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Remote plasma cleaning											
$1–U_i$	NA	NA	NA	NA	0.063	NA	0.018	NA	NA	NA	NA
BCF_4	NA	NA	NA	NA	NA	NA	0.075	NA	NA	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
In situ thermal cleaning											
$1–U_i$	NA	NA	NA	NA	NA	NA	0.28	NA	NA	NA	NA
BCF_4	NA	NA	NA	NA	NA	NA	0.010	NA	NA	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA

Notes: NA denotes not applicable based on currently available information.

14. Table I–5 to subpart I is amended by revising the entries for ''CVD $1–U_i$,'' ''CVD BCF_4'' and ''CVD BC_3F_8;'' and by revising the footnote to read as follows:

TABLE I–5 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1–U_{ij}$) FOR GAS UTILIZATION RATES (U_{ij}) AND BY-PRODUCT FORMATION RATES (B_{ijk}) FOR MEMS MANUFACTURING

Process type factors	Process gas i											
	CF_4	C_2F_6	CHF_3	CH_2F_2	C_3F_8	c-C_4F_8	NF_3 Remote	NF_3	SF_6	C_4F_{6a}	C_5F_{8a}	$C_4F_8O_a$
Etch $1–U_i$	0.7	[a]0.4	[a]0.4	[a]0.06	NA	[a]0.2	NA	0.2	0.2	0.1	0.2	NA

TABLE I–5 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1–U_{ij}$) FOR GAS UTILIZATION RATES (U_{ij}) AND BY-PRODUCT FORMATION RATES (B_{ijk}) FOR MEMS MANUFACTURING—Continued

Process type factors	Process gas i											
	CF_4	C_2F_6	CHF_3	CH_2F_2	C_3F_8	c-C_4F_8	NF_3 Remote	NF_3	SF_6	C_4F_{6a}	C_5F_{8a}	$C_4F_8O_a$
Etch BCF_4	NA	[a]0.4	[a]0.07	[a]0.08	NA	0.2	NA	NA	NA	[a]0.3	0.2	NA
Etch BC_2F_6	NA	NA	NA	NA	NA	0.2	NA	NA	NA	[a]0.2	0.2	NA
CVDChamber Cleaning $1–U_i$	0.9	0.6	NA	NA	0.4	0.1	0.02	0.2	NA	NA	0.1	0.1
CVD Chamber Cleaning BCF_4	NA	0.1	NA	NA	0.1	0.1	[b]0.02	[b]0.1	NA	NA	0.1	0.1
CVD Chamber Cleaning BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.4

Notes: NA denotes not applicable based on currently available information.
[a]Estimate includes multi-gas etch processes.
[b]Estimate reflects presence of low-k, carbide and multi-gas etch processes that may contain a C-containing fluorinated GHG additive.

15. Table I–6 to subpart I is amended by revising the entries for ''CVD $1–U_i$'' and by revising the footnote to read as follows:

TABLE I–6 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1–U_{ij}$) FOR GAS UTILIZATION RATES (U_{ij}) AND BY-PRODUCT FORMATION RATES (B_{ijk}) FOR LCD MANUFACTURING

Process type factors	Process gas i								
	CF_4	C_2F_6	CHF_3	CH_2F_2	C_3F_8	c-C_4F_8	NF_3 Remote	NF_3	SF_6
* * *		*		*		*		*	
CVD Chamber Cleaning $1–U_i$	NA	NA	NA	NA	NA	NA	0.03	0.3	0.9

Notes: NA denotes not applicable based on currently available information.

16. Table I–7 to subpart I is amended by revising the entries for ''CVD $1–U_i$'' and ''CVD BCF_4;'' and by revising the footnote to read as follows:

TABLE I–7 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1–U_{ij}$) FOR GAS UTILIZATION RATES (U_{ij}) AND BY-PRODUCT FORMATION RATES (B_{ijk}) FOR PV MANUFACTURING

Process type factors	Process gas i								
	CF_4	C_2F_6	CHF_3	CH_2F_2	C_3F_8	c-C_4F_8	NF_3 Remote	NF_3	SF_6
* * *		*		*		*		*	
CVD Chamber Cleaning $1–U_i$	NA	0.6	NA	NA	0.1	0.1	NA	0.3	0.4
CVD Chamber Cleaning BCF_4	NA	0.2	NA	NA	0.2	0.1	NA	NA	NA

Notes: NA denotes not applicable based on currently available information.

17. Table I–8 to subpart I is amended by revising the entry for ''Other Manufacturing Process $1–U_i$'' to read as follows:

TABLE I–8 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1–U_{N2O,j}$) FOR N_2O UTILIZATION ($U_{N2O,j}$)

Process type factors	N_2O
* * * * *	
Other Manufacturing Process $1–U_i$	1.14

18. Subpart I is amended by adding Table I–9 to subpart I to read as follows:

TABLE I–9 TO SUBPART I OF PART 98—METHODS AND PROCEDURES FOR CONDUCTING EMISSIONS TESTS FOR STACK SYSTEMS

For each stack system for which you use the stack test method to calculate annual emissions * * *	You must * * *	Using * * *
For each fluorinated GHG	Measure the concentration in the stack system.	Method 320 at 40 CFR part 63, appendix A. Conduct the test run for a minimum of 8 hours for each stack system.
	Select sampling port locations and the number of traverse points.	Method 1 or 1A at 40 CFR part 60, appendix A–1.
	Determine gas velocity and volumetric flow rate.	Method 2, 2A, 2C, 2D, 2F, or 2G at 40 CFR part 60, appendix A–1 and A–2.
	Determine gas molecular weight	Method 3, 3A, or 3B at 40 CFR part 60, appendix A–2 using the same sampling site and time as fluorinated GHG sampling.
	Measure gas moisture content	Method 4 at 40 CFR part 60, appendix A–3, or using FTIR.[a]

[a] Extractive FTIR is an acceptable method, in lieu of Method 4 at 40 CFR part 60 appendix A, of determining the volumetric concentrations of moisture in semiconductor stack gas streams. The spectral calibrations employed should bracket the anticipated range of optical depths (H_2O concentration in parts per million multiplied by FTIR sample cell path length) measured in the field for moisture saturated (relative humidity approximately 100 percent) air streams at temperatures characterized via Method 2 at 40 CFR part 60 appendix A, within the stack. The HITRAN molecular spectroscopic database is an example of a widely used international standard of IR absorption parameters that provide accurate H_2O FTIR calibrations at atmospheric conditions. Field measurements should be verified to be in line with moisture saturated wet scrubber exhaust concentrations at measured temperatures; the use of a hygrometer can provide verification of accuracy, which must be ±2 percent. Field measurements should be verified to be consistent with published water vapor pressure curves at the current stack temperatures (Perry, R.H. and D.W. Green. Perry's Chemical Engineer's Handbook (8th Edition). McGraw-Hill Publishing Company, Inc. New Your, New York. 2008). The use of a hygrometer can also be used to provide verification of accuracy.

19. Subpart I is amended by adding Table I–10 to subpart I to read as follows:

TABLE I–10 TO SUBPART I OF PART 98—MAXIMUM FIELD DETECTION LIMITS APPLICABLE TO FLUORINATED GHG CONCENTRATION MEASUREMENTS FOR STACK SYSTEMS

Fluorinated GHG analyte	Maximum field detection limit (ppbv)
CF_4	5
C_2F_6	5
C_3F_8	5
C_4F_6	5
C_5F_8	5

TABLE I–10 TO SUBPART I OF PART 98—MAXIMUM FIELD DETECTION LIMITS APPLICABLE TO FLUORINATED GHG CONCENTRATION MEASUREMENTS FOR STACK SYSTEMS—Continued

Fluorinated GHG analyte	Maximum field detection limit (ppbv)
c-C_4F_8	5
CH_2F_2	10
CH_3F	10
CHF_3	5
NF_3	5
SF_6	1
Other fully fluorinated GHGs	5

TABLE I–10 TO SUBPART I OF PART 98—MAXIMUM FIELD DETECTION LIMITS APPLICABLE TO FLUORINATED GHG CONCENTRATION MEASUREMENTS FOR STACK SYSTEMS—Continued

Fluorinated GHG analyte	Maximum field detection limit (ppbv)
Other fluorinated GHGs	10

ppbv—Parts per billion by volume.

Subpart I is amended by adding Table I–11 to subpart I to read as follows:

20. Subpart I is amended by adding Table I–11 to subpart I to read as follows:

TABLE I–11 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1–U_{IJ}$) FOR GAS UTILIZATION RATES (U_{IJ}) AND BY-PRODUCT FORMATION RATES (B_{IJK}) FOR SEMICONDUCTOR MANUFACTURING FOR USE WITH THE STACK TEST METHOD

[150 mm and 200 mm wafers]

All processes	Process gas i												
	CF_4	C_2F_6	CHF_3	CH_2F_2	C_2HF_5	CH_3F	C_3F_8	C_4F_8	NF_3	SF_6	C_4F_6	C_5F_8	C_4F_8O
$1–U_i$	0.81	0.71	0.50	0.13	0.064	0.66	0.40	0.14	0.19	0.55	0.17	NA	0.14
BCF_4	NA	0.13	0.085	0.081	0.077	NA	0.20	0.12	0.021	0.15	0.13	NA	0.13
BC_2F_6	0.048	NA	0.031	0.025	0.024	NA	NA	0.037	NA	.17	0.11	NA	0.045
BC_4F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_4F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
$BCHF_3$	0.11	NA	NA	0.066	NA	NA	NA	NA	NA	NA	0.066	NA	NA

Notes: NA denotes not applicable based on currently available information.

21. Subpart I is amended by adding Table I–12 to subpart I to read as follows:

TABLE I–12 TO SUBPART I OF PART 98–DEFAULT EMISSION FACTORS ($1–U_{IJ}$) FOR GAS UTILIZATION RATES (U_{IJ}) AND BY-PRODUCT FORMATION RATES (B_{IJK}) FOR SEMICONDUCTOR MANUFACTURING FOR USE WITH THE STACK TEST METHOD

[300 mm and 450 mm wafer sizes]

All process	Process gas i										
	CF_4	C_2F_6	CHF_3	CH_2F_2	C_3F_8	C_4F_8	NF_3	SF_6	C_4F_6	C_5F_8	C_4F_8O
$1–U_i$	0.63	0.80	0.39	0.15	0.063	0.17	0.17	0.23	0.18	0.13	NA
BCF_4	NA	0.21	0.10	0.059	NA	0.046	0.062	0.045	0.066	0.15	NA
BC_2F_6	0.092	NA	0.078	0.068	NA	0.030	0.057	0.067	0.090	0.083	NA
BC_4F_6	NA	NA	0.00010	NA	NA	0.018	NA	NA	NA	NA	NA
BC_4F_8	0.00063	NA	0.00080	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
$BCHF_3$	0.011	NA	NA	0.052	NA	0.028	0.035	NA	0.022	0.010	NA

Notes: NA denotes not applicable based on currently available information.

22. Subpart I is amended by adding Table I–13 to subpart I to read as follows:

TABLE I–13 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1–U_{IJ}$) FOR GAS UTILIZATION RATES (U_{IJ}) AND BY-PRODUCT FORMATION RATES (B_{IJK}) FOR LCD MANUFACTURING FOR USE WITH THE STACK TEST METHOD

Process gas (i)	Process gas i								
	CF_4	C_2F_6	CHF_3	CH_2F_2	C_3F_8	c-C_4F_8	NF_3 remote	NF_3	SF_6
$1–U_i$	0.6	NA	0.2	NA	NA	0.1	0.03	0.3	0.6
BCF_4	NA	NA	0.07	NA	NA	0.009	NA	NA	NA
$BCHF_3$	NA	NA	NA	NA	NA	0.02	NA	NA	NA
BC_2F_6	NA	NA	0.05	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA

Notes: NA denotes not applicable based on currently available information.+

23. Subpart I is amended by adding Table I–14 to subpart I to read as follows:

TABLE I–14 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1–U_{IJ}$) FOR GAS UTILIZATION RATES (U_{IJ}) AND BY-PRODUCT FORMATION RATES (B_{IJK}) FOR PV MANUFACTURING FOR USE WITH THE STACK TEST METHOD

Process gas (i)	Process gas i								
	CF_4	C_2F_6	CHF_3	CH_2F_2	C_3F_8	c-C_4F_8	NF_3 remote	NF_3	SF_6
$1–U_i$	0.7	0.6	0.4	NA	0.4	0.2	NA	0.2	0.4
BCF_4	NA	0.2	NA	NA	0.2	0.1	NA	0.05	NA
BC_2F_6	NA	NA	NA	NA	NA	0.1	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA

Notes: NA denotes not applicable based on currently available information.

24. Subpart I is amended by adding Table I–15 to subpart I to read as follows:

TABLE I–15 TO SUBPART I OF PART 98–DEFAULT EMISSION FACTORS ($1–U_{IJ}$) FOR GAS UTILIZATION RATES (U_{IJ}) AND BY-PRODUCT FORMATION RATES (B_{IJK}) FOR MEMS MANUFACTURING FOR USE WITH THE STACK TEST METHOD

All processes	Process Gas i											
	CF_4	C_2F_6	CHF_3	CH_2F_2	C_3F_8	c-C_4F_8	NF_3 remote	NF_3	SF_6	C_4F_6	C_5F_8	C_4F_8O
$1–U_i$	0.9	0.6	0.4	0.1	0.4	0.1	0.2	0.2	0.2	0.1	.1	0.1
BCF_4	NA	0.2	0.07	0.08	0.1	0.1	[1] 0.02	0.09	NA	0.3	.1	0.1
BC_2F_6	NA	NA	NA	NA	NA	[1] 0.04	NA	NA	NA	0.2	0.04	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA

Notes: NA denotes not applicable based on currently available information.
[1] Estimate reflects presence of low-k, carbide and multi-gas etch processes that may contain a C-containing fluorinated GHG additive.

25. Subpart I is amended by adding Table I–16 to subpart I to read as follows:

TABLE I–16 TO SUBPART I OF PART 98—DEFAULT EMISSION DESTRUCTION OR REMOVAL EFFICIENCY (DRE) FACTORS FOR ELECTRONICS MANUFACTURING

Manufacturing type/process type/gas	Default DRE (%)
MEMS, LCDs, and PV Manufacturing	60
Semiconductor Manufacturing	
Plasma Etch/Wafer Clean Process Type	
CHF_3, CH_2F_2, C_4F_8, NF_3, SF_6, C_4F_6	98
All other plasma etch/wafer clean fluorinated GHG	60
Chamber Clean Process Type	
NF_3	75
All other chamber clean fluorinated GHG	60
N_2O Processes	
CVD and all other N_2O-using processes	60

Subpart I is amended by adding ''Appendix A'' to read as follows:

Appendix A to Subpart I of Part 98—Alternative Procedures for Measuring Point-of-Use Abatement Device Destruction or Removal Efficiency.

If you are measuring destruction or removal efficiency of a point-of-use abatement device according to EPA 430–R–10–003 (incorporated by reference, see § 98.7) as specified in § 98.94(f)(4), you may follow the alternative procedures specified in paragraphs (a) through (c) of this appendix.

(a) In place of the Quadrupole Mass Spectrometry protocol requirements specified in section 2.2.4 of EPA 430–R–10–003 (incorporated by reference, see § 98.7), you must conduct mass spectrometry testing in accordance with the provisions in paragraph (a)(1) through (a)(15) of this appendix.

(1) *Detection limits.* The mass spectrometer chosen for this application must have the necessary sensitivity to detect the selected effluent species at or below the maximum field detection limits specified in Table I–10 to this subpart.

(2) *Sampling location.* The sample at the inlet of the point-of-use abatement device must be taken downstream of the process tool and pump package. The sample exhaust must be vented back into the corrosive house ventilation system at a point downstream of the sample inlet location.

(3) *Sampling conditions.* For etch processes, destruction or removal efficiencies must be determined while etching a substrate (product, dummy, or test). For chemical vapor deposition processes, destruction or removal efficiencies must be determined during a chamber clean after deposition (destruction or removal efficiencies must not be determined in a clean chamber). All sampling must be performed non-intrusively during wafer processing. Samples must be drawn through the mass spectrometer source by an external sample pump. Because of the volatility, vapor pressure, stability, and inertness of CF_4, C_2F_6, C_3F_8, CHF_3, NF_3, and SF_6, the sample lines do not need to be heated.

(4) *Mass spectrometer parameters.* The specific mass spectrometer operating conditions such as electron energy, secondary electron multiplier voltage, emission current, and ion focusing voltage must be selected according to the specifications provided by the mass spectrometer manufacturer, the mass spectrometer system manual, basic mass spectrometer textbook, or other such sources. The mass spectrometer responses to each of the target analytes must all be calibrated under the same mass spectrometer operating conditions.

(5) *Flow rates.* A sample flow rate of 0.5–1.5 standard liters per minute must be drawn from the process tool exhaust stream under study.

(6) *Sample frequency.* The mass spectrometer sampling frequency for etch processes must be in the range of 0.5 to 1 cycles per second, and for chemical vapor deposition processes must be in the range of 0.25 to 0.5 cycles per second.

(7) *Dynamic dilution calibration parameters.* The quadrupole mass spectrometer must be calibrated for both mass location and response to analytes. A dynamic dilution calibration system may be used to perform both types of mass spectrometer system calibrations using two mass flow controllers. Use one mass flow controller to regulate the flow rate of the standard component used to calibrate the system and the second mass flow controller to regulate the amount of diluent gas used to mix with the standard to generate the calibration curve for each compound of interest. The mass flow controller must be calibrated using the single component gas being used with them, for example, nitrogen (N_2) for the diluent. A mass flow controller used with calibration mixtures must be calibrated with the calibration mixture balance gas (for example, N_2 or He) if the analyte components are 2 percent or less of the volume of the sample. All calibration mixtures must be National Institute of Standards and Technology Traceable gases or equivalent. They must be calibrated over their range of use and must be operated in their experimentally determined dynamic linear range. If compressed gas standards cannot be brought into the fab, metered gas flows of target compounds into the process chamber, under no thermal or plasma conditions and with no wafer(s) present, and with no process emissions from other tools contributing to the sample location, must then be performed throughout the appropriate concentration ranges to derive calibration curves for the subsequent destruction or removal efficiency tests.

(8) *Mass location calibration.* A mixture containing 1 percent He, Ar, Kr, and Xe in a balance gas of nitrogen must be used to assure the alignment of the quadrupole mass filter (see EPA Method 205 at 40 CFR part 51, appendix M as reference). The mass spectrometer must be chosen so that the mass range is sufficient to detect the predominant peaks of the components under study.

(9) *Quadrupole mass spectrometer response calibration.* A calibration curve must be generated for each compound of interest.

(10) *Calibration frequency.* The mass spectrometer must be calibrated at the start of testing a given process. The calibration must be checked at the end of testing.

(11) *Calibration range.* The mass spectrometer must be calibrated over the expected concentration range of analytes using a minimum of five concentrations including a zero. The zero point is defined as diluent containing no added analyte.

(12) *Operating procedures.* You must follow the operating procedures specified in paragraphs (a)(12)(i) through (a)(12)(v) of this appendix.

(i) You must perform a qualitative mass calibration by running a standard (or by

flowing chamber gases under non-process conditions) containing stable components such as Ar, Kr, and Xe that provide predominant signals at m/e values distributed throughout the mass range to be used. You must adjust the quadrupole mass filter as needed to align with the inert gas fragments.

(ii) You must quantitatively calibrate the quadrupole mass spectrometer for each analyte of interest. The analyte concentrations during calibration must include the expected concentrations in the process effluent. The calibration must be performed under the same operating conditions, such as inlet pressure, as when sampling process exhaust. If the calibration inlet pressure differs from the sampling inlet pressure then the relationship between inlet pressure and quadrupole mass spectrometer signal response must be empirically determined and applied to correct for any differences between calibration and process emissions monitoring data.

(iii) To determine the response time of the instrument to changes in a process, a process gas such as C_2F_6 must be turned on at the process tool for a fixed period of time (for example, 20 seconds), after which the gas is shut off. The sample flow rate through the system must be adjusted so that the signal increases to a constant concentration within a few seconds and decreases to background levels also within a few seconds.

(iv) You must sample the process effluent through the quadrupole mass spectrometer and acquire data for the required amount of time to track the process, as determined in paragraph (a)(12)(iii) of this appendix. You must set the sample frequency to monitor the changes in the process as specified in paragraph (a)(6) of this appendix. You must repeat this for at least five substrates on the same process and calculate the average and standard deviation of the analyte concentration.

(v) You must repeat the quantitative calibration at the conclusion of sampling to identify any drifts in quadrupole mass spectrometer sensitivity. If drift is observed, you must use an internal standard to correct for changes in sensitivity.

(13) *Sample analysis.* To determine the concentration of a specific component in the sample, you must divide the ion intensity of the sample response by the calibrated response factor for each component.

(14) *Deconvolution of interfering peaks.* The effects of interfering peaks must be deconvoluted from the mass spectra for each target analyte.

(15) *Calculations.* Plot ion intensity versus analyte concentration for a given compound obtained when calibrating the analytical system. Determine the slope and intercept for each calibrated species to obtain response factors with which to calculate concentrations in the sample. For an acceptable calibration, the R^2 value of the calibration curve must be at least 0.98.

(b) In place of the Fourier Transform Infrared Spectroscopy protocol requirements specified in section 2.2.4 of EPA 430–R–10–003 (incorporated by reference, see § 98.7), you may conduct Fourier Transform Infrared Spectroscopy testing in accordance with the provisions in paragraph (b)(1) through (b)(17) of this appendix, including the laboratory study phase described in paragraphs (b)(1) through (b)(7), and the field study phase described in paragraphs (b)(8) through (b)(17) of this appendix.

(1) *Conformance with provisions associated with the Calibration Transfer Standard.* This procedure calls for the use of a calibration transfer standard in a number of instances. The use of a calibration transfer standard is necessary to validate optical pathlength and detector response for spectrometers where cell temperature, cell pressure, and cell optical pathlength are potentially variable. For fixed pathlength spectrometers capable of controlling cell temperature and pressure to within +/− 10 percent of a desired set point, the use of a calibration transfer standard, as described in paragraphs (b)(2) to (b)(17) this appendix is not required.

(2) *Defining spectroscopic conditions.* Define a set of spectroscopic conditions under which the field studies and subsequent field applications are to be carried out. These include the minimum instrumental line-width, spectrometer wave number range, sample gas temperature, sample gas pressure, absorption pathlength, maximum sampling system volume (including the absorption cell), minimum sample flow rate, and maximum allowable time between consecutive infrared analyses of the effluent.

(3) *Criteria for reference spectral libraries.* On the basis of previous emissions test results and/or process knowledge (including the documentation of results of any initial and subsequent tests, and the final reports required in § 98.97(d)(4)(i)), estimate the maximum concentrations of all of the analytes in the effluent and their minimum concentrations of interest (those concentrations below which the measurement of the compounds is of no importance to the analysis). Values between the maximum expected concentration and the minimum concentration of interest are referred to below as the ''expected concentration range.'' A minimum of four reference spectra must be available for each analyte. When the set of spectra is ordered according to absorbance, the absorbance levels of adjacent reference spectra should not differ by more than a factor of six. Reference spectra for each analyte should be available at absorbance levels that bracket the analyte's expected concentration range; minimally, the spectrum whose absorbance exceeds each analyte's expected maximum concentration or is within 30 percent of it must be available. The reference spectra must be collected at or near the same temperature and pressure at which the sample is to be analyzed under. The gas sample pressure and temperature must be continuously monitored during field testing and you must correct for differences in temperature and pressure between the sample and reference spectra. Differences between the sample and reference spectra conditions must not exceed 50 percent for pressure and 70 °C for temperature.

(4) *Spectra without reference libraries.* If reference spectral libraries meeting the criteria in paragraph (b)(3) of this appendix do not exist for all the analytes and interferants or cannot be accurately generated from existing libraries exhibiting lower minimum instrumental line-width values than those proposed for the testing, prepare the required spectra according to the procedures specified in paragraphs (b)(4)(i) and (b)(4)(ii) of this appendix.

(i) Reference spectra at the same absorbance level (to within 10 percent) of independently prepared samples must be recorded. The reference samples must be prepared from neat forms of the analyte or from gas standards of the highest quality commonly available from commercial sources. Either barometric or volumetric methods may be used to dilute the reference samples to the required concentrations, and the equipment used must be independently calibrated to ensure suitable accuracy. Dynamic and static reference sample preparation methods are acceptable, but dynamic preparations must be used for reactive analytes. Any well characterized absorption pathlength may be employed in recording reference spectra, but the temperature and pressure of the reference samples should match as closely as possible those of the proposed spectroscopic conditions.

(ii) If a mercury cadmium telluride or other potentially non-linear detector (i.e., a detector whose response vs. total infrared power is not a linear function over the range of responses employed) is used for recording the reference spectra, you must correct for the effects of this type of response on the resulting concentration values. As needed, spectra of a calibration transfer standard must be recorded with the laboratory spectrometer system to verify the absorption pathlength and other aspects of the system performance. All reference spectral data must be recorded in interferometric form and stored digitally.

(5) *Sampling system preparation.* Construct a sampling system suitable for delivering the proposed sample flow rate from the effluent source to the infrared absorption cell. For the compounds of interest, the surfaces of the system exposed to the effluent stream must be limited to stainless steel and Teflon; because of the potential for generation of inorganic automated gases, glass surfaces within the sampling system and absorption cell must be Teflon-coated. You must demonstrate that the system, when sampling from a simulated source at the estimated effluent source pressure, delivers a volume of sample at least four times the maximum sampling system volume in a time shorter than the proposed minimum time between consecutive infrared analyses.

(6) *Preliminary analytical routines.* For the proposed absorption pathlength to be used in actual emissions testing, you must prepare an analysis method containing of all the effluent compounds at their expected maximum concentrations plus the field calibration transfer standard compound at 20 percent of its full concentration as needed.

(7) *Documentation.* The laboratory techniques used to generate reference spectra and to convert sample spectral information to compound concentrations must be

documented. The required level of detail for the documentation is that which allows an independent analyst to reproduce the results from the documentation and the stored interferometric data.

(8) *Spectroscopic system performance.* The performance of the proposed spectroscopic system, sampling system, and analytical method must be rigorously examined during and after a field study. Several iterations of the analysis method may need to be applied depending on observed concentrations, absorbance intensities, and interferences. During the field study, all the sampling and analytical procedures envisioned for future field applications must be documented. Additional procedures not required during routine field applications, notably dynamic spiking studies of the analyte gases, may be performed during the field study. These additional procedures need to be performed only once if the results are acceptable and if the effluent sources in future field applications prove suitably similar to those chosen for the field study. If changes in the effluent sources in future applications are noted and require substantial changes to the analytical equipment and/or conditions, a separate field study must be performed for the new set of effluent source conditions. All data recorded during the study must be retained and documented, and all spectral information must be permanently stored in interferometric form.

(9) *System installation.* The spectroscopic and sampling sub-systems must be assembled and installed according to the manufacturers' recommendations. For the field study, the length of the sample lines used must not be less than the maximum length envisioned for future field applications. The system must be given sufficient time to stabilize before testing begins.

(10) *Pre-test calibration.* Record a suitable background spectrum using pure nitrogen gas; alternatively, if the analytes of interest are in a sample matrix consistent with ambient air, it is beneficial to use an ambient air background to control interferences from water and carbon dioxide. For variable pathlength Fourier Transform Infrared Spectrometers, introduce a sample of the calibration transfer standard gas directly into the absorption cell at the expected sample pressure and record its absorbance spectrum (the ''initial field calibration transfer standard spectrum''). Compare it to the laboratory calibration transfer standard spectra to determine the effective absorption pathlength. If possible, record spectra of field calibration gas standards (single component standards of the analyte compounds) and determine their concentrations using the reference spectra and analytical routines developed in paragraphs (b)(2) through (b)(7) of this appendix; these spectra may be used instead of the reference spectra in actual concentration and uncertainty calculations.

(11) *Deriving the calibration transfer standard gas from tool chamber gases.* The calibration transfer standard gas may be derived by flowing appropriate semiconductor tool chamber gases under non-process conditions (no thermal or plasma conditions and with no wafer(s) present) if compressed gas standards cannot be brought on-site.

(12) *Reactivity and response time checks.* While sampling ambient air and continuously recording absorbance spectra, suddenly replace the ambient air flow with calibration transfer standard gas introduced as close as possible to the probe tip. Examine the subsequent spectra to determine whether the flow rate and sample volume allow the system to respond quickly enough to changes in the sampled gas. Should a corrosive or reactive gas be of interest in the sample matrix it would be beneficial to determine the reactivity in a similar fashion, if practical. Examine the subsequent spectra to ensure that the reactivities of the analytes with the exposed surfaces of the sampling system do not limit the time response of the analytical system. If a pressure correction routine is not automated, monitor the absorption cell temperature and pressure; verify that the (absolute) pressure remains within 2 percent of the pressure specified in the proposed system conditions.

(13) *Analyte spiking.* Analyte spiking must be performed. While sampling actual source effluent, introduce a known flow rate of calibration transfer standard gas into the sample stream as close as possible to the probe tip or between the probe and extraction line. Measure and monitor the total sample flow rate, and adjust the spike flow rate until it represents 10 percent to 20 percent of the total flow rate. After waiting until at least four absorption cell volumes have been sampled, record four spectra of the spiked effluent, terminate the calibration transfer standard spike flow, pause until at least four cell volumes are sampled, and then record four (unspiked) spectra. Repeat this process until 12 spiked and 12 unspiked spectra have been obtained. If a pressure correction routine is not automated, monitor the absorption cell temperature and pressure; verify that the pressure remains within 2 percent of the pressure specified in the proposed system conditions. Calculate the expected calibration transfer standard compound concentrations in the spectra and compare them to the values observed in the spectrum. This procedure is best performed using a spectroscopic tracer to calculate dilution (as opposed to measured flow rates) of the injected calibration transfer standard (or analyte). The spectroscopic tracer should be a component not in the gas matrix that is easily detectable and maintains a linear absorbance over a large concentration range. Repeat this spiking process with all effluent compounds that are potentially reactive with either the sampling system components or with other effluent compounds. The gas spike is delivered by a mass flow controller, and the expected concentration of analyte of interest ($AOI_{Theoretical}$) is calculated as follows:

$$AOI_{Theoretical} = \left(\frac{Tracer_{sample}}{Tracer_{cylinder}}\right)\left(AOI_{cylinder}\right) + \left[1 - \left(\frac{Tracer_{sample}}{Tracer_{cylinder}}\right)\right]\left(AOI_{native}\right)$$

Where:

$AOI_{Theoretical}$ = Theoretical analyte of interest concentration (ppm).

$Tracer_{sample}$ = Tracer concentration (ppm) as seen by the Fourier Transform Infrared Spectrometer during spiking.

$Tracer_{cylinder}$ = The concentration (ppm) of tracer recorded during direct injection of the cylinder to the Fourier Transform Infrared Spectrometer cell.

$AOI_{cylinder}$ = The supplier-certified concentration (ppm) of the analyte of interest gas standard.

AOI_{native} = The native AOI concentration (ppm) of the effluent during stable conditions.

(14) *Post-test calibration.* At the end of a sampling run and at the end of the field study, record the spectrum of the calibration transfer standard gas. The resulting ''final field calibration transfer standard spectrum'' must be compared to the initial field calibration transfer standard spectrum to verify suitable stability of the spectroscopic system throughout the course of the field study.

(15) *Amendment of analytical routines.* The presence of unanticipated interferant compounds and/or the observation of compounds at concentrations outside their expected concentration ranges may necessitate the repetition of portions of the procedures in paragraphs (b)(2) through (b)(14) of this appendix. Such amendments are allowable before final analysis of the data, but must be represented in the documentation required in paragraph (b)(16) of this appendix.

(16) *Documentation.* The sampling and spiking techniques used to generate the field study spectra and to convert sample spectral information to concentrations must be documented at a level of detail that allows an independent analyst to reproduce the results from the documentation and the stored interferometric data.

(17) *Method application.* When the required laboratory and field studies have been completed and if the results indicate a suitable degree of accuracy, the methods developed may be applied to practical field measurement tasks.

During field applications, the procedures demonstrated in the field study specified in paragraphs (b)(8) through (b)(16) of this appendix must be adhered to as closely as possible, with the following exceptions specified in paragraphs (b)(17)(i) through (b)(17)(iii) of this appendix:

(i) The sampling lines employed should be as short as practically possible and not longer than those used in the field study.

(ii) Analyte spiking and reactivity checks are required after the installation of or major repair to the sampling system or major change in sample matrix. In these cases, perform three spiked/unspiked samples with calibration transfer standard or a surrogate analyte on a daily basis if time permits and gas standards are easy to obtain and get on-site.

(iii) Sampling and other operational data must be recorded and documented as during the field study, but only the interferometric data needed to reproduce actual test and spiking data must be stored permanently. The format of this data does not need to be interferograms but may be absorbance spectra or single beams.

(c) When using the flow and dilution measurement protocol specified in section 2.2.6 of EPA 430–R–10–003 (incorporated by reference, see § 98.7), you may determine point-of-use abatement device total volume flow with the modifications specified in paragraphs (c)(1) through (c)(3) of this appendix.

(1) You may introduce the non-reactive, non-native gas used for determining total volume flow and dilution across the point-of-use abatement device at a location between the thermal oxidizer of the point-of-use abatement device and the scrubber.

(2) You may select a location for downstream non-reactive, non-native gas analysis that complies with the requirements in this paragraph (c)(2) of this appendix. The sampling location should be traversed with the sampling probe measuring the non-reactive, non-native gas concentrations to ensure homogeneity of the non-reactive gas and point-of-use abatement device effluent (i.e., stratification test). To test for stratification, measure the non-reactive, non-native gas concentrations at three points on a line passing through the centroidal area. Space the three points at 16.7, 50.0, and 83.3 percent of the measurement line. Sample for a minimum of twice the system response time, determined according to paragraph (c)(3) of this appendix, at each traverse point. Calculate the individual point and mean non-reactive, non-native gas concentrations. If the non-reactive, non-native gas concentration at each traverse point differs from the mean concentration for all traverse points by no more than ±5.0 percent of the mean concentration, the gas stream is considered unstratified and you may collect samples from a single point that most closely matches the mean. If the 5.0 percent criterion is not met, but the concentration at each traverse point differs from the mean concentration for all traverse points by no more than ±10.0 percent of the mean, you may take samples from two points and use the average of the two measurements. Space the two points at 16.7, 50.0, or 83.3 percent of the measurement line. If the concentration at each traverse point differs from the mean concentration for all traverse points by more than ±10.0 percent of the mean but less than 20.0 percent, take samples from three points at 16.7, 50.0, or 83.3 percent of the measurement line and use the average of the three measurements. If the gas stream is found to be stratified because the 20.0 percent criterion for a 3-point test is not met, locate and sample the non-reactive, non-native gas from traverse points for the test in accordance with Sections 11.2 and 11.3 of EPA Method 1 in 40 CFR part 60, appendix A–1. A minimum of 40 non-reactive gas concentration measurements will be collected at three to five different injected non-reactive gas flow rates for determination of point-of-use abatement device effluent flow. The total volume flow of the point-of-use abatement device exhaust will be calculated consistent with the EPA 430–R–10–003 (incorporated by reference, see § 98.7) Equations 1 through 7.

(3) You must determine the measurement system response time according to paragraphs (c)(3)(i) through (c)(3)(iii) of this appendix.

(i) Before sampling begins, introduce ambient air at the probe upstream of all sample condition components in system calibration mode. Record the time it takes for the measured concentration of a selected compound (for example, carbon dioxide) to reach steady state.

(ii) Introduce nitrogen in the system calibration mode and record the time required for the concentration of the selected compound to reach steady state.

(iii) Observe the time required to achieve 95 percent of a stable response for both nitrogen and ambient air. The longer interval is the measurement system response time.

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Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Cumberland Darter, Rush Darter, Yellowcheek Darter, Chucky Madtom, and Laurel Dace; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2011–0074; 4500030114]

RIN 1018–AX76

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Cumberland Darter, Rush Darter, Yellowcheek Darter, Chucky Madtom, and Laurel Dace

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, designate critical habitat for the Cumberland darter (*Etheostoma susanae*), rush darter (*Etheostoma phytophilum*), yellowcheek darter (*Etheostoma moorei*), Chucky madtom (*Noturus crypticus*), and laurel dace (*Chrosomus saylori*) under the Endangered Species Act of 1973, as amended. In total, approximately 86 river kilometers (rkm) (54 river miles (rmi)) are being designated as critical habitat for the Cumberland darter, 44 rkm (27 rmi) and 12 hectares (ha) (29 acres (ac)) for the rush darter, 164 rkm (102 rmi) for the yellowcheek darter, 32 rkm (20 rmi) for the Chucky madtom, and 42 rkm (26 rmi) for the laurel dace. The effect of this regulation is to conserve the five species' habitat under the Endangered Species Act.

DATES: This rule becomes effective on November 15, 2012.

ADDRESSES: This final rule and the associated final economic analysis are available on the Internet at *http://www.regulations.gov.* Comments and materials received, as well as supporting documentation used in preparing this final rule, are 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; telephone 931–528–6481; facsimile 931–528–7075.

The coordinates or plot points or both from which the maps are generated are included in the administrative record for this critical habitat designation and are available at *http://www.fws.gov/cookeville, http://www.regulations.gov* at Docket No. FWS–R4–ES–2011–0074, and at the Tennessee Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we may develop for this critical habitat designation will also be available at the Fish and Wildlife Service Web site and Field Office set out above, and may also be included in the preamble and/or at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For information regarding the Cumberland darter, contact Lee Andrews, Field Supervisor, U.S. Fish and Wildlife Service, Kentucky Fish and Wildlife Office, J.C. Watts Federal Building, 330 W. Broadway, Room 265, Frankfort, KY 40601; telephone 502–695–0468; facsimile 502–695–1024. For information regarding the rush darter, contact Stephen Ricks, Field Supervisor, U.S. Fish and Wildlife Service, Mississippi Fish and Wildlife Office, 6578 Dogwood View Parkway, Suite A, Jackson, MS 39213; telephone 601–965–4900; facsimile 601–965–4340 or Bill Pearson, Field Supervisor, U.S. Fish and Wildlife Service, Alabama Fish and Wildlife Office, 1208–B Main Street, Daphne, AL 36526; telephone 251–441–5181; facsimile 251–441–6222. For information regarding the yellowcheek darter, contact Jim Boggs, Field Supervisor, U.S. Fish and Wildlife Service, Arkansas Fish and Wildlife Office, 110 South Amity Road, Suite 300, Conway, AR 72032; telephone 501–513–4470; facsimile 501–513–4480. For information regarding the Chucky madtom or laurel dace, contact Mary Jennings, Field Supervisor, U.S. Fish and Wildlife Service, Tennessee Fish and Wildlife Office, 446 Neal Street, Cookeville, TN 38501; telephone 931–525–4973; facsimile 931–528–7075. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Endangered Species Act, any species that is determined to be an endangered or threatened species requires critical habitat to be designated, to the maximum extent prudent and determinable. Designations and revisions of critical habitat can only be completed by issuing a rule.

This rule will designate critical habitat for the Cumberland Darter, Rush Darter, Yellowcheek Darter, Chucky Madtom, and Laurel Dace. In total, approximately 86 river kilometers (rkm) (54 river miles (rmi)) are being designated as critical habitat for the Cumberland darter in McCreary and Whitley Counties, Kentucky, and Campbell and Scott Counties, Tennessee; 44 rkm (27 rmi) and 12 hectares (ha) (29 acres (ac)) are being designated as critical habitat for the rush darter in Etowah, Jefferson, and Winston Counties, Alabama; 164 rkm (102 rmi) are being designated as critical habitat for the yellowcheek darter in Cleburne, Searcy, Stone, and Van Buren Counties, Arkansas; 32 rkm (20 rmi) are being designated as critical habitat for the Chucky madtom in Greene County, Tennessee; and 42 rkm (26 rmi) are being designated as critical habitat for the laurel dace in Bledsoe, Rhea, and Sequatchie Counties, Tennessee.

The basis for our action. The Act requires that the Service designate critical habitat at the time of listing to the extent prudent and determinable. We have determined that designation is prudent and critical habitat is determinable (see Critical Habitat section below).

We prepared an economic analysis. To ensure that we consider the economic impacts, we prepared an economic analysis of the designation of critical habitat. We published an announcement and solicited public comments on the draft economic analysis. The analysis found that the present value of the total direct (administrative) incremental cost of critical habitat designation is $644,000 over the next 20 years assuming a seven percent discount rate. Primarily these costs are associated with consultation for water quality management activities, transportation; coal mining; oil and natural gas development; agriculture, ranching, and silviculture; dredging, channelization, impoundments, dams, and diversions; and recreation at $10,000 (Industrial Economics, Inc. 2012).

Peer review and public comment. We sought comments from independent specialists to ensure that our designation is based on scientifically sound data and analyses. We invited these peer reviewers to comment on our conclusions in the critical habitat proposal. We also considered all comments and information received during the comment period.

Background

It is our intent to discuss in this final rule only those topics directly relevant to the development and designation of critical habitat for the Cumberland darter, rush darter, yellowcheek darter, Chucky madtom, and laurel dace under the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*). For more information on the biology and ecology of these five fishes, refer to the final listing rule published in the **Federal Register** on August 9, 2011 (76 FR 48722). For information on the five fishes' critical habitat, refer to the

proposed rule to designate critical habitat published in the **Federal Register** on October 12, 2011 (76 FR 63360). Information on the associated draft economic analysis for the proposed rule was published in the **Federal Register** on May 24, 2012 (77 FR 30988).

Previous Federal Actions

The Cumberland darter, rush darter, yellowcheek darter, Chucky madtom, and laurel dace were listed as endangered species under the Act on August 9, 2011 (76 FR 48722). For the full history of previous Federal actions regarding these five species, please refer to the final listing rule (76 FR 48722). In the June 24, 2010, proposed listing rule (75 FR 36035) we determined that designation of critical habitat was prudent for all five species. However, we found that critical habitat was not determinable at the time and set forth the steps we would undertake to obtain the information necessary to develop a proposed designation of critical habitat. The proposed rule to designate critical habitat for these fishes published in the **Federal Register** on October 12, 2011 (76 FR 63360). Information on the associated draft economic analysis for the proposed rule to designate critical habitat was published in the **Federal Register** on May 24, 2012 (77 FR 30988).

Species Information

Cumberland Darter

The Cumberland darter (*Etheostoma susanae*) is a narrowly endemic fish species, occurring in sparse, fragmented, and isolated populations in the upper Cumberland River system of Kentucky and Tennessee. The species inhabits pools or shallow runs of low to moderate gradient sections of streams with stable sand, silt, or sand-covered bedrock substrates (O'Bara 1988, pp. 10–11; O'Bara 1991, p. 10; Thomas 2007, p. 4). Thomas (2007, p. 4) did not encounter the species in high-gradient sections of streams or areas dominated by cobble or boulder substrates. Thomas (2007, p. 4) reported that streams inhabited by Cumberland darters were second to fourth order, with widths ranging from 4 to 9 meters (m) (11 to 30 feet (ft)) and depths ranging from 20 to 76 centimeters (cm) (8 to 30 inches (in)).

The Cumberland darter's current distribution is limited to 13 streams in McCreary and Whitley Counties, Kentucky, and Campbell and Scott Counties, Tennessee (Thomas 2007, pp. 11–12). Occurrences from these streams are thought to form six population clusters (Bunches Creek, Indian Creek, Marsh Creek, Jellico Creek, Wolf Creek, and Youngs Creek), which are geographically separated from one another by an average distance of 30.5 stream km (19 stream mi) (O'Bara 1988, p. 12; O'Bara 1991, p. 10; Thomas 2007, p. 3).

The primary threat to the Cumberland darter is physical habitat destruction or modification resulting from a variety of human-induced impacts such as siltation, disturbance of riparian corridors, and changes in channel morphology (Waters 1995, pp. 2–3; Skelton 1997, pp. 17, 19; Thomas 2007, p. 5). The most significant of these impacts is siltation (excess sediments suspended or deposited in a stream) caused by excessive releases of sediment from activities such as resource extraction (e.g., coal mining, silviculture, natural gas development), agriculture, road construction, and urban development (Waters 1995, pp. 2–3; Skelton 1997, pp. 17, 19; KDOW 2006, pp. 178–185; Thomas 2007, p. 5).

Rush Darter

The rush darter (*Etheostoma phytophilum*) is a narrowly endemic, rare, and difficult to collect fish species in north-central Alabama. The rush darter occurs in sparse, fragmented, and isolated populations. The species is currently known from tributaries and associated spring systems of the Turkey Creek (Jefferson County), Clear Creek (Winston County), and Little Cove-Bristow Creek watersheds (Etowah County). Most of these tributaries contain sites with intact physical characteristics such as riffles, runs, pools, transition zones, and emergent vegetation. Rush darters prefer springs and spring-fed reaches of relatively low-gradient, small streams (Bart and Taylor 1999, p. 32; Johnston and Kleiner 2001, pp. 3–4; Stiles and Blanchard 2001, pp. 1–4; Bart 2002, p. 1; Fluker *et al.* 2007, p. 1; Stiles and Mills 2008, pp. 1–4). Rush darters are also found in wetland pools and in some ephemeral tributaries of the aforementioned watersheds (Stiles and Mills 2008, pp. 2–3). This species also relies heavily on aquatic vegetation (Fluker *et al.* 2007, p. 1), including both small clumps and dense stands, and root masses of emergent vegetation along stream margins. These habitats tend to be shallow, clear, and cool, with moderate current and substrates composed of a combination of sand with silt, muck, gravel, or bedrock.

The species is found in both urban and industrial zoned areas (Jefferson County) and rural settings (Winston and Etowah Counties). Within these areas, the rush darters' habitat has been degraded by alteration of stream banks and bottoms; channelization; inadequate storm water management; inappropriate placement of culverts, pipes, and bridges; road maintenance; inadequate protection of groundwater recharge zones and aquifers; and haphazard silvicultural and agricultural practices. The persistence of a constant flow of clean groundwater from various springs has somewhat offset the destruction of the species' habitat, water quality, and water quantity; however, the species' status still appears to be declining.

Yellowcheek Darter

The yellowcheek darter (*Etheostoma moorei*) is endemic to the Devil's, Middle, South, and Archey forks of the Little Red River in Cleburne, Searcy, Stone, and Van Buren Counties in Arkansas (Robison and Buchanan 1988, p. 429). These streams are located primarily within the Boston Mountains subdivision of the Ozark Plateau. In 1962, the construction of a dam on the Little Red River to create Greers Ferry Reservoir impounded much of the range of this species, including the lower reaches of Devil's Fork, Middle Fork, South Fork, and portions of the main stem Little Red River, thus extirpating the species from these reaches. Cold tailwater releases below the dam preclude the yellowcheek darter from inhabiting the main stem Little Red River. The yellowcheek darter inhabits high-gradient headwater tributaries with clear water; permanent flow; moderate to strong riffles; and gravel, cobble, and boulder substrates (Robison and Buchanan 1988, p. 429). Prey items consumed by yellowcheek darters include blackfly larvae, stoneflies, and mayflies.

Robison and Harp (1981, p. 5) estimated the range of the yellowcheek darter in the South Fork to extend from 2.9 km (1.8 mi) north northeast of Scotland, Arkansas, to U.S. Highway 65 in Clinton, Arkansas. The Middle Fork population was estimated to extend from just upstream of U.S. Highway 65 near Leslie, Arkansas, to 4.8 km (3.0 mi) west of Shirley, Arkansas. The Archey Fork population extended from its confluence with South Castleberry Creek to immediately downstream of U.S. Highway 65 in Clinton, Arkansas. The Devil's Fork population extended from 4.8 km (3.0 mi) north of Prim, Arkansas, to 6.1 km (3.8 mi) east southeast of Woodrow, Arkansas.

The yellowcheek darter is threatened primarily by factors associated with the present destruction, modification, or curtailment of its habitat or range. Threats include sedimentation and nutrient enrichment from impoundment, water diversion, gravel mining, channelization or channel

instability, and natural gas development.

Chucky Madtom

The Chucky madtom (*Noturus crypticus*) is a rare catfish found in Greene County, Tennessee. Specimens collected in Little Chucky Creek have been found in stream runs with slow to moderate current over pea gravel, cobble, or slab-rock boulder substrates (Burr *et al.* 2005, p. 797). These habitats are sparse in Little Chucky Creek, and the stream affords little loose, rocky cover suitable for madtoms (Shute *et al.* 1997, p. 8). It is notable that intact riparian buffers are present in the locations where Chucky madtoms have been found (Shute *et al.* 1997, p. 9).

Little is known about Chucky madtom life history and behavior; however, this information is available for other similar members of the *Noturus* group. Dinkins and Shute (1996, p. 50) found smoky madtoms (*N. baileyi*) underneath slab-rock boulders in swift to moderate current during May to early November. Habitat use shifted to shallow pools over the course of a 1-week period, coinciding with a drop in water temperature to 7 or 8 °C (45 to 46 °F), and persisted from early November to May. Eisenhour *et al.* (1996, p. 43) collected saddled madtoms (*N. fasciatus*) in gravel, cobble, and slab-rock boulders in riffle habitats with depths ranging from 0.1 to 0.3 m (0.3 to 1.0 ft). Based on their limited number of observations, Eisenhour *et al.* (1996, p. 43) hypothesized that saddled madtoms occupy riffles and runs in the daylight hours and then move to pools at night and during crepuscular hours (dawn and dusk) to feed.

The current range of the Chucky madtom is restricted to an approximate 3-km (1.8-mi) reach of Little Chucky Creek in Greene County, Tennessee. Degradation from sedimentation, physical habitat disturbance, and contaminants threaten the habitat and water quality on which the Chucky madtom depends. Sedimentation could negatively affect the Chucky madtom by reducing growth rates, disease tolerance, and gill function; reducing spawning habitat, reproductive success, and egg, larval, and juvenile development; reducing food availability through reductions in prey; and reducing foraging efficiency. Contaminants associated with agriculture (e.g., fertilizers, pesticides, herbicides, and animal waste) can cause degradation of water quality and habitats through instream oxygen deficiencies, excess nutrification, and excessive algal growths.

Laurel Dace

The laurel dace (*Chrosomus saylori*) is endemic to seven streams on the Walden Ridge portion of the Cumberland Plateau (Bledsoe, Rhea, and Sequatchie Counties, Tennessee), where drainages generally meander eastward before dropping abruptly down the plateau escarpment and draining into the Tennessee River. Laurel dace are known historically from seven streams in three disjunct systems: Soddy Creek; three streams that are part of the Sale Creek system (the Horn and Laurel branch tributaries to Rock Creek, and the Cupp Creek tributary to Roaring Creek); and three streams that are part of the Piney River system (Youngs, Moccasin, and Bumbee Creeks). In 1991, and in four other surveys (two in 1995, one in 1996, and one in 2004), laurel dace were not collected in Laurel Branch, leading Skelton to the conclusion that laurel dace had been extirpated from the stream (Skelton 1997, p. 13; Skelton 2001, p. 126; Skelton 2009, pers. comm.).

The current distribution of laurel dace encompasses six of seven historical streams; the species is considered extirpated from Laurel Branch (see above). In these six streams, the species is known to occupy reaches ranging in length from 0.3 to 8.0 rkm (0.2 to 5 rmi). Laurel dace have been most often collected from pools or slow runs from undercut banks or beneath slab-rock boulders, typically in first or second order, clear, cool (maximum temperature 26 °C or 78.8 °F) streams. Substrates in laurel dace streams typically consist of a mixture of cobble, rubble, and boulders, and the streams tend to have a dense riparian zone consisting largely of mountain laurel (Skelton 2001, pp. 125–126).

The primary threat to laurel dace throughout its range is excessive siltation resulting from agriculture and extensive silviculture, especially those involving inadequate riparian buffers in harvest areas and the failure to use best management practices (BMPs) during road construction. Severe degradation from sedimentation, physical habitat disturbance, and contaminants threatens the habitat and water quality on which the laurel dace depends. Sedimentation negatively affects the laurel dace by reducing growth rates, disease tolerance, and gill function; reducing spawning habitat, reproductive success, and egg, larvae, and juvenile development; reducing food availability through reductions in prey; and reducing foraging efficiency.

Summary of Comments and Recommendations

We requested written comments from the public on the proposed designation of critical habitat for the Cumberland darter, rush darter, yellowcheek darter, Chucky madtom, and laurel dace during two comment periods. The first comment period associated with the publication of the proposed rule (76 FR 63360) opened on October 12, 2011, and closed on December 12, 2011. Based on a request made after the comment period had ended, we held a public informational meeting concerning the critical habitat designation for the yellowcheek darter on February 22, 2012, in Clinton, Arkansas, where we took comments on the proposed rule and notified the public that we would also take public comments on the rule through the end of the comment period for a draft economic analysis. That comment period opened May 24, 2012, and closed on June 25, 2012 (77 FR 30988). Based on a request received during the first comment period, we held a public hearing in Clinton, Arkansas, on June 7, 2012. We also contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed rule and draft economic analysis during these comment periods. We issued press releases and published legal notices in *The Times Tribune, Lexington Herald-Leader, Greenville Sun, Knoxville News Sentinel, The Herald News, Chattanooga Times Free Press, Birmingham News, Sand Mountain Reporter, NW Alabamian, Arkansas Democrat-Gazette, Van Buren County Democrat, The Sun Times, The Stone County Leader,* and the *Marshall Mountain Wave.* However, the *Marshall Mountain Wave* declined to publish a legal notice announcing the first public comment period.

During the first comment period, we received 66 comment letters directly addressing the proposed critical habitat designation. During the February 22, 2012, public informational meeting, 11 individuals or organizations made comments on the designation of critical habitat for the yellowcheek darter. During the second comment period, we received 54 comment letters addressing the proposed critical habitat designation or the draft economic analysis. During the June 7, 2012, public hearing, four individuals or organizations made comments on the designation of critical habitat for the yellowcheek darter. All substantive information provided during the comment periods has either been incorporated directly into this final

determination or is addressed below. Comments received were grouped into five general issues categories, and are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from 15 knowledgeable individuals with scientific expertise that included familiarity with the five species and the geographic region in which the species occur. We received responses from three of the peer reviewers.

We reviewed all comments received from the peer reviewers for substantive issues and new information regarding critical habitat for the five fishes. The peer reviewers generally concurred with our methods and conclusions, and provided additional information, clarifications, and suggestions to improve the final critical habitat rule. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

For the Cumberland darter, rush darter, and Chucky madtom, the peer reviewers agreed we relied on the best scientific information available, accurately described the species and its habitat requirements (primary constituent elements (PCEs)), accurately characterized the reasons for the species' decline and the threats to its habitat, and concurred with our critical habitat selection criteria. We did not receive any comments from peer reviewers related to the yellowcheek darter or laurel dace. We respond to all substantive comments below.

Peer Reviewer Comments

(1) *Comment:* The Northern Beltline Corridor will cross and impact the proposed rush darter critical habitat throughout its range in Jefferson County, Alabama, and stimulate growth and development throughout the area.

Our Response: The Northern Beltline Corridor has a Federal nexus through the Federal Highway Administration (FHA). The Service has provided official comment and evaluated the potential effects of the Beltline with respect to the vermilion darter (*Etheostoma chermockii),* watercress darter (*Etheostoma nuchale),* rush darter (*Etheostoma phytophylum*), and other trust resources in accordance with section 7 of the Act and the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*). Species surveys were conducted during the period of August 29–30, 2011. No federally protected species were found during this survey. The rush darter is located in a few scattered tributaries that drain into the south side of Turkey Creek, which is a considerable distance from the proposed beltway impact areas. The corridor will not cross any rush darter habitat.

The Service determined that the project would have minimal to no effect on the rush darter, which occurs in a drainage removed from the action area (Everson 2012, pers. comm.).

(2) *Comment:* Predicted effects of climate change on the rush darter and its habitat should include protection of aquifers and recharge areas of groundwater input and corresponding higher water temperatures.

Our Response: The information currently available on the effects of global climate change and increasing temperatures does not make sufficiently precise estimates of the location and magnitude of the effects. We are also not currently aware of any climate change information specific to the habitat of the rush darter related to temperatures of groundwater outflows and stormwater inflows that are or would become important to the species in the future. Therefore, we are unable to determine what additional threats and corresponding appropriate actions to include in the final critical habitat for the rush darter or the other fishes in this rule to address the effects of this aspect of climate change.

(3) *Comment:* The critical habitat designated for the rush darter in the headwaters in Unit 2 should be expanded to adjacent areas and include the wetland on the western edge.

Our Response: Comment has been noted and after further analysis of the information within Service files and that provided by the commenter, the wetland on the western edge of Unit 2 has been included in the final critical habitat designation for the rush darter. This area contains the physical and biological features essential to the conservation of the species (PCEs 1–3) and which may require special management and protection. As a result of these changes, critical habitat designation has increased by an additional 85.8 m (0.05 mi.) and 0.13 ha (0.32 ac) in Unit 2 for the rush darter.

(4) *Comment:* One peer reviewer mentions that there are active strip mines in the area of the proposed rush darter critical habitat in Doe and Wildcat Branch, Winston County, Alabama. In the Energy Supply, Distribution, or Use determination, the Service only mentions that coal mining occurs or could occur in Cumberland darter units.

Our Response: Historically, there was an abundance of coal mining in Winston County, Alabama. Recently, coal mining has accelerated south of the watershed containing critical habitat for the rush darter. However, there are no active mines that impact the surface water of the proposed critical habitat for the rush darter. The Poplar Springs Mine is active, but is outside the proposed critical habitat unit, and no impacts to the surface waters are believed to occur (Drennen 2011, pers. obs.). Although there are no obvious coal mining impacts to surface water, little is known about groundwater impacts within the aquifer. These types of effects are untimely in expressing themselves and may not be known for many years, if indeed they do occur.

Comments from States

Section 4(i) of the Act states, ''the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.'' We received one comment from the Kentucky Department of Fish and Wildlife Resources (KDFWR) related to road crossings and culverts acting as threats to the Cumberland darter. This comment was incorporated into this final rule. We did not receive any other substantive comments from the States (Alabama, Arkansas, Kentucky, or Tennessee) regarding the proposed rule. No official position was expressed by the States on the critical habitat designation.

(5) *Comment:* The KDFWR commented that culverts and impassable road crossings (fords) could act as barriers to dispersal for Cumberland darters, thereby contributing to population fragmentation and reduced gene flow among and between populations.

Our Response: We agree that impassable road crossings and culverts can limit or prevent natural dispersal of Cumberland darters, which can lead to population fragmentation and reduced gene flow. We discussed this potential threat (Factor E) in the final listing and proposed critical habitat rules, and we summarized our current knowledge of Cumberland darter dispersal behavior in the Physical and Biological Features section of this final critical habitat rule.

Public Comments

Landowner Rights

(6) *Comment:* The proposed designation will harm private landowners in Arkansas through increased government regulation, and

will add unnecessary bureaucracy in the use of surface waters.

Our Response: The designation of critical habitat will not increase government regulation of private land in Arkansas. The effects of private activities are not subject to the Act's section 7 consultation requirements unless they are connected to a Federal action. Federal activities conducted in or adjacent to areas designated as critical habitat are already subject to section 7 consultation requirements of the Act because of the presence of one or more species currently listed under the Act. Most normal operations for rearing of livestock, or for other land uses common to the upper Little Red River watershed in Arkansas, do not require Federal permits or actions. We do not anticipate that this designation will impose any additional direct regulatory burdens to private landowners in Arkansas.

(7) *Comment:* The designation of critical habitat for the yellowcheek darter will involve establishment of streamside buffers, exclusion of cattle from designated critical habitat through installation of new fencing, or taking of private land by the Federal government.

Our Response: The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Critical habitat designation does not regulate private actions on private lands or confiscate private property. It does not affect individuals, organizations, States, local governments or other non-Federal entities that do not require Federal permits or funding. Such designation does not allow the government or public to access private lands.

The designation of critical habitat does not create streamside buffers or impose requirements to fence livestock or other animals from streams. Waters of navigable streams, such as those designated as critical habitat for the yellowcheek darter, are considered public waters by the State of Arkansas. The designation includes river channels within the ordinary high water line, which would not include adjacent private properties.

Procedural and Legal Considerations

(8) *Comment:* Landowners have not been contacted and given the opportunity to respond to the proposed designation. Most landowners (in the Little Red River watershed, Arkansas) and the people of Arkansas did not know of the comment deadline; therefore, the comment period should be extended and public hearings conducted.

Our Response: When we issue a proposed rule, we want to ensure widespread knowledge and opportunity for the public to comment, particularly among those who may be potentially affected by the action. The proposed designation for yellowcheek darter covered portions of four Arkansas counties; therefore, it was impossible to personally contact all landowners in the area. However, we attempted to ensure that as many people as possible would be aware of the proposed designation through distribution of press releases to all major media in the affected area, including those in State capitols and major cities; publication of newspaper notices; and direct notification of affected State and Federal agencies, environmental groups, major industries, State Governors, Federal and State elected officials, and representatives associated with the National Championship Chuck Wagon Races (see *Previous Federal Actions,* above). We continued to accept all comments received after the initial public comment period ended to ensure that all interested parties would have the opportunity to comment on the proposed designation. Further, although the request for a public hearing was made after the deadline for such requests, we held a public information meeting on February 22, 2012, and a public hearing on June 7, 2012, following the publication that made available the draft economic analysis (77 FR 30988). In short, we have complied with or exceeded all of the notification requirements of the Act.

Economic Impacts and Economic Analysis

(9) *Comment:* Multiple commenters state that designation of critical habitat for the yellowcheek darter would negatively affect the National Championship Chuck Wagon Races by preventing horses from crossing the river or by preventing the event from occurring in the future. Additional comments state that the draft economic analysis (DEA) fails to consider the impacts of designation on the local economy of Van Buren County, Arkansas, where the event takes place. The commenters state that if the event is cancelled, impacts would include loss of business for local restaurants, motels, grocery stores, gas stations, and feed stores, and corresponding losses in local and State tax revenues.

Our Response: As stated in section 3.2.5 of the DEA, the Service anticipates that the landowner who hosts the 2012 National Championship Chuck Wagon Races could apply for a permit under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) to construct a dam for the races, and may develop a habitat conservation plan that would allow incidental taking of the species under section 10(a)(1)(B) of the Act. Both of these actions would lead to section 7 consultations with the Service. However, conservation measures that the Service would recommend to prevent adverse effects to the species would also most likely prevent adverse modification of critical habitat and would occur regardless of critical habitat designation. It is, therefore, unlikely that critical habitat designation itself would affect the races by preventing horses from crossing the river or preventing the event from occurring. Therefore critical habitat designation is not expected to affect the regional economy.

(10) *Comment:* Multiple commenters state generally that the DEA does not adequately address the economic impacts of proposed critical habitat designation for the yellowcheek darter on cattle ranching, farming, silviculture, natural gas and oil exploration and development, and recreational activities. The commenters request that more studies be done on the economic impacts of the proposed designation. Multiple commenters suggest that the conservation measures that may result from the rule would put a significant burden on small ranching operations and other economic activities. Commenters specifically mention the following measures as being costly and potentially detrimental to their economic well-being: installation of fencing along the river to prevent access by livestock; prohibition of bank stabilization activities; and prohibition on using river water for irrigation purposes.

Our Response: As described in section 2.3.2 and Appendix D of the DEA, the incremental impacts of critical habitat designation are expected to be limited to any additional administrative costs of section 7 consultations. Voluntary conservation measures suggested by the Service would be recommended regardless of critical habitat designation, in order to avoid adverse effects to the species. Therefore, it is unlikely that critical habitat designation itself would affect ranching, farming, silviculture, natural gas and oil exploration and development, or recreational activities through conservation recommendations such as installing fencing, bank stabilization, or prohibiting use of water for irrigation purposes.

(11) *Comment:* One commenter expresses concern that designation of critical habitat would hamper local fire

department use of river water for rural fire fighting and pump testing.

Our Response: The local fire departments' use of river water would be unlikely to result in adverse modification of critical habitat due to the small amounts of water used for such activities and the fact that no Federal permit is required for these actions. Because there is no Federal permit required, there is no Federal nexus and no section 7 consultation required for these actions. Therefore, it is unlikely that critical habitat would generate recommendations that would hamper local fire departments' use of river water.

(12) *Comment:* Multiple commenters express concern that their land values will be negatively impacted by the designation of critical habitat and that the DEA does not take into account the impact of critical habitat designation on livelihoods and property values.

Our Response: The activities that may occur on a parcel of land are not expected to be limited by the designation of critical habitat because critical habitat is only designated below the ordinary high water mark of streams and most activities occurring on lands adjacent to streams do not require Federal actions that would require section 7 consultation. Therefore, direct reductions in land value due to the designation are not expected. However, it is true that section 2.3.2 of the DEA describes the potential indirect regulatory uncertainty or stigma effect that the designation of critical habitat may have on property values. However, due to uncertainty surrounding the likelihood and extent of such indirect impacts, these potential effects are considered speculative. The uncertainty regarding the regulatory requirements associated with critical habitat may diminish as section 7 consultations are completed and additional information becomes available on the effects of critical habitat on specific activities.

(13) *Comment:* One commenter questioned how the DEA forecasts a value of $140,000 for impacts relating to the designation of critical habitat for the yellowcheek darter.

Our Response: As noted in Exhibit ES–4 of the DEA, the present value of the total incremental costs of critical habitat designation for the yellowcheek darter is $134,000 over the next 20 years, assuming a 7 percent discount rate. These costs reflect additional administrative effort as part of future section 7 consultations in order to consider the potential for activities to result in adverse modification of critical habitat. No change in economic activity levels or the management of economic activities is expected to result from the critical habitat designation.

(14) *Comment:* Multiple commenters express support for the designation of critical habitat for the laurel dace in Tennessee as they believe the designation would help prevent the development of new coal operations near Dayton, TN. Specifically, the comments state that proposed coal mining operations in the area, if initiated, would negatively affect the laurel dace and other species. One comment states that the area where the laurel dace is found is located very close to a ''proposed coal processing plant location on Ogden Road, Dayton TN by Iron Properties.''

Our Response: The DEA discusses known coal mining activity in Tennessee in section 3.2.2. Data from the Office of Surface Mining Reclamation and Enforcement (OSMRE) indicate that there are two pending permits for coal mining activities in the Dayton area of Rhea County, TN. However, only one of these potential projects occurs within a watershed containing laurel dace critical habitat. As indicated in the DEA, this project is located in the watershed containing proposed critical habitat Unit 4 for the laurel dace. As indicated in Exhibit 3–4 of the DEA, it is expected that the Service will consult on this project with OSMRE under the Local Interagency Working Agreement described in section 3.2.2 of the DEA. However, because conservation measures suggested by the Service would be recommended regardless of critical habitat, in order to avoid adverse effects to the species, it is unlikely that critical habitat will generate any additional recommendations that will prevent the development of new coal operations near Dayton, TN.

(15) *Comment:* Multiple commenters elaborate on the potential benefits of the proposed designation. At least one of these commenters suggests that the long-term economic benefits of designation are not adequately addressed in the proposed rule and DEA. Commenters suggest the indirect benefits of critical habitat designation include: water quality and supply improvements, opportunities to generate additional recreation-based economic activities (park visits, hiking, biking, fishing, camping, boating, and service industry), regional small business growth (recreational equipment industry, lodging industry, food industry, gas stations, and other services), increased property values, and increased tax revenues.

Our Response: As detailed in section 3.4 of the DEA, the analysis does not expect any changes in economic activity levels or the management of economic activities to result from critical habitat designation for the five fishes. Absent these changes, we do not expect the designation to result in any incremental economic benefits, such as water quality improvements, recreational opportunities, and increased property values. The DEA does, however, note that conservation for these species undertaken due to the listing (even absent the designation of critical habitat) may generate the types of benefits described in these comments.

Best Scientific Information

(16) *Comment:* Critical habitat designation for the yellowcheek darter was not based on reliable scientific data and not enough habitat area was surveyed.

Our Response: The Act requires the Secretary of the Interior to use the best scientific and commercial data available when designating critical habitat for a species.

In fulfilling this requirement, we received and used information on the biology, ecology, distribution, abundance, status, and trends of species from a wide variety of sources. These sources include status surveys, biological assessments, and other unpublished material (that is, ''gray literature'') from State natural resource agencies and natural heritage programs, Tribal governments, other Federal agencies, consulting firms, contractors, and individuals associated with professional organizations and higher educational institutions. We also use published articles from professional journals. Service biologists are required to gather, review, and evaluate information from these sources prior to undertaking listing, recovery, consultation, and permitting actions. Additionally, Service biologists surveyed most of the areas proposed as critical habitat for the yellowcheek darter as part of a 2004 threats assessment for the endangered speckled pocketbook mussel (*Lampsilis streckeri*) and yellowcheek darter (Davidson and Wine 2004).

Factors Affecting the Species

(17) *Comment:* One commenter stated that the Cumberland darter is threatened by degradation of water quality from large surface coal mines in the northern coalfields of Scott and Campbell Counties, Tennessee. In addition to this general concern, the commenter was aware of selenium contamination within these same watersheds and was aware of several notices of violation from the Tennessee Department of Environment

and the OSMRE regarding degradation of water quality and impacts to aquatic species within these watersheds. The commenter feared that current mining activities and issuance of new permits would cause further degradation to fish and wildlife habitats in Campbell and Scott Counties.

Our Response: We concur with the commenter that large surface coal mine operations in Campbell and Scott Counties, Tennessee, are a potential threat to the Cumberland darter, and have the potential to degrade water quality of Cumberland darter streams in these watersheds. Streams associated with surface coal mining and valley fills are typically characterized by elevated conductivity, elevated total dissolved solids, and increased concentrations of sulfate, bicarbonate ions, and metals such as manganese, iron, aluminum, and selenium. Increased levels of selenium have been shown to bioaccumulate in organisms, leading to deformities in larval fish and potentially harming birds that prey on fishes. The final listing rule (75 FR 36035) provided a more detailed analysis of these and other water quality threats to the Cumberland darter under Summary of Factors Affecting the Species (75 FR 36042).

(18) *Comment:* Two commenters raised the possibility that perched culverts or impassable road crossings (fords) represent a threat to the Cumberland darter and suggested that this potential threat may require special management considerations or protection. The commenters explained that perched culverts are common within the upper Cumberland River system, and they often restrict fish movements, as evidenced by lower species diversity observed by the commenters upstream of these culverts. The commenters also suggested that connectivity of Cumberland darter streams could be affected by these barriers, leading to further isolation of these populations and preventing the free exchange of genetic material between populations.

Our Response: We agree with the commenters that perched culverts represent a potential threat to the Cumberland darter. We, too, have observed perched culverts in the upper Cumberland River system, and we often observe lower species diversity in reaches upstream of these culverts. To address the potential threat posed by these barriers, we have included additional text in the *Special Management Considerations or Protection* section (below) that identifies the threat and lists potential management activities that could ameliorate the threat.

(19) *Comment:* One commenter raised the possibility that agricultural practices pose a threat to the Chucky madtom by eliminating riparian buffers, warming stream temperatures, and introducing fertilizer into the water.

Our Response: We agree with the commenter that agriculture can pose a threat to the Chucky madtom. We have included additional text in the *Special Management Considerations or Protection* section (below) that identifies the threat and lists potential management activities that could ameliorate the threat.

(20) *Comment:* Two commenters raised the concern that coal exploration in the Rock Creek Lands Unsuitable for Mining area indicates a potential threat to the laurel dace from future coal mining in the southern coalfield areas of Tennessee.

Our Response: We agree with the commenters that possible future coal mining in southern Tennessee represents a potential threat to the laurel dace. To address the potential threat posed by coal mining and acid mine drainage, we have included additional text in the *Special Management Considerations or Protection* section that identifies the threat and lists potential management activities that could ameliorate the threat.

Summary of Changes From Proposed Rule

In preparing this final critical habitat designation for the Cumberland darter, rush darter, yellowcheek darter, Chucky madtom, and laurel dace, we reviewed and considered comments from the public on the proposed designation of critical habitat published on October 12, 2011 (76 FR 63360) and our announcement of the availability of the DEA published on May 24, 2012 (77 FR 30988). We likewise reviewed and considered comments from a public informational meeting held on February 22, 2012, and a public hearing held on June 7, 2012, both in Clinton, Arkansas. As a result of public comments and peer review, we made changes to our designation of critical habitat for these five fishes. These changes are as follows:

(1) We added additional threats information for the Cumberland darter, rush darter, Chucky madtom, and laurel dace.

(2) We capitalized the common name of the Chucky madtom, to reflect the fact that it is named after Little Chucky Creek, and is therefore, a proper noun. We updated a reference for Chucky madtom habitat and threats, and clarified that Little Chucky Creek is the entire current range (but not the entire historic range) of the Chucky madtom in the *Criteria Used to Identify Critical Habitat* section.

(3) We updated the total number of river kilometers for the Cumberland darter unit 1, and all four yellowcheek darter units, due to a change in mapping methodology. The beginning and ending points of critical habitat, as well as the unit descriptions (as described in the proposed critical habitat rule) remain the same. The change in mapping results from standardizing methods used to estimate the unit lengths designated as critical habitat for all five species. This methodology better follows the meander of the river channel and results in an additional 0.5 river kilometers (rkm) (0.3 river miles (rmi)) for the Cumberland darter, and an additional 6.6 rkm (4.1 rmi) for the yellowcheek darter.

(4) We revised the ownership of one property for the yellowcheek darter critical habitat, resulting in a change of the total number of river kilometers in private ownership from 148 rkm (92 rmi) to 162.7 rkm (101.1 rmi), as well as a corresponding downward revision in the other ownership types.

(5) We revised the *Energy Supply, Distribution, or Use—Executive Order 13211* section to state that coal mining could potentially occur in one of six critical habitat units for the laurel dace.

(6) We added a spring run and associated wetlands to Unit 2 as critical habitat for the rush darter. This 0.13 ha (0.32 ac) spring associated wetland and 85.8 m (0.05 mi) spring run is adjacent to the headwaters of the Unnamed Tributary to Beaver Creek and is privately owned.

(7) We corrected errors in calculating total length and area in Table 2 for the rush darter.

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the 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 the 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 an 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, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise 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 seeks or 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 obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical and biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. Primary constituent elements are the elements of physical or 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 second prong of the Act's definition of critical habitat, 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. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential to the conservation of the species and may be included in the critical habitat designation. 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.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for 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 new information available at the time of these planning efforts calls for a different outcome.

Physical and Biological Features

In accordance with sections 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 or 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, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distribution of a species.

We derive the specific physical or biological features essential for the Cumberland darter, rush darter, yellowcheek darter, Chucky madtom, and laurel dace from studies of these species' habitats, ecology, and life history as described in the Critical Habitat section of the proposed rule to designate critical habitat published in the **Federal Register** on October 12, 2011 (76 FR 63360), and in the information presented below. Additional information can be found in the final listing rule published in the **Federal Register** on August 9, 2011 (76 FR 48722). We have determined that these five species require the physical or biological features described below.

Space for Individual and Population Growth and for Normal Behavior

Cumberland Darter

Little is known about the specific space requirements of the Cumberland darter; however, the species is typically found in low to moderate gradient, second- to fourth-order, geomorphically stable streams, where it occupies shallow pools or runs with gentle current over sand or sand-covered bedrock substrates with patches of gravel or debris (O'Bara 1991, p. 10; Thomas 2007, p. 4). Geomorphically stable streams transport sediment while maintaining their horizontal and vertical dimensions (width to depth ratio and cross-sectional area), pattern (sinuosity), and longitudinal profile (riffles, runs, and pools), thereby conserving the physical characteristics of the stream, including bottom features such as riffles, runs, and pools and the transition zones between these features. The protection and maintenance of these habitat features accommodate spawning, rearing, growth, migration, and other normal behaviors of the Cumberland darter.

Limited information exists with regard to upstream or downstream movements of Cumberland darters; however, Winn (1958a, pp. 163–164) reported considerable pre-spawn movements for its closest relative, the Johnny darter. In Beer Creek, Monroe County, Michigan, Johnny darters migrated several miles between temporary stream habitats and permanent pools in downstream reaches. Recent capture data for tagged individuals in Cogur Fork, McCreary County, Kentucky, demonstrate that Cumberland darters may make similar movements (Thomas 2010, pers. comm.). Individuals tagged and released by the Kentucky Department of Fish and Wildlife Resources (KDFWR) and Conservation Fisheries, Inc. (CFI), traveled distances ranging from 0.4 to 0.7 rkm (0.2 to 0.4 rmi) between their release date of September 22, 2010, and their recapture date of November 9, 2010 (period of 48 days) (Thomas 2010, pers. comm.). Over longer periods, it is likely that Cumberland darters can utilize stream reaches longer than 0.7 rkm (0.4 rmi).

The current range of the Cumberland darter has been reduced to 13 streams (15 occurrences) due to destruction and fragmentation of habitat. Fragmentation of the species' habitat has subjected these small populations to genetic isolation, reduced space for rearing and reproduction, reduced adaptive capabilities, and an increased likelihood of local extinctions (Burkhead *et al.* 1997, pp. 397–399; Hallerman 2003, pp. 363–364). Genetic variation and diversity within a species are essential for recovery, adaptation to environmental change, and long-term viability (capability to live, reproduce, and develop) (Noss and Cooperrider 1994, pp. 282–297; Harris 1984, pp. 93–107; Fluker *et al.* 2007, p. 2). The long-term viability of a species is founded on the conservation of numerous local populations throughout its geographic range (Harris 1984, pp. 93–104). Connectivity of these habitats is essential in preventing further fragmentation and isolation of Cumberland darter populations and promoting species movement and genetic flow between populations.

Therefore, based on the information above, we identify shallow pools and runs and associated stream segments of geomorphically stable, second- to fourth-order streams to be an essential physical or biological feature for the Cumberland darter. The connectivity of these habitats is essential in accommodating feeding, breeding, growth, and other normal behaviors of the Cumberland darter and in promoting gene flow within the species.

Rush Darter

Little is known about the specific space requirements of the rush darter in the Turkey Creek, Little Cove-Bristow Creek, and Clear Creek systems (Boschung and Mayden 2004, p. 551); however, in general, darters depend on space within geomorphically stable streams with varying water quantities and flow. Specifically, rush darters appear to prefer springs and spring-fed reaches of relatively low-gradient, small streams (Bart and Taylor 1999, p. 32; Johnston and Kleiner 2001, pp. 3–4; Stiles and Blanchard 2001, pp. 1–4; Bart 2002, p. 1; Fluker *et al.* 2007, p. 1; Stiles and Mills 2008, pp. 1–4) and wetland pools (Stiles and Mills 2008, pp. 2–3). This species also relies heavily on aquatic vegetation (Fluker *et al.* 2007, p. 1) including: Root masses of emergent vegetation along the margins of spring-fed streams in very shallow, clear, cool, and flowing water; and both small clumps and dense stands of watercress (*Nasturtium officinale*), parrots feather (*Myriophyllum* sp.), rushes (*Juncus* spp.), sedges (*Carex* spp.), bur reed (*Sparganium* sp.), and coontail (*Ceratophyllum* sp.). The rush darter inhabits streams with substrates of silt, sand, sand and silt, muck and sand or some gravel with sand, and bedrock.

Geomorphically stable streams transport sediment while maintaining their horizontal and vertical dimensions (width to depth ratio and cross-sectional area), pattern (sinuosity), and longitudinal profile (riffles, runs, and pools), thereby conserving the physical characteristics of the stream, including bottom features such as riffles, runs, and pools and the transition zones between these features that contain some silt, sand, and finer substrates. The riffles, runs, and pools not only provide space for the rush darter, but also provide space for emergent vegetation in shallow water along the margins of the small streams and springs for cover, and shelter necessary for breeding, reproduction, and growth of offspring.

The current range of the rush darter within the entire Turkey Creek, Clear Creek, and Little Cove-Bristow Creek watersheds is reduced to localized sites due to fragmentation, separation, and destruction of rush darter habitats and populations. There are dispersal barriers (pipes and culverts for road crossings; channelized stream segments; and emergent aquatic plant control, which eliminates cover habitat for the species) and an increased amount of water extraction, which results in insufficient aquifer recharge zones that may contribute to the separation and isolation of rush darter populations and affect water quality. Fragmentation of the species' habitat has isolated populations and reduced available spaces for rearing and reproduction, thereby reducing adaptive capability and increasing the likelihood of local extinctions (Burkhead *et al.* 1997, pp. 397–399; Hallerman 2003, pp. 363–364). Genetic variation and diversity within a species are essential for recovery, adaptation to environmental changes, and long-term viability (capability to

live, reproduce, and develop) (Harris 1984, pp. 93–107; Noss and Cooperrider 1994, pp. 282–297; Fluker *et al.* 2007, p. 2). Long-term viability is founded on numerous interbreeding, local populations throughout the range (Harris 1984, pp. 93–107). Continuity of water flow between suitable habitats is essential in preventing further fragmentation of the species' habitat and populations, conserving the essential emergent vegetation in shallow water on the margins of small streams and springs, and promoting genetic flow throughout the populations. Continuity of habitat will maintain spawning, foraging, and resting sites, and allow for gene flow throughout the population. Connectivity of habitats, as a whole, also permits improvement in water quality and water quantity by allowing unobstructed water flow throughout the connected habitats.

Therefore, based on the information above, we identify springs and spring-fed reaches of relatively low-gradient, geomorphically stable streams with emergent vegetation to be an essential physical or biological feature for the rush darter. The connectivity of these habitats is essential in accommodating feeding, breeding, growth, and other normal behaviors of the rush darter and in promoting gene flow within the species.

Yellowcheek Darter

The yellowcheek darter is typically found in clear, high-gradient, second- to fifth-order, geomorphically stable streams that maintain permanent year-round flows (Robison and Buchanan 1988, p. 429). The species occupies riffles with moderate to fast current over gravel, cobble, and boulder substrates (Robison and Buchanan 1988, p. 429). Geomorphically stable streams transport sediment while maintaining their horizontal and vertical dimensions (width to depth ratio and cross-sectional area), pattern (sinuosity), and longitudinal profile (riffles, runs, and pools), thereby conserving the physical characteristics of the stream, including bottom features such as riffles, runs, and pools and the transition zones between these features. The protection and maintenance of these habitat features accommodate spawning, rearing, growth, migration, and other normal behaviors of the yellowcheek darter.

In 1962, the construction of Little Red River Dam to create Greers Ferry Reservoir impounded much of the range of the yellowcheek darter, including the lower reaches of Devil's Fork, Middle Fork, South Fork, and portions of the main stem Little Red River, thus extirpating the species from these reaches. The yellowcheek darter was also extirpated from the Little Red River downstream of Greers Ferry Reservoir due to cold tailwater releases. The lake flooded optimal habitat for the species, and caused genetic isolation of populations (McDaniel 1984, p. 1), with only the South and Archey forks of the Little Red River maintaining a non-inundated confluence.

As stated earlier, of the four streams supporting the yellowcheek darter, only the South and Archey forks maintain a non-inundated confluence. Instream habitat at the confluence of the two streams is suboptimal due to previous channelization, but restoration could provide an opportunity for vital population interactions between streams to maintain genetic diversity. Fragmentation of the species' habitat has subjected these small populations to genetic isolation, reduced space for rearing and reproduction, reduced adaptive capabilities, and an increased likelihood of local extinctions (Burkhead *et al.* 1997, pp. 397–399; Hallerman 2003, pp. 363–364). Genetic variation and diversity within a species are essential for recovery, adaptation to environmental change, and long-term viability (capability to live, reproduce, and develop) (Harris 1984, pp. 93–107; Noss and Cooperrider 1994, pp. 282–297; Fluker *et al.* 2007, p. 2). The long-term viability of a species is founded on the conservation of numerous local populations throughout its geographic range (Harris 1984, pp. 93–104). Connectivity of these habitats is essential to prevent further fragmentation and isolation of yellowcheek darter populations and to promote species movement and genetic flow between populations.

Therefore, based on the information above, we identify riffles of geomorphically stable, second- to fifth-order streams to be an essential physical or biological feature for the yellowcheek darter. The connectivity of these habitats is essential to accommodate feeding, breeding, growth, and other normal behaviors of the yellowcheek darter and to promote gene flow within the species.

Chucky Madtom

Little is known about the specific space requirements of the Chucky madtom; however, all of the specimens collected in Little Chucky Creek have been found in shallow pool and run habitats with slow to moderate current over pea gravel, cobble, or slab-rock boulder substrates (Burr *et al.* 2005, p. 797). Geomorphically stable streams transport sediment while maintaining their horizontal and vertical dimensions (width to depth ratio and cross-sectional area), pattern (sinuosity), and longitudinal profile (riffles, runs, and pools), thereby conserving the physical characteristics of the stream, including bottom features, such as riffles, runs, and pools and the transition zones between these features. The protection and maintenance of these habitat features accommodate spawning, rearing, growth, migration, and other normal behaviors of the Chucky madtom.

The current range of the Chucky madtom has been reduced to only one stream due to fragmentation and destruction of habitat. Habitat fragmentation has subjected the small population to genetic isolation, reduced space for rearing and reproduction, reduced adaptive capabilities, and increased the likelihood of extinction (Burkhead *et al.* 1997, pp. 397–399; Hallerman 2003, pp. 363–364). Genetic variation and diversity within a species are essential for recovery, adaptation to environmental change, and long-term viability (capability to live, reproduce, and develop) (Harris 1984, pp. 93–107; Noss and Cooperrider 1994, pp. 282–297; Fluker *et al.* 2007, p. 2). The long-term viability of a species is founded on the conservation of numerous local populations throughout its geographic range (Harris 1984, pp. 93–104). Connecting instream habitats is essential in preserving the genetic viability of the Chucky madtom in Little Chucky Creek.

Therefore, based on the information above, we identify shallow pools and runs of geomorphically stable streams to be an essential physical or biological feature for the Chucky madtom. The connectivity of these habitats is essential to accommodate feeding, breeding, growth, and other normal behaviors of the Chucky madtom and to promote gene flow within the species.

Laurel Dace

Little is known about the specific space requirements of the laurel dace; however, the species is typically found in low to moderate gradient, first- to second-order, geomorphically stable streams. The laurel dace occupies pools or slow runs beneath undercut banks or slab-rock boulders in clear, cool (maximum temperature 26 °C (78.8 °F)) streams. Substrates in streams where laurel dace are found typically consist of a mixture of cobble, rubble, and boulders, and the streams tend to have a dense riparian zone consisting largely of mountain laurel (Skelton 2001, pp. 125–126).

Geomorphically stable streams transport sediment while maintaining

their horizontal and vertical dimensions (width to depth ratio and cross-sectional area), pattern (sinuosity), and longitudinal profile (riffles, runs, and pools), thereby conserving the physical characteristics of the stream, including bottom features such as riffles, runs, and pools and the transition zones between these features. The protection and maintenance of these habitat features accommodate spawning, rearing, growth, migration, and other normal behaviors of the laurel dace.

Strange and Skelton (2005, p. 8) assessed the genetic structure within populations of laurel dace, and, based on distribution of genetic diversity among populations, they recognized two genetically distinct management units: (1) The southern populations in Sale and Soddy creeks, and (2) the northern population in the Piney River system.

The current range of the laurel dace has been reduced to short reaches (approximately 0.3 to 8 rkm (0.2 to 5 rmi) in length) of six streams due to fragmentation and destruction of habitat. Fragmentation of the species' habitat has subjected these small populations to genetic isolation, reduced space for rearing and reproduction, reduced adaptive capabilities, and an increased likelihood of local extinctions (Burkhead *et al.* 1997, pp. 397–399; Hallerman 2003, pp. 363–364). Genetic variation and diversity within a species are essential for recovery, adaptation to environmental change, and long-term viability (capability to live, reproduce, and develop) (Harris 1984, pp. 93–107; Noss and Cooperrider 1994, pp. 282–297; Fluker *et al.* 2007, p. 2). The long-term viability of a species is founded on the conservation of numerous local populations throughout its geographic range (Harris 1984, pp. 93–104). Connectivity of these habitats is essential in preventing further fragmentation and isolation of laurel dace populations.

Therefore, based on the information above, we identify shallow pools and runs and associated stream segments of geomorphically stable, first- to second-order streams with riparian vegetation to be an essential physical or biological feature for the laurel dace. The connectivity of these habitats is essential in accommodating feeding, breeding, growth, and other normal behaviors of the laurel dace and in promoting gene flow within the species.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Cumberland Darter

Feeding habits of the Cumberland darter are unknown but are likely similar to that of its sister species, the Johnny darter (*Etheostoma nigrum* Rafinesque). Johnny darters are diurnal sight feeders, with prey items consisting of midge larvae, mayfly nymphs, caddisfly larvae, and microcrustaceans (Kuehne and Barbour 1983, p. 104; Etnier and Starnes 1993, p. 511). Similar to other darters, juvenile Cumberland darters likely feed on planktonic organisms or other small invertebrates.

Like most other darters, the Cumberland darter depends on perennial stream flows that create suitable habitat conditions needed for successful completion of its life cycle. An ample supply of flowing water provides a means of transporting nutrients and food items, moderating water temperatures and dissolved oxygen levels, removing fine sediments that could damage spawning or foraging habitats, and diluting nonpoint source pollutants. Water withdrawals do not represent a significant threat to the species, but the species is faced with occasional low-flow conditions that occur during periods of drought. One such event occurred in the summer and fall of 2007, when recorded streamflows in the upper Cumberland River basin of Kentucky and Tennessee (USGS Station Number 03404000) were among the lowest monthly values of the last 67 years (Cinotto 2008, pers. comm.).

Water quality is also important to the persistence of the Cumberland darter. The species requires relatively clean, cool, flowing water to successfully complete its life cycle, but specific water quality requirements (such as temperature, dissolved oxygen, pH, and conductivity) that define suitable habitat conditions for the Cumberland darter have not been determined. In general, optimal water quality conditions for fishes and other aquatic organisms are characterized by moderate stream temperatures, acceptable dissolved oxygen concentrations, and the lack of harmful levels of pollutants, such as inorganic contaminants like iron, manganese, selenium, and cadmium; organic contaminants such as human and animal waste products; pesticides and herbicides; nitrogen, potassium, and phosphorus fertilizers; and petroleum distillates.

Sediment is the most common pollutant within the upper Cumberland River system (KDOW 1996, pp. 50–53, 71–75; 2002, pp. 39–40; 2006, pp. 178–185), and the primary sources of sediment include resource extraction (e.g., coal mining, silviculture, natural gas development), agriculture, road construction, and urban development (Waters 1995, pp. 2–3; Skelton 1997, pp. 17, 19; KDOW 2006, pp. 178–185; Thomas 2007, p. 5). Siltation (excess sediments suspended or deposited in a stream) has been shown to abrade and suffocate bottom-dwelling organisms; reduce aquatic insect diversity and abundance; impair fish feeding behavior by altering prey base and reducing visibility of prey; impair reproduction due to burial of nests; and, ultimately, negatively impact fish growth, survival, and reproduction (Waters 1995, pp. 5–7, 55–62; Knight and Welch 2001, pp. 134–136). O'Bara (1991, p. 11) reported that Cumberland darter habitats are very susceptible to siltation because of the habitat's low to moderate gradient, low velocity, and shallow depth. O'Bara (1991, p. 11) concluded that siltation was the major limiting factor for the species' continued existence and its ability to colonize new stream systems.

Cumberland darters are threatened by water quality degradation caused by a variety of nonpoint source pollutants. Coal mining represents a major source of nonpoint source pollutants (O'Bara 1991, p. 11; Thomas 2007, p. 5), because it has the potential to contribute high concentrations of dissolved metals and other solids that lower stream pH or lead to elevated levels of stream conductivity (Pond 2004, pp. 6–7, 38–41; Mattingly *et al.* 2005, p. 59). These impacts have been shown to negatively affect fish species, including listed species, in the Clear Fork system of the Cumberland basin (Weaver 1997, pp. 29; Hartowicz 2008, pers. comm.). The direct effect of elevated stream conductivity on fishes, including the Cumberland darter, is poorly understood, but some species, such as blackside dace (*Chrosomus cumberlandensis*), have shown declines in abundance over time as conductivity increased in streams affected by mining (Hartowicz 2008, pers. comm.). Other nonpoint source pollutants that affect the Cumberland darter include domestic sewage (through septic tank leakage or straight pipe discharges); agricultural pollutants such as fertilizers, pesticides, herbicides, and animal waste; and other chemicals associated with oil and gas development. Nonpoint source pollutants can cause excess nutrification (increased levels of nitrogen and phosphorus), excessive algal growth, instream oxygen deficiencies, increased acidity and conductivity, and other

changes in water chemistry that can negatively impact aquatic species (KDOW 1996, pp. 48–50; 2006, pp. 70–73).

Therefore, based on the information above, we identify aquatic macroinvertebrate prey items; permanent surface flows, as measured during average rainfall years; and adequate water quality with substrates that are relatively silt-free to be an essential physical or biological feature for the Cumberland darter. Relatively silt-free is defined for the purpose of this rule as silt or fine sand within interstitial spaces of substrates in amounts low enough to have minimal impact to the species.

Rush Darter

Feeding habits of the rush darter are unknown but are likely similar to that of its sister species, the goldstripe darter (*Etheostoma parvipinne*). The goldstripe darter is a benthic (bottom) insectivore and is known to consume midge larvae, mayfly nymphs, blackfly larvae, beetles, and microcrustaceans (Mettee *et al.* 1996, p. 655). Extremes in variations in instream flows maintain the stream bottom substrates, providing oxygen and other attributes to various invertebrate life stages. Sedimentation has been shown to wear away and suffocate periphyton (organisms that live attached to objects underwater), disrupt aquatic insect communities (Waters 1995, pp. 53–86; Knight and Welch 2001, pp. 132–135), and reduce photosynthesis in aquatic vegetation. In addition, nutrification promotes heavy algal growth that covers and eliminates the clean rock, gravel, and vegetative habitats necessary for rush darter feeding. Thus, a decrease in water quality and instream flow would correspondingly cause a decline in the major food species for the rush darter. On the other hand, excessive instream flow can also damage and uproot aquatic vegetation necessary for foraging and feeding habitat.

Much of the cool, clean water provided to the Turkey Creek system (Beaver Creek, Unnamed Tributary to Beaver Creek, Tapawingo or Penny Springs and the Highway 79 site; Jefferson County) and Cove Spring run of Little Cove Creek (Etowah County) comes from consistent and steady groundwater sources (springs and seeps). Clear, flowing water provides a means for transporting nutrients and food items, moderating water temperatures and dissolved oxygen levels, and diluting nonpoint and point source pollution. Without clean water sources, water quality and water quantity would be considerably lower and would significantly impair the normal life stages and behavior of the rush darter.

Favorable water quantity for the rush darter includes moderate water velocity in riffles and no flow or low flow in pools (Stiles and Mills 2008, pp. 1–4), a continuous daily discharge that allows for longitudinal connectivity within the species' habitat (Instream Flow Council 2004, p. 117), and discharge from both surface water runoff and groundwater sources (springs and seepages). Along with the continuous daily discharge, both minimum and flushing flows are necessary to remove fine sediments and dilute other pollutants (Moffett and Moser 1978, pp. 20–21; Gilbert *et al.,* eds. 1994, pp. 505–522; Instream Flow Council 2004, pp. 103–104; Drennen 2009, pers. obs.). At some sites, water depth ranges from 3.0 to 50 cm (0.1 to 1.6 ft). Groundwater provides a constant source of flows to dilute pollutants and maintain water quality for the persistence of the rush darter.

Factors that can potentially alter water quality include: Droughts and periods of low seasonal flow, precipitation events, nonpoint source runoff, human activities within the watershed, random spills, unregulated stormwater discharge events (Instream Flow Council 2004, pp. 29–50), and water extraction. Instream pooling may also affect water quality by reducing water flow, altering temperatures, concentrating pollutants (Blanco and Mayden 1999, pp. 5–6, 36), and retarding aquatic and emergent vegetation growth.

Fishes require acceptable levels of dissolved oxygen. Generally, among fishes, the young life forms require more dissolved oxygen and are the most sensitive. The amount of dissolved oxygen that is present in the water (the saturation level) depends upon water temperature. As water temperature increases, the saturated dissolved oxygen level decreases. The more oxygen there is in the water, the greater the assimilative capacity (ability to consume organic wastes with minimal impact) of that water; lower water flows have a reduced assimilative capacity (Pitt 2000, pp. 6–7). Low-flow conditions affect the chemical environment occupied by fishes; extended low-flow conditions coupled with higher pollutant levels could likely result in behavioral changes within all life stages, which could be particularly detrimental to early life stages (e.g., embryo, larvae, and juvenile).

Optimal water quality lacks harmful levels of pollutants, such as inorganic contaminants like copper, arsenic, mercury, and cadmium; organic contaminants such as human and animal waste products; endocrine-disrupting chemicals; pesticides; nitrogen, potassium, and phosphorous fertilizers; and petroleum distillates (Alabama Department of Environmental Management (ADEM) 1996, pp. 13–15). Sediment is the most abundant pollutant produced in the Mobile River Basin (ADEM 1996, pp. 13–15). Siltation (excess sediments suspended or deposited in a stream) contributes to turbidity of the water and has been shown to reduce photosynthesis in aquatic plants, suffocate aquatic insects, smother fish eggs, clog fish gills, and may fill in essential interstitial spaces (spaces between stream substrates) used by aquatic organisms for spawning and foraging; therefore, excessive siltation negatively impacts fish growth, physiology, behavior, reproduction, and survival. Nutrification (excessive nutrients present, such as nitrogen and phosphorous) promotes heavy algal growth that covers and eliminates clean rock or gravel habitats and aquatic and emergent vegetation, which are necessary for rush darter feeding and spawning. Generally, early life stages of fishes are less tolerant of environmental contamination than adults or juveniles (Little *et al.* 1993, p. 67). Appropriate water quality and quantity are necessary to dilute impacts from stormwater and other unnatural effluents. Harmful levels of pollutants impair critical behavior processes in fishes, as reflected in population-level responses (reduced population size, biomass, year class success, etc.). However, excessive water quantity in the form of substantial stormwater runoff may destabilize and move bottom and bankside substrates and increase instream sedimentation.

Essential water quality attributes for darters and other fish species in fast to medium water flow streams include the following: Dissolved oxygen levels greater than 6 parts per million (ppm), temperatures between 7 and 26.7 °C (45 and 80 °F) with spring egg incubation temperatures from 12.2 to 18.3 °C (54 to 65 °F), a specific conductance (ability of water to conduct an electric current, based on dissolved solids in the water) of less than approximately 225 micro Siemens per cm at 26.7 °C (80 °F), and low concentrations of free or suspended solids (organic and inorganic sediments) less than 10 Nephelometric Turbidity Units (NTU; units used to measure sediment discharge) and 15 milligrams/Liter (mg/L) total suspended solids (TSS; measured as mg/L of sediment in water) (Teels *et al.* 1975, pp. 8–9; Ultschet *et al.* 1978, pp. 99–101; Ingersoll *et al.* 1984, pp. 131–138;

Kundell and Rasmussen 1995, pp. 211–212; Henley *et al.* 2000, pp. 125–139; Meyer and Sutherland 2005, pp. 43–64).

Therefore, based on the information above, we identify cool, clean, flowing water; shallow depths; moderate water velocity in riffles and low flow in pools; aquatic macroinvertebrate prey items; aquatic vegetation; and adequate water quality to be an essential physical or biological feature for the rush darter.

Yellowcheek Darter

Adult and juvenile yellowcheek darters' prey items include blackfly larvae, stonefly larvae, mayfly nymphs, and caddisfly larvae among other stream insects (McDaniel 1984, p. 56). McDaniel (1984, p. 37) noted a strong selectivity by yellowcheek darters for fly larvae year round, while other prey taxa were consumed proportionally depending on seasonal availability. Larval stages of yellowcheek darters have not been studied in the field but are assumed to feed on planktonic organisms based on laboratory rearing efforts and known larval fish dietary habits.

Drought conditions and low water levels have been identified as contributing factors in the decline of the yellowcheek darter (Wine *et al.* 2000, p. 11). Expanding natural gas development activities that began in the upper Little Red River watershed in 2005 require large quantities of water and pose a threat to the continued existence of the yellowcheek darter (75 FR 36045, June 24, 2010). Water diversion from the Middle and South forks has increased in recent years due to large-scale extraction of natural gas in the Fayetteville Shale (which encompasses nearly all of the upper Little Red River drainage). Natural gas development is imminent in the Archey and Devil's forks as well and is predicted to affect numerous tributaries in all four watersheds. Because the yellowcheek darter requires permanent flows with moderate to strong current (Robison and Buchanan 1988, p. 429), seasonal fluctuations in stream flows exacerbated by water diversion for natural gas, agricultural, municipal, or other land uses represent a serious threat to the species.

In addition to water quantity, water quality is also important to the persistence of the yellowcheek darter. Although the Middle Fork is designated as an Extraordinary Resource Water, it is listed as impaired along a 33.5-km (20.8-mi) reach due to fecal coliform bacteria contamination according to the Arkansas Department of Environmental Quality (ADEQ) List of Impaired Waterbodies. This same report listed a 3.2-km (2.0-mi) stretch of the South Fork as impaired due to elevated mercury levels (ADEQ 2010, p. 22). Boston Mountain streams that support the yellowcheek darter are typically characterized by adequate water quality; however, increasing activity within the watersheds related to resource extraction, urban development, and other human-related activities is reason for concern regarding the recovery potential of the yellowcheek darter.

Therefore, based on the information above, we identify aquatic macroinvertebrate prey items; permanent surface flows, as measured during average rainfall years; moderate to strong water velocity in riffles; and adequate water quality to be an essential physical or biological feature for the yellowcheek darter.

Chucky Madtom

The Chucky madtom's prey items are unknown; however, least madtom (*Noturus hildebrandi*) prey items include midge larvae, caddisfly larvae, stonefly larvae, and mayfly nymphs (Mayden and Walsh 1984, p. 339). In smoky madtoms, mayfly nymphs comprised 70.7 percent of stomach contents analyzed, followed by fly, mosquito, midge, and gnat larvae (2.4 percent); caddisfly larvae (4.4 percent); and stonefly larvae (1.0 percent) (Dinkins and Shute 1996, p. 61). Significant daytime feeding was observed in smoky madtoms.

The TVA Index of Biological Integrity results indicate that Little Chucky Creek is biologically impaired (Middle Nolichucky Watershed Alliance 2006, p. 13). Given the predominantly agricultural land use within the Little Chucky Creek watershed, nonpoint source sediment and agrochemical discharges may pose a threat to the Chucky madtom by altering the physical characteristics of its habitat, thus potentially impeding its ability to feed, seek shelter from predators, and successfully reproduce. The City of Greeneville also discharges sediments and contaminants into the creek, thereby threatening the Chucky madtom. Wood and Armitage (1997, pp. 211–212) identify at least five impacts of sedimentation on fish, including: (1) Reduction of growth rate, disease tolerance, and gill function; (2) reduction of spawning habitat and egg, larvae, and juvenile development; (3) modification of migration patterns; (4) reduction of food availability through the blockage of primary production; and (5) reduction of foraging efficiency.

Water quality is important to the persistence of the Chucky madtom. The species requires relatively clean, cool, flowing water to successfully complete its life cycle, but specific water quality requirements (such as temperature, dissolved oxygen, pH, and conductivity) that define suitable habitat conditions for the Chucky madtom have not been determined. In general, optimal water quality conditions for fishes and other aquatic organisms are characterized by moderate stream temperatures and acceptable dissolved oxygen concentrations, and they lack harmful levels of pollutants, such as inorganic contaminants like iron, manganese, selenium, and cadmium; organic contaminants such as human and animal waste products; pesticides and herbicides; nitrogen, potassium, and phosphorus fertilizers; and petroleum distillates.

As relatively sedentary animals, madtoms must tolerate the full range of such parameters that occur naturally within the streams where they persist. Both the amount of water (flow) and its physical and chemical conditions (water quality) vary widely according to seasonal precipitation events and seasonal human activities within the watershed. In general, the species survives in areas where the magnitude, frequency, duration, and seasonality of water flow is adequate to remove fine particles and sediments (silt-free) without causing degradation, and where water quality is adequate for year-round survival (for example, moderate to high levels of dissolved oxygen, low to moderate input of nutrients, and relatively unpolluted water and sediments). Relatively silt-free is defined for the purpose of this rule as silt or fine sand within interstitial spaces of substrates in amounts low enough to have minimal impact to the species.

Therefore, based on the information above, we identify aquatic macroinvertebrate prey items; cool, clean, flowing water; shallow depths; permanent surface flows, as measured during average rainfall years; and adequate water quality with substrates that are relatively silt-free to be an essential physical or biological feature for the Chucky madtom.

Laurel Dace

The laurel dace's preferred prey items include fly larvae, stonefly larvae, and caddisfly larvae (Skelton 2001, p. 126). Skelton observed that the morphological feeding traits of laurel dace, including a large mouth, short digestive tract, reduced number of pharyngeal (located within the throat) teeth, and primitively shaped basioccipital bone (bone that articulates the vertebra), are consistent with a diet consisting largely of animal material.

Strange and Skelton (2005, p. 7 and Appendix 2) identified siltation as a threat in all of the occupied Piney River tributaries (Youngs, Moccasin, and Bumbee Creeks). The Bumbee Creek type locality for the laurel dace is located within industrial forest that has been subjected to extensive clear-cutting and road construction in close proximity to the stream. Strange and Skelton (2005, p. 7) noted a heavy sediment load at this locality and commented that conditions there in 2005 had deteriorated since the site was visited by Skelton in 2002. In general, the species occupies areas that are relatively silt-free. Relatively silt-free is defined for the purpose of this rule as silt or fine sand within interstitial spaces of substrates in amounts low enough to have minimal impact to the species.

Strange and Skelton (2005, pp. 7 and 8 and Appendix 2) also commented on excessive siltation in localities they sampled on Youngs and Moccasin creeks, and observed localized removal of riparian vegetation around residences in the headwaters of each of these streams. They considered the removal of riparian vegetation problematic not only for the potential for increased siltation, but also for the potential thermal alteration of these small headwater streams. Skelton (2001, p. 125) reported that laurel dace occupy cool streams with a maximum recorded temperature of 26 °C (78.8 °F). The removal of riparian vegetation could potentially increase temperatures above the laurel dace's maximum tolerable limit.

Water quality is important to the persistence of the laurel dace. The species requires relatively clean, cool, flowing water to successfully complete its life cycle, but specific water quality requirements (such as temperature, dissolved oxygen, pH, and conductivity) that define suitable habitat conditions for the laurel dace have not been determined. In general, optimal water quality conditions for fishes and other aquatic organisms are characterized by moderate stream temperatures and acceptable dissolved oxygen concentrations, and they lack harmful levels of pollutants, such as inorganic contaminants like iron, manganese, selenium, and cadmium; organic contaminants such as human and animal waste products; pesticides and herbicides; nitrogen, potassium, and phosphorus fertilizers; and petroleum distillates.

Other factors that can potentially alter water quality and quantity are droughts and periods of low flow, nonpoint source run-off from adjacent land surfaces (for example, excessive amounts of nutrients, pesticides, and sediment), and random spills or unregulated discharge events. Run-off or discharges could be particularly harmful during drought conditions when flows are depressed and pollutants are more concentrated. Adequate water quality is essential for normal behavior, growth, and viability during all life stages of the laurel dace. Adequate water quantity and flow and good to optimal water quality are essential for normal behavior, growth, and viability during all life stages. Culverts, pipes, and bridge or road maintenance sites within the watersheds serve as dispersal barriers and have altered stream flows from natural conditions.

Other nonpoint source pollutants that affect the laurel dace include domestic sewage (through septic tank leakage or straight pipe discharges) and agricultural pollutants such as fertilizers, pesticides, herbicides, and animal waste. There are no active coal mines within the range of the laurel dace; however, coal mining represents a potential threat to the species in the foreseeable future. Coal mining represents a major source of nonpoint source pollutants because it has the potential to contribute high concentrations of dissolved metals and other solids that lower stream pH or lead to elevated levels of stream conductivity (Pond 2004, pp. 6–7, 38–41; Mattingly *et al.* 2005, p. 59). The direct effect of elevated stream conductivity on fishes, including the laurel dace, is poorly understood, but some species, such as blackside dace, have shown declines in abundance over time as conductivity increased in streams affected by mining (Hartowicz 2008, pers. comm.).

Water temperature may also be a limiting factor in the distribution of this species (Skelton 1997, pp. 17, 19). Canopy cover of laurel dace streams often consists of eastern hemlock (*Tsuga canadensis*), mixed hardwoods, pines (*Pinus* sp.), and mountain laurel (*Kalmia latifolia*). The hemlock woolly adelgid (*Adelges tsugae*) is a nonnative insect that infests hemlocks, causing damage or death to trees. The hemlock woolly adelgid was recently found in Hamilton County, Tennessee, and could impact eastern hemlock in floodplains and riparian buffers along laurel dace streams in the future (Simmons 2008, pers. comm.). Riparian buffers filter sediment and nutrients from overland runoff, allow water to soak into the ground, protect stream banks and lakeshores, and provide shade for streams. Because eastern hemlock is primarily found in riparian areas, the loss of this species adjacent to laurel dace streams would be detrimental to fish habitat.

Therefore, based on the information above, we identify aquatic macroinvertebrate prey items; cool, clean, flowing water; shallow depths; permanent surface flows, as measured during average rainfall years; and adequate water quality with substrates that are relatively silt-free to be an essential physical or biological feature for the laurel dace.

Cover or Shelter

Cumberland Darter

Cumberland darters depend on specific habitats and bottom substrates for normal life processes such as spawning, rearing, resting, and foraging. As described above, the species' preferred habitats (shallow pools and runs) are dominated by sand or sand-covered bedrock with patches of gravel or debris (Thomas 2007, p. 4). Individuals were observed by O'Bara (1991, p. 10) and Thomas (2007, p. 4) in gently flowing runs or pools at depths ranging from 20 to 76 cm (average 36.2 cm) (3.9 to 30 in, average 14.3 in). Most of these habitats contain isolated boulders and large cobble that the species likely uses as cover. According to O'Bara (1991, p. 11), areas used by the Cumberland darter for cover and shelter are very susceptible to the effects of siltation, and the presence of relatively silt-free substrates is the major limiting factor for both the species' continued existence and its ability to colonize new habitats. Relatively silt-free is defined for the purpose of this rule as silt or fine sand within interstitial spaces of substrates in amounts low enough to have minimal impact to the species.

Therefore, based on the information above, we identify stable, shallow pools and runs with relatively silt-free sand, sand-covered bedrock substrates, and isolated boulders and large cobble substrates to be an essential physical or biological feature for the Cumberland darter.

Rush Darter

Rush darters depend on specific stream substrates and stream margins consisting of aquatic vegetation for normal and robust life processes such as spawning, rearing, protection of young, protection of adults when threatened, foraging, and feeding. Preferred substrates are dominated by fine gravel, with lesser amounts of sand, fine silt, coarse gravel, cobble, and bedrock (Blanco and Mayden 1999, pp. 24–26; Drennen 2009, pers. obs.). In addition to these preferred substrates, rush darters

generally prefer aquatic emergent vegetation such as watercress (*Nasturtium officinale*), parrots feather (*Myriophyllum* sp.), rushes (*Juncus* spp.), sedges (*Carex* spp.), burr reed (*Sparganium* sp.), and coontail (*Ceratophyllum* sp.). This emergent vegetation is utilized by the rush darter, especially in the quiet water along stream margins and in ephemeral pools and tributaries (Boschung and Mayden 2004, p. 552; Stiles 2011, pers. comm.).

Excessive siltation of gravel substrates removes foraging and feeding sites for the rush darter (Sylte and Fischenich 2002, pp. 1–25), and eliminates conditions necessary for some aquatic plant species to flourish. Similarly, excessive nutrients promote dense filamentous algae growth on the substrate and within the water column (Drennen 2007, pers. obs.; Stiles 2011, pers. comm.), which may restrict rush darter habitat for foraging and spawning (Stiles 2011, pers. comm.).

Stormwater flows may result in scouring and erosion of important cover, breeding, and sheltering sites for the rush darter. Conversely, drought conditions render the darter populations vulnerable to higher water temperatures and restricted habitat, especially during the breeding season when they concentrate in wetland pools and shallow pools of headwater streams (Fluker *et al.* 2007, p. 10).

Therefore, based on the information above, we identify quiet water along stream margins and in shallow ephemeral pools and headwater tributaries; aquatic emergent vegetation; a combination of silt, sand, and gravel substrates; and seasonal stream flows sufficient to provide connectivity and to remove excessive sediment covering the vegetation and stream bottom substrates to be an essential physical or biological feature for the rush darter.

Yellowcheek Darter

Summertime habitat selected by the yellowcheek darter includes high-velocity (greater than 0.4 meters per second or 1.3 feet per second) water over 8 to 128 millimeters (mm) (0.3 to 5.0 in) gravel and cobble substrate at depths of 11 to 30 cm (4.3 to 11.8 in) (Brophy and Stoeckel 2006, p. 42), which lends evidence to the suggestion by other researchers that it is a ''riffle-obligate'' species and is unlikely to occupy pool or run habitats when riffles are available. Preferred water depths for yellowcheek darters ranged between 11 and 30 cm (4.3 and 11.8 in), but yellowcheek darters have been found in shallower water, when greater depths with suitable velocities were scarce. Gravel and cobble from 8 to 128 mm (0.3 to 5.0 in) median diameter appears to be the important substrate type for yellowcheek darter (Brophy and Stoeckel 2006, p. 42). Larger boulder substrates are important during spring spawning periods (McDaniel 1984, p. 82). Siltation (excess sediments suspended or deposited in a stream) contributes to turbidity of the water and has been shown to suffocate aquatic insects, smother fish eggs, clog fish gills, and may fill in essential interstitial spaces (spaces between stream substrates) used by aquatic organisms for spawning and foraging; therefore, excessive siltation negatively impacts fish growth, physiology, behavior, reproduction, and survival. In general, the species occupies areas that are relatively silt-free. Relatively silt-free is defined for the purpose of this rule as silt or fine sand within interstitial spaces of substrates in amounts low enough to have minimal impact to the species.

Therefore, based on the information above, we identify high-quality riffle substrates that are relatively silt-free and contain a mixture of gravel, cobble, and boulder substrates to be an essential physical or biological feature for the yellowcheek darter.

Chucky Madtom

While nothing is known specifically about Chucky madtom habitat preferences, available information for other similar members of the *Noturus* group is known. Both smoky and elegant madtoms (*N. elegans*) were found to nest under flat rocks (slab-rock boulders) at or near the head of riffles (Burr and Dimmick 1981, p. 116; Dinkins and Shute 1996, p. 56). Smoky madtoms have also been observed using shallow pools and to select rocks of larger dimension for nesting than were used for shelter during other times of year (Dinkins and Shute 1996, p. 56). Siltation (excess sediments suspended or deposited in a stream) contributes to turbidity of the water and has been shown to smother fish eggs, clog fish gills, and may fill in essential interstitial spaces (spaces between stream substrates) used by aquatic organisms for spawning and foraging; therefore, excessive siltation negatively impacts fish growth, physiology, behavior, reproduction, and survival.

Dinkins and Shute (1996, p. 50) found smoky madtoms underneath slab-rock boulders in swift to moderate current during May to early November. Habitat use shifted to shallow pools over the course of a 1-week period, coinciding with a drop in water temperature to 7 or 8 °C (45 to 46 °F), and persisted from early November to May. Eisenhour *et al.* (1996, p. 43) collected saddled madtoms in gravel, cobble, and slab-rock boulder substrates in riffle habitats with depths ranging from 0.1 to 0.3 m (0.33 to 0.98 ft). Based on their limited number of observations, Eisenhour *et al.* (1996, p. 43) hypothesized that saddled madtoms occupy riffles and runs in the daylight hours and then move to pools at night and during crepuscular hours (dawn and dusk) to feed.

Therefore, based on the information above, we identify gently flowing runs and pools with relatively silt-free flat gravel, cobble, and slab-rock boulder substrates to be an essential physical or biological feature for the Chucky madtom.

Laurel Dace

Laurel dace have been most often collected from pools or slow runs from undercut banks or beneath slab-rock boulders, typically in first- or second-order, clear, cool (maximum recorded temperature 26 °C or 78.8 °F) streams. Substrates in streams where laurel dace are found typically consist of a mixture of cobble, rubble, and boulder, and the streams tend to have a dense riparian zone consisting largely of mountain laurel (Skelton 2001, pp. 125–126). Siltation (excess sediments suspended or deposited in a stream) contributes to turbidity of the water and has been shown to smother fish eggs, clog fish gills, and may fill in essential interstitial spaces (spaces between stream substrates) used by aquatic organisms for spawning and foraging; therefore, excessive siltation negatively impacts fish growth, physiology, behavior, reproduction, and survival.

Water temperature may be a limiting factor in the distribution of this species (Skelton 1997, pp. 17, 19). Canopy cover of laurel dace streams often consists of eastern hemlock (*Tsuga canadensis*), mixed hardwoods, pines (*Pinus* spp.), and mountain laurel (*Kalmia latifolia*). Riparian buffers filter sediment and nutrients from overland runoff, allow water to soak into the ground, protect stream banks and lakeshores, and provide shade for streams. The hemlock woolly adelgid is a nonnative insect that infests hemlocks, causing damage or death to trees. The woolly adelgid was recently found in Hamilton County, Tennessee, and could impact eastern hemlock in floodplains and riparian buffers along laurel dace streams in the future (Simmons 2008, pers. comm.). Because eastern hemlock is primarily found in riparian areas, the loss of this species adjacent to laurel dace streams would be detrimental to fish habitat.

Habitat destruction and modification also stem from existing or proposed

infrastructure development in association with silvicultural activities. The presence of culverts at one or more road crossings in most of the streams inhabited by laurel dace may disrupt upstream dispersal within those systems (Chance 2008, pers. obs.). Such dispersal barriers could prevent re-establishment of laurel dace populations in reaches where they suffer localized extinctions due to natural or human-caused events.

Therefore, based on the information above, we identify stream connectivity, gently flowing runs and pools with relatively silt-free cobble and slab-rock boulder substrates with undercut banks, and canopy cover to be an essential physical or biological feature for the laurel dace.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

Cumberland Darter

Little is known regarding the reproductive habits of the Cumberland darter. Thomas (2007, p. 4) reported the collection of male Cumberland darters in breeding condition in April and May, with water temperatures ranging from 15 to 18 °C (59 to 64 °F). Extensive searches by Thomas (2007, p. 4) produced no evidence of nests or eggs at these sites. Reproductive habits of its closest relative, the Johnny darter, have been well studied by Winn (1958a, pp. 163–183; 1958b, pp. 205–207), Speare (1965, pp. 308–314), and Bart and Page (1991, pp. 80–86). Spawning occurs from April to June, with males migrating to spawning areas prior to females and establishing territories at selected spawning sites. Males establish a nest under a submerged object (boulder or woody debris) by using fin movements to remove silt and fine debris. Females enter the nests, the spawning pair inverts, and females deposit between 40 and 200 adhesive eggs on the underside of the nest object. Males care for the nest by periodically fanning the area to remove silt. The eggs hatch in about 6 to 16 days, depending on water temperature. Hatchlings are about 5 mm (0.2 in) and reach 29 to 38 mm (1.1 to 1.5 in) at age 1. Given these specialized reproductive behaviors, it is apparent that the Cumberland darter requires second- to fourth-order streams containing gently flowing run and pool habitats with sand and bedrock substrates, boulders, woody debris, or other cover and that are relatively silt-free. It is essential to maintain the connectivity of these sites, to accommodate breeding, growth, and other normal behaviors of the Cumberland darter and to promote gene flow within the species.

Therefore, based on the information above, we identify stable, second- to fourth-order streams containing gently flowing run and pool habitats with sand and bedrock substrates, boulders, large cobble, woody debris, or other cover and that are relatively silt-free and stream connectivity to be an essential physical or biological feature for the Cumberland darter.

Rush Darter

Rush darters depend on bottom substrates dominated by sand, fine silt, fine gravel and some coarse gravel, and that have significant amounts of emergent aquatic and overhanging terrestrial vegetation (Drennen 2009, pers. obs.).

In July 2008, rush darter young-of-the-year were collected within areas of very little water in the headwaters of an unnamed tributary in Jefferson County (Kuhajda 2008, pers. comm.), and in January 2008, the same tributary was dry. In previous years, this area was a spawning and nursery site for rush darters (Kuhajda 2008, pers. comm.). During May and June, rush darters spawned at this site even though the area had been dewatered occasionally in the summer, fall, and winter (Kuhajda 2008, pers. comm.). Adult rush darters are present in headwater areas for spawning during May and June, and may leave these sites or become trapped in ephemeral pools during the summer. Adults may be migrating upstream from watered areas, or juveniles and adults may be moving downstream from the spring-fed wetland that constitutes the headwaters of the unnamed tributary (Kuhajda 2008, pers. comm.).

Therefore, based on the information above, we identify permanent and ephemeral shallow streams with quiet water along stream margins and in shallow ephemeral pools and headwater tributaries, along with seasonal stream flows sufficient to provide connectivity and refugia to promote the emergent aquatic vegetation necessary for spawning and rearing of young, to be an essential physical or biological feature for the rush darter.

Yellowcheek Darter

Yellowcheek darter spawning occurs from late May through June in the swift to moderately swift portions of riffles, often around or under the largest rocks (McDaniel 1984, p. 82), although brooding females have been found at the head of riffles in smaller gravel substrate (Wine *et al.* 2000, p. 3). During non-spawning months, there is a general movement to portions of the riffle with smaller substrate, such as gravel or cobble, and less turbulence (Robison and Harp 1981, p. 3). Weston and Johnson (2005, p. 24) observed that the yellowcheek darter moved very little during a 1-year migration study, with 19 of 22 recaptured darters found within 9 m (29.5 ft) of their original capture position after periods of several months.

A number of life-history characteristics, including courtship patterns, specific spawning behaviors, egg deposition sites, number of eggs per nest, degree of nest protection by males, and degree of territoriality, are unknown at this time; however, researchers suggest that yellowcheek darters deposit eggs on the undersides of larger rubble in swift water (McDaniel 1984, p. 82). Wine and Blumenshine (2002, p. 10) noted that during laboratory spawning, yellowcheek darter females bury themselves in fine gravel or sand substrates (often behind large, fist-sized cobble) with only their heads and caudal fin exposed. A yellowcheek darter male will then position himself upstream of the buried female and fertilize her eggs. Clutch size and nest defense behavior were not observed. Given these specialized reproductive behaviors, the importance of riffle habitats that are characterized by good water quality and sufficient substrates that are relatively silt-free is apparent.

Therefore, based on the information above, we identify swift to moderately swift riffles with gravel, cobble, and boulder substrates that are characterized by good water quality and are relatively silt-free to be an essential physical or biological feature for the yellowcheek darter.

Chucky Madtom

Little is known regarding the reproductive habits of the Chucky madtom; however, both smoky and elegant madtoms were found to nest under flat slab-rock boulders at or near the head of riffles (Burr and Dimmick 1981, p. 116; Dinkins and Shute 1996, p. 56). Shallow pools were also used by the smoky madtom. Smoky madtoms selected larger rocks for nesting than were used for shelter during other times of year (Dinkins and Shute 1996, p. 56). A single male madtom guards the nest in the cases of smoky, elegant, Ozark (*Noturus albater*), and least madtoms (Mayden *et al.* 1980, p. 337; Burr and Dimmick 1981, p. 116; Mayden and Walsh 1984, p. 357; Dinkins and Shute 1996, p. 56). While guarding the nest, many were found to have empty stomachs suggesting that they do not feed during nest guarding, which can last as long as 3 weeks.

Siltation (excess sediments suspended or deposited in a stream) contributes to turbidity of the water and has been shown to smother fish eggs, clog fish gills, and may fill in essential interstitial spaces (spaces between stream substrates) used by aquatic organisms for spawning and foraging; therefore, excessive siltation negatively impacts fish growth, physiology, behavior, reproduction, and survival.

Therefore, based on the information above, we identify streams containing gently flowing run and pool habitats with flat or slab-rock boulder substrates that are relatively silt-free to be an essential physical or biological feature for the Chucky madtom.

Laurel Dace

Little is known regarding the reproductive habits of the laurel dace. Skelton (2001, p. 126) reported having collected nuptial individuals from late March until mid-June, although Call (2004, pers. obs.) observed males in waning nuptial color during surveys on July 22, 2004. Laurel dace may be a spawning nest associate with nest-building minnow species, as has been documented in blackside dace (Starnes and Starnes 1981, p. 366). Soddy Creek is the only location in which Skelton (2001, p. 126) collected a nest-building minnow with laurel dace. Skelton (2001, p. 127) observed laurel dace burying their noses in the gravel of largescale stoneroller (*Campostoma oligolepis*) nests. The nests used by blackside dace had moderate flow and consisted of gravel substrate at depths of 20 cm (7.9 in) (Starnes and Starnes 1981, p. 366). These nests were noted to be approximately 0.7 m (2.3 ft) from undercut banks (Starnes and Starnes 1981, p. 366).

Siltation (excess sediments suspended or deposited in a stream) contributes to turbidity of the water and has been shown to smother fish eggs, clog fish gills, and may fill in essential interstitial spaces (spaces between stream substrates) used by aquatic organisms for spawning and foraging; therefore, excessive siltation negatively impacts fish growth, physiology, behavior, reproduction, and survival.

Therefore, based on the information above, we identify headwater streams containing moderately flowing run and pool habitats with gravel substrates, containing undercut banks, and that are relatively silt-free to be an essential physical or biological feature for the laurel dace.

Primary Constituent Elements

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of the Cumberland darter, rush darter, yellowcheek darter, Chucky madtom, and laurel dace in areas occupied at the time of listing, focusing on the features' primary constituent elements. Primary constituent elements are those specific elements of the physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the five species' life history processes, we determine that the primary constituent elements specific to these five fishes are:

Cumberland Darter

(1) Primary Constituent Element 1—Shallow pools and gently flowing runs of geomorphically stable, second- to fourth-order streams with connectivity between spawning, foraging, and resting sites to promote gene flow throughout the species' range.

(2) Primary Constituent Element 2—Stable bottom substrates composed of relatively silt-free sand and sand-covered bedrock, boulders, large cobble, woody debris, or other cover.

(3) Primary Constituent Element 3—An instream flow regime (magnitude, frequency, duration, and seasonality of discharge over time) sufficient to provide permanent surface flows, as measured during years with average rainfall, and to maintain benthic habitats utilized by the species.

(4) Primary Constituent Element 4—Adequate water quality characterized by moderate stream temperatures, acceptable dissolved oxygen concentrations, moderate pH, and low levels of pollutants. Adequate water quality is defined for the purpose of this rule as the quality necessary for normal behavior, growth, and viability of all life stages of the Cumberland darter.

(5) Primary Constituent Element 5—Prey base of aquatic macroinvertebrates, including midge larvae, mayfly nymphs, caddisfly larvae, and microcrustaceans.

Rush Darter

(1) Primary Constituent Element 1—Springs and spring-fed reaches of geomorphically stable, relatively low-gradient, headwater streams with appropriate habitat (bottom substrates) to maintain essential riffles, runs, and pools; emergent vegetation in shallow water and on the margins of small streams and spring runs; cool, clean, flowing water; and connectivity between spawning, foraging, and resting sites to promote gene flow throughout the species' range.

(2) Primary Constituent Element 2—Stable bottom substrates consisting of a combination of sand with silt, muck, gravel, or bedrock and adequate emergent vegetation in shallow water on the margins of small permanent and ephemeral streams and spring runs.

(3) Primary Constituent Element 3—Instream flow with moderate velocity and a continuous daily discharge that allows for a longitudinal connectivity regime inclusive of both surface runoff and groundwater sources (springs and seepages) and exclusive of flushing flows caused by stormwater runoff.

(4) Primary Constituent Element 4—Water quality with temperature not exceeding 26.7 °C (80 °F), dissolved oxygen 6.0 milligrams or greater per liter (mg/L), turbidity of an average monthly reading of 10 Nephelometric Turbidity Units (NTU; units used to measure sediment discharge) and 15mg/L total suspended solids (TSS; measured as mg/L of sediment in water) or less; and a specific conductance (ability of water to conduct an electric current, based on dissolved solids in the water) of no greater than 225 micro Siemens per centimeter at 26.7 °C (80 °F).

(5) Primary Constituent Element 5—Prey base of aquatic macroinvertebrates, including midge larvae, mayfly nymphs, blackfly larvae, beetles, and microcrustaceans.

Yellowcheek Darter

(1) Primary Constituent Element 1—Geomorphically stable, second- to fifth-order streams with riffle habitats, and connectivity between spawning, foraging, and resting sites to promote gene flow within the species' range where possible.

(2) Primary Constituent Element 2—Stable bottom composed of relatively silt-free, moderate to strong velocity riffles with gravel, cobble, and boulder substrates.

(3) Primary Constituent Element 3—An instream flow regime (magnitude, frequency, duration, and seasonality of discharge over time) sufficient to provide permanent surface flows, as measured during years with average rainfall, and to maintain benthic habitats utilized by the species.

(4) Primary Constituent Element 4—Adequate water quality characterized by moderate stream temperatures, acceptable dissolved oxygen concentrations, moderate pH, and low levels of pollutants. Adequate water quality is defined for the purpose of this rule as the quality necessary for normal behavior, growth, and viability of all life stages of the yellowcheek darter.

(5) Primary Constituent Element 5—Prey base of aquatic macroinvertebrates, including blackfly larvae, stonefly larvae, mayfly nymphs, and caddisfly larvae.

Chucky Madtom

(1) Primary Constituent Element 1—Gently flowing run and pool reaches of geomorphically stable streams with cool, clean, flowing water; shallow depths; and connectivity between spawning, foraging, and resting sites to promote gene flow throughout the species' range.

(2) Primary Constituent Element 2—Stable bottom substrates composed of relatively silt-free, flat gravel, cobble, and slab-rock boulders.

(3) Primary Constituent Element 3—An instream flow regime (magnitude, frequency, duration, and seasonality of discharge over time) sufficient to provide permanent surface flows, as measured during years with average rainfall, and to maintain benthic habitats utilized by the species.

(4) Primary Constituent Element 4—Adequate water quality characterized by moderate stream temperatures, acceptable dissolved oxygen concentrations, moderate pH, and low levels of pollutants. Adequate water quality is defined for the purpose of this rule as the quality necessary for normal behavior, growth, and viability of all life stages of the Chucky madtom.

(5) Primary Constituent Element 5—Prey base of aquatic macroinvertebrates, including midge larvae, mayfly nymphs, caddisfly larvae, and stonefly larvae.

Laurel Dace

(1) Primary Constituent Element 1—Pool and run habitats of geomorphically stable, first- to second-order streams with riparian vegetation; cool, clean, flowing water; shallow depths; and connectivity between spawning, foraging, and resting sites to promote gene flow throughout the species' range.

(2) Primary Constituent Element 2—Stable bottom substrates composed of relatively silt-free gravel, cobble, and slab-rock boulder substrates with undercut banks and canopy cover.

(3) Primary Constituent Element 3—An instream flow regime (magnitude, frequency, duration, and seasonality of discharge over time) sufficient to provide permanent surface flows, as measured during years with average rainfall, and to maintain benthic habitats utilized by the species.

(4) Primary Constituent Element 4—Adequate water quality characterized by moderate stream temperatures, acceptable dissolved oxygen concentrations, moderate pH, and low levels of pollutants. Adequate water quality is defined for the purpose of this rule as the quality necessary for normal behavior, growth, and viability of all life stages of the laurel dace.

(5) Primary Constituent Element 5—Prey base of aquatic macroinvertebrates, including midge larvae, caddisfly larvae, and stonefly larvae.

With this designation of critical habitat, we intend to identify the physical or biological features essential to the conservation of these five species, through the identification of the features' primary constituent elements sufficient to support life-history processes of these species.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the areas within the geographical area occupied by the species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protection.

Cumberland Darter

The 15 units we are designating as critical habitat for the Cumberland darter will require some level of management to address the current and future threats to the physical and biological features of the species. Due to their location on the Daniel Boone National Forest (DBNF), at least a portion of 13 of the 15 critical habitat units are being managed and protected under DBNF's Land and Resource Management Plan (LRMP) (United States Forest Service (USFS) 2004, pp. 1–14). The LRMP is implemented through a series of project-level decisions based on appropriate site-specific analysis and disclosure. It does not contain a commitment to select any specific project; rather, it sets up a framework of desired future conditions with goals, objectives, and standards to guide project proposals. Projects are proposed to solve resource management problems, move the forest environment toward desired future conditions, and supply goods and services to the public (USFS 2004, pp. 1–14). The LRMP contains a number of protective standards that in general are designed to avoid and minimize potential adverse effects to the Cumberland darter and other federally listed species; however, the DBNF will continue to conduct project-specific section 7 consultation under the Act when their activities may adversely affect streams supporting Cumberland darters.

Two of the 15 critical habitat units are located entirely on private property and are not presently under the special management or protection provided by a legally operative plan or agreement for the conservation of the species. Activities in or adjacent to these 15 critical habitat areas may affect one or more of the physical and biological features essential to the Cumberland darter. For example, features in this critical habitat designation may require special management due to threats posed by resource extraction (coal surface mining, silviculture, natural gas and oil exploration activities), agricultural activities (livestock), lack of adequate riparian buffers, presence of perched road culverts or impassable road crossings that restrict fish movement, construction and maintenance of State and county roads, nonpoint source pollution arising from stormwater runoff, and canopy loss caused by infestations of the hemlock woolly adelgid. These threats are in addition to adverse effects of drought, floods, or other natural phenomena. Other activities that may affect physical and biological features in the critical habitat units include those listed in the Effects of Critical Habitat Designation section below.

Management activities that could ameliorate these threats include, but are not limited to: Use of BMPs designed to reduce sedimentation, erosion, and bank side destruction; moderation of surface and ground water withdrawals to maintain natural flow regimes; increase of stormwater management and reduction of stormwater flows into the systems; preservation of headwater springs and streams; regulation of off-road vehicle use; removal or replacement of perched culverts or fords that can restrict darter movements and reduce genetic exchange between populations; and reduction of other watershed and floodplain disturbances that release sediments, pollutants, or nutrients into the water.

In summary, we find that the areas we are designating as critical habitat for the Cumberland darter contain the physical or biological features for the species, and that these features may require special management considerations or protection. Special management consideration or protection may be required to eliminate, or to reduce to negligible levels, the threats affecting the physical or biological features of each unit.

Rush Darter

The eight units we are designating as critical habitat for the rush darter will require some level of management to address the current and future threats to the physical and biological features of

the rush darter. None of the critical habitat units (or their corresponding aquifer recharge zones, which are not designated as critical habitat) are presently under special management or protection provided by a legally operative plan or agreement for the conservation of the rush darter. However, 4.7 rkm (2.9 rmi) of the Turkey Creek watershed (Jefferson County) is designated critical habitat for the vermilion darter (*Etheostoma chermocki*) (75 FR 75913, December 7, 2010) which includes a portion of rush darter unit 2. Various activities in or adjacent to the critical habitat units described in this final rule may affect one or more of the physical and biological features. For example, features in the critical habitat designation may require special management due to threats posed by the following activities or disturbances: Urbanization activities and inadequate stormwater management (such as stream channel modification for flood control or gravel extraction) that could cause an increase in bank erosion; significant changes in the existing flow regime within the streams due to water diversion or withdrawal; significant alteration of water quality; significant alteration in the quantity of groundwater, prevention of water from percolating into the aquifer recharge zone, and alteration of spring discharge sites; significant changes in stream bed material composition and quality due to construction projects and maintenance activities; off-road vehicle use; sewer, gas, and water easements; bridge construction; culvert and pipe installation; and other watershed and floodplain disturbances that release sediments or nutrients into the water. Other activities that may affect physical and biological features in the critical habitat units include those listed in the Effects of Critical Habitat Designation section below.

Management activities that could ameliorate these threats include, but are not limited to: Use of BMPs designed to reduce sedimentation, erosion, and bank side destruction; moderation of surface and ground water withdrawals to maintain natural flow regimes; increase of stormwater management and reduction of stormwater flows into the systems; preservation of headwater springs, spring runs, and ephemeral rivulets; regulation of off-road vehicle use; and reduction of other watershed and floodplain disturbances that release sediments, pollutants, or nutrients into the water.

In summary, we find that the areas we are designating as critical habitat for the rush darter contain the physical or biological features for the species, and that these features may require special management considerations or protection. Special management consideration or protection may be required to eliminate, or to reduce to negligible levels, the threats affecting the physical or biological features of each unit.

Yellowcheek Darter

The four units we are designating as critical habitat for the yellowcheek darter will require some level of management to address the current and future threats to the physical and biological features of the species. The yellowcheek darter is currently covered under a candidate conservation agreement with assurances (CCAA) in the upper Little Red River watershed in Arkansas, along with the endangered speckled pocketbook mussel, which does not have critical habitat designated. Of the 205,761 hectares (ha) (508,446 acres (ac)) within the upper Little Red River watershed known to support the yellowcheek darter, approximately 35,208 ha (87,000 ac) are owned by private parties (Service 2007, p. 4). To date, multiple landowners have enrolled 4,672 ha (11,544 ac) in the program since its inception in mid-2007, and 10 more landowners with approximately 20,234 ha (50,000 ac) have pending draft agreements. Lands enrolled in these conservation programs include areas within the critical habitat as well as riparian and upland areas that are outside of the critical habitat boundary. Various activities in or adjacent to critical habitat may affect one or more of the physical and biological features. For example, features in this critical habitat designation may require special management due to threats posed by natural gas extraction; timber harvest; gravel mining; unrestricted cattle access into streams; water diversion for agriculture, industry, municipalities, or other purposes; lack of adequate riparian buffers; construction and maintenance of county and State roads; and nonpoint source pollution arising from development and a broad array of human activities. These threats are in addition to random effects of drought, floods, or other natural phenomena. Other activities that may affect physical and biological features in the critical habitat units include those listed in the Effects of Critical Habitat Designation section below.

Management activities that could ameliorate these threats include, but are not limited to: Use of BMPs designed to reduce sedimentation, erosion, and bank side destruction; moderation of surface and ground water withdrawals to maintain natural flow regimes; increase of stormwater management and reduction of stormwater flows into the systems; preservation of headwater springs and streams; regulation of off-road vehicle use; and reduction of other watershed and floodplain disturbances that release sediments, pollutants, or nutrients into the water.

In summary, we find that the areas we are designating as critical habitat for the yellowcheek darter contain the physical or biological features for the species, and that these features may require special management considerations or protection. Special management consideration or protection may be required to eliminate, or to reduce to negligible levels, the threats affecting the physical or biological features of each unit.

Chucky Madtom

The single unit we are designating as critical habitat for the Chucky madtom will require some level of management to address the current and future threats to the physical and biological features of the species. The critical habitat unit is located on private property and is not presently under the special management or protection provided by a legally operative plan or agreement for the conservation of the species. Various activities in or adjacent to the critical habitat unit described in this rule may affect one or more of the physical and biological features. For example, features in this critical habitat designation may require special management due to threats posed by agricultural activities (e.g., row crops and livestock), lack of adequate riparian buffers, construction and maintenance of State and county roads, gravel mining, and nonpoint source pollution (e.g., agrochemicals, sediment) arising from a wide variety of human activities. These threats are in addition to random effects of drought, floods, or other natural phenomena. Other activities that may affect physical and biological features in the critical habitat unit include those listed in the Effects of Critical Habitat Designation section below.

Management activities that could ameliorate these threats include, but are not limited to: Use of BMPs designed to reduce sedimentation, erosion, and bank side destruction; moderate application of agrochemicals; moderation of surface and ground water withdrawals to maintain natural flow regimes; increase of stormwater management and reduction of stormwater flows into the systems; preservation of headwater streams; and reduction of other

watershed and floodplain disturbances that release sediments, pollutants, or nutrients into the water.

In summary, we find that the area we are designating as critical habitat for the Chucky madtom contains the physical or biological features for the species, and that these features may require special management considerations or protection. Special management consideration or protection may be required to eliminate, or to reduce to negligible levels, the threats affecting the physical or biological features of the unit.

Laurel Dace

The six units we are designating as critical habitat will require some level of management to address the current and future threats to the physical and biological features of the laurel dace. These units are located on private property and are not presently under the special management or protection provided by a legally operative plan or agreement for the conservation of the species. Various activities in or adjacent to these areas of critical habitat may affect one or more of the physical and biological features. For example, features in this critical habitat designation may require special management due to threats posed by resource extraction (coal and gravel mining, silviculture, natural gas and oil exploration activities), agricultural activities (row crops and livestock), lack of adequate riparian buffers, construction and maintenance of State and county roads, nonpoint source pollution arising from a wide variety of human activities, and canopy loss caused by infestations of the hemlock woolly adelgid. These threats are in addition to random effects of drought, floods, or other natural phenomena. Other activities that may affect physical and biological features in the critical habitat units include those listed in the Effects of Critical Habitat Designation section below.

Management activities that could ameliorate these threats include, but are not limited to: Use of BMPs designed to reduce sedimentation, erosion, and bank side destruction; moderation of surface and ground water withdrawals to maintain natural flow regimes; increase of stormwater management and reduction of stormwater flows into the systems; preservation of headwater streams; regulation of off-road vehicle use; and reduction of other watershed and floodplain disturbances that release sediments, acid mine drainage, pollutants, or nutrients into the water.

In summary, we find that the areas we are designating as critical habitat for the laurel dace contain the physical or biological features for the species, and that these features may require special management considerations or protection. Special management consideration or protection may be required to eliminate, or to reduce to negligible levels, the threats affecting the physical or biological features of each unit.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(1)(A) of the Act, we used the best scientific and commercial data available to designate critical habitat. We reviewed 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 considered 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 designating critical habitat in areas within the geographical area occupied by the species at the time of listing in 2011. We also are designating specific areas outside the geographical area occupied by the Cumberland darter at the time of listing that are within the historical range of the species, but currently unoccupied, because we have determined that such areas are essential for the conservation of the species. Below is a discussion of the criteria used to identify critical habitat for each of the five species.

Cumberland Darter

We are designating critical habitat in areas within the geographical area occupied by the Cumberland darter at the time of listing in 2011. We also are designating specific areas outside the geographical area occupied by the species at the time of listing that were historically occupied but are presently unoccupied, because we have determined that: (1) Such areas are essential for the conservation of the species; and (2) designation of only occupied habitats is not sufficient to conserve this species. Unoccupied habitats provide additional habitat for population expansion and promote greater genetic diversity, which will decrease the risk of extinction for the species.

We used information from surveys and reports prepared by the Kentucky Department of Fish and Wildlife Resources, Kentucky Division of Water, and Service records to identify specific locations occupied by the Cumberland darter. Delineations were based on the best available scientific information indicating portions of streams containing necessary physical or biological features to support the Cumberland darter. We set the upstream and downstream limits of each critical habitat unit by identifying landmarks (bridges, confluences, road crossings, dams) above and below the upper and lowermost reported locations of the Cumberland darter in each stream reach to ensure incorporation of all potential sites of occurrence.

We used ARCGIS to delineate the specific stream segments occupied by the Cumberland darter at the time of listing, and those locations outside the geographical area occupied by the species at the time it was listed that were determined to be essential for the conservation of the species. Areas designated as critical habitat for the Cumberland darter include only stream channels within the ordinary high water line and do not contain any developed areas or structures.

We are designating as critical habitat all stream reaches in occupied habitat. These stream reaches comprise the entire known range of the species. As discussed above, currently occupied habitat for the Cumberland darter is limited to 13 streams in McCreary and Whitley Counties, Kentucky, and Campbell and Scott Counties, Tennessee. All currently occupied areas contain the physical or biological features of the species.

To identify essential areas outside of the geographical area occupied at the time of listing, we identified areas historically occupied (currently unoccupied) in the upper Cumberland River basin in Kentucky (McCreary and Whitley Counties) and Tennessee (Campbell and Scott Counties). We then assessed the critical life-history components of the Cumberland darter, as they relate to the physical or biological features. We determined the appropriate length of stream segments by identifying the upstream and downstream limits of unoccupied sections necessary for the conservation of the Cumberland darter.

In addition, we are designating as critical habitat reaches that were not occupied by the Cumberland darter at the time of listing, but that are located within the historical range of the species. During our evaluation of unoccupied stream reaches, we considered the availability of potential habitat throughout the historical range that may be essential to the survival and conservation of the species. We eliminated from consideration streams with degraded habitat and water quality conditions, and other streams with

potentially suitable habitat but that are separated from basins with occupied habitats. This screening process produced two unoccupied stream reaches (Indian Creek and Kilburn Fork), which we are designating as critical habitat. These reaches are adjacent to currently occupied areas where there is potential for natural dispersal and reoccupation by the species.

Currently occupied habitats of the Cumberland darter are highly localized and fragmented, with populations separated from one another by an average distance of 30.5 stream km (19 stream mi). As explained above, this fragmentation and isolation of populations reduces the amount of space for rearing and reproduction, reduces the connectivity between populations, and decreases genetic diversity. Long-term viability is founded on the conservation of numerous local populations that can move freely between habitats and exchange genetic information. These reaches are essential to the Cumberland darter because they provide additional habitat for population expansion and will promote connectivity and genetic exchange between populations; in addition, both streams support diverse fish assemblages, including federally listed and at-risk species.

We are designating as critical habitat 13 units that we determined were occupied at the time of listing. These units are designated because sufficient elements of physical or biological features are present to support Cumberland darter life-history processes. Two additional units outside the geographical area occupied by the species at the time of listing are designated because we consider them to be essential to the conservation of the species.

Rush Darter

We are designating critical habitat in areas within the geographical area occupied by the rush darter at the time of listing in 2011. We are not designating any areas outside the geographical area occupied by the rush darter because occupied areas are sufficient for the conservation of the species.

We used information from surveys and reports prepared by the Alabama Department of Conservation and Natural Resources, Alabama Geological Survey, Samford University, University of Alabama, the U.S. Forest Service, the Natural Resources Conservation Service, and the Service to identify the specific locations occupied by the rush darter. Currently, occupied habitat for the species is limited and isolated. The species is currently located within tributaries of three watersheds in three counties in Alabama: the Turkey Creek watershed (Jefferson County) (Drennen 2008, pers. obs.); the Clear Creek watershed (Winston County); and the Little Cove-Bristow Creek watershed (Etowah County). In the Turkey Creek watershed, the species is found in four tributaries including Beaver Creek, an unnamed tributary to Beaver Creek and associated springs and wetland, the Highway 79 site, and Tapawingo or Penny Springs. In the Clear Creek watershed, it is found in Wildcat Branch, Doe Branch, and Mill Creek. In the Little Cove-Bristow Creek watershed, it is found in Little Cove Creek, Cove Spring and spring run, and Bristow Creek.

Following the identification of the specific locations occupied by the rush darter, we determined the appropriate length of stream segments by identifying the upstream and downstream limits of these occupied sections necessary for the conservation of the rush darter. Because populations of rush darters are isolated due to dispersal barriers, to set the upstream and downstream limits of each critical habitat unit, we identified landmarks (bridges, confluences, road crossings, and dams), and in some instances latitude and longitude coordinates and section lines above and below the upper and lowermost reported locations of the rush darter, in each stream reach to ensure incorporation of all potential sites of occurrence. In addition, within the Cove Spring run and Tapawingo or Penny Spring run, the total area of water that is pooled, and is rush darter habitat, was calculated in hectares (acres). The critical habitat areas were then mapped using ARCGIS to produce the critical habitat map.

We are designating as critical habitat all stream and spring reaches in occupied habitat. These stream reaches comprise the entire known range of the rush darter. We are not designating any areas outside the occupied range of the species because occupied areas are sufficient for the conservation of the species, and because the historical range of the rush darter, beyond currently occupied areas, is unknown and dispersal beyond the current range is not likely due to dispersal barriers. Areas designated for critical habitat for the rush darter below include only stream channels within the ordinary high water line and spring pool areas and do not contain any developed areas or structures.

We are designating as critical habitat eight units that we have determined were occupied at the time of listing and contain sufficient elements of physical or biological features to support life-history processes essential to the conservation of rush darter. Some units contain all of the identified elements of physical or biological features and support multiple life-history processes. Some units contain only some elements of the physical or biological features necessary to support the rush darter's particular use of that habitat.

Yellowcheek Darter

We are designating critical habitat in areas within the geographical area occupied by the yellowcheek darter at the time of listing in 2011. We are not designating any areas outside the geographical area occupied by the yellowcheek darter because occupied areas are sufficient for the conservation of the species.

We used information from surveys and reports prepared by Arkansas State University, Arkansas Tech University, Arkansas Game and Fish Commission, Arkansas Department of Environmental Quality, and the Service to identify the specific locations occupied by the yellowcheek darter. We identified those areas for designation as critical habitat, within the geographical area occupied by the species at the time of listing, that contain the physical or biological features of the yellowcheek darter and which may require special management consideration or protection. All of the areas we are designating are currently part of ongoing recovery initiatives for this species and are targeted for special management considerations.

We used ARCGIS to delineate the specific stream segments occupied by the yellowcheek darter at the time of listing, which contain the physical or biological features essential to the species. We assessed the critical life-history components of the yellowcheek darter, as they relate to habitat. Delineations were based on the best available scientific information indicating portions of streams containing necessary physical or biological features necessary to support the yellowcheek darter. We set the upstream and downstream limits of each critical habitat unit by identifying landmarks (bridges, confluences, road crossings, dams, reservoir inundation elevations) above and below the upper and lowermost reported locations of the yellowcheek darter in each stream reach to ensure incorporation of all potential sites of occurrence. Areas designated as yellowcheek darter critical habitat include only stream channels within the ordinary high water line and do not

contain any developed areas or structures.

We are designating as critical habitat four units that we have determined were occupied at the time of listing and contain sufficient elements of physical or biological features to support life-history processes essential to the conservation of the yellowcheek darter. All units contain all of the identified elements of physical or biological features and support multiple life-history processes.

Chucky Madtom

We are designating critical habitat in areas within the geographical area occupied by the Chucky madtom at the time of listing in 2011. We are not designating any areas outside the geographical areas occupied by the Chucky madtom at the time of listing because the historical range, beyond currently occupied areas, is not well known.

We used information from surveys and reports prepared by Conservation Fisheries, Inc., and the Tennessee Valley Authority to identify the specific locations occupied by the Chucky madtom. Currently, occupied habitat for the species is limited and isolated. At the time of listing, the current range of the Chucky madtom was restricted to an approximately 3-km (1.8-mi) reach of Little Chucky Creek in Greene County, Tennessee.

Following the identification of the specific locations occupied by the Chucky madtom, we determined the appropriate length of stream segments by identifying the upstream and downstream limits of these occupied sections necessary for the conservation of the species. To set the upstream and downstream limits of the single critical habitat unit, we identified landmarks (bridges, confluences, and road crossings) above and below the upper and lowermost reported locations of the Chucky madtom in Little Chucky Creek to ensure incorporation of all potential sites of occurrence. The critical habitat areas were then mapped using ARCGIS to produce the critical habitat unit map.

We are designating as critical habitat a single stream reach in Little Chucky Creek, which is occupied habitat. This stream reach comprises the entire current known range of the Chucky madtom. The unit contains one or more of the physical or biological features in the appropriate quantity and spatial arrangement essential to the conservation of this species and supports multiple life-history processes for the Chucky madtom. The area designated for critical habitat for the Chucky madtom includes only the stream channel within the ordinary high water line and does not contain any developed areas or structures.

Laurel Dace

We are designating critical habitat in areas within the geographical area occupied by the laurel dace at the time of listing in 2011. We are not designating any areas outside the geographical area occupied by the laurel dace because occupied areas are sufficient for the conservation of the species.

We used information from surveys and reports prepared by the Tennessee Valley Authority, Tennessee Wildlife Resources Agency, University of Tennessee, and the Service to identify the specific locations occupied by the laurel dace. Currently, occupied habitat for the species is limited and isolated. The species is currently located in three independent systems: Soddy Creek, the Sale Creek system, and the Piney River system. Following the identification of the specific locations occupied by the laurel dace, we determined the appropriate length of stream segments by identifying the upstream and downstream limits of these occupied sections necessary for the conservation of the laurel dace. Because populations of laurel dace are isolated due to dispersal barriers, to set the upstream and downstream limits of each critical habitat unit, we identified landmarks (bridges, confluences, and road crossings), and in some instances latitude and longitude coordinates and section lines above and below the upper and lowermost reported locations of the laurel dace, in each stream reach to ensure incorporation of all potential sites of occurrence. The designated critical habitat areas were then mapped using ARCGIS to produce the critical habitat unit maps.

We are designating as critical habitat all stream reaches in occupied habitat. We have defined occupied habitat as those stream reaches occupied at the time of listing and still known to be occupied by the laurel dace; these stream reaches comprise the entire known range of the laurel dace. Areas designated as critical habitat for the laurel dace include only stream channels within the ordinary high water line and do not contain any developed areas or structures.

We are designating as critical habitat six units that we determined were occupied at the time of listing and contain all of the identified elements of physical or biological features to support life-history processes essential to the conservation of the laurel dace. Six units are designated based on sufficient elements of physical or biological features present to support laurel dace life-history processes. All units contain all of the identified elements of physical or biological features and support multiple life-history processes.

When determining critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands usually lack physical and biological features for the listed species. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text in the rule and are not designated as critical habitat. Therefore, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical and biological features in the adjacent critical habitat. The designation of critical habitat does not imply that lands outside of critical habitat do not play an important role in the conservation of the species.

The critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document in the rule portion. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on *http://www.regulations.gov* at Docket No. FWS–R4–ES–2011–0074, on our Internet sites at *http://www.fws.gov/cookeville/,* and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT** above).

We are designating as critical habitat lands that we have determined are occupied at the time of listing and contain sufficient physical or biological features to support life-history processes essential for the conservation of these five species, and lands outside of the geographical area occupied at the time of listing that we have determined are essential for the conservation of the Cumberland darter.

Units are designated based on sufficient elements of physical or biological features being present to support the Cumberland darter, rush darter, yellowcheck darter, Chucky madtom, and laurel dace life processes.

Some units contain all of the identified elements of physical or biological features and support multiple life processes. Some units contain only some elements of the physical or biological features necessary to support the five species' particular use of that habitat.

Final Critical Habitat Designation

Cumberland Darter

We are designating 15 units as critical habitat for the Cumberland darter. These units, which constitute our current best assessment of areas that meet the definition of critical habitat for the Cumberland darter, are: (1) Bunches Creek, (2) Calf Pen Fork, (3) Youngs Creek, (4) Barren Fork, (5) Indian Creek, (6) Cogur Fork, (7) Kilburn Fork, (8) Laurel Fork, (9) Laurel Creek, (10) Elisha Branch, (11) Jenneys Branch, (12) Wolf Creek, (13) Jellico Creek, (14) Rock Creek, and (15) Capuchin Creek. Table 1 shows the occupancy of the units and ownership of the designated areas for the Cumberland darter.

TABLE 1—OCCUPANCY AND OWNERSHIP OF THE DESIGNATED CRITICAL HABITAT UNITS FOR THE CUMBERLAND DARTER

Unit	Location	Occupied	Private ownership rkm (rmi)	Federal, state, county, city ownership rkm (rmi)	Total length rkm (rmi)
1	Bunches Creek	Yes	0	5.8 (3.6)	5.8 (3.6)
2	Calf Pen Fork	Yes	0	2.9 (1.8)	2.9 (1.8)
3	Youngs Creek	Yes	7.4 (4.6)	0	7.4 (4.6)
4	Barren Fork	Yes	0	6.3 (3.9)	6.3 (3.9)
5	Indian Creek	No	0	4.0 (2.5)	4.0 (2.5)
6	Cogur Fork	Yes	2.7 (1.7)	5.9 (3.7)	8.6 (5.4)
7	Kilburn Fork	No	0.9 (0.6)	3.7 (2.3)	4.6 (2.9)
8	Laurel Fork	Yes	1.3 (0.8)	2.2 (1.4)	3.5 (2.2)
9	Laurel Creek	Yes	0.6 (0.4)	8.8 (5.5)	9.4 (5.9)
10	Elisha Branch	Yes	0	2.1 (1.3)	2.1 (1.3)
11	Jenneys Branch	Yes	0	3.1 (1.9)	3.1 (1.9)
12	Wolf Creek	Yes	6.3 (3.9)	0	6.3 (3.9)
13	Jellico Creek	Yes	8.2 (5.1)	3.3 (2.1)	11.5 (7.2)
14	Rock Creek	Yes	3.9 (2.4)	2.2 (1.4)	6.1 (3.8)
15	Capuchin Creek	Yes	3.4 (2.1)	0.8 (0.5)	4.2 (2.6)
Total					85.8 (53.5)

We present brief descriptions of all units and reasons why they meet the definition of critical habitat for the Cumberland darter. The designated critical habitat units include the stream channels of the creek within the ordinary high water line. As defined in 33 CFR 329.11, the ordinary high water mark on nontidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics, such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas. Critical habitat units are either in private ownership or public ownership. In Kentucky and Tennessee, the owners of adjacent land also own the land under non-navigable streams (e.g., the stream channel or bottom), but the water is under State jurisdiction. Portions of the public-to-private boundary for units 6, 7, 8, 9, and 13 were located along the mid-line of the stream channel; lengths for these segments were divided equally between public and private ownership.

Unit 1: Bunches Creek, Whitley County, Kentucky

This unit is located between Kentucky Highway 90 (KY 90) and the Cumberland River and includes 5.8 rkm (3.6 rmi) of Bunches Creek from the confluence of Seminary Branch and Amos Falls Branch downstream to its confluence with the Cumberland River. Live Cumberland darters have been captured at two sites within Unit 1 (Thomas 2007, pp. 11–12), specifically at the mouth of Bunches Creek and just below its confluence with Calf Pen Fork. This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. This unit is located entirely on Federal lands within the DBNF. Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14). The lower portion of Bunches Creek (stream rkm 0 to 0.3 (rmi 0 to 0.1)) flows through a designated Kentucky Wild River corridor (KRS 146.200 to 146.360) that extends along an approximately 25.7 km (16 mi) reach of the Cumberland River. This Wild River corridor extends from Summer Shoals downstream to the backwaters of Lake Cumberland (KRS 146.241). The Bunches Creek-Cumberland River confluence is located approximately 3.0 km (1.9 mi) upstream of Cumberland Falls. The Bunches Creek watershed is relatively undisturbed, and access is limited (no road crossings). The channel within Unit 1 is relatively stable, with excellent instream habitat (PCE 1). There is an abundance of pool and run habitats (PCE 1), with relatively silt-free sand and bedrock substrates (PCE 2) and adequate instream flows (PCE 3). Water quality is good to excellent (PCE 4), as evidenced by diverse fish and macroinvertebrate communities (PCE 5).

Within Unit 1, the Cumberland darter and its habitat may require special management considerations or protection to address potential adverse effects associated with silviculture-related activities, natural gas and oil exploration activities in headwater reaches, illegal off-road vehicle use and other recreational activities, nonpoint source pollution originating in headwater reaches, and canopy loss caused by infestations of the hemlock woolly adelgid.

Unit 2: Calf Pen Fork, Whitley County, Kentucky

This unit includes 2.9 rkm (1.8 rmi) of Calf Pen Fork, a tributary of Bunches

Creek, from its confluence with Polly Hollow downstream to its confluence with Bunches Creek. Live Cumberland darters have been captured in Calf Pen Fork just above its confluence with Bunches Creek (Thomas 2007, pp. 11–12). This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. This unit is located entirely on Federal lands within the DBNF. Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14). Similar to the watershed of Unit 1, the Calf Pen Fork watershed is relatively undisturbed, and access is limited (no road crossings). Within Unit 2, the channel is relatively stable, with excellent instream habitat (PCE 1), an abundance of run and pool habitats (PCE 1), relatively silt-free sand and bedrock substrates (PCE 2), and adequate instream flows (PCE 3). Water quality is good to excellent (PCE 4), with diverse fish and macroinvertebrate communities (PCE 5).

Within Unit 2, the Cumberland darter and its habitat may require special management considerations or protection to address potential adverse effects associated with silviculture-related activities, natural gas and oil exploration activities, illegal off-road vehicle use and other recreational activities, nonpoint source pollution arising from headwater reaches, and canopy loss caused by infestations of the hemlock woolly adelgid.

Unit 3: Youngs Creek, Whitley County, Kentucky

Unit 3 includes 7.4 rkm (4.6 rmi) of Youngs Creek from Brays Chapel Road downstream to its confluence with the Cumberland River. Live Cumberland darters have been captured within Unit 3 (Thomas 2007, pp. 11–12), specifically at the KY 204 bridge crossing. This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. This unit is located entirely on private land. The watershed of Youngs Creek is less forested than Units 1 and 2, with scattered residences and small farms. The channel is relatively stable (PCE 1), but activities associated with agriculture, silviculture, and residential development have contributed to a more open riparian zone, increased bank erosion, and some siltation of instream habitats. Despite these impacts, Unit 3 continues to provide pool and run habitats with suitable sand and bedrock substrates for Cumberland darters to use in spawning, foraging, and other behaviors (PCEs 1 and 2). Flow is adequate as measured during years with average rainfall (PCE 3), water quality is adequate (PCE 4), and macroinvertebrate prey items are present (PCE 5).

Within this unit, the Cumberland darter and its habitat may require special management considerations or protection to address potential adverse effects caused by resource extraction (mining, silviculture, natural gas and oil exploration activities), agricultural activities (livestock), lack of adequate riparian buffers, perched road culverts or impassable road crossings (fords), construction and maintenance of State and county roads, illegal off-road vehicle use, nonpoint source pollution arising from a wide variety of human activities, and canopy loss caused by infestations of the hemlock woolly adelgid.

Unit 4: Barren Fork, McCreary County, Kentucky

Unit 4 includes 6.3 rkm (3.9 rmi) of Barren Fork from its confluence with an unnamed tributary downstream to its confluence with Indian Creek. Based on survey results by Thomas (2007, pp. 11–12) and Stephens (2009, pp. 10–23), Barren Fork supports the most robust population of Cumberland darters within the species' range. Over the past 4 years, over 75 Cumberland darters have been observed within this unit (Thomas 2007, pp. 11–12; Stephens 2009, pp. 10–23). This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. This unit is located entirely on Federal lands within the DBNF. Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14). In the summer and fall of 2008, the Barren Fork watershed was adversely affected by several large sedimentation events originating from a county park construction site in the headwaters of the basin. Inadequate site planning and poor BMP implementation allowed significant quantities of sediment to leave the construction site and enter headwater tributaries of Barren Fork. The sediment was carried downstream into the mainstem of Barren Fork, eventually affecting the entire reach of Unit 4. Until the construction site was stabilized in 2009, important spawning and foraging habitats for the Cumberland darter were degraded.

Despite these significant adverse effects, habitat conditions have improved since 2008, and are now similar to those described for Units 1 and 2. The watershed is mostly forested, with relatively stable channels (PCE 1), abundant pool and run habitats (PCE 1), relatively silt-free sand and bedrock substrates (PCE 2), adequate flow (PCE 3), adequate water quality (PCE 4), and a diverse macroinvertebrate community (PCE 5).

Within this unit, the Cumberland darter and its habitat may require special management considerations or protection to address potential adverse effects caused by resource extraction (mining, silviculture, natural gas and oil exploration activities), lack of adequate riparian buffers, construction and maintenance of county roads, illegal off-road vehicle use, nonpoint source pollution arising from a wide variety of human activities, and canopy loss caused by infestations of the hemlock woolly adelgid.

Unit 5: Indian Creek, McCreary County, Kentucky

Unit 5 includes 4.0 rkm (2.5 rmi) of Indian Creek from its confluence with Strunk Branch, downstream to its confluence with Barren Fork. Live Cumberland darters have not been captured within Unit 5. This unit was not included in the geographical area occupied by the species at the time of listing, and it is not currently occupied by the species.

This unit is located entirely on Federal lands within the DBNF. Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

This unit is located within the historical range of the species, and is adjacent to currently occupied areas where there is potential for natural dispersal and reoccupation by the Cumberland darter. This unit is essential for the conservation of the Cumberland darter because it provides additional habitat for population expansion and will promote connectivity and genetic exchange between adjacent units to the south (Unit 4, Barren Fork) and to the north (Unit 6, Cogur Fork).

Unit 6: Cogur Fork, McCreary County, Kentucky

Unit 6 includes 8.6 rkm (5.4 rmi) of Cogur Fork from its confluence with an unnamed tributary downstream to its confluence with Indian Creek. Live Cumberland darters have been captured at several locations within an approximately 1-km (0.62-mi) reach upstream of the KY 1045 road crossing (Thomas 2010, pers. comm.). This unit was included in the geographical area occupied by the species at the time of

listing and contains elements of essential physical or biological features. The majority of this unit (5.9 rkm (3.7 rmi)) is in public ownership (DBNF), with the remainder of the unit (2.7 rkm (1.7 rmi)) in private ownership. Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

Cumberland darters have been captured within Unit 6, but the population is considered to be small (Thomas 2010, pers. comm.). From 2008 to present, the fauna has been bolstered through propagation and augmentation efforts by KDFWR, Conservation Fisheries, Inc. (CFI), and the Service (Thomas *et al.* 2010, p. 107). Initial brood stock were collected in 2008, with subsequent releases of propagated darters in 2009 (60 individuals (inds)) and 2010 (335 inds). Both tagged (propagated, 50 inds) and non-tagged (native, 4 inds) darters were observed during recent surveys in November 2010. Individuals tagged and released by KDFWR and CFI traveled distances ranging from 0.4 to 0.7 rkm (0.2 to 0.4 rmi) between their release date of September 22, 2010, and their recapture date of November 9, 2010 (period of 48 days) (Thomas 2010, pers. comm.).

Similar to other units located entirely or predominately on the DBNF (Units 1, 2, 4, and 5), this unit has relatively stable channels (PCE 1), abundant pool and run habitats (PCE 1), relatively silt-free sand and bedrock substrates (PCE 2), adequate flow (PCE 3), adequate water quality (PCE 4), and a diverse macroinvertebrate community (PCE 5).

Within this unit, the Cumberland darter and its habitat may require special management considerations or protection to address potential adverse effects caused by resource extraction (mining, silviculture, natural gas and oil exploration activities), lack of adequate riparian buffers, construction and maintenance of county roads, illegal off-road vehicle use, nonpoint source pollution arising from a wide variety of human activities, and canopy loss caused by infestations of the hemlock woolly adelgid.

Unit 7: Kilburn Fork, McCreary County, Kentucky

Unit 7 includes 4.6 rkm (2.9 rmi) of Kilburn Fork from its confluence with an unnamed tributary downstream to its confluence with Laurel Fork. Live Cumberland darters have not been captured within Unit 7 over the last 15 years (Thomas 2007, pp. 11–12). This unit was not included in the geographical area occupied by the species at the time of listing, and it is not currently occupied by the species.

The majority of this unit (3.7 rkm (2.3 rmi)) is in public ownership (DBNF), with the remainder of the unit (0.9 rkm (0.6 rmi)) in private ownership. Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

This unit is located within the historical range of the species, and is adjacent to currently occupied areas where there is potential for natural dispersal and reoccupation by the Cumberland darter. This unit is essential for the conservation of the Cumberland darter because it provides additional habitat for population expansion and will promote connectivity and genetic exchange between adjacent units to the south (Unit 6, Cogur Fork) and to the north (Unit 8, Laurel Fork).

Unit 8: Laurel Fork, McCreary County, Kentucky

Unit 8 includes 3.5 rkm (2.2 rmi) of Laurel Fork from its confluence with Tom Fork downstream to its confluence with Indian Creek. Live Cumberland darters have been captured within Unit 8 (Thomas 2007, pp. 11–12), specifically just upstream of its confluence with Kilburn Fork. This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features.

The majority of this unit (2.2 rkm (1.4 rmi)) is in public ownership (DBNF), with the remainder of the unit (1.3 rkm (0.8 rmi)) in private ownership. Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

Similar to other streams with major portions of their basins in the DBNF, the watershed of Laurel Fork is relatively intact, and access is limited (limited roads and residential development). The channel within Unit 8 is relatively stable (PCE 1), with suitable instream habitat to support the life-history functions of the Cumberland darter. There is an abundance of pool and run habitats (PCE 1), with relatively silt-free sand and bedrock substrates (PCE 2) and adequate flows (PCE 3). Water quality is good to excellent (PCE 4), as evidenced by diverse fish and macroinvertebrate communities (PCE 5).

Within this unit, the Cumberland darter and its habitat may require special management considerations or protection to address potential adverse effects caused by resource extraction (mining, silviculture, natural gas and oil exploration activities), lack of adequate riparian buffers, construction and maintenance of county roads, illegal off-road vehicle use, nonpoint source pollution arising from a wide variety of human activities, and canopy loss caused by infestations of the hemlock woolly adelgid.

Unit 9: Laurel Creek, McCreary County, Kentucky

Unit 9 includes 9.4 rkm (5.9 rmi) of Laurel Fork Creek from Laurel Fork Reservoir downstream to its confluence with Jenneys Branch. Live Cumberland darters have been captured within Unit 9 (Thomas 2007, pp. 11–12), specifically just upstream of its confluence with Elisha Branch and at the KY 478 bridge crossing. This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. The majority of this unit (8.8 rkm (5.5 rmi)) is in public ownership (DBNF), with the remainder of the unit (0.6 rkm (0.4 rmi)) in private ownership. Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

The watershed of Laurel Creek is relatively intact, with extensive forest cover and few roads. The channel within Unit 9 is relatively stable (PCE 1), with suitable instream habitat to support the life-history functions of the Cumberland darter. There is an abundance of pool and run habitats (PCE 1), with relatively silt-free sand and bedrock substrates (PCE 2) and adequate instream flows (PCE 3). Water quality is good to excellent (PCE 4), with a diverse macroinvertebrate community (PCE 5).

Within this unit, the Cumberland darter and its habitat may require special management considerations or protection to address potential adverse effects caused by resource extraction (mining, silviculture, natural gas and oil exploration activities), lack of adequate riparian buffers, construction and maintenance of county roads, illegal off-road vehicle use, nonpoint source pollution arising from a wide variety of human activities, and canopy loss caused by infestations of the hemlock woolly adelgid.

Unit 10: Elisha Branch, McCreary County, Kentucky

Unit 10 includes 2.1 rkm (1.3 rmi) of Elisha Branch from its confluence with an unnamed tributary (36.70132, –84.40843) downstream to its confluence with Laurel Creek. Live Cumberland darters have been captured within Unit 10 (Thomas 2007, pp. 11–

12), specifically just upstream of its confluence with Laurel Creek. This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. This unit is located entirely on public lands within the DBNF. Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

The watershed of Elisha Branch is relatively intact, with extensive forest cover and no road crossings. Within Unit 10, the channel is relatively stable, with excellent instream habitat (PCE 1), an abundance of run and pool habitats (PCE 1), relatively silt-free sand and bedrock substrates (PCE 2), and adequate flows (PCE 3). Water quality is good to excellent (PCE 4), with diverse fish and macroinvertebrate communities (PCE 5).

Within this unit, the Cumberland darter and its habitat may require special management considerations or protection to address potential adverse effects caused by resource extraction (mining, silviculture, natural gas and oil exploration activities), lack of adequate riparian buffers, illegal off-road vehicle use, nonpoint source pollution arising from a wide variety of human activities, and canopy loss caused by infestations of the hemlock woolly adelgid.

Unit 11: Jenneys Branch, McCreary County, Kentucky

Unit 11 includes 3.1 rkm (1.9 rmi) of Jenneys Branch from its confluence with an unnamed tributary (36.73680, –84.42420) downstream to its confluence with Laurel Creek. Live Cumberland darters have been captured within Unit 11 (Thomas 2007, pp. 11–12), specifically just upstream of its confluence with Laurel Creek. This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. This unit is located entirely on public lands within the DBNF. Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

The watershed of Jenneys Branch is relatively intact and remote, with extensive forest cover and only one road crossing in its headwaters. Within Unit 11, the stream channel is relatively stable, with excellent instream habitat (PCE 1), an abundance of run and pool habitats (PCE 1), relatively silt-free sand and bedrock substrates (PCE 2), and adequate instream flows (PCE 3). Water quality is good to excellent (PCE 4), with diverse fish and macroinvertebrate communities (PCE 5).

Within this unit, the Cumberland darter and its habitat may require special management considerations or protection to address potential adverse effects caused by resource extraction (mining, silviculture, natural gas and oil exploration activities), lack of adequate riparian buffers, illegal off-road vehicle use, nonpoint source pollution arising from a wide variety of human activities, and canopy loss caused by infestations of the hemlock woolly adelgid.

Unit 12: Wolf Creek, Whitley County, Kentucky

Unit 12 includes 6.3 rkm (3.9 rmi) of Wolf Creek from its confluence with Sheep Creek downstream to Wolf Creek River Road. Live Cumberland darters have been captured within Unit 12 just downstream of the Little Wolf Creek River Road bridge crossing (Thomas 2007, pp. 11–12). This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features.

This unit is located entirely on private land. Land use within the watershed of Wolf Creek is similar to Unit 3, and Unit 12 is less forested than units within the DBNF. The channel is relatively stable (PCE 1), but activities associated with agriculture, silviculture, and residential development have contributed to a more open riparian zone, increased bank erosion, and some siltation of instream habitats. Despite these impacts, Unit 12 continues to provide pool and run habitats with suitable sand and bedrock substrates for Cumberland darters to use in spawning, foraging, and other behaviors (PCEs 1 and 2). Flow is adequate as measured during years with average rainfall (PCE 3), water quality is adequate (PCE 4), and macroinvertebrate prey items are present (PCE 5).

Within this unit, the Cumberland darter and its habitat may require special management considerations or protection to address potential adverse effects caused by resource extraction (mining, silviculture, natural gas and oil exploration activities), agricultural activities (livestock), lack of adequate riparian buffers, perched road culverts or impassable road crossings (fords), construction and maintenance of State and county roads, illegal off-road vehicle use, and nonpoint source pollution arising from a wide variety of human activities.

Unit 13: Jellico Creek, McCreary County, Kentucky, and Scott County, Tennessee

Unit 13 includes 11.5 rkm (7.2 rmi) of Jellico Creek from its confluence with Scott Branch, Scott County, Tennessee, downstream to its confluence with Capuchin Creek, McCreary County, Kentucky. Live Cumberland darters have been captured within Unit 13 at the Jellico Creek and Shut-In Branch confluence and at the Gum Fork and Jellico Creek confluence (O'Bara 1988, p. 12; Thomas 2007, pp. 11–12). This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. A portion of this unit in Kentucky (3.3 rkm (2.1 rmi)) is in public ownership (DBNF), with the remainder of the unit (8.2 rkm (5.1 rmi)) in private ownership. Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

Land use within the watershed of Jellico Creek is predominately forest, with scattered residences and small farms (cattle and hay production). The channel in Unit 13 is relatively stable (PCE 1), but activities associated with agriculture, silviculture, and residential development have contributed to a more open riparian zone, increased bank erosion, and some siltation of instream habitats. Despite these impacts, Unit 13 continues to provide pool and run habitats with suitable sand and bedrock substrates for Cumberland darters to use in spawning, foraging, and other behaviors (PCEs 1 and 2). Flow is adequate as measured during years with average rainfall (PCE 3), water quality is adequate (PCE 4), and macroinvertebrate prey items are present (PCE 5).

Within this unit, the Cumberland darter and its habitat may require special management considerations or protection to address potential adverse effects caused by resource extraction (mining, silviculture, natural gas and oil exploration activities), agricultural activities (livestock), lack of adequate riparian buffers, perched road culverts or impassable road crossings (fords), construction and maintenance of State and county roads, illegal off-road vehicle use, and nonpoint source pollution arising from a wide variety of human activities.

Unit 14: Rock Creek, McCreary County, Kentucky

Unit 14 includes 6.1 rkm (3.8 rmi) of Rock Creek from its confluence with Sid Anderson Branch downstream to its confluence with Jellico Creek. Live Cumberland darters have been captured within Unit 14 just above the mouth of Rock Creek at its confluence with Jellico Creek (Thomas 2007, pp. 11–12). This unit was included in the geographical area occupied by the species at the time

of listing and contains elements of essential physical or biological features. A portion of this unit (2.2 rkm (1.4 rmi)) is in public ownership (DBNF), but the majority (3.9 rkm (2.4 rmi)) is in private ownership. Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

Most of the watershed is forested (especially along the ridge tops), but the valley floor has several open fields and is easily accessible via Little Rock Creek Road. Portions of the channel in Unit 14 have been modified by beaver (with some ponding), but it continues to be relatively stable, with excellent instream habitat (PCE 1), an abundance of run and pool habitats (PCE 1), relatively silt-free sand and bedrock substrates (PCE 2), and adequate instream flows (PCE 3). Water quality is good to excellent (PCE 4), with diverse fish and macroinvertebrate communities (PCE 5).

Within this unit, the Cumberland darter and its habitat may require special management considerations or protection to address potential adverse effects caused by resource extraction (mining, silviculture, natural gas and oil exploration activities), agricultural activities (livestock), lack of adequate riparian buffers, perched road culverts or impassable road crossings (fords), construction and maintenance of State and county roads, illegal off-road vehicle use, nonpoint source pollution arising from a wide variety of human activities, and canopy loss caused by infestations of the hemlock woolly adelgid.

Unit 15: Capuchin Creek, McCreary and Whitley Counties, Kentucky, and Campbell County, Tennessee

Unit 15 includes 4.2 rkm (2.6 rmi) of Capuchin Creek from its confluence with Hatfield Creek downstream to its confluence with Jellico Creek. Live Cumberland darters have been captured within Unit 15 at the Kentucky-Tennessee State line (Thomas 2007, pp. 11–12). This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. A portion of this unit in Kentucky (0.8 rkm (0.5 rmi)) is in public ownership (DBNF); the remainder in Kentucky and Tennessee (3.4 rkm (2.1 rmi)) is in private ownership. Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

Land use within the watershed of Capuchin Creek is predominately forest, with scattered residences and small farms (cattle and hay production). The channel in Unit 15 is relatively stable (PCE 1), but activities associated with agriculture, silviculture, and residential development have contributed to a more open riparian zone, increased bank erosion, and some siltation of instream habitats. Despite these impacts, Unit 15 continues to provide pool and run habitats with suitable sand and bedrock substrates for Cumberland darters to use in spawning, foraging, and other behaviors (PCEs 1 and 2). Flow is adequate as measured during years with average rainfall (PCE 3), water quality is adequate (PCE 4), and macroinvertebrate prey items are present (PCE 5).

Within this unit, the Cumberland darter and its habitat may require special management considerations or protection to address potential adverse effects caused by resource extraction (mining, silviculture, natural gas and oil exploration activities), agricultural activities (livestock), lack of adequate riparian buffers, perched road culverts or impassable road crossings (fords), construction and maintenance of State and county roads, illegal off-road vehicle use, and nonpoint source pollution arising from a wide variety of human activities.

Rush Darter

We are designating eight units as critical habitat for the rush darter. The below units, which constitute our current best assessment of areas that meet the definition of critical habitat for the rush darter, are: (1) Beaver Creek, (2) Unnamed Tributary to Beaver Creek and Highway 79 Spring Site, (3) Tapawingo or Penny Spring and Spring Run, (4) Wildcat Branch, (5) Mill Creek, (6) Doe Branch, (7) Little Cove Creek, Cove Spring Site, and (8) Bristow Creek. Table 2 shows the occupancy of the units and ownership of the designated areas for the rush darter.

TABLE 2—OCCUPANCY AND OWNERSHIP OF THE DESIGNATED CRITICAL HABITAT UNITS FOR THE RUSH DARTER

Unit	Location	Occupied	Private ownership rkm (rmi)	State, county, city ownership rkm (rmi)	Total length rkm (rmi)	Total area** ha (ac)
1	Beaver Creek	Yes	0.9 (0.6)	<0.1 (<0.1)	1.0 (0.6)	
2	Unnamed Tributary to Beaver Creek and Highway 79 Spring Site.	Yes	3.7 (2.3)	0.7 (0.4)	4.4 (2.7)	0.1 (0.3)
3	Tapawingo or Penny Spring and Spring Run.	Yes	0.6 (0.4)	<0.1 (<0.06)	0.6 (0.4)	6.7 (16.5)
4	Wildcat Branch	Yes	6.6 (4.1)	<0.1 (<0.06)	6.6 (4.1)	
5	Mill Creek	Yes	5.9 (3.7)	<0.1 (<0.06)	5.9 (3.7)	
6	Doe Branch	Yes	4.3 (2.7)	<0.1 (<0.06)	4.3 (2.7)	
7	Little Cove Creek, Cove Spring, Spring Run.	Yes	11.2 (6.1)	<0.1 (<0.06)	11.2 (6.1)	5.1 (12.7)
8	Bristow Creek	Yes	10.2 (6.3)	<0.1 (<0.06)	10.2 (6.3)	
Total*					44.2 (26.6)	11.9 (29.5)

* Totals may not sum due to rounding.
** Total area in ha (ac) are in private ownership.

We present brief descriptions of each unit and reasons why they meet the definition of critical habitat below. The designated critical habitat units include the stream channels of the creek within the ordinary high water line, and the flooded spring pool in the case of Tapawingo or Penny Springs (Jefferson County), Unnamed Tributary to Beaver Creek (Jefferson County), and Cove Springs (Etowah County). As defined in 33 CFR 329.11, the ordinary high water line on nontidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural water line impressed on the bank; shelving; changes in the character of

soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas. In Alabama, the riparian landowner owns the stream to the middle of the channel for non-navigable streams and rivers. For the spring pools, the area was determined and delineated by the presence of emergent vegetation patterns as noted on aerial photographs.

Unit 1: Beaver Creek, Jefferson County, Alabama

Unit 1 includes 1.0 rkm (0.6 rmi) of Beaver Creek from the confluence with Dry Creek, downstream to the confluence with Turkey Creek. This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. Almost 0.9 rkm (0.6 rmi), or 94 percent of this area is privately owned. The remaining 0.1 rkm (< 0.1 rmi), or 6 percent, is publicly owned by the City of Pinson or Jefferson County in the form of bridge crossings and road easements.

Beaver Creek contains adequate bottom substrate and emergent vegetation for rush darters to use in spawning, foraging, and other life processes (PCE 2). Beaver Creek makes available additional habitat and spawning sites, and offers connectivity with other rush darter populations within the Highway 79 Spring System site and the Unnamed Tributary to Beaver Creek (PCE 1).

Beaver Creek provides habitat for the rush darters with adequate number of pools, riffles, runs (PCE 1), and emergent vegetation (PCE 2). These geomorphic structures provide the species with spawning, foraging, and resting areas (PCE 1), along with good water quality, quantity, and flow, which support the normal life stages and behavior of the rush darter (PCEs 3 and 4), the species' prey sources (PCE 5), and associated aquatic vegetation.

Threats to the rush darter and its habitat at Beaver Creek that may require special management of the PBFs include the potential of: Urbanization activities (such as channel modification for flood control, construction of impoundments, and gravel extraction) that could result in increased bank erosion; significant changes in the existing flow regime due to inadequate stormwater management, water diversion, or water withdrawal; significant alteration of water quality; and significant changes in stream bed material composition and quality as a result of construction projects and maintenance activities, destruction of emergent vegetation, off-road vehicle use, sewer, gas and water easements, bridge and road construction and maintenance, culvert and pipe installation, and other watershed and floodplain disturbances that release sediments or nutrients into the water.

There are three road crossings over Beaver Creek (Pinson Valley Parkway, Old Bradford Road, and Spring Street) that at times may limit the overall connectivity and movement of the species within this unit. Movement might be limited due to changes in flow regime and habitat, including emergent vegetation, water quality, water quantity, and stochastic events such as drought. Populations of rush darters are small and isolated within specific habitat sites of Beaver Creek.

Unit 2: Unnamed Tributary to Beaver Creek and Highway 79 Spring Site, Jefferson County, Alabama

Unit 2 includes 4.4 rkm (2.7 rmi) of the Unnamed Tributary of Beaver Creek and two spring runs. The site begins at the Section 1 and 2 (T16S, R2W) line, as taken from the U.S. Geological Survey 7.5 topographical map (Pinson quadrangle), downstream to its confluence with Dry Creek, and includes a spring run beginning at the springhead (33.67449, -86.69300) just northwest of Old Pinson Road and intersecting with the Unnamed Tributary to Beaver Creek on the west side of Highway 79, and a spring associated wetland (0.1 ha, 0.33 ac) within the headwaters, south of Pinson Heights Road, flowing 0.9 km (0.05 mi) from the northwest (33.668173, -86.708577) and adjoining to the Unnamed Tributary (33.667344,-86.707429). This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features.

Almost 3.7 rkm (2.3 rmi), or 85 percent, of this area is privately owned. The remaining 0.7 rkm (0.4 rmi), or 15 percent, is publicly owned by the City of Pinson or Jefferson County in the form of bridge crossings and road easements.

The Unnamed Tributary to Beaver Creek supports populations of rush darters and is a feeder stream to Beaver Creek (PCEs 1 and 2). The Unnamed Tributary to Beaver Creek has been intensely geomorphically changed by man over the last 100 years. The majority of this reach has been channelized for flood control, as it runs parallel to Highway 79. There are several bridge crossings and culverts that interfere with connectivity, and the reach has a history of industrial uses along the bank. However, owing to the groundwater that constantly supplies this reach with clean and flowing water (PCEs 3 and 4), the reach has been able to support significant emergent vegetation in shallow water on the margins to support several rush darter populations. The headwaters of the Unnamed Tributary to Beaver Creek is characterized by natural flows that are attributed to an abundance of spring groundwater discharges contributing adequate water quality, water quantity, emergent vegetation and appropriate substrates (PCEs 1, 2, 3, and 4). The 0.13 ha (0.33 ac) spring run and associated wetlands is characterized by adequate spring water flow and associated vegetation (PCEs 1 and 2). Increasing the connectivity of the rush darter populations (PCE 1) throughout the reaches of this tributary is an essential conservation requirement as it would decrease the vulnerability of these populations to stochastic threats. The Highway 79 Spring Site is the type locality for the species (Bart 2004, p. 194), supporting populations of rush darters and providing supplemental water quantity to the Unnamed Tributary to Beaver Creek (PCEs 1 and 3). The reach contains adequate bottom substrate and emergent vegetation for rush darters to use in spawning, foraging, and other life processes (PCE 2). The Highway 79 Spring site provides habitat and spawning sites, and offers connectivity with rush darter populations in the Unnamed Tributary to Beaver Creek (PCE 1).

Threats to the rush darter and its habitat that may require special management and protection of PBFs are: Urbanization activities (such as channel modification for flood control, and gravel extraction) that could result in increased bank erosion; significant changes in the existing flow regime due to inadequate stormwater management and impoundment construction, water diversion, or water withdrawal; significant alteration of water quality; and significant changes in stream bed material composition and quality as a result of construction projects and road maintenance activities, off-road vehicle use, sewer, gas and water easements, bridge construction, culvert and pipe installation, and other watershed and floodplain disturbances that release sediments or nutrients into the water.

Unit 3: Tapawingo or Penny Spring and Spring Run, Jefferson County, Alabama

Unit 3 includes 0.6 rkm (0.4 rmi) of spring run, historically called Tapawingo Plunge, along with 6.7 ha (16.5 ac) of flooded spring basin making up Penny Springs. Unit 3 is located south of Turkey Creek, north of Bud

Holmes Road, and just east of Tapawingo Trail Road. The east boundary is at (33.69903, -86.66528): 1.0 km (0.6 mi) west of Section Line 28 to 29 (T15S, R1W) (U.S. Geological Survey 7.5 topographical map (Pinson quadrangle)). This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. All 0.6 rkm (0.4 rmi) and 6.7 ha (16.5 ac) of Unit 3 is privately owned except for that small amount that is publicly owned in the form of bridge crossings and road easements.

The Tapawingo or Penny Spring complex consists of an abundance of springs that drain directly into Turkey Creek by means of a large spring run at the old railroad crossing and Tapawingo Springs Road (PCEs 1 and 2). The historical spring run discharge ranges from 0.03 to 2.4 cubic meters per second (m^3/s) (500 to 38,800 gallons per minute (gal/min)) (Chandler and Moore 1987, p. 49), and there is an abundance of emergent vegetation (PCEs 1, 2, and 3). Historically small numbers of rush darter have been collected in the spring area.

Threats to the rush darter and its habitat that may require special management and protection of physical and biological features are: Urbanization activities (such as channel modification for flood control, vegetation management, and gravel extraction) that could result in increased bank erosion; significant changes in the existing flow regime due to inadequate stormwater management and impoundment construction, water diversion, or water withdrawal; significant alteration of water quality; introduced species; significant alteration or destruction of aquatic and emergent vegetation; and significant changes in stream bed material composition and quality as a result of construction projects and maintenance activities, off-road vehicle use, sewer, gas and water easements, bridge construction, culvert and pipe installation, and other watershed and floodplain disturbances that release sediments or nutrients into the water.

Unit 4: Wildcat Branch, Winston County, Alabama

Unit 4 includes 6.6 rkm (4.1 rmi) of Wildcat Branch from the streams headwaters just east of Winston County Road 29 to the confluence with Clear Creek. This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. Almost 6.6 rkm (4.1 rmi), or 100 percent, of this area is privately owned except for that small amount that is publicly owned by Winston County in the form of bridge crossings and road easements.

Wildcat Branch provides habitat for rush darters with a network of small pools and spring runs, along with an abundance of emergent vegetation (PCE 1 and 2). These geomorphic structures provide the species with spawning, foraging, and resting areas (PCE 1), along with good water quality, quantity, and flow (PCEs 3 and 4), which support the normal life stages and behavior of the rush darter and the species' prey sources (PCE 5). Rush darters are consistently collected in Wildcat Branch, but not in large numbers.

Threats that may require special management and protection of physical and biological features include: Poor silviculture and agriculture practices; road and roadside maintenance; local residential development and urbanization activities (such as channel modification for flood control and gravel extraction) that could result in increased bank erosion; significant changes in the existing flow regime due to inadequate stormwater management and impoundment construction, water diversion, or water withdrawal; significant alteration of water quality; significant alteration or destruction of aquatic and emergent vegetation; and significant changes in stream bed material composition and quality as a result of construction projects and maintenance activities, off-road vehicle use, sewer, gas and water easements, bridge construction, culvert and pipe installation, and other watershed and floodplain disturbances that release sediments or nutrients into the water.

Unit 5: Mill Creek, Winston County, Alabama

Unit 5 includes 5.9 rkm (3.7 rmi) of Mill Creek from the stream headwaters just east of Winston County Road 195 to the confluence with Clear Creek. This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. Almost 5.9 rkm (3.7 rmi), or 100 percent, of this area is privately owned except for that small amount that is publicly owned by Winston County in the form of bridge crossings and road easements.

Mill Creek provides habitat for the rush darter with a network of small pools, and spring runs, along with an abundance of emergent vegetation (PCE 1 and 2). These geomorphic structures provide the species with spawning, foraging, and resting areas (PCE 1), along with good water quality, quantity, and flow (PCEs 3 and 4), which support the normal life stages and behavior of the rush darter and the species' prey sources (PCE 5). Rush darters are consistently collected in Mill Creek.

Threats that may require special management and protection of PBFs include: Poor silviculture and agriculture practices; road and roadside maintenance; local residential development and urbanization activities (such as channel modification for flood control and gravel extraction) that could result in increased bank erosion; significant changes in the existing flow regime due to inadequate stormwater management and impoundment construction, water diversion, or water withdrawal; significant alteration of water quality; significant alteration or destruction of aquatic and emergent vegetation; and significant changes in stream bed material composition and quality as a result of construction projects and maintenance activities, off-road vehicle use, sewer, gas and water easements, bridge construction, culvert and pipe installation, and other watershed and floodplain disturbances that release sediments or nutrients into the water.

Unit 6: Doe Branch, Winston County, Alabama

Unit 6 includes 4.3 rkm (2.7 rmi) of Doe Branch from the stream headwaters north and west of Section Line 23 and 14 (R9W, T11S; Popular Springs Quadrangle) to the confluence with Wildcat Branch. This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. Almost 4.3 rkm (2.7 rmi), or 100 percent, of this area is privately owned except for that small amount that is publicly owned by Winston County in the form of bridge crossings and road easements.

Doe Branch provides habitat for the rush darter with a small network of small pools, and spring runs, along with adequate emergent vegetation (PCE 1 and 2). These geomorphic structures provide the species with spawning, foraging, and resting areas (PCE 1), along with good water quality, quantity, and flow (PCEs 3 and 4), which support the normal life stages and behavior of the rush darter and the species' prey sources (PCE 5). Although the species is considered rare in Doe Branch, there have been few collection attempts in the stream with a few darters captured (Mettee *et al.* 1989, p. 61). Doe Branch contains habitat for the species and is considered occupied. The stream joins Wildcat Branch before flowing into Clear Creek.

Threats that may require special management and protection of physical and biological features include: Poor silviculture and agriculture practices; road and roadside maintenance; local residential development and urbanization activities (such as channel modification for flood control and gravel extraction) that could result in increased bank erosion; significant changes in the existing flow regime due to inadequate stormwater management and impoundment construction, water diversion, or water withdrawal; significant alteration of water quality; significant alteration or destruction of aquatic and emergent vegetation; and significant changes in stream bed material composition and quality as a result of construction projects and maintenance activities, off-road vehicle use, sewer, gas and water easements, bridge construction, culvert and pipe installation, and other watershed and floodplain disturbances that release sediments or nutrients into the water.

Unit 7: Little Cove Creek, Cove Spring and Spring Run, Etowah County, Alabama

Unit 7 includes 11.2 rkm (6.1 rmi) of Little Cove Creek and the Cove Spring run system along with 5.1 ha (12.7 ac) of the spring run floodplain. Specifically, the Little Cove Creek section (11.0 rkm (6.0 rmi)) is from the intersection of Etowah County Road 179 near the creek headwaters, downstream to its confluence with the Locust Fork River. The Cove Spring and spring run section includes 0.2 rkm (0.1 rmi) of the spring run from the springhead at the West Etowah Water and Fire Authority pumping station on Cove Spring Road to the confluence with Little Cove Creek and includes 5.1 ha (12.7 ac) of the spring run floodplain due south of the pumping facility. This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. All 11.2 rkm (6.1 rmi) of Unit 7 is privately owned except for that small amount that is publicly owned by Etowah County in the form of bridge crossings and road easements.

Little Cove Creek provides habitat for the rush darter with a network of small pools, and spring runs, along with an abundance of emergent aquatic vegetation (PCE 1 and 2). These geomorphic structures provide the species with spawning, foraging, and resting areas (PCE 1), along with good water quality, quantity, and flow (PCEs 3 and 4), which support the normal life stages and behavior of the rush darter and the species' prey sources (PCE 5). Rush darters are collected in Little Cove Creek, but not in large numbers. The Cove Spring and Spring Run site supports small populations of rush darters and provides supplemental water quantity to Little Cove Creek (PCEs 1 and 3). Water quantity from the spring averages 0.2 m^3/s (3,000 gal/min) (Snead 2011, pers. comm.) (PCE 4). The spring contains an abundance of gravel and silt along with significant emergent vegetation for rush darters to use in spawning, foraging, and other life processes (PCE 2). The Cove Spring and Spring Run site provides habitat and spawning sites, and offers connectivity with rush darter populations to Little Cove Creek (PCE 1).

Threats that may require special management and protection of physical and biological features include: Road and roadside maintenance; agricultural and silviculture activities that could result in increased bank erosion; significant changes in the existing flow regime due to inadequate stormwater management; impoundment construction, water diversion, or water withdrawal for livestock and irrigation; significant alteration or destruction of aquatic and emergent vegetation; significant alteration of water quality due to release of chlorinated water and other chemicals into the Cove Spring run or Little Cove Creek by the water pumping facility or other sources; and off-road vehicle use, sewer, gas and water easements, bridge construction, culvert and pipe installation, and other watershed and floodplain disturbances that release sediments or nutrients into the water.

Unit 8: Bristow Creek, Etowah County, Alabama

Unit 8 includes 10.2 rkm (6.3 rmi) of Bristow Creek beginning from its intersection with Fairview Cove Road, downstream to the confluence with the Locust Fork River. This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. All 10.2 rkm (6.3 rmi) of Bristow Creek, beginning at the bridge at Fairview Road, downstream to the confluence with the Locust Fork River is privately owned except for that small amount that is publicly owned by Etowah County in the form of bridge crossings and road easements.

Bristow Creek, although channelized in some locations, provides habitat and connectivity for the rush darters (PCE 1). Locations within the creek have the necessary stream attributes of some small pools, and spring runs (PCE 1) along with emergent vegetation (PCE 2). These geomorphic structures provide the species with spawning, foraging, and resting areas (PCE 1), along with supplemental water quantity and flow (PCE 3), which support the normal life stages and behavior of the rush darter and the species' prey sources (PCE 5). The rush darter is considered rare in Bristow Creek, but sampling has been limited.

Threats that may require special management and protection of physical and biological features include: Road and roadside maintenance; agricultural and silviculture activities that could result in increased bank erosion; significant changes in the existing flow regime due to inadequate stormwater management; significant alteration or destruction of aquatic and emergent vegetation; impoundment construction, water diversion, or water withdrawal for livestock and irrigation; and off-road vehicle use, sewer, gas and water easements, septic tank drain fields, bridge construction and maintenance, culvert and pipe installation, and other watershed and floodplain disturbances that release sediments or nutrients into the water.

Yellowcheek Darter

We are designating four units as critical habitat for the yellowcheek darter. These units, all of which are on the Little Red River, constitute our current best assessment of areas that meet the definition of critical habitat for the yellowcheek darter and are as follows: (1) Middle Fork, (2) South Fork, (3) Archey Fork, and (4) Devil's Fork (includes Turkey Creek and Beech Fork). Table 3 shows the occupancy of the units and ownership of the designated areas for the yellowcheek darter.

TABLE 3—OCCUPANCY AND OWNERSHIP OF THE DESIGNATED CRITICAL HABITAT UNITS FOR THE YELLOWCHEEK DARTER

Unit	Location	Occupied	Private ownership rkm (rmi)	State, county, city ownership rkm (rmi)	Total length rkm (rmi)
1	Middle Fork Little Red River	Yes	73.2 (45.5)	0	73.2 (45.5)
2	South Fork Little Red River	Yes	33.3 (20.7)	0.5 (0.3)	33.8 (21.0)
3	Archey Fork Little Red River	Yes	28.2 (17.5)	0.3 (0.2)	28.5 (17.7)
4	Devil's Fork Little Red River	Yes	28.0 (17.4)	0	28.0 (17.4)
Total			162.7 (101.1)	0.8 (0.5)	163.5 (101.6)

We present brief descriptions of all units and reasons why they meet the definition of critical habitat for the yellowcheek darter. The designated critical habitat units include the river channels within the ordinary high water line. As defined in 33 CFR 329.11, the ordinary high water mark on nontidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics, such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas. In Arkansas, the state owns the stream channel within the ordinary high water lines for navigable streams and rivers, including all streams within the critical habitat designation for yellowcheek darter. For each stream reach designated as a critical habitat unit, the upstream and downstream boundaries are described generally below.

Unit 1: Middle Fork of the Little Red River, Searcy, Stone, and Van Buren Counties, Arkansas

Unit 1 includes 73.2 rkm (45.5 rmi) of the Middle Fork of the Little Red River from Searcy County Road 167 approximately 3.4 km (2.1 mi) southwest of Leslie, Arkansas, to a point on the stream 7.7 rkm (4.8 rmi) downstream (35.66515, -92.25942) of the Arkansas Highway 9 crossing of the Middle Fork near Shirley, Arkansas. The lower boundary coincides with the 140.5-m (461-ft) elevation of the conservation pool for Greers Ferry Lake where suitable habitat becomes inundated by Greers Ferry Lake and no longer supports the yellowcheek darter. Live yellowcheek darters have been collected from four sites within Unit 1. The uppermost site is immediately below the Hwy 65 Bridge near Leslie, Arkansas, and the lowermost site is immediately below the Hwy 9 Bridge in Shirley, Arkansas (Wine and Blumenshine 2002, p. 18). This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. Approximately 100 percent of Unit 1 is privately owned. County and State road crossings exist in all three counties and account for less than one percent of total Unit 1 ownership.

This unit contains stable riffle areas of moderate to swift velocity (PCE 1) that are relatively silt-free (PCE 2) and maintain surface flows year round (PCE 3). Such characteristics are necessary for reproductive and sheltering requirements of yellowcheek darters. Water quality within this unit is also characterized by moderate temperatures, relatively high dissolved oxygen concentrations, moderate pH, and low levels of pollutants (PCE 4), which support abundant populations of aquatic macroinvertebrates that serve as prey items for yellowcheek darters (PCE 5).

Threats that may require special management and protection of physical and biological features include: Changes in the existing stream ecology due to activities associated with natural gas development, livestock grazing, county road maintenance, timber harvest, water diversion, gravel mining, and rock harvesting operations. Alteration of water quality and changes in streambed material composition from any other activities that would release sediments, nutrients, or toxins into the water also act as threats to the yellowcheek darter.

Unit 2: South Fork of the Little Red River, Van Buren County, Arkansas

Unit 2 includes 33.8 rkm (21.0 rmi) of the South Fork of the Little Red River from Van Buren County Road 9 three miles north of Scotland, Arkansas, to a point on the stream (35.57364, -92.42718) approximately 5.5 rkm (3.4 rmi) downstream of U.S. Highway 65 in Clinton, Arkansas, where suitable habitat becomes inundated by Greers Ferry Lake and no longer supports the yellowcheek darter. Live yellowcheek darters have been collected from four sites along the South Fork Little Red River, including the uppermost boundary at the County Road 9 Bridge and just above the Hwy 65 Bridge in Clinton, Arkansas. This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. Approximately 33.3 rkm (20.7 rmi), or >99 percent, of Unit 2 is privately owned, and 0.5 rkm (0.3 rmi) is within the boundary of property owned by the city of Clinton, Arkansas. County and State road crossings account for less than one percent of total Unit 2 ownership.

This unit contains stable riffle areas of moderate to swift velocity (PCE 1) that are relatively silt-free (PCE 2) and maintain surface flows year round (PCE 3). Such characteristics are necessary for reproductive and sheltering requirements of yellowcheek darters. Water quality within this unit is also characterized by moderate temperatures, relatively high dissolved oxygen concentrations, moderate pH, and low levels of pollutants (PCE 4), which support abundant populations of aquatic macroinvertebrates that serve as prey items for yellowcheek darters (PCE 5).

Threats that may require special management and protection of physical and biological features include: Changes in the existing stream ecology due to activities associated with natural gas development, livestock grazing, county road maintenance, timber harvest, water diversion, and gravel mining. Alteration of water quality and changes in streambed material composition from any other activities that would release sediments, nutrients, or toxins into the water also act as threats to the yellowcheek darter.

Unit 3: Archey Fork of the Little Red River, Van Buren County, Arkansas

Unit 3 includes 28.5 rkm (17.7 rmi) of the Archey Fork of the Little Red River from its junction with South Castleberry Creek to its confluence with the South Fork of the Little Red River near Clinton, Arkansas. Live yellowcheek darters have been collected just above the confluence of the Archey and South Forks (Wine *et al.* 2000, p. 10) and at a

point 15.3 rkm (9.5 rmi) above the confluence (Brophy and Stoeckel 2006, p. 3). This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. Unit 3 is nearly 100 percent privately owned with the exception of a small city park in Clinton, Arkansas. County and State road crossings and portions within the city of Clinton, Arkansas, account for less than one percent of total Unit 3 ownership.

This unit contains stable riffle areas of moderate to swift velocity (PCE 1) that are relatively silt-free (PCE 2) and maintain surface flows year round (PCE 3). Such characteristics are necessary for reproductive and sheltering requirements of yellowcheek darters. Water quality within this unit is also characterized by moderate temperatures, relatively high dissolved oxygen concentrations, moderate pH, and low levels of pollutants (PCE 4), which support abundant populations of aquatic macroinvertebrates that serve as prey items for yellowcheek darters (PCE 5).

Threats that may require special management and protection of physical and biological features include: Changes in the existing stream ecology due to activities associated with natural gas development, livestock grazing, county road maintenance, timber harvest, water diversion, and gravel mining. Alteration of water quality and changes in streambed material composition from any other activities that would release sediments, nutrients, or toxins into the water also act as threats to the yellowcheek darter.

Unit 4: Devil's Fork of the Little Red River (including Turkey Creek and Beech Fork), Stone and Cleburne Counties, Arkansas

Unit 4 includes 28.0 rkm (17.4 rmi) of stream from Stone County Road 21 approximately 3 miles north of Prim, Arkansas, to a point (35.63556, -92.03400) on the Devil's Fork approximately 5.1 km (3.2 mi) southeast of Woodrow, Arkansas, where suitable habitat becomes inundated by Greers Ferry Lake and no longer supports the yellowcheek darter. Live yellowcheek darters have not been collected at the uppermost site (Turkey Creek) since 1999 (Mitchell *et al.* 2002, p. 131). However, Wine and Blumenshine (2002, p. 11) did detect yellowcheek darters in the Beech Fork, and it is likely that the species persists in very low numbers within the upper portions of the watershed during normal flow years. This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. Approximately 100 percent of Unit 4 is privately owned. County road crossings exist in both counties and account for less than one percent of total Unit 4 ownership.

This unit contains stable riffle areas of moderate to swift velocity (PCE 1) that are relatively silt-free (PCE 2) and maintain surface flows year round (PCE 3). Such characteristics are necessary for reproductive and sheltering requirements of yellowcheek darters. Water quality within this unit is also characterized by moderate temperatures, relatively high dissolved oxygen concentrations, moderate pH, and low levels of pollutants (PCE 4), which support abundant populations of aquatic macroinvertebrates that serve as prey items for yellowcheek darters (PCE 5).

Threats that may require special management and protection of physical and biological features include: Changes in the existing stream ecology due to activities associated with natural gas development, livestock grazing, county road maintenance, timber harvest, water diversion, and gravel mining. Alteration of water quality and changes in streambed material composition from any other activities that would release sediments, nutrients, or toxins into the water also act as threats to the yellowcheek darter.

Chucky Madtom

We are designating one unit as critical habitat for the Chucky madtom. The unit, which constitutes our current best assessment of the area that meets the definition of critical habitat for the Chucky madtom, is Little Chucky Creek, which was occupied at the time of listing. Table 4 shows the occupancy of the unit and ownership of the designated unit for the Chucky madtom.

TABLE 4—OCCUPANCY AND OWNERSHIP OF THE DESIGNATED CRITICAL HABITAT UNIT FOR THE CHUCKY MADTOM

Unit	Location	Occupied	Private ownership rkm (rmi)	State, county, city ownership rkm (rmi)	Total length rkm (rmi)
	Little Chucky Creek	Yes	31.8 (19.7)	<0.1 (<0.06)	31.9 (19.8)
Total					31.9 (19.8)

We present a brief description of the unit and reasons why it meets the definition of critical habitat for the Chucky madtom. The critical habitat unit includes the river channel within the ordinary high water line. As defined in 33 CFR 329.11, the ordinary high water mark on nontidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics, such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas. Lands in the critical habitat unit are either in private ownership or public ownership (Greene County road easements). In Tennessee, landowners own the land under non-navigable streams (e.g., the stream channel or bottom), but the water is under State jurisdiction.

Unit 1: Little Chucky Creek, Greene County, Tennessee

This unit includes 31.9 rkm (19.8 rmi) of Little Chucky Creek from its confluence with an unnamed tributary, downstream to its confluence with the Nolichucky River, at the Greene and Cocke County line, Tennessee. Although the Chucky madtom has not been observed since 2004, we still consider it to exist in Little Chucky Creek. Observations of the species have always been sporadic, and it is a cryptic species that is hard to locate. This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. Almost 31.9 rkm (19.8 rmi), or 100 percent, of this area is privately owned except for that small amount that is publicly owned by Greene County in the form of bridge crossings and road easements.

This unit contains stable riffle and run areas of moderate to swift velocity (PCE 1); flat gravel, cobble, and slab-rock boulders that are relatively silt-free (PCE 2); and surface flows that are maintained year round (PCE 3). Such characteristics are necessary for reproductive and sheltering requirements of Chucky madtoms. Water quality within this unit is also characterized by moderate temperatures, relatively high dissolved oxygen concentrations, moderate pH, and low levels of pollutants (PCE 4), which support abundant populations of aquatic macroinvertebrates that serve as prey items for the Chucky madtom (PCE 5).

This critical habitat unit is almost entirely located on private property and is not presently under the special management or protection provided by a legally operative plan or agreement for the conservation of the species. Various activities in or adjacent to the critical habitat unit described in this rule may affect one or more of the PBFs. Features in this critical habitat designation that may require special management are due to threats posed by agricultural activities (e.g., row crops and livestock), lack of adequate riparian buffers, construction and maintenance of State and county roads, gravel mining, and nonpoint source pollution arising from a wide variety of human activities.

Laurel Dace

We are designating six units as critical habitat for the laurel dace. The units, which constitute our current best assessment of areas that meet the definition of critical habitat for the laurel dace, are: (1) Bumbee Creek, (2) Youngs Creek, (3) Moccasin Creek, (4) Cupp Creek, (5) Horn Branch, and (6) Soddy Creek. Table 5 shows the occupancy of the units and ownership of the designated areas for the laurel dace.

TABLE 5—OCCUPANCY AND OWNERSHIP OF THE DESIGNATED CRITICAL HABITAT UNITS FOR THE LAUREL DACE

Unit	Location	Occupied	Private ownership rkm (rmi)	State, county, city ownership rkm (rmi)	Total length rkm (rmi)
1	Bumbee Creek	Yes	7.7 (4.7)	<0.1 (<0.06)	7.8 (4.8)
2	Youngs Creek	Yes	7.8 (4.8)	<0.1 (<0.06)	7.9 (4.9)
3	Moccasin Creek	Yes	8.9 (5.5)	<0.1 (<0.06)	9.0 (5.6)
4	Cupp Creek	Yes	4.9 (3.0)	<0.1 (<0.06)	5.0 (3.1)
5	Horn Branch	Yes	3.9 (2.4)	<0.1 (<0.06)	4.0 (2.5)
6	Soddy Creek	Yes	8.3 (5.1)	<0.1 (<0.06)	8.4 (5.2)
Total					42.2 (26.2)

We present brief descriptions of all units and reasons why they meet the definition of critical habitat for the laurel dace. The designated critical habitat units include the river channels within the ordinary high water line. As defined in 33 CFR 329.11, the ordinary high water mark on nontidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics, such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas. Lands in critical habitat units are either in private ownership or public ownership (county road easements). In Tennessee, landowners own the land under non-navigable streams (e.g., the stream channel or bottom), but the water is under State jurisdiction.

Unit 1: Bumbee Creek, Bledsoe and Rhea Counties, Tennessee

Unit 1 includes 7.8 rkm (4.8 rmi) of Bumbee Creek from its headwaters in Bledsoe County, downstream to its confluence with Mapleslush Branch in Rhea County, Tennessee. This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. Almost 7.7 rkm (4.7 rmi), or 100 percent, of this area is privately owned except for that small amount that is publicly owned by Bledsoe and Rhea Counties in the form of bridge crossings and road easements.

This unit contains stable headwater streams (PCE 1) that are relatively silt-free, contain cobble and slab-rock boulder substrates with canopy cover (PCE 2), and have surface flows that are maintained year round (PCE 3). Such characteristics are necessary for reproductive and sheltering requirements of laurel dace. Water quality within this unit is also characterized by moderate temperatures, relatively high dissolved oxygen concentrations, moderate pH, and low levels of pollutants (PCE 4), which support abundant populations of aquatic macroinvertebrates that serve as prey items for laurel dace (PCE 5).

Various activities in or adjacent to these areas of critical habitat may affect one or more of the physical and biological features. Features in this critical habitat designation that may require special management are due to threats posed by resource extraction (coal and gravel mining, silviculture, natural gas and oil exploration activities), agricultural activities (row crops and livestock), lack of adequate riparian buffers, construction and maintenance of State and county roads, nonpoint source pollution arising from a wide variety of human activities, and canopy loss caused by infestations of the hemlock woolly adelgid.

Unit 2: Youngs Creek, Bledsoe and Rhea Counties, Tennessee

Unit 2 includes 7.9 rkm (4.9 rmi) of Youngs Creek from its headwaters in Bledsoe County, downstream to its confluence with Moccasin Creek in Rhea County, Tennessee. This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. Almost 7.8 rkm (4.8 rmi), or 100 percent, of this area is privately owned except for that small amount that is publicly owned by Bledsoe and Rhea Counties in the form of bridge crossings and road easements.

This unit contains stable headwater streams (PCE 1) that are relatively silt-free, contain cobble and slab-rock boulder substrates with canopy cover (PCE 2), and have surface flows that are maintained year round (PCE 3). Such characteristics are necessary for reproductive and sheltering requirements of laurel dace. Water quality within this unit is also characterized by moderate temperatures, relatively high dissolved oxygen concentrations, moderate pH, and low levels of pollutants (PCE 4), which

support abundant populations of aquatic macroinvertebrates that serve as prey items for laurel dace (PCE 5).

Various activities in or adjacent to these areas of critical habitat may affect one or more of the physical and biological features. Features in this critical habitat designation that may require special management are due to threats posed by resource extraction (coal and gravel mining, silviculture, natural gas and oil exploration activities), agricultural activities (row crops and livestock), lack of adequate riparian buffers, construction and maintenance of State and county roads, nonpoint source pollution arising from a wide variety of human activities, and canopy loss caused by infestations of the hemlock woolly adelgid.

Unit 3: Moccasin Creek, Bledsoe County, Tennessee

Unit 3 includes 9.0 rkm (5.6 rmi) of Moccasin Creek from its headwaters downstream to 0.1 rkm (0.6 rmi) below its confluence with Lick Creek in Bledsoe County, Tennessee. This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. Almost 8.9 rkm (5.5 rmi), or 100 percent, of this area is privately owned except for that small amount that is publicly owned by Bledsoe County in the form of bridge crossings and road easements.

This unit contains stable headwater streams (PCE 1) that are relatively silt-free, contain cobble and slab-rock boulder substrates with canopy cover (PCE 2), and have surface flows that are maintained year round (PCE 3). Such characteristics are necessary for reproductive and sheltering requirements of laurel dace. Water quality within this unit is also characterized by moderate temperatures, relatively high dissolved oxygen concentrations, moderate pH, and low levels of pollutants (PCE 4), which support abundant populations of aquatic macroinvertebrates that serve as prey items for laurel dace (PCE 5).

Various activities in or adjacent to these areas of critical habitat may affect one or more of the physical and biological features. Features in this critical habitat designation that may require special management are due to threats posed by resource extraction (coal and gravel mining, silviculture, natural gas and oil exploration activities), agricultural activities (row crops and livestock), lack of adequate riparian buffers, construction and maintenance of State and county roads, nonpoint source pollution arising from a wide variety of human activities, and canopy loss caused by infestations of the hemlock woolly adelgid.

Unit 4: Cupp Creek, Bledsoe County, Tennessee

Unit 4 includes 5.0 rkm (3.1 rmi) of Cupp Creek from its headwaters downstream to its confluence with an unnamed tributary in Bledsoe County, Tennessee. This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. Almost 4.9 rkm (3.0 rmi), or 100 percent, of this area is privately owned except for that small amount that is publicly owned by Bledsoe County in the form of bridge crossings and road easements.

This unit contains stable headwater streams (PCE 1) that are relatively silt-free; contain cobble and slab-rock boulder substrates with canopy cover (PCE 2), and have surface flows that are maintained year round (PCE 3). Such characteristics are necessary for reproductive and sheltering requirements of laurel dace. Water quality within this unit is also characterized by moderate temperatures, relatively high dissolved oxygen concentrations, moderate pH, and low levels of pollutants (PCE 4), which support abundant populations of aquatic macroinvertebrates that serve as prey items for laurel dace (PCE 5).

Various activities in or adjacent to these areas of critical habitat may affect one or more of the physical and biological features. Features in this critical habitat designation that may require special management are due to threats posed by resource extraction (coal and gravel mining, silviculture, natural gas and oil exploration activities), agricultural activities (row crops and livestock), lack of adequate riparian buffers, construction and maintenance of State and county roads, nonpoint source pollution arising from a wide variety of human activities, and canopy loss caused by infestations of the hemlock woolly adelgid.

Unit 5: Horn Branch, Bledsoe County, Tennessee

Unit 5 includes 4.0 rkm (2.5 rmi) of Horn Branch from its headwaters downstream to its confluence with Rock Creek in Bledsoe County, Tennessee. This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. Almost 3.9 rkm (2.4 rmi), or 100 percent, of this area is privately owned except for that small amount that is publicly owned by Bledsoe County in the form of bridge crossings and road easements.

This unit contains stable headwater streams (PCE 1) that are relatively silt-free, contain cobble and slab-rock boulder substrates with canopy cover (PCE 2), and have surface flows that are maintained year round (PCE 3). Such characteristics are necessary for reproductive and sheltering requirements of laurel dace. Water quality within this unit is also characterized by moderate temperatures, relatively high dissolved oxygen concentrations, moderate pH, and low levels of pollutants (PCE 4), which support abundant populations of aquatic macroinvertebrates that serve as prey items for laurel dace (PCE 5).

Various activities in or adjacent to these areas of critical habitat may affect one or more of the physical and biological features. Features in this critical habitat designation that may require special management are due to threats posed by resource extraction (coal and gravel mining, silviculture, natural gas and oil exploration activities), agricultural activities (row crops and livestock), lack of adequate riparian buffers, construction and maintenance of State and county roads, nonpoint source pollution arising from a wide variety of human activities, and canopy loss caused by infestations of the hemlock woolly adelgid.

Unit 6: Soddy Creek, Sequatchie and Bledsoe Counties, Tennessee

Unit 6 includes 8.4 rkm (5.2 rmi) of Soddy Creek from its headwaters in Sequatchie County, downstream to its confluence with Harvey Creek in Sequatchie County, Tennessee. This unit was included in the geographical area occupied by the species at the time of listing and contains elements of essential physical or biological features. Almost 8.3 rkm (5.1 rmi), or 100 percent, of this area is privately owned except for a small amount that is publicly owned by Sequatchie and Bledsoe Counties in the form of bridge crossings and road easements.

This unit contains stable headwater streams (PCE 1) that are relatively silt-free, contain cobble and slab-rock boulder substrates with canopy cover (PCE 2), and have surface flows that are maintained year round (PCE 3). Such characteristics are necessary for reproductive and sheltering requirements of laurel dace. Water quality within this unit is also characterized by moderate temperatures, relatively high dissolved oxygen concentrations, moderate pH, and low levels of pollutants (PCE 4), which support abundant populations of

aquatic macroinvertebrates that serve as prey items for laurel dace (PCE 5).

Various activities in or adjacent to these areas of critical habitat may affect one or more of the physical and biological features. Features in this critical habitat designation that may require special management are due to threats posed by resource extraction (coal and gravel mining, silviculture, natural gas and oil exploration activities), agricultural activities (row crops and livestock), lack of adequate riparian buffers, construction and maintenance of State and county roads, nonpoint source pollution arising from a wide variety of human activities, and canopy loss caused by infestations of the hemlock woolly adelgid.

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 Circuits Court 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 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 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 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 these 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 these species. As discussed above, the role of critical habitat is to support life-history needs of these species and provide for the conservation of these 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 Cumberland darter, rush darter, yellowcheek darter, Chucky madtom, and laurel dace. These activities include, but are not limited to:

(1) Actions that would alter the geomorphology of stream habitats. Such activities could include, but are not limited to, instream excavation or dredging, impoundment, channelization, road and bridge construction, mining, and discharge of fill materials. These activities could cause aggradation or degradation of the channel bed elevation or significant bank erosion, result in entrainment or burial of these fishes, and cause other direct or cumulative adverse effects to these species.

(2) Actions that would significantly alter the existing flow regime or water quantity. Such activities could include, but are not limited to, impoundment, water diversion, water withdrawal, and hydropower generation. These activities could eliminate or reduce the habitat necessary for growth and reproduction of these fishes.

(3) Actions that would significantly alter water quantity or water quality (for example, temperature, pH, contaminants, and excess nutrients). Such activities could include, but are not limited to, hydropower discharges, or the release of chemicals, biological pollutants, or heated effluents into surface water or connected groundwater at a point source or by dispersed release (nonpoint source). These activities could alter water conditions that are beyond the tolerances of these fishes and result in direct or cumulative adverse effects to these species.

(4) Actions that would significantly alter stream bed material composition and quality by increasing sediment deposition or filamentous algal growth. Such activities could include, but are not limited to, construction projects, livestock grazing, timber harvest, off-road vehicle use, and other watershed and floodplain disturbances that release sediments or nutrients into the water. These activities could eliminate or reduce habitats necessary for the growth and reproduction of these fishes by causing excessive sedimentation or nutrification.

Exemptions

Application of Section 4(a)(3) of the 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 resources 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.''

There were no Department of Defense lands with a completed INRMP within the proposed critical habitat designation. Therefore, we are not exempting lands from this final designation of critical habitat for the Cumberland darter, rush darter, yellowcheek darter, Chucky madtom, or laurel dace under section 4(a)(3)(B)(i) of the Act.

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, is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

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 prepared a draft economic analysis of the proposed critical habitat designation and related factors (Industrial Economics, Incorporated 2012). The draft analysis, dated May 1, 2012, was made available for public review from May 24, 2012, through June 25, 2012 (77 FR 30988). Following the close of the comment period, a final analysis (dated July 31, 2012) of the potential economic effects of the designation was developed taking into consideration the public comments and any new information (Industrial Economics, Incorporated 2012).

The intent of the final economic analysis (FEA) is to identify and analyze the potential economic impacts associated with the critical habitat designation for these five species. The final economic analysis describes the economic impacts of all potential conservation efforts for the these five fishes; some of these costs will likely be incurred regardless of whether we designate critical habitat. The economic impact of the final critical habitat designation is analyzed 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). The baseline, therefore, represents 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 incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for these species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we consider in the final designation of critical habitat when evaluating the benefits of excluding particular areas under section 4(b)(2) of the Act. The analysis looks retrospectively at baseline impacts incurred since these species were listed, and forecasts both baseline and incremental impacts likely to occur with the designation of critical habitat. For a further description of the methodology of the analysis, see the ''Framework for

the Analysis'' section of the final economic analysis.

The FEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The FEA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decision-makers can use this information to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, the FEA looks retrospectively at costs that have been incurred since 2011 (year of these species' listing) (76 FR 48722), and considers those costs that may occur in the 20 years following the designation of critical habitat, which was determined to be the appropriate period for analysis because limited planning information was available for most activities to forecast activity levels for projects beyond a 20-year timeframe. The FEA quantifies economic impacts of the five fishes conservation efforts associated with the following categories of activity: coal mining; oil and natural gas development; agriculture, ranching, and silviculture; recreational uses; dredging, channelization, impoundments, dams, and diversions; transportation (roads, highways, bridges); and residential and commercial development.

The FEA concluded that the types of conservation efforts requested by the Service during section 7 consultation regarding the five fishes were not expected to change due to critical habitat designation. The Service believes that results of consultation under the adverse modification and jeopardy standards are likely to be similar because: (1) The physical and biological features that define critical habitat are also essential for the survival of the five fishes; (2) the five fishes are limited or severely limited in their respective ranges; and (3) numbers of individuals in the surviving populations are small or very small. In addition, although two of the critical habitat units for the Cumberland darter are unoccupied, incremental impacts of the critical habitat designations will be limited for the following reasons: (1) Both units are currently occupied by the federally threatened blackside dace, *Chrosomus cumberlandensis* (listed as *Phoxinus cumberlandensis*); (2) both units are situated at least partially within the DBNF, which is managed according to a land and resource management plan that includes specific measures to protect sensitive species; and (3) both unoccupied units are located within the same hydrologic unit as three other occupied critical habitat units (Cumberland darter units 4, 6, and 8).

The FEA concludes that incremental impacts of critical habitat designation are limited to additional administrative costs of consultations and that indirect incremental impacts are unlikely to result from the designation of critical habitat for the five fishes. The present value of the total direct (administrative) incremental cost of critical habitat designation is $644,000 over the next 20 years assuming a 7 percent discount rate, or $56,800 on an annualized basis. Water quality management activities are likely to be subject to the greatest incremental impacts at $273,000 over the next 20 years, followed by transportation at $161,000; coal mining at $79,000; oil and natural gas development at $73,700; agriculture, ranching, and silviculture at $36,100; dredging, channelization, impoundments, dams, and diversions at $10,700; and recreation at $10,000 (Industrial Economics, Inc. 2012).

In short, the FEA did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exerting his discretion to exclude any areas from this designation of critical habitat for the five fishes based on economic impacts.

A copy of the FEA with supporting documents may be obtained by contacting the Tennessee Ecological Services Field Office (see **ADDRESSES**) or by downloading from the Internet at *http://www.regulations.gov*.

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 final rule, we have determined that the lands within the designation of critical habitat for the Cumberland darter, rush darter, yellowcheek darter, Chucky madtom, and laurel dace are not owned or managed by the Department of Defense, and, therefore, we anticipate no impact on national security. Consequently, the Secretary is not exerting his discretion to exclude any areas from this 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.

In preparing this final rule, we have determined that the yellowcheek darter is currently covered under a joint safe harbor agreement (SHA) and candidate conservation agreement with assurances (CCAA) in the upper Little Red River watershed in Arkansas along with the endangered speckled pocketbook mussel. The CCAA will convert to a SHA, as a result of the endangered status of the yellowcheek darter, and will be covered by an enhancement of survival permit, which expires January 1, 2044. The SHA is strictly voluntary on the part of participating private landowners, who can opt out of the agreement at any time. This agreement provides added benefits for the recovery of the yellowcheek darter, but does not guarantee long-term protection of habitat. The properties enrolled in the SHA are not technically included in the critical habitat designation, which includes only the stream channel within the ordinary high water line. Because these waters are technically state owned, we cannot exclude them from the designation. The CCAA provides assurances to enrolled landowners that if additional conservation measures are necessary to respond to changed circumstances, we will not require such measures in addition to those provided for in the agreement without the consent of the landowner if the species becomes listed. However like the SHA, the properties enrolled in the CCAA are not technically included in the critical habitat designation, which includes only the stream channel within the ordinary high water line. Because these waters are technically state owned, we cannot exclude them from the designation.

There are currently no HCPs or other management plans for the Cumberland darter, rush darter, yellowcheek darter, Chucky madtom, or laurel dace, and the final designation does not include any

tribal lands or trust resources. We anticipate no impact on tribal lands, partnerships, or HCPs from this critical habitat designation.

Accordingly, the Secretary is not exercising his discretion to exclude any areas from this final designation based on other relevant impacts.

Required Determinations

Regulatory Planning and Review—Executive Order 12866 and 13563

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

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. In this final rule, we are certifying that the critical habitat designation for these five fishes will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; as well as small businesses. Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts on these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule, as well as the types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if the rule could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (e.g., coal mining; agriculture, ranching, and silviculture; oil and natural gas development; recreational uses; dredging, channelization, impoundments, dams, and diversions; and transportation (roads, highways, bridges)). We apply the ''substantial number'' test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define ''substantial number'' or ''significant economic impact.'' Consequently, to assess whether a ''substantial number'' of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities authorized, funded, or carried out by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the five fishes are present, Federal agencies already are required to consult with us under section 7 of the Act on activities they authorize, fund, or carry out that may affect the five fishes. Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities (see *Application of the ''Adverse Modification'' Standard* section).

In our FEA of the critical habitat designation (see ''Exclusions Based on Economic Impacts'' above) we evaluated the potential economic effects on small business entities resulting from conservation actions related to the designation of critical habitat of the five fishes. The analysis is based on the estimated impacts associated with the rulemaking as described in Appendix A of the FEA and evaluates the potential for economic impacts related to: Coal mining; oil and natural gas development; recreation; dredging, channelization, impoundments, dams, and diversions; and transportation (roads, highways, bridges).

For activities related to coal mining, we anticipate that 10 small entities could be affected in a single year at a cost of $875 each, representing less than 3 percent of annual revenues. For oil and natural gas development, we estimate that two small entities could be affected within a single year at a cost of $875 each, representing less than 3 percent of annual revenues. For recreation activities, it is estimated that one small entity could be affected within a single year at a cost of $4,150. This cost to this entity is estimated to be 29 percent of the entity's annual revenue from cattle sales; however, the entity has other revenues, and this percentage is likely overstated. For activities relating to by dredging, channelization, impoundments, dams, and diversions, one small entity could be affected within a single year, at a cost of $2,630, representing less than 1 percent of annual revenues. For transportation activities, one small entity could be affected within a single year, at a cost of $1,750, representing less than 1 percent of annual revenues. Please refer to the FEA of the critical habitat designation for a more detailed

discussion of potential economic impacts.

In summary, we considered whether this designation will result in a significant economic effect on a substantial number of small entities. Based on the above reasoning and currently available information, we concluded that this rule will not result in a significant economic impact on a substantial number of small entities. Therefore, we are certifying that the designation of critical habitat for the Cumberland darter, rush darter, yellowcheek darter, Chucky madtom, and laurel dace will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

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 this designation to significantly affect energy supplies, distribution, or use. Natural gas and oil exploration and development activities occur or could potentially occur within the Cumberland darter (13 of 15 critical habitat units) and yellowcheek darter (4 of 4 critical habitat units) critical habitat units. However, compliance with State regulatory requirements or voluntary BMPs would be expected to minimize impacts of natural gas and oil exploration and development in the areas of designated critical habitat for both species. The measures for natural gas and oil exploration and development are generally not considered a substantial cost compared to overall project costs and are already being implemented by oil and gas companies.

Coal mining occurs or could potentially occur in 11 of the 15 proposed critical habitat units for the Cumberland darter, and coal mining could potentially occur in 1 of the 6 critical habitat units for the laurel dace. Incidental take for listed species associated with surface coal mining activities is currently covered under a programmatic, non-jeopardy biological opinion between the Office of Surface Mining and the Service completed in 1996 (Service 1996, entire). The biological opinion covers existing, proposed, and future endangered and threatened species that may be affected by the implementation and administration of surface coal mining programs under the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 *et seq.*). Through its analysis, the Service concluded that the proposed action (surface coal mining and reclamation activities) was not likely to jeopardize the continued existence of any threatened, endangered, or proposed species or result in adverse modification of designated or proposed critical habitat.

OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute ''a significant adverse effect'' when compared to not taking the regulatory action under consideration. The potential effects of this designation on oil and gas development were considered in the economic analysis. The FEA finds that impacts to oil and gas development activities will be anticipated, but they will be limited to the administrative costs of consultation. Therefore, reductions in oil and gas production are not anticipated, and consultation costs are not anticipated to increase the cost of energy production or distribution in the United States in excess of 1 percent. Thus, none of the nine outcome thresholds of impacts is exceeded. The economic analysis finds that none of these criteria is relevant to this analysis. Thus, based on information in the economic analysis, energy-related impacts associated with these five fishes' conservation activities within critical habitat are not expected. As such, the designation of critical habitat is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(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, 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) We do not believe that this rule will significantly or uniquely affect small governments. The lands with Cumberland darter critical habitat designation are owned by the DBNF and private landowners. The lands with rush darter critical habitat designation are mostly owned by private landowners; a small portion of the City of Pinson; and road easements in Etowah, Jefferson, and Winston Counties, Alabama. The lands designated as critical habitat for the yellowcheek darter are mostly owned by private landowners and road easements

in Cleburne, Searcy, Stone, and Van Buren Counties, Arkansas. Most of the lands designated as critical habitat for the Chucky madtom are private, except for a small portion consisting of road easements in Greene County, Tennessee. Most of the lands designated as critical habitat for the laurel dace are located on private lands, except for a small portion consisting of road easements in Bledsoe, Rhea, and Sequatchie Counties, Tennessee. Consequently, we do not believe that the critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

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 Cumberland darter, rush darter, yellowcheek darter, Chucky madtom, and laurel dace in a takings implications assessment. As discussed above, the designation of critical habitat affects only Federal actions. Although private parties that receive Federal funding, assistance, or 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. Therefore, the takings implications assessment concludes that this designation of critical habitat for these five species 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 rule does not have significant Federalism effects. A federalism impact summary statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this critical habitat designation with appropriate State resource agencies in Kentucky, Alabama, Arkansas, and Tennessee. We received one comment from the Kentucky Department of Fish and Wildlife Resources related to road crossings and culverts acting as threats to the Cumberland darter. This comment was incorporated into this final rule. We did not receive any other comments from the four affected States. The designation of critical habitat in areas currently occupied by these five fishes may impose nominal additional regulatory 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 these species are specifically identified. This information does not alter where and what Federally sponsored activities may occur. However, it may assist these 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 are designating critical habitat in accordance with the provisions of the Act. This final rule uses standard property descriptions and identifies the elements of physical and biological features essential to the conservation of the Cumberland darter, rush darter, yellowcheek darter, Chucky madtom, and laurel dace within the designated areas to assist the public in understanding the habitat needs of these 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)).

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 Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

We determined that there are no tribal lands that were occupied by the Cumberland darter, rush darter, yellowcheek darter, Chucky madtom, or laurel dace at the time of listing that contain the features essential for conservation of these species, and no tribal lands unoccupied by these five species that are essential for the conservation of these species. Therefore, we are not designating critical habitat for these five species on tribal lands.

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**).

Authors

The primary authors of this package are the staff members of the Arkansas, Kentucky, Mississippi, and Tennessee Ecological Services Field Offices.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.11(h) by revising the entries for ''Dace, laurel,'' ''Darter, Cumberland,'' ''Darter, rush,'' ''Darter, yellowcheek,'' and ''Madtom, chucky'' under FISHES in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	*Scientific name*						
*	*	*	*	*	*		*
FISHES							
*	*	*	*	*	*		*
Dace, laurel	*Chrosomus saylori*	U.S.A. (TN)	Entire	E	791	17.95(e)	NA
*	*	*	*	*	*		*
Darter, Cumberland	*Etheostoma susanae*	U.S.A. (KY, TN)	Entire	E	791	17.95(e)	NA
*	*	*	*	*	*		*
Darter, rush	*Etheostoma phytophilum.*	U.S.A. (AL)	Entire	E	791	17.95(e)	NA
*	*	*	*	*	*		*
Darter, yellowcheek	*Etheostoma moorei*	U.S.A. (AR)	Entire	E	791	17.95(e)	NA
*	*	*	*	*	*		*
Madtom, Chucky	*Noturus crypticus*	U.S.A. (TN)	Entire	E	791	17.95(e)	NA
*	*	*	*	*	*		*

■ 3. In § 17.95, amend paragraph (e) by adding entries for ''Laurel Dace (*Chrosomus saylori*)'', ''Cumberland Darter (*Etheostoma susanae*)'', ''Rush Darter (*Etheostoma phytophilum*)'', ''Yellowcheek Darter (*Etheostoma moorei*)'', and ''Chucky Madtom (*Noturus crypticus*)'' in the same order that those species appear in the table at § 17.11(h), to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(e) *Fishes.*

* * * * *

Laurel Dace (*Chrosomus saylori*)

(1) Critical habitat units are depicted for Bledsoe, Rhea, and Sequatchie Counties, Tennessee, on the maps below.

(2) Within these areas, the primary constituent elements of the physical and biological features essential to the conservation of the laurel dace consist of five components:

(i) Pool and run habitats of geomorphically stable, first- to second-order streams with riparian vegetation; cool, clean, flowing water; shallow depths; and connectivity between spawning, foraging, and resting sites to promote gene flow throughout the species' range.

(ii) Stable bottom substrates composed of relatively silt-free gravel, cobble, and slab-rock boulder substrates with undercut banks and canopy cover. Relatively silt-free is defined for the purpose of this rule as silt or fine sand within interstitial spaces of substrates in amounts low enough to have minimal impact to the species.

(iii) An instream flow regime (magnitude, frequency, duration, and seasonality of discharge over time) sufficient to provide permanent surface flows, as measured during years with average rainfall, and to maintain benthic habitats utilized by the species.

(iv) Adequate water quality characterized by moderate stream temperatures, acceptable dissolved oxygen concentrations, moderate pH, and low levels of pollutants. Adequate water quality is defined for the purpose of this rule as the quality necessary for normal behavior, growth, and viability of all life stages of the laurel dace.

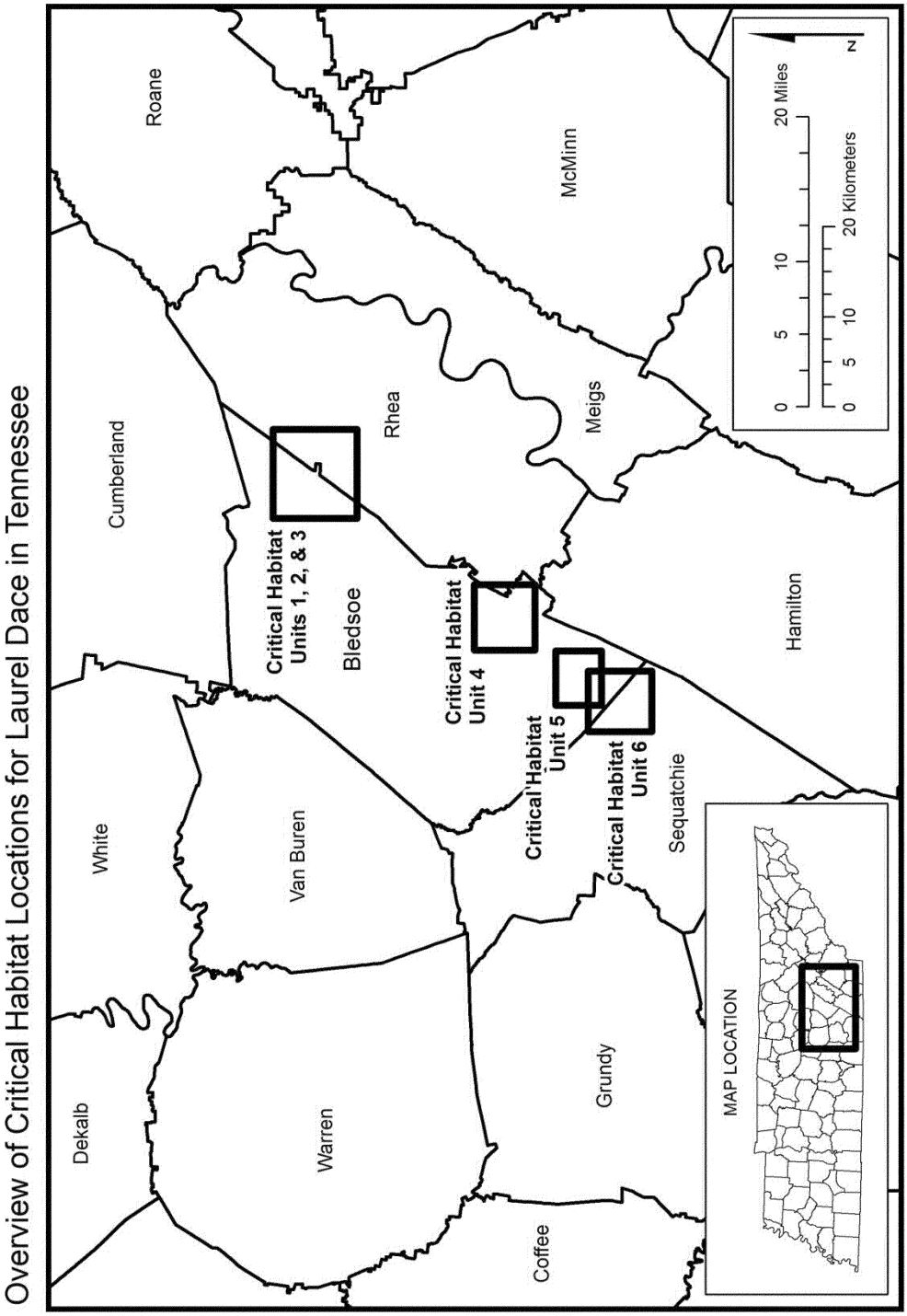
(v) Prey base of aquatic macroinvertebrates, including midge larvae, caddisfly larvae, and stonefly larvae.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on November 15, 2012.

(4) *Critical habitat unit maps.* Data layers defining map units were created on a base of USGS digital ortho-photo quarter-quadrangles, and critical habitat units were then mapped using Tennessee State Plane, Lambert Conformal Conic Projection, units feet. Upstream and downstream limits were then identified by longitude and latitude using decimal degrees and projected in WGS 1984. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the

field office Internet site (*http://www.fws.gov/cookeville), http://www.regulations.gov* at Docket No. FWS–R4–ES–2011–0074, and at the Service's Tennessee Fish and Wildlife Office. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Index map follows:



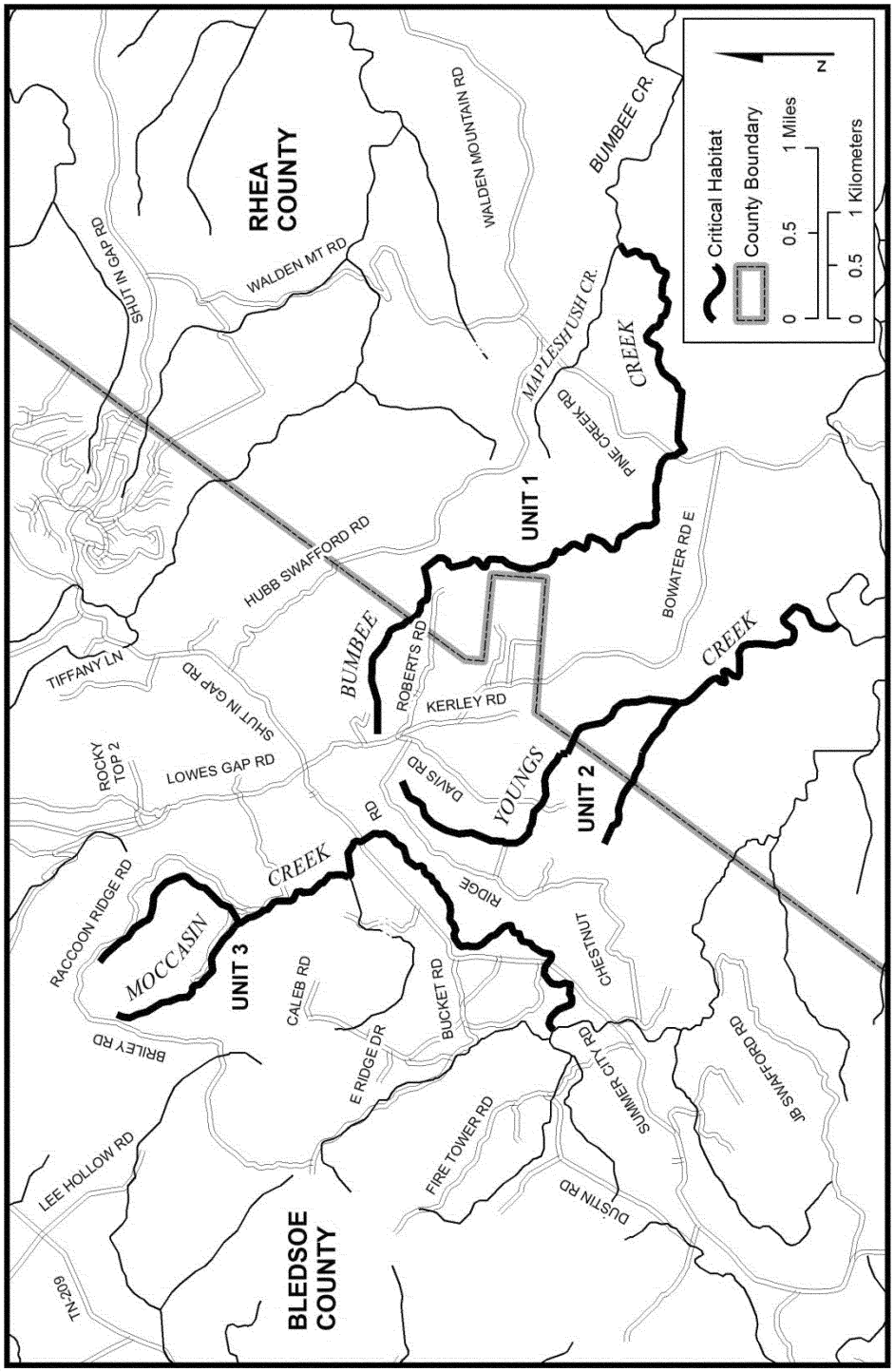
(6) Units 1, 2, and 3: Bumbee Creek and Youngs Creek, Bledsoe and Rhea Counties, Tennessee; and Moccasin Creek, Bledsoe County, Tennessee.

(i) Unit 1 includes 7.8 river kilometers (rkm) (4.8 river miles (rmi)) of Bumbee Creek from its headwaters in Bledsoe County, downstream to its confluence with Mapleslush Branch in Rhea County, Tennessee.

(ii) Unit 2 includes 7.9 rkm (4.9 rmi) of Youngs Creek from its headwaters in Bledsoe County, downstream to its confluence with Moccasin Creek in Rhea County, Tennessee.

(iii) Unit 3 includes 9.0 rkm (5.6 rmi) of Moccasin Creek from its headwaters downstream to 0.1 rkm (0.6 rmi) below its confluence with Lick Creek in Bledsoe County, Tennessee.

(iv) Map of Units 1, 2, and 3 of critical habitat for the laurel dace follows:

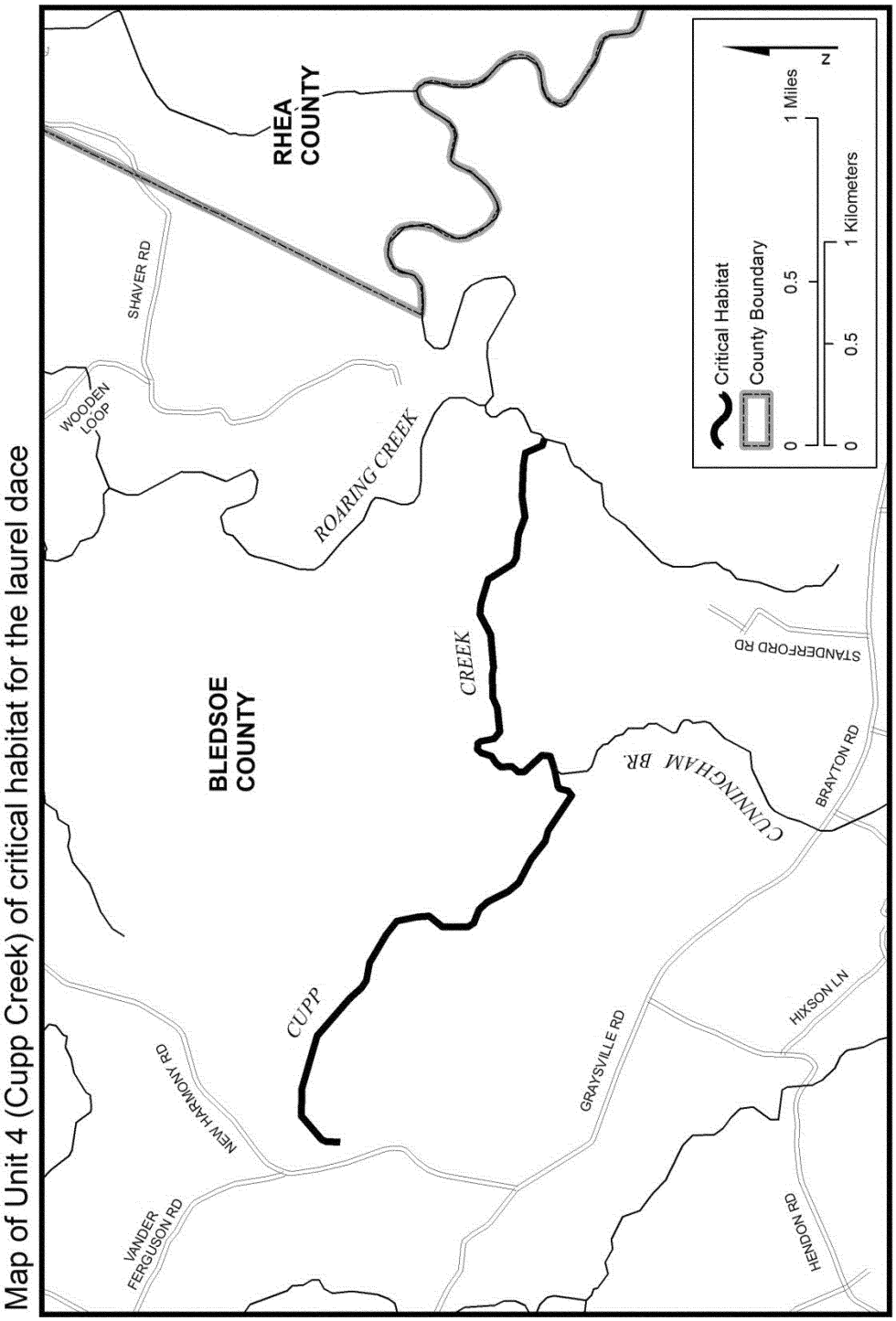


Map of Units 1 (Bumbee Creek), 2 (Youngs Creek), and 3 (Moccasin Creek) of critical habitat for the laurel dace

(7) Unit 4: Cupp Creek, Bledsoe County, Tennessee.

(i) Unit 4 includes 5.0 rkm (3.1 rmi) of Cupp Creek from its headwaters downstream to its confluence with an unnamed tributary in Bledsoe County, Tennessee.

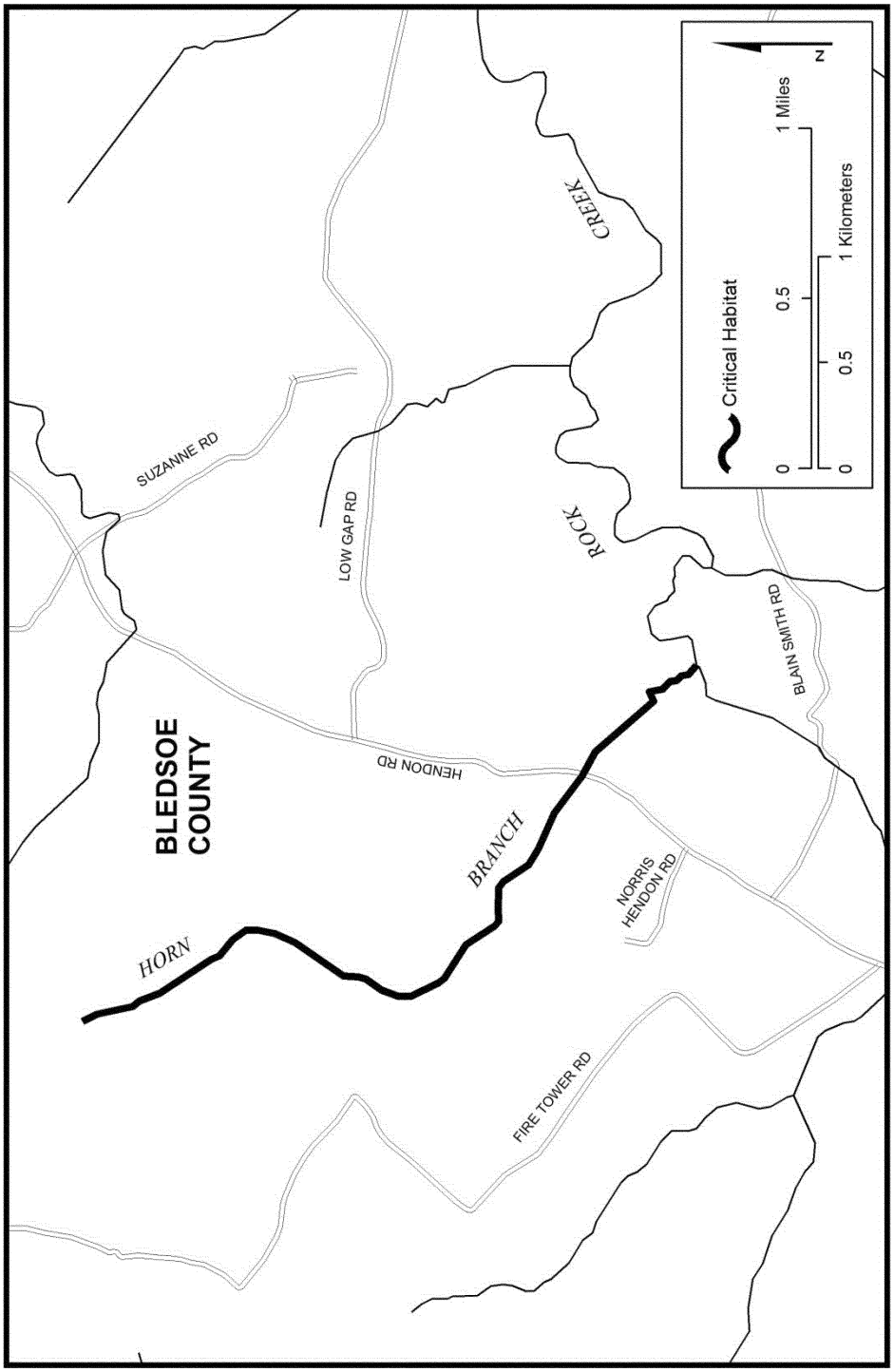
(ii) Map of Unit 4 of critical habitat for the laurel dace follows:



(8) Unit 5: Horn Branch, Bledsoe County, Tennessee.

(i) Unit 5 includes 4.0 rkm (2.5 rmi) of Horn Branch from its headwaters downstream to its confluence with Rock Creek, Bledsoe County, Tennessee.

(ii) Map of Unit 5 of critical habitat for the laurel dace follows:



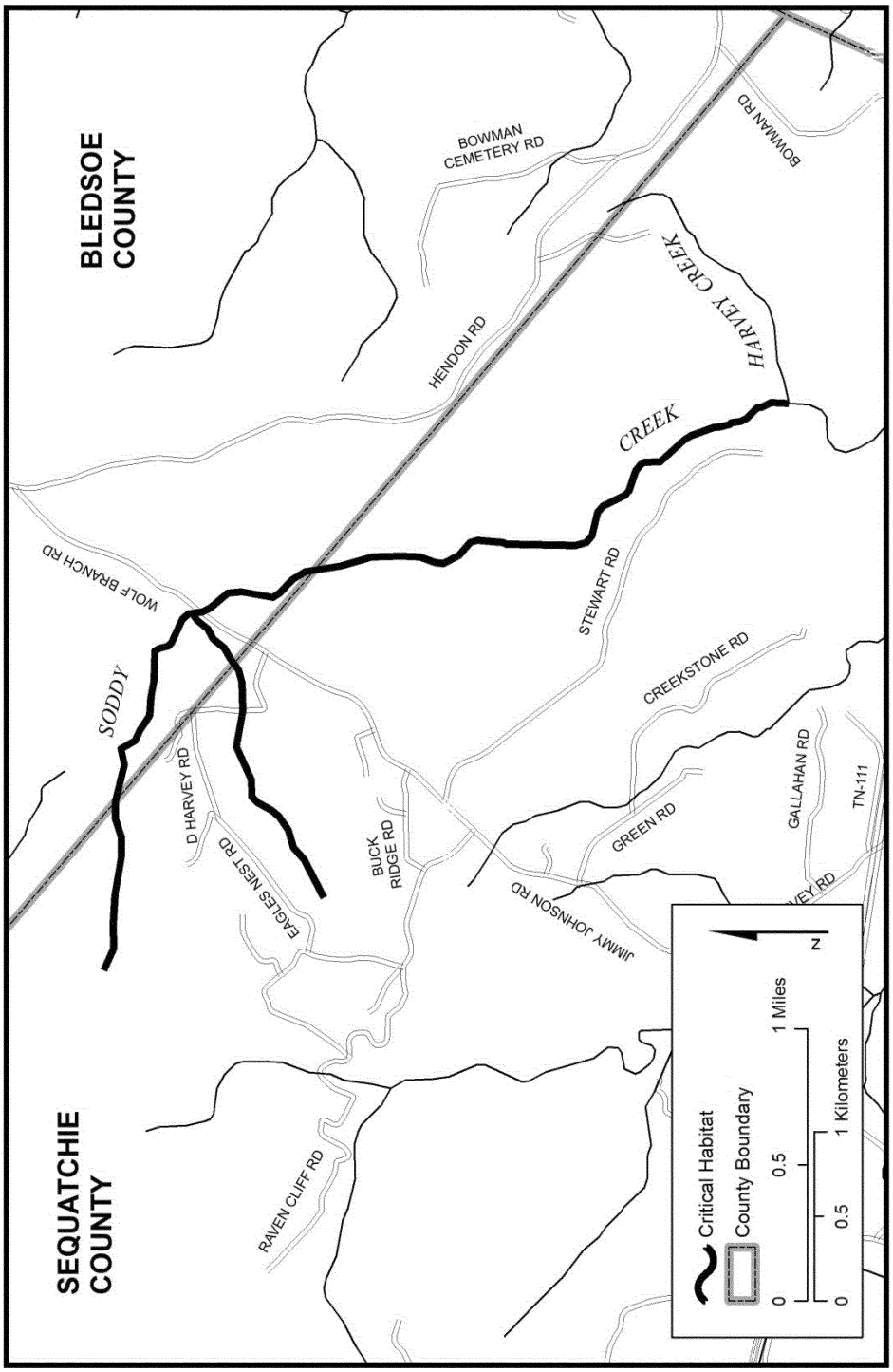
Map of Unit 5 (Horn Branch) of critical habitat for the laurel dace

(9) Unit 6: Soddy Creek, Sequatchie and Bledsoe Counties, Tennessee.

(i) Unit 6 includes 8.4 rkm (5.2 rmi) of Soddy Creek from its headwaters in Sequatchie County, downstream to its confluence with Harvey Creek in Sequatchie County, Tennessee.

(ii) Map of Unit 6 of critical habitat for the laurel dace follows:

Map of Unit 6 (Soddy Creek) of critical habitat for the laurel dace



* * * * *

Cumberland Darter (*Etheostoma susanae*)

(1) Critical habitat units are depicted for McCreary and Whitley Counties, Kentucky, and Campbell and Scott Counties, Tennessee, on the maps below.

(2) Within these areas, the primary constituent elements of the physical and biological features essential to the conservation of the Cumberland darter consist of five components:

(i) Shallow pools and gently flowing runs of geomorphically stable, second- to fourth-order streams with connectivity between spawning,

foraging, and resting sites to promote gene flow throughout the species' range.

(ii) Stable bottom substrates composed of relatively silt-free sand and sand-covered bedrock, boulders, large cobble, woody debris, or other cover.

(iii) An instream flow regime (magnitude, frequency, duration, and seasonality of discharge over time) sufficient to provide permanent surface flows, as measured during years with average rainfall, and to maintain benthic habitats utilized by the species.

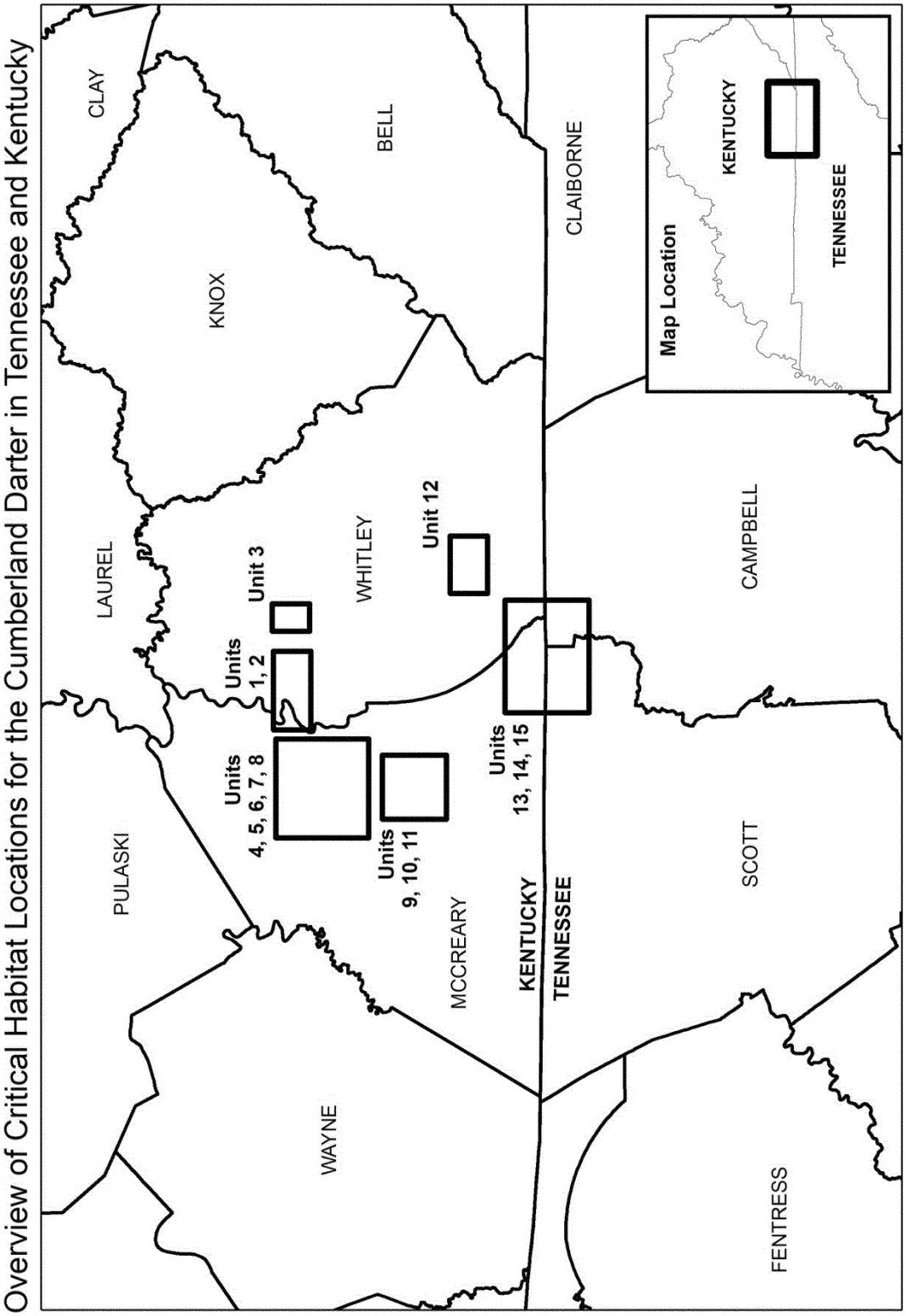
(iv) Adequate water quality characterized by moderate stream temperatures, acceptable dissolved oxygen concentrations, moderate pH, and low levels of pollutants. Adequate water quality is defined for the purpose of this rule as the quality necessary for normal behavior, growth, and viability of all life stages of the Cumberland darter.

(v) Prey base of aquatic macroinvertebrates, including midge larvae, mayfly nymphs, caddisfly larvae, and microcrustaceans.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, bridges, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on November 15, 2012.

(4) *Critical habitat map units.* Data layers defining map units were created on a base of USGS digital ortho-photo quarter-quadrangles, and critical habitat units were then mapped using Tennessee State Plane, Lambert Conformal Conic Projection, units feet. Upstream and downstream limits were then identified by longitude and latitude using decimal degrees and projected in WGS 1984. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the field office Internet site (*http://www.fws.gov/cookeville), http://www.regulations.gov* at Docket No. FWS–R4–ES–2011–0074, and at the Service's Tennessee Fish and Wildlife Office. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Index map follows:

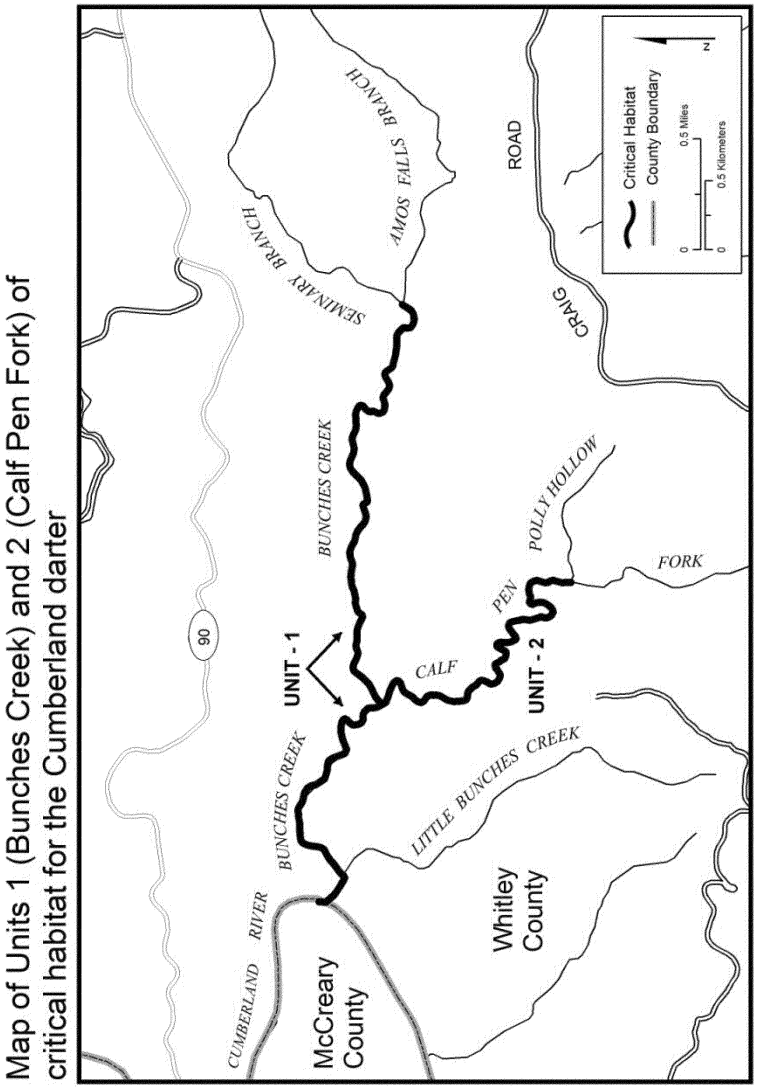


(6) Units 1 and 2: Bunches Creek and Calf Pen Fork, Whitley County, Kentucky.

(i) Unit 1 includes 5.8 river kilometers (rkm) (3.6 river miles (rmi)) of Bunches Creek from the Seminary Branch and Amos Falls Branch confluence downstream to its confluence with the Cumberland River.

(ii) Unit 2 includes 2.9 rkm (1.8 rmi) of Calf Pen Fork from its confluence with Polly Branch downstream to its confluence with Bunches Creek.

(iii) Map of Units 1 and 2 of critical habitat for the Cumberland darter follows:



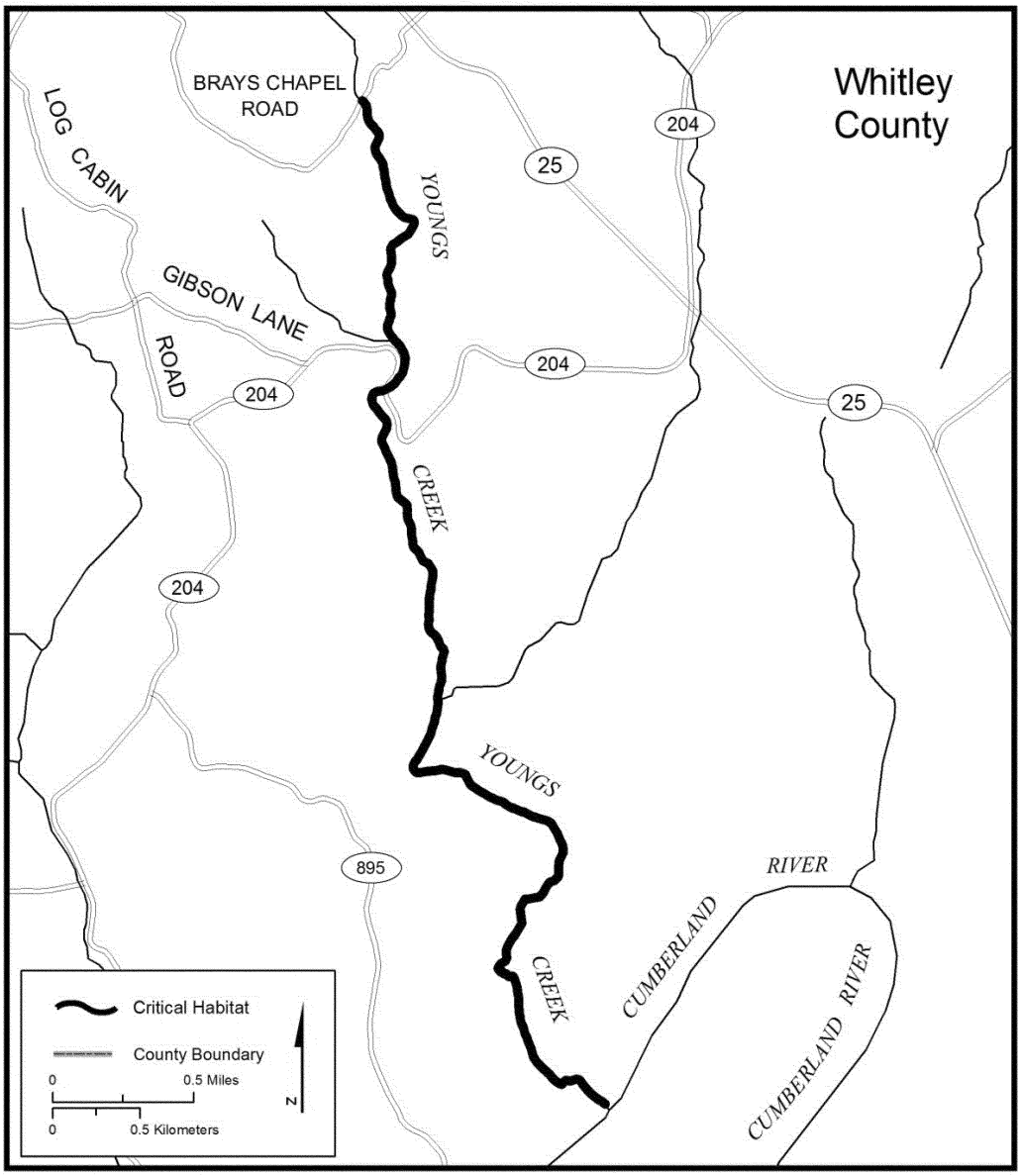
Map of Units 1 (Bunches Creek) and 2 (Calf Pen Fork) of critical habitat for the Cumberland darter

(7) Unit 3: Youngs Creek, Whitley County, Kentucky.

(i) Unit 3 includes 7.4 rkm (4.6 rmi) of Youngs Creek from Brays Chapel Road downstream to its confluence with the Cumberland River.

(ii) Map of Unit 3 of critical habitat for the Cumberland darter follows:

Map of Unit 3 (Youngs Creek) of critical habitat for the Cumberland darter



(8) Units 4, 5, 6, 7, and 8: Barren Fork, Indian Creek, Cogur Fork, Kilburn Fork, and Laurel Fork, McCreary County, Kentucky.

(i) Unit 4 includes 6.3 rkm (3.9 rmi) of Barren Fork from its confluence with an unnamed tributary downstream to its confluence with Indian Creek.

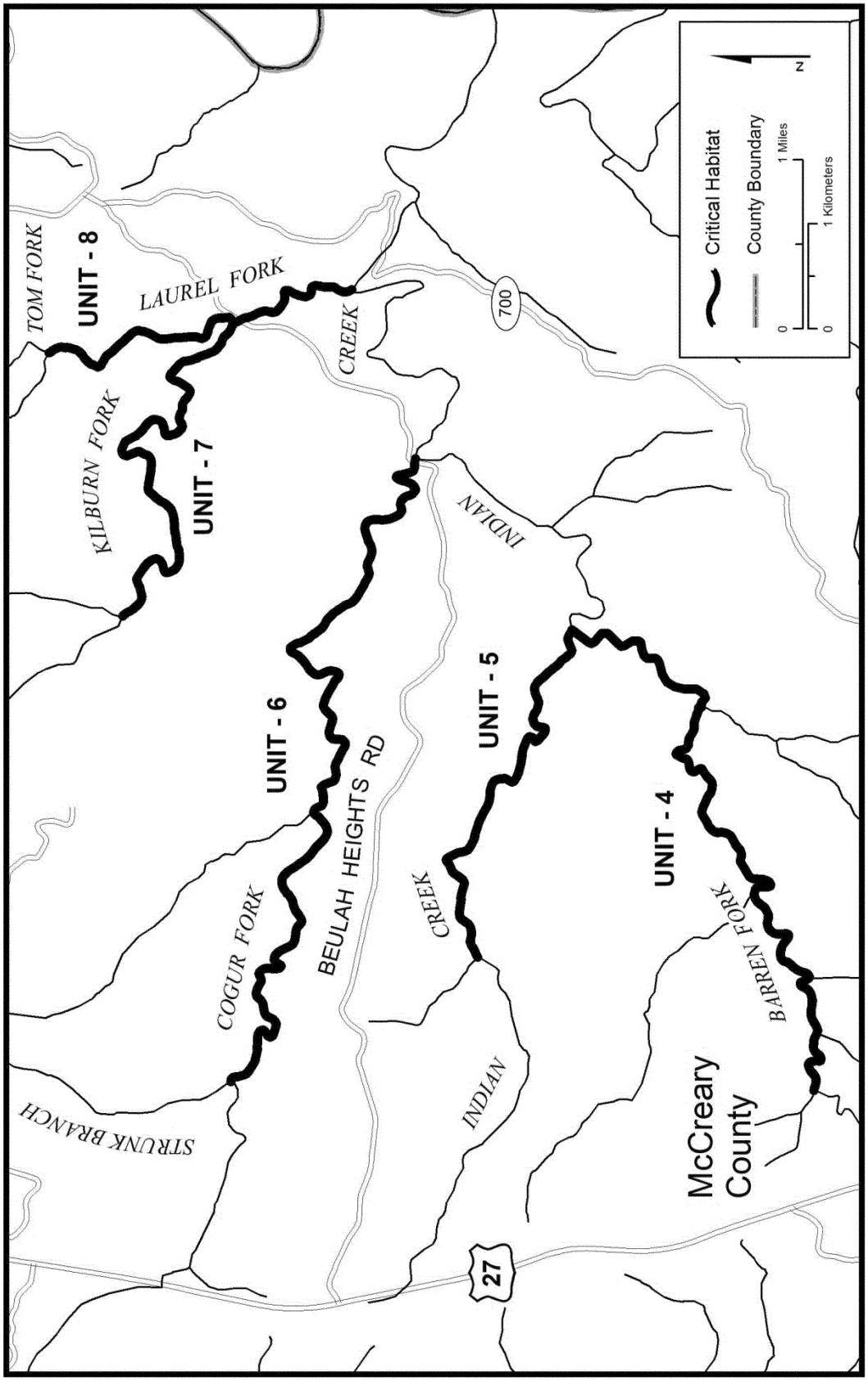
(ii) Unit 5 includes 4.0 rkm (2.5 rmi) of Indian Creek from its confluence with an unnamed tributary downstream to its confluence with Barren Fork.

(iii) Unit 6 includes 8.6 rkm (5.4 rmi) of Cogur Fork from its confluence with Strunk Branch downstream to its confluence with Indian Creek.

(iv) Unit 7 includes 4.6 rkm (2.9 rmi) of Kilburn Fork from its confluence with an unnamed tributary downstream to its confluence with Laurel Fork.

(v) Unit 8 includes 3.5 rkm (2.2 rmi) of Laurel Fork from its confluence with Toms Fork downstream to its confluence with Indian Creek.

(vi) Map of Units 4, 5, 6, 7, and 8 of critical habitat for the Cumberland darter follows:



Map of Units 4 (Barren Fork), 5 (Indian Creek), 6 (Cogur Fork), 7 (Kilburn Fork), and 8 (Laurel Fork) of critical habital for the Cumberland darter

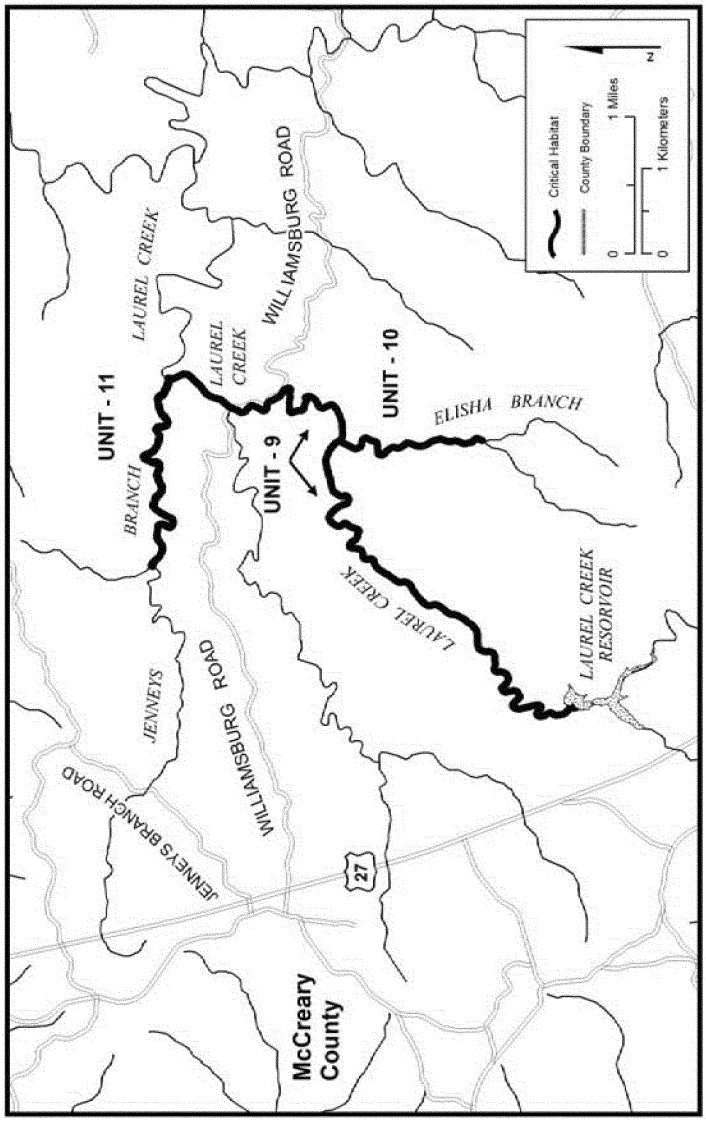
(9) Units 9, 10, and 11: Laurel Creek, Elisha Branch, and Jenneys Branch, McCreary County, Kentucky.

(i) Unit 9 includes 9.4 rkm (5.9 rmi) of Laurel Creek from Laurel Creek Reservoir downstream to its confluence with Jenneys Branch.

(ii) Unit 10 includes 2.1 rkm (1.3 rmi) of Elisha Branch from its confluence with an unnamed tributary downstream to its confluence with Laurel Creek.

(iii) Unit 11 includes 3.1 rkm (1.9 rmi) of Jenneys Branch from its confluence with an unnamed tributary downstream to its confluence with Laurel Creek.

(iv) Map of Units 9, 10, and 11 of critical habitat for the Cumberland darter follows:

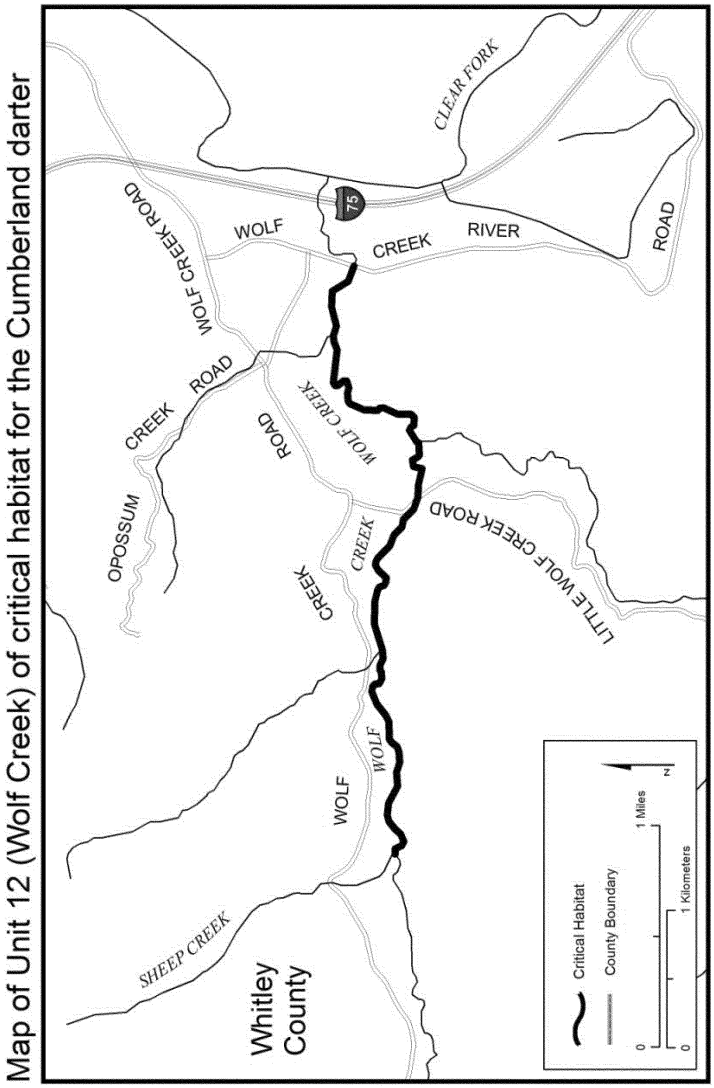


Map of Units 9 (Laurel Creek), 10 (Elisha Fork), and 11 (Jenneys Branch) of critical habitat for the Cumberland darter

(10) Unit 12: Wolf Creek, Whitley County, Kentucky.

(i) Unit 12 includes 6.3 rkm (3.9 rmi) of Wolf Creek from its confluence with Sheep Creek downstream to its intersection with Wolf Creek River Road.

(ii) Map of Unit 12 of critical habitat for the Cumberland darter follows:



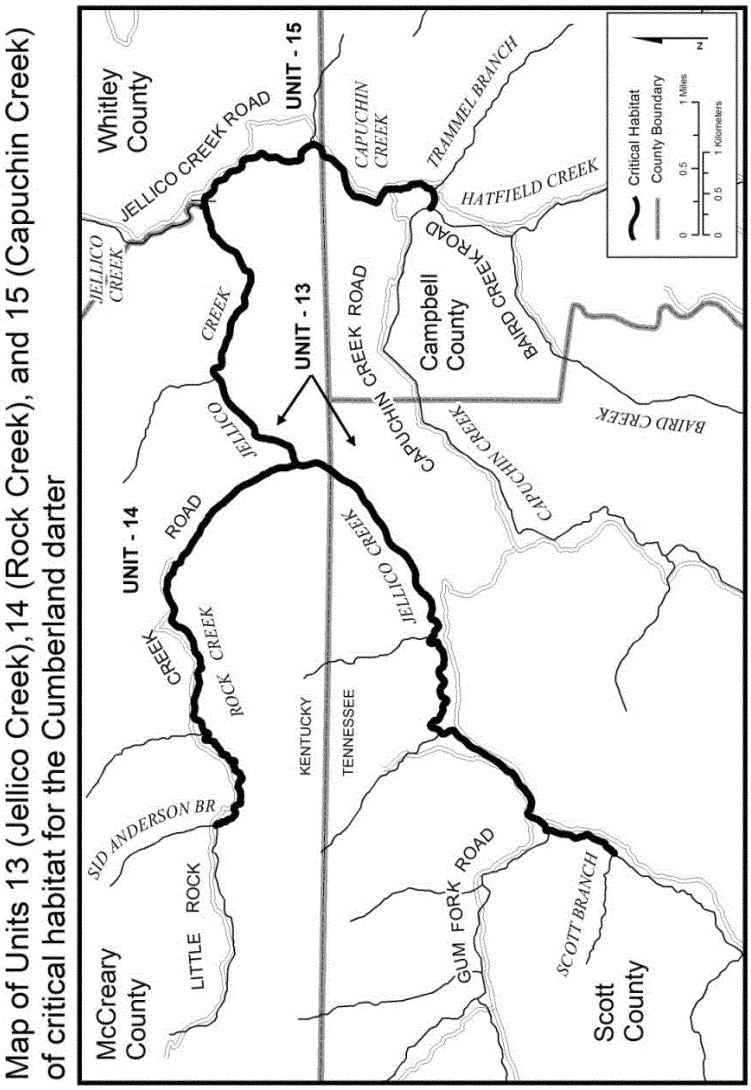
(11) Units 13, 14, and 15: Jellico Creek, Rock Creek, and Capuchin Creek, McCreary and Whitley Counties, Kentucky, and Campbell and Scott Counties, Tennessee.

(i) Unit 13 includes 11.5 rkm (7.2 rmi) of Jellico Creek from its confluence with Scott Branch, Scott County, Tennessee, downstream to its confluence with Capuchin Creek, McCreary County, Kentucky.

(ii) Unit 14 includes 6.1 rkm (3.8 rmi) of Rock Creek from its confluence with Sid Anderson Branch downstream to its confluence with Jellico Creek.

(iii) Unit 15 includes 4.2 rkm (2.6 rmi) of Capuchin Creek from its confluence with Hatfield Creek downstream to its confluence with Jellico Creek.

(iv) Map of Units 13, 14, and 15 of critical habitat for the Cumberland darter follows:



This map is provided for illustrative purposes of critical habitat only. For precise legal definition of critical habitat, please refer to the narrative unit descriptions.

* * * * *

Rush Darter (*Etheostoma phytophilum*)

(1) The critical habitat units are depicted for Jefferson, Winston, and Etowah Counties in Alabama, on the maps below.

(2) Within these areas, the primary constituent elements of the physical and biological features essential to the conservation of the rush darter consist of five components:

(i) Springs and spring-fed reaches of geomorphically stable, relatively low-gradient, headwater streams with appropriate habitat (bottom substrates) to maintain essential riffles, runs, and pools; emergent vegetation in shallow water and on the margins of small streams and spring runs; cool, clean, flowing water; and connectivity between spawning, foraging, and resting sites to promote gene flow throughout the species' range.

(ii) Stable bottom substrates consisting of a combination of sand with silt, muck, gravel, or bedrock and adequate emergent vegetation in shallow water on the margins of small permanent and ephemeral streams and spring runs.

(iii) Instream flow with moderate velocity and a continuous daily discharge that allows for a longitudinal connectivity regime inclusive of both surface runoff and groundwater sources (springs and seepages) and exclusive of flushing flows caused by stormwater runoff.

(iv) Water quality with temperature not exceeding 26.7 °C (80 °F), dissolved oxygen 6.0 milligrams or greater per liter (mg/L), turbidity of an average monthly reading of 10 Nephelometric Turbidity Units (NTU; units used to measure sediment discharge) and 15 mg/L total suspended solids (TSS; measured as mg/L of sediment in water) or less; and a specific conductance (ability of water to conduct an electric current, based on dissolved solids in the water) of no greater than 225 micro Siemens per centimeter at 26.7 °C (80 °F).

(v) Prey base of aquatic macroinvertebrates, including midge larvae, mayfly nymphs, blackfly larvae, beetles, and microcrustaceans.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they

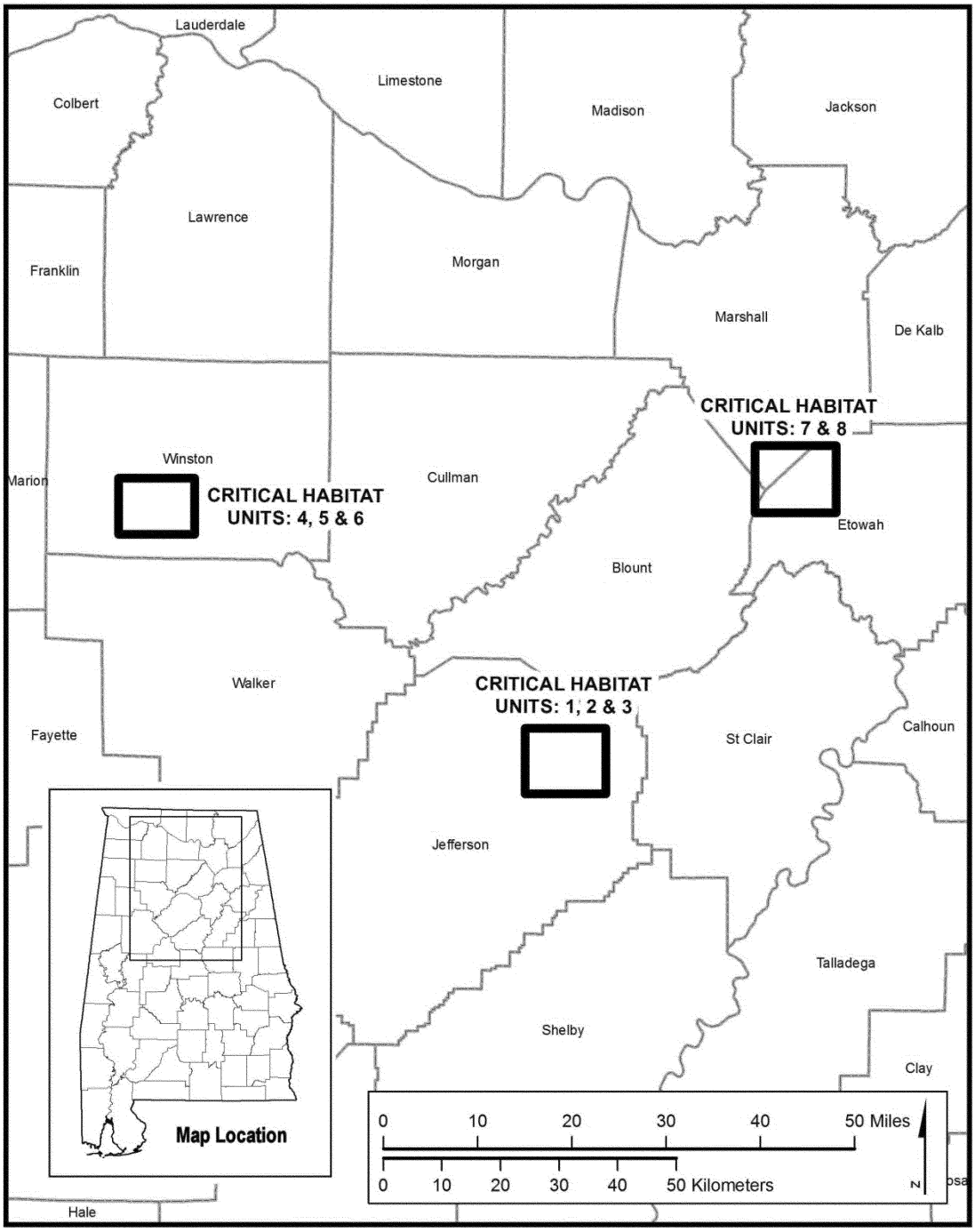
are located existing within the legal boundaries on November 15, 2012.

(4) *Critical habitat map units.* Data layers defining map units were created on a base of USGS digital ortho-photo quarter-quadrangles, and critical habitat units were then mapped using Universal Transverse Mercator (UTM) Zone 16N, NAD1983, coordinates. Upstream and downstream limits were then identified by longitude and latitude using decimal degrees and projected in WGS 1984. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the field office Internet site (*http://www.fws.gov/cookeville*), *http://www.regulations.gov* at Docket No. FWS–R4–ES–2011–0074, and at the Service's Tennessee Fish and Wildlife Office. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Index map follows:

BILLING CODE 4310–55–P

Overview of Critical Habitat Locations for the Rush Darter in Alabama



(6) Units 1, 2, and 3: Beaver Creek, Unnamed Tributary to Beaver Creek and Highway 79 Spring Site, and Tapawingo or Penny Spring and Spring Run, Jefferson County, Alabama.

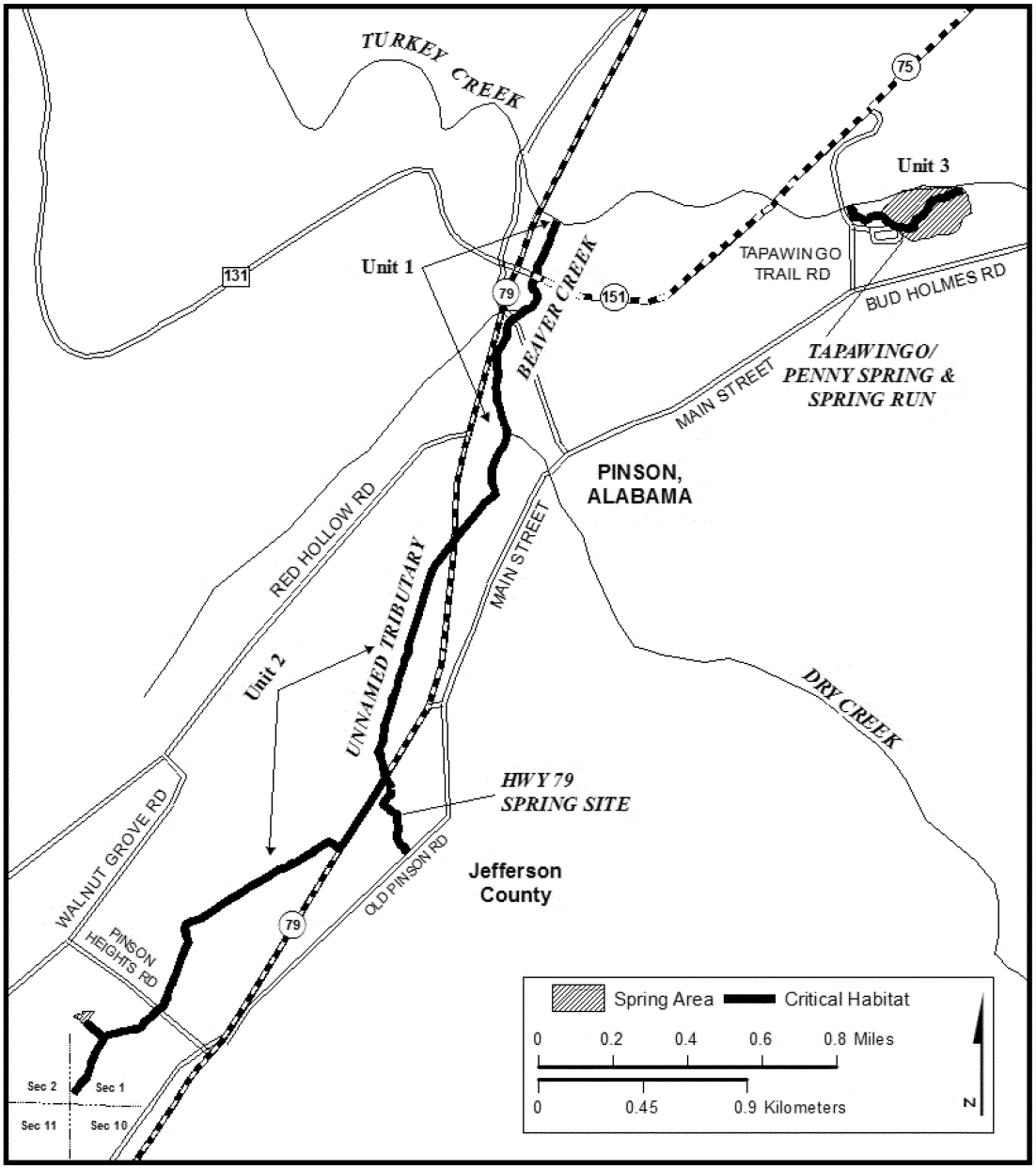
(i) Unit 1 includes 1.0 river kilometers (rkm) (0.6 river miles (rmi)) of Beaver Creek from the confluence with an unnamed tributary to Beaver Creek, downstream to the confluence with Turkey Creek.

(ii) Unit 2 includes 4.4 rkm (2.7 rmi) of an unnamed tributary of Beaver Creek and two spring runs. The site begins at the section 1 and 2 (T16S, R2W) line, as taken from the U.S. Geological Survey 7.5 topographical map (Pinson quadrangle), downstream to its confluence with Dry Creek, and includes a spring run beginning at the springhead just northwest of Old Pinson Road and intersecting with an unnamed tributary to Beaver Creek on the west side of Highway 79, and a spring associated wetland (0.13 ha, 0.33 ac) within the headwaters, south of Pinson Heights Road, flowing 0.9 km (0.05 mi) from the northwest (33.668173, -86.708577) and adjoining to the Unnamed Tributary (33.667344, -86.707429).

(iii) Unit 3 includes 0.6 rkm (0.4 rmi) of spring run, historically called Tapawingo Plunge, along with 6.7 ha (16.5 ac) of flooded spring basin making up Penny Springs, located south of Turkey Creek, north of Bud Holmes Road, east of Tapawingo Trail Road. The east boundary is at latitude 33° 41′ 56.50″ N and longitude 86° 39′ 55.01″ W: 1.0 km (0.6 mi) west of section line 28 and 29 (T15S, R1W) (U.S. Geological Survey 7.5 topographical map (Pinson quadrangle)).

(iv) Map of Units 1, 2, and 3 of critical habitat for the rush darter follows:

Map of Units 1 (Beaver Creek), 2 (unnamed tributary to Beaver Creek and Hwy 79 Spring Site) and 3 (Tapawingo or Penny Spring and Spring Run) of critical Habitat for the rush darter



(7) Units 4, 5, and 6: Wildcat Branch, Mill Creek, and Doe Branch, Winston County, Alabama.

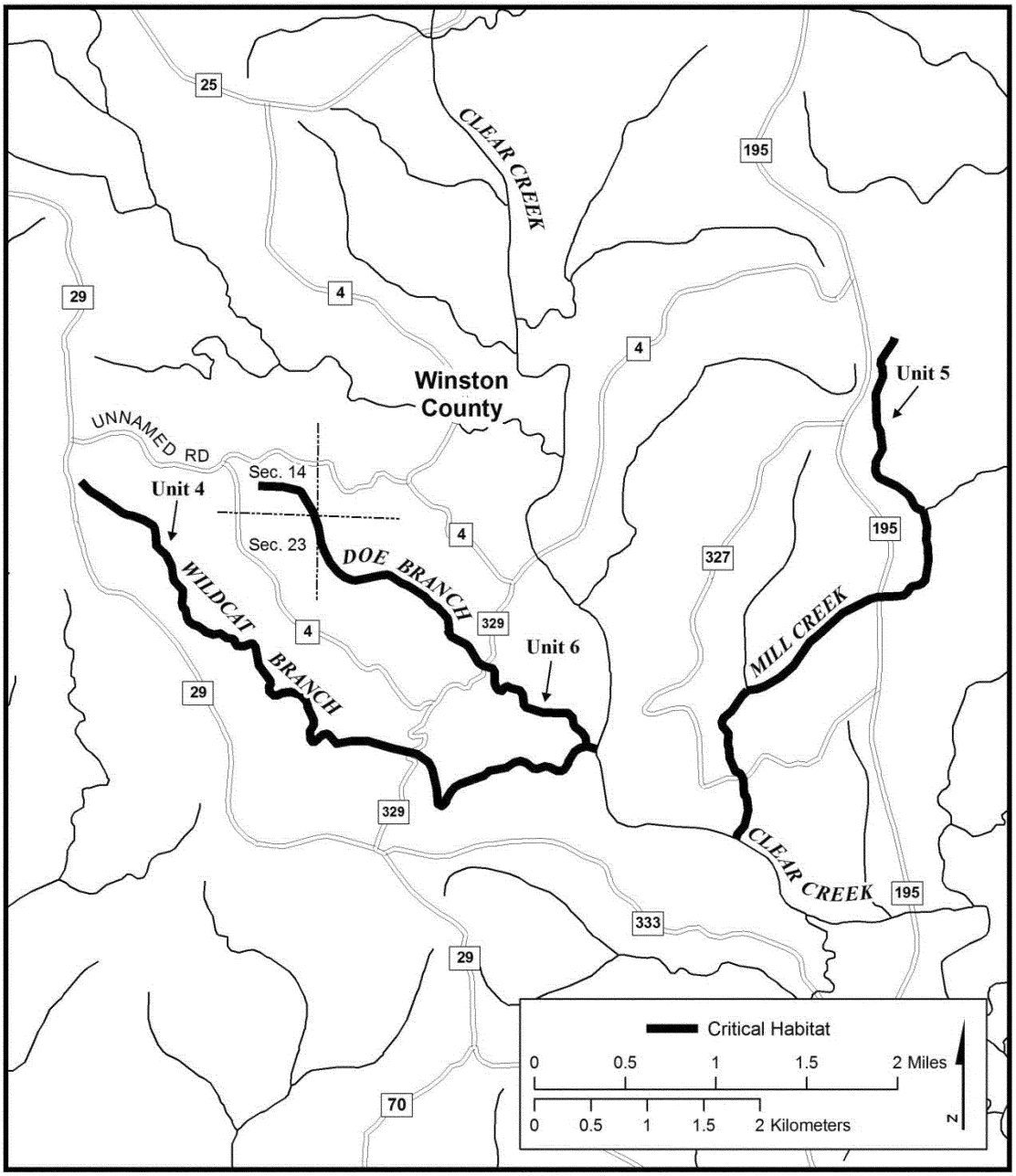
(i) Unit 4 includes 6.6 rkm (4.1 rmi) of Wildcat Branch from the streams headwaters just east of Winston County Road 29 to the confluence with Clear Creek.

(ii) Unit 5 includes 5.9 rkm (3.7 rmi) of Mill Creek from the streams headwaters just east of Winston County Road 195 to the confluence with Clear Creek.

(iii) Unit 6 includes 4.3 rkm (2.7 rmi) of Doe Branch from the streams headwaters north and west of section line 23 and 14 (R9W, T11S; Popular Springs Quadrangle) to the confluence with Wildcat Branch.

(iv) Map of Units 4, 5, and 6 of critical habitat for the rush darter follows:

Map of Units 4 (Wildcat Branch), 5 (Mill Creek) and 6 (Doe Branch) of critical habitat for the rush darter

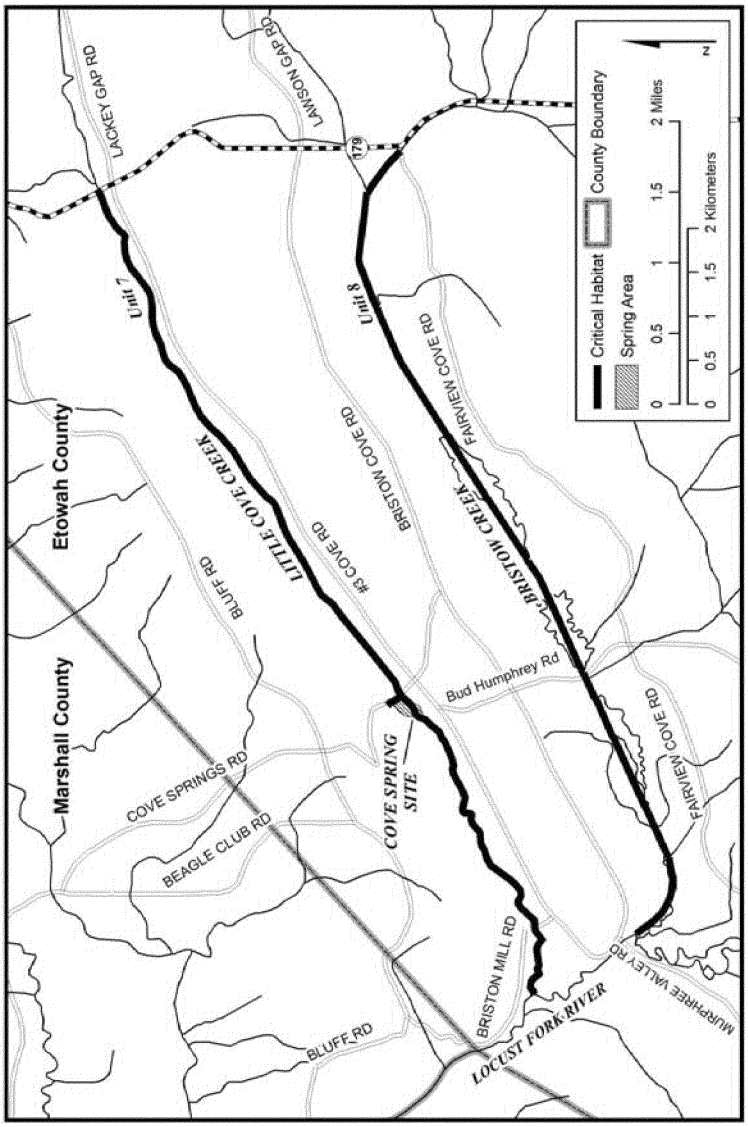


(8) Units 7 and 8: Little Cove Creek, Cove Spring and Spring Run; and Bristow Creek, Etowah County, Alabama.

(i) Unit 7 includes 11.2 rkm (6.1 rmi) of Little Cove Creek and the Cove Spring run system along with 5.1 ha (12.7 ac) of the spring run floodplain. Specifically, the Little Cove Creek section (11.0 rkm (6.0 rmi)) is from the intersection of Etowah County Road 179 near the creek headwaters, downstream to its confluence with the Locust Fork River. The Cove Spring and spring run section includes 0.2 rkm (0.1 rmi) of the spring run from the springhead at the West Etowah Water and Fire Authority pumping station on Cove Spring Road to the confluence with Little Cove Creek and includes 5.1 ha (12.7 acres) of the spring run floodplain due south of the pumping facility.

(ii) Unit 8 includes 10.2 rkm (6.3 rmi) of Bristow Creek beginning from the bridge at Fairview Cove Road, downstream to the confluence with the Locust Fork River.

(iii) Map of Units 7 and 8 of critical habitat for the rush darter follows:



Map of Units 7 (Little Cove Creek, Cove Spring Site) and 8 (Bristow Creek) of critical habitat for the rush darter

* * * * *

Yellowcheek darter (*Etheostoma moorei*)

(1) Critical habitat units are depicted for Cleburne, Searcy, Stone, and Van Buren Counties, Arkansas, on the maps below.

(2) Within these areas, the primary constituent elements of the physical and biological features essential to the conservation of the yellowcheek darter consist of five components:

(i) Geomorphically stable, second- to fifth-order streams with riffle habitats, and connectivity between spawning, foraging, and resting sites to promote gene flow within the species' range where possible.

(ii) Stable bottom composed of relatively silt-free, moderate to strong velocity riffles with gravel, cobble, and boulder substrates.

(iii) An instream flow regime (magnitude, frequency, duration, and seasonality of discharge over time) sufficient to provide permanent surface flows, as measured during years with average rainfall, and to maintain benthic habitats utilized by the species.

(iv) Adequate water quality characterized by moderate stream temperatures, acceptable dissolved oxygen concentrations, moderate pH, and low levels of pollutants. Adequate

water quality is defined for the purpose of this rule as the quality necessary for normal behavior, growth, and viability of all life stages of the yellowcheek darter.

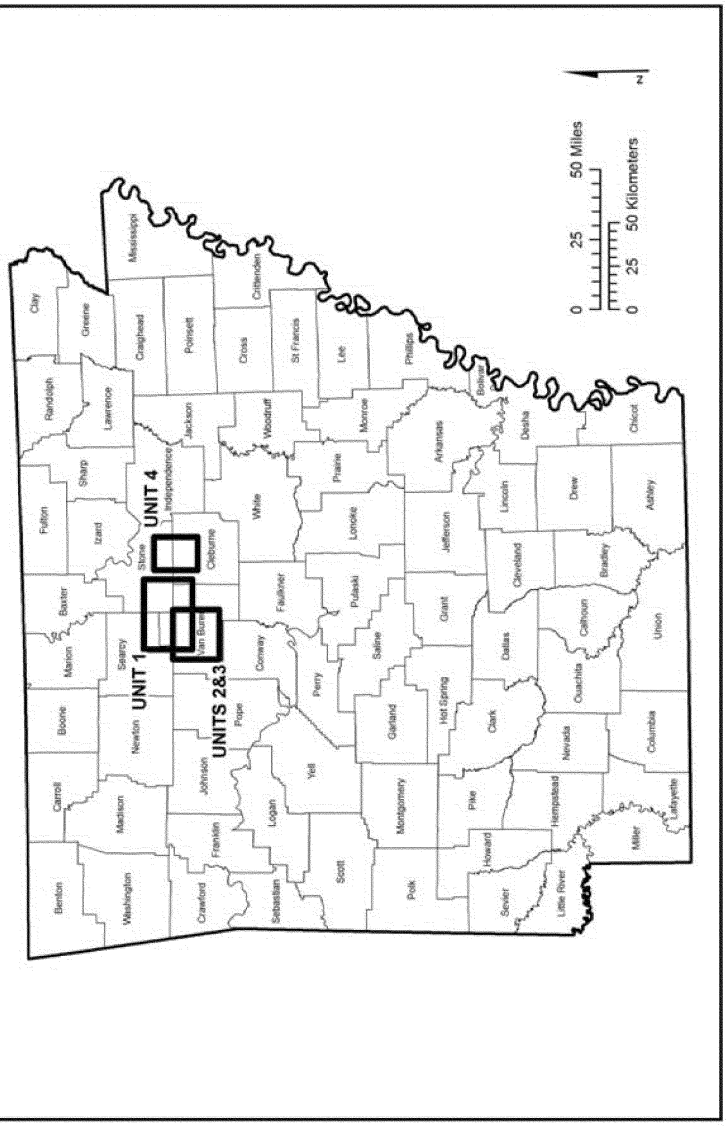
(v) Prey base of aquatic macroinvertebrates, including blackfly larvae, stonefly larvae, mayfly nymphs, and caddisfly larvae.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on November 15, 2012.

(4) *Critical habitat unit maps.* Data layers defining map units were created on a base of USGS digital ortho-photo quarter-quadrangles, and critical habitat units were then mapped using Universal Transverse Mercator (UTM) Zone 15N, NAD1983, coordinates. Upstream and downstream limits were then identified by longitude and latitude using decimal degrees and projected in WGS 1984. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the field office Internet site (*http://www.fws.gov/cookeville*), *http://www.regulations.gov* at Docket No. FWS–R4–ES–2011–0074, and at the Service's Tennessee Fish and Wildlife Office. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Index map follows:

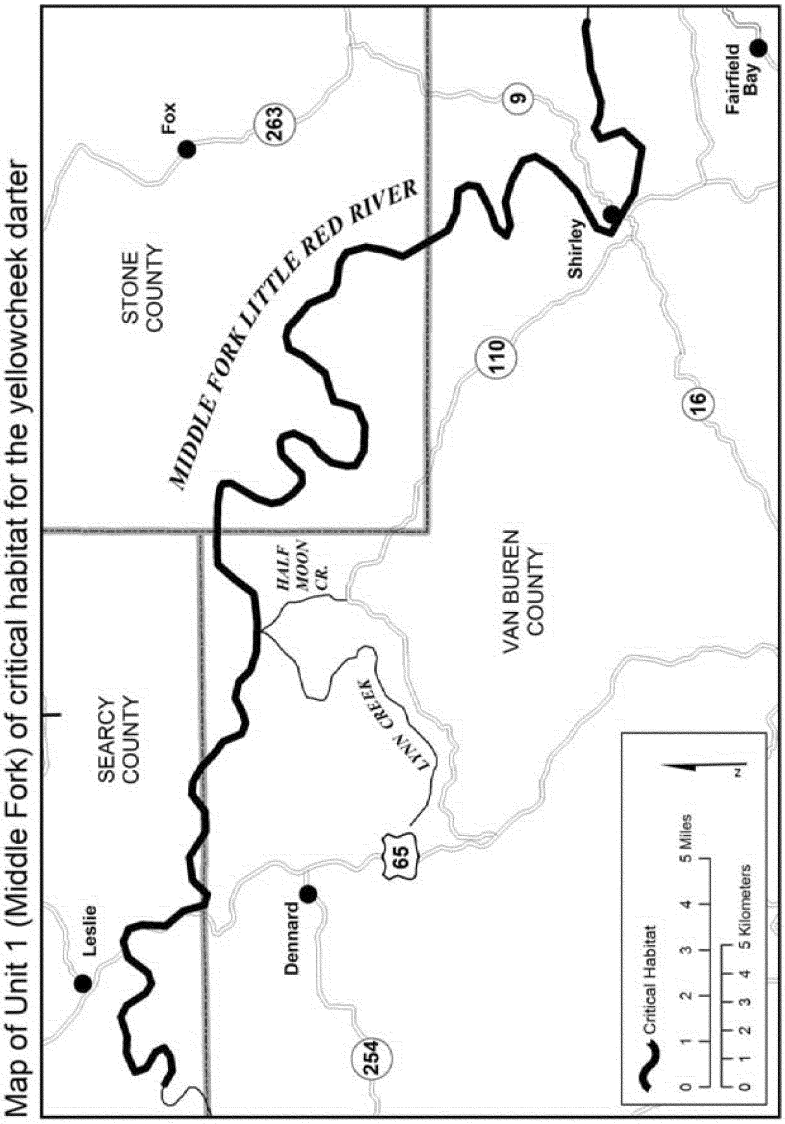
Overview of Critical Habitat Locations for Yellowcheek darter in Arkansas



(6) Unit 1: Middle Fork Little Red River; Searcy, Stone and Van Buren Counties, Arkansas.

(i) Unit 1 includes 73.2 river kilometers (rkm) (45.5 river miles (rmi)) of the Middle Fork of the Little Red River from Searcy County Road 167 approximately 3.4 rkm (2.1 rmi) southwest of Leslie, Arkansas, to a point on the stream 7.7 rkm (4.8 rmi) downstream of the Arkansas Highway 9 crossing of the Middle Fork near Shirley, Arkansas.

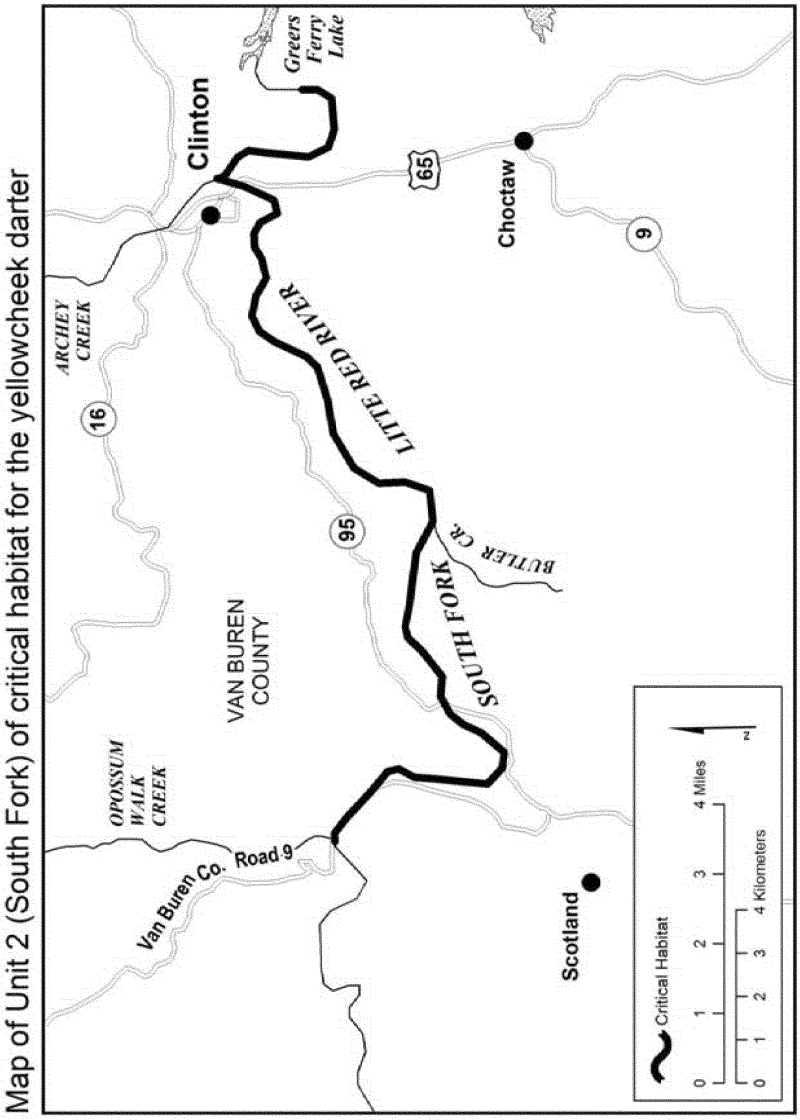
(ii) Map of Unit 1 of critical habitat for the yellowcheek darter follows:



(7) Unit 2: South Fork Little Red River; Van Buren County, Arkansas.

(i) Unit 2 includes 33.8 rkm (21.0 rmi) of the South Fork of the Little Red River from Van Buren County Road 9 three miles north of Scotland, Arkansas, to a point on the stream approximately 5.5 rkm (3.4 rmi) downstream of U.S. Highway 65 in Clinton, Arkansas, where it becomes inundated by Greers Ferry Lake.

(ii) Map of Unit 2 of critical habitat for the yellowcheek darter follows:

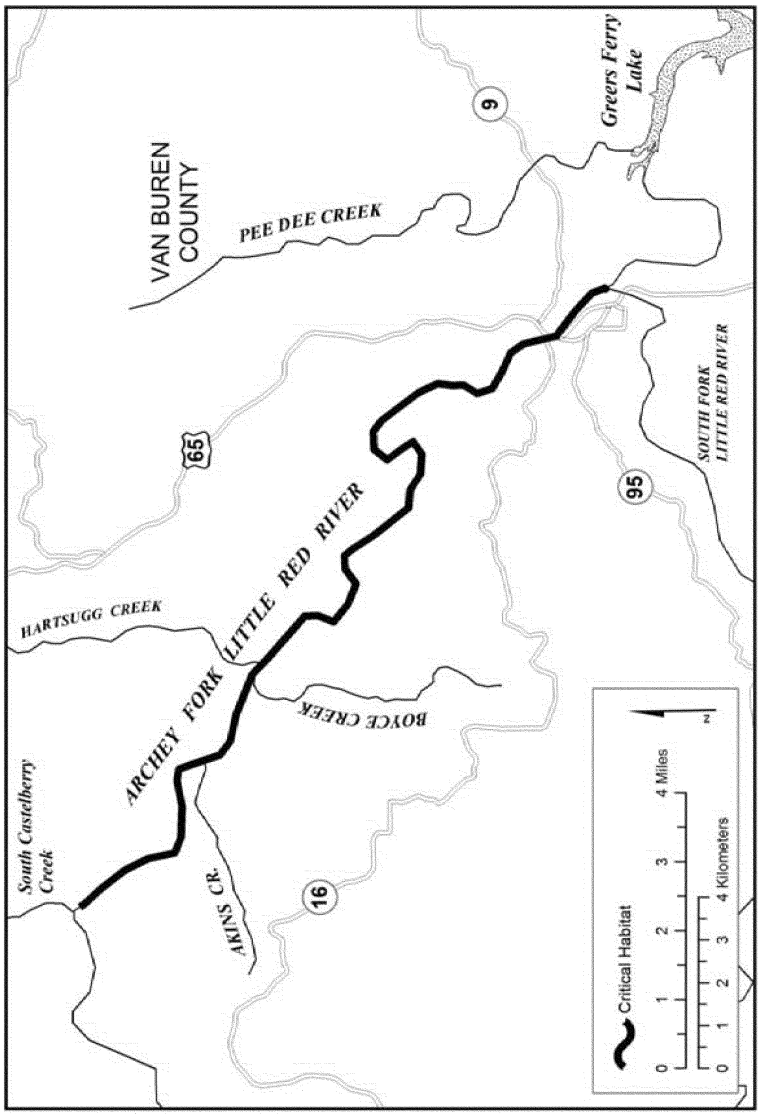


(8) Unit 3: Archey Fork Little Red River; Van Buren County, Arkansas.

(i) Unit 3 includes 28.5 rkm (17.7 rmi) of the Archey Fork of the Little Red River from its confluence with South Castleberry Creek to its confluence with the South Fork of the Little Red River near Clinton, Arkansas.

(ii) Map of Unit 3 of critical habitat for the yellowcheek darter follows:

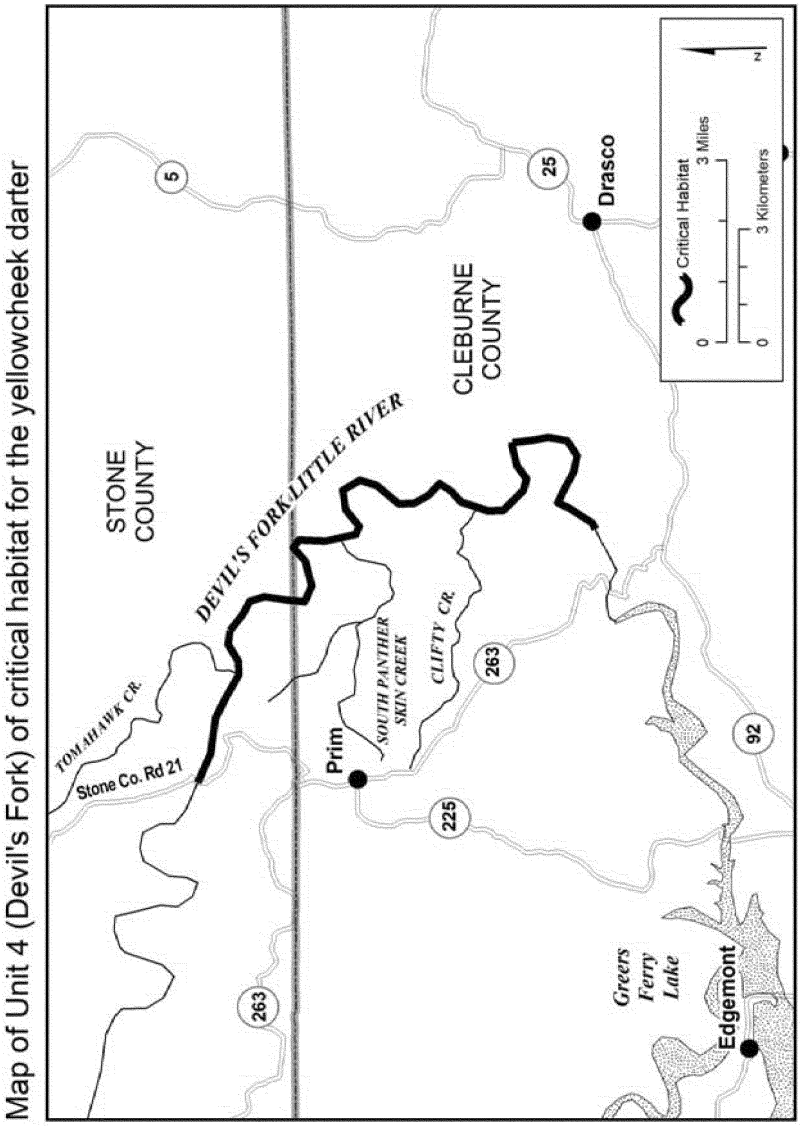
Map of Unit 3 (Archey Fork) of critical habitat for the yellowcheek darter



(9) Unit 4: Devil's Fork Little Red River (including Turkey Creek and Beech Fork); Cleburne and Stone Counties, Arkansas.

(i) Unit 4 includes 28.0 rkm (17.4 rmi) of stream from Stone County Road 21 approximately 3 miles north of Prim, Arkansas, to a point on the Devil's Fork approximately 5.1 km (3.2 mi) southeast of Woodrow, Arkansas, at the point of inundation by Greers Ferry Lake.

(ii) Map of Unit 4 of critical habitat for the yellowcheek darter follows:



* * * * *

Chucky Madtom (*Noturus crypticus*)

(1) The critical habitat unit is depicted for Greene County, Tennessee, on the maps below.

(2) Within this area, the primary constituent elements of the physical and biological features essential to the conservation of the Chucky madtom consist of five components:

(i) Gently flowing run and pool reaches of geomorphically stable streams with cool, clean, flowing water; shallow depths; and connectivity between spawning, foraging, and resting sites to promote gene flow throughout the species' range.

(ii) Stable bottom substrates composed of relatively silt-free, flat gravel, cobble, and slab-rock boulders.

(iii) An instream flow regime (magnitude, frequency, duration, and seasonality of discharge over time) sufficient to provide permanent surface flows, as measured during years with average rainfall, and to maintain benthic habitats utilized by the species.

(iv) Adequate water quality characterized by moderate stream temperatures, acceptable dissolved oxygen concentrations, moderate pH, and low levels of pollutants. Adequate water quality is defined for the purpose of this rule as the quality necessary for normal behavior, growth, and viability of all life stages of the Chucky madtom.

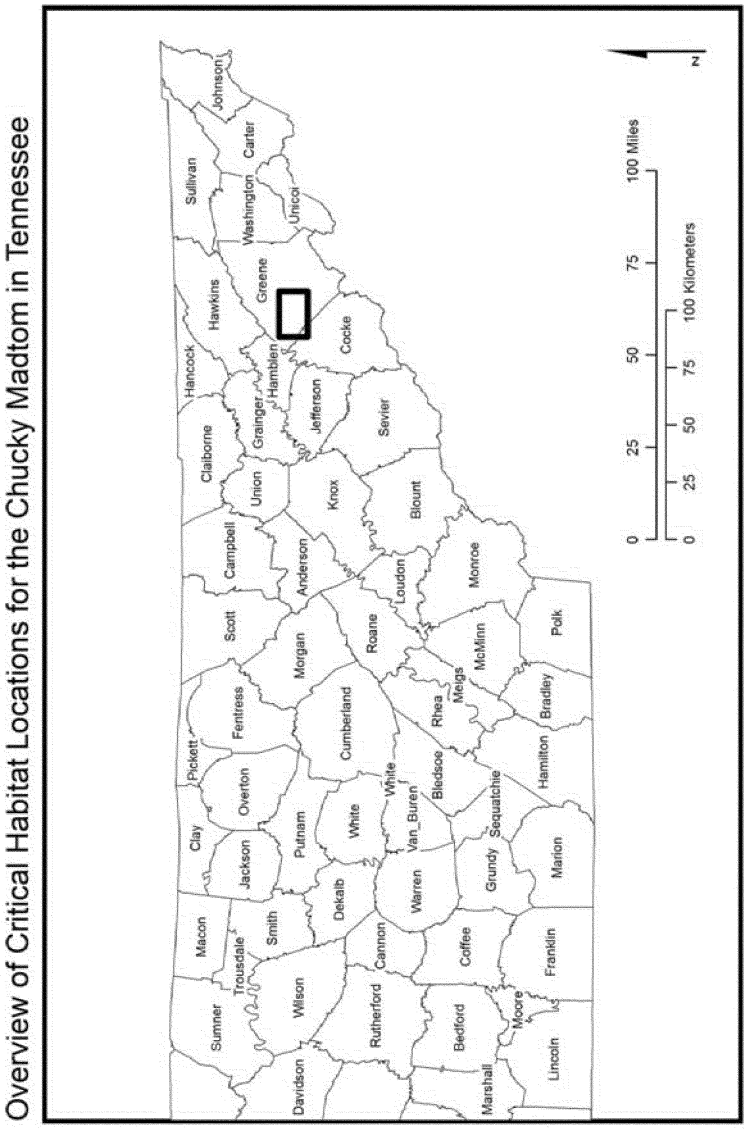
(v) Prey base of aquatic macroinvertebrates, including midge larvae, mayfly nymphs, caddisfly larvae, and stonefly larvae.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on November 15, 2012.

(4) *Critical habitat unit maps.* Data layers defining map units were created on a base of USGS digital ortho-photo

quarter-quadrangles, and critical habitat units were then mapped using Tennessee State Plane, Lambert Conformal Conic Projection, units feet. Upstream and downstream limits were then identified by longitude and latitude using decimal degrees and projected in WGS 1984. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the field office Internet site (*http://www.fws.gov/cookeville*), *http://www.regulations.gov* at Docket No. FWS–R4–ES–2011–0074, and at the Service's Tennessee Fish and Wildlife Office. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Index map follows:

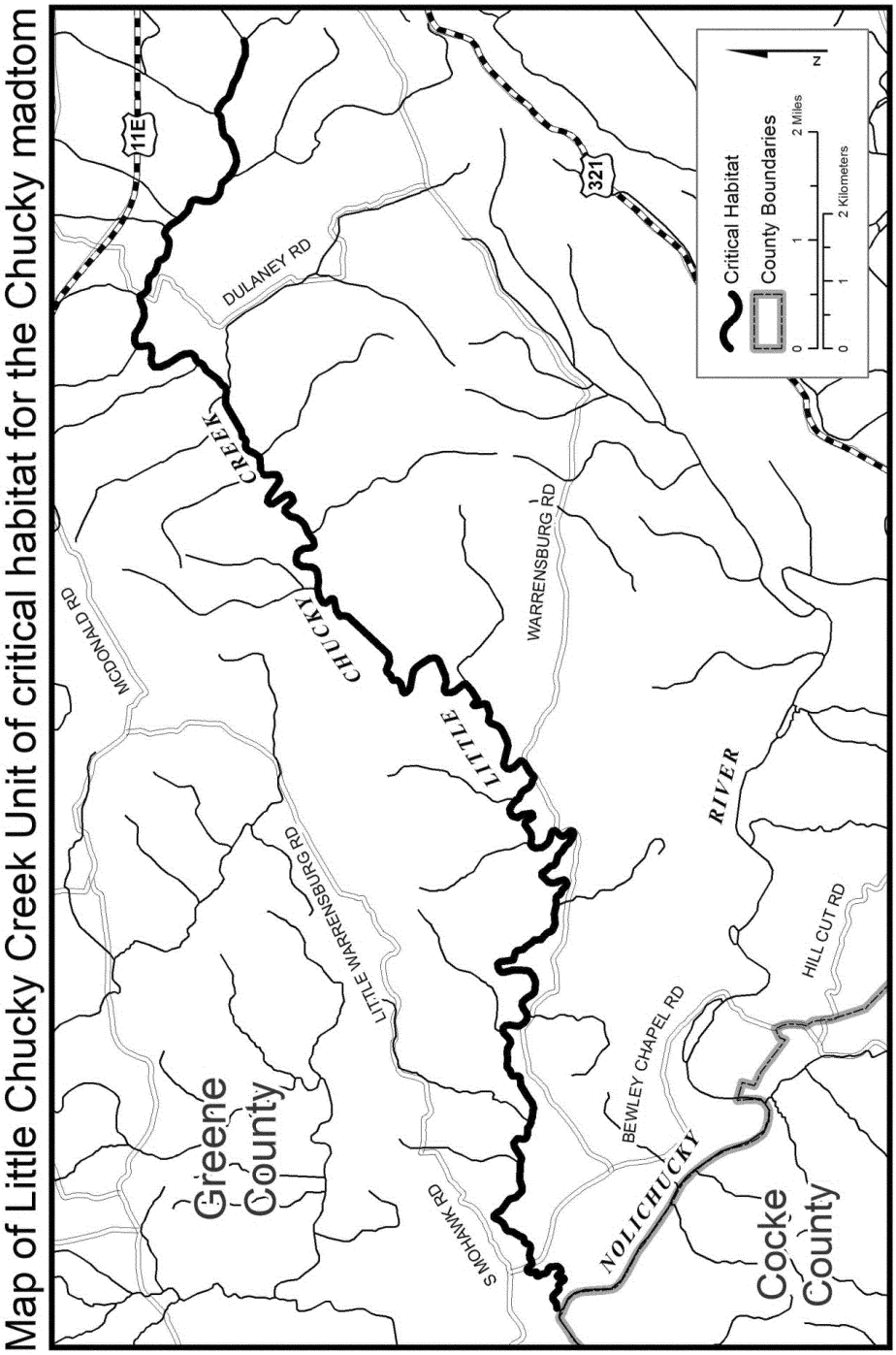


Overview of Critical Habitat Locations for the Chucky Madtom in Tennessee

(6) Little Chucky Creek Unit, Greene County, Tennessee.

(i) Little Chucky Creek Unit includes 31.9 river kilometers (19.8 river miles) of Little Chucky Creek from its confluence with an unnamed tributary, downstream to its confluence with the Nolichucky River, at the Greene and Cocke County line, Tennessee.

(ii) Map of Little Chucky Creek Unit of critical habitat for the Chucky madtom follows:



* * * * *

Dated: September 25, 2012.

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2012–24468 Filed 10–15–12; 8:45 am]

BILLING CODE 4310–55–P

FEDERAL REGISTER

Vol. 77 Tuesday,

No. 200 October 16, 2012

Part V

Department of Transportation

Federal Transit Administration

Notice of FTA Transit Program Changes, Authorized Funding Levels and Implementation of the Moving Ahead for Progress in the 21st Century Act (MAP–21) and FTA Fiscal Year 2013 Apportionments, Allocations, Program Information and Interim Guidance; Notice

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Notice of FTA Transit Program Changes, Authorized Funding Levels and Implementation of the Moving Ahead for Progress in the 21st Century Act (MAP–21) and FTA Fiscal Year 2013 Apportionments, Allocations, Program Information and Interim Guidance

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice.

SUMMARY: This notice announces changes in the Federal Transit Administration (FTA) programs in accordance with the Moving Ahead for Progress in the 21st Century Act (MAP–21), which authorizes surface transportation programs of the Department of Transportation for Federal fiscal years (FY) 2013 and 2014. This notice provides preliminary implementation instructions and guidance for the new and revised programs in FY 2013, announces the partial apportionment for programs authorized and funded with FY 2013 contract authority, and describes future plans for notice and comment for several programs. The notice also includes locations of tables of unobligated (or carryover) funds allocated under the discretionary programs from prior years carried out in accordance with the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users (SAFETEA–LU) or prior authorization acts.

FOR FURTHER INFORMATION CONTACT: For general information about this notice contact Jamie Pfister, Director, Office of Transit Programs, at (202) 366–2053. Please contact the appropriate FTA regional office for any specific requests for information or technical assistance. FTA regional office contact information is available on FTA's Web site: *www.fta.dot.gov.*

An FTA headquarters contact for each major program area is included in the discussion of that program in the text of the notice.

FTA recommends that stakeholders subscribe on FTA's Web site (*www.fta.dot.gov*) to receive email notifications when new information is available.

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V. FTA Policy and Procedures for FY 2013 Grants
A. Automatic Pre-Award Authority To Incur Project Costs
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I. Overview

This document contains important information and interim guidance about new FTA programs and changes to existing FTA programs authorized by the Moving Ahead for Progress in the 21st Century Act (MAP–21) (Pub. L. 112–141), signed by President Obama on July 6, 2012, and effective on October 1, 2012.

In addition, this document provides apportionments for FTA formula programs in amounts at approximately one half of the funding levels available in FY 2012 pursuant to the Continuing Appropriations Resolution, 2013 (CR) (Pub. L. 112–175). It also contains information on how FTA plans to administer its transit programs in fiscal year (FY) 2013 and how funds appropriated and allocated prior to FY 2013 will be treated.

This notice highlights important changes to FTA programs, including new safety authority, new asset management requirements, streamlining of the New and Small Starts Program, and the impact of the 2010 Census on apportionments for FY 2013. It describes definitional changes and cross-cutting requirements. It identifies repealed programs and provides specific information about FTA's programs as authorized under MAP–21.

For each FTA program included, FTA has provided information on the MAP–21 authorized funding levels for FYs 2013 and 2014, funds available under the CR, the basis for apportionment or allocation of funds, requirements specific to the program, period of availability of funds, and other program information. A separate section provides information on pre-award authority and other requirements and guidance applicable to FTA programs and grant administration. Finally, the notice includes references to tables on FTA's Web site that show amounts apportioned under the CR, and approximately $1.9 billion in unobligated or carryover funding available in FY 2013 from prior years under certain discretionary programs carried out in accordance with SAFETEA–LU or other authorization acts.

Information in this document includes references to the existing FTA program guidance circulars. While some information in the circulars has been superseded by new provisions in MAP–21, the circulars remain a resource for program guidance in most areas. FTA intends to revise the circulars, as appropriate, with an opportunity for public comment.

To supplement the guidance provided in this document FTA is preparing answers to frequently asked questions (FAQs) on MAP–21 changes and impacts received from its grantees, stakeholders, and other interested parties. These FAQs will be posted on the FTA's Web site as they become available.

II. FY 2013 Funding for FTA Programs

A. MAP–21 Authorization and FY 2013 Continuing Resolution (CR) Appropriations

MAP–21 is the new two-year surface transportation authority that provides FTA an authorization level of $10.6 billion in FY 2013 and $10.7 billion in FY 2014. MAP–21 consolidates certain transit programs to improve their efficiency and provides significant funding increases specifically for improving the state of good repair of the nation's transit systems. The law grants FTA authority to strengthen the safety of public transportation systems throughout the United States. It also streamlines the New Start process to expedite project delivery and provides for core capacity project eligibility. MAP–21 took effect on October 1, 2012.

The CR makes continuing appropriations for FY 2013 through March 27, 2013 at approximately one half of the FY 2012 funding levels. The CR specifies that appropriations are provided for continuing projects or activities for which funding was available in that fiscal year, except as provided in section 154 of the CR. In section 154 of the CR, Congress updated the appropriations language for FTA's formula programs providing an obligation limitation and liquidating authority to reflect changes to FTA's formula programs authorized in MAP–21. Section 154 of the CR allows FTA to administer FY 2013 funds for formula grant programs according to the terms and conditions established under MAP–21. Current funding availability for each program is identified in section IV of this notice and in Table 1 located on FTA's FY 2013 Apportionment Web page. Funding under the CR is not available for programs that were repealed by MAP–21 or for the new Transit Oriented Development (TOD) discretionary program, which was authorized by MAP–21 but not identified in section 154 of the CR.

B. Oversight Takedown

MAP–21 modifies section 5338(i) [1] to provide for the following oversight takedowns of FTA programs: 0.5 percent of Metropolitan and Statewide Planning funds, 0.75 percent of Urbanized Area Formula funds, 1 percent of Fixed Guideway Capital Investment funds, 0.5 percent of Formula Grants for the Enhanced Mobility of Seniors and Individuals with Disabilities, 0.5 percent of Formula Grants for Rural Areas, 0.75 percent of High Intensity Fixed Guideway State of Good Repair Formula funds, and 1 percent of Capital and Preventive Maintenance Projects for Washington Metropolitan Area Transit Authority funds. The funds are used to provide necessary oversight activities, such as oversight of the construction of any major capital project receiving Federal transit assistance; to conduct State Safety Oversight, drug and alcohol, civil rights, procurement systems, management, planning certification, and financial reviews and audits, as well as evaluations and analyses of grantee-specific problems and issues; and to provide technical assistance to correct deficiencies identified in compliance reviews and audits.

C. Previously Authorized Funding

FYs 2005 through 2012 funds that remain unobligated and for which the program has been repealed or its activities consolidated with other programs under Chapter 53, will continue to be subject to the program and eligibility requirements that existed prior to the enactment of MAP–21 and to new cross-cutting requirements found in section III.D. of this notice. These programs are as follows:

- Section 5307 Urbanized Area Formula Grant Funds
- Section 5309(b)(2) Fixed Guideway Modernization Formula Program
- Section 5309(b)(3) Bus, Bus-Related Equipment and Bus Facilities Discretionary Grants
- Section 5309(m)(6)(B) Alaska-Hawaii Ferryboats
- Section 5309(m)(6)(C) Denali Commission
- Section 5309(m)(7)(A) Bus and Bus Facility Grants
- Section 5309(m)(7)(B) Fuel Cell Program
- Section 5309(m)(7)(C) Projects Not In Urbanized Areas
- Section 5309(m)(7)(D) Intermodal Terminals

[1] All references to ''section'' herein refer to sections of Chapter 53 of Title 49 of the United States Code, unless otherwise specifically stated.

- Section 5310 Formula Grants for Special Needs of Elderly Individuals and Individuals with Disabilities
- Section 5311 Formula Grants for Other Than Urbanized Areas
- Section 5312 Research, Development, Demonstration, and Deployment Projects
- Section 5314 National Research Programs
- Section 5316 Job Access and Reverse Commute Formula Grants
- Section 5317 New Freedom Program
- Section 5320 Paul S. Sarbanes Transit in the Parks Program
- Section 5339 Alternatives Analysis Program
- Section 3038 of TEA–21, as amended by SAFETEA–LU, Over-the-Road Bus Program

For programs that are continued under MAP–21, the provisions of MAP–21 now apply to all unobligated funds from FY 2012 and prior, as well as to FY 2013 funds. These programs are:

- Section 5305 Planning Programs
- Section 5309 Fixed Guideway Capital Investment Grants (formerly Capital Investment Program)

All references in this notice to ''section'' refer to Chapter 53 of Title 49 of the U.S. Code, unless otherwise specified.

III. MAP–21 and FY 2013 Appropriations: Highlights of Changes

MAP–21 furthers several important goals of the Department of Transportation, including safety, state of good repair, performance, and program efficiency. MAP–21 provides FTA significant new authority to strengthen the safety of public transportation systems throughout the United States. The Act also puts new emphasis on restoring and replacing the Nation's aging public transportation infrastructure by establishing a new State of Good Repair formula program and new asset management requirements. In addition, it aligns Federal funding with key goals and tracks progress towards these goals. Finally, MAP–21 improves the efficiency of administering grant programs by consolidating several programs and streamlining the fixed guideway capital investment grant program.

A. Focus Areas

1. Safety Authority

MAP–21 provides FTA significant new authority to strengthen the safety of public transportation systems throughout the United States by granting FTA the authority to establish and enforce a new comprehensive framework to oversee the safety of public transportation. Under MAP–21, FTA has enforcement authority to issue directives; require more frequent oversight of transit systems; impose more frequent reporting requirements; and require that formula grant funds be spent to correct safety deficiencies before funds are spent on other projects. FTA will implement the new law in consultation with the transit community and the U.S. Department of Transportation's (DOT) Transit Rail Advisory Committee for Safety (TRACS), the latter of which has been working since September of 2010 to help guide this effort. Following the promulgation of a rule, recipients of FTA funding will be required to have a public transportation agency safety plan in place in order to obligate any grant funds available under Chapter 53. Additional information on this new authority and the requirements under section 5329 can be found in section IV.O. of this notice.

2. State of Good Repair and Asset Management

MAP–21 places greater emphasis on restoring and replacing aging transportation infrastructure by establishing new asset management requirements as well as a new State of Good Repair formula program.

Section 5326 as amended by MAP–21, requires FTA to define the term ''state of good repair'' and create objective standards for measuring the condition of capital assets, including equipment, rolling stock, infrastructure, and facilities. Subsequent to FTA defining this term through a rulemaking, all FTA recipients will be required to set performance targets based on that definition, and report on progress towards meeting those targets. These measures and targets must be incorporated into metropolitan and statewide transportation plans and transportation improvement programs (TIPs). Also subsequent to a final rule defining state of good repair, all FTA recipients and their subrecipients will be required to develop transit asset management plans. Recipients of FTA formula funding also will be required to report asset inventory and condition information to FTA's National Transit Database (NTD). FTA will support this effort through technical assistance, including asset management decision support tools that allow recipients to estimate their capital investment needs over time and assist with asset investment prioritization.

MAP–21 also establishes a new grant program to maintain public transportation systems in a state of good repair. This program, set forth in section 5337, replaces the fixed guideway modernization program (formerly authorized in section 5309). Funding under this program is limited to fixed guideway systems (including rail, bus rapid transit, and passenger ferries) and high intensity bus (buses operating in high occupancy vehicle (HOV) lanes.) Please see section IV.B. of this notice for more information about this new program.

3. Streamlining and Program Efficiency

i. Fixed Guideway Capital Investment Grants Program (49 U.S.C 5309)—(New and Small Starts)

MAP–21 modified the Capital Investment Program by expanding the eligibility to Core Capacity Improvement projects and streamlining the process. Similar to SAFETEA–LU, New Starts projects are defined as projects with a total capital cost of $250 million or greater or that are seeking $75 million or more in section 5309 funding. Eligible projects are new fixed-guideway systems, such as rapid rail (heavy rail), commuter rail, light rail, hybrid rail, trolleybus (using overhead catenary), cable car, passenger ferries, and bus rapid transit, or an extension of any of these systems. Also similar to SAFETEA–LU, Small Starts projects are defined as projects with a total capital cost less than $250 million and that are seeking less than $75 million in section 5309 funding. Eligible purposes for the Small Starts program are those mentioned for the New Starts program, as well as corridor-based bus systems that do not operate on a separated fixed guideway but include features that emulate the services provided by rail fixed guideway including defined stations, traffic signal priority for public transit vehicles, and short headway bi-directional services for a substantial part of weekdays and weekend days. MAP–21 also makes Core Capacity Improvement projects eligible for section 5309 funding. These are substantial, corridor-based investments in existing fixed guideway systems that are at capacity today or will be in five years. A Core Capacity Improvement project must increase the capacity of the existing fixed guideway system in the corridor by at least 10 percent.

MAP–21 reduces the number of steps in the process for projects pursuing capital investment program funding. For New Starts and Core Capacity Improvement projects, the steps in the process now consist of project development, engineering, and construction. For Small Starts projects the steps in the process consist of

project development and construction. Alternatives Analysis no longer is required. FTA must evaluate and rate projects seeking section 5309 funding according to statutorily defined criteria at various steps in the process. FTA will implement changes under MAP–21 to improve the efficiency of the New and Small Starts process and implement the new Core Capacity Improvement process through rule-making and future policy guidance, which will be developed through a notice and comment process.

ii. Pilot Program for Expedited Project Delivery

MAP–21 requires FTA to develop a pilot program for expedited project delivery. Eligible projects will be new fixed guideway capital projects or core capacity improvement projects as defined under section 5309 that have not yet received a full funding grant agreement. Three projects will be selected for the pilot program, and must demonstrate innovative project development and delivery methods or innovative financing arrangements that can expedite project delivery. At least one of the three projects selected must be an eligible project requesting more than $100 million in section 5309 funding and another must be an eligible project requesting less than $100 million in section 5309 funding. Applicants to this program also must certify that their existing public transportation system is in a state of good repair. FTA will publish guidance in a future **Federal Register** notice describing the process for project sponsors to apply to FTA for consideration as a pilot project. The program itself includes no additional funding.

4. Formula Funding and MAP–21 Discretionary Programs

Under MAP–21, several of FTA's programs were repealed, consolidated, or changed from a discretionary program to a formula-based program. The Bus and Bus Facilities capital program and most of the Tribal Transit funding now are provided by formulas specified by Congress. The shift to more formula programs provides steady and more predictable funding for transit investments.

MAP–21, however, does authorize several discretionary grant programs. FTA is in the process of developing the criteria and program guidance for the following discretionary programs, which will be published in Notices of Funding Availability (NOFA). These programs include:

i. Transit-Oriented Development Planning Pilot Program

MAP–21 authorizes $10 million per year in FYs 2013 and 2014 for a new discretionary pilot program for transit-oriented development (TOD) planning grants. Eligible activities include comprehensive planning in corridors with new rail, bus rapid transit, or core capacity improvement projects. The comprehensive plans should seek to enhance economic development, ridership, and other goals; facilitate multimodal connectivity and accessibility; increase access to transit hubs for pedestrian and bicycle traffic; enable mixed-use development; identify infrastructure needs associated with the project; and include private sector participation. Grant funds are not currently available under the CR. For more information or questions on this program, please contact *Beth Day at 202–366–5159 or Elizabeth.day@dot.gov.*

ii. Passenger Ferry Program

In FYs 2013 and 2014, $30 million per year is set aside from the urbanized area formula program to support passenger ferry projects. Funding will be awarded on a competitive basis. FTA will publish more details on program purpose, eligible applicants and activities, and cost sharing or matching in a subsequent NOFA. For more information or questions on this program, please contact Vanessa Williams at (202) 366–4818 or *vanessa.williams@dot.gov.*

iii. Tribal Transit Discretionary Program

The Tribal Transit program continues to be a set-aside from the Rural Areas Formula program but now consists of a $25 million formula program and a $5 million discretionary grant program. The formula program is described in section IV of this notice. With the creation of a formula program specifically for tribal transit, FTA intends to evaluate, in consultation with the tribes, how the discretionary program can be used to augment the formula funding or ''fill gaps.'' FTA will develop the terms and conditions for the Tribal Transit program in consultation with tribal representatives and other interested stakeholders. More information regarding the consultation process will be made available in the upcoming FY 2012 Notice of Awards in the **Federal Register** for the FY 2012 Tribal Transit discretionary program. For more information or questions on this program, please contact Elan Flippin at (202) 366–2053 or *elan.flippin@dot.gov.*

iv. Innovative Workforce Development Program

Along with other Human Resources and Training authorized in section 5322, MAP–21 authorizes an Innovative Public Transportation Workforce Development Competition (section 5322(b)). This competitive grant program will assist in the development of new and innovative workforce development activities in the transit industry. Funding for this and other human resource and training activities is authorized at $5 million annually.

No funding is available for this program under the CR. As such, a NOFA will be developed subject to further appropriations with more details on program purpose, eligible applicants and activities, and cost sharing or matching once appropriations are provided. For more information or questions on this program, please contact Betty Jackson at (202) 366–1730 or *betty.jackson@dot.gov.*

v. Low or No Emission Vehicle Deployment Program

MAP–21 restructures the National Research Program and authorizes a new competitive grant program within this program for Low or No Emissions Vehicle Deployment (section 5312(d)(5)). The Low or No Emission Vehicle Deployment Program authorizes funding for a competitive grant program for nonattainment or maintenance areas for capital projects for low or no emission vehicles, facilities, and related equipment. Within the amount appropriated for this program, at least 65 percent must be spent for acquiring or leasing low or no emissions buses and 10 percent for low or no emissions bus facilities. No funding is available for this program under the CR. As such, a NOFA will be developed with additional details on program purpose, eligible applicants and activities, and cost sharing or matching once appropriations are provided. For more information, please contact Walter Kulyk at (202) 366–4995 or *walter.kulyk@dot.gov.*

5. Impacts of the 2010 Census for FTA's Fiscal Year 2013 Apportionments

In FY 2013, FTA is incorporating the results of the 2010 Census into its formula apportionments, as required by law, and grant administration procedures for the first time. (Although FTA published two supplemental apportionments for FY 2012 after the 2010 Census Urbanized Areas (UZAs) were released, those apportionments continued to rely on the 2000 Census data).

On March 27, 2012, the Bureau of the Census released a list of UZAs based on the results of the 2010 Decennial Census. The Census data shows that the number of UZAs increased from 465 in 2000 to 497 in 2010, and the total population residing in UZAs increased from 195 to 223 million, an increase of approximately 12 percent.

The 2010 Census resulted in some UZAs crossing statutorily-mandated population thresholds that may change the amount of formula funds that those areas can receive and may also change the eligible uses of these funds. Five more UZAs now have populations of over 1 million people, one UZA lost population such that its population is now under 1 million, twenty-seven additional UZAs now have populations over 200,000 but below 1 million, thirty-six areas became newly qualified UZAs with populations of between 50,000 and 199,999, and four UZAs experienced population losses and are now areas under 50,000 in population and are no longer considered to be UZAs.

In addition, the boundaries of many UZAs have shifted and resulted in former urban clusters (i.e., areas with populations under 50,000) and former non-urbanized areas to be now located within the boundaries of a UZA.

FTA published on its Web site additional information on 2010 Census UZAs, including a fact sheet, a comparison of the 2000 and 2010 Census UZAs and their population, and a matrix of how 2010 Census changes will affect the eligible activities of and formula apportionments made to FTA grant recipients. A Program-by-Program analysis of the impacts of the Census data on FTA's formula programs also is posted on FTA's Web site. The Census Bureau has published reference maps of the 2010 urbanized areas at *ftp://ftp2.census.gov/geo/maps/dc10map/UAUC_RefMap/ua/.*

B. Definitional Changes and New Definitions

Section 20004 of MAP–21 modified section 5302 to provide new definitions and to modify existing definitions that clarify eligibility and requirements within FTA's programs. Unless otherwise stated, these definitions apply across all FTA programs. Several important definitional changes include:

1. Associated Transit Improvement

The term ''transit enhancements'' was changed to ''associated transit improvements.'' An associated transit improvement is a project ''designed to enhance public transportation service or use and that [is] physically or functionally related to transit facilities.'' Eligible associated transit improvements include historic preservation, rehabilitation, and operation of historic public transportation buildings, structures, and facilities (including historic bus and railroad facilities) intended for use in public transportation service; bus shelters; landscaping and streetscaping, including benches, trash receptacles, and street lights; pedestrian access and walkways; bicycle access, including bicycle storage facilities and installing equipment for transporting bicycles on public transportation vehicles; signage; or enhanced access for persons with disabilities to public transportation. Congress struck ''public art'' and ''transit connections to parks within the recipient's transit service area'' from the list of eligible projects. While Federal transit funds are no longer available to support public art in transit facilities, art can be incorporated into facility design, landscaping, and historic preservation, for example through the use of floor or wall tiles that contain artistic designs or patterns, use of color, use of materials, lighting, and the overall design of a facility. In addition, eligible capital projects include incidental expenses related to acquisition or construction, including design costs. Therefore, the incidental costs of incorporating art into facilities and including an artist on a design team continue to be eligible expenses.

2. Bus Rapid Transit (BRT) System

The term ''bus rapid transit system'' is now defined by statute, and this definition impacts how BRT systems qualify as fixed-guideway service for the Urbanized Area Formula Program and State of Good Repair Formula Program apportionments. The statutory definition is narrower than the definition used previously for purposes of the NTD. FTA used NTD data and other sources to determine which BRT systems qualify under the new statutory definition. FTA will issue a future **Federal Register** Notice to update the reporting guidance in the NTD Reporting Manual. As defined by section 5302, a ''bus rapid transit system'' means a bus system in which the majority of each line operates in a separated, dedicated, right-of-way for transit during peak periods and includes features that emulate the services provided by rail transit, including—defined stations; traffic signal priority; short headways for a substantial part of weekdays and weekend days; and any other features the Secretary may determine are necessary to produce high-quality transit services that emulate the services provided by rail transit. This definition means that a BRT system may include a mixture of both exclusive guideway and non-dedicated guideway with traffic signal priority, so long as the exclusive guideway (during peak periods) constitutes a ''majority of the line'' and so long as the other features emulating rail transit are present. All BRT systems meeting this definition are classified as fixed-guideway (see below) for purposes of the Urbanized Area Formula Program and State of Good Repair Formula Program apportionments. Readers should be careful not to confuse the definition of ''bus rapid transit system'' under section 5302 with the different types of bus rapid transit projects defined by section 5309, the statute that authorizes the New Starts and Small Starts programs. Under section 5309 there are definitions for both a ''fixed guideway bus rapid transit project'' and a ''corridor-based bus rapid transit project'' which set limitations for the types of BRT projects that may be eligible to compete for discretionary New Starts or Small Starts funds.

3. Commuter Highway Vehicle or Vanpool Vehicle

This term is a new definition in Chapter 53 and is found in section 5323(i). A Commuter Highway Vehicle or Vanpool Vehicle is defined as any vehicle seating at least 6 adults (not including the driver); and at least 80 percent of the mileage use of which can be reasonably expected to be for the purposes of transporting commuters in connection with travel between their residences and their place of employment.

4. Disability

The definition of ''disability'' was amended so that it has the same meaning as in the Americans with Disabilities Act (ADA), 42 U.S.C. 12101, et seq. However, the definition in section 5302 does not apply to the half-fare provision in section 5307(c)(1)(D). The half-fare provision continues to apply to seniors, persons with Medicare cards, and persons who ''because of illness, injury, age, congenital malfunction, or other incapacity or temporary or permanent disability (including an individual who is a wheelchair user or has semi-ambulatory capability), cannot use a public transportation service or a public transportation facility effectively without special facilities, planning, or design.''

5. Fixed Guideway

The definition of ''fixed guideway'' was amended to remove high occupancy

vehicle lanes, although bus service operating in high occupancy vehicle lanes remains eligible for certain funds under the State of Good Repair Formula Program apportionment. The new definition of fixed guideway includes any facility for the exclusive use of transit vehicles, as well as facilities for rail, using a fixed catenary system (e.g. trolleybus service), for a passenger ferry system or for a bus rapid transit system (see new definition above).

6. Job Access and Reverse Commute Project

The SAFETEA–LU Job Access and Reverse Commute (JARC) Program, (section 5316), was repealed by MAP–21; however, job access and reverse commute projects are eligible under the sections 5307 and 5311 programs. A definition for ''job access and reverse commute project'' was added to section 5302 as follows: ''a transportation project to finance planning, capital, and operating costs that support the development and maintenance of transportation services designed to transport welfare recipients and eligible low-income individuals to and from jobs and activities related to their employment, including transportation projects that facilitate the provision of public transportation services from urbanized areas and rural areas to suburban employment locations.'' Please see sections IV.C. and F. of this notice for additional information.

7. Low-Income Individual

The term is defined as, ''an individual whose family income is at or below 150 percent of the poverty line, as defined in section 673(2) of the Community Services Block Grant Act (42 U.S.C. 9902(2)), including any revision required by that section, for a family of the size involved.'' The formulas for funding apportionment in sections 5307 and 5311 now include consideration of the number of low-income individuals in a rural or urbanized area for part of the apportionment. However, this definition does not apply to the formula for public transportation on Indian reservations, which defines a low-income individual as an individual whose family income is at or below 100 percent of the poverty line.

8. Private Provider of Public Transportation by Vanpool

This term is a new definition in Chapter 53 and is found in section 5323(i). A private provider of public transportation by vanpool is defined as a private entity providing vanpool services in the service area of a recipient using a commuter highway vehicle or a vanpool vehicle. Under MAP–21 and as described in section D of this notice, ''Cross-Cutting Programmatic Requirements,'' there is a new allowance for local match related to private vanpool providers.

9. Public Transportation

Congress amended the definition of ''public transportation'' to specify that public transportation is regular, continuing, shared-ride, surface transportation service that is ''open to the general public or open to a segment of the general public defined by age, disability, or low income.'' Public transportation does not include Amtrak service, intercity bus service, charter bus service, school bus service, sightseeing service, courtesy shuttle service for patrons of one or more specific establishments; or intra-terminal or intra-facility shuttle services.

10. Regional Transportation Planning Organization

This term is a new definition for Chapter 53, and is found in section 5303, Metropolitan Transportation Planning. A ''regional transportation planning organization'' is ''a policy board of an organization'' that a State may establish and designate under section 5304(l) ''to enhance the planning, coordination, and implementation of statewide strategic long-range transportation plans and transportation improvement programs, with an emphasis on addressing the needs of nonmetropolitan areas of the State.'' Section 5304(l)(5) further provides that, ''if a State chooses not to establish or designate a regional transportation planning organization, the State shall consult with affected nonmetropolitan local officials to determine projects that may be of regional significance.''

11. Senior

This is a new term to Chapter 53, and means an individual who is 65 years of age or older. The term is used in section 5310, Enhanced Mobility for Seniors and Individuals with Disabilities.

C. Repealed Programs in FTA's Authorization

MAP–21 focuses on improving the efficiency of grant program operations by consolidating certain programs and repealing other programs. Several of the activities eligible under repealed programs can be found in programs continued or created under MAP–21. The following programs expired on September 30, 2012 and no new funding is authorized beyond fiscal year 2012. However, unobligated funds appropriated or authorized in FY 2012 and prior years remain available for obligation (for the established period of availability when appropriated or allocated) and expenditure, and follow program-specific requirements established under SAFETEA–LU and prior authorizations. In addition, there are new cross-cutting requirements under MAP–21 found in section III.D of this notice that apply to all grants after October 1, 2012.

1. Clean Fuels Grant Program (49 U.S.C. 5308)

The Clean Fuels Grant Program was a discretionary program and the final FY 2012 allocations were announced on September 14, 2012 in response to the NOFA published February 7, 2012 for sections 5308 and 5309 bus funds. Unobligated discretionary allocations (found in Table 7 on FTA's FY 2013 Apportionment Web site) may be obligated through the period of availability, following the SAFETEA–LU requirements.

2. Fixed Guideway Modernization (49 U.S.C. 5309(b)(2))

The Fixed Guideway Modernization Program was a formula program, and the funds for FY 2012 and prior years have been previously apportioned. Unobligated carryover balances for this program may be obligated through the period of availability, following the SAFETEA–LU requirements. Under MAP–21, elements of this program have been replaced with the State of Good Repair formula program (section 5337).

3. Bus and Bus Facilities Program (49 U.S.C. 5309(b)(3))

The discretionary Bus and Bus Facilities Program provided funds for capital bus and bus facility grants in support of the Department's State of Good Repair, Bus Livability, Veterans Transportation and Community Living, and Clean Fuels initiatives. In addition, SAFETEA–LU allocated funds under this program for Ferry Boat Systems, Fuel Cell Bus, and the Bus Testing program.

FY 2012 Bus and Bus Facilities discretionary funds have been allocated through the FY 2012 Veteran's and Community Living Initiative (VTCLI), State of Good Repair, and Bus and Bus Livability discretionary competitions. FY 2012 and prior year allocations remain available for the period of availability and must be used for the purpose selected.

Prior year allocations for Ferry Boat Systems, Fuel Cell Bus, and Bus Testing (found in Table 8 on FTA's FY 2013

Apportionment Web page) may be obligated through the period of availability, following the SAFETEA–LU requirements. Under MAP–21, elements of this program have been replaced with the Bus and Bus Facilities formula program (section 5339).

4. Job Access and Reverse Commute (JARC) Program (49 U.S.C. 5316)

The formula JARC Program funds for FY 2012 and prior years under SAFETEA–LU have been apportioned. Unobligated carryover balances for the JARC program may be obligated through the period of availability, but must follow the SAFETEA–LU requirements. For example, section 5316 JARC projects must still be derived from a human service public transportation coordinated plan and must also be selected through an area-wide or statewide competitive selection process by the designated recipient.

Under MAP–21, activities that were funded under the section 5316 JARC program are eligible under sections 5307 Urbanized Area Formula Grants, and 5311 Formula Grants for Rural Areas. Please see section IV.C. and F. of this notice for additional information.

5. New Freedom Program (49 U.S.C. 5317)

The formula New Freedom Program funds for FY 2012 and prior years under SAFETEA–LU have been apportioned. Unobligated carryover balances for the New Freedom program funds may be obligated through the period of availability, but must follow the SAFETEA–LU rules and requirements. For example, section 5317 New Freedom projects must still be derived from a locally developed, coordinated public transit-human services transportation plan and must also be selected through an area-wide or statewide competitive selection process by the designated recipient.

Under MAP–21, the types of activities that were funded under the section 5317 New Freedom program are now eligible under section 5310, Formula Grants for the Enhanced Mobility of Seniors and Individuals with Disabilities. Please see section IV.E. of this notice for additional information.

6. Paul S. Sarbanes Transit in Parks Program (49 U.S.C. 5320)

FTA published a notice of funding availability on August 28, 2012 for the final allocation of program funding, which will be announced in fall 2012. Under MAP–21, public transportation investments serving national parks and other Federal lands remain eligible under the Federal Lands Transportation Program and the Federal Lands Access Program administered by the Federal Highway Administration (FHWA). Interested recipients should visit the FHWA Web page (*http://www.fhwa.dot.gov*) for additional information on these programs.

7. Alternatives Analysis Program (49 U.S.C. 5339)

FTA issued a notice of funding availability for FY 2012 funds on March 12, 2012. However, MAP–21 repealed the section 5309 requirement that Major Capital Investment projects must be based on the results of an alternatives analysis, eliminating the principal statutory requirement associated with section 5339 Alternatives Analysis Program grants. Therefore, the use of the FY 2012 Alternatives Analysis Program funds will be determined at a later date. Unobligated FY 2011 and prior year allocations remain available for the period of availability and must be used for the purpose selected. Unobligated discretionary allocations are listed in Table 16 on FTA's FY 2013 Apportionment Web page.

8. Over-the-Road Bus Accessibility Program (Section 3038, Pub. L. 105–85)

FTA issued a notice of funding availability on April 30, 2012. The final allocation of program funding is scheduled to be announced in fall 2012. Unobligated funds will be available for obligation until expended.

D. Cross-cutting Programmatic Requirements and Changes

The following cross-cutting requirements apply to all FTA programs as of October 1, 2012 unless otherwise noted. Additionally they also apply to programs that otherwise continue to follow SAFETEA–LU requirements.

1. Metropolitan and Statewide Planning

The planning programs provide funding and procedural requirements to metropolitan areas and States for multimodal transportation planning that is cooperative, continuous, and comprehensive, resulting in long-range plans and short-range programs of projects of transportation investment priorities. $127 million is provided in FY 2013 and $129 million in FY 2014. The planning programs are jointly administered by FTA and FHWA, which provides additional funding. Under MAP–21, four significant changes are noted below. These requirements will not go into effect until FTA and FHWA complete a rulemaking process and issue further guidance.

i. Establishes a performance-based planning process: MAP–21 requires Metropolitan Planning Organizations (MPOs) and States to establish performance targets that address forthcoming U.S. DOT-issued national performance measures that are based on the goals outlined in the legislation—safety, infrastructure condition, congestion reduction, system reliability, economic vitality, environmental sustainability, reduced project delivery delays, transit safety, and transit asset management. MPOs also must coordinate their performance targets, to the maximum extent practicable, with performance targets set by FTA grantees under the new performance measure requirements for safety and state of good repair. Transportation Improvement Programs (TIPs) must include a description of the anticipated progress toward achieving the performance targets resulting from implementation of the TIP. Five years after enactment of MAP–21, U.S. DOT is to provide Congress with a report evaluating the effectiveness of performance-based planning and assessing the technical capacity of MPOs in smaller areas to undertake performance-based planning.

ii. Requires transit representation on MPO policy boards in large urbanized areas: Within two years, MPOs in urbanized areas designated as transportation management areas must include officials of public transit agencies that administer or operate major modes of transportation, as well as representatives of public transit operators, on MPO policy boards.

iii. Supports optional scenario development: MPOs may undertake scenario development exercises in preparing the long-range transportation plan that consider alternative demographic growth, revenue options, and other factors.

iv. Allows designation of Regional Transportation Planning Organizations: Regional transportation planning organizations may be designated, comprised of volunteer local government and transportation officials, to assist the State in addressing the needs of nonmetropolitan areas. Accordingly, ''statewide planning'' has been renamed ''statewide and nonmetropolitan planning'' to signify the important role of local officials in nonmetropolitan areas of States in the development of statewide plans and programs.

2. Environmental Review Process

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321, *et seq.,* and other Federal environmental laws, regulations and executive orders, require that every project proposed for FTA funding assistance be subjected to

some level of environmental review prior to its approval. MAP–21 has made changes to the environmental review process intended to accelerate the process for major projects and expand the lists of projects that are categorically excluded. MAP–21 environmental guidance and regulatory changes will be forthcoming.

3. Agency Safety Plans

Section 5329 requires all FTA grantees to develop comprehensive agency safety plans that at a minimum include methods for identifying and evaluating safety risks, strategies to minimize exposure to hazards and unsafe conditions, and performance targets for safety performance criteria and state of good repair standards established in a forthcoming National Public Transportation Safety Plan. More information regarding state of good repair standards is included in the next paragraph, section IV.D.4.a., of this notice. The agency safety plan and any updates must be approved by the recipient's board of directors (or equivalent entity) and certified by FTA or a State. The agency safety plan also will need to identify an adequately trained safety officer who reports directly to the recipient's chief executive and provide a comprehensive staff training program for operations personnel and personnel directly responsible for safety. The staff training program must include completion of a safety training program and continuing safety education and training. Plans developed pursuant to Part 659 of title 49 Code of Federal Regulations and in effect on October 1, 2012, will remain in effect until the new agency safety plan requirements are in place. For recipients without a 49 CFR part 659 plan in place on October 1, 2012, this requirement will not apply as a condition for receiving assistance until one year after the effective date of a final rule. Rural sub-recipients of section 5311 funds may have their plans drafted and certified by a State. Similarly, FTA will issue a rule designating small urban systems receiving section 5307 funding that may have their agency safety plan drafted or certified by a State.

4. Transit Asset Management Provisions (and Asset Inventory and Condition Reporting)

MAP–21 requires FTA to establish a national transit asset management system that includes: (1) A definition of state of good repair with performance measures; (2) a requirement that grantees develop transit asset management plans; (3) reporting requirements for asset inventory and condition assessments; (4) analytical process or decision support tools; and (5) technical assistance on asset management for grantees.

i. State of Good Repair and Performance Measures

Through a rulemaking, FTA will define ''state of good repair'' for transit systems. MAP–21 specifies that this definition will provide ''objective standards for measuring the condition of capital assets * * * including equipment, rolling stock, infrastructure, and facilities.'' At the conclusion of the rulemaking, grant recipients will be required to establish performance targets relative to the definition of state of good repair and to report these targets, and progress towards meeting them to FTA. The measures and targets also must be coordinated to the maximum extent practicable with the metropolitan and statewide transportation plans and transportation improvement programs (TIPs), as well as incorporated into recipients' agency safety plans.

ii. Transit Asset Management (TAM) Plans

MAP–21 requires that each recipient and subrecipient of FTA grants must establish a ''transit asset management'' (TAM) plan for its transit system. This requirement, however, will not be a condition for receiving FTA grant funds until FTA issues a rulemaking.

Through a rulemaking, FTA will establish requirements for a capital asset inventory, condition assessments, decision support tools, and prioritization of capital investments, all of which must be included in a TAM. Once the TAM rulemaking is issued, grantees apportioned funds under the new State of Good Repair (SGR) Formula Program (section 5337) will be required to include all SGR-funded projects in their own TAM plan.

iii. Reporting Requirements

MAP–21 also established new requirements for reporting asset inventories and condition assessments to FTA at sections 5326(b)(3), 5335(a), and 5335(c). FTA grantees and sub-recipients should look for a future **Federal Register** Notice with proposed changes to the FTA's NTD Reporting Manual for more information and an opportunity to comment on FTA's implementation of these new statutory requirements.

iv. Tools and Technical Assistance

MAP–21 requires FTA to provide technical assistance on transit asset management, including a requirement for FTA to develop a ''decision support tool'' for use by transit systems in estimating capital investment needs and prioritizing capital expenditures. FTA has developed such a decision support tool, TERM-Lite, which is available online at: *http://www.fta.dot.gov/TERM-Lite.* This tool has been used by several transit agencies to assist them in estimating their investment needs, and will continue to be refined by FTA for this purpose.

5. Costs Incurred by Providers of Public Transportation by Vanpool

MAP–21 amends section 5323(i) ''Government Share of Costs for Certain Projects'' to include a paragraph that permits FTA to allow a recipient to count, as part of their local match for a capital project, funds used to purchase vanpool vehicles by private providers of public vanpool (including funds from fare revenues above operating expenses but not including any funding from Federal, State or local government sources). For the costs to be eligible for a recipient's local share, the recipient and the provider must have entered into a legally binding agreement requiring the provider to use the rolling stock in the recipient's service area.

6. Revenue Bonds as Local Match (5307, 5309, 5337)

Sections 5323(e)(1) and (2) allow recipients of Urbanized Area Formula Grants funds (section 5307), Fixed Guideway Capital Investment Grant funds (section 5309) and State of Good Repair Grant funds (section 5337) to use bond proceeds, secured by the revenues of a transit capital project, as local match for the project, provided that the grantee maintains a greater level of local transit investment in the subsequent three fiscal years (as demonstrated in the STIP) than in the current fiscal year and prior two fiscal years (three total).

7. Debt Service Reserve

Section 5323(e)(3) allows recipients to be reimbursed from section 5309 Fixed Guideway Capital Investment Grant funds for deposits of bond proceeds in a debt service reserve. Reimbursements from the unobligated FY 2012 and prior year section 5309(b)(2) Fixed Guideway Modernization Formula Grant funds and section 5309(b)(3) Bus, Related Equipment and Bus Facilities Grant funds are eligible after September 30, 2012. However, these two programs are repealed as of October 1, 2012 and FY 2013 funds will not be available for reimbursements except as provided under section 5309 as amended by MAP–21. MAP–21 also repealed the Debt Service Reserve Pilot Program for

recipients of section 5307 Urbanized Area Formula Grant funds. The establishment of a debt service reserve is included within the definition of a ''capital project'' in section 5302(3)(J), as amended.

8. Government's Share of Cost of Vehicles, Vehicle-Equipment, and Facilities for ADA and Clean Air Act Compliance

An FTA grant used for acquiring vehicles to comply or maintain compliance with the ADA or the Clean Air Act, 42 U.S.C. 7401, *et seq.,* now can cover 85 percent of net project costs. The previously used 83 percent Federal share (determined for administrative ease) is no longer necessary and should no longer be used. FTA grants for vehicle-related equipment or facilities needed to comply with or maintain compliance with the ADA or Clean Air Act remains at 90 percent of net project costs of the equipment of facilities attributable to compliance with the Act (the incremental cost).

9. Private Sector Participation

MAP–21 requires FTA to provide technical assistance when requested by project sponsors and grantees on best practices and methods for using private providers of public transportation, and on how to use public-private partnerships for alternative project delivery of fixed guideway capital projects. MAP–21 also requires FTA to identify public transportation laws, regulations or practices that impede public-private partnerships or private investment in transit capital projects. FTA must also develop procedures through regulation to address these legal impediments, as well as procedures to protect the public interest and any public investment in public transportation capital projects that involves public-private partnerships or private investment. Additionally, FTA must develop guidance to promote greater transparency and public access to public-private partnership agreements, and guidance regarding how to best document compliance by recipients of Federal assistance with the requirements regarding private enterprise participation in public transportation and planning and transportation improvement programs under sections 5303(i)(6), 5306(a) and 5307(c). MAP–21 does not, however, allow FTA to waive any provision of Federal law, including labor protections or NEPA.

10. Bus Testing

MAP–21 amended section 5318, the bus testing provision, to require FTA to issue a final rule by September 30, 2014, establishing a 'pass/fail' standard for bus testing. Vehicles must meet performance standards for safety, structural integrity, reliability, performance (including braking performance), maintainability, emissions, noise, and fuel economy. Once FTA has issued the final rule, recipients may not use FTA funds to purchase a bus that has not received a passing test score.

11. Buy America

Procurements made with FTA financial assistance continue to be subject to the Buy America requirements in section 5323(j) and FTA's implementing regulation at 49 CFR Part 661, which requires end products to be manufactured or assembled in the United States unless a waiver has been issued by FTA. Waiver requests undergo an elevated level of scrutiny by FTA as part of the consideration process. MAP–21 amended section 5323(j) to require FTA to place waiver determinations in an easily identifiable location on DOT's Web site, in addition to publishing the waiver determination in the **Federal Register**. In addition, FTA is required to submit a report to Congress every year that lists any waivers granted during the preceding year.

12. Corridor Preservation

MAP–21 added a new provision in section 5323(q) that allows FTA, under certain conditions, to assist in the acquisition of right-of-way (ROW) before the completion of an environmental review for any transit project that will eventually be built on that ROW. FTA will publish draft guidance for public comment on the process for acquiring right-of-way.

13. Rail Car Procurements

MAP–21 amended the rolling stock requirements of section 5325 by extending the length of option years under rail car procurements to seven years. A grant recipient using Federal funds to enter into a multiyear contract to buy rolling stock and replacement parts may have an option in that contract to buy additional rolling stock or replacement parts for up to five years after the date of the original contract for bus procurements and for up to seven years after the date of the original contract for rail procurements. While the change adds two extra years for rail car procurements, it also includes a new restriction that an option may not allow for significant changes or alterations to the rolling stock.

Grant recipients should note that the additional two years only applies to rail car procurements. If a transit agency were to enter into a single contract for all rolling stock, such as one for replacement parts on existing inventory, then care would be needed to differentiate between bus and rail procurements in order to utilize the two additional years applicable only to rail procurements. If the differentiation is not clearly stated in the contract, the more restrictive five year limitation would apply to the entire contract.

14. Veterans Preference/Employment

MAP–21 amended section 5323, adding subsection (k): ''Recipients and subrecipients of Federal financial assistance under this chapter shall ensure that contractors working on a capital project funded using such assistance give a hiring preference, to the extent practicable, to veterans (as defined in section 2108 of title 5) who have the requisite skills and abilities to perform the construction work required under the contract. This subsection shall not be understood, construed or enforced in any manner that would require an employer to give a preference to any veteran over any equally qualified applicant who is a member of any racial or ethnic minority, female, an individual with a disability, or a former employee.'' FTA will issue additional guidance for complying with this provision. Grantees also can expect the Master Agreement and required Federal procurement clauses to be updated to reflect this change.

15. Alcohol and Controlled Substance Testing

Section 5331 provides that an entity is not eligible for financial assistance under sections 5307, 5309, or 5311 if the entity is required to establish a program for alcohol and controlled substances testing and does not establish such a program. MAP–21 amended section 5331 to also allow FTA to withhold funds from an entity that is not in compliance with the regulations, in an amount FTA considers appropriate.

E. Title 23 (Federal-Aid Highway Programs) Funds Eligible for Transit Purposes

MAP–21 continues the provisions begun under ISTEA and continued through TEA–21 and SAFETEA–LU wherein certain program funds under the title 23 are ''flexible'' and eligible for Title 49, Chapter 53 purposes.

1. Surface Transportation Program (23 U.S.C. 133) (STP) and Transportation Alternatives Program (23 U.S.C. 101) (TAP)

The Surface Transportation Program (STP) authorized since ISTEA is continued under MAP–21. Pursuant to 23 U.S.C. 133, FHWA STP funds are eligible for a variety of highway-related activities and are also available to cover the capital cost of any public transportation projects eligible for assistance under chapter 53, which may include vehicles and facilities (publicly or privately owned) that are used to provide intercity passenger bus service. In addition, STP funds are available for surface transportation planning projects as well as activities under the newly authorized Transportation Alternatives Program (TAP), at 23 U.S.C. 101.

The TAP replaces the funding from pre-MAP–21 programs including Transportation Enhancements, Recreational Trails, and Safe Routes to School with a single funding source. TAP funds may be used to carry out a part of a program or project, or used to carry out an independent program or project related to surface transportation. Eligible activities are broadly defined and with respect to transit include construction, planning and design of infrastructure-related projects and systems that will provide safe routes for non-drivers, including children, older adults and individuals with disabilities to access daily needs, and historic preservation and rehabilitation of historic transportation facilities.

2. Congestion Mitigation and Air Quality Improvement Program (23 U.S.C. 149) (CMAQ)

The CMAQ program, at 23 U.S.C. 149, continues to provide a flexible funding source to State and local governments for transportation projects and programs to help meet the requirements of the Clean Air Act. Funding is available to reduce congestion and improve air quality for areas that do not meet the National Ambient Air Quality Standards (NAAQS) for ozone, carbon monoxide, or particulate matter—nonattainment areas—and for areas that were out of compliance but have now met the standards—maintenance areas. Transit investments, including transit vehicle acquisitions and construction of new facilities or improvements to facilities that increase transit capacity are eligible for CMAQ funds. The Department is reviewing MAP–21's treatment of operating assistance eligibilities under CMAQ, and an interpretation of the language will be issued in the future.

3. National Highway Performance Program (23 U.S.C. 119) (NHPP)

MAP–21 enacted the National Highway Performance Program (NHPP), at 23 U.S.C. 119, which allows funds to be used for the construction of a public transportation project eligible for assistance under chapter 53 if: (1) The project is in the same corridor as, and in proximity to, a fully access-controlled highway designated as part of the National Highway System; (2) the construction will reduce delays or produce travel time savings on such a highway as described in (1) and improve regional traffic flow; and (3) a cost-benefit analysis determines that the construction is more cost-effective than an improvement on such a highway as described in (1).

4. Transferring Title 23 Funds From FHWA to FTA

MAP–21 changed little with respect to the transfer of highway funds to FTA for eligible transit projects to be administered under chapter 53 of title 49 or the transfer of transit funds to FHWA for eligible highway projects to be administered under title 23. Section 104 of title 23 U.S.C. preserves the option for FHWA to transfer funds to FTA for transit capital projects and eligible operating activities that have been designated as part of the metropolitan and statewide planning and programming process. The project must be included in an approved STIP before the funds can be transferred. The State DOT may request, by letter, that the FHWA Division Office transfer highway funds for a transit project. The letter should include a description of the project as contained in the STIP, the amount to be transferred, the apportionment year, State, urbanized area, Federal-aid apportionment category (i.e., STP, CMAQ, TAP, NHPP) or other funding source, and indication of the intended FTA formula program (i.e., Section 5307, 5310, or 5311).

Once a written request for transfer is received (using FHWA transfer request form 1576), if, upon review, the FHWA Division Office concurs in the transfer, it provides written confirmation to the State DOT and FTA that the apportionment amount is available for transfer. The FHWA Division Office provides the transfer request to the FHWA Office of Budget which transfers the funds to FTA.

FHWA funds transferred to FTA will be administered under one of the three FTA formula programs (i.e., Urbanized Area Formula (section 5307), Formula Grants for the Enhanced Mobility of Seniors and Individuals with Disabilities (section 5310), or Formula Grants for Rural Areas (section 5311)). Unobligated balances for High Priority projects under Section 1702 of SAFETEA–LU or Transportation Improvement projects under Section 1934 of SAFETEA–LU and other such funds for which Congress has identified a particular project that are transferred to FTA will be aligned with and administered through FTA's Urbanized Area Formula Grant Program (section 5307). Under 23 U.S.C. 104(f), FHWA funds transferred to FTA retain the same matching share that the funds would have if used for highway purposes and administered by FHWA.

Transferred funds may be used for a capital transit purpose eligible under the FTA formula program to which they are transferred. MAP–21 revised the operating assistance eligibilities under CMAQ. Those changes are being reviewed and an interpretation of the MAP–21 provisions will be issued in the future.

The FTA grantee's application for the project must specify the program in which the funds will be used, and the application must be prepared in accordance with the requirements and procedures governing that program. Upon review and approval of the grantee's application, FTA obligates funds for the project.

In the event that the transferred funds are not obligated for the intended purpose within the period of availability of the formula program to which they were transferred, they become available to the State for any eligible capital transit project under the program to which they were transferred.

5. Matching Share for FHWA Transfers

Pursuant to 23 U.S.C. 104(f)(1)(B), FHWA funds transferred to FTA retain the same matching share that the funds would have if used for highway purposes and administered by FHWA. For the STP, CMAQ, and TAP programs, this Federal share is generally 80 percent, subject to upward adjustment in sliding scale States as noted below.

For a period of time under SAFETEA–LU, CMAQ funds were available at a 100 percent Federal share. Starting on October 1, 2012, the CMAQ Federal share generally will be 80 percent. There are a few instances in which a Federal share on funds transferred from FHWA can be higher than 80 percent. In States with large areas of Indian and certain public domain lands and national forests, parks and monuments, the local share for highway projects is determined by a sliding scale rate, calculated based on the percentage of public lands within that State. This

sliding scale, which permits a greater Federal share, but not to exceed 95 percent, is applicable to transfers used to fund transit projects in these public land States. FHWA develops the sliding scale matching ratios for the increased Federal share. Also, there may be instances where the applicable Federal share may be reduced to a lower Federal share than is generally applicable, such as under the NHPP where the Federal share must be reduced to a maximum of 65 percent if the State DOT does not develop and implement an asset management plan.

Certain safety projects or projects that include an air quality or congestion relief component such as commuter carpooling and vanpooling projects using FHWA transfer funds administered by FTA may retain the same 100 percent Federal share; however, these projects are subject to a limitation for each State of an amount equal to 10 percent of the sums apportioned for programs under section 104 of title 23.

The most recent guidance on transfers of FHWA funds as allowed under SAFETEA–LU is FHWA Memorandum, dated July 19, 2007, ''Information Fund Transfers to Other Agencies and Among Title 23 Programs.'' FHWA plans to revise its guidance to reflect MAP–21's changes to transferred funds.

6. Title 49/Chapter 53 Funds Eligible for Highway Purposes

Funds available under chapter 53 for eligible Federal-aid highway projects under title 23 may be transferred to FHWA. However, MAP–21 repealed FTA's authority to transfer to FHWA Urbanized Area Formula Grant Funds (section 5307) for highway purposes. As described in section IV.H. of this notice, the newly established Appalachian Development Public Transportation Assistance program under section 5311(c)(2) permits transfers to FHWA under certain conditions.

IV. Program-Specific Information

A. Metropolitan Planning Program (49 U.S.C. 5305(d))

Section 5305(d) authorizes Federal funding to support a cooperative, continuous, and comprehensive planning program for transportation investment decision-making at the metropolitan area level. The specific requirements of metropolitan transportation planning are set forth in 49 U.S.C. 5303 and further explained in 23 CFR Part 450, as incorporated by reference in 49 CFR Part 613, Statewide Transportation Planning; Metropolitan Transportation Planning. State Departments of Transportation (DOTs) are direct recipients of funds allocated by FTA, which are then sub-allocated to Metropolitan Planning Organizations (MPOs), for planning activities that support the economic vitality of the metropolitan area.

The metropolitan transportation planning process must establish a performance-based approach in which the MPO will develop specific performance targets that address transportation system performance measures (to be issued by U.S. DOT), where applicable, to use in tracking progress towards attaining critical outcomes. These performance targets will be established by MPO's in coordination with States and transit providers. MPOs will provide a system performance report that evaluates the progress of the MPO in meeting the performance targets in comparison with the system performance identified in prior reports.

This funding must support work elements and activities resulting in balanced and comprehensive intermodal transportation planning for the movement of people and goods in the metropolitan area. Comprehensive transportation planning is not limited to transit planning or surface transportation planning, but also encompasses the relationships among land use and all transportation modes, without regard to the programmatic source of Federal assistance. Eligible work elements or activities include, but are not limited to studies relating to management, mobility management, planning, operations, capital requirements, and economic feasibility; evaluation of previously funded projects; peer reviews and exchanges of technical data, information, assistance, and related activities in support of planning and environmental analysis among MPOs and other transportation planners; work elements and related activities preliminary to and in preparation for constructing, acquiring, or improving the operation of facilities and equipment; development of coordinated public transit human services transportation plans. An exhaustive list of eligible work activities is provided in FTA Circular 8100.1C, *Program Guidance for Metropolitan Planning and State Planning and Research Program Grants,* dated September 1, 2008. For more about the Metropolitan Planning Program, *contact Victor Austin, Office of Planning and Environment at (202) 366–2996 or victor.austin@dot.gov.*

1. Authorized Amounts

MAP–21 authorizes $126,900,000 in FY 2013 and $128,800,000 in FY 2014 to provide financial assistance for both the metropolitan and statewide planning needs under section 5305.

Fiscal year	2013	2014
Funds authorized	$126,900,000	$128,800,000
Metropolitan	*104,971,680*	*106,543,360*
Statewide	*21,928,320*	*22,256,640*

As specified in law and as shown above, 82.72 percent of the amounts authorized for section 5305 are allocated to the Metropolitan Planning Program and 17.28 percent to the Statewide Planning and Research program.

2. FY 2013 Funding Availability

Under the continuing resolution, a total of $50,545,172 is available for the period October 1, 2012 through March 27, 2013 to the Metropolitan Planning Program (section 5305(d)) to support metropolitan transportation planning activities set forth in section 5303. The total amount apportioned for the Metropolitan Planning Program to States for MPOs' use in urbanized areas (UZAs) is $50,292,446 as shown in the table below, after the deduction for oversight (authorized by section 5338).

METROPOLITAN PLANNING PROGRAM—FY 2013 (CR)

Total appropriation	$50,545,172
Oversight deductions	−252,726
Total apportioned	50,292,446

States' apportionments for this program are displayed in Table 2.

3. Basis for Formula Apportionment

MAP–21 did not change the funding formula. Of the amounts authorized in

section 5305, 82.72 percent is made available to the Metropolitan Planning program. Eighty percent of the funds are apportioned on a statutory basis to the States based on the most recent decennial Census for each State's UZA population. The remaining 20 percent is provided to the States based on an FTA administrative formula to address planning needs in larger, more complex UZAs. The amount published for each State includes the supplemental allocation.

4. Requirements

The State allocates Metropolitan Planning funds to MPOs in UZAs or portions thereof to provide funds for planning projects included in a one or two-year program of planning work activities (the Unified Planning Work Program, or UPWP) that includes multimodal systems planning activities spanning both highway and transit planning topics. Each State has either reaffirmed or developed, in consultation with their MPOs, an allocation formula among MPOs within the State, based on the 2010 Census. The allocation formula among MPOs in each State may be changed annually, but any change requires approval by the FTA regional office before grant approval. Program guidance for the Metropolitan Planning Program is found in FTA Circular 8100.1C, *Program Guidance for Metropolitan Planning and State Planning and Research Program Grants,* dated September 1, 2008.

5. Period of Availability

The Metropolitan Planning program funds apportioned in this notice are available for obligation during FY 2013 plus three additional fiscal years. Accordingly, funds apportioned in FY 2013 must be obligated in grants by September 30, 2016. Any FY 2013 apportioned funds that remain unobligated at the close of business on September 30, 2016, will revert to FTA for reapportionment under the Metropolitan Planning program.

B. State Planning and Research Program (49 U.S.C. 5305(e))

This program provides financial assistance to States for statewide transportation planning and other technical assistance activities, including supplementing the technical assistance program provided through the Metropolitan Planning program. The specific requirements of Statewide transportation planning are set forth in 49 U.S.C. 5304 and further explained in 23 CFR Part 450 as referenced in 49 CFR Part 613, Statewide Transportation Planning; Metropolitan Transportation Planning; Final Rule. This funding must support work elements and activities resulting in balanced and comprehensive intermodal transportation planning for the movement of people and goods. Comprehensive transportation planning is not limited to transit planning or surface transportation planning, but also encompasses the relationships among land use and all transportation modes, without regard to the programmatic source of Federal assistance. For more information, contact Victor Austin, Office of Planning and Environment at (202) 366–2996 or *victor.austin@dot.gov.*

1. Authorized Amounts

MAP–21 authorizes $21,928,320 in FY 2013 and $22,256,240 in FY 2014 to provide financial assistance for statewide planning and other technical assistance activities under section 5305. As specified in law, this represents the 17.28 percent of the amounts authorized for section 5305 that are allocated to the Statewide Planning and Research program, as shown below.

Fiscal year	2013	2014
Funds authorized	$21,928,320	$22,256,240

2. FY 2013 Funding Availability

Under the continuing resolution, a total of $10,558,760 is available for the period October 1, 2012 through March 27, 2013 to the State Planning and Research Program (section 5305(e)). Thus far, the total amount apportioned for the State Planning and Research Program (SPRP) is $10,505,966 as shown in the table below, after the deduction for oversight (authorized by section 5338).

STATEWIDE PLANNING PROGRAM—FY 2013 (CR)

Total appropriation	$10,558,760
Oversight deductions	−52,794
Total apportioned	10,505,966

States' apportionments for this program are displayed in Table 2.

3. Basis for Formula Apportionment

MAP–21 did not change the funding formula. Of the amount authorized in section 5305, 17.28 percent is allocated to the State Planning and Research program. FTA apportions funds to States by a statutory formula that is based on the most recent decennial Census data available, and the State's UZA population as compared to the UZA population of all States.

4. Requirements

Funds are provided to States for Statewide transportation planning programs. These funds may be used for a variety of purposes such as planning, technical studies and assistance, demonstrations, and management training. In addition, a State may authorize a portion of these funds to be used to supplement Metropolitan Planning funds allocated by the State to its UZAs, as the State deems appropriate. Program guidance for the State Planning and Research program is found in FTA Circular 8100.1C, *Program Guidance for Metropolitan Planning and State Planning and Research Program Grants,* dated September 1, 2008.

5. Period of Availability

The State Planning and Research program funds apportioned in this notice are available for obligation during FY 2013 plus three additional fiscal years. Accordingly, funds apportioned in FY 2013 must be obligated in grants by September 30, 2016. Any FY 2013 apportioned funds that remain unobligated at the close of business on September 30, 2016 will revert to FTA for reapportionment under the State Planning and Research program.

C. Urbanized Area Formula Program (49 U.S.C. 5307)

Section 5307 authorizes Federal assistance for capital, planning, job access and reverse commute projects, and, in some cases, operating assistance for public transportation in urbanized areas. An urbanized area (UZA) is an area with a population of 50,000 or more that has been defined and designated as such by the U.S. Census Bureau.

FTA calculates an apportionment amount for each UZA based on statutory formulas. For UZAs with populations of 200,000 or more, FTA apportions funds directly to one or more Designated Recipients, which are local or statewide agencies appointed by the Governor in accordance with sections 5303 and 5304, to receive and allocate section 5307 funds to eligible public transportation projects in the UZA. For UZAs with populations between 50,000 and 200,000, FTA apportions funds directly to the Governor for allocation to those areas in the State. Eligible funding recipients are limited to Designated Recipients and other local government authorities, as defined under section 5302(4), that are authorized to apply by the Designated Recipient.

Beginning with this FY 2013 apportionment, FTA is apportioning funds based on UZA designations and population counts from the 2010 Census. The transition from the 2000 Census to the 2010 Census may affect the program requirements and/or eligibilities that apply to recipients in certain areas. Recipients that are located in UZAs that fall under any of the following scenarios may be affected: (1) Existing UZAs that have increased in population from fewer than 200,000 residents to more than 200,000; (2) New UZAs in areas that were formerly under 50,000 in population; (3) Formerly rural areas that are now part of a geographically-enlarged UZA; (4) Previous UZAs that have fallen below 50,000 in population; and, (5) UZAs that have grown or merged with other UZAs to include areas in multiple States. Public transit providers in areas that are affected by these changes are encouraged to work closely with the FTA Regional Office to identify how these changes may apply to their agencies.

In addition to the impacts of the 2010 Census, recipients should be aware of several program changes established by MAP–21. Changes include a new provision allowing operating assistance for transit agencies in UZAs over 200,000 in population that operate a maximum of 100 buses in fixed route service during peak service hours, the eligibility of job access and reverse commute projects, changes in the definition of ''capital project,'' expanded eligibility for sources of local match, and the replacement of ''transit enhancements'' with the ''associated transit improvements'' category.

Changes to the Urbanized Area Formula Program under MAP–21 and the 2010 Census apply to funds apportioned for FY 2013, and are not retroactive to prior funding apportioned under previous authorization. FTA will revise Circular 9030.1D, *Urbanized Area Formula Program: Program Guidance and Application Instructions,* to incorporate any relevant changes. Until this revision is complete, the previous circular, as amended by this notice, remains a good guidance tool in most respects.

For more information about the Urbanized Area Formula Program contact Adam Schildge, Office of Transit Programs, at (202) 366–0778 or *adam.schildge@dot.gov.*

1. Authorized Amounts

MAP–21 authorizes $4,397,950,000 in FY 2013 and $4,458,650,000 in FY 2014 to provide financial assistance for urbanized areas under section 5307. Of the amount authorized and appropriated for section 5307 in each year, $30 million is set aside for a competitive discretionary passenger ferry grant program, 0.5 percent will be apportioned to eligible States for State Safety Oversight (SSO) Program grants, and 0.75 percent will be set aside for program oversight.

Further information on the Passenger Ferry Discretionary Program is provided in section III.A.4.b of this notice. Further information on the 0.5 percent apportionment to States for the State Safety Oversight Program is provided in section IV.N. of this notice.

Fiscal year	2013	2014
Funds authorized	$4,397,950,000	$4,458,650,000

2. FY 2013 Funding Availability

Under the continuing resolution, a total of $2,117,667,740 is available for the section 5307 program for the period October 1, 2012 through March 27, 2013. The total amount apportioned to urbanized areas is $2,290,545,383, which includes the addition of amounts apportioned to UZAs pursuant to the section 5340 Growing States and High Density States Formula factors. This amount excludes the set-aside for the Passenger Ferry Discretionary Program, apportionments under the State Safety Oversight Program, and oversight (authorized by section 5338), as shown in the table below.

URBANIZED AREA FORMULA PROGRAM—FY 2013 (CR)

Total appropriation	$2,130,634,943 [a]
Ferry discretionary program	−14,445,372
State safety oversight program	−10,588,340
Oversight deduction	−15,882,508
Section 5340 funds added	213,793,863
Total apportioned	2,290,545,383

[a] Includes 1.5 percent set-aside for Small Transit Intensive Cities Formula.

Table 3 displays the amounts apportioned under the Urbanized Area Formula Program.

3. Basis for Formula Apportionment

MAP–21 made several changes to the formula for this program. Specifically, section 5336(h) now provides that 3.07 percent of section 5307 funds available for apportionment are allocated on the basis of low-income persons residing in urbanized areas, with 25 percent of these funds allocated to areas below 200,000 in population and the remaining 75 percent allocated to areas 200,000 and over in population. MAP–21 also increased the percentage of funds allocated on the basis of Small Transit Intensive Cities (STIC) factors from 1 to 1.5 percent. Finally, MAP–21 established a new 0.5 percent takedown for State Safety Oversight grant program.

FTA apportions Urbanized Area Formula Program funds based on statutory formulas. Congress established four separate formulas that are used to apportion portions of the available funding: the section 5307 Urbanized Area Formula Program formula, the Small Transit Intensive Cities (STIC) formula, the Growing States and High Density States formula, and a formula based on low-income population. Additional information on these formulas is provided in the following subsections.

Consistent with prior apportionment notices, Table 3 shows a total section 5307 apportionment for each UZA, which includes amounts apportioned under each of these formulas. Detailed information about the formulas is provided in Table 4. For technical assistance purposes, the UZAs that receive STIC funds are listed in Table 6. FTA will provide breakouts of the funding allocated to each UZA under these formulas upon request to the FTA regional office.

i. Section 5307—Urbanized Area Formula

For UZAs between 50,000 and 199,999 in population, the section 5307 formula is based on population and population density. For UZAs with populations of 200,000 and more, the formula is based on a combination of bus revenue vehicle miles, bus passenger miles, bus operating costs, fixed guideway vehicle revenue miles, and fixed guideway route miles, as well as population and population density. The Urbanized Area Formula is defined in 49 U.S.C. 5336.

To calculate a UZA's FY 2013 apportionment, FTA used population

and population density statistics from the 2010 Census and validated mileage and transit service data from transit providers' 2011 National Transit Database (NTD) Report Year (when applicable). Consistent with section 5336(b), FTA has included 22.27 percent of the fixed guideway directional route miles and vehicle revenue miles from eligible urbanized area transit systems, but which were attributable to rural areas outside of the urbanized areas from which the system receives funds. Data from public transportation subrecipients in the Rural Module of the NTD that were identified by FTA staff as having been located in rural areas following the 2000 Census, but are now located in urbanized areas over 200,000 in population following the 2010 Census, were also included in this apportionment, and were not included in the apportionment for the Rural Areas Formula Program. These systems will be identified in the supplementary data tables accompanying the apportionment data tables. This was not done for subrecipients now located in urbanized areas under 200,000 in population following the 2010 Census, data for these systems were included in the apportionment for the Rural Areas Formula Program.

FTA has calculated dollar unit values for the formula factors used in the Urbanized Area Formula Program apportionment calculations. These values represent the amount of money each unit of a factor is worth in this year's apportionment. The unit values change each year, based on all of the data used to calculate the apportionments, as well as the amount appropriated by Congress for the apportionment. The dollar unit values for FY 2013 are displayed in Table 5. To replicate the basic formula component of a UZA's apportionment, multiply the dollar unit value by the appropriate formula factor (i.e., the population, population x population density), and when applicable, data from the NTD (i.e., route miles, vehicle revenue miles, passenger miles, and operating cost).

ii. Small Transit Intensive Cities Formula

Under the STIC formula, FTA apportions funds to UZAs under 200,000 in population that have public transportation service that operates at a level equal to or above the industry average for all UZAs with a population of at least 200,000, but not more than 999,999. STIC funds are apportioned on the basis of one or more of six performance categories: passenger miles traveled per vehicle revenue mile, passenger miles traveled per vehicle revenue hour, vehicle revenue miles per capita, vehicle revenue hours per capita, passenger miles traveled per capita, and passengers per capita.

The data used to determine a UZA's eligibility under the STIC formula and to calculate the STIC apportionments was obtained from the NTD reports for the 2011 reporting year. Because performance data change with each year's NTD reports, the UZAs eligible for STIC funds and the amount each receives may vary each year. UZAs that received funding through the STIC formula for FY 2013 are listed in Table 6.

iii. Section 5340—Growing States and High Density States Formula

FTA also apportions funds to qualifying UZAs and States according to the section 5340 Growing States and High Density States formula, as shown in Table 3. Half of the funds appropriated for section 5340 are apportioned to Growing States and half to High Density States. For the period October 1, 2012 through March 27, 2013, FTA apportions $125,640,719 to UZAs in growing States and $125,640,719 to UZAs in High Density States. More information on this program and its formula is found in section IV.R. of this notice.

iv. Low-Income Population

New under MAP–21, the formula for this program includes a formula factor for low-income population. Section B.7. of this notice contains the new definition of low-income population. Of the amount authorized and appropriated for the Urbanized Area Formula Program in each year, 3.07 percent is apportioned on the basis of low income population. A total of $65,410,493 has been apportioned to UZAs based on this formula for FY 2013, as described below.

As specified in statute, FTA apportions 75 percent of the available funds to UZAs with a population of 200,000 or more. Funds are apportioned based on the ratio of the number of low income individuals in each UZA to the total number of low income individuals in all urbanized areas of that size. FTA apportions the remainder of the funds (25 percent) to UZAs with populations of less than 200,000, according to an equivalent formula. The low income populations used for this calculation were based on the American Community Survey (ACS) data set for 2006–2010. This information is updated by the Census Bureau annually.

4. Requirements

Program guidance for the Urbanized Area Formula Program is found in FTA Circular *9030.1D, Urbanized Area Formula Program: Program Guidance and Application Instructions,* dated May 10, 2010, and is supplemented by additional information and changes provided in this notice and that may be posted to section 5307 web page. FTA is in the process of updating the program circular to incorporate changes resulting from MAP–21. Key program requirements and changes that apply to all programs are addressed in section III.D. of this notice, ''Cross-Cutting Programmatic Requirements and Changes.'' The following subsections outline several important program requirements and changes that apply specifically to the Urbanized Area Formula Program.

i. Designated Recipients Under Census 2010

For UZAs with populations of 200,000 and above (large UZAs), FTA apportions funds to the Designated Recipient(s) that are selected by the State's Governor, responsible local officials, and publicly owned operators of public transportation to receive and apportion the amounts made available to a UZA by Congress and FTA. The Designated Recipient may be a State or regional authority if the authority is responsible under the laws of the State for a capital project and for financing and directly providing public transportation. Section 5307 further provides that the Designated Recipient, after consideration of comments and views of the public, prepares the final program of projects for the amounts available to a UZA of not less than 200,000 in population.

To be selected as a Designated Recipient, an entity must be a public body with the legal capacity to perform all of the following responsibilities:

a. Receive and dispense Federal funds for transit purposes,

b. Submit projects to be included and considered in the annual elements of the Transportation Improvement Program through the Metropolitan Planning Organization,

c. Submit grant applications to FTA, and

d. Enter into formal grant agreements with FTA.

For UZAs with a population of less than 200,000 (small UZAs), the Governor, or his or her designee, is the Designated Recipient. A single total Governor's apportionment amount for the Urbanized Area Formula, STIC, and Growing States and High Density States

for all small UZAs in each State is shown in Table 3. The table also shows, for informational purposes, the apportionment amount that would be attributable by formula to each small UZA within the State. The Governor (or his or her designee) shall determine the sub-allocation of funds among the small UZAs and is not bound by the small UZA amounts published in this notice. The Governor's sub-allocation must be sent to the appropriate FTA Regional Office before grants are awarded.

In FY 2013, FTA will apportion funds to new large UZAs for which a Designated Recipient has not yet been selected. These funds will become available for grants once FTA has received documentation of the selection of a Designated Recipient.

ii. Process for Designation of Designated Recipients in Areas over 200,000 in Population

Given the Census impacts to many urbanized areas, FTA developed specific guidance to assist areas with the process and required documentation for Designated Recipients in areas over 200,000. Specific impacted areas were notified in July 2012 by letter and additional guidance on this requirement can be found on FTA's Web site.

ii. Designations and Documentation in Areas Under 200,000 in Population

For urbanized areas greater than 50,000 but under 200,000 in population, the Governor of each State is the Designated Recipient. This means that the Governor receives and allocates funding for these urbanized areas through the ''Governor's Apportionment,'' which consists of the total amount of funding allocated to a State for all of its small urbanized areas.

The Governor may designate another State agency to act as the Designated Recipient (e.g. the State DOT); however, the Governor or his designee cannot assign the rights and responsibilities of the Designated Recipient to regional or local funding recipients or to transit providers at the local or regional level. The Governor or his designee can, however, authorize local funding recipients or transit providers at the local or regional level to apply for grants directly to FTA as ''Direct Recipients''.

If the Governor designates another State agency to act as the Designated Recipient, such designation must be documented by letter from the Governor naming the Designated Recipient and by an opinion of counsel from the Designated Recipient certifying its legal capacity to perform the functions of a Designated Recipient.

iv. Direct Recipients and Documentation

Many of FTA's grantees are direct recipients, but not all grantees are designated recipients. A direct recipient is a public entity that is legally eligible under Federal transit law to apply for and receive grants directly from FTA. The amount of funds available to direct recipients is determined cooperatively by public transit providers, the MPO, and the designated recipient(s) for that UZA, in adherence with federal planning requirements and communicated to FTA by the designated recipient. FTA can only make grants to direct recipients after a split or suballocation letter is provided to the FTA Regional Office by the Designated Recipient. Additionally, when an applicant for federal funding is not the Designated Recipient, a supplemental agreement will be required. More on this requirement can be found in section V. B. ''FY 2013 Grant Application Procedures'' of this notice.

The allocation of funding to a direct recipient in a small UZA is determined by the Governor or the Governor's designee, in accordance with local transit spending priorities and should be reflected in the planning process. The amount of funding available to a direct recipient in a large UZA is determined by the Designated Recipient for that UZA in accordance with the local MPO and federal planning requirements.

v. Associated Transit Improvements

Designated Recipients in UZAs with populations of 200,000 or more must certify that not less than one percent of the section 5307 funds apportioned to the UZA will be used for associated transit improvements, formerly known as transit enhancements. See section B ''Definitional Changes or New Definitions'' in this notice for the new definition of what is considered an associated transit improvement. In addition, Designated Recipients must submit an annual report listing projects carried out in the preceding year with these funds as part of the Federal fiscal year's final quarterly progress report in TEAM-Web. The report should include the following elements: (1) Grantee name; (2) UZA name and number; (3) FTA project number; (4) transit enhancement category; (5) brief description of enhancement and progress towards project implementation; (6) activity line item code from the approved budget; and (7) amount awarded by FTA for the project. The list of associated transit improvement categories and activity line item (ALI) codes may be found in the table of Scope and ALI codes on TEAM-Web, which can be accessed at *http://FTATEAMWeb.fta.dot.gov.*

Under MAP–21, certain activities previously eligible as ''transit enhancements'' are no longer eligible for funding, unless otherwise eligible as capital or operating expenses under section 5307. Specifically, public art and transit connections to parks within a recipient's service area are no longer included as eligible project activities under this requirement. (Further information about the use of art in the design of a transit facility as a transit capital expense is noted in section III. B. of this notice.) Historic preservation projects may now only be for historic public transportation buildings, structures and facilities that are intended for use in public transportation service.

It is the responsibility of the recipients in a UZA to identify associated transit improvement projects that will receive funding from the Urbanized Area Formula Program. The one percent minimum does not preclude more than one percent from being expended in a UZA for associated transit improvements. However, projects and project elements that are only eligible under this category—in particular, operating costs for historic facilities—may not exceed one percent of a UZA's annual apportionment.

vi. Transit Security Projects

MAP–21 continues the requirement that each recipient of Urbanized Area Formula funds must certify that it will expend at least one percent of the amount received each fiscal year on ''public transportation security projects,'' or that it has decided the expenditure for security projects is not necessary. For applicants not eligible to receive section 5307 funds for operating expenses, only capital security projects may be funded under this one percent requirement. The definition of eligible capital projects includes specific crime prevention and security activities, including: increased lighting in or adjacent to a public transportation system (including bus stops, subway stations, parking lots, and garages), increased camera surveillance of an area in or adjacent to that system, providing an emergency telephone line to contact law enforcement or security personnel in an area in or adjacent to that system, and any other project intended to increase the security and safety of an existing or planned public transportation system. The one percent may also include security expenditures included within other capital activities, and, where the recipient is eligible,

operating assistance. Additional funding for transit security projects may be available from the Transportation Security Administration (TSA). For more information, visit the TSA Transit Security Grants web page at: *http://www.tsa.gov/what_we_do/grants/programs/tsgp_tieri/2011/index.shtm*.

The grantee must provide information regarding its use of the one percent for security as part of each section 5307 grant application, using a special screen in TEAM-Web. If the grantee has certified that it is not necessary to expend one percent for security, the section 5307 grant application must include information to support that certification. FTA will not process an application for a section 5307 grant until the security information is complete.

vii. FY 2013 Operating Assistance

Recipients in urbanized areas under 200,000 in population may use Urbanized Area Formula Program funds for operating assistance at a 50 percent Federal share. There is no cap to the amount that can be used in these areas for operating assistance. Unless specifically authorized, recipients in urbanized areas of 200,000 or more in population are not permitted to use program funds for operating assistance.

Under MAP–21, a special rule allows recipients in urbanized areas with populations of 200,000 or above and that operate 100 or fewer buses in fixed route service during peak hours, to receive a grant for operating assistance subject to a maximum amount per system as explained below:

a. Public transportation systems that operate a minimum of 76 buses and a maximum of 100 buses in fixed route service during peak service hours may receive operating assistance in an amount not to exceed 50 percent of the share of the apportionment that is attributable to such systems within the urbanized area, as measured by vehicle revenue hours.

b. Public transportation systems that operate 75 or fewer buses in fixed route service during peak service hours may receive operating assistance in an amount not to exceed 75 percent of the share of the apportionment that is attributable to such systems within the urbanized area, as measured by vehicle revenue hours.

A list of eligible recipients and their maximum operating assistance amounts for FY 2013 is shown in Table 3–A. FTA identified the systems eligible to use this provision and their maximum amounts for FY 2013 using data from the NTD for reporting year 2011. Operating assistance requires a 50 percent local match.

In accordance with section 5307(a)(2), FTA has calculated a fixed annual cap on operating assistance for each eligible agency that provides service in a large UZA. The cap is determined by dividing the UZA's apportionment by the total number of vehicle revenue hours reported from all public transportation operators and from all transit modes in the UZA, and then by multiplying this quotient by the number of bus vehicle revenue hours operated in the UZA by the eligible system. The result is the proportional share of the apportionment that is attributable to the qualifying system, as measured by vehicle revenue hours. This cap is calculated based on the FY 2013 apportionment for an eligible provider's UZA under the continuing resolution, and will be updated as additional funding is made available. Eligible systems operating in more than one UZA over 200,000 in population will receive separate operating caps from each UZA in which the system operates.

If a recipient believes that this table does not accurately reflect the number of buses the system operates in fixed route service during peak service hours, the recipient may submit a supplementary report to the NTD, and should notify the FTA Office of Program Management that it is appealing this list for FY 2013. The supplementary NTD report must be based on service levels on or prior to October 1, 2012. FTA will determine whether a proposed adjustment is necessary based on evidence of a continuing change in maximum service levels. FTA will only accept supplementary reports through January 15, 2013 so it can validate the data and consider any changes prior to the expiration of the current continuing resolution.

In addition, many expenses that accounting rules classify as operating costs are eligible as capital expenses in this program, including preventive maintenance, expenses (up to 10 percent of the amount apportioned) for providing non-fixed route paratransit transportation services in accordance with section 223 of the ADA, and mobility management expenses.

viii. Job Access and Reverse Commute Projects

Job access and reverse commute projects are eligible for funding under the Urbanized Area Formula Program. A job access and reverse commute project is defined as: ''a transportation project to finance planning, capital and operating costs that support the development and maintenance of transportation services designed to transport welfare recipients and eligible low-income individuals to and from jobs and activities related to their employment, including transportation projects that facilitate the provision of public transportation services from urbanized areas and rural areas to suburban employment locations.''

There is no set-aside or cap under MAP–21 for job access and reverse commute projects funded under this section. However, the projects must be for the ''development and maintenance'' of transportation services designed to transport welfare recipients and eligible low-income individuals to and from jobs and employment-related activities. FTA defines ''development of transportation services'' to mean new projects that were not in service on October 1, 2012. New job access and reverse commute projects may include the expansion or extension of an existing service, so long as the new service was designed to support the target population consistent with the definition above and the other planning requirements (described below) were met. Such projects are not required to be designed exclusively for these populations.

''Maintenance of transportation services'' is identified as the continuation of eligible job access and reverse commute projects that received funding under the section 5316 JARC Program, as amended by SAFETEA–LU, and which was repealed by MAP–21.

Reverse commute projects are only eligible under this section if they are designed to transport welfare recipients and eligible low-income individuals to and from jobs and employment-related activities. However, as noted above, the services do not need to be exclusively for the target population.

For FY 2013, any projects or project elements that were eligible under the section 5316 Job Access and Reverse Commute Program, authorized under SAFETEA–LU, will remain eligible, so long as they can be classified as development or maintenance, as described above and comply with the MAP–21 definition of a job access and reverse commute project. A list of these eligible projects elements can be found in FTA Circular 9050.1: *The Job Access and Reverse Commute (JARC) Program Guidance and Application Instructions.* FTA anticipates cancelling this circular and addressing project eligibility in a revised FTA Circular 9030.1 for the Urbanized Area Formula Program. Some of these types of projects may not continue to be eligible in the future.

In order to receive funding for a job access and reverse commute project

under this provision, the project must be identified by the MPO and Designated Recipient as a job access and reverse commute project in the Designated Recipient's annual Program of Projects, which must be developed in consultation with interested parties, published with the opportunity for comments, and subject to a public hearing.

While the job access and reverse commute projects funded under this section do not have to be selected from a locally-developed, human service public transportation planning process (''coordinated planning process''), FTA encourages MPOs and section 5307 Designated Recipients to continue the coordinated planning process in identifying and developing projects for funding. FTA encourages MPOs and recipients to coordinate with the organizations previously designated as Designated Recipients for the SAFETEA–LU JARC program, and to identify and consider the funding needs of existing job access and reverse commute projects and services.

Funds previously apportioned under section 5316 (JARC) that have not been obligated will remain available to the entity that was the Designated Recipient for those funds at the time of apportionment through the period of availability unless a new designation is received. These funds are subject to the requirements of SAFETEA–LU and cannot be combined in a grant in a section 5307 grant under MAP–21.

ix. Sources of Local Match

MAP–21 expands the categories of funds that can used as local match. These categories are included below and described in the section III.D. ''Cross-Cutting Programmatic Requirements and Changes'' of this notice. In most cases, the maximum Federal share of an Urbanized Area Formula Program grant is 80 percent of net project cost for a capital project and 50 percent of net project cost for operating assistance, unless the recipient indicates a lower federal share. The remainder of the net project cost (i.e., 20 percent and 50 percent, respectively) shall be provided from the following sources:

a. Non-government sources other than revenues from providing public transportation services;

b. Revenues derived from the sale of advertising and concessions;

c. An undistributed cash surplus, a replacement or depreciation cash fund or reserve, or new capital;

d. Amounts appropriated or otherwise made available to a department or agency of the Government (other than the Department of Transportation);

e. Amounts received under a service agreement with a State or local social service agency or private social service organization; and

f. Proceeds from the issuance of revenue bonds;

g. Funds from Section 403(a)(5)(C)(vii) of the Social Security Act (42 U.S.C. 603(a)(5)(C)(vii));

h. Transportation Development Credits (formerly Toll Revenue Credits); and

i. Any amounts expended by providers of public transportation by vanpool for the acquisition of rolling stock to be used in the recipient's service area, excluding any amounts the provider may have received in Federal, State or local government assistance for such acquisition, provided that the provider has a binding agreement with the public transportation agency to provide service in the relevant UZA.

x. Urbanized Area Formula Funds Used for Highway Purposes

Funds apportioned under the Urbanized Area Formula Program are no longer eligible for transfer to FHWA for highway projects.

xi. Eligibility for Safety Certification Training

Recipients of section 5307 funds are permitted to use not more than 0.5 percent of their formula funds under the Urbanized Area Formula Program to pay not more than eighty percent of the cost of participation for an employee who is directly responsible for safety oversight to participate in public transportation safety certification training. Safety certification training program requirements will be established in accordance with section 5329.

5. Period of Availability

MAP–21 expanded the period of availability for section 5307 funds to six years (year of apportionment plus five additional years). The Urbanized Area Formula Program funds apportioned in this notice are available for obligation in FY 2013 plus five additional years. Accordingly, funds apportioned in FY 2013 must be obligated in grants by September 30, 2018. Any FY 2013 apportioned funds that remain unobligated at the close of business on September 30, 2018 will revert to FTA for reapportionment under the Urbanized Area Formula Program.

6. Other Program or Apportionment Related Information and Highlights

State Safety Oversight Funding

As mentioned above, under MAP–21 there is a 0.5 percent take-down from the section 5307 urbanized area program that will be apportioned to States for State Safety Oversight (SSO) program activities. These funds will be apportioned by formula to States with rail fixed guideway public transportation systems that are either operating or in the engineering or construction phase of development, and which are not subject to regulation by the Federal Railroad Administration (FRA) to develop or carry out State safety oversight programs. FTA is currently developing the formula by which these funds will be apportioned. By law, this formula must take into account fixed guideway route miles, fixed guideway vehicle revenue miles, and fixed guideway passenger miles on fixed guideway systems. Funds may be used for program operational and administrative expenses, including employee training activities. A twenty percent non-Federal match is required for these funds. The State's share of the cost may include in-kind contributions and may not include any funds received from or revenues earned by a public transportation agency.

Vehicle Fuel and Electrical Propulsion Costs as Capital Maintenance for Section 5307

The FY 2013 CR does not continue the provision to permit FTA to treat fuel costs for vehicle operations, including utility costs for the propulsion of electrical vehicles, as a capital maintenance item for grants in FY 2013. As such, these expenses are considered operating expenses and require a 50 percent local match.

NTD Reporting

Section 5335 requires that each recipient or beneficiary under the section 5307 program submit an annual report to the NTD containing information on financial, operating, and asset condition information. Annual NTD reports should be full reports of all transit activities, regardless of funding source. For the 2012 Report Year, which lasts from October 2012 through July 2013, the reporting requirements apply to any recipient of a section 5307 grant obligation in 2011, any recipient of a section 5307 grant outlay in 2012, or any entity that continued to benefit in 2012 from capital assets purchased using Section 5307 grants. Also, grantees that received section 5307 grants in prior years, and which anticipate receiving section 5307 grants in future years, should also continue to report to the NTD. Recipients or beneficiaries of section 5307 grants that do not operate transit service, either directly or through a contract for purchased transportation services, are

still required to report to the NTD on capital and planning expenditures, but have significantly reduced reporting requirements. Recipients or beneficiaries of Section 5307 grants that operate 30 or fewer vehicles in maximum service across all transit modes are also eligible for reduced, ''Small Systems'' reporting requirements. Recipients or beneficiaries making full annual reports to the NTD are also subject to monthly reporting requirements on service operations and safety incidents. MAP–21 also established new requirements for reporting asset inventories and condition assessments to FTA at section 5326(b)(3), 5335(a), and 5335(c). FTA grantees and sub-recipients should look for a future **Federal Register** Notice with proposed changes to the FTA's NTD Reporting Manual for more information and an opportunity to comment on FTA's implementation of these new statutory requirements.

The NTD Reporting Manuals contains detailed reporting instructions and are posted on the NTD Web site, *www.ntdprogram.gov.*

D. Fixed Guideway Capital Investment Program (49 U.S.C. 5309)—New and Small Starts and Core Capacity Improvements

The Fixed Guideway Capital Investment Program provides funds for construction of new fixed guideway systems or extensions to existing fixed guideway systems and, as amended by MAP–21, projects that will expand the core capacity of existing fixed guideway corridor. Eligible projects are new fixed-guideway systems, such as rapid rail (heavy rail), commuter rail, light rail, hybrid rail, trolleybus (using overhead catenary), cable car, passenger ferries, and bus rapid transit, or an extension of any of these. The Small Starts program also includes corridor-based bus rapid transit systems that do not operate on a separate fixed guideway but include features that emulate the services provided by rail fixed guideway including defined stations, traffic signal priority for public transit vehicles, and short headway bi-directional services for a substantial part of weekdays and weekend days. The Core Capacity Improvement program provides funds for substantial, corridor-based investments in existing fixed guideway systems that are at capacity today or will be in five years. Core Capacity Improvement projects must increase the capacity of the existing fixed guideway system in the corridor by at least 10 percent. Projects become candidates for funding under this program by successfully completing steps in the process defined in section 5309 and obtaining a satisfactory rating under the statutorily-defined criteria. For New Starts and Core Capacity Improvement projects, the steps in the process include project development, engineering, and construction. For Small Starts projects the steps in the process include project development and construction. New Starts and Core Capacity Improvement projects receive construction funds from the program through a full funding grant agreement (FFGA) that defines the scope of the project and specifies the total multi-year Federal commitment to the project. Small Starts projects receive construction funds through a single year grant or an expedited grant agreement that defines the scope of the project and specifies the Federal commitment to the project. For more information about the New or Small Starts or Core Capacity project development process or evaluation and rating process contact Elizabeth Day, Office of Planning and Environment, at (202) 366–4033, or for information about published allocations contact Eric Hu, Office of Transit Programs, at (202) 366–0870 or *eric.hu@dot.gov.*

1. Authorized Amounts

MAP–21 authorizes the appropriation of $1,907,000,000 in each FY 2013 and $1,907,000,000 in FY 2014 to provide financial assistance under section 5309.

Fiscal year	2013	2014
Funds Authorized	$1,907,000,000	$1,907,000,000

2. FY 2013 Funding Availability

Under the continuing resolution, a total of $931,994,700 is available for the section 5309 program for the period October 1, 2012 through March 27, 2013. This amount is based on the rate of operations as defined in OMB Bulletin 12–02, which specifies that the CR annualized level equals the FY 2012 enacted appropriation net of FY 2012 rescissions. In the case of this account, because $44 million would be subject to rescission were the 2012 rescission enacted in FY 2013, FTA must subtract this amount when calculating the CR annualized level. Thus far, the total amount available for allocation is $922,674,753, after the one percent deduction for oversight, as shown in the table below.

FIXED GUIDEWAY CAPITAL INVESTMENT PROGRAM—FY 2013 (CR)

Total Appropriation	$931,994,700
Oversight Deductions	−$9,319,947
Total Available	$922,674,753

3. Basis for Allocation

Funds are allocated on a discretionary basis and subject to program evaluation.

4. Requirements

FTA will be completing a rulemaking and interim guidance documents related to the New Starts, Small Starts, and Core Capacity Improvement program to implement the provisions of MAP–21. Project sponsors should reference the FTA Web site at *www.fta.dot.gov* for the most current fixed guideway capital investment program guidance. Grant-related guidance is found in FTA Circular 9300.1B, *Capital Investment Program Guidance and Application Instructions,* November 1, 2008; and C5200.1A, *Full Funding Grant Agreement Guidance,* December 5, 2002, which will be updated in the future to incorporate the changes made by MAP–21.

5. Period of Availability

MAP–21 expanded the period of availability for section 5309 capital investment funds to five years, (the fiscal year in which the amount is made available plus four additional years). Therefore, funds for a project identified in FY 2013 must be obligated for the project by September 30, 2017. Section 5309 funds that remain unobligated to the projects for which they originally were designated after five fiscal years may be made available for other section 5309 projects.

6. Other Program Information

Prior year FY 2011 and FY 2012 unobligated allocations for New Starts in the amount of $528,273,000 remain available for obligation in FY 2013. These unobligated amounts are

displayed in Table 10 on FTA's FY 2013 Apportionments web page.

E. Enhanced Mobility of Seniors and Individuals With Disabilities Program (49 U.S.C. 5310)

The Enhanced Mobility of Seniors and Individuals with Disabilities Program provides formula funding to States and Designated Recipients of large UZAs (UZAs with populations of 200,000 or more) to improve mobility for seniors and individuals with disabilities. This program provides funds to: (1) Serve the special needs of transit-dependent populations beyond traditional public transportation service, where public transportation is insufficient, inappropriate, or unavailable; (2) projects that exceed the requirements of the Americans with Disabilities Act (ADA) act; (3) project that improve access to fixed route service and decrease reliance on complementary paratransit; and (4) projects that are alternatives to public transportation.

Under MAP–21 this program no longer provides a single apportionment to the State; however, it now provides apportionments specifically for large urbanized, small urbanized and rural areas; and will require new designations in large UZAs. Additionally, MAP–21 expanded the eligibility provisions to include operating expenses.

For more information about the Enhanced Mobility of Seniors and Individuals with Disabilities Program, contact Gil Williams, Office of Transit Programs, at (202) 366–0797 or *gilbert.williams@dot.gov.*

1. Authorized Amounts

MAP–21 authorizes $254,800,000 in FY 2013 and $258,000,000 in FY 2014 for the Enhanced Mobility of Seniors and Individuals with Disabilities formula program.

Fiscal year	2013	2014
Funds Authorized	$254,800,000	$258,000,000

2. FY 2013 Funding Availability

Under the continuing resolution, a total of $122,689,376 is available for the section 5310 program for the period October 1, 2012 through March 27, 2013. Thus far, the total amount apportioned to States and UZAs for the section 5310 program is $122,075,929, after the deduction for oversight (authorized by section 5338), as shown below in the table.

ENHANCED MOBILITY OF SENIORS AND INDIVIDUALS WITH DISABILITIES PROGRAM—FY 2013 (CR)

Total Appropriation	$122,689,376
Oversight Deductions	−$613,447
Total Apportioned	$122,075,929

Table 11 displays the amounts apportioned under the Enhanced Mobility of Seniors and Individuals with Disabilities Program.

3. Basis for Formula Apportionment

Sixty percent of the funds shall be apportioned among Designated Recipients for urbanized areas with a population of 200,000 or more individuals. Twenty percent of the funds shall be apportioned among the States for their urbanized areas with a population of at least 50,000 but less than 200,000. Twenty percent of the funds shall be apportioned among the States for their rural areas, areas with a population less than 50,000. In addition, previous law allowed U.S. DOT to establish the formula for section 5310. The Secretary's formula provided a $125,000 funding floor (i.e., minimum apportionment amount) for each State, as well as for the District of Columbia, Guam and Puerto Rico, and a $50,000 funding floor for American Samoa and the Northern Mariana Islands. Since the formula is now prescribed in section 5310, as amended by MAP–21, there are no funding floors under this program.

Under the section 5310 formula, funds are allocated using Census data on seniors (i.e., persons 65 and older) and people with disabilities. However, beginning in 2010, the Census Bureau stopped collecting this demographic information on as part of its decennial census. Data on seniors and people with disabilities is now only available from the American Community Survey (ACS), which is conducted and published on a rolling basis. FTA's FY 2013 section 5310 apportionments incorporate ACS data published in December, 2011. Data on seniors comes from the ACS 2006–2010 five-year data set, Table S.0103, ''Population 65 Years and Older in the United States,'' and Table S.0103PR, ''Population 65 Years and Older in Puerto Rico.'' Data on persons with disabilities comes from the ACS 2008–2010 three-year data set, Table S.1810, ''Disability Characteristics.'' (A five-year data set for persons with disabilities is not yet available because the Census changed the wording of its question on disability status after 2008.)

4. Program Requirements

i. Designated Recipients

For urbanized areas less than 200,000 and in the rural areas, the State is the Designated Recipient for section 5310. Current 5310 designations remain in effect until changed by the Governor of a State by officially notifying the appropriate FTA regional administrator of re-designation.

In urbanized areas over 200,000 in population, the recipient charged with administering the section 5310 Program must be officially designated through a process consistent with sections 5303 and 5304 prior to grant award. The MPO, State, or another public agency may be a preferred choice based on local circumstances. The designation of a recipient shall be made by the governor in consultation with responsible local officials and publicly owned operators of public transportation, as required in sections 5303 and 5304. As such, FTA asks that in the large urbanized areas, the MPO initiate the process for designating a 5310 Designated Recipient as soon as possible. Funds cannot be awarded until this designation is on file with the FTA Regional office. A State agency could be designated as the recipient of section 5310 funds for a large urbanized area. However, if the State is selected as the designated recipient in a large urbanized area, the apportioned funds for the large urbanized area must be allocated to agencies within the urbanized area.

Designated recipients are responsible for administering the program. Responsibilities include: Notifying eligible local entities of funding availability; developing project selection processes; determining project eligibility; developing the program of projects; and ensuring that all subrecipients comply with Federal requirements.

Although FTA will only award grants to the designated recipients for the program, there are other entities eligible to receive funding as a subrecipient. These include private nonprofit agencies, public bodies approved by the state to coordinate services for elderly persons and persons with disabilities, or

public bodies which certify to the Governor that no nonprofit corporations or associations are readily available in an area to provide the service.

ii. Eligible Expenses

MAP–21 expands eligibility of the funds to be used for operating, in addition to capital, for transportation services that address the needs of seniors and individuals with disabilities. Not less than 55 percent of the funds available for this program must be used for projects planned, designed, and carried out to meet the special needs of seniors and individuals with disabilities when public transportation is insufficient, inappropriate, or unavailable, typically carried out by non-profit agencies. The 55 percent is a floor. Recipients may use more or all of their section 5310 funds for these types of projects. Remaining funds may be used for: public transportation projects that exceed the requirements of the ADA; public transportation projects that improve access to fixed-route service and decrease reliance by individuals with disabilities on complementary paratransit; or alternatives to public transportation that assist seniors and individuals with disabilities. The expanded eligibility provisions are a result of the consolidation of the section 5317 New Freedom Program, which was repealed in MAP–21, with the section 5310 program. The acquisition of public transportation services remains an eligible capital expense under this section.

States and Designated Recipients may use up to ten percent of their annual apportionment to administer, plan, and provide technical assistance for a funded project. No local share is required for these program administrative funds.

For more on eligible expenses, until FTA revises the section 5310 circular, recipients may use FTA Circular 9070.1F, *Elderly Individuals and Individuals with Disabilities Program Guidance and Application Instructions,* dated May 1, 2007 for 5310 projects and FTA Circular 9045.1, *New Freedom Program Guidance and Application Instructions,* dated May 1, 2007 for New Freedom-like projects.

iii. Local Match

The matching requirements for this program remain the same; capital assistance is provided on an 80 percent Federal share, 20 percent local share. Operating assistance requires a 50 percent match. One difference to note, however, is that MAP–21 eliminated the provision for the sliding scale match under FHWA programs to be used in this program. Funds provided under other Federal programs (other than those of the Department of Transportation, with the exception of the Federal Lands Transportation Program and Tribal Transportation Program established by sections 202 and 203 of title 23 U.S.C.) may be used for local match for funds provided under section 5310, and revenue from service contracts may be used as local match.

iv. Planning and Consultation

The States and Designated Recipients must certify that: Projects selected for funding under this program are included in a locally developed, coordinated public transit-human services transportation plan; and the plan was developed and approved through a process that included participation by seniors, individuals with disabilities, representatives of public, private, nonprofit transportation and human services providers, and other members of the public.

Under MAP–21, the coordinated planning provision requires that all projects be included in the local coordinated human service-public transportation plan. However, on an interim basis, FTA defines ''included in'' to mean essentially the same as ''derived from,'' which is consistent with the policy established under SAFETEA–LU, so long as there is evidence the plan was developed and approved with inclusion from the specific targeted populations. FTA will, however, through revisions to its circular, seek notice and comment for how to define ''included in'' for FY 2014.

Although the requirement for a coordinated plan is not new, FTA recognizes that some large urbanized areas may need to modify existing coordinated plans to address the specific needs of the program's target populations and/or be approved by individuals from the target populations. Modifications to existing programs are acceptable. For areas where a coordinated plan does not exist, FTA requires the following elements, at a minimum, be included in the plans:

a. An assessment of available services that identifies current transportation providers (public, private, and nonprofit);

b. An assessment of transportation needs for individuals with disabilities and seniors;

c. Strategies, activities, and/or projects to address the identified gaps between current services and needs, as well as opportunities to achieve efficiencies in service delivery; and,

d. Priorities for implementation based on resources (from multiple program sources), time, and feasibility for implementing specific strategies and/or activities identified.

Additionally, the plan must be developed and adopted with representation from seniors, individuals with disabilities, representatives of public, private, nonprofit transportation and human services providers, and other members of the public.

Similar to how FTA treated this requirement under SAFETEA–LU programs, recipients are not required to submit the coordinated plans to FTA. Recipients must certify, however, that projects were selected from this process and must make reference to the plan in the program of projects, which is described below. Additional guidance for developing coordinated plans can be found in Chapter V of the FTA Circular 9070.1F, *Elderly Individuals and Individuals with Disabilities Program Guidance and Application Instructions,* dated May 1, 2007.

v. State and Project Management Plans

Similar to the requirements established under SAFETEA–LU, FTA will require States and designated recipients responsible for implementing the section 5310 program to document their approach to managing the program. States may need to update their plan to reflect MAP–21 changes. In areas over 200,000, the designated recipient will be required to submit a plan to the regional office prior to grant award. For assistance with developing these plans, recipients can use Chapter VII of the FTA Circular 9070.1F, *Elderly Individuals and Individuals with Disabilities Program Guidance and Application Instructions,* dated May 1, 2007. This chapter includes guidance on how to create and use State Management Plans (SMP), and can be used as a guide to develop a Program Management Plan (PMP) in the urbanized areas. The primary purposes of Management Plans are to serve as the basis for FTA management reviews of the program, and to provide public information on the administration of the programs.

vi. Program of Projects (POP)

Designated Recipients are required to develop a Program of Projects (POP) with the grant application and submit it to the FTA regional office. The POP should be developed with respect to the coordinated plan, long range plan, and the transportation improvement plan.

For additional guidance in developing the required POP, recipients can use Chapter IV of the FTA Circular 9070.1F,

Elderly Individuals and Individuals with Disabilities Program Guidance and Application Instructions, dated May 1, 2007.

5. Period of Availability

For Enhanced Mobility of Seniors and Individuals with Disabilities Program funds apportioned under this notice, FTA has administratively set the period of availability to three years, which includes the year of apportionment plus two additional years. Accordingly, funds apportioned in FY 2013 must be obligated in grants by September 30, 2015. Any FY 2013 apportioned funds that remain unobligated at the close of business on September 30, 2015 will revert to FTA for reapportionment among the States and urbanized areas.

6. Other Program Information

Recipients may use a competitive selection to select projects, but it is not required.

MAP–21 requires FTA to establish performance measures for the program, which will be developed in coordination with revisions to the existing FTA Circular 9070.1F, *Elderly Individuals and Individuals with Disabilities Program Guidance and Application Instructions,* dated May 1, 2007, and through notice and comment.

Cross-cutting requirements for transit asset management plans and reporting of asset inventory and condition information will apply to this program. See section III.D. in this notice on cross-cutting programmatic requirements for more information.

States may transfer rural or small urbanized areas funds. The State may transfer apportioned funds between the small urbanized areas and the rural areas if it can certify that the needs are being met in the area to which the funds were originally apportioned. The State can transfer the funds (rural and small urbanized area) to any area within the state if a statewide program for this section is established. There are no administrative or statutory provisions to permit transferring section 5310 funds to other FTA programs nor is there a provision for large urbanized areas to transfer their funds to the State.

Program Guidance is found in FTA C 9070.1F, *Elderly Individuals and Individuals with Disabilities Program Guidance and Application Instructions,* dated May 1, 2007. FTA is in the process of updating this circular to incorporate changes resulting from MAP–21 and will publish it for notice and comment prior to issuing a final circular.

F. Formula Grants for Rural Areas Program (49 U.S.C. 5311)

The Rural Areas program provides formula funding to States and Indian tribes for the purpose of supporting public transportation in areas with a population of less than 50,000. Funding may be used for capital, operating, planning, job access and reverse commute projects, and State administration expenses. Eligible sub-recipients include State and local governmental authorities, Indian Tribes, private non-profit organizations, and private operators of public transportation services, including intercity bus companies. Indian Tribes are also eligible direct recipients under section 5311, both for funds apportioned to the States and for projects apportioned or selected to be funded with funds set aside for a separate Tribal Transit Program. For more information about the Formula Grants for Rural Areas program, contact Lorna Wilson, Office of Transit Programs, at (202) 366–0893 or *lorna.wilson@dot.gov.*

Under MAP–21, the changes to this program included changes to the formula, eligibility, and to the set-asides that support other rural transit programs within this section, such as the Tribal Transit Program. These changes are described in the sections below.

1. Authorized Amounts

MAP–21 authorizes $599,500,000 in FY 2013 and $607,800,000 in FY 2014 to provide financial assistance for rural areas under section 5311.

Fiscal year	2013	2014
Funds Authorized	$599,500,000	$607,800,000

In addition to the funds made available to States under section 5311, approximately 16 percent of the funds authorized for the new section 5340 Growing States and High Density States formula factors will be apportioned to States for use in rural areas.

Funding for oversight, the Rural Transportation Assistance Program (RTAP), Tribal Transit Program, and the new Appalachian Development Public Transportation Assistance Program will be taken off the top before amounts are apportioned to the States.

2. FY 2013 Funding Availability

Under the continuing resolution, a total of $290,423,512 is available for the section 5311 program for the period October 1, 2012 through March 27, 2013. Thus far, the total amount apportioned to the States for the section 5311 program is $293,341,084, after the deductions for the Rural Transportation Assistance Program (RTAP), oversight (authorized by section 5338), the Tribal Transit Program, the Appalachian Development Public Transportation Assistance Program, and the addition of Section 5340 for Growing States, as shown in the table below.

FORMULA GRANTS FOR RURAL AREAS PROGRAM—FY 2013 (CR)

Total Appropriation	$288,666,722
Oversight Deductions	−1,443,334
RTAP Takedown	−5,773,336
Tribal Takedown	−14,445,372
Appalachian Takedown	−9,630,250
Section 5340 Funds Added	35,966,654
Total Apportioned	293,341,084

Table 12 displays the amounts apportioned to the States under the Formula Grants for Rural Areas Program.

3. Basis for Formula Apportionment

MAP–21 modifies the formula for the Rural Areas Program. SAFETEA–LU directed 80 percent of funds to be allocated to States on the basis of non-urbanized population and the remaining 20 percent to be allocated on the basis of non-urbanized land area. MAP–21 reduces the amount of funds that are apportioned on the basis of non-urbanized population from 80 percent to 66.5 percent while adding an apportionment based on non-urbanized vehicle revenue miles and an apportionment based on the population of low-income individuals residing in non-urbanized areas. The percentage of funds allocated on the basis of non-urbanized land area is roughly the same under the MAP–21 formula as it was under the SAFETEA–LU formula.

Data from the Rural Module of the National Transit Database (NTD) 2011 Report Year was used for this apportionment, including data from directly-reporting Indian tribes. Data from public transportation systems that reported to the Annual (Urbanized Area) Module, and that was not attributable to an urbanized area, was also included. Data from public transportation

subrecipients in the Rural Module of the NTD that were identified by FTA staff as having been located in rural areas following the 2000 Census, but are now located in urbanized areas over 200,000 in population following the 2010 Census, were not included in this apportionment, but were included in the apportionment for the Urbanized Area Formula Program. These systems will be identified in the supplementary data tables accompanying the apportionment data tables. This was not done for subrecipients now located in urbanized areas under 200,000 in population following the 2010 Census; data for these systems were included in the apportionment for the Rural Areas Formula Program.

Under MAP–21, the section 5311 program now includes three takedowns: the new Appalachian Development Public Transportation Assistance Program; the Rural Transit Assistance Program (RTAP); and the Tribal Transit Program, which was changed under MAP–21. These separate programs are described in the sections that follow.

4. Program Requirements

The program requirements under this section are generally unchanged, with the exception of the cross-cutting requirements mentioned in section III.D. of this notice and specific subsections outlined below.

The Federal share for capital assistance is 80 percent and for operating assistance is 50 percent, except that States eligible for the sliding scale match under FHWA programs may use that match ratio for section 5311 capital projects and 62.5 percent of the sliding scale capital match ratio for operating projects. This is not changed under MAP–21.

Each State prepares an annual program of projects, which must provide for fair and equitable distribution of funds within the States, including Indian reservations, and must provide for maximum feasible coordination with transportation services assisted by other Federal sources.

Additional program guidance for the Rural Areas Program is found in FTA Circular 9040.1F, *Nonurbanized Area Formula Program Guidance and Grant Application Instructions,* dated April 1, 2007, and is supplemented by additional information and changes provided in this notice and that may be posted to FTA's section 5311 Web page. FTA is in the process of updating the program circular to incorporate changes resulting from MAP–21.

The following subsections outline several important program requirements and changes that apply specifically to the section 5311 program.

i. Eligible Expenses

The section 5311 program provides funding for capital, operating, planning, job access and reverse commute projects, and administration expenses for public transit service in rural areas under 50,000 in population. Planning is a new eligible expense under MAP–21; note that States were permitted to use a portion of the administrative set-aside for planning, but now planning is an eligible activity for subrecipients under this program. The planning activities undertaken with 5311 funds are in addition to those awarded to the State under section 5305 and must be used specifically for rural areas' needs. For FY 2013, FTA expects States to follow the requirement set forth by section 5305 and described in FTA Circular 8100.1C, *Program Guidance for Metropolitan Planning and State Planning and Research Program Grants,* dated September 1, 2008, for eligible uses of 5311 funds for planning and for programming the funds prior to obligation. Job access and reverse commute projects are also eligible under this program; further guidance on this eligible activity is described in section iv below.

ii. Intercity Bus Transportation

The requirement did not change under MAP–21 for each State to spend no less than 15 percent of its annual Rural Areas Formula apportionment for the development and support of intercity bus transportation, unless it can certify, after consultation with affected intercity bus service providers, that the intercity bus service needs of the State are being adequately met. FTA continues to encourage consultation with other stakeholders, such as communities affected by loss of intercity service. MAP–21 codifies the ''Intercity Pilot Match Program'' established by FTA in March 2007, which permits the cost of an unsubsidized portion of privately provided intercity bus service that connects feeder service to be used as in-kind local match for the intercity bus projects. FTA will develop guidance consistent with that published in the **Federal Register** on February 28, 2007, as Appendix 1 of the Notice that announced the final revised FTA Circular 9040.1F, and update the program circular to include this provision.

iii. State Administration

MAP–21 reduced the amount available to States to 10 percent from 15 percent for use for administration, planning, and technical assistance. States may elect to use 10 percent of their apportionment at 100 percent federal share to administer the section 5311 program and provide technical assistance to subrecipients. Technical assistance includes project planning, program and management development, public transportation coordination activities, and research the State considers appropriate to promote effective delivery of public transportation to rural areas.

iv. Job Access and Reverse Commute Projects

Job access and reverse commute projects are eligible for funding under the Rural Areas Formula Program. A job access and reverse commute project is defined as:

> ''a transportation project to finance planning, capital and operating costs that support the development and maintenance of transportation services designed to transport welfare recipients and eligible low-income individuals to and from jobs and activities related to their employment, including transportation projects that facilitate the provision of public transportation services from urbanized areas and rural areas to suburban employment locations.''

There is no set-aside or cap under MAP–21 for job access and reverse commute projects funded under this section. However, the projects must be for the ''development and maintenance'' of transportation services designed to transport welfare recipients and eligible low-income individuals to and from jobs and employment-related activities. FTA defines ''development of transportation services'' to mean new projects that were not in service on October 1, 2012. New job access and reverse commute projects may include the expansion or extension of an existing service, so long as the new service was designed to support the target population consistent with the definition above and the other planning requirements (described below) were met. Such projects are not required to be designed exclusively for these populations.

''Maintenance of transportation services'' is identified as the continuation of eligible job access and reverse commute projects that received funding under the SAFETEA–LU section 5316 JARC Program, which was repealed by MAP–21.

Reverse commute projects are only eligible under this section if they are designed to transport welfare recipients and eligible low-income individuals to and from jobs and employment-related activities. However, as noted above, the

services do not need to be exclusively for the target population.

For FY 2013, any projects or project elements that were eligible under the section 5316 Job Access and Reverse Commute Program, authorized under SAFETEA–LU, will remain eligible, so long as they can be classified as development or maintenance, as described above and comply with the MAP–21 definition of a job access and reverse commute project. A list of these eligible projects elements can be found in FTA Circular 9050.1, *The Job Access and Reverse Commute (JARC) Program Guidance and Application Instructions.* FTA anticipates cancelling this circular and addressing project eligibility in a revised FTA Circular 9040.1C for the Rural Areas Formula Program. Some of these types of projects may not continue to be eligible in the future.

In order to receive funding for a job access and reverse commute project under this provision, the project must be identified by the State as job access and reverse commute projects in the annual Program of Projects.

While the job access and reverse commute projects funded under this section do not have to be selected from a locally-developed, human service public transportation planning process (''coordinated planning process''), FTA encourages States to continue the coordinated planning process in identifying and developing projects for funding.

Funds previously apportioned under section 5316 (JARC) that have not been obligated will remain available to the entity that was the Designated Recipient for those funds at the time of apportionment through the period of availability unless a new designation is received. These funds are subject to the requirements of SAFETEA–LU and cannot be combined in a grant in a section 5311 grant under MAP–21.

v. Eligibility for Safety Certification Training

Recipients of section 5311 funds are permitted to use not more than 0.5 percent of their formula funds under the Rural Areas program to pay not more than eighty percent of the cost of participation for an employee who is directly responsible for safety oversight to participate in public transportation safety certification training. Safety certification training program requirements will be established in accordance with section 5329.

5. Period of Availability

For funds authorized under MAP–21, FTA is continuing to apply the period of availability established under SAFETEA–LU, which is four years; this includes the year of apportionment plus three additional years. The Rural Areas program funds apportioned in this notice are available for obligation during FY 2013 plus three additional years. Any FY 2013 apportioned funds that remain unobligated at the close of business on September 30, 2016 will revert to FTA for reapportionment under the Rural Areas program.

6. Other Program Information

NTD Reporting. Section 5335 requires that each recipient or beneficiary under the section 5311 program submit an annual report to the NTD containing information on capital investments, operations, and service. Section 5311(b)(4) specifies that the report shall include information on total annual revenue, sources of revenue, total annual operating costs, total annual capital costs, fleet size and type, and related facilities, revenue vehicle miles, and ridership. Annual NTD reports should be a complete report of all transit activities, regardless of funding source. State or Territorial DOT 5311 grant recipients must complete a one-page form of basic data for each 5311 sub-recipient, unless the sub-recipient is already providing a full report to the NTD as a Tribal Transit direct recipient or as an urbanized area reporter (without receiving a full reporting waiver). For the 2012 Report Year, which lasts from October 2012 through July 2013, State or Territorial DOTs must report on behalf of any sub-recipient receiving section 5311 grants in 2012, or that continued to benefit in 2012 from capital assets purchased using section 5311 grants. State or Territorial DOTs should also continue to report on behalf of any sub-recipients that received Section 5311 grants in prior years, and which anticipate receiving section 5311 grants in future years. Tribal Transit direct recipients must report if they received an obligation for a grant in 2011, or if they received an outlay for a section 5311 grant in 2012, or if they continued to benefit in 2012 from capital assets using section 5311 grants, unless the Tribe is already filing a full NTD Report as an urbanized area reporter or unless the Tribe has only received $50,000 or less in planning grants. MAP–21 also established new requirements for reporting asset inventories and condition assessments to FTA at sections 5326(b)(3), 5335(a), and 5335(c). FTA grantees and sub-recipients should look for a future **Federal Register** Notice with proposed changes to the FTA's NTD Reporting Manual for more information and an opportunity to comment on FTA's implementation of these new statutory requirements.

G. Rural Transportation Assistance Program (49 U.S.C. 5311(b)(3))

This program is not changed in MAP–21 and continues to provide funding to assist in the design and implementation of training and technical assistance projects, research, and other support services tailored to meet the needs of transit operators in rural areas. For more information about Rural Transportation Assistance Program (RTAP) contact Lorna Wilson, Office of Transit Programs, at (202) 366–0893 or *lorna.wilson@dot.gov.*

1. Authorized Amounts

MAP–21 authorizes a two percent takedown from the funds appropriated for section 5311 for RTAP. Of this amount, 15 percent is reserved for the National RTAP program. The remainder is available for allocation to the States.

MAP–21 AUTHORIZES THE FOLLOWING AMOUNTS TO CARRYOUT SECTION FOR FISCAL YEARS 2013–2014

Fiscal year	2013	2014
Funds Authorized	$11,990,000	$12,156,000

2. FY 2013 Funding Availability

Under the continuing resolution, a total of $5,773,336 is available for the Section 5311 RTAP program for the period October 1, 2012 through March 27, 2013. Thus far, after the reservation for the National RTAP program, a total of $4,907,336 is available for allocation to the States, as shown in the table below.

RURAL TRANSPORTATION ASSISTANCE PROGRAM—FY 2013 (CR)

Total Appropriation	$5,773,336

RURAL TRANSPORTATION ASSISTANCE PROGRAM—FY 2013 (CR)—Continued

National RTAP	– 866,000
Total Apportioned	4,907,336

Table 12 shows the FY 2013 RTAP allocations to the States.

3. Basis for Formula Apportionment

FTA will continue to allocate funds to the States by an administrative formula. First, FTA allocates $65,000 to each State ($10,000 to territories), and then allocates the balance based on rural population in the 2010 census.

4. Requirements

States may use the funds to undertake research, training, technical assistance, and other support services to meet the needs of transit operators in rural areas. These funds are to be used in conjunction with a State's administration of the Rural Areas Formula Program, but also may support the rural components of the section 5310 program.

5. Period of Availability

The section 5311 RTAP funds apportioned in this notice are available for obligation in FY 2013 plus three additional years, consistent with that established for the section 5311 program.

6. Other Program Information

The National RTAP project is administered by cooperative agreement and re-competed at five-year intervals. FY 2013 marks the fifth year of the current agreement and FTA will publish a Request for Proposals in the spring of FY 2013. The National RTAP projects are guided by a project review board that consists of managers of rural transit systems and State DOT RTAP programs. National RTAP resources also support the biennial TRB National Conference on Rural Public and Intercity Bus Transportation and other research and technical assistance projects of a national scope.

H. Appalachian Development Public Transportation Assistance Program (49 U.S.C. 5311(c)(2))

MAP–21 establishes this new program as a take-down under the section 5311 program to provide additional funding to support public transportation in the Appalachian region. There are sixteen eligible States that receive an allocation under this provision. The States and their allocation are shown in the Rural Areas Formula program table posted on FTA's Web site under the FY 2013 Apportionments page. For more information about the Appalachian Development Public Transportation Assistance Program, contact *Lorna Wilson, Office of Transit Programs, at (202) 366–0893 or lorna.wilson@dot.gov.*

1. Authorized Amounts

MAP–21 authorizes $20 million in FY 2013 and in FY 2014 as a take-down under the section 5311 program to support public transportation in the Appalachian region.

Fiscal year	2013	2014
Funds authorized	$20,000,000	$20,000,000

2. FY 2013 Funding Availability

Under the continuing resolution, a total of $9,630,250 is available for the Appalachian Development program for the period October 1, 2012 through March 27, 2013, as shown below.

APPALACHIAN DEVELOPMENT PUBLIC TRANSPORTATION ASSISTANCE PROGRAM—FY 2013 (CR)

Total appropriation	$9,630,250
Total apportioned	9,630,250

3. Basis for Formula Apportionment

FTA apportions the funds using percentages established under section 9.5(b) of the Appalachian Regional Commission Code (subtitle IV of title 40). Allocations will be based in general on each State's remaining estimated need to complete eligible sections of the Appalachian Development Highway System as determined from the latest percentages of available cost estimates for completion of the System. Such cost estimates shall be produced at approximate five year intervals. Allocations shall contain upper and lower limits in amounts or to be determined by the Commission and shall be made in accordance with legislative instructions.

4. Requirements

Funds apportioned under this program can be used for purposes consistent with section 5311 to support public transportation in the Appalachian region. Funds can be applied for in the State's annual section 5311 grant.

MAP–21 includes a provision that permits the use of Appalachian program funds that cannot be used for operating to be used for a highway project under certain circumstances. FTA will issue guidance in a subsequent notice on how to accomplish a transfer.

5. Period of Availability

Section 5311 Appalachian program funds are available for four years, which includes the year of apportionment plus three additional years, consistent with that established for the section 5311 program.

I. Formula Grants for Public Transportation on Indian Reservations Program (49 U.S.C. 5311(j))

Under SAFETEA–LU, through extensive consultation, FTA administered this program as a discretionary program. MAP–21 continues a discretionary program and establishes a tribal transit formula program, both of which include language that permits FTA to determine the terms and conditions for grants under this section. FTA intends to consult with Tribal grantees and stakeholders as it implements both of the programs authorized under MAP–21. FTA will publish its plans and schedule for consultation on its Tribal Transit program Web page and in the upcoming FY 2012 Notice of Award allocating the FY 2012 Tribal Transit Program funds.

The Tribal Transit Program now totals $30 million, of which $25 million is for a formula program and $5 million is for a discretionary grant program. Formula factors include vehicle revenue miles and the number of low-income individuals residing on tribal lands. It is funded as a takedown from funds made available for the section 5311 program. Eligible direct recipients are federally recognized Indian tribes in rural areas. The funds are to be allocated for grants to Indian tribes for any purpose eligible under section 5311, which includes capital, operating, planning, job access and reverse commute projects, and administrative assistance for rural public transit services and rural intercity bus service. For more information about the Tribal Transit

Program contact *Lorna Wilson, Office of Transit Programs, at (202) 366–0893 or lorna.wilson@dot.gov or Elan Flippin, Office of Transit Programs at (202) 366–2053 or elan.flippin@dot.gov.*

1. Authorized Funding

Under MAP–21, $30 million is authorized in FY 2013 and in FY 2014. Five million will be allocated on a competitive basis and $25 million will be allocated by formula.

2. FY 2013 Funding Availability

At this time, given the need to consult the tribes on the terms and conditions for the program, there are no FY 2013 funds available for obligation. FTA is publishing an illustrative apportionment table (Table 14) to show the estimated allocations to the Indian tribes by formula. Through the consultative process, FTA will invite comment on the data and methods used to allocate these funds.

Following consultation, FTA will publish a final apportionment table to show the amounts available to Indian tribes under the formula program. As described earlier in the notice, FTA will publish a NOFA for the discretionary program soliciting proposals for funding at a later date.

3. Basis for Allocation

Funds will be allocated by formula and through a discretionary competition, as described below.

Tribal Transit Formula Program

The Tribal Transit formula program is distributed to eligible Indian tribes providing public transportation on tribal lands. The illustrative apportionment shown in Table 14 is based on a statutory formula which includes three tiers. Tiers 1 and 2 for the Tribal Transit formula program are based on historical data reported to NTD by Indian tribes who received section 5311 funding in prior years (including discretionary Tribal Transit Program funds); the third tier is based on 2010 U.S. Census data. The allocations included in the illustrative apportionment are not available for obligation at this time. It is FTA's intent to consult Indian tribes and discuss the basis for the allocations.

The three tiers for the formula are:

Tier 1—50 percent based on vehicle revenue miles.

Tier 2—25 percent based on Indian tribes providing at least 200,000 vehicle revenue miles.

Tier 3—25 percent based on Indian tribes providing public transportation on reservations where more than 1,000 low income individuals reside.

In order to calculate the illustrative apportionments, FTA made the following interpretations of the statute. These interpretations enable FTA to determine how much money each Indian tribe receives under the formula program and should be treated as illustrative, pending consultation with the Indian tribes. Note, the data used for Tiers 1 and 2 is from the NTD. Section 5335 requires NTD reporting for all direct recipients of section 5311 funds. Since the inception of the program, this reporting requirement has applied to the Tribal Transit Program. Thus, only current NTD reporters that have provided vehicle revenue miles are considered for an allocation under these two tiers.

i. Vehicle Revenue Miles reported to the NTD from Indian tribes will count towards both the Tribal Transit Formula and towards the Rural Formula (or Urban Formula.)

ii. When another local government entity pays an Indian tribe to operate service in an off-Reservation jurisdiction, 100% of the service operated by the Indian tribe will count towards the Tribal Transit Formula. This is service by ''each Indian tribe providing public transportation service.''

iii. When an Indian tribe pays another local government entity to extend service to the Reservation, a pro-rated share of the local government's vehicle revenue miles will be counted towards the Tribal Transit formula. This share will count towards both the Rural and Tribal Transit formulas. The pro-rated share will be based on the proportion of total operating expenses paid for by the Indian tribe.

iv. When an Indian tribe provides capital assistance only to a local government entity providing service to the Reservation, then no vehicle revenue miles are counted towards the Tribal Formula. In this case, the Tribe would still participate in the Tier 3 of the Tribal Formula, which is based ''on each Indian tribe providing public transportation on tribal lands * * *''

v. Previous recipients of Tribal Transit grants of $50,000 or less have been administratively exempted from reporting to the NTD. These grants were usually for planning projects. If these Indian tribes were, in fact, already operating service, they will be excluded from the FY 2013 apportionment, due to the absence of NTD data. These Indian tribes can still report to the NTD for the 2012 Report Year through July 2013 to be eligible for the FY 2014 apportionment. Any other Indian tribe that is already operating transit service, either directly, through a partnership with a local government, or through a contract for purchased transportation services may also provide an NTD report by July 2013 to be eligible for the FY 2014 apportionment. These Tribes should contact Lauren Tuzikow at 202–366–2059 or lauren.tuzikow@dot.gov for information on how to begin reporting to the NTD.

vi. For Indian tribes that have multiple service providers, that service data will be consolidated and the Indian tribe will receive a single apportionment.

vii. For Tribal operators that serve multiple reservations, a single apportionment will be made based on the combined poverty data for all reservations served.

viii. An Indian tribe that is active in the NTD, but has not reported any vehicle revenue miles, will be considered for an allocation under Tier 3 only.

Tribal Transit Discretionary Program

See section III.4.iii of this notice; following, consultation with tribal representatives and stakeholders, FTA expects to publish a NOFA or the $5 million that is authorized to be allocated on a competitive basis.

4. Requirements

Similar to the implementation of the program under SAFETEA–LU, FTA will develop procedures for the Tribal Transit program in consultation with tribal representatives and other interested stakeholders. FTA will issue its FY 2012 Notice of Award for the FY 2012 program selections in fall 2012 and this Notice will include a consultation process and timeline for MAP–21 implementation. FTA also intends to participate in face-to-face meetings and will invite comments on the applicable terms and conditions for the program (e.g. planning, local match, etc.) and criteria for the new discretionary program.

5. Other Program Changes and Highlights

The funds set aside for the Tribal Transit Program are not meant to replace or reduce funds that Indian tribes receive from States through the section 5311 program but are to be used to enhance public transportation on Indian reservations and transit serving tribal communities. Funds allocated to Indian tribes by the States may be included in the State's section 5311 application or awarded by FTA in a grant directly to the Indian tribe. FTA encourages Indian tribes intending to apply to FTA as direct recipients to

contact the appropriate FTA regional office at the earliest opportunity.

Additionally, recipients under this program have been and area still required to report to the NTD (see section IV.F.6. above). As mentioned previously, only those Tribes that reported to the NTD for the FY 2011 Report Year through July 2012 will be considered in the FY 2013 formula apportionment. To be considered in the FY 2014 formula apportionment, it is critical that recipients report for the FY 2012 Report year by July 2013.

Technical assistance for Indian tribes may be available from the State DOT using the State's allocation of RTAP or funds available for State administration under section 5311, from the Tribal Transportation Assistance Program (TTAP) Centers supported by FHWA, and from the Community Transportation Association of America under a program funded by the United States Department of Agriculture (USDA). National RTAP will also be developing new resources for Tribal Transit. For more information contact Lorna Wilson, Program Manager at 202–366–0893 or visit the National RTAP Web site *http://www.nationalrtap.org.*

J. Research, Development, Demonstration, and Deployment Projects (49 U.S.C. 5312)

The previous section 5312 (Research, Development, Demonstration, and Deployment Projects) and section 5314 (National Research Programs) are now consolidated into one program under section 5312. Additionally, MAP–21 divides the program into: Research; Innovation and Development; and, Demonstration, Deployment and Evaluation. The latter also includes a Low or No Emission Vehicle Deployment program to fund low or no emission vehicles, facilities, or related equipment in non-attainment or maintenance areas. Additionally, MAP–21 establishes a structured process for applications, evaluations, and reporting for the research programs.

For more information contact *Walter Kulyk, Office of Research, Demonstration and Innovation, at (202) 366–4995 or walter.kulyk@dot.gov.*

1. Authorized Funding

MAP–21 authorizes the following amounts for the Research Program for FYs 2013 and 2014.

Fiscal year	2013	2014
Funds Authorized	$70,000,000	$70,000,000

All research and development projects are subject to a reduction for the Small Business Innovative Research Program (SBIR). FTA will make the determination as to whether or not the SBIR reduction will be applied to a particular project based on a review of the proposed scope of work for the project.

2. FY 2013 Funding Availability

Under the continuing resolution, a total of $12,192,500 is available for the Research program for the period October 1, 2012 through March 27, 2013, as shown below. This amount is based on FY 2012 appropriations for the section 5312 program as authorized under SAFETEA–LU, in which $25 million was appropriated.

RESEARCH, DEVELOPMENT, DEMONSTRATION, AND DEPLOYMENT PROJECTS—FY 2013 (CR)

Total Appropriation	$12,192,500
Total Apportioned	12,192,500

3. Basis for Allocation of Funds

Topical areas are based on the Department's Strategic Goals and projects are generally selected through Notices of Funding Availability. Potential recipients can register to receive notification of funding availability under this program on Grants.gov.

4. Requirements

Application Instructions and Program Management Guidelines are set forth in FTA Circular 6100.1D *Research, Technical Assistance and Training Programs: Application Instructions and Program Management Guidelines.* FTA is in the process of updating this circular to incorporate changes resulting from language in MAP–21. All research recipients are required to work with FTA to develop approved Statements of Work. Under MAP–21 all research projects now require at least a 20 percent non-Federal share. In some cases FTA may require a higher non-Federal share if FTA determines a recipient would obtain a clear and direct financial benefit from the project, or if non-Federal share is an evaluation factor under a competitive selection process. Projects under the Low or No Emission Vehicle Deployment Program are also subject to section 5307 requirements.

5. Period of Availability

Except for the Low or No Emission Vehicle Deployment Program, the period of availability is established for each funding allocation or within the project agreement. Low or No Emission Vehicle Deployment funds are available for two years in addition to the year the funds are made available to a recipient, for a total of three years.

6. Other Related Information

Requests for research proposals will be published in Grants.gov.

K. Transit Cooperative Research Program (49 U.S.C. 5313)

MAP–21 makes no changes to the Transit Cooperative Research Program (TCRP). FTA carries out this program through a Cooperative Agreement with the Transportation Research Board.

1. Authorized Funding

MAP–21 authorizes the following amounts for the TCRP for FYs 2013 and 2014.

Fiscal year	2013	2014
Funds Authorized	$7,000,000	$7,000,000

2. FY 2013 Funding Availability

Under the continuing resolution, a total of $3,170,050 is available for the TCRP for the period October 1, 2012 through March 27, 2013, as shown below.

TRANSIT COOPERATIVE RESEARCH PROGRAM—FY 2013 (CR)

Total Appropriation	$3,170,050
Total Apportioned	3,170,050

3. Basis for Allocation of Funds

TCRP issues annual calls for problem statements. For more information and past reports see *www.tcrponline.org.*

L. Technical Assistance and Standards Development (49 U.S.C. 5314)

MAP–21 establishes the Technical Assistance and Standards Development program which authorizes some activities previously carried out through FTA's National Research Program. This section provides technical assistance to assist FTA recipients to more effectively and efficiently provide transit service and to improve administration of federal transit funds. It also authorizes the development of voluntary and consensus-based standards and best practices. Additionally, through a competitive process, FTA may enter into agreements with national nonprofit organizations to assist providers of public transportation to: comply with the Americans with Disabilities Act (ADA); comply with human services transportation coordination

requirements and enhance Federal coordination; to meet the transportation needs of elderly individuals; to increase transit ridership in coordination with MPOs and other entities through development around public transportation stations; to address transportation equity needs; and to provide any other technical assistance activities deemed necessary by FTA.

For more information contact *Walter Kulyk, Office of Research, Demonstration and Innovation, at (202) 366–4995 or walter.kulyk@dot.gov.*

1. Authorized Funding

MAP–21 authorizes the following amounts for the Technical Assistance and Standards program for FYs 2013 and 2014.

Fiscal year	2013	2014
Funds Authorized	$7,000,000	$7,000,000

2. FY 2013 Funding Availability

Under the continuing resolution, funding for sections 5314 and 5322 is provided in a different structure than what is authorized under MAP–21. Amounts are not specified for sections 5314 or 5322. Therefore, FTA does not intend to allocate the funds until further appropriations are available.

3. Basis for Allocation of Funds

Funds will be programmed by FTA based on identified technical assistance and standards needs for the transit industry and generally selected through a competitive process.

4. Requirements

Application Instructions and Program Management Guidelines are set forth in FTA Circular 6100.1D, *Research, Technical Assistance, and Training Programs: Application Instructions and Program Management Guidelines,* dated May 1, 2011. FTA is in the process of updating this circular to incorporate changes resulting from language in MAP–21. All recipients of Technical Assistance and Standards funds are required to work with FTA to develop approved Statements of Work. Projects funded using grants require at least a 20 percent non-Federal share.

5. Period of Availability

The period of availability is established for each funding allocation or within the project agreement.

6. Other Related Information

Requests for proposals will be published in Grants.gov.

M. Human Resources and Training Programs (49 U.S.C. 5322)

Section 5322 is modified to authorize an Innovative Public Transportation Workforce Development Program and to incorporate a National Transit Institute.

FTA may make grants or enter into contracts for human resource needs including: Employment training programs; outreach programs to increase minority and female employment; research on public transportation personnel and training need; and, training and assistance for minority business opportunities. Additionally, the Innovative Public Transportation Workforce Development program is a competitive grant program to assist in the development of innovative workforce activities.

A national transit institute, formerly authorized under section 5315, is now authorized under section 5322. The institute is authorized to develop training and education programs related to topics in public transportation.

For more information contact *Walter Kulyk, Office of Research, Demonstration and Innovation, at (202) 366–4995 or walter.kulyk@dot.gov.*

1. Authorized Amounts

MAP–21 authorizes the following amounts for the Human Resources and Training 5322(a), the Innovative Public Transportation Workforce Development Program 5322(b), and a National Transit Institute 5322 (d) for FYs 2013 and 2014.

Fiscal year	2013	2014
Funds Authorized: 5322(a) and (b)	$5,000,000	$5,000,000
5322 (d) National Transit Institute	$5,000,000	$5,000,000

2. FY 2013 Funding Availability

HUMAN RESOURCES AND TRAINING PROGRAMS—FY 2013 (CR)

Funds Apportioned 5322(a) and (b).	See Note.
5322 (d) National Transit Institute (NTI).	$1,706,950.

Note: The CR provides funding for sections 5314 and 5322, but not in the same structure as MAP–21, and not specifying specific amounts for sections 5314 or 5322. Except for the continuation of NTI, FTA does not intend to allocate the funds until further appropriations are available.

3. *Basis for Allocation of Funds*

Funds will be programmed by FTA based on identified workforce development and training needs, as well as by competitive selection via an innovative workforce development competition or through the contracting process.

4. Requirements

Application Instructions and Program Management Guidelines are set forth in FTA Circular 6100.1D, *Research, Technical Assistance, and Training Programs: Application Instructions and Program Management Guidelines,* dated May 1, 2011. FTA is in the process of updating this circular to incorporate changes resulting from language in MAP–21. All recipients of Human Resources and Training funds are required to work with FTA to develop approved Statements of Work. FTA may award funds through contracts or grants. Grants funded under the Human Resources and Training and the Innovative Public Transportation Workforce Development Program require a 50 percent non-Federal share.

5. Period of Availability

The period of availability is established for each funding allocation or within the project agreement.

6. Other Related Information

Requests for proposals will be published in Grants.gov.

N. Public Transportation Emergency Relief Program (49 U.S.C. 5324)

MAP–21 establishes a public transportation emergency relief program to fund eligible operating expenses, as well as capital projects to protect, repair, reconstruct, or replace equipment and facilities of a public transportation system in the United States or on an Indian reservation that the Secretary determines is in danger of suffering serious damage or has suffered serious damage as a result of an emergency.

Congress did not provide funding for this program in the continuing resolution for FY 2013, however, in certain circumstances recipients may use funds apportioned to carry out sections 5307 and 5311 for emergency purposes.

Section 5324(a)(2) defines an emergency as ''a natural disaster affecting a wide area (such as a flood, hurricane, tidal wave, earthquake, severe storm) or a catastrophic failure from any external cause as a result of which (a) the Governor of a State has declared an emergency and the Secretary has concurred or (b) the President has declared a major disaster under section 401 of the Robert T. Stafford Disaster Relief and Emergency

Assistance Act.'' The key provision here is that at a minimum the Governor must declare an emergency (and DOT must concur) in order for the section 5324 provisions to apply. Expenses incurred due to incidents that do not rise to the level of a Governor's declaration with concurrence by the Secretary of Transportation will not be eligible to be funded under section 5324. Further, in the event of a Presidential declaration of emergency, FTA may reimburse only those expenses that are not reimbursed under the Stafford Act.

Large urbanized areas over 200,000 in population may use funds for emergency operating expenses for purposes of evacuations, rescue operations, and temporary service in the event of a declared emergency as defined above, beginning on the date of declaration. Recipients should inform their FTA regional office as soon as practicable that it plans to seek reimbursement for emergency operations and/or repairs that have already taken place or are in process. Properly documented costs may later be reimbursed by grants made either from section 5324 funding (if appropriated) or section 5307 and 5311 program funding, once the eligible recipient formally applies to FTA for reimbursement and FTA determines that the expenses are eligible for emergency relief.

FTA will publish additional guidance on this program using a notice and comment process later in FY 2013.

For more information on the Public Transportation Emergency Relief Program, contact *Bonnie Graves, Office of Chief Counsel, at 202–366–4011 or bonnie.graves@dot.gov.*

O. Public Transportation Safety Program (49 U.S.C. 5329)

MAP–21 establishes a Public Transportation Safety Program (section 5329) authorizing FTA to establish and enforce a new comprehensive framework to oversee the safety of public transportation throughout the United States. It directs FTA to issue a National Public Transportation Safety Plan, which must include safety performance criteria for all modes of public transportation and minimum safety performance standards for vehicles not regulated by other Federal agencies.

Section 5329 provides the Secretary with the authority to inspect and audit all public transportation systems; to make reports and issue directives with respect to the safety of public transportation systems; to issue subpoenas and take depositions; to require the production of documents; to prescribe record-keeping and reporting requirements; to investigate public transportation accidents and incidents; to enter and inspect equipment, rolling stock, operations and relevant records; and to issue regulations to carry out transit safety provisions.

Safety Certification Training Program

Section 5329 includes new requirements for establishing a Safety Certification Training Program for Federal and State employees, or other designated personnel, who conduct safety audits and examinations of public transportation systems and employees of public transportation agencies directly responsible for safety oversight. FTA will establish an Interim Safety Certification Program, which will be in effect until the effective date of the final rule. Recipients may use up to 0.5 percent of section 5307 and section 5311 funds for up to eighty percent of costs of participation in the Safety Certification Training Program by an employee of a State safety oversight agency or a recipient who is directly responsible for safety oversight. Additionally, States that receive formula funds under section 5329(e)(6)(B) to develop or carry out State Safety Oversight (SSO) programs may use those formula funds, for up to eighty percent of the cost, for employee training activities, including for the Safety Certification Training Program.

State Safety Oversight (SSO) Program

Section 5329 requires States with rail fixed guideway public transportation systems that are either operating or in the engineering or construction phase of development which are not subject to regulation by the Federal Railroad Administration (FRA), to establish SSO programs which assume responsibility for overseeing public transportation rail systems and which establish a SSO agency. SSO agencies must be legally and financially independent from the rail systems they oversee, and have the authority, staff training, and expertise to enforce Federal and State safety laws. FTA must certify each SSO program. FTA will oversee implementation of the SSO programs and audit each SSO agency at least triennially. Federal and State employees, or other designated personnel, who conduct safety audits and examinations of public transportation systems and employees of public transportation agencies directly responsible for safety oversight must complete the Safety Certification Training Program identified in section 5329.

As mentioned in section IV.C.6 in this notice, under MAP–21 there is a 0.5 percent take-down from the section 5307 urbanized area program that will be apportioned to States for State Safety Oversight (SSO) program activities. These funds will be apportioned by formula to States with rail fixed guideway public transportation systems that are either operating or in the engineering or construction phase of development, and which are not subject to regulation by the Federal Railroad Administration (FRA) to develop or carry out State safety oversight programs. FTA is currently developing the formula by which these funds will be apportioned.

For more information about the Public Transportation Safety Program, *contact Ronald Keele, Office of Safety and Security, at (202)366–5615 or Ronald.keele@dot.gov.*

P. State of Good Repair Program (49 U.S.C. 5337)

The State of Good Repair program provides capital assistance for replacement and rehabilitation projects of existing fixed guideway systems to maintain a state of good repair. This program provides funding for the following transit modes: Rapid rail (heavy rail), commuter rail, light rail, hybrid rail, monorail, automated guideway, trolleybus (using overhead catenary), aerial tramway, cable car, inclined plane (funicular), passenger ferries, and bus rapid transit. Fixed-route bus services operating on high-occupancy-vehicle (HOV) facilities are also funded through a separate tier of this formula. Funding is limited to the above fixed guideway systems.

This program replaces and modifies elements of the fixed guideway modernization program (section 5309). Most notably, recipients should be aware that ''modernization'' activities no longer are eligible and the SGR program only funds projects to replace or rehabilitate existing fixed guideway systems.

For more information about the State of Good Repair program, contact Eric Hu, Office of Transit Programs, at (202) 366–0870 or *eric.hu@dot.gov.*

1. Authorized Amounts

MAP–21 authorizes $2,136,300,000 for FY 2013 and $2,165,900,000 for FY 2014 for the State of Good Repair program.

Fiscal year	2013	2014
Funds Authorized	$2,136,300,000	$2,165,900,000

2. FY 2013 Funding Availability

Under the continuing resolution, a total of $1,034,944,372 is available for the State of Good Repair program for the period October 1, 2012 through March 27, 2013. After a one percent oversight takedown, the total amount allocated for the State of Good Repair program is $1,021,160,042, as shown in the table below.

STATE OF GOOD REPAIR PROGRAM—FY 2013 (CR)

Total Appropriation	[a] $1,034,944,372
Oversight Deductions	−7,495,038
Total Apportioned	$1,021,160,042

[a] Total Appropriation includes $1,005,454,331 for the High Intensity Fixed Guideway Formula and $29,490,041 for the High Intensity Motorbus Formula.

Table 15 shows the FY 2013 State of Good Repair Program formula apportionments to eligible urbanized areas.

3. Basis for Formula Apportionment

FTA allocates State of Good Repair program funds according to a statutory formula. Funds are apportioned to urbanized areas with fixed guideway systems that have been in operation for at least seven years. This means that only segments of fixed guideway systems that entered into revenue service on or before September 30, 2005 are included in the formula, as identified in the NTD. The new formula comprises: (1) Modified formula from what was used under SAFETEA–LU, which reflects the new definition of fixed guideway; (2) a new service-based formula; and (3) a new formula for buses on HOV lanes.

The law requires that 97.15 percent of the total amount authorized for the State of Good Repair program be apportioned to urbanized areas with ''High Intensity Fixed Guideway'' systems. The apportionments to urbanized areas with ''High Intensity Fixed Guideway'' systems are determined by two equal elements: (1) The proportion of the amount an urbanized area received in FY 2011 to the total amount apportioned to all urbanized areas in FY 2011; (2) the proportion of vehicle revenue miles of an urbanized area to the total vehicle revenue miles of all urbanized areas and the proportion of directional route miles of an urbanized area to the total directional route miles of all urbanized areas. High Intensity Motorbus systems will receive the remaining 2.85 percent of the total amount authorized for the State of Good Repair program, and the apportionments to urbanized areas are based on vehicle revenue miles and directional route miles.

Vehicle revenue miles and directional route miles that are attributable to an urbanized area must be placed in revenue service at least 7 years before the first day of the fiscal year. A threshold level of more than one mile of fixed guideway is required in order to receive State of Good Repair funds. Therefore, urbanized areas reporting one mile or less of fixed guideway mileage under the NTD are not included.

FTA will apportion funds to Designated Recipients in the UZAs (see section IV.D.4. of this notice for more information about Designated Recipients; FTA will apportion section 5339 funds to the section 5307 Designated Recipient for the UZA) with fixed guideway transportation systems operating at least 7 years. The Designated Recipients will then allocate funds as appropriate to recipients that are public entities in the urbanized areas and provide split letters to the FTA. FTA can make grants to direct recipients after sub-allocation of funds.

4. Eligible Expenses

While funds are apportioned based only on fixed guideway segments that have been in operation seven years or longer, a recipient may use the funds apportioned to it for eligible replacement and rehabilitation projects on any existing fixed guideway system in the urbanized area.

Eligible capital projects are those necessary to maintain fixed guideway systems in a state of good repair, including projects to replace and rehabilitate:

i. Rolling stock;
ii. Track;
iii. Line equipment and structures;
iv. Signals and communications;
v. Power equipment and substations;
vi. Passenger stations and terminals;
vii. Security equipment and systems;
viii. Maintenance facilities and equipment;
ix. Operational support equipment, including computer hardware and software;
x. Development and implementation of a transit asset management plan; and
xi. Other replacement and rehabilitation projects FTA determines appropriate.

Although not explicitly listed above, preventive maintenance activities are eligible. However, modernization or expansion projects are not eligible under this program.

5. Requirements

For FY 2013, FTA will rely on program guidance and requirements found in the FTA circular formerly used for the Fixed Guideway Modernization Program: *FTA Circular 9300.1B, Capital Investment Program Guidance and Application Instructions,* dated November 1, 2008. FTA is in the process of updating the program circular to incorporate changes resulting from MAP–21.

In addition to this program guidance, all recipients must certify that they will comply with the forthcoming rule issued under section 5326 for the Transit Asset Management plan, and state of good repair projects must be included in recipients' Transit Asset Management plans. This requirement is subject to FTA rulemaking and will become effective only after the rule is issued

6. Period of Availability

The State of Good Repair Program funds apportioned in this notice are available for obligation during FY 2013 plus three additional years. Accordingly, funds apportioned in FY 2013 must be obligated in grants by September 30, 2016. Any FY 2013 apportioned funds that remain unobligated at the close of business on September 30, 2016 will revert to FTA for reapportionment under the State of Good Repair Program.

Q. Bus and Bus Facilities Formula Grants (49 U.S.C. 5339)

MAP–21 establishes the Bus and Bus Facilities Formula program, replacing some of the elements of the former Bus and Bus Facilities discretionary program under SAFETEA–LU. The program provides funding to replace, rehabilitate, and purchase buses and related equipment well as construct bus-related facilities.

Eligible recipients are Designated Recipients and States that operate or allocate funding to fixed-route bus operators. Eligible subrecipients include public agencies or private nonprofit organizations engaged in public

transportation, including those providing services open to a segment of the general public, as defined by age, disability, or low income. For more information about the Bus and Bus Facilities program, *contact Sam Snead, Office of Transit Programs, at (202) 366–1089 or samuel.snead@dot.gov.*

1. Authorized Amounts

MAP–21 authorizes $422,000,000 for FY 2013 and $427,800,000 for FY 2014 for the Bus and Bus Facilities formula program, as shown below.

Fiscal year	2013	2014
Funds Authorized	$422,000,000	$427,800,000

2. FY 2013 Funding Availability

Under the continuing resolution, a total of $203,458,262 is available for the Bus and Bus Facilities program for the period October 1, 2012 through March 27, 2013. After the take-down for the States and Territories (National Distribution), $171,659,195 is available to be apportioned to the urbanized areas, as shown below.

BUS AND BUS FACILITIES—FY 2013 (CR)

Total Appropriation	$203,198,262
State and Territory Allocation	−31,539,067
Total Apportioned	$171,659,195

Table 17 shows the FY 2013 Bus and Bus Facilities formula apportionments to States, Territories, and urbanized areas.

3. Basis for Formula Apportionment

Funds are allocated according to a statutory formula. However, State and Territories (including the District of Columbia and Puerto Rico) receive a fixed allocation before applying the formula. Under the continuing resolution and the National Distribution allocation, the amount that each State receives is $601,891 and the amount each territory receives $240,756. The remainder of the funds will be allocated to urbanized areas based on population, vehicle revenue miles and passenger miles.

For areas under 200,000 in population, the funding is similar to the section 5307 Governor's Apportionment, in that the Governor or Governor's designee (e.g. State DOT) will determine the final amounts available to urbanized areas under 200,000. The Governor or Governor's designee also will have to apply for the funding on behalf of recipients that are otherwise able to directly apply to FTA (e.g. grantees under section 5307) in urbanized areas under 200,000 in population.

4. Requirements

The requirements of Section 5307 apply to recipients of grants made under this section. Eligible capital projects include projects to replace, rehabilitate, and purchase buses and related equipment, and projects to construct bus-related facilities. This includes the acquisition of buses for fleet and service expansion, bus maintenance and administrative facilities, transfer facilities, bus malls, transportation centers, intermodal terminals, park-and-ride stations, acquisition of replacement vehicles, bus rebuilds, passenger amenities such as passenger shelters and bus stop signs, accessory and miscellaneous equipment such as mobile radio units, supervisory vehicles, fare boxes, computers, and shop and garage equipment.

Program guidance for the Bus program is found in FTA Circular 9300.1B, *Bus and Bus Facilities Instructions.* FTA is in the process of updating this circular to incorporate changes resulting from language in MAP–21 and will go out for notice and comment during the circular revision process.

A grant for a capital project under this section shall be for 80 percent of the net capital costs of the project. A recipient of a grant under this section may provide additional local matching amounts. The remainder of net project cost shall be provided in cash from non-Government sources other than revenues from providing public transportation services; from revenues derived from the sale of advertisement or concessions; from undistributed cash surplus, a replacement or depreciation cash fund or reserve, or new capital; or from amounts received under a service agreement with a State or local social service agency or private social service organization.

5. Period of Availability

The Bus and Bus Facilities Formula Program funds apportioned in this notice are available for obligation during FY 2013 plus three additional years. Accordingly, funds apportioned in FY 2013 must be obligated in grants by September 30, 2016. Any FY 2013 apportioned funds that remain unobligated at the close of business on September 30, 2016 will revert to FTA for reapportionment under the Bus and Bus Facilities Formula Program.

6. Other Program Information

Based on the language in MAP–21, FTA will only award grants under this section to the Designated Recipients in the large urbanized areas (section 5307 Designated Recipients) and States for the apportionments to areas under 200,000 and for the National Distribution amounts. Designated Recipients and States will be required to apply on behalf of eligible subrecipients.

The Governor of a State may transfer any part of the State's apportionment under subsection (d)(1) ''National Distribution'' to supplement amounts apportioned to the State under the rural areas (section 5311) or urbanized areas formula (5307) programs. The funds must continue to be used for capital only and for eligible purposes under this section. The Governor (or his or her designee) has flexibility in the sub-allocation of funds among the small UZAs and is not bound by the small UZA amounts published in this notice.

R. Growing States and High Density States Formula Factors (49 U.S.C. 5340)

MAP–21 continues the use of formula factors (established under SAFETEA–LU) to distribute additional funds to the section 5307 and section 5311 programs for Growing States and High Density States. FTA will continue to publish single urbanized and rural apportionments that show the total amount for 5307 and 5311 programs that includes apportionments these programs formulas together with 5340.

1. Authorized Amounts

MAP–21 authorizes $518,700,000 for FY 2013 and $525,900,000 for FY 2014 for the Growing States and High Density States Formula factors, as shown below.

Fiscal year	2013	2014
Funds Authorized	$518,700,000	$525,900,000

2. FY 2013 Funding Availability

Under the continuing resolution, $251,281,438 is available for apportionment in accordance with the formula factors prescribed for Growing States and High Density States set forth in section 5340 for the period October 1, 2012 through March 27, 2013. MAP–21 did not change the funding formula.

GROWING STATES AND HIGH DENSITY STATES FORMULA FACTORS—FY 2013 (CR)

Total Appropriation	$249,760,258
Total Apportioned	249,760,258

3. Basis for Apportionment

Under the Growing States portion of the section 5340 formula, 50 percent of funds are allocated to States on the basis of their projected population growth. FTA projects each State's 2025 population by comparing each State's apportionment year population (as determined by the Census Bureau) to the State's 2010 Census population and extrapolating to 2025 based on each State's rate of population growth between 2010 and the apportionment year. Each State receives a share of Growing States funds on the basis of its projected 2025 population relative to the nationwide projected 2025 population.

Once each State's share is calculated, funds attributable to that State are divided into an urbanized area allocation and a non-urbanized are a allocation on the basis of the percentage of each State's 2010 Census population that resides in urbanized and non-urbanized areas. Urbanized areas receive portions of their State's urbanized area allocation on the basis of the 2010 Census population in that urbanized area relative to the total 2010 Census population in all urbanized areas in the State. These amounts are added to the Urbanized Area's section 5307 apportionment.

The States' rural area allocation is added to the allocation that each State receives under the section 5311 Formula Grants for Rural Areas program.

The remaining 50 percent of the section 5340 funds are allocated under the High Density States portion of the section 5340 formula. These funds are allocated to urbanized areas in States with a population density equal to or greater than 370 persons per square mile. Based on this threshold and 2010 Census data, the States that qualify are Maryland, Delaware, Massachusetts, Connecticut, Rhode Island, New York and New Jersey (these are the same States that qualified under SAFETEA–LU and based on 2000 Census data). The amount of funds provided to each of these seven States is allocated on the basis of the population density of the individual State relative to the population density of all seven States. Once funds are allocated to each State, funds are then allocated to urbanized areas within the States on the basis of an individual urbanized area's population relative to the population of all urbanized areas in that State.

FTA cannot provide unit values for the Growing States or High Density formulas because the allocations to individual States and urbanized areas are based on their relative population data, rather than on a national per capita basis.

S. Washington Metropolitan Area Transit Authority Grants

Under the continuing resolution, $73,602,709 is available for the period October 1, 2012 through March 27, 2013 for grants to the Washington Metropolitan Area Transit Authority (WMATA). Such funding is authorized under section 601 of the Passenger Rail Investment and Improvement Act of 2008. See Public Law 110–432, Division B, Title VI.

Grants may be provided for capital and preventive maintenance expenditures for WMATA after it has been determined that WMATA has placed the highest priority on investments that will improve the safety of the system, including but not limited to fixing the track signal system, replacing 1000 series cars, installing guarded turnouts, buying equipment for wayside worker protection, and installing rollback protection on cars that are not equipped with the safety feature. FTA will communicate further program requirements directly to WMATA.

V. FTA Policy and Procedures for FY 2013 Grants

A. Automatic Pre-Award Authority To Incur Project Costs

This section includes some changes to automatic pre-award authority published in previous notices, particularly in light of the new authorization and several new formula programs, some of which will require new Designated Recipients before projects costs can be reimbursed.

1. Caution to New Grantees and for New Formula Programs

While FTA provides pre-award authority to incur expenses before grant award for formula programs, it recommends that first-time grant recipients and recipients of grants under new formula programs NOT utilize this automatic pre-award authority without verifying with the appropriate FTA Regional office that all prerequisite requirements have been met. As a new grantee, it is easy to misunderstand pre-award authority conditions and be unaware of all of the applicable FTA requirements that must be met in order to be reimbursed for project expenditures incurred in advance of grant award. FTA programs have specific statutory requirements that are often different from those for other Federal grant programs with which new grantees may be familiar. If funds are expended for an ineligible project or activity, or for an eligible activity but at an inappropriate time (e.g., prior to NEPA completion), FTA will be unable to reimburse the project sponsor and, in certain cases, the entire project may be rendered ineligible for FTA assistance.

2. Policy

FTA provides pre-award authority to incur expenses before grant award for certain program areas described below. This pre-award authority allows grantees to incur certain project costs before grant approval and retain the eligibility of those costs for subsequent reimbursement after grant approval. The grantee assumes all risk and is responsible for ensuring that all conditions are met to retain eligibility. This pre-award spending authority permits an eligible grantee to incur costs on an eligible transit capital, operating, planning, or administrative project without prejudice to possible future Federal participation in the cost of the project. In this notice, FTA provides pre-award authority through the authorization period of MAP–21 (FY 2014) for capital assistance under all formula programs, so long as the conditions described below are met. FTA provides pre-award authority for planning and operating assistance under the formula programs without regard to the period of the authorization. All pre-award authority is subject to conditions and triggers stated below:

i. Operating, Planning, or Administrative Assistance. FTA does not impose additional conditions on pre-award authority for operating, planning, or administrative assistance under the formula grant programs. Grantees may be reimbursed for expenses incurred before grant award so long as funds have been expended in accordance with all Federal requirements, and the grantee is otherwise eligible to receive the funding. In addition to cross-cutting Federal grant requirements, program specific requirements must be met. For example, a planning project must have been included in a Unified Planning Work Program (UPWP); a 5310 project must have been included in a coordinated public transit-human services transportation plan (coordinated plan) and selected by the Designated recipient before incurring expenses; expenditure on State Administration expenses under State Administered programs must be consistent with the State Management Plan (as defined in FTA Circular 9040.1F, Section 6). Designated Recipients for Section 5310 have pre-award authority for the ten percent of

the apportionment they may use for program administration.

ii. Transit Capital Projects. For transit capital projects, the date that costs may be incurred is: (1) For design and environmental review, the date of the authorization of formula funds or the date of the announcement of the discretionary allocation of funds for the project; and (2) for property acquisition, demolition, construction, and acquisition of vehicles, equipment, or construction materials, the date that FTA approves the document (Record of Decision (ROD), Finding of No Significant Impact (FONSI), or Categorical Exclusion (CE) determination) that completes the environmental review process required by the National Environmental Policy Act (NEPA) and its implementing regulations. New Starts, Small Starts and Core Capacity Projects. The pre-award authority described above does not apply to Section 5309 Fixed Guideway Capital Investment Program (New and Small Starts and Core Capacity) projects. Specific instances of pre-award authority for Capital Investment Program projects are described in paragraph 4 below. Before an applicant may incur costs for Capital Investment program projects when pre-award authority has not been granted or any other projects not yet published in a notice of apportionments and allocations, it must first obtain a written Letter of No Prejudice (LONP) from FTA. To obtain an LONP, a grantee must submit a written request accompanied by adequate information and justification to the appropriate FTA regional office, as described in section 4. below.

iii. Research, Technical Assistance, and Training. Unless provided for in an announcement of project selections, pre-award authority does not apply to section 5312 Research, development, demonstration, and deployment projects, section 5314 Technical Assistance and Standards Development, or section 5322 Human Resources and Training. Before an applicant may incur costs for activities under these programs, it must first obtain a written Letter of No Prejudice (LONP) from FTA. To obtain an LONP, a grantee must submit a written request accompanied by adequate information and justification to the appropriate FTA headquarters office. Information about LONP procedures may be obtained from the appropriate headquarters office.

3. Conditions

The conditions under which pre-award authority may be utilized are specified below:

i. Pre-award authority is not a legal or implied commitment that the subject project will be approved for FTA assistance or that FTA will obligate Federal funds. Furthermore, it is not a legal or implied commitment that all items undertaken by the applicant will be eligible for inclusion in the project.

ii. All FTA statutory, procedural, and contractual requirements must be met.

iii. No action will be taken by the grantee that prejudices the legal and administrative findings that the Federal Transit Administrator must make in order to approve a project.

iv. Local funds expended by the grantee after the date of the pre-award authority will be eligible for credit toward local match or reimbursement if FTA later makes a grant or grant amendment for the project. Local funds expended by the grantee before the date of the pre-award authority will not be eligible for credit toward local match or reimbursement. Furthermore, the expenditure of local funds or undertaking of project implementation activities such as land acquisition, demolition, or construction before the date of pre-award authority for those activities (i.e., the completion of the NEPA process) would compromise FTA's ability to comply with Federal environmental laws and may render the project ineligible for FTA funding.

v. The Federal amount of any future FTA assistance awarded to the grantee for the project will be determined on the basis of the overall scope of activities and the prevailing statutory provisions with respect to the Federal/local match ratio at the time the funds are obligated.

vi. For funds to which the pre-award authority applies, the authority expires with the lapsing of the fiscal year funds.

vii. When a grant for the project is subsequently awarded, the Financial Status Report, in TEAM-Web, must indicate the use of pre-award authority.

viii. Planning, Environmental, and Other Federal requirements.

All Federal grant requirements must be met at the appropriate time for the project to remain eligible for Federal funding. The growth of the Federal transit program has resulted in a growing number of inexperienced grantees who find compliance with Federal planning and environmental laws increasingly challenging.

FTA has modified its approach to pre-award authority to use the completion of the NEPA process, which has as a prerequisite the completion of planning and air quality requirements, as the trigger for pre-award authority for all activities except design and environmental review. Following authorization of formula funds or appropriation and publication of earmarked projects or the announcement of project allocations, pre-award authority for capital project implementation activities, such as property acquisition, demolition, construction, and acquisition of vehicles, equipment, or construction materials, may be exercised only after FTA concurs that all applicable environmental requirements have been satisfied, including those for actions classified as normally requiring preparation of environmental impact statements, environmental assessments, and categorical exclusions found in 23 CFR 771.117.

The requirement that a project be included in a locally-adopted Metropolitan Transportation Plan, the metropolitan transportation improvement program and federally-approved statewide transportation improvement program (23 CFR Part 450) must be satisfied before the grantee may advance the project beyond planning and preliminary design with non-Federal funds under pre-award authority. If the project is located within an EPA-designated non-attainment or maintenance area for air quality, the conformity requirements of the Clean Air Act, 40 CFR Part 93, must also be met before the project may be advanced into implementation-related activities under pre-award authority. Compliance with NEPA and other environmental laws and executive orders (e.g., protection of parklands, wetlands, and historic properties) must be completed before State or local funds are spent on implementation activities, such as site preparation, construction, and acquisition, for a project that is expected to be subsequently funded with FTA funds. The grantee may not advance the project beyond planning and preliminary design/engineering before FTA has determined the project to be a Categorical Exclusion (CE), or has issued a Finding of No Significant Impact (FONSI) or a Record of Decision (ROD), in accordance with FTA environmental regulations, 23 CFR Part 771.

For a planning project to have pre-award authority, the planning project must be included in a MPO-approved Unified Planning Work Program (UPWP) that has been coordinated with the State.

ix. Federal procurement procedures, as well as the whole range of applicable Federal requirements (e.g., Buy America, Davis-Bacon Act, Disadvantaged Business Enterprise) must be followed for projects in which Federal funding will be sought in the future. Failure to follow any such

requirements could make the project ineligible for Federal funding. In short, this increased administrative flexibility requires a grantee to make certain that no Federal requirements are circumvented through the use of pre-award authority.

x. All program specific requirements must be met. For example, projects under section 5310 must comply with specific program requirements, including coordinated planning.

Before incurring costs, grantees are strongly encouraged to consult with the appropriate FTA regional office regarding the eligibility of the project for future FTA funds and for questions on environmental requirements, or any other Federal requirements that must be met.

4. Pre-Award Authority for the Fixed Guideway Capital Investment Program (New and Small Starts Projects and Core Capacity Projects)

Projects proposed for Section 5309 capital investment program funds (New and Small Starts and Core Capacity) are required to follow a process defined in law. For New Starts and Core Capacity projects, this process includes three phases—project development (PD), engineering, and construction. For Small Starts projects, this process includes two phases—project development and construction. After receiving a letter from the project sponsor requesting entry into the project development phase, FTA must respond in writing within 45 days whether the information was sufficient for entry. If FTA's correspondence indicates the information was sufficient and the New Starts, Small Starts or Core Capacity project may enter PD, FTA extends pre-award authority to the project sponsor to incur costs for PD activities. PD activities include the work necessary to complete the environmental review process and as much engineering and design activities as the project sponsor believes are necessary to support the environmental review process. Upon completion of the environmental review process for a New Starts, Small Starts, or Core Capacity Improvement project with a ROD, FONSI, or CE determination by FTA, FTA extends pre-award authority to project sponsors in PD to incur costs for as much engineering and design need to develop a reasonable cost estimate and financial plan for the project, utility relocation, and real property acquisition and associated relocations, for any property acquisitions not already accomplished as a separate project for hardship or protective purposes or right-of-way under 49 U.S.C. 5323(q). Upon receipt of a letter notifying a New Starts or Core Capacity project sponsor of the project's approval into the engineering phase, FTA extends pre-award authority for any remaining engineering and design, demolition, vehicle purchases, and procurement of long lead items for which market conditions play a significant role in the acquisition price. The long lead items include, but are not limited to, procurement of rails, ties, and other specialized equipment, and commodities. Please contact the FTA Regional Office for a determination of activities not listed here, but which meet the intent described above. FTA provides this pre-award authority in recognition of the long-lead time and complexity involved with purchasing vehicles as well as their relationship to the ''critical path'' project schedule. FTA cautions grantees that do not currently operate the type of vehicle proposed in the project about exercising this pre-award authority. FTA encourages these sponsors to wait until later in the process when project plans are more fully developed. FTA reminds project sponsors that the procurement of vehicles must comply with all Federal requirements including, but not limited to, competitive procurement practices, the Americans with Disabilities Act, and Buy America. FTA encourages project sponsors to discuss the procurement of vehicles with FTA in regards to Federal requirements before exercising pre-award authority. Because there is not a formal engineering phase for Small Starts projects, FTA does not extend pre-award authority for demolition, vehicle purchases and procurement of long lead items. Instead, this work must await receipt of a grant award or an expedited grant agreement.

i. Real Property Acquisition

As noticed above, FTA extends pre-award authority for the acquisition of real property and real property rights for fixed guideway capital investment projects (New or Small Starts or Core Capacity) upon completion of the environmental review process for that project. The environmental review process is completed when FTA signs an environmental Record of Decision (ROD) or Finding of No Significant Impact (FONSI), or makes a Categorical Exclusion (CE) determination. With the limitations and caveats described below, real estate acquisition may commence, at the project sponsor's risk. For FTA-assisted projects, any acquisition of real property or real property rights must be conducted in accordance with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA) and its implementing regulations, 49 CFR Part 24. This pre-award authority is strictly limited to costs incurred: (i) To acquire real property and real property rights in accordance with the URA regulation, and (ii) to provide relocation assistance in accordance with the URA regulation. This pre-award authority is limited to the acquisition of real property and real property rights that are explicitly identified in the final environmental impact statement (FEIS), environmental assessment (EA), or CE document, as needed for the selected alternative that is the subject of the FTA-signed ROD or FONSI, or CE determination. This pre-award authority regarding property acquisition that is granted at the completion of the environmental review process does not cover site preparation, demolition, or any other activity that is not strictly necessary to comply with the URA, with one exception. That exception is when a building that has been acquired, has been emptied of its occupants and awaits demolition, poses a potential fire safety hazard or other hazard to the community in which it is located, or is susceptible to reoccupation by vagrants. Demolition of the building is also covered by this pre-award authority upon FTA's written agreement that the adverse condition exists. Pre-award authority for property acquisition is also provided when FTA makes a CE determination for a protective buy or hardship acquisition in accordance with 23 CFR 771.117(d)(12). Pre-award authority for property acquisition is also provided when FTA completes the environmental review process for the acquisition of right-of-way as a separate project in accordance with 49 U.S.C. 5323(q). Guidance on this approach to property acquisition will be forthcoming. When a tiered environmental review in accordance with 23 CFR 771.111(g) is used, pre-award authority is NOT provided upon completion of the first tier environmental document except when the Tier-1 ROD or FONSI signed by FTA explicitly provides such pre-award authority for a particular identified acquisition. Project sponsors should use pre-award authority for real property acquisition relocation assistance with a clear understanding that it does not constitute a funding commitment by FTA. FTA provides pre-award authority upon completion of the environmental review process for real property acquisition and relocation assistance to maximize the time available to project sponsors to move people out of their homes and places of business, in accordance with the requirements of the URA, but also with

maximum sensitivity to the circumstances of the people so affected.

i. Reimbursement of Costs Incurred Under Pre-Award Authority

Although FTA provides pre-award authority for property acquisition, long lead items, and vehicle purchases upon completion of the environmental review process, FTA will not make a grant to reimburse the sponsor for real estate activities, vehicle purchases or purchases of long lead items conducted under pre-award authority until the project receives its construction grant. This is to ensure that Federal funds are not risked on a project whose advancement into construction is still not yet assured.

iii. National Environmental Policy Act (NEPA) Activities.

NEPA requires that major projects proposed for FTA funding assistance be subjected to a public and interagency review of the need for the project, its environmental and community impacts, and alternatives to avoid and reduce adverse impacts. Projects of more limited scope also need a level of environmental review, either to support an FTA finding of no significant impact (FONSI) or to demonstrate that the action is categorically excluded (i.e., CE) from the more rigorous level of NEPA review. FTA's regulation titled ''Environmental Impact and Related Procedures,'' at 23 CFR Part 771 states that the costs incurred by a grant applicant for the preparation of environmental documents requested by FTA are eligible for FTA financial assistance (23 CFR 771.105(e)). Accordingly, FTA extends pre-award authority for costs incurred to comply with NEPA regulations and to conduct NEPA-related activities, effective as of the earlier of the following two dates: (1) The date of the Federal approval of the relevant STIP or STIP amendment that includes the project or any phase of the project, or that includes a project grouping under 23 CFR 450.216(j) that includes the project; or (2) the date that FTA approves the project into project development. The grant applicant must notify the FTA regional office upon initiation of the Federal environmental review process in accordance with the ''Dear Colleague'' letter from the FTA Administrator dated February 24, 2011. NEPA-related activities include, but are not limited to, public involvement activities, historic preservation reviews, section 4(f) evaluations, wetlands evaluations, endangered species consultations, and biological assessments. This pre-award authority is strictly limited to costs incurred to conduct the NEPA process and associated engineering, and to prepare environmental, historic preservation and related documents. When a New Starts, Small Starts, or Core Capacity project is granted pre-award authority for the environmental review process, the reimbursement for NEPA activities conducted under pre-award authority may be sought at any time through Section 5307 (Urbanized Area Formula Program), Section 5309, or the flexible highway programs (STP and CMAQ). As with any pre-award authority, FTA reimbursement for costs incurred is not guaranteed.

iv. Other New and Small Starts and Core Capacity Project Activities Requiring Letter of No Prejudice (LONP).

Except as discussed in paragraphs i through iii above, a major capital investment project sponsor must obtain a written LONP from FTA before incurring costs for any activity. To obtain an LONP, an applicant must submit a written request accompanied by adequate information and justification to the appropriate FTA regional office, as described in B below.

B. Letter of No Prejudice (LONP) Policy

1. Policy

LONP authority allows an applicant to incur costs on a project utilizing non-Federal resources, with the understanding that the costs incurred subsequent to the issuance of the LONP may be reimbursable as eligible expenses or eligible for credit toward the local match should FTA approve the project at a later date. LONPs are applicable to projects and project activities not covered by automatic pre-award authority. The majority of LONPs will be for Section 5309 capital investment program (New or Small Starts or Core Capacity) projects undertaking activities not covered under automatic pre-award authority. LONPs may be issued for formula and discretionary funds beyond the life of the current authorization or FTA's extension of automatic pre-award authority; however, the LONP is limited to a five-year period, unless otherwise authorized in the LONP.

2. Conditions and Federal Requirements

The conditions and requirements for pre-award authority specified in section V.A.2 and V.A.3. above apply to all LONPs. Because project implementation activities may not be initiated before completion of the environmental review process, FTA will not issue an LONP for such activities until the environmental review process has been completed with a ROD, FONSI, or CE determination.

3. Request for LONP

Before incurring costs for project activities not covered by automatic pre-award authority, the project sponsor must first submit a written request for an LONP, accompanied by adequate information and justification, to the appropriate regional office and obtain written approval from FTA. FTA approval of an LONP is determined on a case-by-case basis. Receipt of Federal funding under the capital investment program is not implied or guaranteed by an LONP.

C. FY 2013 Annual List of Certifications and Assurances

The full text of the FY 2013 Certifications and Assurances will be published in the **Federal Register** in the near future and will be made available on the FTA Web site and in TEAM-Web. The FY 2013 Certifications and Assurances must be used for all grants and cooperative agreements awarded in FY 2013. All recipients with active projects will be required to sign the FY 2013 Certifications and Assurances within 90 days after publication.

D. Civil Rights Requirements

On August 28, 2012, the Office of Civil Rights published in the **Federal Register** a revised Title VI Circular (4702.1B), which made extensive clarifications and refinements to the requirements all FTA grantees must meet as recipients of Federal transit funds. In order to facilitate the orderly transition from the old Title VI Circular (4702.1A) to the revised Title VI Circular (4702.1B), FTA has set out a schedule for submitting programs to FTA that conform to the revised Circular requirements. The chart below sets out for grantees when they should upload their updated Title VI program into TEAM-Web. Further, FTA now requires that all updated Title VI programs be submitted in TEAM-Web sixty (60) days in advance of the program's expiration date. Previously FTA requested this submission 30 days in advance of the expiration date. FTA believes that sixty days will allow for review and the ability to provide technical assistance, if needed, well in advance of the expiration date. Please note that grantees who fail to submit a Title VI program for which FTA can concur will jeopardize their ability to receive Federal funds or FTA grants. FTA has developed an overall schedule as follows:

Due to FTA	Includes programs that will expire between:
April 1, 2013	Oct 1, 2012 through May 31, 2013.
June 1, 2013	June 1, 2013 through July 31, 2013.
October 1, 2013	August 1, 2013 through November 30, 2013.
December 1, 2013	December 1, 2013 through January 31, 2014.
February 1, 2014	February 1, 2014 through March 31, 2014.
April 1, 2014	April 1, 2014 through May 31, 2014.
June 1, 2014	June 1, 2014 through July 31, 2014.
October 1, 2014	August 1, 2014 through November 30, 2014.
December 1, 2014	December 1, 2014 through January 31, 2015.
April 1, 2015	February 1, 2015 through May 31, 2015.
June 1, 2015	June 1, 2015 through July 31, 2015.
October 1, 2015	August 1, 2015 through November 30, 2015.

FTA has posted a spreadsheet on its Web site that identifies each grantee and their respective due dates and expiration dates for their next Title VI submission.

Please note that programs expiring after October 1, 2012, have almost seven months to come into compliance with the revised Title VI Circular requirements. FTA reserves the right to adjust individual due dates for any grantee to ensure even workload distribution. Should you have questions about the above process and schedule, please do not hesitate to contact your Regional Civil Rights Officer (RCRO). A current RCRO contact list is as follows:

Region 1—*Peggy.Griffin@dot.gov*
Region 2—*Aaron.Meyers@dot.gov*
Region 3—*Michael.Riess@dot.gov*
Region 4—*Carlos.Gonzalez@dot.gov*
Region 5—*Felisha.Phillips@dot.gov*
Region 6—*Aida.Douglas@dot.gov*
Region 7—*Rebecca.Rand@dot.gov*
Region 8—*Rebecca.Tanrath@dot.gov*
Region 9—*Derrin.Jourdan@dot.gov*
Region 10—*Chris.MacNeith@dot.gov*
HQ—Jean.*Comedy@dot.gov*
Division Chief:
Monica.McCallum@dot.gov

In addition, FTA will hold monthly webinars. The first series of webinars on Title VI will start the week of October 8th and continue through November and start again in January 2013. Further information will be sent to each grantee regarding the training schedule or you may check the FTA Office of Civil Rights Web page at: *http://www.fta.dot.gov/civil_rights.html.*

Finally, please be aware that on September 6, 2012, the Office of the Secretary published a Notice of Proposed Rulemaking (NPRM) regarding the Disadvantaged Business Enterprise Program. The comment period will close on November 5, 2012. FTA strongly encourages all grantees to read this notice and submit comments to the *http://www.regulations.gov.* The docket number for the NPRM is OST–2012–0147.

E. Consolidated Planning Grants (CPG)

FTA and FHWA planning funds under both the Metropolitan Planning and State Planning and Research Programs can be consolidated into a single consolidated planning grant, awarded by either FTA or FHWA. The CPG eliminates the need to monitor individual fund sources, if several have been used, and ensures that the oldest funds will always be used first.

Under the CPG, States can report metropolitan planning program expenditures (to comply with the Single Audit Act) for both FTA and FHWA under the Catalogue of Federal Domestic Assistance number for FTA's Metropolitan Planning Program (20.505). Additionally, for States with an FHWA Metropolitan Planning (PL) fund-matching ratio greater than 80 percent, the State can waive the 20 percent local share requirement, with FTA's concurrence, to allow FTA funds used for metropolitan planning in a CPG to be granted at the higher FHWA rate. For some States, this Federal match rate can exceed 90 percent.

States interested in transferring planning funds between FTA and FHWA should contact the FTA Regional Office or FHWA Division Office for more detailed procedures. Current guidelines are included in Federal Highway Administration Memorandum dated July 12, 2007, ''Information: Final Transfers to Other Agencies that Administer Title 23 Programs.''

For further information on CPGs, contact Nancy Grubb, Office of Budget and Policy, FTA, at (202) 366–1635.

F. Grant Application Procedures

During FY 2013, FTA grantees may be making grants for both SAFETEA–LU authorized program funds (carryover balances) and MAP–21 authorized program funds. There may be different requirements depending on the program and the year of funds and different eligibility depending on the program. As such, it is critical that grantees work closely with the regional and metro office staff to plan and develop their grant portfolio for FY 2013.

All applications for FTA funds should be submitted to the appropriate FTA regional office. FTA utilizes TEAM-Web, an Internet-accessible electronic grant application system, and all applications are filed electronically.

FTA regional staff is responsible for working with grantees to review and process grant applications. In order for an application to be considered complete and for FTA to assign a grant number, enabling submission in TEAM-Web and submitted to Department of Labor (when applicable), the following requirements must be met:

- The recipient's contact information, including Dun and Bradstreet Data Universal Numbering System (DUNS), is correct and up-to-date.
- Recipient has properly submitted its annual certifications and assurances.
- Recipient's Civil Rights submissions are current and approved.
- Documentation is on file to support recipient's status as either a designated recipient (for the program and area) or a direct recipient.
- Funding is available, including any flexible funds included in the budget, and split letters or suballocation letters on file (where applicable) to support amount being applied for in grant application.
- The project is listed in a currently approved Transportation Improvement Program (TIP); Statewide Transportation Improvement Program (STIP), or Unified Planning Work Program (UPWP).
- All eligibility issues are resolved.
- Required environmental findings are made.
- The project budget's Activity Line Items (ALI), scope, and project description meet FTA requirements.
- Local share funding source(s) is identified.
- For projects involving new construction (using at least $100 million in New Starts or formula funds), FTA has reviewed the project management plan and given approval.

• Milestone information is complete, or FTA determines that milestone information can be finalized before the grant is ready for award. FTA will also review status of other open grants' reports to confirm financial and milestone information is current on other open grants and projects.

Before FTA can award grants for discretionary projects and activities, notification must be given to members of Congress, and in the case of awards greater than $1 million, to the House and Senate authorizing and appropriations committees.

Other important issues that impact FTA grant processing activities are discussed below.

1. Combining Program Funds in a Grant

FTA has updated its internal budgeting rules and systems of funds controls to reflect program changes made in MAP–21. Because MAP–21 consolidated several programs and replaced some programs with new formulas or created new formula programs, there will be some instances where SAFETEA–LU program funds cannot be combined in a grant with MAP–21 program funds. Specifically, where a program was repealed and replacement activities are eligible in a new program in a new section of statute, the grantee will be required to develop a separate grant for the MAP–21 program. For example, section 5309 Bus and Bus Facilities funds (SAFETEA–LU) cannot be combined with section 5339 Bus and Bus Facilities funds (MAP–21) because of the inherent difference in the programs, issues with tracking the discretionary program funds, and the process for notifying Congress when the funds are being obligated.

Additionally, program funds from different sections of statute cannot be combined with each other, unless, there is a specific transfer provision in MAP–21 for the program. Separate grants are required for each program, with the exception of section 5339, which permits transferring the funds to sections 5307 or 5311 so long as they continue to be used for eligible capital purposes under section 5339. FTA will issue grant making guidance for requesting these types of administrative transfers.

2. Grant Budgets—SCOPE and ALI Codes

FTA uses the SCOPE and Activity Line Item (ALI) Codes in the grant budgets to track program trends, to report to Congress, and to respond to requests from the Inspector General and the Government Accountability Office (GAO), as well as to manage grants. The accuracy of the data is dependent on the careful and correct use of codes. FTA is in the process of revising the SCOPE and ALI table to include new codes for the newly eligible capital items, to better track certain expenditures, and to accommodate the new programs. FTA encourages grantees to review the table before selecting codes from the drop-down menus in TEAM-Web while creating a grant budget. Additional information about how to use the SCOPE and ALI codes to accurately code budgets will be added to the resources available through TEAM-Web.

Under sections 5307 and 5311, FTA will continue to use the SCOPE established for job access and reverse projects (646–00) in order to track the use of these program funds for this eligible purpose. Additional codes may be developed as needed.

3. Designated and Direct Recipients, Documentation and Supplemental Agreements

For its formula programs, FTA primarily apportions funds to the Designated Recipient in the large urbanized areas (areas over 200,000), or for areas under 200,000, it apportions the funds to the Governor, or its designee (e.g. State DOT). Depending on the program and as described in the individual program sections found in section IV of this notice, further suballocation of funds may be permitted to eligible recipients who can then apply directly to FTA for the funding (''direct recipients''), so long as the required documentation is on file. However, there are certain programs under MAP–21 whereby FTA will only award grants to the designated recipients for the area or program. These include sections 5310 and 5339.

For the programs in which FTA can make grants to eligible direct recipients, other than the Designated Recipient(s), recipients are reminded that documentation must be on file to support the (1) status of the recipient either as a Designated Recipient or direct recipient; and (2) the allocation of funds to the direct recipient. Additionally, FTA requires a supplemental agreement to be pinned to the grant in TEAM-Web prior to grant execution. The supplemental agreement is required when the recipient of the funds is not the Designated Recipient. It permits the grant recipient (e.g. direct recipient) to receive and dispense the Federal funds and sets forth that the grant recipient is assuming all responsibilities of the grant agreement.

Under MAP–21, with the exception of the new urbanized areas resulting from the 2010 census under the section 5307 program, the only program for which NEW designations are needed in the large urbanized areas before a grant can be made is Section 5310. Before the first grant application in a large urbanized area under section 5310 is submitted to FTA, the Governor must designate an agency charged with administering the Enhanced Mobility of Seniors and Individuals with Disabilities funds. This designation must be on file with the Regional office prior to the award of any Section 5310 grants in large urbanized areas.

For all other programs, documentation to support existing designated recipients for the urbanized area must also be on file at the time of the first application in FY 2013. Further, split letters and/or suballocation letters (Governor's Apportionment letters), must also be on file to support grant applications from direct recipients.

4. Payments

Once a grant has been awarded and executed, requests for payment can be processed. To process payments FTA uses ECHO-Web, an Internet accessible system that provides grantees the capability to submit payment requests on-line, as well as receive user-IDs and passwords via email. New applicants should contact the appropriate FTA regional office to obtain and submit the registration package necessary for set-up under ECHO-Web.

5. Oversight

FTA is responsible for conducting oversight activities to help ensure that grants recipients use FTA federal financial assistance in a manner consistent with their intended purpose and in compliance with regulatory and statutory requirements. FTA conducts periodic oversight reviews to assess grantee compliance with applicable Federal requirements. Each Urbanized Area Formula Program recipient is reviewed every three years, (also known as FTA's Triennial Review); and States and state-wide public transportation agencies are reviewed periodically to assess the management practices and program implementation of FTA state-wide programs (e.g. Planning, Rural Areas, Enhanced Mobility of Seniors and Individuals with Disabilities Programs). Other more detailed reviews are scheduled based on an annual grantee oversight assessment. Important objectives of FTA's oversight program include, but are not limited to: Determining grantee compliance with Federal requirements; identifying technical assistance needs, and delivering technical assistance to meet those needs; spotting emerging issues

with grantees in a forward-looking fashion; recognizing when there is a need for more in-depth reviews in the areas of procurement, financial management, and civil rights; and identifying grantees with recurring or systemic issues. FTA will develop appropriate oversight procedures for the new programs authorized by MAP–21.

6. Technical Assistance

As noted throughout the notice, FTA continues to rely on many of the existing program circulars for general program guidance. FTA will be updating the program circulars, with an opportunity for notice and comment, to reflect changes under MAP–21. In the meantime, if you have any questions, please do not hesitate to contact FTA. FTA headquarters and regional staff will be pleased to answer your questions and provide any technical assistance you may need to apply for FTA program funds and manage the grants you receive. At its discretion, FTA may also use program oversight consultants to provide technical assistance to grantees on a case by case basis. This notice and the program guidance circulars previously identified in this document may be accessed via the FTA Web site at *www.fta.dot.gov.*

G. Grant Management

Recipients of FTA funds are reminded that all FTA grantees require some level of grant reporting and that it is critical to ensure reports demonstrate reasonable progress is being made on the project. At a minimum, all grants require a Federal Financial Report (FFR) and a Milestone Progress Report (MPR) on an annual basis, with some reports required quarterly depending on the recipient and the type of projects funded under the grant. The requirements for these reports and other reporting requirements can be found in FTA Circular 5010.1D, *Grant Management Requirements,* dated November 1, 2008. FTA staff, auditors, and contractors rely on the information provided in the FFR and MPR to review and report on the status of both financial and project-level activities contained in the grant. It is critical that recipients provide accurate and complete information in these reports and submit them by the required due date. Failure to report and/or demonstrate reasonable progress on projects can result in suspension or close-out of a grant.

In FY 2013, FTA will continue to focus on inactive grants and grants that do not comply with reporting requirements and, if appropriate, will take action to close out and deobligate funds from these grants if reasonable progress is not being made. The efficient use of funds will further FTA's fulfillment of its mission to provide efficient and effective public transportation systems for the nation.

Issued in Washington, DC, this 9th day of October, 2012.

Peter Rogoff,

Administrator.

[FR Doc. 2012–25152 Filed 10–15–12; 8:45 am]

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FEDERAL REGISTER

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Part VI

The President

Proclamation 8887—General Pulaski Memorial Day, 2012

Federal Register
Vol. 77, No. 200
Tuesday, October 16, 2012

Presidential Documents

Proclamation 8887 of October 11, 2012

General Pulaski Memorial Day, 2012

By the President of the United States of America

A Proclamation

Two hundred and thirty-three years ago, a Polish-born patriot gave his life to advance the cause of American independence. As a leader in the Continental Army who fought shoulder-to-shoulder with men from Europe and America alike, Brigadier General Casimir Pulaski battled to extend the principles that were as dear to him as they are to us—liberty, equality, and justice for all. Today, we reflect on the proud legacy he left behind, and we celebrate the lasting ways Polish Americans have enriched our Nation.

In his native Poland, Casimir Pulaski strove to secure sovereignty for his country. Years of struggle came to an end when his confederation was overpowered, leaving him an exile to France. In Paris, General Pulaski met Benjamin Franklin, who directed him toward another fight for freedom taking place across the Atlantic.

When Franklin wrote to General George Washington to recommend Casimir Pulaski as a volunteer in the American cavalry, he noted that Pulaski ''was renowned throughout Europe for the courage and bravery he displayed in defense of his country's freedom.'' Though the soil he fought for was not his own, the founding ideals of our young Republic were ones General Pulaski shared with all who saw freedom's promise. For his heroic actions on battlefields that spanned from Brandywine to Charleston, Casimir Pulaski was promoted to the rank of Brigadier General and became known as the ''Father of the American Cavalry.'' Tragically, he did not live to see the success of the revolution he gave so much to advance. Today, we see the future he helped create: a free and independent United States standing proudly with its strong ally, a free and independent Poland.

On General Pulaski Memorial Day, we honor a hero who helped secure our country's fate when it was most fragile. As we recall his tremendous contributions, let us also pay tribute to the countless Polish Americans who followed his bold example. Generations have contributed mightily to building the country we know and love today, and they will continue to play an important role in carrying us toward a more perfect Union in the years to come.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim October 11, 2012, as General Pulaski Memorial Day. I encourage all Americans to commemorate this occasion with appropriate programs and activities paying tribute to Casimir Pulaski and honoring all those who defend the freedom of our Nation.

IN WITNESS WHEREOF, I have hereunto set my hand this eleventh day of October, in the year of our Lord two thousand twelve, and of the Independence of the United States of America the two hundred and thirty-seventh.

[FR Doc. 2012–25611
Filed 10–15–12; 11:15 am]
Billing code 3295–F3

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The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO's Federal Digital System (FDsys) at *http://www.gpo.gov/fdsys*. Some laws may not yet be available.

H.R. 1272/P.L. 112–179
Minnesota Chippewa Tribe Judgment Fund Distribution Act of 2012 (Oct. 5, 2012; 126 Stat. 1411)

H.R. 1791/P.L. 112–180
To designate the United States courthouse under construction at 101 South United States Route 1 in Fort Pierce, Florida, as the ''Alto Lee Adams, Sr., United States Courthouse''. (Oct. 5, 2012; 126 Stat. 1415)

H.R. 2139/P.L. 112–181
Lions Clubs International Century of Service Commemorative Coin Act (Oct. 5, 2012; 126 Stat. 1416)

H.R. 2240/P.L. 112–182
Lowell National Historical Park Land Exchange Act of 2012 (Oct. 5, 2012; 126 Stat. 1420)

H.R. 2706/P.L. 112–183
Billfish Conservation Act of 2012 (Oct. 5, 2012; 126 Stat. 1422)

H.R. 3556/P.L. 112–184
To designate the new United States courthouse in Buffalo, New York, as the ''Robert H. Jackson United States Courthouse''. (Oct. 5, 2012; 126 Stat. 1424)

H.R. 4158/P.L. 112–185
To confirm full ownership rights for certain United States astronauts to artifacts from the astronauts' space missions. (Oct. 5, 2012; 126 Stat. 1425)

H.R. 4223/P.L. 112–186
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H.R. 4347/P.L. 112–187
To designate the United States courthouse located at 709 West 9th Street in Juneau, Alaska, as the ''Robert Boochever United States Courthouse''. (Oct. 5, 2012; 126 Stat. 1432)

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Divisional Realignment Act of 2012 (Oct. 5, 2012; 126 Stat. 1433)

H.R. 6189/P.L. 112–189
Reporting Efficiency Improvement Act (Oct. 5, 2012; 126 Stat. 1435)

H.R. 6215/P.L. 112–190
To amend the Trademark Act of 1946 to correct an error in the provisions relating to remedies for dilution. (Oct. 5, 2012; 126 Stat. 1436)

H.R. 6375/P.L. 112–
91 VA Major Construction Authorization and Expiring Authorities Extension Act of 2012 (Oct. 5, 2012; 126 Stat. 1437)

H.R. 6431/P.L. 112–192
To provide flexibility with respect to United States support for assistance provided by international financial institutions for Burma, and for other purposes. (Oct. 5, 2012; 126 Stat. 1441)

H.R. 6433/P.L. 112–193
FDA User Fee Corrections Act of 2012 (Oct. 5, 2012; 126 Stat. 1443)

S. 300/P.L. 112–194
Government Charge Card Abuse Prevention Act of 2012 (Oct. 5, 2012; 126 Stat. 1445)

S. 710/P.L. 112–195
Hazardous Waste Electronic Manifest Establishment Act (Oct. 5, 2012; 126 Stat. 1452)

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